LAW AS A SOCIAL SYSTEM

NIKLAS LUHMANN

Translated by Klaus A. Ziegert

Edited by Fatima Kastner, Richard Nobles,
David Schiff, and Rosamund Ziegert

With an Introduction by:
Richard Nobles and David Schiff

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General Editor's Introduction

The late Niklas Luhmann is widely regarded as one of the most significant social theorists of recent years. Luhmann's work is concerned with the development of a general theory of modern society treated as a communication system, comprising a number of functionally specialized, self-referential, and self-reproducing sub-systems. Law is one such sub-system, and each chapter in *Law as a Social System* applies the theory to themes relating to law and the legal system, many of which have long been among the central concerns of legal philosophers.

A great deal of care has been lavished on the preparation of this English-language version of Luhmann's book. With few exceptions, Luhmann's writings have not been well served by his translators. The present volume, however, benefits from a translation by one of his former pupils. Professor Klaus Ziegert of the University of Sydney, not only studied with Luhmann but is also a distinguished sociologist of law in his own right, as well as an accomplished linguist. Ziegert's translation of *Law as a Social System* has been carefully edited, and two of the editors, Richard Nobles and David Schiff of the London School of Economics, have added an extremely helpful introduction.

Keith Hawkins
Oxford, January 2004

Preface

The following text can be read, as far as its subject matter is concerned, as a text in the sociology of law—in both a broader and a narrower sense. Its context is a theory of society rather than of any particular special sociology, one that provides a marker for the characterization of sociological associations or of individual academic disciplines. Nobody would deny the importance of law in society. Thus, a theory of society needs to occupy itself with society's law. This applies to the most intricate refinements of judicial semantics as well as to each decision made in law—even when they refer only to the diameter of apples or the ingredients of different kinds of beer which can be sold—because even the most detailed legal propositions happen to emerge in society and society alone. Nothing can be too esoteric or too strange to be excluded from consideration within the domain of sociological relevance. Only sociological theory can decide what is included and what excluded.

Of course, this may mean different things to different people. Since what follows refers to society as a comprehensive system, which includes everything social, this also implies a certain limitation when compared to the approach of a theory of institutions, of social action, or of the sociology of professions. Such a limitation does not necessarily mean that concepts derived from other sources are not relevant; however, how they are relevant, how allocated, is the task of a theory of society. Concepts (such as operative closure, function, coding/programming, functional differentiation, structural coupling, self-concept, evolution, etc.) have been chosen in such a way as to be just as applicable in other functional areas of modern society, not only law. (How successful this approach will be remains to be seen.) If such a holistic attempt to apply abstract terms to widely different subject areas such as politics, religion, science, education, economy, and, of course, law were to succeed, then there would be reason to assume that the consistency demonstrated is not purely coincidental, but indicative of specific characteristics of modern society. This would show precisely that such findings (consistent characteristics) could not be deduced from any particular functional area, from the 'spirit of law' or any other 'spirit', but from society itself.

With this approach to the evidence, the ensuing observations in this book try to understand legal communication as a part of society in operation. It always assumes, even when not explicitly stated, that there are two systems to be referred to: the legal system and the social system (society). With this approach, this study follows in the footsteps of my studies on the economy and on science, which have already been published.[1] Other publications of this kind are planned.

[1] See Niklas Luhmann, *Die Wirtschaft der Gesellschaft* (Frankfurt, 1990); *Die Wissenschaft der Gesellschaft* (Frankfurt, 1990).

My work on the subject of the legal system has a long history. Originally this study was designed as a parallel publication to my book on the sociology of law with its evolutionary theory approach, which had assumed certain systems theory aspects, without being able to include them fully.[2] Since then, my visits to the Northwestern University Law School in Chicago and the Yeshiva University, Cardozo Law School have provided me with the opportunity to familiarize myself with common law reasoning. I am grateful to my American colleagues for their support. I have benefited from their critiques offered at conferences and seminars. The arguments presented in this study have also been influenced by other critical writings on the as yet incomplete concept of an 'autopoiesis' of law.[3] I hope that here I have managed to resolve the misunderstandings of this concept, which have occurred far too hastily. It goes without saying that every theory with a distinct approach invites well-reasoned rejections. However, in considering these one should recall a distinctive feature of Jewish legal interpretation: that it is important to adjust dissent to an appropriate level, and to preserve it as tradition.

Niklas Luhmann
Bielefeld, June 1993

[2] See Niklas Luhmann, *Rechtssoziologie*, 1972, 2nd edn. (Opladen, 1983); English translation: *A Sociological Theory of Law* (London, 1985).

[3] See, above all, Gunther Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (Berlin, 1988), and 13 *Cardozo Law Review* 5 (1992).

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Introduction

Richard Nobles and David Schiff

Introducing the introduction

This book needs to be accessible to an English-speaking audience. It is a profound work of increasing significance in the twenty-first century. It presents what is probably the most important, original, and complete statement made about law in the second half of the twentieth century by a social theorist, a statement about the autopoiesis of law. It may well be the most complete statement since the one made at the beginning of that century by one of the founders of modern sociology, Weber, or perhaps the gradual reinterpretation during the twentieth century of Marx's socio-economic analysis and its application to law by Pashukanis, Renner, Althusser, and Poulantzas.

The key question in this book is central to legal theory: what differentiates law from other parts of society? However, unlike conventional legal theory this book seeks to provide an answer in terms of a general social theory, that of modern systems theory, which provides a methodology that answers this question in a manner that is applicable not only to law, but to all other subsystems (Luhmann principally refers to these as function systems) in society, such as politics, the economy, religion, media, and education. This is a truly sociological approach, and one that offers a rigorous application to law of a theory that can be used to describe and analyse all of the complex and highly differentiated systems within contemporary societies. In modern systems theory, society performs through its communications. These are its empirical reality, what can be observed and studied. Such observation and study requires a theory appropriate to the task. Systems theory identifies how communications operate within a physical world and how different subsystems of communication operate alongside each other. Utilizing systems theory Luhmann is able to offer an authoritative statement of sociology of law (but by no means a final statement of the autopoiesis of law).

Luhmann's offering is not an easy read. To achieve its aims it needs to clarify its own terminology and concepts with precision and deal with the many variables that sometimes cloud and sometimes refine our understanding of the phenomena that are the focus of the description. Further, in doing this Luhmann engages in responding to a number of the critics of his theory, which requires further elaboration and exposition. But, once the ingredients of the analysis are understood, it is possible to engage in its refinements and find in them an extraordinary depth of meaning, as well as detailed and wide-ranging historical and comparative references.

This book needs to be available to be read in English by academics and future academics who wish to pursue research into law in modern societies, or more particularly for Luhmann, law as a social system. Our current understanding of law as it operates in society is, according to the analysis presented in this book, seriously deficient. Using the tools of analysis presented here a wealth of opportunities arise for the researcher to improve that understanding and advance our current knowledge about our contemporary world and the role played by law in it.

The introduction that you are about to read has as its primary aim the task of introducing what Luhmann has written in this landmark book (which, with the series of books starting with 'Social System' in 1984, can be described as Luhamnn's magnum opus[1]), but does so by breaking out from what Luhmann has written in order to allow the reader to enter into it. The text of the book is a thorough analysis in its own terms, but the uninitiated reader needs considerable help with those terms, in a number of ways. The help that is being offered here is in the form of road maps to each of the chapters that develop Luhmann's description of law, his sociology of law, his account of law's autopoiesis. Each chapter is part of his description. Some chapters are more complex than others, some more controversial. All are developed using the tools of analysis that Luhmann sets out in the early chapters, and in particular in Chapter 2. Some of the road maps are longer than others, as we feel is necessary to enable the reader to go on and engage with what Luhmann has actually written. As the road maps develop the arguments they gradually introduce Luhmann's systems theory, the terms in which he develops that theory, and the subject matter to which, with a focus on law, it can be applied. So, the later road maps are able to take more for granted; in other words, they can use more of Luhmann's discourse, his communications as representing his description. We hope that, by the end of reading the road maps, the reader will have become sufficiently acquainted with not only the rubrics of the theory but also the terms in which the theory can be developed and applied.

Before beginning this road map exercise, however, two words of warning are necessary. A first and simple warning refers to the current use of the language of road maps and its association with an idea of progress (e.g. road maps to peace), an idea thoroughly refuted in the course of Luhmann's analysis. Equally, these road maps do not lead anywhere, they are not

[1] The introduction to this series appeared in 1984 entitled *Soziale Systeme*. Since then, the following studies have appeared: *Die Wirtschaft der Gesellschaft* (1988, The Economy as a Social System); *Die Wissenschaft der Gesellschaft* (1990, Science as a Social System); *Das Recht der Gesellschaft* (1993, Law as a Social System); *Die Kunst der Gesellschaft* (1995, Art as a Social System); *Die Gesellschaft der Gesellschaft* (1997, Society as a Social System); *Die Politik der Gesellschaft* (2000, Politics as a Social System). Suhrkamp Verlag, Frankfurt am Main, published all the books in this series.

progressive, but rather represent the discontinuities between Luhmann's text and its translation. That is the beginning of the second, more complicated warning. This book is a translation of Luhmann's *Das Recht der Gesellschaft*, published in 1993. It cannot do justice to the original work, by definition, according to the theory it presents. Luhmann's description is already one step removed from its subject, law, it represents his external observations on that subject, trying to use the communications available in general social communication, but more particularly having selected those communications that operate as scientific, or at least, as part of sociological observation of the empirical reality of its subject. There is no adequate meta-language, a language of all languages, to translate all the nuances of individual languages, to allow for this translation to be a straightforward replication of what Luhmann wrote. Furthermore, communications do not stand still, which makes some of the projections described by Luhmann, particularly in the last chapter, beyond simple translation. We can only observe what he has written and, not with his scientific task in mind, but an alternative function, that of enabling understanding, an educational function, re-present his ideas. That is what we attempt in these road maps, as, in its different form, is what is being attempted in the translation written by Klaus Ziegert, as edited by Fatima Kastner, Rosamund Ziegert, and ourselves.

We repeat: this book needs to be translated in order that it will be accessible to an English-speaking audience. But the overall task involved may be, according to the theory Luhmann presents, contingent and involve the invisibilization of a paradox, which make both the translation and our introduction to it both his text and not his text at the same time, both one form of his text and its other form. To translate, or introduce, is to attempt do what the text itself is doing and can only do, namely carry out its performance. Nevertheless our considered view is that it is worth re-performing. On the other hand, we must admit that nothing in the theory itself would permit such an evaluative judgement (that this exercise is worthwhile) to be made.

Chapter 1. The Location of Legal Theory

In the first chapter Luhmann identifies how systems theory, which in a modern version Luhmann develops, relates to pre-existing forms of legal theory. The latter take two forms. The earliest kinds of legal theory seek to make sense of legal practice. Theories about legal doctrine, principles, etc., are a response to the necessity for consistency in the processing (retrieval and re-use) of legal decisions. These theories serve both legal practice and legal education. In the latter sphere, there can be greater abstraction (legal philosophy), but the focus on legal practice, and the need to make statements

that can be used in legal practice (if only to reform it) restricts the ability of legal theory, even within education, to develop far beyond the self-understandings of practising lawyers. Within the last three decades, there have been attempts, using a variety of perspectives, to take things 'further'. This second kind of legal theory has adopted a wide range of approaches, including hermeneutics, theories of institutions, systems theory, and theories of rhetoric and argumentation.

These two kinds of legal theory are not completely separate from each other. Despite attempts by the second kind of legal theory to be more scientific, the distinctions used in this legal theory are different from those of science. Science distinguishes between facts and concepts, the latter being used to organize and understand the former. Legal theory maintains its contact with law using the distinction between fact and norm. This ties legal theory to law's understanding of itself, as there is no source for the normative character of laws outside of law itself: 'everything, which is available using the title of legal theory, has been produced in conjunction with self-descriptions of the legal system' (page 60).

For Luhmann, a *strictly* scientific form of legal theory would take as its function that of constituting its object. The question that best serves this function is: 'what are the boundaries of law?' Existing legal theories adopt different approaches to this task, often talking past each other. Subjective approaches to the problem lead to a situation in which every observer identifies their own object. To avoid this, Luhmann starts from the assumption that the object (law) and not the observer define the boundaries of law. Starting with this assumption, the next question is: 'how does law proceed in determining its own boundaries?' Luhmann argues that systems theory is the theory best placed to answer this question.

Luhmann makes a number of claims for the superiority of systems theory in this context. First, the central distinction and concepts of the theory goes directly to the question. The theory's central distinction is system and environment, and one of its central concepts is that of the observing system: observing how systems use self-produced observations. Secondly, no other currently available theory can deal as adequately with the issue of complexity. Attempts to define law's environment as 'society' both ignore law's existence within society, and provide inadequate means to analyse the numerous and highly differentiated contexts in which law has to establish its borders. (In the chapter the most developed example given of an inadequate rival theory is economic analysis of law, which not only seeks to reduce all legal decisions to calculations of utility, but also assumes that all of the activity surrounding the law is economic in nature.) Only a theory that can analyse how all systems construct their own borders from their own self-observations (rather than a theory that only has regard to the manner in which one system such as law or the economy undertakes this task) can hope to integrate the 'poly-contextual contexts' that need to be organized. Thirdly, alternative sociological theories of law seek to distance themselves from the juristic views that constitute conventional legal theory, and adopt an external view of law. In seeking a more scientific basis for the observation of law, such as empirical research, such theories lose sight of the question that establishes law as an object: how does law establish its own boundaries? The self-descriptions of lawyers, how lawyers understand their own activity, are an essential part of what needs to be described.

The superiority of systems theory is linked to developments within society. Law has responded to society's increasing complexity. Luhmann gives the particular example of legal evidence, which has changed from formal proofs to assessments of internal states: intentions, motives, etc. These changes threaten to undermine the function of law (see Chapter 3), which is to produce expectations. Expectations here are not a matter of causality (what will happen) but the ability to make consistent and meaningful communications about what ought to happen. Lawyers have responded to such changes in society by developing their own form of legal theory: doctrine and principles. This form of theorizing insulates law from the corruption of outside influences (like cases can be treated alike), and produces material that is both chaotic and rational. While such theories reduce the element of surprise, allowing what can be expected (what ought to happen) to remain calculable, they are incapable of developing a theory of law as a unity.

Natural law, positivism, and sociological theories have attempted to theorize law's unity. Natural law started by theorizing law as a hierarchy of laws (divine, natural, human) within a society organized through a hierarchy of ranks. With the breakdown of the *ancien régime*, and the emergence of welfare as the basis of political legitimacy, natural law theories were organized around ideas of progress. The central idea became that of civilization, and law was theorized through the concept of the social contract as a mechanism for the domestication of violence. The creation of new knowledge, with the birth of social science, undermined the ability to conceive of society as simply a contract. Positivist theories of law abandoned substantive bases for the unity of law in favour of procedural ones. Ultimately these conceive the unity of law in terms of the rules of legal argumentation, and the distinction between facts and (legal) values: which (rules, principles, standards) are appropriate to determine expectations about any particular constellation of facts?

Each of these theories provides an inadequate basis for understanding the boundaries of law. They offer no appropriate distinction between what is law, and what is not. Natural law conflates injustice with all that is not law. Economic analysis of law (which Luhmann sees as an extension of the welfare focus of social contract theories) reduces all that is not law in society to calculations of costs and benefits. Positivist theories, with their focus on the basis for legal decisions, treat legal decisions as if they decided what

constituted the unity of law. This is an error. The unity of law is produced through legal decisions, but legal decisions do not decide the basis of law's unity (its boundaries).

Luhmann claims that the difficulties of distinguishing law can be solved if one succeeds in describing law as an autopoietic, self-distinguishing system. This implies that law produces by itself all the distinctions and concepts that it uses, and the unity of law is nothing but the fact of this self-production. This is law's operative closure. And the development of such closure is a necessary reaction to society's increasing complexity. Law cannot achieve its unity through values located outside it. Its borders cannot be established through ethics, or economics. In order to continue to produce calculable expectations law has to simplify its relationship with its environment to something distinctly less complicated than that environment. At the same time, it has to respond to the complexity of that environment (so, for example, it cannot treat all of its environment as an economic phenomenon). Law achieves this, as do other functional systems, by reproducing its environment internally, through the manipulation of its own concepts and distinctions.

Within systems theory, law's operations, through which it reproduces itself (producing its own structures and boundaries), are meaningful communications. Law has to differentiate itself within society by identifying which communications are legal communications. Although lawyers use some specialist terms, they do not have a separate language. As such, the boundaries of law cannot be studied through the use of linguistic theory. Instead, one needs a theory based on communications theory. Legal communications, like all other communications, have a circular relationship between their structures and operations. Structures can only be established and varied by operations that, in turn, are specified by structures. In studying these communications, one has to use a complex series of distinctions. Within communications theory, these are information/message/understanding. To understand the dynamic relationship between operations and structures, one also needs to utilize distinctions taken from evolutionary theory: variation/selection/restabilization.

Luhmann acknowledges that his theory is complex, but claims that a complex theory is necessary to understand complex matters. He also acknowledges that, whilst his theory seeks to observe and describe the self-understandings of law, it requires a level of interdisciplinary knowledge and abstraction that prevents any claim that it could be used to guide legal practice (except incidentally).

Chapter 2. The Operative Closure of the Legal System

Here Luhmann provides an exposition of some of the most troubling concepts of systems theory and uses them to explain the nature of law's autonomy

or autopoiesis. The central concept is operative closure. This is a concept common to all systems, not just law. Law's particular form of operative closure is that of normative closure.

It is helpful to start with what is not operative closure. It does not mean causal independence, which in the case of law would require a legal system that is unaffected by everything from politics to global destruction. The legal system has a causal relationship to geography, morality, money, class, etc. But causal accounts of legal systems have to be secondary to the enterprise undertaken by systems theory: accounting for the boundaries of law. Before we can describe the development of law in terms of, say, politics, we have to establish the separate existence of politics and law: how these systems differentiate themselves from each other. This also applies to action theories. In order to account for events in terms of the orientations of individuals towards law, we presuppose a recognizable object, the law, towards which those individuals can exhibit orientations.

Operative closure is not a concept about causal relationships, but about identity: how systems reproduce themselves. However, certain aspects of causality within modern societies provide a starting point from which to understand the concept. Modern society is complex. All sorts of things are having causal effects on each other, all of the time. While some of this causality can be located in our physical environment, a great deal of it (to say the least) occurs within society. The complexity of such interactions does not allow for different areas of social life to have stable and simple (mechanical) relationships with each other. Responses to what occurs under conditions of complexity inevitably involve a wide range of possibilities, which points in turn to the need to make selections. The question is on what basis can those selections be made? To this complexity we must add the problem of time. Whilst we construct histories, and predict futures, everything exists only in the present. This means that law, politics, and everything else that exists in society exists (reproduces itself) only from moment to moment, from one communication to the next. Put this all together, and we can see that modern society exists as complex differentiated sub-systems, with communications linking each to each other and selections being made from moment to moment. How can this be achieved?

Operational closure is an answer to this question that derives from theories of evolution. To deal with complex causality, organisms have to become closed to their environment. Instead of simple and direct relationships to their environment, organisms develop a limited range of responses and an internal basis for selection. This internal basis for selection provides them with their autonomy, which in turn allows them to develop more complex internal responses to their environment. (A paradigm example is human consciousness, but this was only possible because earlier more simple organisms developed internal complexity.) Applied within systems theory this

becomes operational closure. Systems cannot develop complexity without autonomy. And autonomy is achieved when the basis of selection (most importantly the selection of communications that belong to the system) is internal to the system.

All autopoietic systems exhibit operational closure. Their individual operations, which are communications, are identified as such by themselves. Politics may influence the development of law, but it cannot be law (see Chapter 9). Politics operates alongside law, but so do religion, science, and the physical environment. Law may respond to these (its environment), but it can only do so by altering its selections. And the possibilities of selection (what communications can take place within the legal system) are established by the legal system itself.

All systems are operationally closed, but cognitively open. This statement follows quite logically. The operations of any system are those communications recognized by the system as belonging to it. A social system only exists through its communications, and can only respond to its environment by making communications. Because its operations are identified as such by itself, and not by other systems or the physical environment, it can be described as operationally closed. At the same time it is cognitively open. This latter phrase means that the system is capable of responding to its environment. This does not mean that it always responds, but that it is capable of responding. Its openness to its environment may be described as cognitive, for two reasons. First, because it is capable of making limited responses to its environment. The selections internally open to a system will be far less complicated than the infinity of social and physical events that operate in the real world. This limited response, an inevitable simplification of the real world, operates as a form of cognition. Secondly, the openness can be described as cognitive because the system can learn. This means that it may respond to its environment by making communications that alter the possibilities of what will, in future, constitute a communication within that system.

The alternative to operational closure would be operational openness. For example, if one treated political communications, the operations of the political system, simultaneously and identically, as constituting legal communications. The difficulties of this can be seen through the example of legislation. Legislation forms part of the political process: our political system identifies legislation as part of itself. It also forms part of our legal system. But what each recognizes as a communication belonging to itself can only be achieved internally, by each system, for itself. Law will recognize a statute, and will conceptualize the meaning of that statute by reference to interpretative practices which it calls 'the intention of parliament'. These interpretative practices (attributing a holistic meaning to a text, and locating that text alongside other legal texts) are not political communications. By contrast the political system

can connect a statute to its own communications in quite different ways. It can be described as the 'will of the people', or the outcome of negotiations between interest groups, or the carrying out of an election promise. These political communications do not dictate, or replicate, the legal communications generated by the statute. In time, law may 'learn'. For example, the intention of parliament may be interpreted to allow courts to entertain arguments based on election manifestos. But this learning only occurs if law alters its communications in such a way as to recognize the manifestos. Only operations of law can provide the necessary act of recognition. And if this recognition occurs, it will still not connect the legal system to all the communications that an election manifesto can connect to within the political system.

Operational closure is common to all systems. What differentiates systems is the different ways in which they achieve operational closure. This is a consequence of their different codes and functions. The codes and function peculiar to law result in a form of operative closure that can be described as normative. The function of law is to maintain normative expectations in the face of disappointment. Law's communications about what ought to occur must, if they are to continue as expectations, remain meaningful despite the inevitability that what ought to occur will not always occur. Law is not alone in making communications about what ought to occur. Morality and religion will contain such communications. Thus function alone is not sufficient to differentiate law. But what is sufficient is that law achieves this function by coding events in its environment using a binary code that is unique to itself: legal/illegal. All its communications make, or are linked to communications that make, this distinction. It can also code its own earlier communications as legal or illegal. It is the combination of function and code, maintaining communications that utilize the binary distinction legal/illegal, which allows law to differentiate itself (maintain its boundaries).

The reason why law's operative closure can be described as normative closure can be seen from the way in which law responds to its environment. Law's environment is both the physical environment, and all other communications (i.e. general social communication, and the communications of all other sub-systems). Law's operations are structured through a norm/fact distinction. Law compares facts with its norms (pre-existing law) and responds to those facts that are identified (selected) by legal norms. Operative closure is achieved because no norms (custom, morals, religion) can in themselves be legal norms. Legal norms can recognize the norms of other systems as facts and respond to them, but only where its own norms have the capacity to recognize those norms as facts. Law can also develop (learn) by developing new legal norms in response to its environment, which environment includes norms from other systems. But this process

does not mean that moral norms simply become, or enter into, the legal system, any more than the recognition of election manifestos within statutory interpretation means that political communications have simply become legal ones.

Law's normative closure achieves a form of cognition (cognitive openness) because it simplifies the complexity of its environment. Law does not respond to its entire environment. It responds only to that part of its environment that is selected by its norms. It is therefore possible to say that law identifies its environment, internally, by reference to its existing communications (existing law). It is also possible to say that law recognizes itself, as a system of norms, as something separate from the environment (facts) that it has recognized through its norms. Thus its operative closure not only allows it to maintain its boundaries, but to construct those boundaries internally, by making communications that use a distinction (norm/fact) which constructs both itself as self-reference, and its environment as external reference. The ability to do all this work through internally linked communications (operational closure) is what gives legal systems, within modern society, their autonomy.

All systems code their environment, and all systems stabilize this coding by developing programmes (structures) for the application of the code. But while the code is essential to the continued existence of the system (indeed the present, not the past or the future, momentary operations of coding *are* the system), the content of these programmes is contingent. This claim is the basis of Luhmann's criticism of positivist legal theories. Positivist theories accept the contingency of law's programming in respect to substantive law. Indeed, the rejection of moral constraints on what may constitute a valid law is how legal positivism defines itself in contrast to natural law theories. But positivist legal theories attempt to identify structures which stabilize what can become valid law, e.g. Austin's sovereign, Hart's rule of recognition, and Kelsen's historically first constitution validated by a presupposed basic norm. These theories can be seen as attempts to break out of a paradox generated by the contingency of law's normative programmes. Once we accept that the law can have any substantive content, what establishes what can be law? Do we have to conclude that the law decides what can be law? If we reach this conclusion, we are involved in paradox. How can something decide law, which is at the same time law? How can such a thing be inside (law) and outside (deciding what can be law) at the same time? Positivists look to structures outside law to establish the content of law. Particular kinds of communications are identified as legal because they have some kind of meaningful (logical, rational, semantic, etc.) relationship with a pre-existing structure. Austin relies on the consistent (non-arbitrary) application of political force (by the sovereign). Hart's rule of recognition is a structure that is subtly external to valid law: the rule

that establishes what can be a rule of law cannot itself be a rule of law. Hart's rule of recognition is not a rule of the system at all, but an attitude expressed by officials towards what could constitute a rule of the system. Kelsen's source of validity, the basic norm, is outside the legal system in terms of fact, but at the same time also linked to each norm of the system as a presupposed fiction. The stability offered by these structures has been subject to sustained criticism pointing to their circularity: the circularity that Austin's sovereign is identified by law, as are Hart's and Kelsen's pre-existing structures.

Luhmann offers the concept of operational closure as a more scientific basis to positivist (structural) accounts of identity under conditions of contingency. The law does indeed identify the law. Luhmann does not deny the existence of structures, or their stabilizing influences. Normative programmes are structures. However, they are also operations: legal communications. Normative programmes are a particular kind of legal operation: an observation based upon a distinction. The law codes, through its operations, in terms of its binary code, legal/illegal. In turn (never at the same moment) it observes its own coding. This observation, which Luhmann argues is structured by the need to identify what is connected (equal or unequal) with earlier coding, produces normative programmes. The law understands its own earlier coding in terms of its normative programmes. But while these programmes stabilize, their own existence is contingent on their ability to connect legal communications about coding. Thus, unlike positivist theories, there is nothing outside the legal system to produce its validity. Law's conditional programmes (existing law) are produced by itself through self-observation on its previous coding. And there is no hierarchy. Structures do not pre-exist and determine what can be a legal communication, but are stabilizing elements that are formed by, and can be changed by, what is coded legal/illegal. Thus structures, while they stabilize, are also dynamic and capable of change. Structures are constituted by what they stabilize: legal communications coding as legal/illegal. As such, they can be changed by those communications.

While this theory offers an account of the legal system that is dynamic, it is not anarchic. The premiss of operational closure is not that each communication that can be recognized as legal is known with absolute certainty from moment to moment. The theory is premised upon the reduction of complexity: that the range of communications that can be connected to other legal communications at any moment is limited by the need to establish that connection. However, the degree of constraint can be better understood if one concentrates on the need for such connections to be made in the present. Law only exists, throughout society, from moment to moment (i.e. in the present) if the connections between its communications can be established in that moment. Thus, for a highly complex system

like law to exist, millions of communications have to be recognized as legal in a moment. From this basis, while the content of all normative programmes is contingent, they cannot all be treated, all of the time, as contingent. Most of the existing law is treated, most of the time, as a structure stabilizing what can connect to it. From this perspective, law's self-observations (its normative programmes) are both stable and contingent. This focus on the enormity of what has to be accomplished for a legal system to exist is also Luhmann's explanation for why systems have binary codes. If every coding involved third values, and communications could only exist in degrees (half legal, etc.), the task of connecting legal communications in order to generate further legal communications would break down.

To stabilize itself, law not only generates self-observation, but self-description. The law can make communications about itself as a unity. Such descriptions can be legal communications, and as such they are real, and not merely ideological. However, what may cause them to be taken as ideological is their inability to account for all of what they attempt to describe: every communication in the legal system. For example, alongside tort doctrine (a normative programme stabilizing the application of legal/illegal within an internally identified area of legal communications) one finds communications about the constitution. Constitutional law doctrine is a self-observation about a hierarchical structure (unchanging law), which stabilizes the process of changing law. Observing these various self-observations leads to the generation of descriptions of the legal system as a system: its values, role, functions, and limitations. These self-descriptions do not provide a way of knowing what can be legal. The possibilities of connection within the legal system only exist through the evolution of that system, and while that system is stabilized by self-observation and self-description, its evolution is determined by the communications made at any moment. Its communications constantly change its structures, which alter the possibilities of what can be connected to it. We can only find the possibilities of connection by looking at how the communications that interest us are made: locally. Focusing on law's operations (legal communications) *in situ* not only gives us a different view of law's self-descriptions, but also widens our understanding of sites of production of legal communications. These are not limited to courts, or even lawyers. They occur whenever communications are made that connect to existing legal communications, i.e. whenever law reproduces operative closure (through applying legal norms to facts—including facts about its own earlier operations).

If law is not held stable by any fundamental idea, or master rule, what is the status of the values that are found within self-descriptions of the law: justice, equality and the rule of law? Within systems theory, values do not enter law from the outside, to stabilize its operations. Rather, they exist internally, generated by the operations of law. The first of these values is

validity. Legal validity is not law that has political or moral legitimacy, as would be the case within natural law theory, and in the practices of less differentiated societies where systems have not achieved operational closure. Legal validity is simply the connection of legal communications to other legal communications. Communications that are recognized as legal by the legal system are valid. Those that are not so recognized are not. There is no value or test for validity outside the system itself. And the validity of the system as a whole is nothing more than its existence as a system: the connection of all new legal communications to the system itself.

Equality as a value of the legal system also exists solely through the operations of law. But whereas validity is a value exhibited by every operation of law, every communication of the legal system, equality is a value generated only by self-observation within law. Every coding can be observed to see if the drawing of the distinction legal/illegal has taken place on a basis that is equal or unequal. Equal distinctions have to be justified. Unequal ones do not. The basis for assessing equality is the existing law: the conditional programmes that steer the applications of the binary code. An illustrative question would be: does the application of the code treat the relevant parties equally? The necessity for this to be an internal assessment is contained in the world 'relevant'. The law itself has to construct the basis of comparison. For example, much of the law of labour relations has been generated through reflection upon the rights and duties of employers and employees. But in identifying what is appropriate to a contract of employment, law does not simply accept, from the outside, what political or other systems identify as equality between the parties as they construct them. Thus, whatever politics or ethical systems identify as employers and employees (do family firms and single-employee companies count?), the law identifies these terms within contracts of employment as the parties to the legal contract. And whatever politics or ethics has to say about the appropriate basis for equality, the basis of equality within law is an assessment of legal rights and duties, which is inevitably situated within, and compared with, other existing allocations of rights and duties.

Chapter 3. The Function of Law

Luhmann argues that, from a system differentiation perspective, one has to see what the specific function of law could be. Earlier systems theories that stressed integration (Parsons) are challenged by conflict theories (the critical legal theorists and Marxists). Attempts to articulate function in terms like dispute resolution are not function-specific to law; there are functional equivalents in other systems. One must also be wary of theories that attempt to attribute general functions to law that exceed its performance, only to claim that the distance between these functions and their performance

represents some failure of function. Lastly, there is little explanatory power in calling every effect of law one of its functions: is it a function of law to provide lawyers with income?

Luhmann constructs a distinction between function and performance. The function of law is specific, even though its performance in terms of its contribution to such matters as dispute resolution is not. For Luhmann, the sole function for the legal system is the maintenance (stabilization) of expectations despite disappointments (counterfactual examples). It is a normativity of normative expectations. No other system can rival law in this function, which function is not simply a consequence of coercion and the level of enforcement. Luhmann describes this in terms of time binding. This is developed at some length. It is not just the time taken to communicate, or even the fact that all communications are linked between past (communications) and future ones. It is the fact that expectations are generated as communications that link the present with the future—they are future-oriented communications. Expectation here is not a psychological event, but a communication. It is a communication about what is approved, and as time-binding, what will be approved. Such communication covers not only prohibitions, such as criminal law, but also 'artificial freedoms' like contract and property.

The time binding nature of legal communications shares features common to all language. Repeated use of language within society creates meanings that cannot easily be rejected. Such established meanings have social costs (they have effects, including winners and losers). There is also the possibility of dissent (rejecting common meanings), but in the absence of conflict, and even in its presence depending on the difficulties of challenging existing meaning, fixed meanings operate, even if the only sanction is an individual's tendency to perceive different usage as a mistake, and self-correct. Similarly with law. Law's normative form involves expectations as to what will be approved in future. There can be dissent, but in the absence of rival norms, those asserting law's norms have an advantage. Even in the presence of rival norms, the expectations of law are stabilized by forming part of a dense and complex network of expectations that has internal relationships as well as stable relationships between itself and other (function) systems. While norms can be asserted which conflict with legal norms, there is no system of norms that can rival law in its function of stabilizing expectations. This is not because legal norms have a closer relationship to 'human nature' than other norms, but the reverse. Because of law's operative closure, it has developed autonomy from the rest of society, which allows its norms to be more consistent, and therefore stable, than a system of norms based on whatever has been perceived as 'normal', 'natural', or 'ethical'. This has led, through evolution, to complex and stable norms that support the operations of other systems. For example, the corporation is

a legal form that supports operations within the economy and politics. Indeed, such is the superiority of contemporary law's ability to maintain consistent and stable norms, that where one desires to stabilize ethical norms, one inserts them into this system, i.e. one jurifidies them.

Luhmann does not claim that law is capable of maintaining stable expectations under any circumstances. He explores the conditions, both internal and external, which allow law to carry out this function. Internally, the ability of law to develop complex and consistent norms requires the system to develop a sub-system for decisions as to what law is (which includes when law is changed). This sub-system is staffed by persons, identified by their membership (the legal profession and the judiciary), whose particular task is to provide consistency to legal expectations (see Chapter 7). As a sub-system it represents one of the important structures that law can generate through its communications. (Though unlike certain legal theories, this structure does not represent all of law, or even exhaust the possibilities of law, both of which reside in the current state of all legal communications.) External factors include the need to manage dissent. Luhmann calls this the social dimension of law, contrasting it with its temporal dimension (the maintenance of meaningful communications of normative expectations). Law's autopoiesis increases the stability of its expectations, but the very autonomy that creates certainty as to what can constitute a legal communication also reduces law's sensitivity to what will provoke dissent. In addition, law's success in meeting expectations is not a legally relevant consideration in deciding what expectations are legal. If it were such, the law could not carry out its function of maintaining expectations in the face of disappointment. Luhmann argues that the management of dissent is largely externalized to the political system. Politics, and sometimes ethics, have to manage dissent created by law.

Luhmann accepts that the ability of law to maintain expectations in the face of disappointment makes enforcement important. However, the complexity and density of legal communications, and the networks that they support, allow law to maintain expectations in the face of considerable degrees of disappointment. For example, the presence of theft will not lead people to learn that they cannot expect to own property. Punishment reaffirms this expectation. And it is not even necessary for punishment to occur in response to each theft. The presence of expectations that captured and convicted thieves will be punished stabilizes expectations represented by the law of theft even if only a few criminals are punished relative to the amount of crime. The minimal situation is that a person must not be a fool for having expectations based on law. When does it become meaningless to say: 'If you take that, you commit theft'? This minimal situation is linked to law's symbolic level. Alongside the specific expectations of law, there is the general expectation that the expectations of law will be met.

This is in turn part of a general understanding that law motivates human behaviour: motivating people to obey law, or to learn from punishment, or to carry out their official duties to punish. These understandings are symbolic, in that there is no clear referent. At what level of disobedience and disappointment would one have to conclude that law's expectations were not being met, and that legal norms could not be understood in some general way to bind time? Law fails to carry out its function only when its expectations cease to be normative. The normativity of expectations lies in the distinction between normative and cognitive. Cognitive expectations are ones where one learns from disappointment: 'it will never rain in July'. Normative expectations are where one does not: 'it is illegal to park on double yellow lines'.

Law's function allows it to contribute to dispute resolution, and regulation, but these are examples of law's performance, and should not be confused with its function. In the case of regulation, there are simply too many equivalent systems for steering human behaviour for it to be claimed that this is law's differentiated function within society. All kinds of activities steer human behaviour, e.g. the design of aisles in supermarkets. Describing law's function as regulation conflates it with all other such activities, and loses its specific contribution based on its function: the production and stabilization of normative expectations. Similarly with dispute resolution. Law's function as a system of normative expectations, and its operative closure whereby it generates those expectations from its current communications, allows us to see how law's performance as dispute resolution differs from the performance of other systems. For example, whereas small groups may undertake dispute resolution as an informed exploration of the possibilities of continuing ongoing relationships, dispute resolution through law takes the form of enforcing or compromising expectations that may bear little relation to those relationships.

Law is not alone in trying to maintain expectations (time binding) in the face of social dimensions generating dissent. The economic system has a function of creating expectations of access to scarce resources in the future by reference to the payment of money. Both law and the economy can be expected to have varying degrees of success in balancing their temporal and social dimensions. Internally, reconciliation can only be an indirect consequence of each system's operations. Reaction will be incremental, in the sense that no single response ends the possibilities of further responses. It will also be crude in that reconfigurations of reflexive communications will not be reproductions or even always be equally compatible with what stimulates them. In the case of law, learning (by changing law's normative expectations) or not learning (by not changing) can be likened to a form of immunization. What law resists by stabilizing expectations is the proliferation of disorganized and inconsistent norms. However, Luhmann questions

whether society is about to face problems which cannot be solved through autopoietic systems, problems for which there is no possibility of immunization, where the operations of a system cannot block developments that could destroy them. In particular, he is concerned with the nature of risk under modern conditions, where a 'wrong' decision cannot be corrected by later decisions of the system, and where there may be no system in place at all. Some possibilities arising from this issue are examined more fully in Chapter 12.

Chapter 4. Coding and Programming

Function is not an adequate description of law. Alone it cannot clarify what the legal system uses when it reproduces itself and draws boundaries between itself and its environment. For this, we need the distinction between coding and programming: 'codes enable us to distinguish between belonging to the system and not belonging to the system, while programmes, which attribute the values legal/illegal, are the objects of judgements of valid/invalid' (page 209).

Law codes facts as legal and illegal. Legal is the positive side of the code, and illegal is the negative side. Unlike natural law theories, this does not mean that legal is good, and illegal is bad, or that legal is just and illegal is unjust. Law operates a binary code whose meaning at the moment of coding is solely a distinction: something that is coded illegal has not been coded legal; and something that has been coded legal has not been coded illegal. Coding is essential to any system's reproduction. Binary codes produce bi-stability. The coding produces just two states to which future communications can be linked, in the case of law, that the facts were legal, or illegal. Introducing third values undermines the ability to code, and in turn to link communications to each other in a system.

The application of a system's code is regulated through that system's programming: the conditions, which that system establishes, for when it is appropriate to apply the negative or the positive side of the code. In legal theories these might simply be called the 'rules' of law. As the programmes determine which side of the code is applied, lawyers tend to concentrate on the programmes alone and neglect the code. Yet the link (or distinction) between code and programming is essential. While there are aspects of law's programming that are peculiar to law, the system would not be able to maintain its boundaries without its distinct code. In addition, while the content of law's programming is completely changeable (even those 'constitutional' laws presumed to be unchangeable at particular times have been amended when conditions have changed), its code does not change. As such, it is the code, or rather the continual coding, that reproduces law as a separate sub-system of society.

In order to describe the relationship between programmes and code, Luhmann first explores the logic of binary codes. This is a form from which there can be no appeal to a higher (or meta) value. In isolation, knowing that something has been coded legal tells us nothing except that it has not been coded illegal, and vice versa. (If I told you that an unspecified event, known only as 'X', had been coded legal, what would this tell you?) This situation involves paradox, tautology, and contradiction. The tautology comes from the nature of operative closure: only the law can code events as legal or illegal. The legal is legal. Paradox arises because what is legal is also illegal. This is because legal and illegal exist in unavoidable conjunction. Luhmann gives the example of a dispute between two parties. The state of affairs which gives rise to a dispute is a single state. If we decide that one party wins the dispute (acted legally) and another party loses (acted illegally) we are not applying the code to two different situations but to one: the two sides of the code are always applied simultaneously to the same situation. This paradox leads in turn to contradiction. As there is nothing within the code itself that determines what, within any situation, is assigned to each side of the code, then there is nothing 'to distinguish' what is assigned a positive as opposed to a negative value (and vice versa). As nothing distinguishes that which is coded legal from that which is coded illegal, one is left with a paradox that is also a contradiction: the legal is at the same time illegal, and vice versa.

This description of the logic of law's form as a code sets out the challenge facing law's programmes. These are analysed as mechanisms to unfold and avoid the paradox and contradictions that arise from using a code that has no meaning in itself other than assigning facts to one side or other of a distinction. Remember, there is no value involved in this assignment. Legal is not for the common good, or for health, or for the stabilization of expectations (law's function), or for anything else. And there is nothing that law within a modern functionally differentiated society can do which will inject a third value into the code to enable law to decide what should be coded legal, as opposed to illegal. (Any such third value would undermine the legal system's ability to link its communications, reproduce itself, and establish its boundaries.) And not only can one not resort to a third value to say whether something has been coded legal or illegal appropriately, the logic of a binary code (that it is an opposition without any content beyond that opposition) means that there is no *logical* way of telling that the code has been applied *legally* or not.

Law develops structures (conditional programmes) for application of the code. This involves second-order observation. Secondary observation here is the operation of observing coding. The code can be applied to itself, to say whether the previous coding was valid or invalid. As an operation of coding this has no greater meaning, in itself, than the original coding

(so all the elements of paradox, tautology, and contradiction remain within this observation). But the observation offers rationality. Why was the earlier coding appropriate (valid or invalid)? Answers to this question create conditional programmes: 'In the presence of fact X, code Y legal. In the presence of fact Z, code Y illegal.' These programmes also constitute norms: those facts that comply with the system's norms are labelled legal; those facts that violate the system's norms are labelled illegal.

These second-order observations cannot answer the question: what is the distinction between legal and illegal? They cannot address the question of whether the distinction between legal and illegal is itself legal. They can only produce relatively stable applications of the code, allowing law to carry out its function of maintaining stable expectations. These stable applications of the code allow the legal system, in its operations, to avoid paradox and contradiction. Law's programmes determine the application of the distinction legal/illegal. This allows for meaningful communications that something is illegal or legal. Something that law (through its conditional programmes) has identified as legal is not at the same time illegal. At a latter time the conditional programmes may change, or the individual coding may simply be revisited and the coding altered. As such, validity (the appropriateness of a coding) can only be temporary. Nevertheless, the ability of the legal system to code, in the present, what is legal and illegal, by reference to its conditional programmes (which are structures produced by its own operations), gives law its social dimension. Autopoiesis (the legal system's reproduction of itself through its operations) overcomes the lack of any logical (or epistemological) basis for its distinctions.

Law's conditional programmes allow law to be an open system. When observing coding, and articulating programmes that account for it, law can utilize values communicated within any of society's sub-systems (function systems), or within general societal communication. Indeed, because the values form part of programmes working towards a single code, one can have relationships between values that would otherwise be incompatible. While conditional programmes may be constructed by reference to every kind of value communicated within society, they never impose a value that determines, for the system as a whole, what is legal and illegal (not even the value of legality). There are two reasons for this. First, the conditional programmes of law utilize too many values for law to be reduced to any single value. Second, and this is more fundamental, to assume that the values utilized within conditional programming could determine the value of the code is to misunderstand the distinction between programmes and code. No value utilized within a conditional programme to structure coding is applied in the same manner as it exists in the system from which it originates. An example will assist here. Criminal law often uses forensic science. This is necessary to get at the 'truth', which is important to coding behaviour as

legal or illegal. But law only wants to use 'truth' to reach the conclusion whether something is legal or illegal. So forensic science will be used within a process constructed by rules of procedure rather than an experimental situation, in order to decide whether an individual committed a particular act, with a view to finding him/her guilty of a crime. This process inevitably means that finding an individual guilty of a crime (so that punishment is legal) does not mean that it is 'true' (according to the meaning of that value within science as a system). And this is not just because the conditions under which science is applied within law are different from science. It is because the code applied by law (this punishment is legal/illegal) is not the code applied by science (this communication is true/false). Another way of putting this is to say that law can borrow the values of other systems, but not their codes. If legal proceedings ended with the coding that something was 'true', rather than 'legal', then its subjects will have ceased to participate within the legal system.

The distinction between coding and programming also has implications for the ability of the legal system to continue reproducing itself through its operations. Coding ('this punishment is legal') provides conditions for further coding ('a parole board may consider releasing this prisoner after X years'). The programme (and the values utilized) to make one coding is not necessary to the next coding (although it may be relevant if *this* coding needs to be reassessed/reobserved). This ability of coding to provide the basis for further coding (and thus link legal communications) is enhanced by the logic of 're-entry' or the application of a form to itself. In the case of a binary code, the re-entry is 'doubled' as the code can be reapplied to either side of the distinction created by an earlier coding. For example, if an ongoing situation is identified as a robbery, the actions of the participants are illegal. This distinction has divided the world into two: what is legal, and what is illegal. But the distinction can be applied again, and to both sides of what was previously distinguished. We can ask whether the arrests of those who acted illegally were legal, or whether the reactions of bystanders were illegal. This means that the coding does not simply result in the linking of communications that code facts as legal. Coding something as illegal is also a basis for making further distinctions as to what is legal and illegal. If one could only attach further legal communications to one side of the code (what is legal) the application of the code would gradually shut down what could be coded. But as we can recode both what is legal and illegal, the whole world remains accessible to the legal system, and vice versa.

Luhmann calls the requirement of an effective coding its *technicalization*. This means that the application of the code to the pre-existing state of facts (including earlier coding) depends on only a few conditions and not on either the sense that the world (other sub-systems and general societal

communication) makes of it, nor on the particular characteristics of the subject applying the code. This is not a condition that excludes uncertainty in the application of the code. Technicalization exists when, even without being particularly knowledgeable, one can know and anticipate the conditions under which something being legal or illegal depends in a particular case. (It could be explained to one, even if one would not have known without explanation.) It also allows error-checking. Within a blurred margin of acceptance, it can be established whether an error has been made in the application of the code. And while one has a hierarchy to check errors, the ability for there to be errors, rather than simply different points of view, assumes that, except in particular circumstances, it will not matter which court applies the code.

Luhmann's analysis of conditional programmes as structures that unfold the paradox of law's code leads him to particular insights into law's operations that differ from those reached through other theories.

- While the distinction between legal and illegal can be maintained for individual coding, the system as a unity can never decide the basis of what is legal or illegal. It can never apply the code to itself as a system. There is no foundational value establishing what is legal or illegal, only operations.
- The rigidity and costs of coding legal/illegal can be reduced by delay. Law can delay coding through proceedings. Proceedings allow participation in the system prior to a coding decision. Here delay (the decision cannot be made until the proceedings are completed) is justice. Theories that seek certainty without proceedings ignore the advantages to law that arise from delay.
- Law's programmes are conditional rather than purposive. The need to develop programmes that decide what is legal/illegal, and the need to make further coding based upon earlier coding, restricts the ability to use programmes based on a continuous assessment of the present. Law has to reduce any assessment of circumstances by reference to achieving some future state into its judgment as to whether that assessment was legal or illegal at the time it was made. And the latest when law's judgment can be made is when the code is applied. This considerably reduces the ability to use goal-based instructions as legal programmes.
- Law develops programmes to achieve what in prior periods amounted to a rejection of law. Luhmann uses the example of non-prosecution in situations where prosecution would threaten general law and order. Emergency powers, derogation from constitutional law, theories of abuse of law, all represent the application of law's coding, through its own conditional programmes, to what previously would have represented the suspension of law. The only true rejection of law is a refusal to code, which is actually the application of the code of another system in place of coding through law.