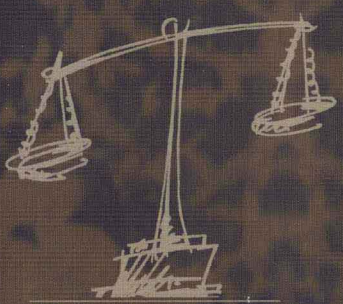
Observing Law Through Systems Theory

Richard Nobles and David Schiff



legal theory today

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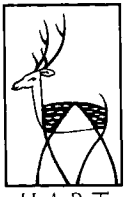

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Preface

This book is complementary to our book *A Sociology of Jurisprudence*,[1] although it is not necessary for readers to have read that book in order to engage with what we present here. In *A Sociology of Jurisprudence* we offered a way of exploring general jurisprudence and legal theory as law's self-description,[2] adopting a particular version of general systems theory[3] to enable us to do so. This particular, modern version of general systems theory, often referred to as neo-systems theory or autopoiesis theory, provides an abstract theoretical underpinning from which to observe on the manner in which systems construct themselves, and construct what they are not (their environment). The theory is most closely associated with the writings of the German social theorist Niklas Luhmann.[4] Exploring jurisprudence as law's self-description enabled us to reconsider a number of jurisprudential theories about law's nature, its essential or implicit character, or what unifies law, and offer further commentary on those theories.

For the purpose of understanding jurisprudence as self-description, self-description has to be contrasted with external description.[5] Law's self-description is both generated by legal operations, and in turn stabilises those operations. In this sense self-description is not different from self-observation, or what others might portray as the internal understandings or implicit assumptions of those most closely associated with the practice of law.[6] However, the distinction between self-observation and self-description

[1] Nobles and Schiff, 2006.

[2] For a short statement of this approach and its application to natural law and legal positivist theories, and the differences between them, see Nobles and Schiff, 2009.

[3] See von Bertalanffy, 1976.

[4] His writings are not easily accessible to the uninitiated. For our purposes, the main general works that represent his fully developed theory are: *Social Systems* (1995), being built on his earlier work *The Differentiation of Society* (1982), and his last major work, the two volumes of *Die Gesellschaft der Gesellschaft* (1997), a translation of which is about to be published in English. For a valuable introduction to his general theory, see Moeller, 2006. Luhmann's major later work on law *Das Recht der Gesellschaft* (1993) is translated in English as *Law as a Social System* (2004). Difficulties abound in reading Luhmann's 70 books and over 400 scholarly articles as the theory that he develops shares some of the features of Marxism, in that alongside the works of Luhmann, one also has the work of various 'Luhmannians' who take a variety of approaches. These range from 'strict literalists' who insist that a correct interpretation of the theory requires fidelity to Luhmann's own works; 'liberals' who re-interpret and elaborate on his basic concepts; and 'pragmatists' who take some of his concepts and seek to apply them to their own subject areas (see Priban, 2010).

[5] As a clear example of this difference, see the account of the theoretical writings of the Critical Legal Studies movement in Nobles and Schiff, 2006, ch 6.

[6] We adopt the phrases self-description and self-observation, as understood from a particular sociological perspective (that of systems theory). This is close, as a sociological equivalent,

arises at the level of generality. Whereas self-observation has as its object particular operations within the legal system, self-description is the system's attempt to describe itself to itself as a unity.[7] But in describing itself in this way self-description is reflecting on self-observations, and guiding those self-observations, as well as guiding more mundane, local or particular legal operations. In *A Sociology of Jurisprudence* our concern was with how law generates its self-description, and the role played by that self-description in guiding laws' operations. In this book we are concerned less with law's self-description than a number of law's general, significant and often controversial self-observations, and in particular how those self-observations can be contrasted with the understanding and use of similar observations constructed within other subsystems, namely those observations reflecting on the same subject-matter but generated within other functionally differentiated subsystems in modern societies (such as the political system, the mass media, the economic system, etc).[8]

In writing this book we are seeking to demonstrate that observing systems using systems theory makes a difference: that it can increase our understanding of the legal system. In our last book, with its focus on law's self-description, that difference was at a high level of generality. But self-description does not operate in isolation from the rest of a system. It involves a relationship between the most particular[9] and most general kinds of system communications. The premise of systems theory is that a system's self-description is generated through that system's operations, observation on those operations, and observation on those observations. Thus, although a self-description is a system's description of itself as a totality, it

to the philosophical understanding that has recently been developed by Nigel Simmonds as an example of law's 'reflexivity' and the role of jurisprudence in this. 'Legal thought and practice exhibit reflexivity in so far as they explicitly or implicitly appeal to the idea of law. For the idea of law is not one that simply describes existing practices; rather, the idea of law plays a vital part *within* the practices that make up the existence of a legal order' (Simmonds, 2010, 1). The point at which this philosophical account diverges from the sociological account adopted here is well represented in Simmonds' statement about the inability to describe the social practices represented by the idea of law he is alluding to: 'The idea of law is the focal point that enables us to make coherent sense of the otherwise diverse features of practice, but it is not itself a matter of observable practice. It resembles a notional point in space that enables us to grasp the relationship between various parts of a complex drawing, although in itself it forms no part of the drawing' (at 18). Rather than a 'notional point in space', for systems theory the empirical evidence of this idea can be found in the actual communications used within the legal system, whether as self-description or self-observation.

[7] On Luhmann's analysis of the self-description of society as a whole, and in particular modern society, see N Luhmann, 1984.

[8] On functionally differentiated subsystems, see Luhmann, 1982, or in a short form, Luhmann, 1977.

[9] 'Nobody can 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' (Luhmann, 2004, Preface).

operates reflexively, by stabilising the self-observations which generate it, which in turn stabilise the system's operations. The most general, and the most particular, have a relationship to each other. Our book was called *A Sociology of Jurisprudence* because it offered a sociological explanation for the generation and role played by jurisprudence within the legal system, in linking law's operations to its most general kinds of communications. We attempted to demonstrate that jurisprudence, as philosophy, and as a sociological approach to law, does not identify different issues, and that a sociological approach to law, informed by systems theory, could improve our understanding of how the legal system generates the issues which philosophy has attempted to describe and evaluate.

In this book we have moved below the level of self-description to that of self-observation. And at this lower level of analysis the theme which unites the different Chapters in this book is our attempt to demonstrate that systems theory has the potential to increase our understanding of issues which other approaches (both sociological and philosophical) have already identified and imbued with significance. As with our earlier book, this endeavour is our response to assertions that systems theory is too abstract, general and complex to be used to undertake such a task. Unlike that book, we cannot claim that all of our Chapters here explore a single, central theme. But we do believe that the Chapters build upon one another, in the sense that issues dealt with within one Chapter provide a basis, or starting point, for those dealt with in others.[10]

One of the key self-observations that coalesce in so many of the communications of legal practitioners, and especially judges, is that they operate within and as part of the legal system. Communications by others than legal practitioners also offer what appear to be the 'same' observation, namely that lawyers and judges, and indeed law in general, operates within and as part of the legal system in general, or particular legal systems. But what is the nature of any legal system, or indeed of any social system? There are those who have doubted the characterisation of law as operating as a system, and those who have given that notion some specific content (and in both cases such characterisations have been offered differently by different people). Systems theory is well placed to observe on such attempts since it is most closely concerned with how the modern social world has evolved and has splintered into one in which subsystems, or functionally differentiated systems, operate. Even more, it has established ways of understanding how society operates as a system.

Right from the beginning of what is offered in this book, an attempt will be made to show how this sociological approach and its understanding of the modern social world, and its observations on systems and the legal

[10] And this is very different from an approach that might try to utilise 'bits and pieces' of systems theory, rather than the whole theory, to account for law's operation in society (for example, Galligan, 2007, 43).

system in particular, makes a significant difference. It highlights and sheds light on issues that have seemed to be so intractable: issues that throw up problems that we seem to fail to resolve with any degree of adequacy. In doing so it does not shy away from describing modern society in a manner which is adequate to both its modernity[11] and its complexity.[12] From the vantage point of systems theory society is a system made up of the sum total of its communications,[13] including the communications of each of its subsystems. Namely, society itself and each of its subsystems can be observed through their communications: those that construct society, and each subsystem, as themselves.[14] But, since systems theory makes the claim that systems construct themselves through their own operations, it follows that, for example in relation to law, what needs to be observed most closely is how the law communicates what it itself constructs as itself, as distinct from how other systems might communicate about law.

Chapter 2 addresses two interrelated issues. Within general discussions of systems theory, a central concern is the role played by individuals within a social system. To those used to analysing social events by reference to the thoughts, motivations and interests of human actors, placing individuals at the centre of any explanation, a theory that makes systems the subject of its propositions ('the legal system thinks this', or 'the political system does that')[15] has alarming elements of reification and socio-animism.[16] In this Chapter we seek to address the question of how individuals participate within systems and, by taking the example of judges, offer this explanation as an answer to one of the questions which has occupied much of legal philosophy: the nature of judicial discourse. Individuals who wish to achieve the operations which a legal system makes possible have to utilise the communications through which such operations occur, and in so doing, they are necessarily

[11] For a short account of Luhmann's systems theory as 'A Theory of Modernity', see Muller, 1994, especially section III (47–51). For a systems theory account of modernity, see Luhmann, 1998, ch 1, 'Modernity in Contemporary Society', and more generally, see Rasch, 2000.

[12] There are many attributes to systems theory's expression of complexity (as there are of the study of complex systems, complexity theory, network theory, and other terms that deal with the modelling of complex systems). To give one succinct example, see Luhmann's short account of the relationship between complexity and meaning: 1990, ch 3, 'Complexity and Meaning' 80–5; see also Luhmann, 1995a.

[13] Throughout this book the meaning of communications, communicative meaning, and epistemological implications of the communicative turn in social theory will be advanced. As background some readers might wish, at this stage, to reflect on the different meanings that can be attributed to the notion of communication, for example, in relation to science: consider Luhmann, 1996. Also one might wish to reflect on some improbabilities of communication: Luhmann, 1981, and some of communications' main characteristics: Luhmann, 1994.

[14] This can be described as 'a second-order cybernetics that observes observations' (Rasch and Knodt, 1994, 3). Such a disposition entails significant epistemological questions, which it is not our intention to engage with here. For short accounts of these epistemological questions of 'second-order cybernetics', see Luhmann, 2002, ch 9, 'I see something you don't see', esp 190–3; Rasch and Knodt, 1994.

[15] For example, see Teubner, 1989.

[16] Teubner, Nobles, Schiff, 2002, 918.

constrained in the meanings which can be generated. When participating within the legal system, especially at the level of judges, individuals have no means to carry out legal operations other than through the use of communications which generate explicit or implicit meanings, which include a commitment to the validity of the legal system. This discussion demonstrates why commitment is something internal to the legal system, a feature of its communications, rather than something internal to the individuals who participate in that system. It also considers why judges continue to speak, in their judgments, as if they were recognising a law that already existed, even though their law-making role is generally acknowledged, even by themselves, in other contexts. This discussion will introduce the reader to the difference between social and physic systems, as well as the manner in which redundancy (a concept which explains how information is extracted from communications) limits an individual's freedom to choose what meanings she/he can generate.

The Chapter on judicial discourse offers, we believe, a useful starting point for the understanding of how different commitments operate within different systems, and in particular the legal and political systems. The following Chapter introduces Luhmann's ideas on the nature of political legitimacy, and the role played by law within the political system, in establishing the legitimacy of political decisions. The particular issue which allows us to explore this is that of civil disobedience: the claim that it is, in certain situations, right to disobey law. In keeping with our approach to judicial speech, we explore the constraints which systems place upon individuals who seek to assert this right. Starting with the legal system, we consider the difficulties of acknowledging such a right within legal decisions. Next, we consider the problems of articulating such a right within the political system, and why civil disobedience can exist as protest, but not form part of the distribution of political power through government.

In Chapter 4 our focus shifts from issues which have been addressed by legal and political theory to one that has received more attention from anthropology and the sociology of law: the nature and study of legal pluralism. We take up the claim made by Gunther Teubner, a leading exponent of systems theory with particular reference to law, and its dismissal by Brian Tamanaha, a leading exponent of legal pluralism, that systems theory could make an important difference to our understanding of plural legal orders. Teubner has claimed explicitly, and in much recent writing continues to claim implicitly, that legal pluralism could be explored though the identification of the legal with a system that codes in terms of the distinction legal/illegal. In this Chapter, we consider the nature of codes (both in law and other systems) and the capacity of codes to provide criteria which can separate the legal from the rest of the social in a manner that does not reduce that distinction to the subjective opinion of a given individual, whether or not that assessment is shared with significant numbers of other

individuals. This Chapter also explores the difference between a society that exhibits functional differentiation (one where it is meaningful to speak of separate religious, economic, legal and political norms) and one that does not, and the problem of seeking to find criteria for law that applies adequately to both.

When considering issues of pluralism one is principally concerned with normative space – which norms operate in which settings, locally, nationally, trans-nationally, regionally, internationally. But such consideration should not ignore a dimension that underpins these possibilities, namely time. That which has an existence needs to exist not only in space, but also in its allied temporality. This dimension of meaning is often studied in its application to society and its systems by utilising the various methods of historical analysis to help us understand how we came to where we currently are, and various other forms of analysis to anticipate from where we are to where we might be heading. Moving through time, past, present and future, and linking those moments involve the application of methods of analysis, explanation and understanding.[17] Systems theory offers one such method by its observations on how subsystems construct time within their own operations. In this Chapter our question is: how does law construct time and what can we learn from exploring those constructions as evidenced by its communications? We first introduce readers to the counter-intuitive idea that time can only exist socially within the meanings constructed by society's communications. As such, time can have different meanings as societies evolve and, when those societies evolve to produce functionally differentiated social subsystems (political, economic, religious, legal, mass media, etc), different meanings within those different social subsystems. With this starting point the Chapter looks at a number of ways in which time has particular meanings, or significance, for law. The need to bind time, to create expectations that meanings generated in the past will guide the generation of meanings in the future, are essential to all systems' operations. But the nature of that time binding differs between systems. We look at two examples. First, the presumption of innocence, which requires a defendant's guilt to be postponed until conviction regardless of the communications generated within the mass media, or the political system. Second, and this is a more complex example, we examine a claim that can be attributed to some natural law theorists (such as Lon Fuller) that law is inherently prospective in nature. We consider this claim in light of the routine retrospective character of law created through adjudication, and the difficulties of acknowledging this, and reforming law to prevent its occurrence. We also consider the reasons why attempts to create retrospective law remain an exceptional practice within the political system, and

[17] What Abbott calls 'temporality defined by relation' (Abbott, 2001, 239, see particularly ch 7).

further why political constructions of time might cause particular difficulties for legal operations.

Whilst Chapter 5 touches on some aspects of the relationship between law and politics, Chapter 6 attempts to re-examine the general relationship between these two subsystems using Luhmann's concept of structural coupling. We begin by considering the possibilities for co-ordinating law and politics, and the implications for both systems if political power is brought directly to bear on judges on anything other than an exceptional basis. Rule by way of law (legislation) represents a structural coupling through which politics increases its ability to distribute political power, but at the cost of relinquishing the ability to apply political power in illegal ways. Our discussion of 'the rule of law' provides a foundation for us to look at the development of constitutional law, and then human rights. The Chapter attempts to demonstrate how the self-limitation of politics represented by the rule of law, constitutional law, and human rights are generated by dynamics within a political system that has differentiated itself from the legal system. The motivation for political actors to make communications which affirm the rule of law is a consequence of the increased complexity which arises from the distribution of political power through legality. The evolutionary increase in the use of this technique provides the background for a change in the nature of constitutions, from 'fundamental laws' which exist only within the political system, to constitutional law, which can be the subject of adjudication within the legal system. The last section of this Chapter considers a systems theory explanation for the rise of human rights as part of this evolution, and whether human rights can operate as self-limiting for systems other than politics through processes of societal constitutionalism.

Chapter 6 deals with the structural coupling and co-evolution of the legal and political systems, which is a vast subject, while Chapter 7, too, deals with the equally vast subject of the co-evolution between the legal and other subsystems, not only the political system. Again, the aim is not to give adequate coverage of this wide-ranging topic, but rather to show how a systems theory understanding might make a difference to how we approach it. In this Chapter we briefly consider subjects associated with the idea of 'control through law', especially with the use of law (including both adjudication and legislation) to resolve issues and disputes. We explore a number of potential reasons for law's regulatory failure – either in terms of why it fails to have the impact that is aimed at (a failure of steering), or causes debilitating consequences for other systems, or for itself as a system in response to other's expectations of it. We ask tentatively whether the better understanding available from the perspective and application of systems theory (whether in terms of structural coupling, social constitutionalism or reflexive law) could engender practical solutions to the systemic difficulties and consequent problems demonstrated (not only in this Chapter but throughout the analysis in this book).

The analysis involved in Chapter 7 introduces many issues concerning the inter-systemic complexity of systems and the possibilities of structural coupling and co-evolution. The related final Chapter, Chapter 8, explores a similar analysis of inter-system coupling, but between law and the media in relation to convictions and appeals. It starts by addressing the meaning of appeals in law to itself through the evolution of doctrine, and goes on to offer some analysis of what the meaning of appeals in law has for the mass media. This Chapter also provides an example of the manner in which systems maintain closure, and why the participation of individuals in different systems, and their knowledge of each system's operations, does not overcome the system's closure, and allow each system to 'learn' what these individuals 'know'. The Chapter ends with a postscript both to Chapter 8 and the book as a whole about the place of individuals within systems.

This book explores themes that are represented in some of the most general and sustained observations about law characteristic of the communications of lawyers, law teachers, but also politicians, economists, journalists, and many others as they engage with law from the various vantage points offered to them within the systems that they are operating in. It demonstrates that a focus on systems offers a perceptive perspective from which to explore the modern social world and law's operation within it. But we recognise that our attempt to engage in this exploration is problematic as readers may, we hope, after reading our book well understand. Indeed, how can social scientific observations, engendered by research undertaken within the education system, construct insights and suggestions that can be adequately understood and used within the legal or political systems? *A Sociology of Jurisprudence* was a precursor to this book as it reflected on law's constructions of its unity, its jurisprudence. In this book we have moved from those constructions to an exploration of a number of law's general self-observations as they reflect its substantive differences from the external constructions by its social, economic and political environment. But in neither book have we systematically moved from applying some of the insights of systems theory and the understanding that this can engender, to a sustained account of the potential use of those applications and understandings. Although we have glimpsed the suggestions of others about how systems theory insight may be useful, we have yet to find a way to offer any sustained analysis of this ourselves.

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'Why do judges talk the way they do?' (2009) 5 *International Journal of Law in Context* 25–49, an amended version of which is produced here as Chapter 2.

'Disobedience to Law, Debbie Purdy's case' (2010) 73 *Modern Law Review* 295–304, part of an amended version of which is incorporated in Chapter 3.

'Using systems theory to explore legal pluralism – what could be gained?' (2012) 46 *Law & Society Review* 265–96, part of an amended version of which is incorporated in Chapter 4.

'Legal pluralism: a systems theory approach to language, translation and communication' in Michael Freeman and Fiona Smith (eds), *Law and Language*, Current Legal Issues, Volume 15 (Oxford, Oxford University Press, 2013) ch 7, part of an amended version of which is incorporated in Chapter 4.

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Richard Nobles and David Schiff, London, 1 March 2012

Contents

1

Is the Legal System a System?

It is not sensible to launch into applications and implications of a theory that operates on the assumption that the legal system is both a system and one that describes and observes itself through its own operations, without giving some attention to what systems theorists mean by a system and, therefore, what makes the legal system a system for these purposes. This does not require us to restate all of the elements of autopoietic systems theory, but will inevitably involve some comparison between this version of systems theory and legal theories that have attempted to describe the legal system as a system, the most notable being that of HLA Hart. Nor is it necessary for us to explore all of the different meanings and approaches to systems, what it means to think and learn in systems[1] or in terms of systems.[2] Rather, for our purposes, such an introductory analysis of law's operation as a system addresses some of the most general questions in jurisprudence and, as we will demonstrate, displaces some of the answers provided by conventional legal theories.

What kind of system is the legal system?[3] Despite the ubiquitous use of the phrase 'legal system' there is no obvious consensus on what it means for law to operate as a system, how its systematic qualities are generated or maintained, or even that law operating as a system has a distinct character that could be distinguished from, or could distinguish itself from, any other part of society. This is so despite the fact that there have been many attempts to present law as a system.[4] Perhaps the most famous, that of Hart in *The*

[1] Consider the difference between 'systems engineering' (SE) and 'soft systems methodology' (SSM): Checkland, 2001.

[2] See Meadows, 2009; Midgley, 2000, ch 3, 'The Systems Idea'.

[3] This is a question that many others have addressed. For example, in the Preface to the French edition of their book, Van de Kerchove and Ost, 1994, ix: 'The starting point of this essay will be the obvious fact that law – at least modern, Western law – takes the form of a system. The central question throughout will be: in exactly what sense is law a system?'

[4] Joseph Raz makes this point succinctly: 'Laws are part of legal systems; a particular law is a law if it is part of American law or French law or some other legal system. Legal philosophers have persistently attempted to explain why we think of laws as forming legal systems, to evaluate the merits of this way of thinking about the law, and to make it more precise by explicating the features that account for the unity of legal systems. Various theories have been suggested but none have been accepted as completely satisfactory, and the continuing debate owes much to the intricacy of the problems involved' (2009, 78).

Concept of Law,[5] elaborated on law as a system of rules, separated from other social rules by the presence of a pedigree test for which rules count as legal rules, namely the 'rule of recognition'. Much of the writing in Anglo-American jurisprudence since this seminal work can be seen as a debate about the claim that law exists as a system, with some providing alternative accounts of law's systematic qualities (for example Dworkin – law as the systematic articulation of justificatory principles; Raz – law as the provision of source-based reasons for action within legal systems which are comprehensive in that they claim 'authority to regulate any type of behaviour', supreme, in that they claim 'authority to regulate the setting up and application of other institutionalized systems by its subject-community', and open, in giving 'binding force within the system to norms which do not belong to it'[6]), or denials or serious questioning of its systematic character (for example Sampford – law as mêlée;[7] Van de Kerchove and Ost – law operating between order and disorder;[8] much critical legal studies writing which, from a variety of theoretical perspectives, seeks to challenge claims that law is systematic and distinct, especially from politics).

Classical ideas of what a system is go back to the Greeks (Plato, Aristotle and Euclid), who explored ideas of wholeness, or union. The most general idea of system expressed is that of a distinct whole which has internal relationships between its various parts. The wholeness of a system requires it to be separated from its surroundings. There must be a boundary. The notion that the parts of the whole have a relationship with each other, and with the whole of which they form a part, is captured in the following statement by American philosopher John Dewey: 'It differs from such terms as aggregate, collection and inventory, in expressly conveying the way inherent bonds bind together . . . the parts of the whole [and] it differs from such terms as organism, totality and whole in expressly connoting that the parts are interdependent.'[9] The features of wholeness, a whole formed out of the

[5] 1961/1994. It is not only legal theorists who represent law in this way, sociological and political theory analysis of law also characterises the operation of law in similar terms. For what is now a classic statement to this effect, see Friedman, 1975, ch 1, 'The Legal System'.

[6] Raz, 2009, 115–21.

[7] Sampford, 1989.

[8] Van de Kerchove and Ost, 1994.

[9] Dewey 1901, quoted by Sampford, 1989, 14. There are, of course, many modern alternative definitions of system and systems, especially those that both inform systems science in itself and in relation to complexity science (see, for example, Castellani, 2009, 8: 'the celebrated insight of complexity science: all social systems, by definition, are complex'; Urry, 2005). There might be some agreement about the most general definition of a system (such as that offered by Webster's New World Dictionary: 'a set or arrangement of things so related or connected as to form a unity or organic whole') but this does not mean that modern theorists who explore systems, systems theory and systems science in depth, rely on the same definition or adopt similar methodologies in their study of systems. (Webster's definition is quoted by Klir, 2001, who also says (at 4): 'The term "system" is unquestioningly one of the mostly widely used terms not only in science, but in other areas of human endeavor as well. It is a highly overworked term, which enjoys different meanings under different circumstances and for different people. However, when separated from its specific connotations and uses,

relationship between the parts, points in turn to the concept of structure. The relationship between the parts forms the structure of the whole, and gives it its character as a particular system, distinct from other entities. Thus, with this formulation of what it means to be a system, structure also establishes the border or boundary of the system. By establishing what forms part of the system, the structure necessarily also establishes what does not form part of the system and hence establishes the system's boundary.

Using these ideas of system, Charles Sampford in *The Disorder of Law* undertakes a sustained attack on the possibilities of law existing as a system.[10] He presents legal positivism, as represented by the works of Hart, Kelsen, Raz and MacCormick, natural law, as represented by Dworkin, and sociological approaches to law, as represented by Parsons, as three unsuccessful attempts to understand law as a system. His presentation of these three approaches, and his reasons for concluding that they fail to explain how law could exist as a system, provides a useful starting point to our own explanation of how law operates as a separate and autonomous social system.

Legal positivism relies on a hierarchical structure, which sets out, in many different versions, to present law as the consequence of relationships of validity stretching between higher and lower norms. To Sampford all such versions fail to account for all of the possibilities of what can become law. Some norms become legal norms that are not selected as such by the highest norms in the system, and there are occasions when the highest norms are themselves altered. The structures identified by positivist legal theories cannot account for all that is commonly accepted to be law and, in particular, they cannot account satisfactorily for the capacity of law to evolve. Dworkin's attempt to describe law, using a hierarchy of principles and other background values, explains the capacity of law to exist, and evolve, by reference to relationships between levels of justification.[11] In particular, justifying the use of coercion involves a combination of consistency and appeal to community values. Community values themselves change, so some earlier justifications lose their persuasive force. Totally ad hoc justification would appear arbitrary, so some part of whatever has been justified in the past (especially the very recent past) must operate as a restraint on the ability to

the term "system" is almost never explicitly defined.') Nevertheless, despite the many significantly different uses of the term, there are those who suggest that there is a developing consensus on at least how to approach social systems (see Bausch, 2001) and how the paradigm of systems thinking provides an alternative to the prevailing analytic mode.

[10] Indeed his book (1989) attacks the possibility of any part of society qualifying as a system. Sampford identifies society as the aggregate of individual experience of interactions between individuals, locates this in each individual's mind, points to the asymmetry in any two individuals' experience of the same interaction, and claims that these disparate experiences could never create systems, but merely overlapping similarities. If we refer to Dewey's definition, the best that can be produced is aggregation, collection or inventory.

[11] For a later clarification of the approach which Sampford refers to, see Dworkin, 2006, ch 2, 'In Praise of Theory', esp 53–57.