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## **The legacy of Luhmann's sociology of law: a triologue among social theory, jurisprudence and empirical research**

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LUCAS FUCCI AMATO\* 

### **Abstract**

This paper aims to map the possibilities of adopting social systems theory in order to couple three usually isolated domains: social theory, jurisprudence and empirical research. It argues that these different uses would be the distinctive legacy of Luhmann's work for legal research. The text suggests that investigations interested in adopting a systemic approach for discussions in each of these three domains (or in all of them) should focus on the entanglement among interactional, decisional and functional systems. However, this presupposes some enhancements in Luhmann's own description of law as a social system. The core hypothesis presented here is that a functional system's out-differentiation (its specialisation in face of other communications happening in the societal environment) depends on the inner-differentiation of this system – that is, on operations backed by the very construction of specific functional-systemic institutions and semantics (including decisional programs and self-descriptions).

### **Key words**

Sociology of law; socio-legal studies; social systems theory; sociological jurisprudence; jurisprudence

### **Resumen**

Este artículo pretende trazar un mapa de las posibilidades de adoptar la teoría de los sistemas sociales para acoplar tres ámbitos habitualmente aislados: la teoría social, la teoría del derecho y la investigación empírica. Sostiene que estos diferentes usos serían el legado distintivo de la obra de Luhmann para la investigación jurídica. El texto sugiere que las investigaciones interesadas en adoptar un enfoque sistémico para los debates en

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\* Lucas Fucci Amato. Associate Professor at the University of São Paulo Law School, Department of Jurisprudence and Philosophy of Law. Visiting researcher at the Universities of Oxford, Harvard and Cambridge. Email address: [lucas.amato@usp.br](mailto:lucas.amato@usp.br)

cada uno de estos tres dominios (o en todos ellos) deberían centrarse en el entrelazamiento entre sistemas interaccionales, decisionales y funcionales. Sin embargo, esto presupone algunas mejoras en la propia descripción de Luhmann del derecho como sistema social. La hipótesis central presentada aquí es que la diferenciación externa de un sistema funcional (su especialización frente a otras comunicaciones que tienen lugar en el entorno social) depende de la diferenciación interna de este sistema, es decir, de las operaciones respaldadas por la propia construcción de instituciones y semánticas funcionales-sistémicas específicas (incluidos los programas decisionales y las autodescripciones).

### **Palabras clave**

Sociología jurídica; estudios sociojurídicos; teoría de los sistemas sociales; jurisprudencia sociológica; teoría del derecho

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## 1. Introduction

How to use Luhmann's sociology of law to develop legal theory and research today? This guiding question clarifies the purpose of this decidedly theoretical paper: to map the articulation among theory of society, jurisprudential conceptualisations and empirical venues of research brought about by Luhmann's work.

This text then suggests that systemic approaches in one or all of those three pathways (social theory, jurisprudence or empirical legal research) should consider the entanglement of three scales of social systems: interactions (communication in face-to-face encounters), organisations (decision-making systems) and functional systems (specialised by reference to their coding and function in face of the wider societal system, *i.e.* society). To emphasise this understanding, the paper proposes an explanatory hypothesis that unifies the reconfiguration paths of the Luhmannian conceptual apparatus suggested here. This guiding hypothesis is that the "outdifferentiation" of a system (especially considering the level of functional systems) in relation to its environment depends on its internal differentiation; that is, the specialisation of the legal system (for instance in face of politics, morality or economy) is based on the construction of semantics and institutions that build a degree of internal complexity capable of supporting the self-referentiality of the system (Amato 2021).

Let us clarify this hypothesis: only when there are specialised legal organisations and theories, among other elements, one can find a basis for the functional differentiation of law, and this is a variable that admits more detailed, historical and gradual analyses. It is necessary to have a certain inexhaustible stock of communicative possibilities (*i.e.* complexity) so that each selection of meaning can be seen as a contingent operation. Only given this condition can the operational closure of a system be produced, with a certain binary code directing and distinguishing its communications. The suggested hypothesis is worked out from a special emphasis on the differentiation and coordination among three "types", "levels", or "scales" of social systems: interactions, organisations, and functional systems<sup>1</sup>.

Luhmann's analyses serve the scope and dimension of his lifelong intellectual endeavour: a theory of modern society viewed from the end of the last century, updating the ambitions of the classics of the mid-19<sup>th</sup> to early 20<sup>th</sup> century. Scholars who adopt Luhmann's work may have – and usually do – different intellectual projects. While contributing to expand and deepen the systemic analytical legacy, they may face difficulties in adopting such an ambitious and intricate theory, of such a high degree of abstraction and generality, to analyse, more closely, phenomena more specific than the historical process of emergence of modern functionally differentiated world society – Luhmann's *leitmotif*.

Niklas Luhmann was part of a generation that repositioned the study of law within sociology, mainly following the lineage inaugurated by Max Weber (1922/1978), who

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<sup>1</sup> As Luhmann (1997/2013, p. 132) points out, "'interface' relations between functional systems use interactions and organisations that cannot be clearly attributed to either side". Mascareño (2007, p. 15) refers to a "coupling among the different levels of formation of social systems". Considering the radical constructivism in which systems theory is based, we will prefer hereinafter the reference to "scales" of social systems.

focused his analysis on the social orientation of individual action, providing typologies of the forms of social action, of legitimate domination and of manifestations of legal rationality (combining the dimension of generalisation and predictability of legal criteria with the dimension of the degree of their differentiation as strictly internal parameters of analysis and decision). Exemplary works of that generation are Luhmann's *A sociological theory of law* (1972/2014), as well as the books by Unger (1976), Nonet and Selznick (1978/2001), and Bobbio (1976).

The closest antecedent of that generation was the functionalist synthesis of Parsons (1937/1949, 1951/1991, 2008), whose work provides a combination of Weberian methodological individualism with the Durkheimian concern about symbolic generalisation and normative or evaluative integration as ways to prevent or reduce the problem of anomie. Luhmann will seek to neutralise the normative or moral accent of functionalism and will take mainly the Parsonsian re-elaboration of that problem – the question of “double contingency”<sup>2</sup> – as one of the starting points of his theory.

Now that Luhmann's major works on law have already completed a celebrated career – half a century of his *A sociological theory of law*, and three decades of his *Law as a social system* – it is important to consider his legacy for legal research. The purpose of this paper is to trace neither a genealogy of systems theory nor a summarisation of its conceptual architecture. Rather, its aim is to propose certain displacements in Luhmannian theorisation that could enhance its potential for three types of legal research, adopted alone or in combination: sociological research, linked to social theory; the analytical study of law, linked to jurisprudence; and empirical research, either historically based or for mapping contemporary legal materials. The conceptuality proposed here is intended to be faithful to Luhmann, but to promote a certain rearrangement: themes that used to be marginal and superficial observations in the author's work are situated with greater centrality and depth here.

The first topic of the paper focuses on Luhmann's theory of society. Of course, one of the ways to follow the Luhmannian legacy is through the interaction between his general theory of society and his specific theories of functional subsystems, as is the case of his sociology of law. On this path, one of the risks is to decouple the sociology of law from his general social theory. As I argue here, Luhmann's theory of society itself has a very strict focus on the “novelty” or “modernity” of functional differentiation, but this should not obscure its potential for the mapping of the empirical combination that exists in today's society (in the different regions of world society) among forms of social differentiation marked by functional criteria, but also by segmentary, geographical, and hierarchical cleavages. Even if one considers the prevalence of functional differentiation as a structural feature of modern society, such prevalence should not authorise a sociological analysis that is myopic in face of inclusions and exclusions based on “non-functional” criteria.

Although Luhmann emphasises the logical binarity of forms – differences that divide and unify a whole horizon of meaning – it is necessary to empirically perceive the

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<sup>2</sup> Basically, the theorem of double contingency deals with the fact that we don't know what others are thinking, and vice-versa. Therefore: how is social order (based on communication) possible despite of the closure of psychic systems (which produce meaning through thoughts) and of the mutual opacity of each individual mind?

processes of emergence, consolidation and combination of different forms. Thus, from the point of view of the theory of society (to which the first topic of this text is dedicated), it is necessary to have markers capable of indicating more precisely how the semantic and institutional specialisation of functional systems does not absolutely exclude, empirically, the communicative reproduction of differences that go beyond the specialised scope of a given functional system. The central theme proposed in the following first topic is the recognition of the “syncretism” among forms of societal differentiation empirically mappable within a given context.

As the second topic of this paper details, systems theory provides an accurate map of the internal structures of functional systems, law included. Therefore, Luhmann’s theory is distinguished from some “substantialist” or “naturalist” versions of legal sociology by recognising the self-determination of law according to its own operations and its internally constructed and validated criteria. Luhmann takes legal discourse seriously, not observing it as mere rhetoric or ideology that masks real and symbolic conflicts of power and interest (in the fashion of Bourdieu 1986). If this attention to the specificity of legal semantics and institutionality risks reducing law to its “face value”, however, there is also a potential contained in this theoretical option: the possibility of a productive dialogue with (general) analytical jurisprudence, in its widest scope of providing an account of the (more or less “universal”, *i.e.* not particular to a legal order or doctrinal branch) attributes of legal practice and discourse.

Here, in the third topic of this chapter, the analytical proposal centres around the concept of “decision-making arenas” as specific institutional configurations that characterise different discursive, argumentative, and decisional styles within the functional system of law. This would provide some approximations of Luhmann’s sociology of law to general jurisprudence – not in any normative theoretical claim, but only in the endeavour of identifying the specificity of legal operations (marked by the coding of legal/illegal) and their production by legal organisations.

Finally, the “stratospheric” level of construction of the Luhmannian conceptual apparatus brings difficulties for empirical legal research – whether for the historical study of long or medium duration, or for the more synchronic analysis of communications effectively produced on a given theme within a given legal order. Therefore, in the fourth topic of this chapter it is suggested, as a concluding remark, how the articulation among the interactional, organisational, and functional levels of law can facilitate the registration and empirical mapping of legal communications.

## **2. Theory of society: from the purism of functional differentiation to the syncretism of forms of societal differentiation**

Starting explicitly from a generalisation of the European historical experience, Luhmann (1997/2013, ch. 4) describes a transition among four prevailing forms of societal differentiation: segmentary differentiation (the formation of social units by natural criteria, such as kinship, but also age and sexual criteria); centre-periphery or geographical differentiation (including personal dependency relations such as clientelism); hierarchical differentiation (typical of feudal stratified and corporate society); and functional differentiation (“technical” specialisation of communication spheres).

I argue that an inaccurate reading of that explanation may suffer from at least three vices: *naturalism*, *etapism*, and *purism* (Amato 2020).<sup>3</sup> These vices may appear just if one takes a unilateral view on some of Luhmann's arguments. For instance, the flaw of *naturalism* lies in explaining social evolution ultimately by reference to environmental (extra-social) constraints. While Luhmann (1997/2013, p. 12) even speaks of "organic barriers" in face of which a form of societal differentiation can no longer reproduce itself, he also considers that the excess of communicative possibilities (complexity) is reproduced both at the level of structure and at the level of semantics, which needs to keep adequacy and plausibility with the operations that reproduce society. Since structure and semantics are both composed of the basic element of communication, semantics is formed, however, by a repertoire of self-descriptions, reflections and second-order observations – operations aimed at giving a kind of second meaning, which, more distant from the unity of action and experience that constitutes all communication, presents the contingency and contextuality of the meaning selections made. We could also speak of "culture" in place of "semantics" (Luhmann 1980/1983b, 1995/1997, Holmes 2018). Moreover, as Luhmann (1997/2012, ch. 2) suggests, the formation and emergence each form of societal differentiation is internally engendered by the evolution of dissemination media, from orality (characteristic of segmentary societies) to writing (in hierarchical societies) and to the press (at the upcoming of the functionally differentiated society). Therefore, the forms of societal differentiation are not simply determined by external, naturalistic constraints (such as physical, technological, and psychological factors).

Through the methodological vice of *etapism*, a closed list of social types is established, which in reality universalises experiences delimited in time and space. These types are seen as indivisible complexes of institutions and ideas. Despite the closed typology of forms of societal differentiation presented by Luhmann (1997/2013, ch. 4), he distinguishes this "factual" identification from the "temporal" dimension of "evolution" (Luhmann 1997/2013, p. 341), thus emphasising that evolution (given by the circularity of variation, selection and restabilisation) has no direction or purposive orientation (Luhmann 1997/2012, p. 269). This may open ways for us to consider equifinal paths and a range of institutional variations that are functionally equivalent (in terms of sustained degree of complexity), not simply a linear convergence.

Finally, *purism* refers to a certain reading of Luhmann's theory that simplifies everything in modern society as "modern"; the primacy of functional differentiation would mean the nonexistence of other ("prior") forms of social cleavage and differentiation. Here lies the crux of the present critique. Although emphasising the primacy of functional differentiation as a modern trend, Luhmann (1997/2013, p. 12) affirms that "mixes of

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<sup>3</sup> This critique parallels Unger's (1987, ch. 6) criticism of Marx's "deep structure" theory; for such a parallel, see Christodoulidis (1996). As discussed in Amato (2023a), those methodological vices are especially patent in the literature that takes Luhmann's typology and modelisation as a precise description of the core "modernity" and contrasts it with the empirical/historical experience of peripheral regions/countries, what stigmatises such experiences as deviant or backward. Indeed, varieties of answers to comparable natural constraints and different mixes of institutions, ideas and forms of differentiation are to be found in any concrete regional path in the world society, historically and today. Sometimes Luhmann himself (1997/2013, p. 121, 127–31; 1995/2009) falls into the idea (typical of modernization theories) that "earlier" forms of differentiation only present themselves today as "revivals" or are inherent in functional "corruption" or "de-differentiation", understood as an idiosyncratic cultural peculiarity of certain peoples of the global South.

several differentiation forms are typical, indeed, evolutionary necessary” and that “[i]n the case of functional differentiation, we still find stratification in the form of social classes and center-periphery distinctions, but they are by-products of the endogenous dynamics of functional systems”.

We may understand that the very emergence of functional differentiation (that is, the various trajectories of “modernisation”) incorporates and reconfigures the other forms of differentiation. Through the formation of nation-states, a functional equivalent to “tribal” kinship ties – and a sense of unity, half biological and generational, half cultural – is institutionalised. Through the (colonial) relations between the centre and the periphery in world society, asymmetries are structured (in the international division of labour, in geopolitics, in cultural hegemony) that cross the various functional systems. Through the expansion of organisational systems (public and private bureaucracy), equally typical of modernity, distinctions between members and non-members and internal hierarchies are reproduced, generating a stratification of social classes and a mass of excluded people. Organisational inclusion (in the state, churches, schools or companies) is highly relevant for inclusion in functional systems (that is, to effectively take part in politics, religion, education or the economy). It generates positive feedbacks: those included in one sphere can convert access to certain *media* (such as power, knowledge or money) into access to other systems; above all, lack of access to a certain organisational and functional system tends to generate a cascading effect in exclusion, feeding the equally modern phenomenon of total and massive exclusion – absolute misery, different even from the lower strata of a stratified society (Luhmann 1994/1998a). Functional differentiation is thus empirically limited, constrained, and at the same time drawn by the (“non-functional”) differences that itself reproduces, such as identity distinctions (*e.g.* national, sexual/gender, and racial/ethnic matrices), personal and geographical dependency relations, and stratification into social classes (Amato 2020).

Let us take the constitution as a relevant marker of functional differentiation. As a structural coupling between the political and legal systems responsible for structuring the organisational system of the state (Luhmann 1990/1996), the constitution is also a device that structures the cognitive opening of these systems to others, such as the economy, health, and so many others (constitutional rights and respective public policies). Despite structuring modern law and its differentiation in face of politics, we find examples of national constitutions from the 19<sup>th</sup> and 20<sup>th</sup> centuries that have maintained the exclusion or hierarchisation of voting (or even other civil) rights by gender, race or wealth. And one may find more subtle exclusionary criteria in legal texts or public policies implementation even today.

This highlights how – even at the explicit and institutionalised level of constitutional texts – functional differentiation did not reign alone, absolutely overriding other forms of social differentiation. The “mix”, fusion or syncretism of forms of functional differentiation seems to be the rule rather than the exception. The four typical forms listed by Luhmann thus have an explanatory role similar to that of Weber’s ideal-types: in a given empirical context, it is necessary to identify how the different pure types combine, generating the specificity of particular (but comparable) “modernisation” trajectories and contexts of “modernity”.



It is possible to align the types of differentiation listed by Luhmann with the scales of social systems discerned: interactions, organisations, and functional systems.<sup>4</sup> In a functionalist explanation, consequences are taken as causes, and subsystems differentiate themselves to better fulfil a role in relation to the maintenance or expansion of the general system of which they are organs. Communication systems (society and its subsystems) would have emerged to enable what they reproduce: social systems seek to make communication – that is, the processes of information, message and understanding – feasible.<sup>5</sup>

Since our thoughts are not transparent to the other's (as psychic systems are operationally closed), we need social systems to build up generalisable meaning. Interaction systems are the most basic, precarious, fleeting, and unstable social systems that emerge. In typical evolutionary dynamics, societies begin structured on the basis of interactions, communication systems of face-to-face encounters. To make possible the discernment of information against a background of already accumulated knowledge (redundancy), communications (operations, elements) need to be supported by structures. Structures provide the context and the durable link between volatile episodes, events and operations. The social microstructures are expectations. Just as language and signs structurally couple psychic and social systems, expectations are bivalent structures; they need to be generalised on the side of social systems, but are individually constructed on the side of psychic systems. To this end, there is a cluster of cognitive expectations (knowledge that can be learned from experience) and normative expectations – norms, anticipations about what ought to be, which resist disappointment in the face of what actually is or will be. In societies based on interaction routines, the conditions for variability in communication are minimal. Law cannot be changed by deliberate decision, but is reproduced traditionally, as custom. Communication is mainly orally disseminated. We could associate this scenario with segmentary societies, of small territorial and population scale, such as villages, tribes and communities.

An evolutionary takeover in the face of interaction systems is given by the emergence of organisations, centralised, stable and durable decision-making systems. There are free interactions, outside organisations, but also proceduralised, routinised and standardised interactions, within each organisation. Besides the social microstructures that are expectations, complexes of expectations arise, forming the internal structure of organisational systems, roles and proceduralised interactions. This is what can be called “institutions” (see Luhmann 1965/2010, p. 86).

The classical Athens or the Roman republic already show a certain political organisation, not yet fully centralised. The rural areas of Greece, distant from the polis, or the distant outskirts of Rome are ruled by segmentary criteria and interaction systems; in the cities, organisational systems emerge, which concentrate and specialise (as “pre-adaptive advances”) means of political, juridical and economic communication (the case of the Roman senate, jurisprudential rhetoric or commercial markets). European feudal disintegration marks an organisational pluralism – among fiefdoms, religious orders,

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<sup>4</sup> As Neves (2013, p. 9, note 32) suggests.

<sup>5</sup> Just as neoinstitutionalism explains the emergence of market institutions based on transaction cost economics, *i.e.* the overcoming of the improbability of exchanges. For a parallel between systems theory and new institutional economics, see Amato (2021).

burghs and guilds, with dispersed and autarkic legal-political-economic orders, which communicate with each other by general criteria of stratification among clergy, nobility and serfs. At the top of the social hierarchy there is a concentration of resources, including access to written communication, which allows greater variability by distancing the moments of information and understanding and by complexifying the possible ways of producing the message. Like the great empires of antiquity, the absolute state of the *ancien régime* concentrates a series of symbolically generalised means of communication – power, money, truth –, unifying the structure of corporate stratification among the various strata, ranks or “orders” of society.

Thus, by concentrating economic powers (starting with the issuance of money and the collection of taxes), linguistic and cultural homogenisation, the positivisation of law and the organisation of preventive and repressive force, the absolute state both unified territories, currencies, languages and legislations and paved the way for the successive differentiation of symbolically generalised media. These *media* facilitate communication in specialised areas of society by generating a motivation for the acceptance of information: if someone reinforces his message by offering something in terms of money or power, or by threatening a legal sanction, her communicative “partner” will be more likely to accept the premises of the one who offers her facilities or threatens difficulties.

Thus, a mega-organisation – the territorial state – makes room for the process of functional differentiation propelled by the liberal revolutions between the 17<sup>th</sup> and 19<sup>th</sup> centuries. It can be said that the political centralisation of early modernity was an intermediate phase between the prevalence of a total organisation (the absolute state) and the emergence of a new type of social system: the functional systems. Validity becomes the exclusive criterion of law, power is disputed in specifically political arenas, money becomes the universal medium of exchange. Now social inclusion is presumed to be universal – no one will be excluded anymore by reference to the social stratum they were born into, but only indirectly through access to differing economic, political, legal or educational resources. That the lack of access to one system generates increasing difficulties of access to the other social systems is also the truth already noted – universal inclusion and total exclusion arise coetaneously (Luhmann 1994/1998a).

Political inclusion (in the form of voting, first with census and gender exclusions) and civil rights (religious, scientific, artistic, economic freedom) are an institutionalisation of functional differentiation (Luhmann 1965/2010). However, despite the dedifferentiating potentials of the bureaucratic expansionism of the welfare state (Luhmann 1981/1990b), the 20<sup>th</sup> century evidenced that widespread political inclusion (in the form of universal suffrage) and politically tractable inclusion in other social systems (access to public educational, scientific, healthcare or economic services and policies) were equally presuppositions of functional differentiation (Dutra 2016), insofar as the asymmetry between the included and the excluded ones in functional systems negatively integrates society, restricting the autonomy and self-referentiality of functional systems (Luhmann 1997/2013, p. 25). Like the over-politicisation promoted by authoritarian regimes, the comprehensive over-economicisation of society propelled by neoliberal policies brings a de-differentiating potential, of reducing social complexity and expanding exclusion, with reduced autonomy of partial functional systems (Minhoto and Amato 2023).

## 2. The inner institutional morphology of functional systems

The institutional morphology of functional systems presents the complexes of presumably generalised and supported expectations that internally sustain the systemic operations (see Luhmann 1965/2010, p. 86). Functional systems are distinguished not only by the external (out)differentiation of a system (with its code, function, and symbolically generalised means of communication) in face of the others (environment), but also by its internal differentiation – this is the hypothesis deployed here. Such internal differentiation – the institutions that internally sustain the system's differentiation – entails, among some distinctions, two main ones: between an organised sphere of the system and a public sphere; and between core organisations and peripheral organisations (Luhmann 1993/2004, ch. 7; Amato 2021). Functional systems become the determining macrostructure, presiding over expectations; and their institutions (complexes of expectations, internal structures of these systems, or slides of a macrostructure) cease to amount to organisations or stratified systems, also carrying the counterweight of a sphere of presumably universal inclusion.

In its “internal environment” or “public sphere,”<sup>6</sup> each functional system reflects and absorbs environmental “irritations”, de-codifying them into internal communications; basically, we have here a more or less chaotic cluster of communications, engendered by means of dissemination that are not only oral and written, but above all concerns mass media – written and audiovisual. This is the case of public opinion, for politics; of the market, for economy; and of legal personality, for the law (based on declarations of rights and constitutions, all are legally constructed as subjects of rights and duties, although owning different assets).

Already in their organised sphere, functional systems count on a series of organisations, decision-making systems, which both reinforce differentiation, allow communication among functional systems, and institutionalise structural couplings between them. However, these are no longer such all-encompassing organisations as the medieval church, the absolutist state or the monopolistic mercantile company. In addition to a core organisation, there is a series of peripheral organisations, which even link and organise the demands of the system's public sphere, connecting to the respective core organisation, which operationalises the constituting paradox of each functional system.

In politics, whose function is the taking of collectively binding decisions, the core organisation is the state (or, more precisely, the legislative and executive branches), because it operationalises the paradox of sovereignty: taking decisions that are directly binding to all its citizens, the political branches are also subject (in a democratic regime) to the citizens themselves, through elections. Thus, the choice of public policies is a second-order, representative choice, linked to the direct choice of representatives by the citizens.

In the economy, banks and financial institutions operationalise the paradox of the scarcity of money, winning on the side of both savers and borrowers; thus, they operationalise investment operations – which allow linking expectations of future

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<sup>6</sup> These terms are synonyms. Luhmann (1996/2000, p. 104) suggests that the public can be defined as “a reflection of every system boundary internal to society”, or as “the environment, internal to the system, of social subsystems”. Thus, public sphere has not any normative meaning in this sense.

income and increased productivity to currently available resources. On the economic periphery, we have the organisations responsible for production, trade, and consumption, *i.e.* the transactions of the real economy.

Because it is bound to make decisions according to law, the judiciary (or courts and judges in general) is at the core of the (state) legal system: there lies the paradox of the prohibition of denial of justice. Legislators, public administrators, and even lawyers and dealers, lying in the periphery of law, are freer to create or apply the law at their own discretion, attending to political or economic timing and reasons, for instance. They produce legal interpretations, but without a so strict bonding to give the final word on the validity of a norm or claim. On the other hand, judges, if provoked to decide a claim, need to give a legally based answer, even to “hard cases”, *i.e.* “undecidable decisions”, which cannot be unequivocally based on a sound interpretation of an undoubtedly valid norm; then, they need to find some reference to consequences or principles, but also invoked as previously recognised sources of law (Luhmann 1993/2004, p. 289).

In courts, legal argumentation (Luhmann 1995) produces an observation of the possible interpretations attributable to facts and norms, sustaining one of them. Possible interpretations are scrutinised, through a test that reinforces the systemic self-reference, operational closure, consistency and redundancy (through the reference to legal concepts and valid norms). However, argumentation advanced by each side and the judge final ruling justifies what interpretation and arguments to take into consideration; this communication implies other-reference, cognitive openness, information and variation (by pointing out either to interests, consequences or values). Therefore, the programming of the code legal/illegal is reinforced through the mandatory application of decisional programs taking place in courts.

The image below schematises the isomorphisms among the internal structures (*i.e.* institutions) of the legal, political, and economic systems. It helps us to visualise the combination of organisations (such as courts, government or enterprises) and interactions (clustered *e.g.* by reference to the market, the legal subjects, or the public opinion) articulated at the level of functional systems. This is central for analysing the entanglement among these three scales of social systems.

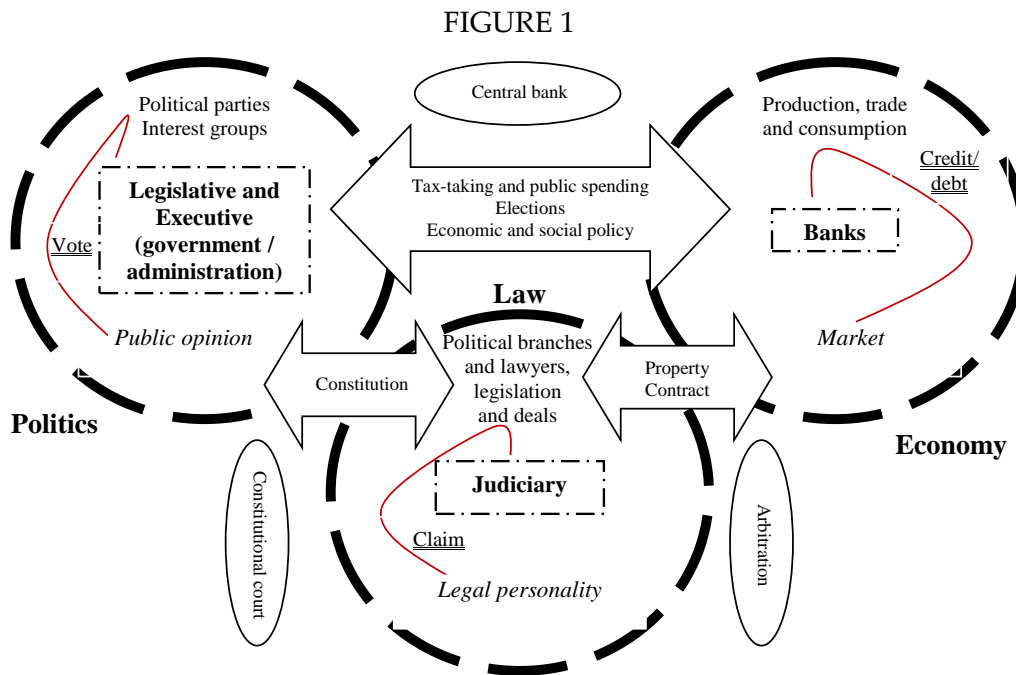


Figure 1. The institutional morphology of legal, political and economic systems.  
(Source: Amato 2021, p. 119.)

Note that structural couplings (such as constitution, taxation, contract, and property) as well as procedures (judicial claims, elections, credit and investment programs) play a fundamental role in the “triangulation” of communication among public spheres, peripheral organisations, and core organisations. Deficiencies in these triangulation mechanisms are linked to inflationary or deflationary dynamics with respect to the mobilisation of symbolically generalised media by the respective systems. It is a matter of verifying the support of economic, legal, political, scientific operations in generalised trust, warding off dangers, absorbing, decoding, and managing risks by the formation of expectations supported by third-party, *i.e.* institutionalised, presumed expectations (Luhmann 1997/2012, pp. 227–232).

Media inflation occurs when communication presumes to be supported by more trust than it can actually generate. Symbols are devalued – in economics, prices rise and, in the extreme, the currency is no longer accepted, it loses value; in politics, promises over possibilities of support devalue power itself; in law, interpretations not guided by decision-making programs devalue the validity of norms. In figurative terms, inflationary tendencies are linked to attempts at direct connection between the organised cores of systems and their public spheres, without the mediation of peripheral organisations: it is the case of populism, in which leaders of the executive seek direct contact with the people, overriding parties, social movements and interest groups (and, consequently, their legislative representations); it is the case of activist judicial decisions, which seek to expand rights, duties, powers or responsibilities (reference to the sphere of legal personality) without mediation by the decision-making programs (constitution, statutes, contracts, case law); it is the case, finally, of financial bubbles without “ballast” in the assets of the real economy.

Deflation concerns the underutilisation of available trust for the achievement of communicative operations. We can think here of movements blocking the public sphere and reducing communication to a circulation between core and peripheral organisations:

certain excessively “legalistic”, “formalistic”, or “self-contained” tendencies in law; “corporatist” or “elitist” forms of politics, or negotiation only within the “political class,” without hearing from public opinion; privileged access to credit or financing by companies, without consideration of market pricing.

With deflation, the circulation of the medium is reduced, and in the limit, communication can stop: one stops making political decisions, accepting payments, or applying the law. Deflation can be a strategy to correct inflation: when it is observed that scientific truth cannot do everything, social sciences refuse “grand theory” in the name of empiricism. In deflationary dynamics, the circulation of symbolic means can be restricted to such an extent that communication becomes unfeasible and is replaced by symbiotic signs that denote a situation of total exclusion: dissent, negotiation, and political deliberation (engaged in by means of communicative operations) are replaced by violence (denial of communication, deflation of power); prices are not formed, markets are extinguished, and transactions are replaced by necessity (lack of access to essential goods); the operations of application, interpretation, argumentation, and justification that find their reasons in law are replaced by anomie (a kind of generalisation of self-tutorship and the arbitrary exercise of one’s own reasons). We then return to the Hobbesian problem: how is social order possible? These are the moments of crisis, dedifferentiation and systemic integration. Ordered and differentiated systems turn into chaos and noise.

Modern world society – and its regional or national specifications – emerges beyond the scale of individual microstructures (expectations) that need to be generalised from face-to-face communications (interaction systems); it also overflows the institutionalisation of these expectations (their presumed support by expectations of indeterminate third parties) by territorially delimited organisations. Without dispensing with interactions (“free” and proceduralised/organised ones) and organisations (such as the national state itself), it is a society whose microstructure is constituted mainly by expectations “artificially” worked out from the service provided by functionally differentiated systems. This society’s mesostructure are the institutions, the internal structures of these subsystems, which work as a balance between a public sphere and an organised sphere (besides relying on “transformers” or institutional interfaces, which are the structural couplings). The macrostructure of today’s society, finally, is made up of combinations of functional differentiation (even when this is prevalent) with other forms, rules, and criteria of differentiation, reproduced intertwined at the level of interactive, organisational and functional systems.

In modern society, therefore, there are not only functional systems, but also systems of interactions (which reproduce segmentary criteria and are decodified by functional systems in clusters of interactions identified in their public spheres) and organisations (which reproduce hierarchies and operationalise decision-making linked to functional specialisations). Once we have recognised not only the evolutionary emergence, but also the contemporary simultaneity of the three basic scales of social systems (interactions, organisations and functional systems), space opens up to analyse when and how a given systemic level interferes with another in a positive way (*e.g.* by reinforcing organisational differentiation through proceduralised interactions, or by reinforcing functional differentiation through inclusivist organisations), or either in negative feedbacks (*e.g.*

corruptive particularist interactions or networks parasitising bureaucratic professionalism; or universalistic inclusion in functional systems being obstructed by means of organisations, procedures or interactions that reproduce broad, non-sectoralised criteria of stratification and exclusion, which escape, for example, the standards of formal qualification in the educational and economic system, or the age requirements for the exercise of political rights).

### 3. Systemic sociology of law as jurisprudence: decision-making arenas

Despite the fact that Luhmann does not intend to provide a legal theory with guiding criteria for the identification of valid rules, or for their interpretation – the scope of what is usually the general jurisprudence, as an “advisor” to specialised legal doctrines – it is possible to mobilise his theory for homologous purpose and to use the map of the institutional morphology of the legal system as an equivalent to the “analytical” descriptions of law (in a broad sense, the various projects of general jurisprudence that have emerged since the analytical positivism of John Austin). That is, systems theory has not a guiding ambition directed to legal interpretation or decision-making, but it provides a criteria for identifying the specifically legal operations (those one guided by the legal/illegal coding) and for mapping the performance of law’s function across the different organisations that take decisions attaching the symbol of “validity” to some normative expectations (Luhmann 1993/2004, ch. 2).

This mobilisation of systems theory is aligned with the unifying hypothesis of this text – that the outdifferentiation of a functional system with respect to others (in this case, law in face to its extra-legal social environment) rests on the internal construction of complexity (its own institutions and semantics). After all, says Luhmann (1993/2004, ch. 11), jurisprudence serves as a reflection mechanism, aimed at conferring unity of meaning to the legal system, and is precisely a structural coupling between internal self-descriptions of the legal system (doctrines) and philosophical, sociological, or linguistic theories allocated in the scientific system.

By defining the boundaries of the legal system from its operations and its code (any communication that mobilises the difference between legal and illegal is an operation of the legal system), systems theory allows us to analyse the differentiation and self-reference of law without being bound to the image of the monistic and hierarchical structuring of state norms. From the same legal/illegal code, the structuring of different normative clusters can be identified: legal orders with their own decision-making programs, organisations and self-descriptions (doctrines). It is enough to verify the self-reference between communicative operations.

Although it models its view of the legal system from reference to state law, systems theory is capable of incorporating within the boundaries of “the legal system” – as a conceptual universe – every communication that disputes the attribution of lawfulness or unlawfulness to a conduct or event. Here is the vast field of customary norms and Ehrlich’s “living law” (1913/1936). However, we would be on the periphery of law, even if such communication takes place in organisations and procedures such as neighbourhood associations or informal mediation practices. The diffuse social norms that constitute the program that directs the application of the legal/illegal code in these situations are a legal structure, but one that circulates with great variety and

contradiction at the periphery of law. At the core of a legal order, there is an organisational system that reflects on this sea of norms and, guided by well-defined substantive and procedural programs (its “sources” recognised as valid and the respective norms made explicit and formalised), tries to filter, discern and impose the valid and enforceable norms – in the concrete case, in abstract judicial review or similar procedures. The approach of legal positivism – especially in Kelsen (1960/1967) – is centred on the point of view of the courts. Luhmann (1993/2004) provides a modelisation of legal system capable of overcoming controversial points in the classic debate between Kelsen and Ehrlich (Amato 2023b).

Note that this systemic position does not necessarily imply the recognition of a situation of legal pluralism. However, the basic morphology of the legal system (an inner legal “public sphere” of subjective rights and duties, besides core and peripheral organisations) tends to be mimicked by different (national, international, supranational, transnational/ sectorial) legal orders to the extent that they are self-referentially closed. This is because a legal order institutionalises itself mainly by instituting an organised core obliged to decide on the validity of its norms and the lawfulness of conducts to be evaluated according to those parameters. This consideration reinforces our hypothesis that the out-differentiation of law (in face of its social environment) relies on the inner differentiation of distinctively legal institutions and semantics.

Teubner (1993) suggests a typology of degrees of autonomisation of legal orders, identifying, between socially diffuse law and autonomous legal orders (autopoeitic law), partially autonomous orders. The autonomisation of a legal order would occur only when it is able to reproduce its operations according to its own elements, which demands self-descriptions that guide self-reproduction, constituting a comprehensive “hyper-cycle” of legal norms, doctrines, processes and acts. Santos (1977), inheriting Ehrlich’s radical legal pluralism, goes so far as to suggest that even an organisation not characterised by the prohibition of the denial of justice and by powers of coercive enforcement of norms (such as a slum dwellers’ association) would act as the core of a legal order competing with state law. However, from a systemic point of view, a legal order only becomes autonomous when it is capable of generating an organised core with prerogatives functionally equivalent to those of the state courts; without them, we would only have peripheral organisations, producing legal communication on the margins of state law itself, albeit with their own normative programs, alternative to the official codes, statutes, constitutions and case law. In short, at most we are dealing with a socially diffused law. In this sense, as Moita (2023) analyses, the practices guided by diffuse normative expectations (sometimes *contra legem*) would not constitute a legal order of their own, separate from and competing with state law; we would have situations of informality and “arenas of non-compliance”, in which the means of power and legal validity mobilised by the state are devalued.

Having made reference to a Luhmannian-inspired way out of the controversy between empiricist sociology and normativist positivism (the Kelsen-Ehrlich debate), we could also address the debate between hermeneutic positivism (Hart) and interpretivism (Dworkin). Hart (1961/2012) explicitly brings his analytical positivism closer not only to



ordinary language philosophy, but also to descriptive sociology.<sup>7</sup> Thus, he provides a strictly functionalist explanation of the emergence of positive law: its configuration as a union of primary and secondary rules is explained as a consequence of the problems it solves in relation to its evolutionary starting point: static, uncertain, and ineffective customary law. Thus, rules – *i.e.* shared reasons for evaluation, criticism, and justification – of change, recognition, and adjudication constitute a reflexive level of the legal system, alongside the basic order of rules of conduct. The conceptual artefact of the social rule of recognition, above all, allows Hart to jump to second-order observation in delimiting the legal system. If he simply adopted the viewpoint of the authorities, indicating criteria for the validation of norms within a positive system, Hart would approach Kelsen; if Hart unilaterally adopted the viewpoint of the users of law, the ordinary citizens, he would fall into sociology *a la* Ehrlich.

Thus, when considering a “moderate external” point of view, assessing how citizens and authorities mobilise the rules as reasons to act or decide (capturing, therefore, the “internal aspect” of these rules and not only behavioural regularities caused by them), Hart would tend to include all communication governed by law as legal communication. However, his definition of law is not operational (like the Luhmannian one), but structural – and the definition of valid legal rules is referred to the authorities. In other terms, legal theorists and citizens in general need to observe how officials observe the rules to define their criteria of pertinence to the legal system. Endorsing this conventionalism, Hart aligns himself with the notion that a legal order is autonomous only to the extent that it has such a decision-making body in charge not only of evaluating conduct according to rules, but also of defining which rules are valid and applicable. We would have here the notion equivalent to that of a core of a legal order. Although Hart did not move in this direction, it would even be possible to arrive at a pluralist theory of law – if one recognises the overlapping of different decision-making centres as the axes of rotation of competing legal orders.

In the Hartian lineage of positivism, Schauer (2015) moves away from the scope of the Austinian general jurisprudence’s claim of defining the “essential and necessary” attributes of law and legal norms, proposing an approach to the sociological claim of defining, describing, and explaining what is “typical” in law, even if not essential and necessary. He commits certain inaccuracies, however. First, in identifying the Weberian method with the substance of the assumption of a monist-statist position. Weber (1922/1978, 311–319) considered that there is a plurality of legal orders, and that the monopoly of legitimate violence is not a necessary condition of a legal order, but only an advantage in the face of arbitrary violence (*e.g.* militia or mafia orders) and other

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<sup>7</sup> MacCormick (2008, pp. 366–367) reports: “At the time Hart wrote that book [*The Concept of Law*, 1961], there was comparatively little academic sociology in British universities, and virtually none at Oxford. Hart did not make a close study of Weber. I know that he read something between 1967–68, because during our first conversation, after I arrived in Oxford, he spoke to me about Weber with enthusiasm, as if he were an author he had recently met. At that point, he thought that Weber’s writings might be more accessible and interesting to undergraduates than more technical works in philosophy of law.” Legal positivism and its analytical general jurisprudence, says Hart (1962/1998, pp. 71–76), are characterised by three points: the delimitation of its object to positive law (rejection of natural law); the avoidance of moral controversies, over the evaluation of the settled law (a task allocated to the philosophy of law); the avoidance likewise of the task of explaining the empirical workings of law (the task of legal sociology). Meanwhile, on the possibilities of adopting Hartian positivism as a starting point for socio-legal research, see Calvo-García (2014).

coercive means (boycotts, expulsions, downgrading of status) at the disposal of non-state legal orders. Second, by identifying Luhmann with a certain “procedural differentiation” of law, Schauer (2015, ch. 11) tends to reduce the legal system to courts and lawyers, which serves to describe the level of the core organisation of a legal order, but not the criterion for delimiting the functional system of law (which is the legal/illegal code, albeit mobilised at the periphery of the system).

How much, however, would not capturing the “internal aspect” of rules require a morally committed “internal viewpoint” on the part of jurisprudence? Luhmann (1992/1998b, p. 27) explicitly objects to the Dworkinian thesis of the “only right answer” directed at the claims of moral objectivity of the discourse of jurisdictional justification. Dworkin (2006, pp. 97–98), in turn, considers that delimiting the field of law in relation to the whole set of norms (of social, moral, ideological, religious matrix) is a matter of interest for sociologists, but not for legal theorists and philosophers (see Schauer’s 2009 critique). The dialogue, therefore, seems interdicted. However, if we consider interpretivism as a theory of jurisdiction, specifically, we can take it as an observation (in the level of basal self-reference of law even) from the position of the core of a legal order, in charge of giving it practical coherence and logical consistency.<sup>8</sup> The theories of legal argumentation are moving in the same direction.

MacCormick (2005, p. 26), for example, recognises that the indeterminacy of law does not exist only as a function of the “open texture” of ordinary language in which normative statements are formulated, but also has as variable the type of procedure within which such statements are interpreted and submitted to argumentation; in the judicial process, for example, the guarantees of adversarial proceedings function by expanding the elasticity of the indeterminacy of normative texts.<sup>9</sup> However, jurisprudence in general, and theories of legal argumentation in particular, usually focus on a subsystem of law: the courts. With this, they promote a contrast between the strategic and self-interested action of legislators (and even administrators), with decisions taken by votes and scores (or by discretionary prerogatives), and the deliberative action of judges, with their impartial and universalistic discourse of justification.

A way out of this unlikely contrast would be provided by mapping the discursive forms adopted in different “decision-making arenas,” both at the core and the periphery of a legal order. I propose the concept of “decision-making arena” to refer to the set of procedural attributes that shapes and constrains the type of discourse adopted; in the case of the decisional arenas of law, it is not always a matter of organisations in the strict sense, but rather of modalities of law creation and application whose institutional specificities set up the styles of interpretation and argumentation generally admitted in

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<sup>8</sup> In Habermas’ words (2006/2009, pp. 38–9): “Niklas Luhmann describes the legal system from the distance of a sociological observer, and includes the self-description of the lawyer and the legal theorist in his own detached description. Dworkin, by contrast, develops his theory of law from the perspective of the participants who, in cases of conflict, seek and pass judgments in accordance with what the law demands.”

<sup>9</sup> “Our law as it develops becomes, as Kelsen put it, more concretised, more exact, more capable of dealing with more and more fine-grained questions; also, of course, by the same token, more complex at each level of its development. With this we may compare Niklas Luhmann’s theory of legal systems as autopoietic systems, continually solving problems of complexity, though always at the price of generating new complexities” (MacCormick 2005, p. 278).

that ambience – including the definition of the decisional programs accepted as “sources” and the suitability of arguments to the audience in question.

Fuller’s interactional perspective, though grounded in a theory of agency,<sup>10</sup> opens itself to possibilities for a systemic and communicational “redescription” (Hesse 1966). What Fuller (1981/2001) mapped, sparsely and incompletely, as processes of “social ordering” by law – adjudication and mediation; contract and legislation; managerial direction – can here be re-presented as “decision-making arenas,” situated primarily by reference to the distinction between the core and the periphery of the legal system or of a given legal order. We could then combine the social dimension meaning (of decision-making arenas), with the temporal dimension (of normative expectations and sanctions) and the material dimension (of decision-making programs and justification discourses) (Luhmann 1972/2014). The legal system continuously expands and reduces complexity as it circulates through its various arenas.

What characterises jurisdiction as the core of a legal order, says Luhmann (1993/2004, ch. 7), is the paradox of the duty to decide, which is transformed into the freedom to ground decisions. The principle of the prohibition of denial of justice (*non liquet*) is crucial to identify the specificity of jurisdiction, bringing a series of corollaries, such as jurisdictional inertia, impartiality (natural judge), and the (political and legal) unaccountability of magistrates for their votes (reinforced by the institutional guarantees of the judiciary: lifelong and stable positions, with irreducibility of salaries). It is true that these institutional constraints make the courts a decision-making arena capable of taking “programmed decisions”, through a more or less strict reference to “programming decisions” (constitution, statutes, contracts) taken at the periphery of the system and a more or less strict self-reference to consolidated case law and precedents (uniformity organisationally reinforced by the system of appeals and hierarchy of the judiciary).<sup>11</sup>

Judgments are easily produced – and their support is presumed – when it comes to applying conditional programs, with clear definitions of typical roles as to their addressees and with well-defined incidence hypotheses and normative consequences (*i.e.* rules). However, to the extent that the purposes underlying these rules are mobilised, by contesting their formulation and proposing a reformulation of their scope, or to the extent that one can only apply decision-making programs with more unstructured complexity and indeterminate references to values and persons, the jurisdiction is constrained not to simply take a discretionary decision, making a political judgment of convenience and opportunity, as would be the case of a legislator or administrator on the periphery of the law. The judge will be required to “conditionalise”

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<sup>10</sup> Fuller (1969, p. 229) proposes an interactional theory of law, which draws the meaning of this practice from the purpose of subjecting human conduct to the governance of rules; and that it is founded on the observation of the interdependence of roles (e.g., of legislator and citizen), differentiated and underpinned by mutual expectations – only the reciprocity of expectations allows law, as a “cooperative enterprise,” to fulfill its function of creating “an orderly interaction among citizens and to furnish dependable guideposts for self-directed action.”

<sup>11</sup> See Campilongo (2000/2011, ch. 3). Luhmann (1970/1990a, pp. 125–9, 1972/2014, pp. 179–85) uses the difference between “programming decision” and “programmed decision” developed by Herbert Simon (1955, 1960/1977, ch. 2), recognising it as a *continuum* (Luhmann, 1972/2014, p. 353, note 73).

the finalistic program – that is, to (re)formulate a rule from considerations of value or purpose (Luhmann 1968/1983a, ch. 4–5, 1972/2014, pp. 174–185, 1993/2004, pp. 196–203).

To do so, on the one hand, the judge avails herself of her legal and political irresponsibility – this is the freedom of reasoning inherent in the inalienability of jurisdiction; on the other hand, however, the judge will need to make timely considerations of value and purpose, considering the circumstances of the concrete case. Only then would her judgments differ to some degree from the overtly evaluative choices made on the periphery of the law, by politicians, bureaucrats, and citizens. However much she may be concerned with the universalisability of her reasons (as MacCormick 2005 suggests), the typical judge (*i.e.* outside the abstract control of constitutionality) would combine formal self-reference to conditional programs with a more punctual, prudential, problematic, and analogical hetero-reference to finalistic programs (Unger 1976, p. 86, Luhmann 1983/2014, pp. 285 and 384, note 14).

Now, this characterisation of the institutional (procedural and organisational) constraints of jurisdiction can be replicated to the periphery of the legal system. We have already noted, for example, the contrast between the typically programming character of contractual, legislative, and administrative norms and the programmed profile of sentences. Another example: although close to the jurisdictional core of a legal order or even functionally equivalent to such a core, arbitration is instituted by a voluntary self-binding of subjects of law and modelled for the solution of specific controversies linked to a certain business and legal sector. Thus, the referee’s discourse may be more freely open to the use of finalistic programs (up to the borderline case of the judgment of equity) or may even be characterised by an *ad hoc* delimitation of the decisional programs to be applied.

#### **4. Concluding remark: interfaces among social theory, jurisprudence and empirical research**

Starting from the specific modelling of a certain decision-making arena (its organisational structure and its definitions of competence and procedure), it is possible to address how it gathers and recognises the circulating normative expectations and how it formulates and formalises them in its discourses. The very set-up of a given decision-making arena is addressed in its discourses, through institutional arguments (self-referential reasons, aimed at situating the limits of a given decision-making arena in relation to a given legal order as a whole); these institutional arguments combine with formal (self-referred formulated reasons of a legal order) and substantive arguments (aimed at a hetero-reference of law to its environment).

One can then observe how this detailing of the institutional morphology of the legal system – on a scale capable of verifying and comparing its different decision-making arenas – is a conceptual tool capable of guiding an empirical legal research. By allowing that any communication pragmatically oriented towards the solution of problems of lawfulness or unlawfulness be considered an element of the legal system, systems theory opens space to a vast repertoire of primary and secondary data that could be collected – official pronouncements of authorities, generators of decision making programs, as well as interviews and observations on decision-making routines, including legal semantics

of self-description and reflection (doctrines, historical, anthropological, economic investigations, etc.; mentalities, concepts and theories).

According to the hypothesis presented in the introduction, the distinction of law from its environment depends on a functional specification supported by the construction of an internal complexity, structured on the basis of its own institutions and semantics that become specialised within the legal system itself. Combined with the attention to institutionality and semantics that internally profile the legal system, the high degree of abstraction with which systems theory defines the boundaries of law may thus be a comparative advantage both in relation to analytical theories of law (which define the legal system from normative sets or discursive practices) and in relation to conventional legal sociology (which either identifies a diffuse "legality" or summarises law to institutionalised professions and organisations, such as lawyers and judges).

The challenge of systemic empirical research is thus to interweave the functional system level of law with the observation of organisations and interactions. Let us remember that organisations are systems closed by the self-reference of their own decisions, but they can transcend the limits of a functional system (for example, the state and the political powers are at the periphery of law and at the core of politics). Interactions, on the other hand, may take place freely, without any direct link to structured decisions (organisational systems) and to specific codes (functional systems); they may, on the other hand, be proceduralised interactions, so that face-to-face communication takes place as a reproduction of certain organisational decision-making routines. To what extent does an organisation reinforce functional differentiation and promote structural couplings, or otherwise facilitate the path to systemic dedifferentiation and corruption? How and when do interactions reproduce procedures and reinforce self-referential decision-making within an organisation, and which interactions break with rational criteria and bureaucratic routines, parasitising formal structures by personalism and personalistic privileges? Now, these are fundamental questions that can be explored from the systemic conceptual architecture.

In addition to this openness to empirical research in the strictest sense, based on the production of primary data from observations, interviews and other research techniques, we have already noted how the systemic toolkit can be mobilised for historical research – to identify, for example, the conditions of emergence of functional differentiation, its limits and its combinations with other forms of societal differentiation. Here, the scale of the social macrostructure (what is the specific combination of forms of differentiation in a given time and place) interacts with the scale of the internal institutionality of social systems (especially functional systems, with their organisations and public spheres) and with the scale of interactions and the analysis of the formation and generalisation of expectations.

A third possibility for mobilising systemic conceptuality comes in using functional systems morphology as a tool for mapping institutional alternatives – different forms of ordering, programming and legal accountability, and, more broadly, different forms (i) of structural coupling (varieties of constitutionalism, taxation, property and contract), (ii) of organisation (state, jurisdictional or extra-judicial arenas, banking and finance institutions, the set up of political parties, advocacy or production and consumption), (iii) of procedure (collective or individual legal claims, direct and indirect elections,

plebiscites and referenda etc.), and (iv) of public sphere (private or constitutional rights, new markets, public opinion founded on analogical or digital means of dissemination).

The legacy of Luhmannian legal sociology may persist and expand beyond the scopes and scales outlined by Luhmann himself. Some may write and research on the plane of constructing a theory that describes the emergence of modern society from its subsystems; others may work on more situated and precise analyses from some of these subsystems. The radical constructivism of the theory and its multiscalarity are the keys to its vitality.

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