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**CYBERNETICS AND CONTINGENCY, CODES
AND PROGRAMS: AN ACCOUNT OF
SOCIAL SYSTEM THINKING IN LAW AND
LEGAL THEORY TODAY**

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DOCTORATE OF PHILOSOPHY (PHD) IN LAW

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I hereby declare that the work presented in this thesis is my own, except where explicit reference is made to the work of others.

Giulia Bryson

ABSTRACT

The thesis discusses aspects of current Social Systems Theory, with the main attention devoted both to the level of the encompassing social system society and to that of function systems, especially law. Throughout, I refer to the version of social systems theory developed and presented as theory of social autopoiesis in Niklas Luhmann's mature work, while a limited but important part of the thesis will explain this choice and serve as a comparative and genealogical guideline. Central will be the notion and idea of what Luhmann calls a Contingency Formula — term that both functions as a problem outline and that indicates how the problem can be solved, within the context of the Legal System. Equally centre-staged is the scientific, even the philosophical background the Contingency Formula is based upon. The reporting and explaining of this background, to which luhmannian Social System Theory is indebted in its initial inspirations as well as in its relentless efforts of 'doing justice' to every new empirical finding, involves, among others, elements of cybernetics, Boolean algebra, biology, and approaches to mathematics and topology - as well as of some pivotal concepts in philosophy (e.g. contingency).

The Contingency Formula and the problematic of modern society in relation to Law and Justice of which it constitutes the pivot, constitute the focus of my PhD. They are approached through a comparison with traditional theories of justice and pre-systemic views of society; as it is generally the case of systems theory, the decisive difference-marker is provided by the notion of a function. The systemic narrative also involves the divide of coding and programming, and the claim that, in modern society, with its constant overproduction of complexity, these are part of its arsenal of modes of systemic reducing that complexity. It finally implies contingency formulas. These operate as system-immanent second-order observation devices that allow function systems to manage their steering dilemmas without unrealistically claiming to have access to a (function system transcending) first-order observation of its own interventions. I am addressing both the Contingency Formula as general concept and Luhmann's endorsement of Justice as Contingency Formula of the function system law (plus Teubner's alternative offer of a Transcendence Formula Justice), up

to a compared analysis of modernity and post-modernity according to the social-systemist approach of modern society.

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INTRODUCTION

“I have a system!” claims, answering his wife's reproach to have lost the cover of a DVD that he had played, Larry David¹. How should he have lost it indeed, as: “I have a system ! When I play a DVD I always put the cover on top of the DVD player”. A short time later in Heaven — it so happens that he has died in the meantime - Larry David is escorted by two snow-white clad, long-bearded guardian angels, who promptly inquire into the matter of the lost DVD cover (which much later will turn out to have slipped behind the furniture). "I never lose a DVD, he claims again, I have a system! I put the DVD cover on the DVD player!" But with the guardian angels Dustin Hoffman and Sasha Baron Cohen this goes down less well than it did at home at his lifetime. “That’s not a *system!*”, reprimands him a Dustin Hoffman promoting, for the occasion, a central postulate of Luhmannian systems theory. He explains: "A *system*, that would be: you have purchased a box of DVD jackets, just plain ones, ready in case you can't find yours. That's a system!" A heated argument ensues, full of strong words, at the end of which Larry, deemed not yet ready to stay, is sent back to life on Earth.

¹ In an episode of his TV series *Curb Your Enthusiasm* ('Fifth Season's Finale'). <https://www.youtube.com/watch?v=yCwwqsdyAY0> (Last accessed 6 June 2018).

What is enlightening here is what the altercation teaches about the constitutive antagonism between modern and traditional systems thinking. Larry David presents traditional systems thinking - systematic thinking, as it could also be called. Traditional or systematic systems thinking is based on a strong notion of rule. Of a rule, to be more precise — such as the rule Always put the DVD cover on the DVD player - then you are safe. The rule might be successful, in which case everything will work out according to plan. Modern systems thinking — or systemic thinking, as it could also be called — distinguishes itself by the fact that it takes on board experience, specifically the experience that, whatever a rule might claim or impose, 'stuff happens'. In other words, it is foreseeable already now that something unforeseen and indeed unforeseeable, might happen. Something that thwarts the rule's effective ruling, or in other words stops it from exercising the 'bite' it intends to exercise upon actual events. The untheoretical simplicity with which the TV series, staging the opposition between traditional and modern conceptions, shows how it is that things do not, generally, behave the way we intend or expect them to behave, in life, politics, the economy, law or no matter which other sphere of social existence. We are asked to integrate this in our routines and procedures. This summarises the *concern* to which modern, 'systemic' systems theory ventures to offer an at least momentarily appropriate response, as opposed to earlier, 'systematic' systems thought which, far from responding to a concern about effective happening, proceeded by imposing a once-for-all-times order or rule under the optimistic assumption that this suffices to permanently nonplus the vicissitudes of effective becoming. Exceptions, unexpected events, mishaps, mistakes, misunderstanding, errors, losses - all of

these factually happen, randomly, contingently, in the absence of any certain prediction, any pre-established order or in-advance guaranteed security (Providence). All happening in the world is left to chance and contingency, all rules involve an (unknown) fraction of exceptions. But one will hardly suppose that the dark enlightenment that is summarised in such a maxim, has reached many people's mind. One would rather suppose that most human lives are lived, consciously at least, in an intrinsically steady world, on the basis of the promise of things to be or to stay as expected, as long as they are not tampered with, and of a naturally felt faith in this promise and the protection it offers against any unexpected or contingent accident cropping up unwillingly-unwittingly.

No wonder that the believer in the pre-modern, ontological world-view will be tempted to react as Larry David effectively does, namely by denial and resistance. Dustin, the guardian angel is, on the contrary, aware of the unsuspected collateral effects that anything we do is likely to trigger, and wary of the ever-fertile contingency of outcomes, as well as of the strict limits to which this subjects the traditional naïve confidence that all that happens is, always or more often than not, that which, a moment earlier, had been likely to happen. Dustin Hoffman's guardian angel is — apart from his superior skills at defining of what a system is — close to the views of the exponents of systems theory and, more largely, cybernetics. The world is not composed of steadily being objects that stay put; instead, it is a world in which every action triggers an open number of loops (unseen effects that might emerge). A system, as social systems theory understands it, is essentially a device destined to allow to reckon how to proceed, manoeuvre, steer in such a world. To hold a reserve of spare DVD

covers equals, translated in the relevant system theory lingo, to a way of reducing complexity, or at least, to foresee the possibility of disappointed expectations. This is a clear explanation, yet, of course, too quick an explanation, of what social system theory is. Like a boat on rough waters, which necessitates steering or governing in order to reach its destination, or even just to stay afloat when circumstances are not that favourable, in Luhmann's view modern society necessitates of something very similar; society must see and steer its way through a sea of unexpected happenings. It cannot, strictly speaking, steer its course — not in the sense of mastering all the forces that, at any given point of its trajectory, determine its location or direction. Yet neglecting the duty of trying at it might turn out an expensive lack of concern.

Re-visiting the idea of society as a system (already explored by Talcott Parsons) Luhmann has explored a large number of scientific theories. What re-unites them is the fact of questioning, in one way or another, what is contingent in modern society. The study of feed-back loops, or cybernetics has offered a set of concepts suitable for understanding and explaining systems, which are by their nature complex and involve exceptions to their regular operations. Second-Order Cybernetics are linked to the Luhmannian notion of second order observation.² Yet, the idea of an observation of observation, of an observer being observed in the act, was not born with, and is not exclusive to, Cybernetics. In fact, it can be found in literature and fine arts going back through the centuries. An example is provided by story of the communication between two painters, sometimes quoted as "Apelles' Cut", in Pliny's *Natural History* (XXXV, 81-83). Trying to visit

² See Foerster, H. von, *'Understanding Systems'*, 2002, Heidelberg, Carl Auer Systeme Verlag, p.101 and ff.

Apelles, Protogenes, finding his workshop empty, and wishing to leave a trace to be seen by the great colleague at his return, paints a line so fine that it does not seem even painted by a human brush. Apelles comes back and succeeds in painting over that line with an even finer line,³ thereby realising a paradigmatic case of a distinction within a distinction. In a famous painting of Cranach the Elder, the painted veil that Venus holds over her modesty gives the idea of an observation of observation, in letting the observer see through the veil. It is in the act of covering it that the goddess of beauty exhibits her genital to the onlooker, second-order observing his anticipated observation. John Donne, in his short poem *The Triple Fool*, in which he gives even three examples of second order observation: 'I am a fool I know, for loving and for saying so'.⁴ The poet is staged as observing himself as being a fool for giving in to the temptation of love. By observing — declaring — his love, he then offers an example of second order observation ('two fools'). Not content with this, he adds a rare example of third order observation, by introducing poetry to this game of second order observation, as poetry is effectively staged as a triply foolish (cf. the title) apology of love and its declaration.

The range of concepts referred to in the examination of the background of *autopoiesis* is a wide and complex one; although mathematical topological models and their terminology — which involve terms such as

³ The anecdote, which incidentally, far from having reached its end at this points, includes several further incidents, figures in a different context in Agamben, G. *Il Tempo che Resta. Un Commento alla Lettera ai Romani*, Torino, Bollati Boringhieri, 2000, p.52. For a state-of-the-art philological account, see Gutzwiller, K. « Apelles and the painting of language », *Revue de philologie, de littérature et d'histoire anciennes*, 2009/1 (Tome LXXXIII), p. 39-63. URL : <https://www.cairn.info/revue-de-philologie-litterature-et-histoire-anciennes-2009-1-page-39.htm> (Last accessed 24 June 2018).

⁴ Donne, J. *Poems of John Donne*. vol I. E. K. Chambers, ed. London: Lawrence & Bullen, 1896. 14.

boundary, distinction, re-entry, recursion, circularity, coding, entropy, and finally contingency, which are in turn explained in all their meaning and application to social system theory - and with the help of philosophers - turn out to be apt to describe what Luhmann claims has been a paradigm shift from an ontological and teleological to a systemic worldview; from the passage from *Unity* to *Difference*, and from *Hierarchy* to *Heterarchy*, what appears is how society went from a pre-modern order and perception of society to a modern one. Beyond any terminological details, the idea of a description of society as an autopoietic systems changes the perspective on the workings and the operations of society.

Beyond the mathematical explanation of difference, “sociology has always been concerned with differentiation. (...) It stands for the unity (or establishment of the unity) of difference”⁵. To put it simply, any society, seen as a country, a city a village, has defined itself, through the differences existing among their people. So it has defined the differences between city and countryside people; between members of a family as opposed to members of another family, with all the this may imply, such as feuds, rivalries, or instead alliances, marriages and so forth. Differences between nobles and peasants and all that attaches to it. This is a simpler form of differentiation that society does of itself. From the Nineteenth Century, there is a “switch from theories of progress to structural analysis”⁶. Defining theories arise, on analysis of changes on forms of moral solidari-

⁵ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. p. 1

⁶ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012 p. 2.

ty⁷, to theories of rationalisation of different orders of life⁸, such as religion or economy, politics. For classical sociologists “differentiation is the emergence of individuality”⁹; therefore, it becomes apparent that all theoretical approaches are included when considering the concept of differentiation, and allow for society to observe and criticise itself “[d]ifferentiation is necessary to maintain cohesion under conditions of growth”¹⁰

Of course, “anything that can be distinguished can be described as difference”¹¹. Nevertheless, this overdetermination (looking at each individual behaviour in structural problems, differentiated taste, differentiated role) has a cost. Talking about individual behaviour makes it more difficult to arrive at clear conclusions. Luhmann tries to be clear cut in a topic that is overcomplicated and easily overdetermined, so therefore he prefers to speak of system differentiation, “any operational connection that generates a difference between system and environment”¹². “System differentiation is thus nothing other than recursive system formation, the on-going application of system formation to its own results. The system in which further systems arise is reconstructed by a further distinction between system and environment”¹³. It is important to point out that even where Luhmann or

⁷ Durkheim, E. *The Division of Labour in Society* Palgrave; 2nd edition edition (2013).

⁸ Weber, M. *The Protestant Ethics and the Spirit of Capitalism* Wallachia Publishers (2015).

⁹ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012 p. 2.

¹⁰ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.2.

¹¹ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.2.

¹² Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.2. See also Luhmann, N. *Differentiation Theory and Social Change: Comparative and Historical Perspectives* ed Jeffrey Alexandre and Paul Colomy New York 1990; ch 2 and 3.

¹³ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.3.

other systems theorists refer to "subsystems", this does not mean that a higher-ranking whole is divided into lower-ranking parts. That "from the perspective of the subsystem, the rest of the comprehensive system is now the environment", should not be understood in a way as if the environment were a superior in a hierarchical sense. It is important to understand this when the various systems (or subsystems) that constitute the whole of society in the perspective of Social System Theory are at work. Luhmann, in fact, is careful not to speak of 'sub-systems' when talking of the political system or the legal system. They are 'sub' insofar as the social system society constitutes their environment, they are not 'sub' in the - unfortunately widely diffused - sense of 'parts' of a 'whole'. Functions systems (economic, legal, media, politics, etc.) are all alike in that they are, each of them, the 'product' of the distinction-drawing membrane between them and their environment. The idea of an opposition whole vs part is integral part of the old-European conceptual equipment. "[I]f applied in this context [it] would miss the decisive point",¹⁴ says Luhmann, pointing at Derrida, who instead proposes the time related concept of *Différance*. Luhmann's point relates, not to the deconstruction of a supposedly original unity, but to the fact of dealing with the emergence of distinctions in a (yet unmarked) world. System differentiation means neither that the whole is divided into parts, nor point to a "relation" between parts. Instead, "every subsystem [constructs itself as a] comprehensive system [...] through its own, subsystem-specific *difference between system and environment*."¹⁵

¹⁴ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.3.

¹⁵ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. P.3.

None of these pushes social systems theory to deny a limited usefulness to the Old European semantics of the opposition of *whole* and *part*. It fits empirical experiences of everyday life, allowing complex objects to be understood as parts of a whole. It resolves the old paradox of *unitas multiplex*. Luhmann explains how the paradox boasts two levels: On one level, the whole; on the other, the parts. The problem of the setting seems to be that it discourages to descend further than the parts, and to ascend further than the whole. At the same time, the old problem of a unity of difference is traditionally hidden by the maxim “the whole is more than the sum of its parts”, of which Luhmann says that it is the ‘more’ that stands in need of explanation. This unexplained surplus element has been largely used to explain hierarchies in social order (and justify power, we may add)¹⁶. The overall solution has been theological. God, the idea of God, appears in and multiplies into everything, offering the triumphantly paradoxical solution: there is unity in everything.

Systems theory distinguishes itself from the entire gamut of the theoretical tradition and its manifold accounts of the legal order in two ways. The majority of theories of law and the legal order carry a robust notion of a finality of justice. A minority chooses to claim that there is no goal, but only a law-internal construction of law-external forces (as e.g. in Marx' productivist-economic conception of law). Autopoietic theory as well expects systems to have no such thing as goals — whereas marxism, though in its own observation an improbable suspect, arguably does offer a position of an enlightened finality: changing the world. “[T]he external relations in order to subvert the endemic injustice of the legal order”. Again,

¹⁶ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012. Pp 196-197.

natural law theory, to the extent to which it carries a deductive theory of justice, to be inferred from the nature of man or of humanity (or of creation), presides another group of finality. For positivism, on the other hand, justice takes the role of a mere point of view, and it is only its elimination that constitutes the passage-way to rationality and to a professional level of legal discourse. Luhmannian system theory, on the other hand, disagrees with the very principle of this disagreement: there is, according to it, no access to transcending justice either inside or outside. Yet there is a strictly immanent notion justice playing its role *within* the legal system. Justice is being taken only as a factor of the continuity of the exercise of the law. No accomplishment, no perfection, no 'goal-attainment' is promised, reference is made only to a function - the fact that the question cannot stop, cannot be eliminated or displaced, but neither can it be operatively solved once for all, and without a 'modulo'.

To follow the line of the reasoning, if the legal system does not have justice as a goal, the price to be paid for this would be that justice should then rank as a system in its own right - which would lead to a schism, with Justice on the one hand, law on the other. Instead Luhmann creates a new concept, with the modest vocation of functioning as a mere managing agent, a steersman, of each function system. Luhmann calls this Contingency Formula (*Kontingenzformel*) and sets it up as device embodying the most slippery, exposed, fragile, or in any case undefined aspect of each social system. In present society, being a functionally differentiated society, a society of function systems, deprived of a unique overriding or panoramically inclusive (sovereign), each function system only elaborates upon its own inherent horizon. The question is: What helps a function system to

develop a goal of its own? It cannot borrow a society-wide common good, and simply 'apply' it on its procedures. Function systems must determine their own course by drawing samples (Luhmann says: "reductions") from their own function, their own code. Only in such a way they can give themselves an orientation, provide themselves with a resilient recipe of how to formulate, precisely, the contingency to which they are relentlessly subjected, without being able to ask for external guidance. This compass needle is Scarcity for the function system economy; it is Legitimacy for the function system politics; it is something which Luhmann calls *Limitationalität* for the function system science¹⁷. For law it is Justice. The chapter contingency formula contains one of the more reclusive aspect of Luhmann's theory of social systems, There is definitely something like a sensor, a tentacle or an antenna that systems theory here extends and that goes far beyond its usual positivist or even functionalist outlines — beyond the entire scope of the conservatively "modernist" enterprise with which his work is sometimes still identified. My thesis addresses and tries to illustrate this difficulty; interestingly, though, it is the contingency formula for religion that is possibly best placed to help in understanding what a contingency formula is and what it does.

According to Luhmann, the contingency formula of the function system religion is God. Now Luhmann barely extends his interest in religion beyond a sociological one. Even less he distinguishes between the respective phenomenological or experiential content of different religious settings. Issues of the history of religion, such as the birth of monotheism, are for Luhmann definitely outside of the scope of social systems theory.

¹⁷ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p.318 and ff.

And yet, it is the step towards monotheism, towards the contingency formula of the religion system, that offers, paradoxically, the occasion to develop a first step towards a general theory of contingency formulas.

There are diverse ways to react to the upsetting fact of the contingency of the world. There is no such thing as a *Urmonotheismus*, although, in the catholic, church-sponsored work of Father Wilhelm Schmidt, this model has importantly inspired some branches of social anthropology of the earlier half of the 20th century. Monotheism is a late product – itself somehow an example of an unpredictable contingency. The Bible itself, paradigm of the monotheistic take on contingency, does not leave a doubt about it. All starts with Abram, who, in order to found the new, monotheistic nation, has to take up a new name, Abraham, to move out of his native Chaldea, and to show that he is prepared to kill his son if asked to.

Monotheism, a late invention, is based upon a certain optimism. God is master and whatever happens, God has made it happen. There is someone, not me – someone else, “badate ben’, non io!”, in the words of Mozart and Da Ponte’s Leporello – who authors and commands it all. An imperious conception of one’s relation to the world’s contingency, and of construing a social and political order of coexistence. There are soft and tender ways as well. Soft and tender ways of relating to the fact that everything in the world is contingent and could be otherwise. This radical contingency, which is synchronic contingency, “contingency today” as opposed to the more modest and obvious “contingency tomorrow”, which reminds us of the Queen telling Alice that “The rule is, jam to-morrow and jam yesterday - but never jam *to-day*.”¹⁸. The famous contingency passage

¹⁸ Carroll, L. *‘Alice’s Adventures in Wonderland and Through the Looking Glass’* CreateSpace Independent Publishing, 2005.

in Aristotle's treatise *On interpretation*¹⁹ is only about contingency tomorrow. Tomorrow a sea-battle might happen - or not. Everyone is aware of that. Radical or synchronic contingency means: right now, things being how they are, things could be otherwise than how they are now.

The most ambitious formulations of contingency follow this radical, *synchronic* conception, this perfect form of schizoid thought.²⁰ The suspicion would be that the solidarity of (1) *potentia dei absoluta* and (2) radical or synchronic contingency is the distinctive discovery of Western modernity. The latter – at its starting point, under late 13th century conditions – is only thinkable because of the former.

Contingency has become thinkable, even generally thought of in a form *emancipated*, as it were, from the theo-despotic tranquillisation. No one knows whether what we find in the soft and tender ways of relating to contingency located in Buddhism, is not a clear-sighted understanding even of the most radical contingency. If one were to know, one would first have to know the answer to the silly quest whether buddhism is rather Aristotelian or Scotist. One might surmise that, the more radical the contingency, the more convincing are the ways of relating to as to a part of nature. Schematically, these "soft and tender ways" of receiving contingency, of 'dealing-with' contingency, consists in subjecting oneself to it without re-

¹⁹ Aristotle, '*De Interpretatione*', Part IX, Loeb, 1989.

²⁰ On radical or synchronic contingency, as in: "things could be otherwise right now than how they are right now", as opposed to the more acceptable « time before vs time after » contingency (which incidentally can include cases like: "I could as well have arrived at the airport in time to get my plane, and thus be dead by now, killed by its crash »), see Antonie Vos et al., *John Duns Scotus, Contingency and Freedom (Lectura I 39)*, Dordrecht, Kluwer 1994, 23ff. The archive of the threats, promises, recomensations, and schizogenic powers of synchronic contingency, contains, from Duns Scotus's suggestion to torture those who reject radical contingency unless and until they admit that they could as well not be tortured, to Herman Melville's « Bartleby », Robert Musil's musings about Wirklichkeitssinn and Möglichkeitssinn, J.L. Borges's Garden of bifurcating paths, the still instructive, once best-selling study *Gödel, Escher, Bach* by Douglas Hofstadter.

sistance, giving oneself up, at least degrading oneself to the level of a slave or hostage, under contingency's master-less yoke. A good practical example is provided by the way in which one looks for shelter against the onslaught of the unpredictable and ungovernable, such as rain, snow, hail. No construction of a world-creating one God is either necessary or sufficient to encourage us to look for shelter when it rains. Even unidentified, contingency often produces fitting reactions. Bad weather is not the only example. Levels of salaries and goods can behave in ways that are largely as unruly and unpredictable as the rain. The protagonist of evolution theory, of systems theory is the tender, submissive – or as Luhmann calls it: "learning" or "cognitive" – way of subjecting oneself to over-powerful and untreatable contingency.

What is generally referred to as the strategy of self-adaptation is based upon radical or synchronic contingency. Where there is no hope of success, of the enterprise of excluding certain contingencies from happening, or of making some of them more probable than others, there the pre-monotheistic take of borderless self-submission recommends itself without alternative. The market of neo-liberalism is by no means shaped according to a powerful and creatively capable monotheistic divinity: it is an irresponsible abyss out of which anything whatsoever can, and according to the neo-liberal doxa, should be, allowed to emerge.

There exists another take on contingency, not based upon tenderness or unconditional self-subjection. A more optimistic one, and most of all, one that is globally successful, and no one seriously thinks of giving it up, be it only for a quarter of a second. The building of a house neutralises the problem of rain, snow, and hail. Monotheism, not at all as a religious,

rather as a social achievement, is in this respect a strict equivalent of a house – a point manifoldly observed and underscored by the theological tradition. Monotheism allows to take certain measures, to reduce complexity not only, but contingency as well. Perhaps there are *oikonomia*, the ongoing practice of managing a household, of allowing a house to endure over time, to resist its environment, to cope with its crisis, to master and outlive the threats of its situations,²¹ on the one hand, and a founding or once-for-all-times gesture, e.g. *oikodomia* (the practice of edifying a house in the first place) on the other hand (Agamben himself sticks to the bipolarity between oikonomical and eschatological views).

Social systems theoretical views generally, and Luhmann's in particular, are exclusively *oikonomic*: to the extent to which they are system/environment related, systems act in a landscape of possibilities that corresponds to the pre-monotheism sort. The exposure of the system to its environment is an exposure to the fact that “everything can happen”, and this exposure, this basic condition, can never be entirely overcome. However, systems, to the extent to which they are successful at ruling out certain possibilities from happening, can produce excess possibilities. They can act as houses – houses are not systems, as one should keep in mind. The logic of systems allows for such houses as can give shelter to politics, to the realm of political claims (i.e. what is usually called “politics”).

The contingency formula is as 'late' in the short history of functionally differentiated modern society and of its function systems, as monotheism is over the longer history of pre-modern societies. It is a necessarily

²¹ On this see for instance Agamben, G. *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government*, Stanford University Press, 2011.

premature response to the question whether contingencies can be preempted from unfolding all of their consequences and implications. While, for a long time, available power-resources were resolutely exaggerated, and while modernity was perhaps the period of the ruin of these exaggerated claims, one could ask to what extent the absence of power over the consequences of contingencies can itself have become an object of exaggeration. Social systems theory, at any rate, recommends a reference to and a relation of contingency that strives to counter-act both kinds of exaggerations : the exaggeration of available power resources and steering capacities, and the exaggeration of the effective powerlessness of all available powers, and the new, spurious justifications of neglect and withdrawal that it entails.

1 - Mathematical Models, Heterarchy, and Circularity: The Background of Social Autopoiesis.

1.1 - Cybernetics and Boolean Algebra: Old Models for a New Discourse.

In order to understand Luhmann's theory of modern society, it is necessary to look at the background theories and ideas that influenced him as a sociologist. Before discussing modern society as a system, or discussing what modern society is, or even what a system is, it is necessary to at least introduce the mathematical models that influenced Luhmann's work, and place them in the correct context. Without understanding this background, Luhmann's description of modern society cannot be properly grasped, nor can his theory be discussed in the context of Twenty-First Century law and society, even less so in the very different world of the 21st century, twenty years after Luhmann's last writings.

There are a number of scientific models that contribute, even if only indirectly to Luhmann's way of thinking, and in shaping some ideas that converged into Social Autopoiesis. Luhmann had some precise problems and questions in mind in relation to the idea of society that needed an effective analysis and description; incessantly forging, or filling with new con-

tents, such concepts as organisation, communication, cognition, entropy, complexity and contingency, among others; as well as modern concepts, modern models, new ways of posing old questions, new problems to overcome, or at least to describe, in terms of behaviour, and in terms of the development of society in a modern discourse.

Among the theories that had an impact on Luhmann's thinking and gave him ground to elevate his own constructions upon them, quite a few have their origins in what is known as Cybernetics or especially Second-Order Cybernetics. There are several significant figures in this field, from the point of view of their multifold contribution to a number of disciplines. They come from partly very different directions. Norbert Wiener (1894-1964)²² was an American mathematician and philosopher interested in social issues; he has coined the term Cybernetics; Heinz von Foerster (1911-2002)²³, an Austrian-American pioneer in matters of radical constructivism; Ludwig von Bertalanffy (1901–1972) ²⁴ an Austrian biologist famous for his inaugural attempts to construe a General System Theory; Gotthard Günther (1900-1984) ²⁵, a German philosopher, interested in lo-

²² See Wiener, N. *'Cybernetics, or Control and Communication in the Animal and the Machine'*, MIT 1948; See also Wiener, N. *'The Human Use of Human Beings'*, Da Capo Press 1950.

²³ See Foerster, H. Von *'Cybernetics: Transactions of the Sixth Conference'*, (editor), Josiah Macy Jr. Foundation: New York, 1949, 220 pp. See also See Foerster, H. Von *'Observing Systems'* Intersystems Publications; 2nd edition, 1982.

²⁴ See Bertalanffy, L. von *'General System theory: Foundations, Development, Applications'*, New York: George Braziller, 1968; See Also Bertalanffy, L. von *'General system theory - A new approach to unity of science (Symposium)*, Human Biology, Dec 1951, Vol. 23, p. 303-361. And Bertalanffy, L. von *'General System theory: Foundations, Development, Applications'*, New York: George Braziller, 1975.

⁴ See Günther, G. *'Cybernetic Ontology and Transjunctional Operations'*. University of Illinois, Engineering Experiment Station. Technical Report no. 4. Urbana: Electrical Engineering Research Laboratory, University of Illinois, 1962.

gic and German philosophy; W. Ross Ashby (1903-1972)²⁶, a British psychiatrist interested in cybernetics; Warren S. McCulloch (1898 – 1969)²⁷, an American cyberneticist and neurophysiologist; Gregory Bateson (1904-1980)²⁸ a British social scientist and cyberneticist, as well as anthropologist; Humberto Maturana (1928-) and Francisco Varela (1946-2001)²⁹, two Chilean biologists, who first introduced the term 'autopoiesis' in relation to living cells with the capacity of self-reproduction; Stafford Beer (1926 – 2002)³⁰ a British theorist in management cybernetics (and pupil of Warren McCulloch); George Spencer-Brown (1923 - 2016)³¹, a British Mathematician, and several others. These men are but a few exponents of this scientific current, which started in the early Twentieth Century.

What is Cybernetics, and why is it relevant for a sociologist like Luhmann? The term cybernetics derives from the Greek naval term *kybernetēs*, (*κυβερνήτης*), which means “the steersman”, so among its many definitions cybernetics it can be viewed, especially for our purposes, as the ‘art of governing’ - more traditionally a boat, or perhaps anything that can be ‘steered’ (maybe even a society?), and it is widely defined as “the scientific study of control and communication in the animal and the machine”, as defined by US cybernetics pioneer Norbert Wiener. Other possible

²⁶ See Ashby, W. R. *Introduction to Cybernetics*, Chapman & Hall, London, 1956 Available online at <http://pespmc1.vub.ac.be/books/IntroCyb.pdf> (this is the second edition of 1957) Last accessed 12 June 2017.

²⁷ McCulloch, W. *Recollections of the Many Sources of Cybernetics*, 1969, published in: ASC FORUM Volume VI, Number 2 -Summer 1974.

²⁸ Bateson, G. *Mind and Nature: A Necessary Unity (Advances in Systems Theory, Complexity, and the Human Sciences)*, 1979,. Hampton Press.

²⁹ Maturana, H., Varela, F. *Autopoiesis and Cognition: The Realization of the Living* Boston Studies in the Philosophy of Science), 1979;

³⁰ Beer, S. *Cybernetics and Management*, English Universities Press, 1959.

³¹ Spencer-Brown, G. *Laws of Form*. New York: Dutton, (1969/1979)

definitions, some of which have become significant in the relevant literature are “the art of steermanship” (W. Ross Ashby), “The science and art of understanding” (Humberto Maturana) and the more recent: “The study of systems and processes that interact with themselves and produce themselves from themselves” (Louis Kauffman)³². Other views of what cybernetics is include cybernetics as “the science of effective organisation” (Stafford Beer); as well as cybernetics in the sense of a science that, not only deals with how things are done, but also focuses on form and pattern, rather than matter and energy (Gregory Bateson); cybernetics is also the art of manipulating defensible metaphors, focusing on how they can be constructed and what can be deduced as their direct result (Gordon Pask).

As a theory that concerns itself in observing what living and non-living things do (i.e. machines - or people), cybernetics is also defined as “the science of government” (A. M. Ampère 1775-1836 - French mathematician and physicist), which carries within the same idea of ‘steering’; or more specifically, Ampère invented the suggested term for a ‘*science de gouvernement*’, ‘*cybernétique*’³³. All these views, say Kauffman’s and Ampère’s, come from complete different intellectual situation or horizon. As well as, again from a historical point of view, James Clerk Maxwell (1831-1879 - Scottish scientist in both fields of mathematics and physics),

³² Louis Kauffman (1945 -) an American mathematician and cyberneticist, whose work is conspicuously influential in the cybernetic field. Often the name of Kauffman is quoted by Luhmann in his work, and we could even say that this sentence by Kauffman is Luhmann’s theory in a nutshell.

³³ André-Marie Ampère used the term ‘*cybernetique*’ for the first time in 1834 in his ‘*Essai sur la philosophie des sciences*’, which discusses the science of civil government. http://www.ampere.cnrs.fr/textes/essaiphilosophie/pdf/essaiphilosophiesciences_1.pdf (Last accessed 1st September 2017)

and his work on what he calls "a governor"³⁴. It is not clear whether Maxwell has recourse to the Greek notion, but this fits exactly into the problem horizon of a first autochthonous, then displaced notion of governing. On this point, Luhmann is interesting in this respect also for the reason that German is a language in which the very root *gubernare*, 'government' is absent. Instead of talking about a Government, they call it a *Regierung*. Even Foucault, "*art de gouverner*" is translated in German as *Regierungskunst*.

Albeit many are the definitions of cybernetics³⁵, one in particular that sounds helpful in hindsight for those already acquainted with Luhmann's theory is "the art of securing efficient operation" (L. Couffignal)³⁶. It is perhaps because of the word "operation", which, although used here in a mathematical context, becomes then recurrent in the socio-legal world of Niklas Luhmann. Still, all of those definitions sit with a theory that wants to observe society and its operations; second-order-observation, governing, efficiency, communication, organisation. Apart from the terms, it is the *modus operandi* of cybernetics that allows a general change of perspective. Cybernetics, as already mentioned, is concerned not with what something "is", but with what something "does"; it is "a way of thinking" (Ernst von Glasersfeld)³⁷ and as such it allows for a collaboration among tradi-

³⁴ Clerk M., J. 'On Governors. *Proceedings of the Royal Society of London*'. (1868) 16: 270–283. doi:10.1098/rspl.1867.0055. JSTOR 112510. See also: Mayr, O. 'Maxwell and the Origins of Cybernetics', (1971) *Isis*. 62 (4): 424–444.

³⁵ On this see: https://www2.gwu.edu/~asc/cyber_definition.html Last accessed 8 May 2017.

³⁶ Louis Couffignal 1902 – 1966, a French mathematician and cyberneticist.

³⁷ Ernst von Glasersfeld 1917 – 2010, a German philosopher, who coined the term "radical constructivism" and member of the American Society of Cybernetics.

tions and disciplines. Norbert Wiener, a cyberneticist, is concerned, among other things, with a concept that becomes pivotal at some point in Luhmann's work, and will be therefore widely discussed here in various contexts; said concept is contingency.

Contingency is of course not a Twentieth Century invention of cyberneticists or physicists. The term goes back to Aristotle (*de interpretatione/peri hermeneias*), and means in its Aristotelian definition "neither impossible nor necessary", and as a concept it has been dealt with in philosophy throughout the centuries. In the early Twentieth Century then, Norbert Wiener writes³⁸ of his idea of contingency applied to the concept of society at the beginning of the Twentieth Century. He talks of a completely new world and of a new perception of society, due to new discoveries and the setting aside of the "old ways of thinking", to say it with Thomas Kuhn³⁹, who said there was a different way of thinking at any given time, and therefore spoke of 'paradigm' and of 'paradigm shift', in the sense that old information or concepts can be and are seen in a different way all the time. Kuhn referred mainly to the scientific world and gave the term a double meaning; on the one hand 'paradigm is the whole of notions shared among a community of scientists (but not only, it can be any community), and on the other hand, it is a model, an example of a traditional way of doing certain things, or of values⁴⁰. The 'paradigm shift' is illustrated, for in-

³⁸ Wiener, N. *The Human Use of Human Beings*, Da Capo Press 1950.

³⁹ Kuhn, T, *The Structure of Scientific Revolutions* The University of Chicago Press, 1968.

⁴⁰ For a different, more contemporary, philosophical discussion on paradigm, see Agamben, G. *What is a paradigm* Lecture at the European Graduate School 2002. <http://www.maxvanmanen.com/files/2014/03/Agamben-What-is-a-paradigm1.pdf>. (Last Accessed 1st September 2017). <https://www.youtube.com/watch?v=G9Wxn1L9Er0> (1 of 10), (Last Accessed 1st September 2017).

stance, by the 'duck-rabbit optical illusion'⁴¹, as Wittgenstein made famous in his *Philosophical Investigations*, in order to describe and to highlight two different ways of seeing, depending on one's perspective: "seeing that" versus "seeing as"⁴².

This 'shift' occurred caroused all disciplines; as an example, talking of science in modern times, Isaac Newton's theory as to the perception of the universe was in its time a 'break with the old', Newton, rather than any other scientist caused a real a paradigm shift of considerable proportions with his research, and, albeit controversial, it became dominant in the 17th and 18th centuries. Newton's certainty of physical laws that applied in the same way and with the same *modus* to a series of different systems and in different *momenta* with the same unchanged causal laws, saw another shift towards the end of the 19th Century.⁴³ In fact, for a long time after Newton the observation of the world was done - like Newton did in Physics - in rigid terms, which did not contemplate the notion of *probability*. Wiener observing from the point of view of the cyberneticist, considers that it was Josiah Willard Gibbs (1839 - 1903), an American scientist concerned primarily with physics and mathematics⁴⁴, who introduced contingency and probability in physics, something unheard of before that time. Of course, there may be very many points of view, indeed one per each of the impor-

⁴¹ Unattributed drawing from the 23 October 1892 issue of the German satirical magazine *Fliegende Blätter*. https://en.wikipedia.org/wiki/Rabbit-duck_illusion#/media/File:Kaninchen_und_Ente.png (Last accessed 1st September 2017)

⁴² Wittgenstein, L. '*Philosophical Investigations*' '*Philosophische Untersuchungen*' (1953). Wiley-Blackwell; 4th Revised ed. edition (6 Nov. 2009)

⁴³ Newton, I. '*Philosophiæ Naturalis Principia Mathematica*', 1687; '*The Mathematical Principles of Natural Philosophy*', CreateSpace Independent Publishing Platform, 2017.

⁴⁴ On this see: '*The Scientific Papers of J. Willard Gibbs*, in two volumes, eds. H. A. Bumstead and R. G. Van Name, Woodbridge, Connecticut, USA, Ox Bow Press, 1993 (First Ed.1906)

tant scientists of the time, but we are considering here uniquely the cybernetic perspective.

According to Wiener, it is Gibbs, more than Einstein or Planck, who sparked a real revolution in physics in the Twentieth Century, albeit it was not clear until much later, after his death.⁴⁵ Specifically, Gibbs allowed for a different approach to the way of managing entropy. Entropy is a concept from physics and specifically from thermodynamics and it concerns energy (usually temperature) and its transformation. In physics entropy is explained as a series of formulae, but the concept of entropy is applicable to any type of system. Entropy, to put it plainly, concerns the disorder within a system and, more to the point, its randomness or changeability. In other words, as systems do not operate in a predictable manner, there is the need to take into account their inherent contingency, and therefore the need of managing, about limited steering possibilities, about ways of monitoring and surveilling processes that actually happen, that happen, obviously contingently. Entropy increases disorder. But of course there are islands of what had been called negentropy, that is the exact opposite of the randomness and contingency of entropy; it is - to a degree - order, organisation and structure within a closed system. Luhmann understood that factual transformations within the structure of modern society, could be correctly described only at the price of introducing concepts such as entropy and contingency into the analysis, and developing a new applied meaning to the concept of contingency in order to explain a set of new *modi operandi* of modern society.

⁴⁵Wiener, N. 'The Human Use of Human Beings. Cybernetics and Society', Da Capo Press, 1988, pp.18 and ff.

The promises of Cybernetics are⁴⁶ that “it offers a single vocabulary and a single set of concepts suitable for representing the most diverse types of system”; that “it offers a method for the scientific treatment of the system in which complexity is outstanding and too important to be ignored”; that it “offers the hope of providing effective methods for the study, and control, of systems that are intrinsically extremely complex.”; also, “cybernetics treats the subject from a new, and therefore unusual, angle”⁴⁷ It is easy to see how all this must have been appealing to a sociologist initially of the school of Talcott Parsons, from post-World War II Germany, who was on the lookout for a new method to tackle the description of society in a new, unique way.

The question that remains is why the study of sociology taken up, not by a social scientist, but by a researcher whose main academic study and professional was in law, should buy itself into such a resolute centre-staging of a genuine scientific project. Luhmann had developed the idea of society as a *system*. This was not a new idea, it appeared also in traditional sociology, but he wanted to take it to a new level, as he saw (or possibly even foresaw) the ever-increasing complexity of society in the future, in the same way as systems develop an internal ever increasing complexity (and, therefore, in the language of the 19th century, entropy) as the operations add up to one self-carrying flow. In what way this occurs will be explained forthwith, after clarifying what a system is, according to the

⁴⁶ All the following quoted definitions are from Ashby, W. R. *Introduction to Cybernetics*, Chapman & Hall, London, 1956 Available online at <http://pespmc1.vub.ac.be/books/IntroCyb.pdf> (this is the second edition of 1957) p.4. and ff.

⁴⁷ Ashby, W. R. *Introduction to Cybernetics*, Chapman & Hall, London, 1956 Available online at <http://pespmc1.vub.ac.be/books/IntroCyb.pdf> (this is the second edition of 1957) p.4. and ff.

Luhmannian conception of social systems, how it comes into being, and how the continuity of its operation can (or, rather: cannot) be guaranteed.

What is a system? How does a system come into being? There are different definitions of 'system' depending on various fields; but the general idea underlining all those definitions is that it consists of a set of parts, or things, or principles, which are organised and work together as a whole; an organism (albeit an artificial one for our purposes), a scheme, a process, a practice, which exists in order to *do* something. Cybernetics, beyond the various definitions, deal with *ways of behaving* and deal, not with what something *is*, but with what that something *does*.⁴⁸ So, at this point, we could explain it even more simply, by saying that the archetype of a system is a delimited, *differentiated*, space, and in which space something *does* happen, in the sense that something continuously happens; or it can be interpreted as something that does not stop happening, or that does not stop unfolding; something in fact that exists in the form, not of some being, of some un-deconstructible substance, but of an ultimately unpredictable, on-going process. As to the term 'system' referred to 'society', one can measure the distance between a whole group of traditional images of the world and of society that will have to change accordingly, in fact "the word "society" does not refer to a clear cut idea. Even the common term "social" has no incontestably objective reference"⁴⁹, as Luhmann himself states at the very beginning of what could be considered his more

⁴⁸ Ashby, W. R. *Introduction to Cybernetics*, Chapman & Hall, London, 1956 Available online at <http://pespmc1.vub.ac.be/books/IntroCyb.pdf> (this is the second edition of 1957) p. 1.

⁴⁹ Luhmann, N. *Theory of Society* vol. I' Stanford University Press, 2012, p.1

detailed and mature publication. In other words, the discussion on society is left open⁵⁰ and, for its nature, ongoing.

Another influence in shaping the Luhmannian idea of society as a system is Boolean Algebra⁵¹ and, roughly a century later, the seminal work by George Spencer-Brown (1923-2016), a British mathematician whose most famous work, '*Laws of Form*', was on Algebra and the calculus of indications, or more exactly the mutual presupposition of two operations: distinction and indication. One does not work without the other. Thus, Brown work suggests the concept that every act of 'indicating', whatever it might be, can only start by "drawing a distinction"⁵² within a hitherto unlimited, blank space. Luhmann's intuition in this respect was limited to applying this to social systems, to the extent to which they are based upon differentiation, upon carving themselves out from a pre-existing continuum. In other words, social systems theory claims that there is a blank space we draw what we can actually call a *system*. The book is seminal and offers concepts and paradigms, such as *distinction*, or *boundary interactions*, *re-entry*, *recursion*, and therefore, *circularity*, all in relation to algebra, but which concepts Luhmann applies to his model of modern society.

In fact, in its most fundamental structure, the apparatus of Luhmann's theory is based on the notion that a system *is* a difference, that a social system emerges owing to a process of distinguishing itself from an environment. This difference between the system and its environment is

⁵⁰Luhmann, N. '*Theory of Society*' vol. I' Stanford University Press, 2012, p.xiv

⁵¹ Let us be clear that Boolean algebra does not develop at the same time as Cybernetics, but goes back to George Boole in the early to mid Nineteenth Century. Nevertheless, it merges with Luhmann's inspirations and ideas in his social system theory, in the shape of the idea of the 'distinction' that Spencer-Brown illustrates and develops.

⁵² Spencer-Brown, G.: '*Laws of Form*', New York: Dutton, (1969/1979)

really what might be called, borrowing from a psychoanalytic vocabulary, the *Urszene*, the primal scene, of the universe for which Luhmann stands. But this description gives immediately rise to much more complex concepts than the ones encountered so far, such as the paradigm of re-entry, of self-referentiality; which means, in fact, that the system itself is contained in the description of the system. This theoretical approach is not new, it was formulated, in view of a very different subject-matter, namely language, at the beginning of the twentieth century by the Swiss linguist Ferdinand De Saussure (1857 - 1913), who considered language is a self-contained system.⁵³

As mentioned, at the very beginning of *Laws of Form*, Spencer Brown “orders” - in the sense of a hypothetical imperative - his readers to ‘draw a distinction’⁵⁴. This simple command, the nature of this order or instruction, in the form of an imperative, needs to be examined briefly. Spencer Brown starts from a ‘blank space’, a space with no distinctions. Maybe any social scientist, if confronted with a proceeding of the Spencer-Brownian kind, will have doubts whether an approach of the sort can possibly have a claim to preside the study of society. Luhmann, though, trying to capture the universe as which he construes the social reality, a reality in which process-concepts such as communications and operations, distinc-

⁵³ See for instance: Saussure, De, F. '*Cours de linguistique générale*', ed. C. Bally and A. Sechehaye, with the collaboration of A. Riedlinger, Lausanne and Paris: Payot (1916); trans. W. Baskin, *Course in General Linguistics*, Glasgow: Fontana/Collins, (1977) See also: Wells, R.S. (1947) '*De Saussure's System of Linguistics*' 3:1-2, 1-31 <http://dx.doi.org/10.1080/00437956.1947.11659300> Last accessed 12 June 2017.

⁵⁴ Just to clarify: GSB does not claim that the reader is under the duty of receiving and fulfilling orders. He only claims that knowledge alone is not competent - knowledge, and its grammatical form: the indicative. Therefore, like many thinkers of the 20th century, from Wittgenstein to the theorists of speech-acts, he chooses not the indicative form, not the form of description or analysis, but that of a (hypothetic) imperative.

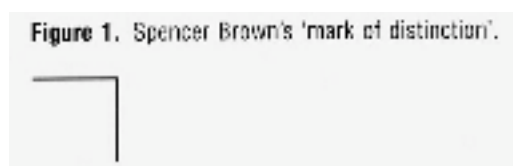
tions and decisions play the leading parts, must constantly work with choices that are not determined, that are in other words, not saturated with sufficient reasons or motives, in the way in which the substantial concepts of the past had been. The choices, or at least some portion of the choices and the decision taken, could always be taken otherwise than they factually are, to the extent that no one knows in advance, so one can perfectly suggest that whatever precedes the imperative of drawing a distinction, happens in a blank space. This type of proceeding does come up with an order, no doubt — an existing order as opposed to an order given, or in other words, a command. although this order is not present where usually orders are present in traditional philosophical takes, such as the order of nature, of creation. The order that emerges in the context of social systems, has not been given before; instead, it is it is the cumulative collateral result of a large number of distinctions happening at the same time - in a way that can easily be compared to that in which a word has its *meaning* not within itself, but must be understood and interpreted, and it is determined by its - constantly continued - *use*.

At the same time, a rule's meaning determines what actions are to follow. If there have not been any previous instructions, on which instructions should the system rely? The resolution of this can be in considering the simultaneity of use and meaning, which leads to the meaning and use being understood '*mit einem Schlage*'.⁵⁵ Still, Wittgenstein concludes, it is not possible to obey one order only once. This means therefore that the order to draw a distinction will not happen only once, but the system will

⁵⁵ "grasped in a flash" Wittgenstein, L. '*Remarks on the Foundation of Mathematics*', Blackwell, Translated by G.E. M.. Anscombe, Cambridge MIT 1956. Part I at 130.

re-iterate it by itself. This gives a philosophical explanation of the *recursivity* of operations of the system.⁵⁶ To give a more recent application of Wittgenstein's example, we can look at programming languages. In programming languages such as Java (or C++), within a determined *class*, an initialisation by a *loop* command causes the program to run several (or an infinite number of) times using the same command. The program, as small as it can be, is indeed an actual system, and it is a recursive one. The program comes to an end when the elements of the class run out. To be noted, the earliest programming languages were much simpler, but still based on binary codes of 0 and 1, as sets of instructions. Spencer-Brown, as a scientist, was clearly aware of them, at least historically, but not only, as his theory shows. To make a parallel: the binary code, the instructions 0 and 1 are correspondently outside and inside of Spencer-Brown 'mark of distinction'⁵⁷.

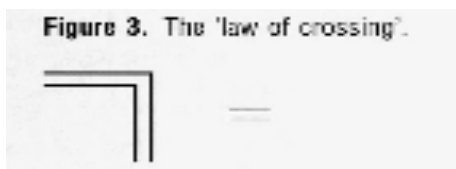
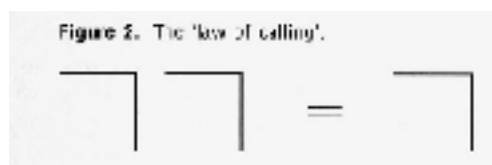
The symbol that specifically Spencer Brown uses to 'mark' a distinction is shown in Figure 1.



⁵⁶ Spencer-Brown, G. '*Laws of Form*'. New York: Dutton, (1969/1979)

⁵⁷ The first ever program was by Ada (Countess of) Lovelace (1815-1852), an English mathematician and writer, who in 1842-43 translated into English from French the work of an Italian mathematician, Luigi Menabrea who wrote about the invention of a machine by a French mathematician, Charles Babbage, himself considered the "father of the computer". In her work, Lovelace added numerous notes and algorithms, and she is for this work considered the first ever computer programmer. Her notations were finally implemented in 1953 when Babbage's machine was built. See Menabrea, L.F.; Lovelace, A. (1843). "*Sketch of the Analytical Engine invented by Charles Babbage... with notes by the translator. Translated by Ada Lovelace*". In Taylor, R.. *Scientific Memoirs*. London: Richard and John E. Taylor. pp. 666–731.

By means of placing this sign (called 'the mark'), Spencer Brown transforms an unmarked space into a space marked by a difference, where the two similar perpendicular lines have created a boundary. This boundary separates two sides in the space and to go from one side to the other, the boundary must be crossed. Each side of the boundary can be indicated. From this Spencer Brown derives two 'laws'; the 'law of calling', where the distinction is repeated and the value that is derived is equal to the value of one distinction (as shown in Figure 2), and the 'law of crossing', where the mark of distinction is crossed within the boundary, therefore the second distinction is applied to the first and, as a consequence, annulled (as shown in Figure 3).



If applied to the legal system, the law of calling would simply see the first operation in form of legal communication, such as, for instance, the establishment of a legal rule, which would commence the distinction between the legal system and its environment, and will be then repeated in the same way. That would not change the first operation, it would not increase the system complexity, and therefore it would be exactly the same as the communication would have happened only once. No time would be in-

volved. The law of crossing, however, if applied to the legal system would instead involve a crossing of the boundary. This would represent the re-entry into the system. System means “non linear recursion”⁵⁸, What re-entry means, to try to put it simply, is any communication dynamics. These, on their part, involve the need to exclude causality, or at least, to be unsure about cause and effects. So when a system, such as the legal system, communicates, it needs to first see all the causes and effects to pan out every time communication happens. As Luhmann points out⁵⁹, with all the communication that happens at any one time, there are many causes and many effects also all happening simultaneously. Let us not forget the role of the environment. The “environment selects”⁶⁰ and Luhmann saw in the Darwinian view an important and fitting element in the organisation of society; the attempt of society to monitor itself⁶¹.

Spencer-Brown also states that in the same way a difference is drawn if in an unmarked space a circle is drawn.⁶² Luhmann utilises this example to depict self –reference.⁶³ This is clearly understood if an arrow

⁵⁸ Foerster, H. Von *‘Der Anfang von Himmel und Erde hat keinen Namen: Eine Selbsterschaffung in 7 Tagen’*, ed. by Albert Müller and Karl H. Müller. Wien: Döcker p. 47.

⁵⁹ Luhmann, N. *‘Gleichzeitigkeit und Synchronisation. In: Soziologische Aufklärung 5: Konstruktivistische Perspektiven’*. Opladen: Westdeutscher Verlag, pp. 95-130.

⁶⁰ Darwin, C. *‘Origin of Species’* William Collins; UK ed. edition (2011) ch. 4.

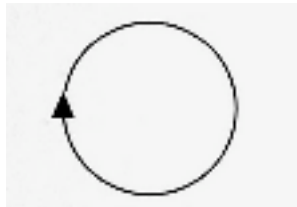
⁶¹ On this see Baecker, D. *‘Why Systems?’* <http://soc.thu.edu.tw/fskang/LU/Why%20Systems-Dirk%20Baecker.pdf> Last accessed 12 February 2018. See also: Baecker, D. *‘Problems of Form’* UP, 1999

⁶² Spencer-Brown, G. *‘Laws of Form’*. New York: Dutton, (1969/1979) p.1.

⁶³Luhmann, N. *‘System as Difference’*, Organization Articles, Jan 2006,Vol. 13(1) p.42.

is added to the circle, as utilised by Kauffman for describing self-reference, to give the idea of the circle pointing to itself (Figure 4).⁶⁴

Figure 4.



These ways of representing a distinction have an inherent peculiarity; they are both composed by two marks, which, supposedly, according to Spencer-Brown's and Kauffman's definitions, must be considered as one mark only. Although, it is to be noted, the second mark cannot be drawn without having already drawn the first one. This means therefore, that the entire logical process starts with self-reference. Ultimately, this means that there is no difference between difference and self-reference. Now, Luhmann adds here that there is no difference, therefore, between self-reference and observation.⁶⁵ This fact that the mark of distinction is made of two marks, shows that there is a paradox embedded within this theory; a distinction within the distinction. This distinction cannot be noted at the beginning, at the moment of drawing a distinction, but only later on, when the observation element is introduced, that is to say, the calculus shows self-

⁶⁴ On this see Kauffman, L. *'On Knots (Annals of Mathematics Studies)'*, Princeton University Press, 1987.

⁶⁵ Luhmann, N. *'System as Difference'*, Organization Articles, Jan 2006, Vol. 13(1) p.43.

reference, that the paradox become apparent and it is also clear that it was in it from the start.⁶⁶

What does *difference* mean, though, in reference to society? What is *difference* in this context, and is it opposed to *unity*? If we look at the idea of society historically running up to the Twentieth Century, society has had many interpretations and definitions based on an anthropocentric view; people make society and they are defined by a common language, a regional 'culture', values, tradition; all unifying elements of a unified view of a (local, regional) society. More generally, society has historically being conceived as made of people and their relations to each other, the consensus among themselves; and the fact that their on peculiar characteristics (language, values, traditions) make them different from another society, such as another nation; but "Society does not weight exactly as much as all the human beings taken together"⁶⁷. A more abstract concept of society has always been absent until modern times. Until the moment when, in fact, the relationship between man and society became problematic, more or less around the mid Eighteenth Century, when people started not to be as socially unmovable as they had been until that point. At this moment unifying concepts such as 'consensus', such as, values, such as tradition', are substituted by other concept such as, for instance, and only for a time, the Social Contract. This did not last long, Hobbes, and Pufendorf had their time, but had to leave the way to something that was less of a simple legal construct and more of an explanation of the more complex concepts that make a society.

⁶⁶ Luhmann, N. '*System as Difference*', Organization Articles, Jan 2006, Vol. 13(1) p.44.

⁶⁷ Luhmann, N. '*Theory of Society* vol. I, Stanford University Press, 2012, p.7.

1.2 - From Unity to Difference and from Hierarchy to Heterarchy.

One of the main innovative features of the new paradigm, called the Autopoiesis of social systems, is that it involves the notion that social systems are closed systems, as opposed, of course, to the open systems of classical sociology⁶⁸, but also of the mathematical models from which Luhmann took his inspiration. Systems become so by creating themselves, by continuously delimiting their "area" in each of their operations, thus by continuously *drawing* a distinction between themselves and their environments. This is a simple, basic, even somehow crude scenario in science — in the general theory of systems — which is commonly at the base of advanced or second-order cybernetics. However, it becomes of a great, almost revolutionary value when applied to the study of society.

This *distinction* or *difference* underlying the being of a system, has been studied in its general implications by Maturana and his collaborators, taking up an older intuition going back to the works of Jacob von Uexküll (1864-1944)⁶⁹. In dealing with matters social, talking about the legal system, for instance, the revolutionary paradigm it brings is not surprising. Positive law versus Natural Law, a never ending quarrel. Positive law appears historically, a long time ago, in the form of the plea for codification, in order to prevent variation and the lacking uniqueness in the law. Bentham teaches exactly that – largely in vain, but on the continent the same polit-

⁶⁸ See for instance -Parsons, T. 'An Outline of The Social System', (1961), Blackwell Publishing (2007);

⁶⁹ Uexküll, J. Von 'A Foray into the Worlds of Animals and Humans: with A Theory of Meaning (Posthumanities)' University Of Minnesota Press, 2010.

ics has had much success. These people said, what we need is to provide ourselves with a once-for-all law, forever identical to itself. The second group, the Natural Law lawyers, are at the opposite end: laws should be founded and decided upon moral principles and ethics. As the notion of power-conditioned legitimacy, and especially the notion of legitimate decision-making on its base, are rejected, the difficulty is precisely the step from the naturalist view to the nitty-gritty disputes of the everyday life of the law. In the end, Luhmann⁷⁰ (and many other observers) will have to note that this supposed contraceptive of change – positivisation, as the remedy that should protect law against every challenge to it being what it is, based on the hope that after the publication of the code, i.e. in the presence of the new positive law, no further law will be necessary (at best minor more detailed sub-laws) - has resulted in an hitherto unseen birth explosion of difference in law, of change. This is because by positivisation what has been proved is that the law is perfectly open to manoeuvring. If one can codify once, one can codify again, as often as one likes. So, instead of finally attaining stability and identity, we have attained, by imposing positive law, contingency, manipulability, possibility, to an otherwise unheard of extent.

The question of *unity* versus *difference* is an old question with ramifications in several older disciplines of knowledge. Certainly Luhmann shares with a philosopher like Adorno the distrust in the category of the 'whole', but what this position means for them is two different things. The problematic of Adorno, the resistance against philosophical totality claims in Hegel and after Hegel, is a philosophical problematic. In the case of

⁷⁰ Luhmann, N. '*Rechtssoziologie*', Opladen, Westdeutscher Verlag, 1980, 190ff.

Luhmann, if the totality vision of society is not a totality, this is because, in and especially after Hegel's lifetime, society is predicated upon non-totality - functional differentiation. Adorno's critique is part of the long line of philosophical Hegel-criticisms : Kierkegaard, Marx. For Luhmann, the Hegelian totality claim is wrong, or rather misleading, on the level of its every day operations – it does not allow to observe that it is communication, numberless communications, that continuously constitute society.

If we start with Adorno versus Hegel, *unity (das Ganze; ein Ganzes)* covers/uncovers a multiplicity of fundamental questions. The system, as Luhmann uses the word, in order to refer to a action-capable unit always in the middle of a game against an over-powering adversary- its environment - has a long genealogy in earlier conceptions of such units – whether big or small. In particular, the philosophical tradition is here among the ancestors. What is *das Ganze* for Hegel, for Marx, for Adorno? If we read Adorno⁷¹, we find a man who is tired of a functionally unified world. For Adorno, only a Mozart Sonata or a Wagner Opera or a Schoenberg piece can be called *ein Ganzes* because their likes, precise and perfect works of art, are effectively wholes - just in the way in which in other traditions, a flower is a whole, or the sunlight at dusk. This does not apply to society or to law: "*Das Ganze ist das Unwahre*"⁷². When instead we are with Hegel

⁷¹ Adorno, T. '*Minima Moralia:Reflections on Damaged Life (Radical Thinkers): Reflections on a Damaged Life*', Verso Books; New Edition edition (21 Oct. 2005) No 29, 55.

⁷² Adorno, T. '*Minima Moralia:Reflections on Damaged Life (Radical Thinkers): Reflections on a Damaged Life*', Verso Books; New Edition edition (21 Oct. 2005) No 29, 55.

*das Wahre ist das Ganze*⁷³, the first implication seems to be to set up an irresistible power to lead humanity in the right direction.

The *Weltgeist* is another configuration of the same idea. The world realises itself in its totalisation. We can say that this "*Das Ganze ist das Unwahre*" works also for Luhmann (although he rarely speaks of music or art or literature), as documents of a strange theory of modern society. Between Luhmann and Habermas the issue at stake is effectively that: Luhmann is opposed to the idea of modern society as synthesis or totalisation of systems; systems go each in their own direction; there is no power that can unify or synthesise all. For the Hegelians, when they are not artists like Adorno (who, apart from a sociologist and philosopher, was also, as a composer, a pupil of Alban Berg) there is this strong idea of a system either static or revolutionary, but which expresses "*das Ganze*", the "*unity*", the "*whole*". A suppression of negativity is nothing but a false conciliatory statement in favour of an existing centre of top of the pyramid, or transcendence.

Beyond the dichotomy unity-difference, already revolutionary, there is another concept that has an interest for Luhmann. The concept of 'module', 'modular', found in Spencer -Brown carries in its definition an idea of cycle (modular), but also of separation by function, as in modular programming for instance, where modules are separated by functions, and each function performs a specific job, often a repetitive one; and all go together to make the whole machine, or system perform in a particular way. This is easily seen as applicable to social systems, not only to mechanical,

⁷³ Hegel, G. W. F. "*Phenomenology of Spirit 1807*, See also Richter, U. '*Das Wahre Ist Das Ganze, Sagt Hegel - Adorno Sagt: Das Ganze Ist Das Unwahre. Methodologische Reflexionen Über Drei Weltentwürfe*', Published Online: 2014-01-09 | DOI: <https://doi.org/10.1524/hgjb.2002.4.jg.350> Last accessed 19 June 2017.

scientific ones, but also, for instance, to the legal system and other social systems.

Before entering into the workings of Luhmannian social systems, there are other explanations of concepts that precede the definition of society as a social system. For instance, the opposition hierarchy vs heterarchy, or hierarchy vs something different, perhaps less prestigious or less sovereign, but in the same proportion more complex, reflects a contrast, a polarity between antiquity and modernity in society. The passage from one to the other was of course not abrupt, and not so clear cut. Several have been the attempts in sociology, among other disciplines, to try and define what modernity is⁷⁴. For instance one aspect relates to the individual that becomes aware of his own uniqueness, of his right to freedom and of his rights in general, of the 'reality' of his own subjective perception of the world, of his own self-creation⁷⁵. All this happens after the Middle Ages, where a then dominant *Weltanschauung* had its fundamental presupposition in the idea or doctrine of a God, who all decides, sees, and judges; and when new ideas started to seep in the artistic world showing a slight change in attitude during a period called Early Modernity.

One particular example of a changing of perspective is represented in Hieronymus Bosch's *Garden of Earthly Delights*⁷⁶, where the painter has rendered the unique *fantasmagories* inspired to him, ultimately, by the vision of an "earthly paradise", though the theological *nomenclatura* behind

⁷⁴ See for instance Gay, C. M. *The Way of the (Modern) World: Or, Why It's Tempting to Live As If God Doesn't Exist*. Grand Rapids: Eerdmans, 1998.

⁷⁵ On this see Berger, P. L. "Western Individuality: Liberation and Loneliness," *Partisan Review* 52 (1985).

⁷⁶ Hieronymus Bosch, *The Garden of Earthly Delights*, c. 1480-1505, oil on panel, 220 x 390 cm (Prado, Madrid)

the title is of only minor importance in this context. This painting has been subject to numerous interpretations⁷⁷, but the first impression every viewer receives is the utter modernity of its form — the unrestrained freedom that the painter allows himself. This altar piece, a triptych, shows men and women mingling with fantastic creatures, which are generally considered as expressions of many devilish temptations, but at the same time, they can also be read as some sort of an *ante litteram* type of order of the type described by Luhmann as ‘heterarchical’; each does what he wishes, there are no orders, no imposition, everyone seems to be free to follow their desires.

What the painter seems to wish to tell us, is that humans decide of their own fate. It is almost a cause and effect kind of approach to life; no one is there to show them what to do nor what is right or wrong, there is the sense of a subjective morality. This, for the world-view of the 16th century was certainly understood as something sinful and potentially devilish, but to the modern eye it takes up an entirely different aspect. Moreover, by closing the triptych, one can see on the external door, in the top left corner, the figure of God looking down to the Earth as a mere observer, excluded from all that is going on among men on the Earth, as if he did not have any longer, any imposing powers.

Did Bosch, in spite of what were his deliberate and official intentions, want to make a statement that looks so hugely modern in our eyes?

⁷⁷ See for instance Silver, L. ‘*Hieronymus Bosch, Tempter and Moralist*’ <http://www.percontra.net/archive/5silver.htm>. Last accessed 4th May 2018. See also Gombrich, E. H. ‘*Bosch's 'Garden of Earthly Delights': A Progress Report*’. *Journal of the Warburg and Courtauld Institutes*, Volume 32, 1969: 162–170. See also Baldass, L. von, ‘*Die Chronologie der Gemälde des Hieronymus Bosch*’, in: *Jahrbuch der königlichen Preussischen Kunstsammlungen*, XXXVIII (1917), pp. 177–195. All these critics points to the lust and sinful aspects depicted in the painting, as a sort of warning to all of the transient world we live in. Transient, or contingent?

It is not possible to know, but looking at this painting now, what is represented there by Bosch seems to be showing elements of a totally new view on society, a partial break with tradition, almost a new social order. If one would dare pushing the interpretation further, one may even see some aspects in common with Luhmann's view of society, where God is not at the centre of the scene, but on the side, as a mere *observer*, unable - or unwilling - to intervene.

The old-European pre-modern hierarchically rigidly stratified structure of society evolved; several consecutive series or sequences of innovations have pushed society out of the "Old-European" structure into the operational setting that constitutes modern and current society, in terms, for instance, of the individual's rights and freedoms, leaving way to the Enlightenment, and especially Kant's philosophy with idea of man-made laws. Modernity officially started at this point, with a paradigm shift on many levels. Redefining law, politics, economy, and society at large, as God-independent agencies had a number of consequences. People's place in society was no longer a dependent variable of God's will, and society has lost its hierarchical certainties and its conservative radicalism. Modernity, on the other hand, as dealing with admitted conditions of contingency, will have to show some sort of rigidity as to its rules. Through the past two and a half centuries, although under the one, identical denomination of 'modernity', the society model that has given rise to today's first world has evolved into a more socially flexible society.

The notion that has been coined to express this move is "heterarchy", from "*heteros*" (ἕτερο), ancient Greek for "the other", referring to all couples and types of relations and proportions that are of the type "the

one/the other", as opposed to "hierarchy", from Gr. "*hieros*" (ἱερός) , sacred, holy; a term that justifies the relationship of subordination by reference to some third value. It points to the fact that the realm of dependencies is wider than that of justified dependencies. It also reflects a different, more complex structure. These changes caused an ever-increasing complexity in social relations and the need for *managing* modernity's hurdles. The reaction was to centre upon the individual and its possibilities, which started its career as a being defined by the ever more complex societal relationships it never stops creating — not because some notion of "progress" is in-built into human time, but because the moves that allows the individual to deal with its own environment, are inexorably predicated on ever-increasing complexity.⁷⁸

The individual in social-scientific and philosophical discourses of the 20th century modernity is cast by German Idealism into a specific *Weltverhältnis*, a unique world-relation. Versions of this - such as Husserl's *Lebenswelt*⁷⁹ integrate the individual into a social universe. Luhmann, however, finds it impossible to conceive the individual as "part of a whole", part of a society: there are conceptual limits of such a relation, for reasons largely already outlined by Foucault in the 20th and Nietzsche in the 19th century.⁸⁰ Nietzsche's claim that "God is dead"⁸¹ and Foucault's claim that the idea of history as aiming towards a goal had already, with their philo-

⁷⁸ Luhmann, N. '*Ecological Communication*', University of Chicago Press, 1989.

⁷⁹ Husserl, E. '*The Crisis of European Sciences and Transcendental Phenomenology*' (1936), Cambridge University Press, 2012.

⁸⁰Luhmann, N. '*Ecological Communication*', University of Chicago Press, 1989, p. 212. See also Foucault, M. '*Les Mots et les Choses*' Gallimard, Paris, 1966. And Nietzsche, F. '*Human all too Human: A Book for Free Spirits* . Penguin Classics 1994; ('*Menschliches, Allzumenschliches: Ein Buch für freie Geister* ' 1878.)

⁸¹ Nietzsche, F. '*The Gay Science (The Joyful Wisdom)*' Digireads.com; 2nd ed. edition, 2009, Ch II, Aphorism No 125.

sophical means, covered part of the Luhmannian ground. Foucault had innovated by substituting a discontinuous succession of *epistemes*⁸² for the continuity of history, salvation, progress. For Foucault, each of these eminently mortal stages tends to take itself, obviously, but obviously falsely, as being the final one.

Although Luhmann was not a philosopher and his theory is, by its themes and topics, far removed from both those thinkers, these two rather revolutionary claims in modern philosophy somewhat fit in with Luhmann's new perspective on modernity. Especially Luhmann has no concept of "hegemonic" or comprehensive discourses. In modern society semantics (Luhmann's term, not all-too far from what Foucault calls discourse) are always differentiated semantics. Each system produces its own descriptions of the world and of itself. The reason is that for Luhmann there is no meaning beyond the boundaries of social systems. Still, the Nietzschean renewed affirmation that 'God is dead' leads towards a rejection of ethics; similarly, the Foucaultian idea of history as *epistemes* reinforces a more general view of a modern society once all "great narratives" (as philosopher Jean-François Lyotard has called it, in 1979, in his *Postmodern condition*) and all common all-encompassing *teloi* have fallen out of use.

With the change from hierarchy, with its inherent drive to simplicity, to heterarchy, which cannot but produce ever more complexity, the social issues progressively change and become ever more convoluted and heterogeneous. Consequently and gradually, it is no longer about the power of God, but about the power of the individual; there is no longer a history of humanity leading towards a common goal, but single, self-defined *epis-*

⁸² Foucault. M. 'The Order of Things: Archeology of Human Science', Routledge, 2001.

temes of knowledge; what matters is no longer religious ethics, but rather negative ethics, and a type of sociological analysis that is no longer a matter for ontology but for management, and, finally and more clamorously, society is, as Luhmann formulates, no longer made of people, but of communication.

This idea of systems associated with society seems to indicate two main things, which make it unpopular: the first is that the idea of society as a system suggests that there is some sort of order and reason in the world (an idea difficult to fathom); and the second is that systems are associated with an idea of organisation - that is because systems can organise things in a way unknown and not correlated to those things - and consequently to an idea of domination and control. So, order, but at what cost? This is perhaps the reason behind the accusations to Social System Theory (and to Luhmann himself) of being right-wing⁸³. In fact, it is not at all this way. Modern society is tense to control and monitor itself, but control and communication go hand in hand, at least, if not especially in social sciences⁸⁴. Interestingly, Habermas, in a recent interview admitted that: "My impression is that the whole world has become more conservative and shares the attitude towards life summed up by my colleague Nicholas Luhmann in the formula: 'Everything is changing and nothing works any more'".⁸⁵

Usually, when first approaching Autopoiesis of society there is the hope or understanding of seeing the opposition between, on the one hand,

⁸³ Especially as Luhmann was opposed by Habermas, who was openly affiliated to left wing theories. This misunderstanding continues today: Borch, C. *Niklas Luhmann (Key Sociologists)* Routledge; 1 edition (2011)

⁸⁴ Wiener, N. *Cybernetics, or Control and Communication in the Animal and the Machine* (1948)

⁸⁵ Stuart, J. *'A rare interview with Jurgen Habermas'* FinancialTimes, 30 April 2010. <https://www.ft.com/content/eda3bcd8-5327-11df-813e-00144feab49a> Last accessed 12 February 2018.

something like the effective reality of Autopoiesis as a process that happens and can be observed; and, on the other hand, something like an ultimate substantial element, a representative of the traditional conception of society, something which points beyond it and which is exemplified in something like a transcendence, a *telos* and *consensus*. It is Luhmann's realisation of complexity's role in modern society that has triggered his admission that there is no longer space for the display of teleological schemes, as, for instance, in Aristotle.

Luhmann therefore speaks of modern society as a society where there is no longer a space for goals - destinations commonly shared by all. This proposition seems again rather obscure at first looks and seems to stand in need of an effective explanation. A teleological conception of society is tied with antiquity but not to be confused with religion. In fact, antiquity is not particularly religious as such. It has, apart from the Jews, no monotheism, and the Jewish one sustained a kingdom of its own only for a very limited time. It is however religious in reference to Old Europe. Luhmann wants to avoid having to speak of Christianity, and to some extent even of religion. This is because religion is in fact a function system in its own right, so there is no systemicist objection against it. Greek Antiquity is in a much more subtle relation to religion than the Christian history. The society we are discussing, modern society, is in continuous reference to pre-modern Christian society, not to any religion or rite of antiquity. For instance, in Aristotle the aim of life, the *telos* was happiness, but when he speaks of *telos* (*τέλος*)⁸⁶, he also speaks of *tele* (*τηλε* - mystery) and *telein*

⁸⁶ Aristotle, *'Metaphysics'*, Green Lion Press (1999). See also Aristotle *'Nicomachean Ethics'*, OUP Oxford; Revised edition 2009 - 10.5. 117a 22-23. See also Achtemberg D. *'Cognition of Value in Aristotle Ethics'*, SUNY press 2002, p. 49 and ff.

(τελεῖν - to initiate), which are all not accidental homophonies, but semantic aspects of the very same word, the same root. The result of someone's initiation, or in fact any a pagan-religious ceremony, is happiness – and as this is a result the participants actively try to achieve, it is also their goal. This is not an invention of the philosopher Aristotle; much earlier it is witnessed in Athens, e.g. by the Victory Odes by Pindar⁸⁷.

The initiated are those who are happy because they understand the principle given by Zeus. Also, Sophocles states that only the initiated are *trioiboi* (tre times happy) as they have seen the mystery⁸⁸. Hence, those who do not participate in the ceremony are called *ateleis* (non-initiated) those without knowledge of Zeus, and consequentially conduct a life without *telos*, an unachieved, imperfect life.⁸⁹ The commonality with Christianity is, on this point, a very obvious one. Here, there are sacraments that take up the role of the mysteries, and especially there is the fundamental rite of initiation : baptism. Baptism brings the person in the kingdom of God and bestow upon him the right the goal of one day be allowed to see the light of his face. The whole idea of a life that is directed towards an accomplishment, an aim, has been present in philosophy throughout its evolution and has influenced the conception of history. Of course this is not to be interpreted as an argument against any type of accomplishment. Rather, and more simply, there is no commonly shared *telos* for Luhmann. Maybe the society of Luhmann - and already of Max Weber, - has no society-wide notion of perfection. Then, also, the view that antiquity cannot

⁸⁷ Pindar, 'Victory Odes', Cambridge University Press, 1995 (fr 137)

⁸⁸ Sophocles fr 387.

⁸⁹ On this see Agamben, G. 'La ragazza Indicabile', Mondadori Electa, 2010 P.16 and ff.

give us what Europeans have been looking for in Antiquity, since the Renaissance already, that is a full alternative to Christianity.

1.3 - Circularity, code and re-entry.

Another decisive concept found in Laws of Form is *recursivity*⁹⁰. To explain what *recursivity* is, we might remember a drawing of the Dutch artist M. C. Escher, 'Drawing Hands', which shows two hands in the process of being mutually drawn by each other, and drawing each other. Alternatively, we can think of recursivity as a torus, a doughnut. The torus is a topological concept (or space) that refers to a mathematical process that sees an operation repeating itself, or a procedure applied repeatedly such as in a computer program⁹¹. To explain it in lay terms, the torus is a flat surface, like a rectangle, turned into a tube and then with the ends joined together to form a doughnut. Why going through all this trouble? Because the three-dimensional topological figure that is the torus, is the representation of a space, where exceptions happen, which, to put it briefly, cause the hole in the middle to appear⁹². There are exceptions, yet

⁹⁰ According to the English Oxford Dictionary 'recursivity' is a word created in the 1950s, car 'recursiveness', from the 1930s, again a mathematical concept. The origins are from 'recursive'. Both terms carry out a recursive procedure; to perform the same sequence of operations on successive results; as well as the mathematical definition of performing a mathematical or computational operation again on the result of the previous operation. The root goes back to the mid 17th Century, from classical Latin *recursare* to keep running back, return again and again.

⁹¹ On this see for instance: Lamb, E. 'What We Talk About When We Talk About Holes', in Scientific American, December 2014. <https://blogs.scientificamerican.com/roots-of-unity/what-we-talk-about-when-we-talk-about-holes/> Last accessed 1st February 2018.

⁹² McCulloch, W. S. 'A Heterarchy of Values Determined by the Topology of the Nervous Nets', http://vordenker.de/ggphilosophy/mcculloch_heterarchy.pdf Last accessed 3rd February 2018.

the system is highly reliable⁹³. One example of a reliable torus is a hurricane; it has a hole in the middle, where wind is absent⁹⁴. Exceptions in fact happen everywhere, and they happen in society. Luhmann talks of “disappointed expectations”, which are the exceptions, the hole of the torus.

As cybernetics is concerned with the explanation of behaviour generally understood as teleological - an essential characteristic of mind and life - in terms of control and information, it looks for patterns like *recursivity*, which refer to the achieving and maintaining of goals. These states are seen as models for the autonomy characteristic of organisms: their behaviour, while purposeful, is not strictly determined by either environmental influences or internal dynamical processes. Social systems are seen as independent and will-endowed. For instance, considering the legal system, the question comes up whether the role it attributes to justice is really a teleological one. If justice is often considered to be the goal of the legal system, another interpretation might take it to be a response to the *absence* of any pre-existing goals, as a way of providing the legal system with some instructions as to the direction to take in its everyday tasks, even if there are no goals left and if there are therefore no definitive instructions to be derived from goals. In any case, the legal system's requirements in a second-order cybernetic approach are the reference to the identity of the system, which describes itself within the boundaries of judicial theories.

⁹³ See Foerster, H, von, 'Understanding Understanding: Essays on Cybernetics and Cognition', Springer, 2003, p.244 and ff.

⁹⁴ On this and recursivity see McNeil, D. H. 'What's Going On With The Topology of Recursion' Para 4.4 <http://see.library.utoronto.ca/SEED/Vol4-1/McNeil.htm> Last accessed 3rd February 2018.

Warren McCulloch, one of the pioneers of the field, defined cybernetics as well as cybernetics of cybernetics, or second order cybernetics, introducing a second level of observation; cybernetics, gives way to an experimental epistemology that is concerned with the communication within an observer (first order cybernetics / observation) and between the observer and his environment (second order cybernetics / observation). The influence of this concept on Luhmann is clear when we read in relation to social systems about second order observation of the system, beyond the system simply observing itself, but from the point of view of the external observer from the environment⁹⁵.

As previously explained, one possible definition of cybernetics could therefore be “the science of effective organisation”⁹⁶. In fact, a system organises itself through recursive operations and reflexive questioning, through self-observation, that is to say, it splits into an observer and an observing system. This way allows the system to maintain itself by being able to distinguish between itself and its environment, that is, to distinguish between and recombine internal and external references. Similarly, the idea of circularity presupposes the idea of difference, considering that the re-crossing of the boundary (or in other words, the form) of the system, with the re-entering of the boundary of the difference between system and environment. This means that the re-entry is already contained in itself, that is, the distinction re-enters the distinguished. For instance, the communication within the legal system will produce legal norms recursively by utilising the concept of legal validity. The legal/illegal code utilised by the

⁹⁵ McCulloch, W. S. ‘A Heterarchy of Values Determined by the Topology of the Nervous Nets’, http://vordenker.de/ggphilosophy/mcculloch_heterarchy.pdf Last accessed 3rd February 2018.

⁹⁶ Beer, S. ‘*Cybernetics and Management*’, English Universities Press, 1959;

legal system should not be prematurely imagined according to what we imagine to be norm; it is simply utilised as a rule of attribution and connection when there is the need to consider whether something is legal or illegal. If it were a norm, the paradox would arise as to whether the distinction between legal and illegal should be considered *itself* legal or illegal.

This re-entry of the legal system into the distinction legal/illegal can be productive of what might be seen a perfect example of a paradox, which can be resolved in logical terms by moving to a different level. The change of level is obtained by introducing the figure of an observer. Logicians have distinguished two levels, object-level and a meta-level. This would compare respectively, with a self-observer and an external observer. The self-observer would observe himself, so it would be simply self-referential, while the external observer observes the system observing itself, this level would represent second order observation. This is also the point at which the distinction between cybernetics and second-order cybernetics enters into play. The important difference is that cybernetics would deal with a system simply as an object, while second order cybernetics understands the system as an agent in its own right, which in turn deals with an observer. Ultimately, this indicates that every social system operating thus is a self-describing system. As already noticed, cybernetics is concerned with the explanation in terms of control and information of teleological behaviour, which is an essential characteristic of mind as well as life.

More precisely, cyberneticists still borrow from Aristotle in terms of teleology, but try and adapt the concept to a situation of modernity (or post-modernity). Not only does the fact that according to Luhmann's theory of social systems individuals are not part of the social systems, but situ-

ated outside society and all social systems, in that they constitute the most important component of their environment, not mean that they are of any “lesser” importance. According to another conception, which has its roots in Descartes⁹⁷ more than in Aristotle⁹⁸, that of Noam Chomsky⁹⁹, the human being is endowed with inborn goals that shape its “ambition” and therefore its identity, and constitute it as “perfect”. In modern society, man has no longer such all-encompassing, life-long goals, as it had in pre-modern times, such as in Feudal times, for example, both in the West and in the East (let us think of Japan), where a man had to dedicate his life’s work, and his loyalty, to his Lord; but the same happened throughout history. Icelandic people spent centuries upon centuries dedicating their life to sheep farming with the single-minded goal to earn a (often poor) living independently¹⁰⁰. Those goals were the same everywhere: loyalty to a Lord, to the King, to the the State, to God, and the reward was (supposedly) liberty and happiness. Through revolutions, wars and many times of bloodshed, man has learned a different lesson. His goals have changed direction¹⁰¹.

⁹⁷ See for instance: Detlefsen, K. ‘*Teleology and natures in Descartes’ Sixth Meditation*’ In Series page. (2012). In K. Detlefsen (Ed.), *Descartes’ Meditations: A Critical Guide* (Cambridge Critical Guides, p. li). Cambridge: Cambridge University Press.

⁹⁸ Aristotle. ‘*The Organon and Other Works*’ Open source collection. Translated under the editorship of W.D. Ross. Full text at Internet Archive (archive.org). p. 649 in text. n647 in page field. Retrieved 2009-10-22. Aristotle, *Metaphysics Book Theta* (translated with an introduction and commentary by Stephen Makin), Oxford University Press, 2006.

⁹⁹ Chomsky, N. ‘*Linguistics and Descartes*’. In: Smith JC. (eds) *Historical Foundations of Cognitive Science*. Philosophical Studies Series, vol 46. Springer, Dordrecht 1991.

¹⁰⁰ See for instance Laxness, H. ‘*Independent People*’, Vintage Classics (2008).

¹⁰¹ See Martineau, H. ‘*How to Observe Morals and Manners*’, Charles Knight and Co, 1838 p.203. See also Tocqueville, A. *Democracy in America*’ (vol. I 1835; vol II 1840). Trans. and eds, Harvey C. Mansfield and Delba Winthrop, University of Chicago Press, 2000.

Even if individuals in everyday life still pursue happiness, or efficiency, or economic advantages, or other tasks, and in that sense still follow a 'teleological behaviour'. Cybernetics are concerned with behaviour as recursivity, that is in relation to outcomes, to results, including of processes and actions that had been intended to have other, very different outcomes and results, which tries to achieve and maintain goals, and with actions. These states have been seen, by the previously acknowledged scientists, who have provided the biological sources of Luhmann's autopoietic paradigm, as models for the autonomy characteristic of organisms: their behaviour, while purposeful, is not strictly determined by either environmental influences or internal dynamic processes. Systems are seen as independent and autonomous¹⁰².

This red conceptual line from organisms and their behaviour to systems and theirs does not constitute an objection to the fact that the legal system presents a number of differences if compared to biological systems. First of all, autopoietic systems are not autonomous in the sense of independent. They depend on their environment. Luhmann's notion that human beings are outside the system, has one major aspect in the fact that, in this way, it is possible to avoid some specifically "human" problems such as the need of goals or the restriction to tasks. The paradox already mentioned in a different context, the notion of a 'difference embedded in a difference' applies, and so does the same solution as in the case of every other system. In the specific case of law, it would be also necessary to have a final 'stop' in the system actively preventing the law from finding the

¹⁰² See for instance Bourguine, P. Varela, F. J. *'Towards a Practice of Autonomous Systems: Proceedings of the First European Conference on Artificial Life'*. (1992) Cambridge, Mass.: MIT Pr., pp. xi-xvii . See also Wiener, N, *'Cybernetics: Or the Control and Communication in the Animal and the Machine'* Martino Fine Books; 2nd ed. edition (2013).

response to the 'final quest for law'. In any case, ultimately, the law in its self-observation and self-description must accept "itself", that is to say, it must find a specific function bestowed upon it by its environment, society (that is, other functionally defined and differentiated systems) and must sustain the amount of internal coherence that is sufficient for it to go on. The internal coherence is, though, limited to the fact that the system can reproduce itself autopoietically, it is a matter of consistency in identity, not in terms of causality. Moreover, it does not mean the absence of paradoxes.

Once again, the legal system, as a self-describing system¹⁰³, is operationally - that is normatively - closed, but is cognitively open, because it can observe and is not precluded by any external factor from "learning".¹⁰⁴ The social systems (legal, political, economical and so on) do not communicate with each other. This is because each system has a code that makes the legal communication not understandable, so to speak, by, say, the political system, which has a different code. It is cognitively open, in the sense that the system can learn. Although this idea was accepted by several authors writing before Luhmann and outside the scope of sociology, such as the biologist Umberto Maturana and the epistemologist and mathematician George Spencer-Brown, most of these authors objected themselves to its application to social systems, because in their world view, it was unthinkable that human individuals are not included within so-

¹⁰³ Self describing means that the legal system puts into action a set of distinctions that no other societal agency knows (or attempts) to handle. Law, in the type of society we are in, is "managed" by the legal system and no one else. To this extent it is also operationally closed. The operations it puts into action are all of one kind, insofar as they are dealing with the distinction directrice lawful/unlawful.

¹⁰⁴ Luhmann, *'Law as a Social System'* Oxford University Press, USA; 1st Published in Pbk. 2008;

ciety. Therefore, to this extent, when speaking of the legal system, the paradox of the distinction within the distinction is bound to resurface. It is however overcome only when, once again, the necessary operation is identified as legal communication. Social Autopoiesis indicates that there are two ways to react to disappointment: cognitively, that is by learning and adapting to the facts, and normatively, that is by not learning nor adapting or, in other words, by sticking “counterfactually” to the original expectations even after their disappointment. The legal system uses language for its operations of communication but with its own specific terminology that has no relevance outside the system. This shows that the system can recognise its boundaries and can distinguish between internal issues in relation to what is ‘legal’, and external issues of interest which however cannot be dealt with and cannot even be perceived otherwise than within the system. These are therefore only remotely perceived¹⁰⁵

Norms are created within the system and serve as criteria in terms of decision making. They have no correspondence in the environment, which means that the system is normatively closed and, as such, freed from the burden of morality, which rests with psychic systems¹⁰⁶. And this is one of the reasons why psychic systems are confined to the environment as observers. Ethical issues such as racism, or any kind of discrimination, becomes normative only when the legal system declares racism illegal. Similarly, the distinction between normative and cognitive, between facts and norms, must be made by the system itself as it is not something that can

¹⁰⁵ Foerster, H, von, *Understanding Understanding: Essays on Cybernetics and Cognition*, Springer, 2003, p. 6 and ff.

¹⁰⁶ To be noted that this is a new type of burden to be carried alone by the psychic systems - as before the era of what Luhmann calls "modern society" psychic and social systems were not neatly separated.

be found in the world. Looking at the way the system works, one might be tempted to assert that the guarantee of justice is not something that can derive from the environment, but rather from the consistency of the operations that recognise and distinguish the interests and the facts that are protected by the law from those which are not and are to be eliminated. The problem of combining internal and external references is resolved always by internal operations, which is what Luhmann refers to as 'closure'.

1.4 - Internal Stability: Eigenvalues and Eigenbehaviour.

It remains to see how the legal system as an autopoietic, operationally closed system can guarantee the stability of its internal operations. But, in fact, can it? Can a system guarantee coherence and consistency in terms of operations and, if looking ultimately at what the legal system consists of, in legal practice? About this possibility systems theory is everything but optimistic. Sometimes, a judge claims to have learnt from a legal theory. But does it really happen? For Luhmann's degree of adversity to demagogical overstatement it is already an important achievement if legal theory succeeds in telling *itself* a credible story about what happens in legal practice rather than having to import such a description from its (intra-societal) outside.

One such story is encapsulated in a term – a term formed after a long line of mathematical and scientific terms, namely the term "*eigenvalue*"; a closer look into it is necessary. Luhmann refers to *eigenvalues* in order to refer to the acquired internal stability of the system caused by autopoietic, recursive operations. Cyberneticists have postulated that the operations of

a system are maintained constant in their evolution by some structures that remain stable in the operations of the system¹⁰⁷.

The above mentioned concepts of *difference*, *heterarchy*, and *eigen-value* (or any concept with the suffix *eigen-*) work together. German mathematician's David Hilbert's concept of *eigen-* represents a fundamental point. This is that *eigen-* relates to emergent properties in the duration of a process. These are not substantial, that is, do not relate to 'being' in some older philosophical senses of the term, but they do generate something out of nothing. In other words, when, in a world of experience, we randomly select, or perceive, something such as sensations coming from different sources, and do so repeatedly, we end up forming categories in our mind about those selections (smells, objects, sounds), which will allow us to categorise. This happens because of the recurring behaviour, but this recurring behaviour is random and started out of nothing. The importance of it is that it is a way to bridge between the world described in physics and mathematics and the world of experience.¹⁰⁸

One could even surmise a whole very specific type of ethics, or rather of the social scientist's professional deontology, which would tend to see the right approach or method as being much less given to criticising and much more to observing. Instead of criticising, taking into account the

¹⁰⁷ On this see Baecker, D. '*Organisation als System*'. (1999): Frankfurt am Main: Suhrkamp. See also Baecker, D. *The Intelligence of Ignorance in Self-Referential Systems*. In: Robert Trappl (ed.), *Cybernetics and Systems 1994*. Proceedings of the Twelfth European Meeting on Cybernetics and Systems Research, Vienna 5-8 April 1994, vol. II. Singapore: World Scientific, pp. 1555-1562.

¹⁰⁸ Foerster, H. v. '*On Constructing a Reality*' 1973, 211-228. <https://pdfs.semanticscholar.org/5934/573a5be75bc6c7030a3ce3c6278e872e2d4c.pdf> - last accessed 13 February 2018; Foerster, H.v. (2003) *Objects: Tokens for (Eigen-)Behaviors*. In: *Understanding Understanding*. Springer, New York, NY, p 261-272. See also Piaget, '*The Construction of Reality in the Child*' 1955. <https://pdfs.semanticscholar.org/ba16/facb32fec367cc0f4c9f1e04e80943f2c89a.pdf> Last accessed 13 February 2018.

consequences of every action. This is the achievement of functional differentiation. Of course one could equally contend that the *autos* (self) is in a sense the great absent of autopoietical theory, remains eternally at the postulate level. It is the self of which nothing can be said than precisely that it is in the making of itself. There is a real difficulty in the task, say, of de-substantialising the self. The self – that sounds like some being. In a sense the notion of German ‘*eigen*’ which applies to a doing, seems to contain less difficulty. One might suggest that even "autopoiesis", being somehow off the mark, could be advantageously replaced by with a word like *eigenpoiesis*.

The opening up of the problematic of structures springing from the recursive reference of what is called *eigenvalues* is one of those aspects of Luhmann's theory of society that are theoretically most promising. Similarly, the notion of a system's stable conduct in continuously or repetitively making appeal to the same distinctions in dealing with its environment has clear reflections in the notion of *eigenbehaviour*. This is a notion that has first been applied to, and makes sense in relation to, the behaviour of autonomous cognitive systems, and Luhmann uses it to describe autopoietic social systems. Incidentally, let us remember that an autopoietic social system is not necessarily also autonomous; they are autonomous in biology, but not in Social System Theory. The term ‘*autos*’, self, as in *autopoiesis*, postulates the self-making characteristic of an autopoietic being a being that has no need of the hypothesis of an external maker. The same term *autos*, as used in *autonomy*, self-command of a self that rejects external commands, contains a strong value-related reference, an aspiration. It is generally desirable to be “autonomous”; on the contrary, to say it

is desirable (or undesirable) to be “autopoietic”, is meaningless under all circumstances. Under similar appearances, we find thus a wide gap separating autopoiesis and autonomy (though both *can* coincide). Perhaps a *Grenzbegriff*, a boundary- or limit-concept. The non-exchangeability of autopoiesis and autonomy is essential given attempts of finding in the distinction autopoiesis/autonomy the appropriately impoverished Luhmannian version of what is known, in Political Philosophy, as the chief enigma of democracy theory: the distinction “constituent power”/”constituted power”.¹⁰⁹

Nevertheless, rather than autopoietic, it might make more sense to refer to what Luhmann calls the autopoietic system, as being much more precisely pointed at by a term such as *eigenpoietic*, in that “*eigen*” points toward stability rather than identity, and towards process and recursivity rather than defence of a pre-existing same. The concept of *eigenbehaviour* relates to cognitive systems, which, through their closure or self-referential recursivity, not only allow the continuation of systems, but produce regularities. In making itself, the legal system also tells itself as a story, as something like a reasoning autobiography. While it organises itself by each step it takes, as a functionally differentiated system, the legal system has the capacity of self-organisation, this capacity is not intrinsic to the system but it derives from the relationship between observer and the thing observed. In other words it supposes an external observer. Organisation occurs when the relation between two entities becomes conditional on a third value or state, which directs the autopoietic attention in direction to the

¹⁰⁹ On this see Negri, A. *‘Insurgencies. Constituent Power and the Modern State’*. Minneapolis: University of Minnesota Press, 2009. See also Hardt, M., and Negri, A.. *‘Empire’*, Cambridge: Harvard University Press, 2001.

theory of functions with more than one variable.¹¹⁰

The function system or machine will have an internal state S , an external input ' I ' and a mapping ' f '. If ' f ' changes, the organisation of the system changes. The mapping is the difference between two ways of looking at the object of the observation: the difference between the observer's observation of the system and the observation that the system has of itself.¹¹¹ The questions of "applied system theory", such as that of good and bad organisation and the autopoietic contributions to it, take off at this point. In function-based systems theory the agreement is that good organisation is not absolute, but relative to the external input or disturbances and the goal of the system at hand. Systems capable of adjusting their organisation in a way to be able to pursue their goal(s) are therefore called 'self-organising'.

Moreover, as already mentioned, autopoietic systems are less defined by a goal than by an internal series of operations, which form an internal organisation, so to speak; therefore, whether the self organisation is a 'good' organisation is not a theoretical issue, or generally speaking: anything that refers to the moral distinction, the distinction between 'good' and 'bad', is, including in view of issues of organisation, related to ethics and difficult to separate from issues of ideology, whose status in social autopoiesis is, at best, unclear. What is clear is that self-organisation ne-

¹¹⁰ The term 'conditional on' has its opposite or converse in 'not conditional on' and the term 'organisation' consequently has its converse in the term 'separability'. Separability occurs in functions of several variables or in complex machines, in which some parts (or sub-parts or sub-machines) are observed to be acting independently or separately from the others, but still as a part of the whole ("machine" here is intended to stand in for any system that shows behavioural regularity).

¹¹¹ Ashby, W. R. *'Principles of Self-Organising Systems'*, in 'Computer Science and Technology and their Application' vol. 9 'Principles of Self Organisation', Pergamon Press, New York, 1962. pp.255 and ff.

cessitates the adaptation of the system to its environment.¹¹² that the irritation by the environment creates *order by noise*¹¹³, where for “noise’ is intended an external perturbation, which is cybernetic and is nothing but a principle of selective variety. The order so reached is not necessarily a desirable, let alone a ‘good’ order, still leads to systems finding a sort of internal organisation. In other words, this is another way of showing that there is no escape from the necessity of embracing unrestrained contingency (even if predictability and probability offer the luhmannian ‘method’ of managing contingency). Luhmann’s theory of society does not present itself, as so many other theory-suggestions do, as a cure, even a *panacea* for excessive contingency, or what might be experienced as such. Indeed, “irritation” or “perturbation”, the choice of these terms seems to relate to the deep-seating and not always sufficiently clear postulate that complexity and complexity management are not possible under conditions of perfection. Perfection means: what emerges coincides with what was expected. Learning, on the other hand, is predicated on a loss; it makes only sense where there is something to be learned, some result that does not correspond to what had been expected. The continuation of systems is - and here we find one of Luhmann's foremost arguments - predicated on a disappointment of expectations – giving rise to a formidable paradox of

¹¹² Ashby, W. R. ‘*Principles of Self-Organising Systems*’, in ‘Computer Science and Technology and their Application’ vol. 9 ‘Principles of Self Organisation’, Pergamon Press, New York, 1962. pp.262 and ff.

¹¹³ This expression comes from an experiment in physics. If a number of plastic cubes weighting enough to barely float, are put in a bucket full of water and the bucket is subjected to a series of external disturbances, or ‘noise’ the cubes will, after a while, order themselves into regular clusters. On this See Foerster, H. von, Poerksen, B. ‘*Understanding Systems, Conversations on Epistemology and Ethics*’ Carl-Auer-Systeme Verlag, Heidelberg, 2002. p.91.

successful/unsuccessful problem solving ¹¹⁴.

To explain the concept of *eigenbehaviour* further, one must compare for a moment the 'objects' of a linear epistemology (without an observer) with a *neo-cybernetic* epistemology. The 'objects' become 'tokens for stable behaviour' or what might be called, '*eigenfunctions*'. This simply means that the interactions between a subject and an object and relative observation can be of different types:

1-observation relative to the action of the subject; 2-observation relative to the object; 3-coordinations of operations of the subject (i.e. the law); 4-coordinations between objects;

In terms of law these interactions are all operations within the legal system are in one way or the other, realisations of one of these basic operations. The observations are 'compounding coordinating operations' performed by the legal system within the single operator of the coordination, which transforms and rearranges the behaviour of the operations to guarantee the coherence and connectedness of the outcome of these operations. This engages in a continuity of recursive operations of observations and coordinations *ab infinitum*. If the observations and coordinations are taken as variables, these show *eigenbehaviour*, in relation to reflecting or defining operations. In fact, in their domain, these variables show *equilibria* (functional, operational and structural). The variables are in a complementary relationship with the *eigenvalues*. The *eigenvalues*, because of their self-defining nature, imply topological closure. This is like a snake biting its own tail. The snake biting its own tail represents also how the relationship between object and subject is within the topology of closure. In

¹¹⁴ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008.

terms of legal system the object (the law) as cognition computes its own cognition through the cognition of the 'other'. The legal system, or any legal discourse, starts originating its own ethics of independence. Topologically, the snake is the same as the torus, the analysis of whose behaviour can give an interesting insight in terms of heterarchy, stability and value anomaly. This is important in relation to the consistency / contingency dichotomy.

Heterarchy literally means 'the rule of the other' (from Greek: *heteros*, the other [of two] and *archein*, to dominate, to begin), therefore it is no longer the case of a *summum bonum* that rules over others, which lead, for instance (in the history of the common European notion of 'hierarchy' to the holiness of power. Lawgivers cannot pretend to derive their rules from a higher moral authority or any legitimacy of imposing its diktat as a matter of law. As a consequence of the rejection of this authority, there exist no absolute values any longer, and every operation is conceived circularly. Moreover, not having a hierarchy of absolute values established at the top, leaves way to the possibility of value anomaly, which in a hierarchical society would be considered as 'disappointment of expectations' as previously described. Not only, but experiments in which B is preferred to A, then C is preferred to B, but then A is preferred to C, which is *prima facie* an inconsistency, have shown how this is an 'inconsistency of an order too high to permit a construction of a scale of values'. In a hierarchical organisation with absolute values, C would be the ultimate choice, creating thus a hierarchy: C is above B, which is above

A¹¹⁵. Though, this is not the outcome of the experiment. Here a heterarchical organisation presents the emergence of uncertainty, which leads to independent answers and possibilities. In other words, a heterarchical system shows self-organisation. McCulloch showed that the 'reflex arc' of the nervous system, which builds a circularity consisting of stimulus and response, leads to a stability of action, that is, of operations, which in turn means - if applied to the legal system - a stability in terms of law enactment and judgments.

At this point the topological representation is bi-dimensional, it is simply a loop. Still, it exists the possibility of 'choice'. This, caused by value anomaly (the equivalent in sociological terms would be either 'disappointed expectations' or more generally 'contingency') will have an effect inasmuch as some incompatibilities arise during the circular operations of the sensorimotor circuit. At this point, only one of the possible choices is allowed to continue in its circular behaviour, while the other is blocked (the anomalous behaviour) and deviated by inhibitors which McCulloch calls '*diallels*'.

System theory disables all promises of construing or saving any totality. This is not only a stereotype of Luhmann-criticism; it is a longstanding intrinsic problem of the luhmannian understanding of modern and current social theory. It might lead us to surmise that the luhmannian lesson on Justice, radical as it is, it cannot help entering into conflict with the most widespread social common sense¹¹⁶. This is, after all, the lesson that

¹¹⁵ This is, according to von Foerster, how people tend to choose, in a circular manner. See Foerster, H. von, Poerksen, B. '*Understanding Systems, Conversations on Epistemology and Ethics*' Carl-Auer-Systeme Verlag, Heidelberg, 2002. pp 101 and ff.

¹¹⁶ On this see Möller H. G. '*The Radical Luhmann*', Columbia University Press (2011).

Justice both 'does with us what it wants' (no less than the justice of the gods of antiquity) and that at the same time emanates from a limited agency within society, a function-system among others, which as such cannot be subjected to the verdict of some higher decision power (cf. the important point that is at stake when today a government claims the power of firing its judges). Together, these two, society-universal justice, plus the socially differentiated agency that is in charge of it, nail us on a life-long cross - with as a crossbar the universalist claim to provide all justice that is available society-wide, and as a vertical bar the limitation that only one limited function-system is in charge of all justice. No one would be able to argue that this is an immediately convincing or intuitively comfortable way of solving the issue of law in society. For instance, it is clear that its maintenance needs to be "rigid" - arguably much more so than any pre-modern societies.

In fact, while Luhmann speaks of "psychic systems", of "consciousness", in order to refer to that which he locates at the opposite side of what he calls "social systems", and while Habermas has famously tried to counter this by reference to a husserlian *Lebenswelt*, far more common and unpretentious terms of everyday language, such as that of "people" suffices to locate the rift between the meaningful world of common discourse and common sense, on the one hand, that of function systems, and therefore justice as a function system, on the other hand. As far as people are concerned, as "ourselves" are concerned, there is no such thing as an ontology without a teleology. Luhmann, specialising on social systems, never mentions "people", thus remains utterly devoid of any help in relation to "populism" (a movement which had not existed in his life-time). He

does leave a precinct outside of meaningful communication, namely meaningful consciousness. Even here, the question remains open whether, in their little cages, in prisons for instance, what is called everyday life does induce, more often than not, to leave their goals where they are and enslave themselves to facts rather than goals. Learning for instance is built on the temporary suspension of goals – of all goals apart from that of learning. The confusion is located within the problem, not in the eyes of Luhmann, or Luhmann critics.

Within the remit of his developed theory, Luhmann makes it perfectly clear what he means by *teleology*¹¹⁷. What is at stake is not what Aristotle thought; to recycle the vast Aristotelian employment of the term *telos* subtly enriching its meaning to make it fitting for the 20th century is not his strategy. That's why he says that Aristotle (and almost everyone else) cannot deliver any longer a correct description of contemporary society. Modern society does not observe (observe in the sense of subscribing to, vindicating, honouring) goals, modern society observes (in the sense of take into account) informations. Teleology is out, as far as social systems are concerned. There is no such things as goals left, everything social (and again: everything legal) is just a one system-internal construction. Not only the legal system has no transcending, essence-defining goal; no function-system is teleological.¹¹⁸ It determines its own directions (a) for now, (b) for its own use. Not even because this setting of goals is its goal. Only because the system has no better idea about spending its time.

The paradigm shift brought about by Luhmann's work on sociology

¹¹⁷ Luhmann, N. *'Theory of Society'* vol. I, Stanford University press, 2012;

¹¹⁸Luhmann, N. *'Zweckbegriff und Systemrationalitaet'*. Tübingen (J.C.B. Mohr – Paul Siebeck) 1968;

and especially social theory, consists, as it has become apparent, in the choice of directly relating to the observable reality of contemporary society, of questioning the inherent problems caused by complexity, instead of trying to avoid them, or hiding them behind a gamut of traditional concepts. There is no question that some or most of these concepts have a huge significance or standing - it suffices to have a look into centuries of Commentaries on human society, politics, social order, among others, delivered by a large number of thinkers since well before the official birth of the social sciences; yet the great question in a convinced modernist's eyes - as Luhmanns is - whether the *tempo* of evolution has not become such that the way in which society presents itself today is still able to be sufficiently captured in these older concepts, whatever their complexity and, potentially, wisdom, is still sufficient in our days. In fact, the "old-European" self-presentation of society as stratified society, is no longer apt, in Luhmann's opinion, to render the complexities and contingencies of modernity. Other theorists and philosophers have continued to examine society throughout the times with the same focus, paradigm and method. The theory of Autopoiesis proposes to describe society in a novel and, perhaps it could be said, radical way. What Luhmann was doing is best described not as 'solving' these problems, but as developing a style of inquiry capable of handling them, "figuring them out". Luhmann takes it in a modern, in part also - he had been himself very conscious of the split between the two views - a post-modern discourse¹¹⁹.

On the basis of this detailed rejection of traditional theory terminology Luhmann develops, radically, but also carefully, his own conceptual

¹¹⁹ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998;

basis, starting the line of his own ideas in terms of social system theory by taking Talcott Parsons's functionalist-structuralist paradigm and reviving it into a sociological theory based not only on cybernetics but also on evolutionary principles. The theory of social autopoiesis can be read also as a contribution to the fundamental dialectic between structure and function. Society is in fact described as functionally differentiated. Functions are, according to the theory of autopoiesis, what are responsible for the internal differentiation of contemporary society. Luhmann uses a number of concepts that are either innovative or borrowed from other disciplines and used in order to both unsettle and replace, to analyse and explain ("re-describe") the fundamental self-descriptions of modernity. For instance, he finds unity as a concept in which modern society, modern law in particular, portrays itself, as an internal self-representation, insufficient, and replaces it with the concept of difference. Law, precisely in the process of striving for unity, cannot but produce difference. On another level, but within the same perspective, we find the notion of heterarchy in order to replace rather than of hierarchy; this expresses the idea that vertical command structures are no longer the underlying model in modern society (as opposed to medieval and "ancient regime" societies). These are the concepts that allow to draw the sharp profile of functional differentiation. The impact of such a novel approach ruffled a few feathers in the peaceful world of social-scientific institutions of the last third of the 20th century.

2 - Philosophy Contingency, and the Promise of Autopoiesis: A Philosophy of Socialised Contingency.

2.1 - The Philosophical Background.

In addition to the Cybernetic influence, we are confronted with a philosophical context that needs to be briefly explored. We must look at the theories in Germany especially at the time when Luhmann started to develop his 'dissenting' view on modernity — placing the core of modern innovations, not in the fields of Philosophy, the arts, literary criticism, politics, or even the exchange between religion and science as leading discourse, but in the internal build-up of society. Since the beginning of his work in the Sixties, Luhmann distanced modern society from what he called the Old European tradition (a term which Luhmann takes from German historian Otto Brunner (1898-1982), a specialist on early modern regional powers and constitutions¹²⁰ — it is still not clear how Donald Rumsfeld, US president George W. Bush defence secretary, who has done a lot for the term's popularisation, had got hold of the term 'Old-European', but this years after Luhmann's death in 1998. Old European elites had understood society as based on stratified differentiation; the stratificational model was *natural*, and still widely continues to be taken for natural today. Luhmann's aim was to directly confront societal modernity with the help of a gaze on later 20th century society, and without assuming a social "na-

¹²⁰ On this see for instance Brunner, O. *Land and Lordship: Structures of Governance in Medieval Austria: Structures of Governance in Mediaeval Austria (The Middle Ages Series)* University of Pennsylvania Press, 1992.

ture". This approach required Luhmann to have recourse to a new type of accounting for social phenomena. What is called social systems theory embodies this new type of accounting for society.

For the "natural" stratificational model, Luhmann substituted a societal structure based on functional differentiation. Luhmann, trained as a lawyer in Germany during the early Fifties and working in the administration of a regional German government thereafter, discovered his own sociological interest toward the end of the 1950s; important had been a year of study with Talcott Parsons in Harvard with Talcott Parsons (1960/61) whose functionalist-structuralist paradigm he largely, yet critically adopted, combining it with elements from the portfolio of young US disciplines (largely on the wake of the *Macy-conferences* in New York throughout the 1940s and 50s) among which cybernetics played an outstanding role. Luhmann's specific ideas had however no direct ancestor there, as the few Social Scientists who were part of the Macy conference regulars (including Margaret Mead and Gregory Bateson, outstanding social anthropologists) had been very far from conceiving society as a *sui generis* phenomenon in the way in which Luhmann was, from there onward, trying to do. General systems theoretical approaches had been around — courtesy for instance to the Viennese biologist Ludwig von Bertalanffy (1901-1972). Luhmann was to take up a refined systems theoretical approach in order to gain access to a new theory of society fitting his own anxiety of looking at modern society immanently as at a new phenomenon of a new kind or type, a kind or type of its own, different from pre-modern social formations.

Considering that systems theory is always also environment theory — if not rather "membrane theory" — what needs a specific emphasis is

the notion of a *problem* in this context. The distinction of problem and solution is general in scientific research and inquiry. In systems theory, what is different is that the researcher is not the only addressee of the problem. The other, and no doubt the first addressee of "problems" is the system itself! How can the system cope with its environment? This is the lifelong problem the system is confronted with. Now, to the extent to which social systems share with social scientists doing research on social systems one identical medium (*Sinn*, translated as sense or as meaning), the reference to the concept of a problem becomes even more inclusive. Given that Luhmann specialises on social systems, his theory abounds in problem-notions that represent what the system is exposed to, but also what the theory itself is exposed to, which finds itself under the duty of understanding social systems as problem solving agencies. Complexity, contingency, the requirement of "reducing" complexity, that of absorbing contingency, the question of how new, heterarchical modes and relationships can be installed, the question of how paradoxes need to be invited in, yet also to be dismantled or rendered inoffensive for the current processes to be able to continue, are all "problems" of this specific systems theoretical type. We should also not forget that the main preoccupation of the Social Sciences in our context is surely not that of providing idiosyncratically "Luhmannian" answers. It is rather to provide access, today, to his insights and discoveries.

Back to the German Federal Republic, Luhmann is working throughout the Sixties in an intellectual atmosphere imbued with highly politicised general ideas. While Sartre, in France, solemnises marxism qualifying it, in his main philosophical work, *Critique of Dialectical Reason*

(1960), as *l'horizon indépassable de notre temps*,¹²¹ the post World War II generation in Western Germany, which grows up under the explosive double condition of an economic *hausse* that goes beyond the most optimistic forecasts, and a need to critically look at the generation of their parents and grand-parents who have followed, or at least invited in the Hitlerian catastrophe, is no less tempted by what can be easily understood as 'leftist' commitments. It is unsurprising, considering the historical precedents and circumstances, that especially the field of the Social Sciences had been dominated by the Frankfurt School of Critical Theory.

The Frankfurt School had been founded in 1923 under the name of an Institute for Social Research at Frankfurt University. Now, after the division of Germany in an Eastern and a Western German state (1949), intellectuals in the Western part felt the need to re-examine Marxism in a western optic.¹²² The long history of the socialist Workers' Movement before and after the First, the Second World War had displaced the movement largely to the east of Europe, with the emerging of a number of Soviet-dependent new states. The remanent, but soon over-pouring socialist commitment in West Germany in the in the second half of the 20th Century, had naturally developed very quickly strong roots and sympathies among the students and teachers working in the University, and especially in the field of social theory.

Although during the Nazi persecutions many of the Frankfurt School's members had to leave Germany and Europe, a significant group of them returned to Germany in the Fifties, making the Frankfurt School

¹²¹ Sartre, J.P. *Critique of Dialectical Reason*, Verso; 2nd ed. edition, 2006.

¹²² Martin, J. *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-1950* – Boston, Little Brown 1973, p.3 and ff.

and Critical Theory a sort of 're-discovery' in the Sixties. Since a certain, widespread, marxist *engagement*, so to speak, had given rise to the socialist regimes of the eastern block and become institutionalised as 'state ideology', and been transformed into what had later been called "real socialism", the revolutionary question of replacing the liberal and social-democratic principles, that were more or less consensual in the German West, with the terms "historical materialism",¹²³ had tested different and much more high-strung ambitions in the West. What was created there was a highly intellectualised form of Marxism, which heavily influenced what was soon calling itself the 'new left'. There was a lot of criticism and self-criticism. The conclusion was that the agent of revolutionary change could no longer reside in the proletariat, but only in the intellectuals, even in 'Reason' (re-defined in the sign of revolutionary-political) itself¹²⁴, attracted the obvious criticism from leftist intellectuals that the Frankfurt School was simply perpetuating the traditional German Idealism and had turned critical theory in a sort of intellectual elitism.¹²⁵

One must not all-too schematically identify the Frankfurt School in its general aim as an institution which welcomed scholars of different political persuasions, although a great number of them were left wing, with Critical Theory representing rather a series of problems of which some members of the Frankfurt School were first class exponents.¹²⁶ In the

¹²³ Martin, J. *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research 1923-1950* – Boston, Little Brown 1973, p.3.

¹²⁴ On this see Marx, K Engels, F. *The Communist Manifesto* Yale University Press, 2012

¹²⁵ On this see Therborn, G. *The Frankfurt School* in New Left Review I/63, September-October 1970

¹²⁶ Connerton, P. *The Tragedy of Enlightenment: An Essay on the Frankfurt School* Cambridge University Press, 2010 , p.IX

Twentieth Century 'Critical' has very much to do with a list of programmatic ideas, which were not only and perhaps not most decisively "anti-capitalist", but which are present among some of the members of the Frankfurt School, especially in the works of Max Horkheimer (1895 - 1973)¹²⁷, Theodor W. Adorno (1903 - 1969)¹²⁸, Herbert Marcuse (1898 - 1979)¹²⁹ and Jürgen Habermas (1929)¹³⁰, among others, thinkers in whose works strong claims as to receiving and channelling a strong Marxist (or "neo-Marxist", or in any case, as long as there had been an Eastern model of Marx-inspired socialism - a "Western-Marxist"), as well as, equally obviously, Hegelian influence are dominant.

As these thinkers are largely identified as pertaining to a critical tradition, one might say that they have bestowed a fresh and more specific meaning upon the term "critical". Not obviously the term "critical", which in its many coexisting meanings, is a fully fledged product of modern times, but its linguistic root, is from Greek. Aristotle uses the word *kritikos*, in the sense of a factor that enables an observer to place or draw a distinction. Generally, in antiquity and throughout pre-modern times, the word related to the way of discerning. Then the term arrives with a different meaning in the Eighteenth Century. It is an organising part of the French Revolution

¹²⁷ See for instance Horkheimer, M. 'Traditional and Critical Theory' (1937), Horkheimer, M. 'The Eclipse of Reason' (1947), Horkheimer, M. 'Between Philosophy and Social Science' (1938) and Horkheimer, M and Theodor W. Adorno, 'Dialectic of Enlightenment', (1947)

¹²⁸ See for instance Adorno, T.W. 'Minima Moralia: Reflections from Damaged Life', 1951

¹²⁹ See for instance Marcuse, H. 'Reason and Revolution: Hegel and the Rise of Social Theory' (1941).

¹³⁰ See for instance Habermas, J. 'On the Logic of the Social Sciences' (1967) and Habermas, J. 'Technology and Science as Ideology' (1968), Habermas, J. 'The Theory of Communicative Action' (1981), and Habermas, J. 'The Philosophical Discourse of Modernity' (1985).

and, much earlier already, of Enlightenment thought throughout Europe. The reference to Kant's work¹³¹ goes without saying, but the term circulates in a variety of meaning throughout the spheres of textual science inside and outside religion and law/legal history. The general meaning has remained stable: to be engaged in critical efforts means to pursue the task of examining the validity of a text and its limits.¹³² The term is used by Marx in his *Das Kapital*¹³³, also as '*Kritik*'. At this point one may feel that German Philosophy had made the term its own and from this moment it will be difficult to disconnect it from it.

Disconnecting - or in other words: distinguishing the term's current use from any possible future one - is perhaps not the only perspective that needs to come to mind. Rather, what might prove more decisive is the strangely un-severable knot between *critical* approaches in all walkways of intellectual and political discourse and their apparently inherent claim to legitimacy. Firstly, German philosophical tradition is rooted in Idealism, with Kant and Hegel as Fathers, from whose work a left and a right wing derived, permeating the whole of the philosophical world and arriving thus to Marx and then to the work of the Frankfurt School. Now, the role of philosophy as a discipline in Germany is rather incomparable to the role of the field in other nations. Secondly, one must add West Germany's own peculiar history and the widespread and understandable contention that

¹³¹ See for instance Kant, I. '*Critique of Pure Reason*' (*Kritik Der Reinen Vernunft*) (1781) Cambridge University Press, 1997.

¹³² The OED reports this definition of 'critique': "detailed analysis and assessment of something, especially a literary, philosophical, or political theory".

¹³³ Marx, K, '*Capital*' (*Das Kapital*) Pluto Press, 2016. One may suggest that its use throughout the 19th and 20th century make of it the longtime fashion word of the intellectual debate and almost any type of University-related venture.

the world wars as well as the murder planned and exercised upon minorities need to be pointed out as having been examples of publicly committed crime. It is noteworthy, too, that the generations of the 2nd half of the 20th century have not taken up an attitude of sweeping things under the carpet, or have them erased from official history. The student revolt that was heating up from 1960 onwards is not the only site of this rather principled attitude. On the other side, there were those intellectuals of the previous generation, who coming back from their exile in the US, were not tainted, as those who had a history overshadowed by the NS past, by the misery that had an obvious effect, a diminishing effect on whatever they could say now, especially in a field such as social theory.

In the early Seventies, Habermas left Frankfurt and set himself up in the Max Planck Institute in Starnberg, in the South-East of Munich, surrounding himself with various young scholars,¹³⁴ thereby generalising the effect of basic critical teaching. The intellectual atmosphere of West Germany, starting from the end of the Sixties, had been very largely, if not hegemonically defined, not by the Frankfurt School alone, but by the extension of its influence throughout. Under these conditions, that a new current in the field of social sciences could have been initiated singlehandedly by the then almost unknown Niklas Luhmann, who proposed a radical change in perspective using the term 'social systems theory', needs to be understood as an anomaly, and a courageous solo action. Although in the mid-Sixties Luhmann and Habermas seemed to be on the same track concerning some issues, it very soon became clear that Luhmann aspired to other avenues and was completely detached from the informal, but only the

¹³⁴ Connerton, P. *The Tragedy of Enlightenment: An Essay on the Frankfurt School* Cambridge University Press, 2010; p.X

more unforgiving claims to consensus that defined the Frankfurt School. It is also true that Luhmann is not a political theorist. All he is interested in is the effective reality of society, its way of existing, not as a state of things, or an institution, but as an on-going process.

Despite the large neo-marxist consensus within theoretical sociology, Luhmann succeeded in attracting some attention in sociological circles. Habermas invited him to contribute to a seminar at the University of Frankfurt. This was published in *Theorie der Gesellschaft oder Sozialtechnologie: Was leistet Systemforschung?*¹³⁵ (Theory of Society or Social-technology: what can system research accomplish?) a book that projected Luhmann onto the intellectual scene of the time. In the book, Habermas spoke in 1971 of Luhmann accusing him of being the exponent of a politically unreflected, naked “social technology”.

In fact, Luhmann's argumentation appeared and still appears to cast a doubt over the whole social-scientific discourse, whether rooted in Marxism as it was the case then, or because it is perceived as uncanny, or somehow suspicious, to relativise the sovereign role of politics, as Luhmann continuously does. One of the main reasons is that for Luhmann the idea of consensus, which carries down to Habermas' theory of truth, according to which the “truth condition of propositions is the potential assent of *all* others”, therefore “the universal-pragmatic meaning of truth (...) is determined by the demand of reaching a rational consensus”¹³⁶, has no discernable relevance. While for Habermas, society is realised through

¹³⁵Habermas, J. Luhmann, N. *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet die Systemforschung?*, Frankfurt a.M. 1971.

¹³⁶ Habermas, J. *'Reflections on the linguistic foundations of sociology'*: The Christian Gauss Lectures (Princeton University, February-March 1971). In Habermas, *'On the Pragmatics of Social Interaction'*, B. Fultner (trans.). Cambridge, MA: MIT Press, 2001. 1–103. p.86

consensus, that is by means of people agreeing with each other (including very often silently, by not contradicting), for Luhmann, it is realised only through communication, or in other words through micro-happenings, a type of operations really, that are, however relevant to the extent to which each of it adds some difference (as tiny as it might be) to the consensus as it existed up to that moment. Habermas' society is anthropocentric, following the traditional view, where people create and constitute society through the fact of coexisting with each other, and of creating society by means of their good-will and of the identity or the closeness of their views, as well as the *dialogue* that is the means in use to establish these conditions. Society is therefore, in a sense, the totality of all opinions, all convictions that exist and are represented by society's members. Luhmann is rather skeptical that society should be understood as the sum, or the product, of all convictions that are in circulation. In fact, consensus is for Luhmann the least important and most overstated notion. His view, instead, is that society is the sum of operations, which have their own 'life' so to speak (although it is an often very short-term life), in the sense that communication often triggers other further communication. So Luhmann's real interest is in understanding what society is actually made of - or even more accurately, how society proceeds in order to 'make itself' - this, making oneself is after all the meaning of Luhmann's later chosen heading "social autopoiesis". Although, in order to be perfectly accurate, It is not (only) "society" that "makes itself", but those far more limited and short-lived instantiations of the social process that he calls social systems¹³⁷.

¹³⁷ Luhmann, N., '*Social Systems*', Stanford University Press, 1995.

The belief that underlies Habermas's work throughout his long publication history (more than half a century) is predicated on the need for a 'truth'. This fits in the (very widely shared) expectation that a theory of society has first of all to deal with being, with ontology. Luhmann, although a keen reader of Heidegger as well as Husserl during his early years, is not primarily animated by a philosophical interest in "being". Luhmann is much more interested in making (i.e. poiesis) than being. This is clear already in his 1969 iconoclastic and successful book *Legitimität durch Verfahren*, 'Legitimation by procedure'¹³⁸. In the meantime we can find authors outside the circles of autopoietic social sciences, who have moved, often unwittingly, in the same or comparable directions. This is the case of the Italian philosopher Giorgio Agamben, whose notion of *oikonomia* in *Il Regno e La Gloria*¹³⁹, one of the instalments of his *opus magnum* meantime completed *Homo Sacer*¹⁴⁰, asks precisely, though within a logic of inquiry that is genealogical or archaeological rather than systemist or evolutionist, how operations (as opposed to: truth claims, programs, doctrines, etc.) relate to being. Other perspectives on the same issue can be found in his more recent *Opus dei: A genealogy of duty*, and, as well, in Agamben's properly legal-theoretical work, *Il Sacramento del Linguaggio*.¹⁴¹

¹³⁸ Luhmann, N. '*Legitimität durch Verfahren*', Suhrkamp; Neuauflage edition (1983);

¹³⁹ Agamben, G. '*Il Regno e la Gloria. Per una Genealogia Teologica dell'Economia e del Governo*', Venezia, Neri Pozza, 2006.

¹⁴⁰ Agamben, G. '*Homo Sacer: Sovereign Power and Bare Life*', Stanford University Press, 1998.

¹⁴¹ Agamben, G. '*Il Sacramento Del Linguaggio: Archeologia del Giuramento*' Editori Laterza; 2 edition (2014).

Yet, if we look even further backward, into the tradition which Agamben understands himself as pursuing, namely, Foucault's concept of government or *governmentality*, in fact of discipline as such, we are confronted with the problematisation of operations and performances and not with philosophical explanations, meanings, intentions, etc. Even Habermas is, to some extent, a case in point here. Ironically, in the 39 years following his critique of Luhmann, his own intellectual development brought him, in many ways, and not always admittedly, progressively closer to Luhmann's proceduralism or operationalism. This is the case, for instance, of *Theory of Communicative Action* (1981 in German), and *Between Facts and Norms* (1992)¹⁴².

Luhmann set himself the goal of finding a new way of describing modern society, based not upon human persons who pursue, enjoy, spend, etc. their lives, but upon what might well be called the social machinery they put into function in the pursuit of their relationships. This appears to be rather radical to those who hear it for the first time, and presents itself very much in contrast to the all-politicising agenda and ideas, surely not exclusively of the Frankfurt School, but of the most general ways of looking at human life and society. In these conventional ways of looking at society, society is in advance considered as subjected to politics — to some power-holding agent or agencies, be they legitimately in this position or less so. To give an idea of how radical this may have seemed to the intellectuals of the time, one only needs to look into the basic positions in the field, what one might call the political topography or choreography. In a country with the immediate past that was the one of the

¹⁴² Habermas, J. *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, Polity Press; New Ed edition, (1997).

German Federal Republic during the 1960s and 70s, a country which is at the same time second to none in matters of the philosophical inquiry into the sphere of the social, it was clear that the Marx-inspired conception of the Frankfurt School, and the barely entirely de-nazified right-wing thinking that had been (if only partly) that of Martin Heidegger, had been opposite extremes — even *the* opposite extremes.¹⁴³ But when Luhmann's social systems theory had conquered some attention, many observers were suddenly doubting whether the key opposition was not rather between his work on the one hand, and Heidegger's plus the critical theorists' on the other hand.¹⁴⁴

2.2 - A Modern, Autopoietic Society.

Looking at capitalism and at Marxism, they seem today like the two sides of a Rorschach inkblot test; opposite and equal in their opposition, with the right and left sides seeing different response tendencies and interpretations. The most important difference was perhaps no longer between capital and labour, but between different ways of dealing, of coping with the new rhythms in which situations and horizons were rapidly transforming. So in a sense, the German student movement, still opposing (as e.g. at the unsuccessful 1848 revolution) revolutionaries and counter-

¹⁴³ Heidegger, M., '*An Introduction to Metaphysics*', translated by Ralph Manheim (New Haven, Yale University Press, 1987); See also Ferrari Di Pippo, A. '*The Concept of Poiesis in Heidegger's An Introduction to Metaphysics*'. In: Thinking Fundamentals, IWM Junior Visiting Fellows Conferences, Vol. 9: Vienna 2000.

¹⁴⁴ On this see for instance Thornhill, C., (2002) '*Systems Theory and Legal Theory: Luhmann, Heidegger and the False Ends of Metaphysics*'. *Radical Philosophy*, 116(Novemb), pp. 7-20.

revolutionaries got it right only with respect to the "ideas", but not with respect to the general situation, which was neither revolutionary nor reactionary, but an effect of 'evolution'.

For Luhmann, postmodernism, though critical of the promises and *grand narratives* of modernism, had itself come forward suggestions, even promises, that it could not maintain. To that extent, Luhmann argues, postmodernity is just another way of saying 'modernity'.¹⁴⁵ For postmodernists, the modern is only a non-description of its own unity, a meta-narrative that has no bearing on an accurate representation of society. But there can be no representation of a society within the new type of society in which we are existing, that can be considered as final or necessary. The structure is too complex and bears within itself convoluted structures and consequences; it is, Luhmann argues, a never-ending contingency and it cannot be schematically enclosed under the title of 'post-modernity' or under any other title. Also and importantly, there can be not one appropriate observation, but only as many representations as there are observers. Therefore, Luhmann uses the terms 'modern' and 'postmodern' sometimes interchangeably, not for reason of carelessness, but because he does not attribute to either of the two terms anything determinant as to the description of what matters in his view, which is complexity and contingency in the type of society that we know.

Luhmann does not make a secret of his view on Marxism as a description of contemporary society by referring to it as to an attempt of "raising of the dead"¹⁴⁶. This is not only a lighthearted mockery. Luhmann sees

¹⁴⁵ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998.

¹⁴⁶ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998; p. 5.

in the terminology used by Marx and Marxists a theoretical and chronological inadequacy in describing modernity through the critique of the capitalistic economic system. The term 'alienation', and furthermore the entire universe of idea of a quasi hierarchical structure dominated by Economy, "stronger", as it were, than Politics, are no longer up to date with what modern society has become.

"Social autopoiesis", Luhmann's later (post 1980) term for the way in which he considers social systems to evolve, is a word that is obtained by combining two Greek words, *autos*, self and *poiesis*, production. This, then, means literally that it is society itself that makes itself and reproduces itself – that society continuously produces the elements of which it consists. An autopoietic system reproduces each part that is part of its constitution, through the elements of which it is constituted. The first formulation of this theory comes from the work of two Chilean biologists, Humberto Maturana and Francisco Varela, who in 1972 coined the new term in order to explain the nature and the working of living systems, in particular of mono-cellular organisms, where the cell's output becomes its new input, showing thus a circular production of life. Thus, their first topic is not about society at all, but serves the understanding of mono-cellular organisms within an environment. If we apply this notion to society, then the result is a theory of modern society — and a rather complex theory to boot. The translation of *poiesis* with 'production' is likewise, perhaps, not optimal, considering that economy, both of the liberal and the marxian type, always refer to their action of making commodities available in these terms. Would "fabrication" provide a better translation? What sense does it make to say that society *fabricates itself*? On the one hand, this is quite an ineleg-

ant word to associate with society or with jurisprudence, which would be not too harmful, considering that the tendency seems to be, that the days of elegant theories of law and society are long gone, (which will become even clearer when understanding the specific way of being of modernity); yet, on the other hand, the question is whether society is "a fabrication". Or whether this making-of-oneself-by-its-own-operations really deserves the far-fetched Greek (e.g. Aristotelian) term.

At this point objections flock in already copiously. How can a mono-cellular — hence a simple — living being compares as a model of a complex society? But the point here is that of the — how should one put it? — childishness, perhaps, of believing that, because bodies are complex, cells, of which they are made, need to be simple. This would suppose that there exists only one "scale", so to say, of complexity, which is simply not the case. Another objection would question the legitimacy of transposing a device for understanding living beings to society. In fact, it may seem a somehow heavy-handed approach to reduce society to a mono-cellular organism — apart from the question whether it is only alive. We will return to this fundamental objection to Autopoiesis theory, which Jean Clam has finely attempted to explain by distinguishing between *Basal* and *derivative* autopoiesis. Before this, though, it is necessary, in the hope to start and unravel the baffling and, sometimes, mistaken information on social autopoiesis (e.g. that it is a merely biological conception that is merely glued onto question about sociology) that is around, to take a step back in order to grapple with the background concepts and experiences that have inspired this theory. As we have already seen, Luhmann distanced himself

from the Old European sociological tradition since the beginning of his work in the Sixties.

What does the lawyerly or sociological observer who, arming herself with social systems theory, looks at law and society? What is the effective change of horizon, direction, vantage point, etc., introduced by the theory? Why is it called "autopoietic"? if one starts with the second question, which is the way I would choose, one needs to pay particular attention to take it literally. People who hear "autopoietic", used on behalf of society, and who are full of unquestionable certainty that they know what "society" is — how could I not, after all, being myself part of it?! Galileo Galilei's interlocutors had been equally convinced to know what nature is, and for the same reason — often cannot resist the temptation of taking it as a mere metaphor. Simply because otherwise it would not fit into the world-view that underlies the notion that societies are organised as large multitudes into which people are born, and within which they spend their lives, under conditions that are ordered according to some independently existing (or at least projected) order, not any longer necessarily hierarchical but it is of course necessarily political. Such a world-view *excludes* taking the notion of autopoietic society, literally, or seriously, why? Because the belief in these ordering categories is, precisely, *not* thought as being part of what is continuously produced by society itself. According to a longstanding model, society was the naturally given content mirroring itself in its pre-existing organising form (=the state, from a certain date onward).

Autopoietic, society is only taken seriously, if it is understood that society is (a) a process, and (b) one that produces the elements that it consists of. There is not a form that society "finds" or "is confronted to" and which is there, outside of it. One can also summarise things by saying that society is a laboratory of processes and that there is no pre-existing plan, no goal of history, no aim of society, no design of God, but an open field of continuously happening events which are relevant for what further such

events will be about. There are people trying to find common goals and aims, related to transcendent or to immanent values. but what Luhmann finds the most specific feature of modern autopoietic society, is that society continues nonetheless, successfully, even in these circumstances.

Clearly, we have to locate the part of the luhmannian message that is the most difficult one to accept for many, in this extension, to society, of the older model, as present for instance the pioneering work of German zoologist Jakob von Uexküll ("Streifzüge durch die Umwelten von Tieren und Menschen", 1934 [there is a rather recent E. translation of this, "A Foray in the Worlds of Animals and Humans", unfortunately abandoning the word "Umwelt" in the title, which is decisive for later biological and then luhmannian social autopoiesis]), and later on in the works of Maturana, Varela, and their collaborators. By effectuating such an extension or transposition, by claiming that society is composed, not of rationally and freely self-created forms, but of systems, or more exactly system/environment differences or "membranes", does not Luhmann question the privilege of humankind, and of its notions of German *Sinn* (and English *sin*, which is as well beyond the horizon of the animal) ? Is Luhmann not disregarding the autonomy of man as a free being, as it is claimed by both theology and philosophy, by subjecting it to a social reality composed according to the strictures of self-making within an environment? In this PhD I cannot commit myself in a full discussion of these theoretically most decisive topics; let me only add that Luhmann, who clearly has a sense of the controversial character of his teaching on this point, is trying to cope with the objections by means of providing an at least partial self-defence by his doctrine of not one but two different procedures of sense-making, that of psychic systems or consciousnesses, and that of social systems. The system./environment differentiation exists of course both here and there, but involves on the side of consciousnesses no exposure to an accusation of

political incorrectness (as it does on the side of social systems and communications).

That the theory of social autopoiesis poses problems of a specific type to the philosophical community, will under these circumstances not be overly surprising. And yet, of course the theoretical model it harbours has obvious connections to, as well as deliberate disconnections with, some of the discourses of modern philosophy: moreover, it is not untypical for professional intellectuals to prefer to fly on the coat tails of more assuring or secure theories, and especially such that form part of the melting pot of traditions. In matters of society more than elsewhere, it takes courage to not promise existing right answer to modern society's problems, to indicate more fundamentally new directions. In addition, Luhmann's theory, its autopoietic claims as much as its terminology, is not easily accessible to the newcomer. Also the limitedness of predictability and control that is part of its claims is in itself a challenge. Luhmann is not even apologetic about it. The gesture of his theory is in no way provocative; yet "radical", in a certain sense of the word, it clearly is¹⁴⁷. Hence it is difficult to find them a place within the accepted philosophical tendencies and to encourage the enterprise of approaching a theory of such complexity.

2.3 - Describing Modern Society.

Luhmann's aim to *describe* modern society, as opposed to find a cure of its ills, is but one aspect of this epistemological approach to change. In one sense, in comparing his approach to other approaches to sociology, one can speak of a re-organisation, perhaps a re-foundation.

¹⁴⁷ -Moeller H. G. *'The Radical Luhmann'*, Columbia University Press (2011);

The point is not that sociologists are frequently leftists, in political terms. One's political convictions are or should be, for sociologists as well as for other people, a wholly different issue. The point is that "social" has received, by association, part of the meaning of "socialist", which is a term referring to a group of political doctrines. Luhmann used *description* as opposed to what most sociologists, in the tradition of Bourdieu or Habermas or their followers would have called critical analysis, says a popular accusation addressed to Luhmann. But this accusation, seen from a social system theory angle, involves a rather uncritical take on what the reference to "critical" should do for the sociologist. This, together with other points seems to be among the reasons why the English-speaking world has closed, or si it seems, the parenthesis on Luhmann without having ever opened it, otherwise than cursorily, instead lingering in the more comforting morality tale of neo-marxism.

Luhmann intends the theory of Autopoiesis as an alternative conception of society in order to overcome the frustrations of a philosophical exercise of which modernity had already seen many examples. This means that those who approach the theory of sociological autopoiesis expecting to see the presence of philosophical problems relating to the problems of the philosophical tradition, or as an ontological or teleological characterisation of the reality of society, are bound to be disappointed. The philosophical point is that social systems theory is not about 'being' but about 'making', that is, its approach is not 'ontological' but 'poietological'. Doing so, Luhmann takes up, however, strings from earlier moments in the history of the Social Sciences. Max Weber and Durkheim were not of the kind of some of their current successors, sociologists vying for a decently

left-looking humanist position on the political map of their days. Neither, in a certain sense, was Marx, often counted as the third "founding father" of the discipline. But the case of Weber is especially instructive. It is obvious enough that Weber had indeed a deep, highly personal commitment as the central axis of his thinking: the two lectures given at the end of his life, *Wissenschaft als Beruf*¹⁴⁸ and *Politik als Beruf*¹⁴⁹ (Science/Politics as a vocation) show the distinction he wanted to see drawn in the life of what he wished to become a modern nation such as post World War I Germany. It is very questionable whether his distinctions have been heartened by the practitioners of the science he has founded. Today what can be found is a common quasi-science of "good government", perhaps some code of political correctness of what is sometimes called the political class. This is not to say that systems theorists cannot count themselves among "humanists", or have no good reason for having a political position. Luhmann's frequent discussion partners von Foerster, Maturana e Varela are witnesses here — including in their opposition to Luhmann, as in the case of Maturana.¹⁵⁰ Maturana in fact said that human societies, involving political bonds and communities are clearly not candidates for autopoiesis - which only shows however that Maturana in political matters is a conservative thinker.¹⁵¹ Still, this is not sufficient to close the argument. One can-

¹⁴⁸ Luhmann, N. '*Wissenschaft als Beruf*' Matthes & Seitz Berlin; Auflage: 1, 2017.

¹⁴⁹ Luhmann, N., '*Politik als Beruf*', Anaconda Verlag, 2014.

¹⁵⁰ Maturana, H R. Varela, F. J. (1980). '*Autopoiesis and Cognition*'. Dordrecht: Reidel. Maturana, H. R. Varela, F. J. (1987). '*The Tree of Knowledge*'. Boston: Shambhala.

¹⁵¹ Maturana, H. R. '*Man and Society*,' in: Benseler, F./Hejl, P./Kock, W. (Eds.) '*Autopoiesis, Communication, and Society: The Theory of Autopoietic Systems in the Social Sciences*'. Frankfurt: Campus, 1980. pp 11-32. See also Fuchs, C. Hofkirchner, W., '*Autopoiesis and critical social systems theory*'. In *Autopoiesis in organization theory and practice*, ed. Rodrigo Magalhães and Ron Sanchez, 111-129.

not simply act like Foucault did who, said “I am not a structuralist, and I confess, with the appropriate chagrin, that I am not an analytic philosopher. Nobody is perfect”.¹⁵²

Seen the lack of fortune of Luhmann’s theory in the Anglo-Saxon world, there may be the temptation to postulate that autopoiesis needs to be understood within the context of German tradition which has nothing to do with an Anglo-Saxon perspective on society. Is there a basis for such assumption? Luhmann, who writes about social systems, including the legal system, has a civil law, even a Roman law law background. It is certainly legitimate to assume that this is *prima facie* opposed to the common law English tradition. What does really "German" mean?

The history of philosophical thought after the French Revolution is a history which is more German than English or than any other. There is the American pragmatism, deeply impregnated of this thought, then the analytical philosophy, English style, very different, almost an enemy. All the rest is thought-dependent from Germany. The Eighteenth Century was French, with the philosophers of Enlightenment, and the Seventeenth Century somehow even more French, Descartes or the “Nation-less” such as Spinoza and, in a sense, Leibniz. What does this mean? It is a profound question. Perhaps certain types of “*questionnements*” spring more easily on German soil, just as truffles. Does this mean that truffles are intrinsically German? Very possibly not, and very possibly those philosophical questions cannot be “typically German” either. Still, the diplomacy of sympathies speaks a different language, which needs to be taken seriously, as this sympathy has an influence on the philosophical discussion.

¹⁵² Foucault M. “*Sexuality and Solitude*” Lecture given at New York University 1980 Published in ‘*Dits et Ecrits*’, 1994, Gallimard. (in English in the text).

Luhmann himself shows a clear consciousness of what might appear, and has appeared as questionable from outside observers of German culture, one can say that he "factors in" the wide-spread anti-German affection. More importantly, he has early in his life as a social scientist left behind the German philosophical thought of Kant, Hegel, Heidegger as well as the typically German approaches to matters sociological. Right from the start, Luhmann unquestionably locates himself in the post World War II tradition of English-speaking Sociology. Also, on the level of primary empirical material, he approaches society not as represented first of all, let alone naturally, by German society; he was very much aware of a globalised society and in doing so he often speaks of legal issues that are of global interest such as Human Rights and of creation of the English legal system such as Equity¹⁵³.

2.4 - Contingency and Justice.

Certainly philosophers know and have dealt with contingency or related notions from Aristotle onwards, at the latest. Contingency as observed by Luhmann in a postmodern discourse, though, seems to be some sort of King Midas gold of modernity. Luhmann's sociological use of this classical philosophical notion that – together with, but even more prominently than, the notion of 'possibility' – constitutes the door through which modernity entered the tradition, transforming the use of philosophical notions and of their archive. By saying this, I am not claiming that Luhmann's social-theoretical work, integrally based upon the notion of contin-

¹⁵³ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008; Se also Luhmann, N. '*Die Weltgesellschaft*', published in *Soziologische Aufklärung*, vol.I (1971).

gency as it is, limits his own use to one configuration only. The sociology of modernity with its inherent dependency on contingent relations is one thing; the Luhmannian notion of *Kontingenzformel*, which relates to function systems coping with contingency on the basis of a formalised way of managing contingency, is slightly different. Luhmann is the first to confront the philosophical rationality and to challenge its pretence to exercise a theo-politically defined hegemony over the interpretation of the social being. If there is such a thing as a common-sensical essence of Luhmann's contingency-based theory of modern society, it might be formulated in a maxim such as "looking more and judging or criticising less". If most generally what happens in society happens between systems and their environments, then attempts to self-limitation, or more generally, to reduction of complexity, appear as being the obvious general direction that follows. Using again the legal system as a prime example, for my purposes, the element of contingency is represented by justice. Justice is a postulate. It is not "guaranteed" by the presence of a legal order or the internal operations of the system *prima facie* observing how the system works. represents the heterarchy and circularity of the legal operations.

If the basic orientation entrusts upon contingency the single one most distinctive feature of modern society, the modalities of governing/steering/managing a function system pose problems of a different or at least more specific type. "When one is in the inside", under the need of dealing with a specific situation, how does one proceed? Coming back to "Justice", it is well known that the Western legal philosophical tradition has for a long time been gloriously grandiloquent and confidently promising enough to say that its legal order is able to cater for the expectation of

making decisions that are "just". Legal modernity has broken with this optimism. Justice is not for professional lawyers, says Hans Kelsen, for instance, in a famous article¹⁵⁴. Modern positivists dismiss the very notion that the reference to *justice* could harbour anything helpful for the running of the legal order. This is the point at which Niklas Luhmann contradicts the luminaries of legal positivism — naturally without falling back to the anterior full trust in the realisability of Justice. But Luhmann's conception of function systems comes complete with a claim of involving an employment for the concept of justice right within the legal order. This employment is that of what he calls the contingency formula of the legal system. This needs to be distinguished, very clearly indeed, from the account of the basic positions and agencies in the systems theoretical explanation of modern society. Justice is for Luhmann not a sub-system of the legal system, and does of course not pertain to the system's environment. But neither is it located in the medium or the code of the legal system. Rather it holds the weakest of roles, and it answers to an aporetic situation modern society knows exceedingly well: the absence of integrating finalities as could be found in pre-modern societies has led to a scarcity of means of selection and preferences, and most of all of their justification. There is in other words a blockage of decision-potential, caused by an overflow of un-masterable contingency, and, resulting from it, a decline of the arsenal of means of establishing preferences, where everything tends to become equally probable and equally approvable. Derrida, a philosopher rather than a system thinker, has devoted to the issue a widely received newspaper article, not about law, if indeed about Europe, under the title "*The other*

¹⁵⁴ Kelsen H. *What is justice?: Justice, Law, and Politics in the Mirror of Science: Collected Essays* Berkely: University of California Press, 1957.

Heading"¹⁵⁵. Even if Derrida writes about the "other heading", that notion of a heading is instructive for the understanding of what Luhmann tries to achieve by means of the contingency formula Justice. The concrete parameters of legal decision-making, including factors related to repetition, if also to process, time, social life. Luhmann tries to "formulate" the contingency of legal decision-making limiting — though not discarding — the problem of a contingent justice, a justice that disappoints expectations; that justice needs to disappoint (some) expectations, goes without saying and is of the essence — but the notion of the contingency formula Justice proves that system theory view point is already navigating in another ocean than that of the philosophers who — following a famous claim going back to Plato, wish to accredit the belief that everything about the polis would be all right, if only them, the philosophers, were allowed to rule it as its Kings.

In various ambits of human research, from art to science, there has always been the need to find new ways of describing changing times. This goes far further back than the birth of evolutionary thinking, but since far more than a century now evolution can no longer be eluded in the study of nature. That is a major discontinuity with respect to the Old European tradition, and its largely a-temporal categories, appropriate to a simpler, God based or sovereignty based, type of society. Societies have become early recognition devices for evolutionary innovations. After a first, misguided and deservedly discredited individualist attempt of "social Darwinism" about a century ago, the Darwinian language is back in connection with social systems theory, its underlying ambition (the reduction of complexity)

¹⁵⁵ Derrida, J., *The other Heading: Reflections on Today's Europe (Studies in Continental Thought)* Indiana University Press, 1992;

being closely related to the issue of adaptation, which effectively constitutes a decisive point in relation to Luhmann, and to the theory of autopoietic social systems. Adaptation as applied, not to the individual but to society. One of the great problems of collective ways of existence today is the (incidentally, barely luhmannian) one of connecting the individual and human kind — of overcoming the multiple double-binds, aporias and blockages that impair the connections of what is collectively preferred to an individual person's decisions. It is difficult to imagine a sustainable world that would not succeed in solving these problems (which are in the last resort, problems of adaptation); however, and in a sense unsurprisingly, there is little headway made.

Adaptation, in a luhmannian angle, is the paradigmatic term for the relationship between social systems and their environments. According to the darwinian doctrine, successful adaptation can be only distinguished after the fact. How to adapt to a future evolution, cannot be known, it can only guessed, expected, and be a matter of betting. In fact, "System Theory treats variation and selection as 'sub-dynamics of the complex system.'"¹⁵⁶ Imposing to commit or omit certain actions from others would suppose a knowledge of future evolutions, but "[w]here autopoietic systems are involved, evolution can therefore not be understood as a mere meeting of particulars, where what already exists enables something to be added that could not have been done without this precondition."¹⁵⁷ God's

¹⁵⁶ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p.262 quoting Leydesdorff, L. 'New Models of Technological Change: New Theory for Technology Studies', in *Evolutionary Economics and Chaos Theory: New Directions in Technology Studies*, Ed. Id. And Peter van den Besselaar, London 1994, 180-192, p.180.

¹⁵⁷ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p.n 266.

universal knowledge including the knowledge of events yet to happen was an important branch of early modern theology, for instance in Gregory of Rimini and John of Ripa¹⁵⁸. Nothing of the sort is available to us today. The problem for us, today, is the tendency to exaggerate, to misinterpret, expectations as knowledge. Only with respect to past evolution, a discourse of adaptation can unfold its — limited — explanatory virtues.

Wishful thinking, based on or masked as moral discourse is still around today, especially in the media, and the political and legal discourses they cater for. The idea of a neat set of moral rules, be it as a supplement to the positivistic idea of the search for unity, has its strongest proponents among the advocates of a marriage of law and morals: “the endeavour to make morals and law coincide will be an important future goal.”¹⁵⁹ That ethics continue to play their role and remain deeply rooted in the functioning of psychic systems is, including from Luhmann's vantage point, not a controversial point. The theory of social autopoiesis does not suggest that where ethics-grounded thinking had been decisive, social systems based thinking should replace it. Rather, an unfolding of the understanding of social systems can allow to draw better distinctions between the best ways of distributing both.¹⁶⁰

As already explained, people are observers, nevertheless, they are observing systems, posited in the system's environment. On the cognitive level, social systems theory is predicated on the notion of observa-

¹⁵⁸ On this see for instance Elliott, M. W. *Providence Perceived: Divine Action from a Human Point of View*, Walter de Gruyter GmbH & Co KG 2015, p. 123 and ff.

¹⁵⁹ In the words of the American scholar early 20th century scholar Pound, R. *The Spirit of the Common Law*, HardPress Publishing, 2013.

¹⁶⁰ Cf. Luhmann, N. *Paradigm Lost: Über die ethische Reflexion der Moral*, Frankfurt am Main 1990.

tion, and on the strong and necessary emphasis on the claim that observers are themselves being observed - that there is no such thing as absolute knowledge — which would be the knowledge of an unobserved observer. Only when things become difficult, one has the occasion to indicate explicitly the conditions under which one has regard or disregard. This means that there is an empirical limit in the area of morals and therefore it cannot possibly be defined as values or norms with a range of application. This has the uniqueness of increasing delays in relation to the attempts of defining the specific nature of morals (as opposed to law) of rules at level of norms and values. Therefore, this new conception of morals can be defined as self perceived¹⁶¹.

Habermas famously diagnosed Luhmann's theoretical publications before 1970, speaking of "Sozialtechnologie".¹⁶² Today, one needs to contextualise this attack. The Federal Republic was shaken by the opposition between the progressive, largely Marx-inspired (Western branch) student movement and the generation of their parents, heavily compromised by their earlier nazism (or nazi-"compatibility", barely less criticisable). Luhmann's work from the 1960s,¹⁶³ was, in 1970, a rare and early bird among the potential objects of critical Frankfurt School criticism: for the first time, Habermas turned against a modern or indeed modernist target. Social sys-

¹⁶¹ Luhmann, N. *'Paradigm lost: Über die ethische Reflexion der Moral'* Suhrkamp, Frankfurt am Main, 1990;

¹⁶² Habermas, J., Luhmann, N, *Theorie der Gesellschaft oder Sozialtechnologie: Was leistet die Systemforschung?*, Frankfurt am Main (Suhrkamp), 1970.

¹⁶³ These included: Luhmann, N., *'Funktionen und Folgen formaler Organisation'* (1964), Duncker & Humblot GmbH 2005; *'Grundrechte als Institution'* (1965), Duncker & Humblot, 1974; *'Zweckbegriff und Systemrationalität'* Tübingen, J.C.B. Mohr – Paul Siebeck, (1968); *'Vertrauen - ein Mechanismus der Reduktion sozialer Komplexität'* (1968), UTB GmbH 2014; *'Legitimation durch Verfahren'* (1969), Suhrkamp, 1983.

tem theory carried, in his view, the stigmata, not only of creating problems of its own — which is the case of every suggested mode of problem-solving — but of disturbing, by its neo-cybernetic or at least quasi-cybernetic suggestions, by its highlighting of the complexity/reduction of complexity paradigm, nothing less important than the young democracy of post-war Western Germany. What was at stake here is Habermas's (and many others') progressive conviction that Philosophy, the Social Sciences (Marx, Durkheim, Weber), but most of all Politics (Western model), each of them understood according to the very same old-European tradition that had been brutally interrupted by Nazism, should be considered as the pillars of any new (Western) German public entity; the strong normative commitment here goes without saying; Luhmann's clear sense that the FRG of the 1960s was as unlikely to obey the best opinions of the best opinion-holders, and as likely to follow its own dispositions and propensities, as any other social organisation, as well.

Luhmann started to develop his theory not as a philosophical exercise, but as an alternative way of approaching the object society, a way intended to save sociology from the frustrations provided by some of its tradition(s) — from the frustration, first of all, of the democratically incurred end of democracy in Germany around 1930. Yet, at the same time — and this is part of what I would like to put forward here, as my thesis — there are some rather conspicuous encounters and parallels between certain claims and arguments, featuring in works that Niklas Luhmann has published thirty or forty years ago, and contemporary, early 21st century evolutions, most especially of philosophical discourses, today that are, looking at their genealogy, *a priori* unrelated to systems theory in general, and to

Luhmann in particular. Roughly, I would like to draw attention to some of these encounters and parallels and describe the underlying problems within the context of the evolution of the reception of Luhmann. Secondly, I would like to approach a recent contribution to the theory of social autopoiesis – the distinction between two types of social autopoiesis, basal and derivative, the finely tuned critique of Luhmann, which is found in the book *Kontingenz, Paradox, Nur-Vollzug* (2004) by French sociologist Jean Clam – a contribution which offers both a cutting-edge critique and a theoretically fruitful improvement of the theory.

The most shared and most traditional criticism addressed to Luhmann is that he departs from the 'eternal truth', purportedly indispensable and, in any case, shared by mediatised common sense as much as by politicised social theory, that society is correctly conceived of as a collection of coexisting individuals or collectives. The first question here is that of the time-related character of claims as to politics and society. There is a vast philosophical prehistory to it — and a fascinating width of view-points, between the Greek-Sicilian pre-socratic philosopher Parmenides (early 5th century BC), who (or: the Goddess whose teaching Parmenides notes) tells us that that which is, is necessarily perfect and unchangeable, and the doctrine that "everything that happens, happens now" (Luhmann).¹⁶⁴ For the first, everything decisive has happened before, for the second, nothing decisive happened before, decisive is only that which is now in the making. Furthermore, pre-Luhmannian elaborations upon society and related topics have always, unwaveringly, rested their case on society's members as representing the substance of the social.

¹⁶⁴ Luhmann, N., *Schriften zur Pädagogik*, D. Lenzen (ed.), Frankfurt am Main, Suhrkamp, 2004, p.149.

Through the gate of these popular, common, and plausible-looking assumptions, the entire traffic of ideologies and beliefs about the nature and potential to be attributed to mankind and individuality had entered right inside the social sciences, precluding more ambitious ways of understanding society. Since modernity rejected the notion of hierarchical structures based on theological assumptions, it is well-known that "man", mostly the individual, took centre stage. But the individual was made by German Idealism into a *Weltverhältnis*, a unique world-relation,¹⁶⁵ whereas, if one bases one's account upon the rationale of system and environment, it is impossible to conceive of society on the basis of such a all-deciding "hot-line"-conversation between an idealised individual and a no less idealised universe, figuring as a microcosm and a macrocosm respectively.¹⁶⁶

In order to deliver what, he suggests, explaining society under the conditions of modern society entails, Luhmann redefines it in terms of self-reproducing or self-producing units (which later on he will call systems). By doing so he commits himself to a two front situation. On the one hand, although he is deeply uninterested in any enterprise of the sort "critique of ideology", he emancipates the effort of sociological sense-making from suggestions based on human nature, on religious (or secular) beliefs, of world pictures and world views. On the other hand, he suspects that the study of *human behaviour* is less helpful than it is often assumed. Why at all consider systems rather than people as constitutive elements of society? It is important to look carefully at the specific problem Luhmann is facing here. He understands modern society, not as a court-room, a forum or

¹⁶⁵Luhmann, N. *'Ecological Communication'*, Polity Press, Cambridge, 1989 p. 212.

¹⁶⁶ Luhmann, N., *'Schriften zur Pädagogik'*, D. Lenzen (ed.), Frankfurt am Main, Suhrkamp, 2004; esp. pp. 159-208

a mooting session, where opposing claims are fought out, but as an immense accumulation of difficulties, deadlocks, and double-binds, piling up, together with the equally vast amount of ingenious enterprises of circumventing them, both of which are subject to an exponential growth that is increasingly difficult to manage or handle.

Traditional theories, especially if they follow sophist Protagoras's maxim that it is the human being which must be understood as the measure of all things, cannot explain the ever increasing complexity that characterises societal modernity, let alone even start to handle it. It is somehow tempting, in this connection, to introduce an element of Luhmann's biography. Though well-versed in Roman law and, as well, in ancient philosophy (cf. his frequent references to Aristotle, especially to the latter's *Politics*), the primary differential feature of his work is neither about wisdom (as it is the case of philosophers), nor about power (as it is the case of - modern - politicians), nor about life (again: philosophers, later to be replaced by more empirical sciences such as medicine or biology): It is, instead, about households,, their conditions of continuation, their governance, their management, and it might well be that Luhmann's only time outside of the academic setting, as a functionary in the administration of one of the German *Länder*, has left its marks in this emerging preferential interest. Luhmann is a theorist of management, and his problems are decision-related problems.

This criticism is often levelled against his work, and to some extent, this plays even an important role in Habermas's criticism of Luhmann's supposed penchant for "social technology". Now there is no question that a manager's approach involves its own perspective. A manager is involved

in society in a different way than a politician. He sees it as a continuing enterprise, and his focus is less in governing society than in running society. But the question is rather about the reasons why "running", rather than governing society has become more and more important these days? Rather than criticising, rather or at least before condemning it, one has to understand this. For starters, if you take deadlocks and decision problems seriously, then people's convictions, opinions, identifications are no longer what is decisive. A crisis, for instance, is never produced by convictions, but always by consequences, by complexity.

This is why Luhmann distinguishes between people as conscious systems and society as composed by communicating systems (economy, law, science, politics etc). He also teaches that conscious systems constitute the *environment* of communicating systems – that human beings constitute the environment of society. As shocking as this may sound, it needs to be understood that what autopoiesis centres upon is the 'operation', the performance itself of the system, and not the question of who imposes his will, even if the latter has, for time immemorial, determined the outlook on society (which, we might say, had given rise to a politically motivated outlook). Systems theory gives a systematic preference to the "how"-question over the "what"-question, and to the "what"-question over the "who"-question. The individual is still important for society, but now as part of its environment, or more exactly as a condition: because it allows communication (thereby: society) to *take place*. As a bearer of a proper name, the individual functions, in a systems-theory perspective on society, as an *address*.¹⁶⁷

¹⁶⁷ Luhmann, N. '*Die soziale Adresse und die Person* (ms. accessible through <https://www.degruyter.com/.../books/.../9783839401637-001.xml>

Going back to Luhmann and to his own formulation of this operationally conceived society, it is important to note in his latest discussion, the 1997 published *Die Gesellschaft der Gesellschaft*, the step he suggests is of short-circuiting operation and structure. Operation equals structure, which refers to a radical step, maybe one can say, to the effort of providing his sociological and social-theoretical results with a philosophically formulated conclusion.

‘Empirical events’ and ‘compassing structures’ constitute the two extremes between which the theory of society as evolved, for the entire, relatively short time (in terms of the evolution of the sciences) of its existence). The claim that both are aspects of one identical reality looks, on a first gaze, as something that is not far from the proverbial squaring of the circle. As Luhmann explains: “Social systems practice a circular self-referential relation between operation and structure. They generate structures by their operations. Hence, for the operation there is never a beginning, because the system must always be able to reproduce its operations from its own products and also there is no end because every other operation is produced in view of further operations. Only an observer can ascertain a beginning and an end if he has a suitable rational construction of an earlier and a later state. The system has operated only if it has built up enough complexity to be able to describe itself in the time dimension. The idea of a *before* is a myth made in the system or in the story of the observer.”¹⁶⁸

This fast and somehow uncompromising style of Luhmann has confronted many people, including close collaborators, with problems. Gunter Teubner has, in 1988, in *Hypercycle in Law and Organisation: the Re-*

¹⁶⁸ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p.265.

*lationship Between Self-observation, Self-constitution and Autopoiesis*¹⁶⁹, given a detailed analysis of autopoiesis, starting from the two Chilean biologists Roberto Maturana and Francisco Varela, who had brought out the concept of autopoiesis applied to mono-cellular organisms. Teubner criticises Luhmann's inflexible application of the autopoiesis to social systems. He attempts to find a technique of 'shifting', of "gradualising", between non-autopoietic and autopoietic, between things and systems, between the ontological and the 'poietical', between being and operation, in order to establish a passage, a continuity between the mode of being of things and the mode of being of autopoietic systems. Luhmann's, counter-suggestion is "all or nothing", of "inflexible rigidity", that is, either systems are autopoietic or they are not autopoietic, in the same way in which there is also a rigid difference between living and non-living matter. Teubner instead proposes to use the term 'hypercycle' to indicate autopoiesis as a concept that focuses on *gradually emerging* realities.

Teubner, on the other hand, argues that 1- social subsystems, better known as function systems, start their operations and constitute their components by enriching them with degrees of self-reference; in so doing, they become gradually autonomous; and 2- only once the subsystem's components have achieved the state of interlinking into a hypercycle, then and only then they start becoming autopoietic. It would be an exaggeration, however, to say the least, to claim that Teubner was successful in convincing Luhmann. In *Die Gesellschaft der Gesellschaft*, he insists that there is no question that a system is "half", or "a little" autopoietic, any

¹⁶⁹ Teubner, G. 'Hypercycle in Law and Organisation: the Relationship Between Self-observation, Self-constitution and Autopoiesis', *European Yearbook in the Sociology of Law* (1988), pp. 43 and ff.

more than of a being that is “half” or “a little” alive, that the concept of autopoiesis itself requires this ‘uncompromising hardness’¹⁷⁰, etc. Now this is, no doubt, a fascinating topic for a controversy, not only — as one might be tempted to judge at first sight — as an academic dispute between two professorial conceptions, but also, decisively, as to the question of how to understand self-reference and autopoiesis. I am turning to a more recent interpreter and critic of Luhmann, French sociologist (and psychoanalyst) Jean Clam, whose distinction between autopoiesis basal and autopoiesis derivative might well function as a decisive enabling device.

In one of his two German-written contributions to sociological systems theory,¹⁷¹ Clam shows how Luhmann has omitted to recognise and integrate an important distinction, or rather: to take account of a game-changing non-coincidence. The identity of basal and derivative autopoiesis, which Luhmann, according to Clam, supposes continuously, if silently, overstates the case of systemic autopoiesis, that is to say, of the autopoietic systems of society: law, economy, politics, science. Heeding this non-coincidence, what becomes obvious is the fact that social and legal autopoiesis remains “improbable”, that there is nothing much in common between the autopoiesis of life according to Maturana, and social autopoiesis according to Luhmann. This is based on the observation that nothing “naturally” precludes the spectre of law’s becoming non-autopoietic again. In Luhmann’s own non-distinction of both types of autopoiesis

¹⁷⁰Luhmann, N. *‘Die Gesellschaft der Gesellschaft’* Frankfurt am Main Suhrkamp, 1997; p. 440. My translation.

¹⁷¹ Clam, J. *‘Kontingenz, Paradox, Nur-Vollzug’*, Konstanz (UVK) 2004. [“Nur-Vollzug”= mere execution]. See also Jean Clam, J. *‘Was heisst, sich an Differenz statt and Identität orientieren? Zur De-ontologisierung’* in *Philosophie und Sozialwissenschaft*, UVK; Auflage: 1, (2002); What it means to take one’s orientation from difference rather than from identity.

this much less robust status of the autopoiesis of the differentiated functional systems of society, remains somehow obscured. What is it that Clam calls *basal* autopoiesis and *derivative* autopoiesis?

Schematically, there is the following difference within the total realm of what Clam calls the inaugural structure of autopoiesis. In the case of basal autopoiesis, autopoiesis simply *cannot be avoided* as it constitutes a *conditio sine qua non*. Biologically, life is autopoietic in the sense that the distinction between system and environment (a membrane, mostly) puts itself into place, and if it fails to do so, life does not happen, does simply not emerge, or ceases. But of communication, the same is true. Communication is, like life, basal autopoiesis. Communication happens, schematising Clam's account, whenever two conscious systems, two "persons" in everyday language, dream to get "involved" with each other. For instance, they would like to understand each other. Whether or not they will have succeeded in "understanding" each other is for each of them (or indeed an external observer) to judge. But what does happen, necessarily, indispensably, always, is this: they will have communicated. Like life, communication is therefore a case of basal autopoiesis. Basal autopoiesis is an autopoiesis *in natura rerum*. Its autopoietic character results directly from its operations. Communication takes place autopoietically, on the basis of an existing impossibility: in the case of communication, the impossibility of two consciousnesses to allow to engage with each other. Once again, whether or not they succeed in, e.g. becoming transparent to each other, is another matter; they might or not. Maybe also the problem is not posed in a way that allows to allow a clear answer. In short, people communicating may well not succeed in becoming transparent to each other. But, be

this as it might, by trying to, they produce communication. Clam speaks of basal autopoiesis as happening in the mode of 'despite and therefore'. That is to say, it happens *despite* the fact that consciousnesses cannot fuse, or penetrate into each other, but it also happens 'therefore', namely because communication happens whenever this attempt is launched. In a more humanist idiom, we might also say: communication happens whenever we make an attempt of this sort, an attempt of speaking to each other¹⁷².

Derivative autopoiesis is, on the contrary, not covered by such a *conditio sine qua non* character. As I have just shown, there is no life without biological autopoiesis, there is no communication without communicational autopoiesis. But what function system specific communications, what about law, economy, politics?¹⁷³ Has there ever been such a thing as non-autopoietic economy, non-autopoietic politics, non-autopoietic law? The answer is: absolutely yes. It is clear that the largest part of Western legal history has been a history of non-autopoietic law. By far most episodes of European legal history show a legal order that continues, even thrives without the necessity of this cyclical constitution that defines self-reference and auto-poiesis als forms of reflexivity. In Clam's categories, therefore, legal autopoiesis is a case of merely derivative autopoiesis, because there is no inherent necessity that legal autopoiesis happens, as life or communication do. Based on a lot of institutional art and action, modern legal orders have developed the schematic question: "lawful/unlawful". As Luhmann's readers will remember, according to Luhmann, any legal com-

¹⁷² Clam, J. '*Kontingenz, Paradox, Nur-Vollzug*', Konstanz (UVK) 2004, p. 149 and ff.

¹⁷³ Clam, J. '*Kontingenz, Paradox, Nur-Vollzug*', Konstanz (UVK) 2004, p.158.

munication whatsoever is an answer or a contribution to the solution of this question: lawful?/unlawful?, about which any legal decision will ultimately decide. But nothing, apart from a finely tuned framework of legal procedure, prevents law that fails to follow this outline, to still be law. In fact, most law we know – all law outside of modern society – is not autopoietic. Autopoietic law needs to be put into circuit artfully as it were. It is eminently “avoidable”.

By distinguishing a natural autopoietic level and an artificial one, Clam uncovers an oversight by Luhmann, who had not made this distinction.¹⁷⁴ Thereby Clam downgrades a certain misplaced and unjustifiable optimism within the theory of autopoiesis and brings the autopoiesis of the functionally differentiated systems of society into a different, downgraded or ‘weakened’ level, adding, at the same time, a third voice to the Teubner-Luhmann debate.

When Hegel rethinks political history on new basis (between 1800 and 1830) immediately two groups of thinkers were born (between 1830 and 1870, with the centre in 1848, were the years of politics’ great historical moment, in Germany but not exclusively there, also in Italy, for instance). One group, the “right wing Hegelians” wanted to sum their conclusions on Hegelian knowledge in relation to historical reason as integrated in the political evolution and invented a conception of politics, whose centre is the theory of state. For them the State is the main thing. This theory goes from the XIX to the XX century up to Leo Strauss, who thinks he has found the

¹⁷⁴ It should be noted, however, that Luhmann, without allowing the distinction the same decisive standing as Clam, distinguishes biological psychic and social systems as featuring a "mode of operation and reproduction (life, consciousness, communication) that is autonomous by its own nature." [Ihr Operations- und Reproduktionsmodus (Leben bzw. Bewußtsein bzw. Kommunikation) ist aus seiner Natur heraus autonom] Cf. Niklas Luhmann, *Schriften zur Pädagogik*, D. Lenzen (ed.), Frankfurt am Main, Suhrkamp, 2004, p.53.

Prussian state as an ultimate figure of political history, in the figure of the US – here the authors of “post-history” have their roots. The others want to continue, and even push beyond itself the Hegelian gesture. These others are the left-wing Hegelians, the Linkshegelianer or Junghegelianer, Bruno Bauer and Karl Marx, and all the Marxists (but not the Nietzschean left wing with Gilles Deleuze and the situationists such as Guy Debord, for instance).

With this in mind, the distinction made by Jean Clam of the two types of autopoiesis shows Luhmann in a light a new species of *Rechtshgelianer* – this time not based on the concept of State, but on the concept of autopoiesis, as an embodiment of reason in history. The old Hegelian right wing statisticians had made too many promises about the State. The new right wing Hegelians, the systemists, make too many promises about the autopoiesis. Certainly, the protagonist candidate of the left wing Hegelians, the proletariat, has been very far from proving its proofs.

One point to make is that Luhmann’s conception of society admits only operations as building blocks. This is the case of everything that touches the underlying idea of the theory of social autopoiesis, or, in other words, the conception of society itself, made up by small “events” (or “operations”). The operation is for Luhmann the atom of social autopoiesis. For sociologists, there is a *caveat* in order here. ‘Operation’ in Luhmann by no means equals ‘action’. For Luhmann, society is the result of operations, namely communications. Both action and operation make some type of a difference, but the difference a communication makes is a mere result, it is not at all necessarily that which had been intended by one or the other “party to the communication” (for instance in the case of a contract, the

one or the other party). Jean Clam takes full account of this lesson. His term '*nur-Vollzug*' ('mere-execution') indicates that all the attention is placed exclusively in the performance. Clam speaks of mere-execution as an instantiation of post-ontology. Clam, who has also published a study on Heidegger and Luhmann, investigates the post-ontological, and by doing so, brings Luhmann's social autopoiesis and certain philosophical stands of thought into a closer connection.

2.5 - What is a System?

What does Luhmann intend with the term 'system'? The word is perhaps what is the most misleading feature of his entire social theory. This is especially true of the term's earlier history, especially its German philosophical history in and after Hegel.¹⁷⁵ There, the term had a totally different set of meanings and contexts of use, it referred, first of all, to an ordered set of explanations, such as "system of philosophy", "system of science", etc., rather to any empirical reality. Neither had this been unknown to Luhmann, who eventually would receive the Hegel-prize, but in his view, there were little alternatives, if what one is looking for is a term of the required width of application and of the required precision, especially a degree of abstraction that makes the relation system/environment meaningful. The price to be paid is that, owing to its polysemy, it can easily warrant different understandings and consequently also lead to illusory convictions. Within the paradigm change operated by Luhmann, one could even distinguish two equally paradigmatic ingredients, the social system, and

¹⁷⁵ On this, see the useful site <http://wiki.hegel-system.de/index.php?title=Rechtshegelismus> providing the main sources especially of the "state"-oriented branch among Hegel's followers, through the writing of the Hegel-pupils Karl Eduard Erdmann und Karl Ludwig Michelet. (Last accessed 2 June 2018)

the autopoietic system. In fact, this is the paradigm *par excellence* in this ambit, because it shows the essence of the shift in the paradigm of sociology. Pulling out of the conception of society conceived as a group of human beings subject to the long reign of its sovereign authorities, society is now no longer a hierarchical architecture of power-relations, but the outcome of the communications of social systems. Thus, the theory of social systems importantly refrains from claiming to offer "the whole truth". Human beings, who are conditions for the functioning of social systems, are also the site at which the other sense/meaning-processing agencies, consciousnesses fulfil their missions. In fact, Luhmann says that society is possible because of systems and not of people because he sees consequentially, that what constitutes society is communication, not consciousnesses. Yet, it is important not to forget that, if human beings are thrown out of the picture outright, in the sense that the emerging order of social systems no longer required to take them into account (otherwise than as an external *conditio sine qua non*, but of those, there are many), they are perfectly admitted as sites of consciousness. With consciousness/consciousnesses, we are entering a different level, a different paradigm. There is no bridge reconnecting psychic systems and social systems.

Luhmann thus can be said to redefine modern society in terms of systems and events, but he does not claim that modern society rules over modern humans, persons or individuals. Society is the inclusive social system and as such the product of communication, but it is only socially inclusive. In this sense not only Luhmann emancipated the effort of sociological sense-making from any suggestions based on human nature, religious beliefs, or secular ideologies; he is also the thinker of simultaneous

series without an overarching 'cause'. Nevertheless Luhmann considers human behaviour as the most powerful source of systemic behaviour. This has been put into doubt by King¹⁷⁶, who considers the study of human behaviour less helpful than it is often assumed. Not human behaviour, not "people", but systems are the constitutive elements of society. Sociological insight is increased, as it were, by the cunning decision of sidestepping traditional humanist theories which cannot explain the ever increasing complexity that characterises modernity.

A distinction between 'people as conscious systems – in short: human individuals - and society as communicating systems', where conscious systems constitute the *environment* of communicating systems, now replaces their earlier identification. As shocking as this 'outsourcing' of humans outside society may sound, it needs to be understood that what autopoiesis centres upon is the 'operation', the performance itself of the system, and not who or what operates or performs. Therefore the individual is important insofar as it allows communication to take place. Also, by being placed into the environment as an observer, it offers second order observation of the operations of the system, or, to put it more simply, a series of perspectives on what goes on within each social system.

A human centred method has been the basis of every theory of society that we find in the relevant epistemic tradition. From antiquity, with Protagoras's idea that man is the measure of all things and with Plato's Republic, where the *polis* is defined as a group of people, to early modernity with Hobbes and Rousseau's theories of "social contract", to late modernity with Bentham's utilitarianism, Rawls's consensus theory of fairness and

¹⁷⁶ King, M. '*Systems not People Make Society Happen*'. Holcombe Publishing, 2009.

Habermas's consensus theory of communicative action. The one thing all these views have in common is to offer what needs to be called an anthropocentric theory of society and tend to be epistemologically optimistic. Even Marshall McLuhan's non-traditional media-sociological conception of the "global village" shares certain characters of anthropocentrism. With society's complexity continuing to increase, to increase exponentially, a tendency to look at it and its problems from a view-point that is not understanding social reality as a mere stage setting for humankind, emerged.

The exclusion of human beings from society is partially a theoretical *escamotage*, as certainly Luhmann does not underestimate the need of human beings in the workings of society, but gives people a role of the observer of society's communication, which could not happen other than through human beings. It is in fact communication that constitute society, not people in Luhmann's revolutionary view. However, Luhmann was also under the need of coming up with compassing notion capable to capture what constitutes everyday matters of standard observation. Society, in other words, needed to be counter-opposed to visible social activity. This is what has given rise to the concept of interaction. Interaction is a simple "societal episode"; the decisive point is the simultaneous presence, or the presence of each other, of those who participate in it. The choice of the term 'episode' involves the idea of time and shows already one of the differences between the ideas of episode/interaction and society.

The concept of interactions comes complete with the idea of finding its point of gravity in itself, unrelated to a temporal dimension. Interactions are in this sense transitory, while societies continue, largely because they are agents of modification by giving rise to ways of dealing with them, as

previously mentioned. With the advent of modernity and the overcoming of the old European semantics, the widespread notion that the sphere of the social consisted entirely of "interaction"-type encounters according had lost its plausibility. Society, in modernity, does not 'happen', in specific especially significant interactions. Modern society is taking place at several levels at once. Of course, interactions still occur: the difference is that from the beginning of modernity onwards society evolves self-referentially.¹⁷⁷ Society therefore cannot be conceived as constituted by human beings, as, noted Luhmann, the weight of society does not coincide with the totality of human beings, or with the occurrence of births and deaths.¹⁷⁸ As an example, court cases, legislation and all the legal communication that involves all aspects of the legal system have been continued for centuries, during which Judges, lawyers and legislators have lived, contributed and died, without, for this reason, interrupting the legal communication. And the same can be said of the political system and all other function systems. From a very different background, the medievalist historian Kantorowicz can here offer precious insights dealing with the "King's two bodies". Kings die, but the monarchy does not; Prime Ministers can succeed to each other, without the political system stopping from functioning. In other words, communication does not stop because human beings cease to be¹⁷⁹.

This non-coincidence of the individual and society, it was already said in the mid eighteenth century, constitutes the main entry under "human

¹⁷⁷ Luhmann, N. *'Social Systems'*, 1996, Stanford University Press, p. 407.

¹⁷⁸ Luhmann, N. *'Die Gesellschaft Der Gesellschaft'* in Moeller, H.G. *'Luhmann Explained. From Souls to System'*, Chicago, Open Court, 2006, p. 231.

¹⁷⁹ Kantorowicz, E., *'The King's Two Bodies: A Study in Medieval Political Theology'*, Princeton University Press, 1997.

individuality".¹⁸⁰ This issue will have a bearing in the change that will see society reject hierarchy and stratification and instead taking the direction of what towards horizontal differentiation, 'heterarchy' to name it with a term developed, first in the context of cognitive structures linked to the human brain (Warren McCulloch, 1952) and, linked to it through the achievement and continuation of functional differentiation. In the differentiation between system and environment, the consciousness of the individual has only a place in the environment, as it is not part of society. Individual consciousness is part of the ecological conditions and has the role of irritating the system by being structurally coupled with the autopoietic societal system. This coupling, which can happen by using language as a device,¹⁸¹ is the only direct link of the societal system with its outside, as no system can operate outside its own boundaries and can change its meaning in accord with historical changes. This irritation by individual consciousness creates the 'order by noise',¹⁸² which leads to the emergence and evolution of a social order.¹⁸³

The already mentioned issue of consensus of values, functionally necessary under the moral normativity of the old-European society, and

¹⁸⁰ Luhmann, N. *'Die Gesellschaft Der Gesellschaft'* in Moeller, H.G. *'Luhmann Explained. From Souls to System'*, Chicago, Open Court, 2006, p. 231.

¹⁸¹ Language is, in Luhmann's view, not a system. This is why there is no super-system involved in the structural coupling of consciousness and societal system, as correctly observed by. Habermas, J. *'Theory of Communicative Action'*, Polity Press Vol 1, 1986.

¹⁸² This expression comes from an experiment in physics. If a number of plastic cubes weighing enough to barely float, are put in a bucket full of water and the bucket is subjected to a series of external disturbances, or 'noise', the cubes will, after a while, order themselves into regular clusters. On this See Foerster, H. von, Poerksen, B. *'Understanding Systems, Conversations on Epistemology and Ethics'* Carl-Auer-Systeme Verlag, Heidelberg, 2002. p.91.

¹⁸³ Luhmann, N. *'Globalisation or World Society: How to Conceive of Modern Society?'* International Review of Sociology, March 97, Vol. 7 Issue 1. pp.74-5.

resting on categorisation and moral accounts of anything, created an all-inclusive, normatively thinking society. Before Luhmann's theory, the idea of consensus within politics or law had been the denomination of political credibility, and was formulated in terms of problems and projected onto the idea of society.¹⁸⁴ Parsons followed Durkheim and saw a solution in a consensus of values, which increased generalisation as a reaction to an increased differentiation.¹⁸⁵ Luhmann, instead, carefully avoids attributing to consensus any role in *constituting* modern society. This is because through communication and self-referential operations society, as a system, will produce its own identities, references and *Eigenwerte*¹⁸⁶ independently from any experience or any other exposure to a specifically human dimension.¹⁸⁷ As a corollary to consensus is the issue of integration and the quest as to whether it should have a necessary role in society. It is usually assumed that integration, as integration through consensus, is necessary to constitute society. As Luhmann considers society as constituted by communication it would derive that integration is superfluous as society can create through communication its own values independently from what individuals feel and experience.

¹⁸⁴ Luhmann, N. '*Die Weltgesellschaft*' In *Soziologische Aufklärung* 2, 1986, GmbH Opladen Westdeutsche Verlag, pp.52-3.

¹⁸⁵ Luhmann, N. '*Die Gesellschaft Der Gesellschaft*' as quoted in in Moeller, H.G. '*Luhmann Explained From Souls to Systems*', Open Court Publishing 2006; ' p. 232.

¹⁸⁶ Moeller here translates the term as 'own-value'. The term '*eigenwerte*' came firstly from the mathematician David Hilbert. It is general agreement that in German, his terms, *Eigenzustaende*, *Eigenfunktionen*, *Eigenwerte*, are not nearly as visibly insistent on that "Eigen"-motive, which, as the effect of their impossible English translation, is usually left "raw" and untranslated in these terms, therefore '*eigenwerte*' should become '*eigenvalue*' and not '*own-value*'.

¹⁸⁷ Luhmann, N. '*Die Gesellschaft Der Gesellschaft*' in Moeller, H.G. '*Luhmann Explained. From Souls to System*', Chicago, Open Court, 2006, p. 233.

3 - Justice in a Postmodern Climate: Luhmann's Gift to the Legal System.

3.1 - Modern Conceptions of Society.

Marx's critique of the capitalistic system still has arguably a prominent place in sociology's description of contemporary society and is still today a tempting and indeed a fitting instrument of the interpretation of social injustice, even with a number of anachronisms.¹⁸⁸ In fact, Marx's construction of society, as it was conceived in the 19th Century cannot possibly reflect the complexity of contemporary society, and also is a theoretical obstacle as it simply represents traditional humanistic philosophic ideas and semantics unknowingly and against all efforts from the tradition of Old Europe¹⁸⁹. Luhmann equates Marx's description of the capitalist system with the 'rising of the dead', identifying it as a 'muscular metaphysics of materialism' and insisting on the 'humanistic malnourishment of Marxist terminology'.¹⁹⁰

¹⁸⁸ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 5.

¹⁸⁹ Luhmann is not opposed to the fact that Marx is named as one of the founding fathers of the Social Sciences (together with Durkheim and Weber mainly), and in Luhmann, there is no "rejecting" Marx, but rather the Marxists of the world in which he lives, the 1960s to 1990s in Western Germany. There is no need for us today to commit the methodological error of mixing up Marx and the Marxists of a century later.

¹⁹⁰ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 5.

Luhmann would not go along with a theory framework which he considers as largely obsolete, because of its “empirical referentiality”;¹⁹¹ for instance, Luhmann points out that the notion of ‘alienation’, which, even if Marx gives it an almost exclusively socio-economic content, if seen sociologically, rather than anthropologically, therefore defying it “as the capital management of the industrial as well as the political economy”¹⁹²; then it is clear how the use of the term by Marx does not “take into consideration that materiel and people work in completely different ways”¹⁹³. It involves a philosophical input that fits perfectly within the mono-centric structure of earlier, in fact, even pre-modern, Western society models. Marx ascribes to economy a central position, conceiving it as an over-constituting power for “all the rest” of society and therefore unable to account for any other moving parts, or functional systems, within society – a clear “misconception of the relationship between function-systems”¹⁹⁴

Still, Luhmann’s social theory of exclusion, which, although it owes some of its input to Marx’ writing and certainly throws its roots into the same hummus. Luhmann is not interested in orchestrating a discourse on society that invests itself into ideologies, whether to uphold or to reject them. This eminently practical decision allows him to sidestep the value-architectures. The point for Luhmann is not that of the values endorsed, but of the consequences it triggers. Notwithstanding the critiques paid to

¹⁹¹ Luhmann, N. *‘Observations on Modernity’*, Stanford University Press, 1998, p. 6.

¹⁹² Luhmann, N. *‘Observations on Modernity’*, Stanford University Press, 1998, p. 6.

¹⁹³ Luhmann, N. *‘Observations on Modernity’*, Stanford University Press, 1998, p. 6.

¹⁹⁴ On this see Moeller, H. G. *‘Luhmann Explained. From Souls to Systems’*, Chicago, Open Court, 2006, p. 177 and ff.

Marxism, Luhmann acknowledges that the importance of Marx's work in the description of modern society is conspicuous, insofar as it caused "a shift of a knowledge previously justified through nature, to a social context"¹⁹⁵. Also it provided some of the theoretical preconditions for social system theory, mostly by transforming the Kantian and Hegelian epistemological idealism and its constructivist elements into its particular brand of social constructionism¹⁹⁶, he says that it "reflects the logic of a social construct"¹⁹⁷.

Niklas Luhmann considered Marx's understanding of economy as an attempted construction of social reality. In fact, he sees Marx's theory in the second half of the 20th Century to have become "so omnipresent (...) that it ceases to be a specifically economic phenomenon or a special interest ideology"¹⁹⁸. Rather, as "every cognition is construction as *cognition*"¹⁹⁹, it is a move away from the previous conceptions of society as a series of processes, intimately related to elements of natural law, and founded upon an idea of society as a self-constructing, autopoietic system.

Moreover, Luhmann finds questionable the "newer version that states that the phony [sic] objectivity of economic theory really serves to cover up the true power relationship mediated by state and law"²⁰⁰. Luh-

¹⁹⁵Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p.8

¹⁹⁶ On this see Rasch, W. "*Luhmann's Ontology*", *Revue internationale de philosophie*. 2012/1 No 259, pages 85 - 104

¹⁹⁷ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 8

¹⁹⁸ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 8

¹⁹⁹ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 8

²⁰⁰ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p. 8

mann, on the contrary, interprets modern society not as a project directed, through a series of 'contradictions', towards an ultimate unity, but as a *difference*; where the term 'contradiction' in Marx could indeed equate to the term 'paradox' in Luhmann. For instance, '[t]he founding problem of law (...) is not to find and identify the ultimate ground or reason which justifies its existence. The problem is how to suppress or to attenuate the paradox which an observer with logical inclinations or with a sufficient degree of dissatisfaction could see and articulate at any time. It remains possible to ask the third question: can we accept contradictory opinions as being both right and wrong? At least under modern conditions we cannot avoid the issue"²⁰¹. In terms of this non-unifying power (*Gewalt*), to say it with Walter Benjamin "[t]here is no such right above right and wrong, no such super-right. There is simply *Gewalt*"²⁰², alienation then, seen in sociological terms as social injustice, would become a perhaps inevitable part of opposition (in Luhmannian terms, a 'meta-code') inclusion/exclusion. This opposition or meta-code, or "difference, has serious effects, first, because it is provoked by the functional differentiation of world society, and second, because it hampers, if not prevents, the regional establishment of conditions for functional differentiation."²⁰³. This means that "large sections of the population (...) [are] denied inclusion in the legal system, so that the legal /illegal code of the legal system cannot be enforced, or can be en-

²⁰¹ Luhmann, N., *The Third Question: The Creation of Paradoxes in Law and Legal History*, 15 *Journal of Law and Society* (1988), 153-166. P.154.

²⁰² Benjamin, W. *Zur Kritik der Gewalt* in id., *Gesammelte Schriften* 2.1 1977, pp 179-203. Also quoted by Giorgio Agamben: "the possibility of a violence (*Gewalt*) that lies absolutely 'outside' (*außerhalb*) and 'beyond' (*jenseits*) the law." Agamben, G. *State of Exception*, trans. Kevin Attell, Chicago; London: Univ. Press Chicago, 2005, p. 53.

²⁰³ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p. 97.

forced only to a very limited extent.”²⁰⁴ The ongoing issue, especially with traditional view is that “[t]he prevailing opinion in legal and social science describes the unity of the system as a value, representing the social and cultural autonomy of its task. The legal system then has to implement justice. This comes close to being tautological. In my opinion, the unity of a system is realised by its guiding distinction. The legal system then has to implement the distinction of legality and illegality. This comes close to being paradoxical, seeing unity as the unity of a difference. These are clearly competing theories. We will have to choose between beginning and ending with unity or with difference. And there is no other final answer to the third question”²⁰⁵.

We will now explore briefly some of the concepts and contributions that historically lay behind the idea of social exclusion, from the Enlightenment to Luhmann’s theory. Some of these have provided an inspirational background of ideas to Luhmann’s theory. Others are simply analysed for sake of completeness, but they all will contribute in showing that Luhmann has presented the ultimate theory able to describe social injustice and exclusion in a globalised contemporary society.

Arguably, the moral philosophy of Immanuel Kant, had an impact on Luhmann’s system theory in terms of providing the question of unity within the difference of cognition and real object; “cognitively all reality must be constructed by means of distinctions and, as a result, remains construc-

²⁰⁴ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012, p. 98.

²⁰⁵ Luhmann, N. *The Third Question: The Creative Use of Paradoxes in Law and Legal History* Journal of Law and Society, Vol.15, No.2 (Summer,1988), pp. 153-165. p.163.

tion”²⁰⁶. Kant’s constructivist epistemology, which asserted that cognition is possible only because it has no access to the being underlying external reality, is doubtlessly an ancestor of Luhmann’s idea of difference between system and environment. “Theory, insofar as it is intended to be systems theory, begins with a difference, the difference between system and environment; if the theory is intended to be something else, it must be based on a different difference. Therefore, such theory does not begin with a unity, a cosmology, a concept of the world or of being, or anything comparable. Instead, it begins with a difference. For at least 100 years or so, precursors of such a procedure have existed.”²⁰⁷

Luhmann mentions how the Greek *diapherein* (term also used by Derrida²⁰⁸), difference already existed, although the scope of the term was limited in comparison to more contemporary use of it. For instance it was simply “one thing among others [where] theology as well as ontology worked with a concept of being. But, around 1900, such unitary concepts started to become questionable.”²⁰⁹ De Saussure is also mentioned as a conspicuous contributor to the evolution of the concept of difference: “it is this difference between words that keeps language going and controls what can be said next. Whether these differences exist in reality may well

²⁰⁶ Luhmann, N. ‘*The cognitive program of constructivism and a reality that remains unknown*’. p. 64-85 in: W. Krohn (Ed.), *Selforganization. Portrait of a scientific revolution*. p. 50.

²⁰⁷ Luhmann, N. ‘*System as Difference*’ *Organization*, Vol 13, Issue 1, 2006 p. 37-57. p.38.

²⁰⁸ Derrida, J. ‘*Différance*’ translated by Alan Bass, *Margins of Philosophy* (Chicago: University of Chicago Press, 1982), pp 3-27 <https://web.stanford.edu/class/history34q/readings/Derrida/Differance.html> Last accessed 20 February 2018.

²⁰⁹ Luhmann, N. ‘*System as Difference*’ *Organization*, Vol 13, Issue 1, 2006 p.37-57. p.39.

remain an open question.”²¹⁰ At this point Luhmann skips to the Nineteenth Century and to sociology, naming Gabriel Tarde (1843-1904)²¹¹ and his theory of imitation. Tarde’s work is important in Luhmann’s view as “consolidation of sociality [is] by means of imitation, that also did not begin with unity but with difference. If one imitates somebody else, this somebody else must exist in the first place. One cannot continuously imitate oneself (...) in any case difference is presupposed.”²¹² The next citation is of Gregory Bateson (1904-1980)²¹³ and his “classic formulation that information is ‘a difference that makes a difference’ (...) Information is information only if it is not just an existing difference; it is information only if it instigates a change of state in the system. This is the case whenever the perception (or any other mode of input one might have in mind) of a difference creates a difference in the system.”²¹⁴

Kant, nevertheless, was still searching for unity, for one specific reality, while modernity, as Luhmann demonstrated, is rather a complex multiplicity. When Immanuel Kant wrote his famous essay on ‘*What is En-*

²¹⁰ Luhmann, N. ‘*System as Difference*’ Organization, Vol 13, Issue 1, 2006 p.37-57. p.39.

²¹¹ French sociologist and social psychologist, antagonist of Cesare Lombroso and of Durkheim, by whose theories was overtaken in popularity. Tarde was re-discovered in the 1960s. Tarde, G. ‘*Les lois de l’imitation*’ (1890) Online publishing http://classiques.ugac.ca/classiques/tarde_gabriel/lois_imitation/tarde_lois_imitation.pdf Last accessed 20 February 2018.

²¹² Luhmann, N. ‘*System as Difference*’ Organization, Vol 13, Issue 1, 2006 p. 37-57. p.40.

²¹³ English anthropologist, social scientist and cyberneticist. See Bateson, G. *Steps to an Ecology of Mind*. San Francisco, CA: Chandler, (1972).

²¹⁴ Luhmann, N. ‘*System as Difference*’ Organization, Vol 13, Issue 1, 2006 p.37-57. p.40.

*lightenment?*²¹⁵ and his '*Critique of Practical Reason*'²¹⁶ he was embodying in his writings the essence of modernity, the reflection on which had just started with the end of the era of Enlightenment; "[t]he guardians who have kindly taken upon themselves the work of supervision will soon see to it that by far the largest part of mankind"²¹⁷ Kant therefore encourages men to use their reason, rather than to accept to be told what to believe and what to obey without discussion. The idea of exclusion would not be acceptable for Kant not in virtue of the idea of equality, not in name of democracy, but for a reason of ethical nature – the autonomously self-legislating individual will.

The moral question in Kant is represented by the categorical imperative, which has a threefold formulation. It states firstly: to act only on that maxim that one can consistently will to be acted upon *universally*, that is, by all agents in all circumstances. Secondly, it states that we should never act in such a way that we treat Humanity as a means only, but always as an end in itself. Thirdly, although not formulated in a way of an imperative, it states that "the Idea of the will of every rational being as a *will that legislates universal law*",²¹⁸ which could be rephrased as act so that through maxims one could be a legislator of universal laws. In any case, every kind of duty can be derived from the categorical imperative; hence this is the

²¹⁵ Kant, I. '*What is Enlightenment?*' In '*Foundations Of The Metaphysics Of Morals And What Is Enlightenment?*', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

²¹⁶ Kant, I. '*Critique of Practical Reason*' (1788) Cambridge University Press, 1997.

²¹⁷ Kant, I. '*What is Enlightenment?*' In '*Foundations Of The Metaphysics Of Morals And What Is Enlightenment?*', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

²¹⁸ Kant, I. '*Groundwork of the Metaphysics of Morals*', Cambridge, Cambridge University Press, 1998.

fundamental principle of morality. To act based on the categorical imperative, the question is whether the maxim for acting, and see whether this reason would be a law universally applicable to all other 'rational agents'. If yes, then the question is whether this maxim is conceivable as a principle of universal legislation.²¹⁹ Kant's idea of Social contract is not Hobbesian, inasmuch as Kant does not see, contrarily to Hobbes, the contract to be *tout court* of advantage to the people.

For Kant a proper political system allows men to think for themselves, and *includes* "public insight into the nature of such matters had progressed and proved itself to the point where, by general consent (if not unanimously), a proposal could be submitted to the crown"²²⁰. Furthermore, when it comes to law there is "[t]o test whether any particular measure can be agreed upon as a law for a people, we need only ask whether a people could well impose such a law upon itself. This might well be possible for a specified short period as a means of introducing a certain order, pending, as it were, a better solution. This would also mean that each citizen, particularly the clergyman, would be given a free hand as a scholar to comment publicly, i.e. in his writings, on the inadequacies of current institutions."²²¹

²¹⁹ For philosopher Jean-Luc Nancy, "L'opération de l'injustice est toujours, en quelque façon, une exclusion." Nancy, J.L. Bailly, J. C., *La comparition*, Paris (Christian Bourgois), new edition 2007, 103.

²²⁰ Kant, I. 'What is Enlightenment?' In 'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

²²¹ Kant, I. 'What is Enlightenment?' In 'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

3.2 - Modern Pre-systemic Theories of Justice.

In order to introduce the social system theory perspective on justice, the concept of justice should be now analysed within modern legal theory, in many aspects, as it will be shown, and compared with Luhmann's approach. Modern theories of justice, in fact, maintain an ethical dimension, maintain the idea of humanism, of human well-being, as Kant pointed out, in order to confer, in Dworkin's words, 'equal concern and respect'²²² to all people. Moreover, the horizons of Kant and Dworkin, as well as those of Hobbes and Rousseau, are still earlier configurations, marked by the still undeveloped social systems of economy and science (and several others), which put law and state into a rather omnipotent position.

Kant was a sympathiser of the ideas of the French Revolution, which supported the idea that all men are equal in front of the law on the basis of men's natural rights. Of course this does not mean that Luhmann does not agree to the notion that all men are equal in front of the law, simply the perspective of social system theory is not about equality and ethics, but of function, the ethical dimension does not come into the Luhmannian picture. For Kant, these rights were represented by human reason as the basis for the legitimacy for equality. Still, Kant argued, on the basis of reason, there will be 'few independent thinkers, even among the

²²² Dworkin, R. *'A matter of Principle'*, Cambridge/London: Harvard University Press 1985. p. 190. See also Dall'Agnol, D. *Dworkin's Liberal Egalitarianism* *Kriterion* Jan./June 2005, vol.46, n.o111, pp.55-59.

self-appointed guardians of the multitude'²²³, and then, precisely because 'Cesar non est supra grammaticos'²²⁴, the sovereign will attempt to oppress their subjects. Kant sees the paradoxes of human affairs, where civic freedom, which allows for intellectual freedom, also creates barriers. While less civic freedom, allows for human reason expansion.

Theories based on the notion of natural rights are opposed to social contract theories, but are not mutually incompatible, as sometimes the latter included natural rights elements in defining the boundaries of legitimacy. Social contract theories were trying to establish social arrangements based on the consent of the members of society. The Hobbesian idea of a collective depository of all available power, the overly powerful Leviathan, to which people surrender their freedom in exchange for protection, represented a tough but necessary form of justice.²²⁵ Rousseau's view of the social contract illustrates the state as an expression of sociability rather than a despotic imposition, according liberties to their citizens in virtue of their natural rights.²²⁶ In the *Second Treatise on Civil Government*, Locke asserts that the state exists in order to protect people's rights and the state itself is subject to those rights.²²⁷ Over two hundred years later Rawls resurrected these theories of social contract but simply as a rhetorical

²²³ Kant, I. 'What is Enlightenment?' In 'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

²²⁴ Kant, I. 'What is Enlightenment?' In 'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

²²⁵ See Hobbes, T. 'Leviathan', Oxford, Oxford Paperbacks, 1998.

²²⁶ See Rousseau, J.J. 'The Social Contract', Wordsworth Editions Ltd, 1998.

²²⁷ See Locke, J. 'The Second Treatise on Civil Government' Hackett Publishing Co, 1980.

device.²²⁸ Rawls idea of justice had to do with fairness, meaning both 'neutrality', as independent of any bias or partiality, and 'publicly reasonable'.²²⁹

Whether Kant's categorical imperative had exerted an influence on Bentham, is open to debate. Bentham rejected both the idea of social contract and of natural rights as he rejected the metaphysical speculations around God as the donor of those rights. Bentham developed a sort of test for judging social arrangements which had to do with maximising utility, therefore, the "greatest happiness for the greater number".²³⁰ This kind of approach to justice of course attracts obvious criticism as not only terms such as 'utility' or 'happiness' are imprecise and do not give a measure of its application and of the results obtainable, but also it does not guarantee fairness in the treatment of people. A utilitarian approach of this kind is exactly what Kant would have rejected. Justice cannot be simply a conception or another human *telos*. Justice cannot be contingent it is must be 'categorical'.²³¹

There was the urgent need of codification to counteract the lack of uniqueness in the law. Legal Positivists, such as Bentham and later Austin, contrary to Natural Law examined the nature of stable rule systems, by way of trying to generalise the common features of all centralised rule-based systems. In doing so they tried to eliminate all assumptions related

²²⁸ See Rawls, J. 'A Theory of Justice', Oxford, Oxford University Press, 1971.

²²⁹ See Rawls, J. '*Political Liberalism*', New York, Columbia University Press, 1993.

²³⁰ See Bentham, J. '*An Introduction to the Principles of Moral and Legislation*', J H Burns and H L A Hart Eds, London Methuen, 1982.

²³¹ On this see Sandel, M. '*Liberalism and the Limits of Justice*', Cambridge, Cambridge University Press, 1982.

to nature or to values which were associated with Natural Law and make clear what the basic terms of what was called law were.

Bentham and Austin²³² defined law as a phenomenon of societies with a sovereign, which could be represented by a specific person or by a group. These have supreme and absolute *de facto* power, which means that they are obeyed by all and do not have to obey anyone. Laws in this kind of society derive from the sovereign's commands, which are intended as general orders backed by sanctions. This theory identifies the existence of law with command and obedience and does not consider either whether the sovereign has a moral right to rule, nor whether his orders are meritorious, simply the sovereign guarantees the unity of the legal system as it represents all laws as having a single form.

Later on, Kelsen, although retaining the 'imperative' monism of Bentham and Austin, rejected its reductionism. Kelsen, in his Kantian views, saw the unity of law in the fact that it is a set of rules having the kind of unity that can be understood by a system of valid rules, with no more factual base than its "ought" sentences. In other words, unity is in the fact that all laws are links in one chain of authority up to the *Grundnorm*.²³³ Although in line with the refusal to assign any intelligible role to the God of monotheistic religions, and the subjugation of law to his moral diktat, which implies the rejection of a hierarchy, the Positivists were still very much inclined in seeing a hierarchical and stratified society and by trying to resolve the complexity of it by an in vain quest for unity.

²³² See Austin, J. *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, London Weidenfeld and Nicolson Eds. 1955.

²³³ See Kelsen, H. *General Theory of Law and State*, trans. A. Wedberg, repr. 1961. New York: Russell and Russell, 1945. And Kelsen, H. *Pure Theory of Law*, trans. M. Knight. Berkeley: University of California Press, 1967.

The Positivists' plea for codification, the need for a once-for-all law, forever identical to itself, presents a twofold paradox. Firstly, it opened the way to a never ending quarrel about derogation and new legislation and secondly, positivism proved that the law is perfectly open to manoeuvring law that is codified and draws its validity from its being codified, can be codified without end, again, and again, as many times as required. So, instead of finally attaining stability and identity, by imposing positive law, contingency has been exacerbated, although no longer as the effect of some impossibility, but to the contrary, as the result of increased *possibility*.²³⁴ This discussion on a desperate attempt to unify law is today applied to the now overriding campaign of the international scene, globalisation. Its results are in some cases manifestly opposite its initial perspectives and promises.

3.3 - Humankind, Injustice, and Positivation of Law.

Kant in his his opus posthumous and his Critique of Practical Reason²³⁵ his idea of progress, and more fundamentally in his notion of universality the issues of inclusion and exclusion are very present indeed. In his What is Enlightenment?²³⁶ clearly his protagonist is the *Menschengattung*, the humankind, the human genus. From here the way to inclusion/exclusion cannot be far, all exclusion is abusive in his view, a

²³⁴ On this see Luhmann, N. *'Rechtssoziologie'*, Opladen, Westdeutscher Verlag, 1980, p. 190 ff.

²³⁵ Kant, I. *'Critique of Practical Reason'* (1788) Cambridge University Press, 1997;

²³⁶ Kant, I. *'What is Enlightenment?'* In *'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?'*, Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*;

despotic injustice. Not because of equality, or even democracy, but because of unjustifiability.

Different from Rawls, all the Ehrlich, Durkheim, Luhmann, Teubner, etc., are non-kantians. They are all orientated primarily not at the *Menschengattung*, but at society. There are no normative claims which have an origin more dignified than history, in their view (for Kant there is such a thing as the categorical imperative). But of course certain of them are socialists – this is via equality also a strong incentive for non-exclusion. The common point between Ehrlich and Durkheim on the one hand and Luhmann and Teubner on the other is the time passed since – a century. For instance the whole fragmentation chapter was unthinkable at their time – it becomes thinkable only as an effect of unification.

If Kant was concerned with the *Menschengattung*, humankind, nowadays, in times of globalisation, perhaps a view addressed at society would be useful. There are diverse easily available contributions to the matter of 'globalisation', the great topic of the 1980s, and to the Luhmannian re-conception of society as world society. For Luhmann²³⁷ there is no other society apart from world society. This self-governing political unit, in terms of the state or the municipal legal order are no longer the model of society. There is strictly speaking no such thing as English society or French society, or Uruguayan society or Paraguayan society (Luhmann's examples). What counts is not sovereignty but 'attainability' - and the fact is that excepted certain particularly dangerous areas of diverse Latin American (but also Northern American) cities, where no one dares to enter today (probably this would include North Korea as well), the world can be

²³⁷Luhmann, N. 'Die Weltgesellschaft', published in *Soziologische Aufklärung*, vol.I (1971).

accessed universally. There is therefore not so much a process like "globalisation" to be observed, rather there is a new way of thinking society that has become necessary - thinking society as a global object without limits on the globe, quite different as a way of thinking society from all preceding ones. Already, Eugen Ehrlich (1862-1922), one of the founders of the discipline of Legal Sociology probed what a strong orientation at society would mean for the study of law²³⁸, and in this sense, parts of his intuitions are still pertinent today. Fragmentation as a typical aspect of globalisation affects socio- legal discourses within society.

The basic idea is what could be called the anomaly of positive law. The question is: is it not fragmentation, as an irritating response to the program of globalisation, explainable in terms of a repetition of the self-change potential unfettered in law as a response to its positivisation? Is it not in that sense a 20th/21st century replay of a 18/19th century novel ("novel" in the sense of the literary form of an anomaly – something unthought-of, unexpected appears at a moment of the story, as in German in French and Italian, we distinguish between novels in this sense on the one hand, and *Romane, romans, romanzo* on the other)?

Positive law appears historically, a long time ago, in the form of the plea for codification. Because of the need of stopping the on-going variation and lacking uniqueness in the law. Bentham teaches exactly that – largely in vain, but on the continent the same politics has had much success. These people said, what we need is a once-for-all law, forever identical to itself. That's the first part: the underlying intentions, but not the whole story. The second half, it is about the results engendered, are very

²³⁸ Erlich, E. *Recht und Leben: Gesammelte Schriften zur Rechtstatsachenforschung und zur Freirechtslehre*, Duncker & Humblot GmbH, 1967.

different: an infinite, never-ending arguing about derogation and new legislation. Infinitely more of the same of what? Exactly of that against which positivisation had been prescribed as a cure! In the end, Luhmann²³⁹ and many other observers will have to note that the supposed-to-be contraceptive of change – positivisation as the remedy that should protect law against every challenge to its being what it is, positivisation as the hope that after the publication of the code no further law will be necessary (at best minor more detailed sub-laws) - has resulted in an hitherto unseen birth explosion of difference in law, of change! Why? Because by positivisation what has been proved is that the law is perfectly open to manoeuvring! If you can codify once, you can codify again, and again, as often as you like! So instead of finally attaining stability and identity, we have attained, by imposing positive law, contingency/manipulability/"possibility" to an unheard-of extent.

It could be very tempting to think of fragmentation in the same terms. In other words, positivisation, or imposing a unity under the heading of a once-for-all law has resulted in the irritating opening up to indefinite law-changing activism. Globalisation imposes maximum mutual exposure and ends up in fragmentation – more distance between parts of the globe than ever before! Fragmentation is the irritating response to the uniformisation of 'globalisation', in the same way in which multiplication of change had been the irritating response to the uniformisation of positivisation. Both push difference to unheard-of levels of diversification – just in the opposite sense of where they claim to push them. In all spheres, a whole vocabulary, such as precisely diversification, or even more comic-

²³⁹ Luhmann, N. '*Rechtssoziologie*', Opladen, Westdeutscher Verlag, 1980, p. 190 and ff.

ally, 'personification', sanctions the groundless difference that responds to the abolishment of grounded differences. An exactly as anomalous (meaning: diametrically opposed to law) or paradoxical result.

Social exclusion is usually intended in terms of marginalisation of minorities, which feel or are placed by socio-political or legal circumstances away from the centre of society. These minorities are also usually identified as weaker groups, including women, elderly, children, immigrants and disabled. In Durkheimian terms, social integration is promoted by the division of labour according to one's capacity, which leads to people depending on each other within a social structure, like for instance the family. In this way, according to Durkheim, a strongly integrated family has less possibility to fall into a loop of poverty and social exclusion. On the other hand, the more a group is weakened, the more each component can rely only on himself. Accordingly, a single mother finds herself without a strong social structure and starts withdrawing from the group. In other words, the breakdown of structures of society is due to self alienation²⁴⁰.

3.4 - Stratification to Functional Differentiation.

Durkheim provided some basis for the development of social system theory which, it is claimed here, is the more appropriate way of describing modern society and its complexities. Social systems were firstly considered by Talcott Parsons with his theory of the evolutionary universals in society. He realised that social stratification in society (not neces-

²⁴⁰ Luhmann, N. *Theory of Society*, vol II, Stanford University press, 2012, p. 109.

sarily in modern society) derived from differentiated social functions, somewhat similar to the division of labour of Durkheim. Parsons argued that the internal differentiation of society would start by differences arising between higher-status-groups (for example in lineage) and groups of lower standing, which would recognise the difference and accept to have less advantageous living conditions in terms of accommodation or subsistence. A second aspect of the insurgence of functional differentiation in society is related to political power (which is highly correlated to one of the four features of society action system, namely, kinship²⁴¹). This kind of differentiation in society as evidenced by Parsons is still in vertical terms and shows therefore a hierarchical model, which is mainly pre-modern, nevertheless it is useful inasmuch as it shows the social 'need' for centralisation of responsibility towards the same structural outcome even within functional differentiated groups.

This theoretical structure of a stratified society presents an overarching and unified social system. Society, as a result, has become an entity driven towards a balance of parts. The various societal constituents are interdependent and adjust to each other in order to satisfy the needs of the system. Parsons understands, following Durkheim, integration as solidarity, and as expressive of social (not necessarily legal) norms. Integration is one out of the four functions of social systems as Parsons understands them. Society is conceived as a social community that takes upon itself that integrative function. Parsons developed what he called the AGIL paradigm, which describes how a system has to adapt to its environment to a certain degree in order to survive. This will consist therefore of 'adapta-

²⁴¹ The other three being religion, language and technology. See Parsons, T. *An Outline of The Social System*, (1961), Blackwell Publishing (2007), p, 421 and ff.

tion', 'goal attainment' 'integration' and 'latency pattern maintenance'. These are called by Parsons the system's 'functional imperatives'. In terms of a societal system, the AGIL paradigm will manifests itself in four inter-related subsystems, respectively A: behavioural system, G: personality system, I: society as societal organisation and L: cultural system²⁴². Within this paradigm, 'I' is what is of interest here, society as organised subsystem of action has people in organised positioned roles, which become differentiated and associated with roles such as political, juridical, educational and occupational. In this way society becomes organised in interrelated functionally differentiated subsystems, such as economy, politics, law and so on. On this basis integration is the normative background of the social formation of structures²⁴³ whereas inclusion is, for Parsons, "an evolutionary mechanism located in the system of societal community".²⁴⁴ There are four such mechanisms: adaptive upgrading, differentiation, inclusion and value generalisation, and the integration of normative structures within society is entrusted upon the two latter.²⁴⁵

A further variation of the Durkheim/Parsonsian themes is provided by Habermas, with his famous characterisation of the late 20th century

²⁴² Parsons, T. 'Das System moderner Gesellschaften', München 1972, p.21 and ff.

²⁴³ See Bora, A. 'Einleitung 1: 'Partizipation' als politische Inklusionsformel', 15-34 (17), in Christoph Gusy, Heinz-Gerhard Haupt (eds.), 'Inklusion und Partizipation: Politische Kommunikation im historischen Wandel', Frankfurt am Main (Campus) 2005.

²⁴⁴ Parsons, T. 'Das System moderner Gesellschaften', München 1972, p.26 and ff. My translation.

²⁴⁵ See Bora, A. 'Einleitung 1: 'Partizipation' als politische Inklusionsformel', 15-34 (17), in Christoph Gusy, Heinz-Gerhard Haupt (eds.), 'Inklusion und Partizipation: Politische Kommunikation im historischen Wandel', Frankfurt am Main (Campus) 2005.

“systemic” fate of the originally socially integrated lifeworld as colonisation of the lifeworld.²⁴⁶

All the examined thinkers have focused their interest either on the human being or on society considered as formed of human being. This automatically leads to a vision of integration or inclusion as the goal of society and as a consequence exclusion becomes the manifestation of the failures of society. Moreover this conception is anchored to a teleological vision of society, where people are strictly connected with teleological behaviour within a hierarchical society. All these sociologists and philosophers have missed out on one important observation about modern society. As already mentioned, modern society had rejected hierarchy in the moment it had rejected the Kantian *summum bonum*. The instant men have decided that rules do not come from God but are self imposed, and based on one's reason, a process of deconstruction of hierarchy had started. No more fixed position in society, no more stratification,²⁴⁷ rather a 'heterarchy', the rule of the other, which in a social system theory scenario, clarifies most of its difficulties.

Luhmann thought of society as a social system, in which all societal systems are in a heterarchical relationship, different from Parsons - who distributes all decision-power evenly between his agencies or system - Luhmann is careful to attribute to his functionally differentiated social systems each a specialised function-determined competence. These function-

²⁴⁶ Kemmis, S. 'System and lifeworld, and the conditions of learning in late modernity', (1998), Curriculum Studies, 6:3, 269-305. p. 280. Habermas, J. 'Theory of Communicative Action, Volume Two: Lifeworld and System: A Critique of Functionalist Reason, Boston (Mass.), Beacon Press. 1985.

²⁴⁷ On this see Luhmann, N. 'Globalisation or Global Society: How to Conceive of Modern Society', International Review of Sociology March 1997, Vol. 7 Issue 1, p. 67.

systems are therefore also called, by Luhmann, "autopoietic", self-producing rather than merely self-reproducing, as they continuously deal with the same type of issues and to that extent use the results or the output of their own operations as the input of their next operations, but rather autopoietic, which means that their output becomes their new input of operations. Luhmann's systems are also structurally coupled with one another, which means that one system may 'irritate' another system and obtain a reaction within the 'irritated' system, which leads to a sort of change in the internal operations of that system. Luhmann noticed that the Aristotelian theory of goals in society does not apply to modern society any longer, because it cannot deliver any longer a correct description of contemporary society. Teleology is out. There are no goals left, there is only a one-system internal construction. One technique Luhmann uses to escape the issues of teleology, is not to accept that society is ultimately formed by human beings (both Durkheim and Parsons still were sticking to this level of "humanism"). Human beings are, not excluded from Luhmann's theory of society, but transposed into the sphere, no longer of society, the encompassing social system, but into that of the social system's environment - the existence of humans is thus one among the conditions for society to operate/exist.

For now, Luhmann points out, the existence of humans is one among the factors necessary in order to making society happen. This is in the sense of observations, which make a difference only when they are communicated, which use humans as conditions, in the same way in which they use also to communicate. The point being that it is not humans who make the choices, the choices are those of social systems. Although Luhmann excluded human beings from his theory of society, in his very

last years he did not seem to deny their existence any longer. It was a visit in the Brazilian Favelas and the observation of the conditions in which people lived there, which inspired him to write his theory of all inclusion.²⁴⁸ They are confined in the environment, so the 'included' are not objects of the social system, but the problem is that they are there together with the 'excluded' ones, the 'others', which should not even exist. The 'others', in Greek antiquity, were represented by the barbarians as distinct and opposed to the Hellenes.

This distinction is once again representative of the old conception of hierarchical world architecture, which was about oppositions, with a higher value assigned on one side which justifies a superior position in society. It was not a matter of antagonism but simply of defining a social order and defining what one was and could not be. It was accepted and not fought against. Pre-modern society started to show an increased complexity and tried to change these asymmetrical oppositions and has taken into account ethnicities and social status and did not exclude on this basis, but had the tendency include everyone by organising a hierarchy with all ranks, not only binary relations, such as oppositions. The inclusion would happen at family level and at this level also exclusion was decided if certain rules were not respected (child outside wedlock a prime example).

Modern society presents a altogether more complex structure with no stratification²⁴⁹, no hierarchy but, in Luhmann's view with function sys-

²⁴⁸ See Luhmann, N. '*Jenseits und Barbarei*', in '*Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft*', vol 4, Frankfurt am Main, Surkamp, 1999, p.138-50.

²⁴⁹ Unless this is seen as a mere byproduct of function systems. See Luhmann, N. '*Jenseits und Barbarei*', in '*Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft*', vol 4, Frankfurt am Main, Surkamp, 1999, (p.138-50).

tems. A classification of modern society by asymmetrical oppositions is now in many respects meaningless. Contemporary world society cannot speak of 'us and all the others'.²⁵⁰ There is no outside. Similarly, the family loses its power of defining who is in and who is out (and here the Durkheimian idea discussed previously shows its fallacies), because it is expected to accept and support individual decisions rather than imposing them. A functionally differentiated society will tend to turn old exclusions into inclusion (joblessness, homelessness) or juvenile delinquency are dealt with by enacting policies and programs for reintegration in society). The tendency to include all, as in "human rights for all", "no one should go hungry", or "global market" is to have the barbarians, the 'other' disappear. The way function systems are organised supposes the inclusion of everyone. Systems have not left any legitimate 'good reasons' to exclude anyone. However, although logically all are included, there are different grades of inclusion based on the criteria of society's own systemic reproduction. Modern society assumes that all human individuals participate in communication. Obviously in this scenario the asymmetric opposition does not fit. One could not define non-economic, non-scientific or non-legal communication as barbarian. The apparent necessity of a multicultural ideology is only produced by the failure to define society as social system, and by continuing to accept the notion that society is "constituted" by human beings. Barbarians and non-barbarians exist only among human be-

²⁵⁰ See Luhmann, N. '*Jenseits und Barbarei*', in '*Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft*', vol 4, Frankfurt am Main, Surkamp, 1999, pp.141-2.

ings. Systems are focused on their own operations and events only for their own function.²⁵¹

If the concept of a system is logically incompatible with the fact of social exclusion, Luhmann asks, how can it be possible to keep the concept, if there are different grades of inclusion, because logically there cannot be inclusion without exclusion? The answer is that, factually, social exclusion exists on a massive scale and it is of no use blaming capitalism or indeed any other scapegoat. Luhmann devotes many pages to what he identifies as inappropriate ways of reacting to the presence of such exclusions; he sees in the “appeal-filing” or blaming attitude, a residue of the old and vital European inclination to be able to rely on a cosmological theory of all-inclusion, a theory which is in fact inseparable from the conditions prevailing during the pre-modern conception of a stratified society. In strict opposition to the segmentary differentiation of those earlier societies that were repeating one identical pattern, but also to the vertical, stratificational pattern typical of societies of pre-modern Europe, Luhmann assigns to modern society a function-led differentiation. Especially as to the operations of the function systems in a zone, such as Europe for instance, in order to observe whether they operate coherently, we have to abstain from using normative theoretical models that will rule out or ‘invisibilise’, or simply divert his or her attention from considering the fact that people who are factually excluded, be it partially, for instance from the education system, later on, when the dynamics of repercussions described by Luh-

²⁵¹ See Luhmann, N. ‘*Jenseits und Barbarei*’, in ‘*Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft*’, vol 4, Frankfurt am Main, Surkamp, 1999, pp.142-3.

mann's late article²⁵² unfolds all its effects, and when exclusions lead to ever more exclusions, totally. Modern society is greatly integrated indeed but, contrary to the optimistic interpretations of "integration", according to the dimension of integration, integration tends to displace itself from positive integration toward negative integration. In a sense, therefore, what is integrated, is not society, but the growing areas of exclusion in the midst of which it is thriving.

This idea of all-inclusion, the idea of a world without an 'other' and without an 'outside', was already present in Kant with his idea of the reduction of the external world to the unknowable thing in itself. Although Kant represents the attempt of realisation of the *entelechia* of European humankind²⁵³, a society without exclusion is not quite here yet. One reason that Luhmann identifies is to do with the old European semantics of culture and its reflexivity which had a bearing on the future of modern Europe in terms of grades of inclusion. The neo-humanist idea that culture and freedom are connected is no longer related to the self realisation of each individual; what we are facing today, is rather an *en-masse* phenomenon of acceptance of pre-confectioned decisions and ideas. This is however not typical of contemporary society, it goes back to much more remote stages of European civilisation and the long history of conceptions such as *communitas* or *ius gentium*, which modern society is still recycling and trying to apply them to the current situation calling them with the more modern

²⁵² Luhmann, N. 'Jenseits und Barbarei', in 'Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft', vol 4, Frankfurt am Main, Surkamp, 1999, pp.142-3.

²⁵³ Kant, I. 'What is Enlightenment?' In 'Foundations Of The Metaphysics Of Morals And What Is Enlightenment?', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*.

sounding names of 'community' or 'human rights'. But if this is the case, then there is no escape and inclusion/exclusion will represent the paradigm of the future, and already of the present.²⁵⁴ The quest for justice indeed remains open, but justice does not come for free, even though Luhmann's work on justice can be considered a real 'gift' he gave the legal system.²⁵⁵

3.5 - Justice as Gift.

The interest in gifts, potlatch, etc., is absent from systems theory. As everyone knows, social anthropologist Marcel Mauss (1872-1950) had studied the gift from the viewpoint of its oscillating nature between interest and gratuitousness.²⁵⁶ As equally known, Mauss has been the last of a long list of targets for the philosopher Jacques Derrida as a critique of the Human Sciences. In his discussions of the gift²⁵⁷ Derrida, opposite to Mauss, identifies the gift in its pure gratuitousness, emancipated of all interest, calculus, economy, exchange – in the example of Abraham's gift when he sacrifices his son Isaac.

Not only gift is not a systems theory term, but it is in a sense quite at the opposite of it. Systems are dealing with their environments and a gift to

²⁵⁴ Luhmann, N. 'Jenseits und Barbarei', in 'Gesellschaftsstruktur und Semantik. Studien zur Wissenssociologie der modernen Gesellschaft', vol 4, Frankfurt am Main, Suhrkamp, 1999, p.144 and ff..

²⁵⁵ See Luhmann, N. 'Die Gesellschaft der Gesellschaft', Suhrkamp, 5th Ed. 1997, p. 470 and ff. See also Luhmann, N. 'Die Wissenschaft der Gesellschaft', Suhrkamp, 4th Ed. 1990, p.393 and ff.

²⁵⁶ Mauss, M. 'Essai sur le don' (1923-1924), <http://anthropomada.com/bibliotheque/Marcel-MAUSS-Essai-sur-le-don.pdf> (Last accessed 3rd May 2018)

²⁵⁷ Derrida, J.' *Given Time: Counterfeit Money*' (1991), University of Chicago Press; New edition edition, 1994;

or from one's environment would be quite meaningless. There is of course a long-standing exposure of Western society, throughout pre-modern times, to the logic of the gift. Religiously bound natural lawyers have construed Justice as a gift of God. For modernity, on the contrary, the gift is no longer an object that can be institutionally relied on. For the more radical legal positivists it is precisely its character of a gift that makes Justice as such incompatible with the requirements of a modern legal order. Kelsen expels Justice altogether out of the law. For Luhmann, on the contrary, Justice has its place in law. But how and in which quality? Luhmann's answer to this question is summarised in the rather enigmatic, if not also complicated and original expression 'contingency formula of the legal system'.

To remind us of the basics, Natural law theories construct the law in dependence to justice. Law and justice, indeed law and politics, were not separate. Yet this doctrine had encountered an antagonist: positivism. Modern law was defined as 'positive law' as opposed to natural law. At the price of making law subject to decisions (with all the *odium* of arbitrariness), positivism at least could guarantee one thing of great importance for modern legal systems: law could be changed, and change was part of its routines. Positivist legal theory, while its understanding of law was often wedded to unity and hierarchy, nonetheless encountered the notion of 'distinction'. This notion plays the leading role in systems legal theory. Luhmann's thought of modern law as autopoietic social system is something like a third boxer entering a match going on since a long time. In such cases, everyone tries to say that number three is really either like number one or like number two. Luhmann took revenge on this view by suggesting

the theory that Justice is the 'contingency formula of the legal system'²⁵⁸.

That was a double blow - against the natural lawyers for whom Justice is the sovereign value of law (law 's 'consistency formula'), and against the positivists, for whom Justice is outside the law. In that sense, if the contingency formula Justice can be interpreted as Luhmann's gift to the legal system, more fundamentally still it is his gift to legal theory, yet here not in the sense the English word 'gift', but rather in the sense of the German word *Gift*, which means 'poison'. A certain theoretical model of law, both immobile and aporetic, frozen in its helplessness, which gives legal theory the aspect of a cold war between naturalist and positivist postulates, is - this is my thesis - discontinued at the very point at which Luhmann comes up with the notion of contingency formula.

What does Luhmann mean with this definition of Justice? First, he means: 'contingency'. Electricity involves a touching of two poles. Contingency, which actually means the touching of two poles or whatever objects, appears as a general theory, or at least the generic category, of that which electricity is the most spectacular illustration of. 'Contingent' has also acquired diverse meanings otherwise related to 'casual', from the latin *cadere*, to fall, and *casus*, the case, from which a large group of further terms including both 'casually' and 'casualty'. In English, also, we find the use of contingency is as in 'contingent on something', as prices that are contingent on offer. None of this applies to Luhmann, as he uses the term 'contingency' in the German way, which is in a sense closer to philology. The German '*Kontingenz*' remains faithful to its philosophical meaning,

²⁵⁸ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.211 and ff.

which is the double meaning of ‘absence of impossibility’ and ‘absence of necessity’. Usually the reference is either to one or to the other.

For Foucault, the absence of impossibility is what occupies the centre of attention: ‘history is contingent’ means in a Foucaultian perspective that the archive shows all that has been possible, all the historic features that have been possible rather than impossible. Jacques Lacan’s idea of contingency, where it relates to the subject in connection to structural change and to its overdetermination by structure and impossibility, is another example²⁵⁹. But generally, in most of the pre-systemic uses (that is, philosophical, cultural, media-vernacular) of the terms ‘contingent’, ‘contingency’, it is not the possibilistic but the ‘necessitistic modalisation’, not the negation of impossibility but the negation of necessity that determines the term – not so much the fact that something is shown to be not impossible, but the fact that something, being under no necessity, escapes any rule. It is important to keep these things in mind in dealing with Luhmann on contingency. The danger is that Luhmann’s pairing of ‘contingency’ with ‘formula’ could suggest that he is talking of a mechanism for exceptional, perhaps particularly ‘hard cases’, as opposed to average or normal cases, which he is not, differently from other legal theorists. For him what counts is every case, any case. Yet the hardest aspect in the case of the contingency formula is not the intrinsic problem of contingency, but the relationship, more exactly the tension between ‘contingency’ and ‘formula’. They seem almost to contradict one another, which is fitting here

²⁵⁹ Lacan, J. *The Seminar of Jacques Lacan Book XI: The Four Fundamental Concepts of Psychoanalysis*, ed. Jacques-Alain Miller, trans. Alan Sheridan, (New York: Penguin, 1994), 207. See also Evers, T. *The ‘Signifier-In-Relation’, ‘The Signifier-In-Isolation, and the concept of the ‘Real’ in Lacan*, *Parrhesia*, No 14, 2012 56-70.

since the concept of the contingency formula makes sense only if one recognises that there is contingency and there is no remedy against this.

The first step to take consists in saying, in spite of all I have reported so far about the term's conceptual structure, that contingency does not need to be perceived in negative terms. Foucault explains contingency as *emergence* utilising Nietzsche's use of *Entstehung*²⁶⁰, interpreting society as a series of collisions instead of a series of causes. True, the reference to contingency decomposes universals (as already for Occam), but on the other hand, as we have already seen, whatever emerges in history, emerges contingently. Contingency is the very stuff history is made of. Although Foucault was not concerned with society, his view of contingency is by no means far from Luhmann's, even if Luhmann sees in contingency, i.e. the absence of necessity and impossibility, not only a necessary ingredient of modern society, but also a determinant and productive functional pre-requisite of each of the functional systems, and generally an inescapable aspect of the complexity of modernity, for instance when heterarchy is affirmed against hierarchy.

Moreover, if for Foucault there is no theory of power, as there is no equilibrium, no inherent logic, or stability at work in it,²⁶¹ functionally differentiated modern society includes this same postulate among its requirements, replacing transcending goals with the internal construction of autopoietic systems. The autopoietic theory of law describes the relationship of justice and power by rejecting the classical approach that sees

²⁶⁰ Foucault, M. '*Nietzsche, la Genealogie, l'Histoire*', in *Hommage a Jean Hypolite*, Paris, Presses Universitaires de France, 1971.

²⁶¹ Dreyfus, H., Rabinow, P. '*Michael Foucault Beyond Structuralism and Hermeneutics*', Brighton: Harvester, 1982, pp. 187-8.

justice as a form of exchange between equally powerful parties, and offers itself as solution to the problems modernity finds itself confronted with - problems of erosion of power or control, of the growing absence of a social agency for necessity, '*notwendigkeit*', of a power that would combine 'irresistible force' or 'overruling power' with legitimacy. It underwrites the sacrifice of ideal, society-wide ends, but it offers itself as a means for dealing with complexity, choice, risk and disappointment management - multiplicities of trajectories and goals replacing the one, society-unique necessity.

The contingency formula is not a representative sample of Luhmann's theory of autopoietic systems. It is not even a representative expression of the autopoietic theory of the legal system. It is essentially a *Folgeproblem*, a problem that follows once the autopoietic theory of the legal system is effectively enacted. If justice is the contingency formula of the legal system, it is by no means the only contingency formula Luhmann finds at work in modern society. Each of the functional systems - economy, politics, religion, media, education, science, etc. - includes such a "program of programs"²⁶². Justice is the contingency formula of the legal system, but 'legitimacy' is the contingency formula of the political system, 'limitationality' (the idea that certain truth-claims are excluded if certain other truth-claims are accepted) is the contingency formula of the science system, scarcity is the contingency formula of the economic system, learning ability is the contingency formula of the education system, the idea of a God is the contingency formula of the religion system. What do these 'formulas' do? They replace in the system other central terms such as 'value' or 'principle', which are too solid and inflexible. These central terms

²⁶² Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.212.

were appropriate as long as these agencies were not systems but hierarchies, or orders. Something changes when hierarchies are replaced with systems – when for instance the legal “order” stops to be an order and becomes simply an agency, which we call a system. Systems cannot any longer rely on the values and principles on which everyone agrees casually, as within a family. The society-compassing maxims are no longer up to the task - common values and principles today are those the tabloid press relies on. The contingency formula takes into account the fact that these are not good enough to be ultimately in charge with governance of functional systems.

The problem is that while the guiding values or principles of a family can be simply stated, written on a list, repeated, learned by heart, etc., contingency formulas cannot! They can only be seen, named, identified by an external observer. Either you use the contingency formula – then you cannot see what it is that you use – this is the case of the system itself. Or you see it, you observe it, as a second order observer, for instance as a legal theorist. But then you have no power of acting. The system, like any observer, cannot see what it cannot see,²⁶³ Luhmann writes – which of course means that it cannot see what it can see either, as the difference between what she or he can see and what she or he cannot see escapes the observer. But what cannot be seen by the observer, can be seen by the observer’s observer. The second order or external observer provides, Luhmann writes, the functional system as first order observer with an operational object and with learning possibilities for the object. Only a second order observer can see someone (for instance the legal system) ‘learn’.

²⁶³ Luhmann, *‘Ecological Communication’*, Polity Press, Cambridge, 1989, p.24.

The second observer thus introduces a contingent dimension of what is just or unjust. This does not mean that there are no criteria; it means only that instead of absolute values, we get only relational 'perspectives'.²⁶⁴

Let us admit: there is no doubt that it would be easier with the natural law notion of Justice as the source of the unity of the legal order, and alternatively that it would as well be easier with the positivist suggestion of expelling the reference to Justice from the legal order. Yet, against the first suggestion, *stare decisis* severely limits, if not annihilates, the impact of the reference to Justice for contemporary legal orders;²⁶⁵ and against the second suggestion it is easy to show that something in the legal order functions always like the reference to Justice. This is a matter of empirical diagnose; in that sense the notion of justice in law is empirical.

The quest for the *unity* of the legal order is generally known to be the most characteristic feature of positivism. Naturally, though, unity is not an Austinian invention. Perhaps the idea of unity is even older than God, thinking that the idea of a chain of being is even a prehistorical idea, but with the advent of atheism of philosophical Illuminism and the embracing of heterarchy over hierarchy in modernity, unity became a renewed belief, and, in the case of legal system, it became a self belief. Luhmann instead, sees the legal system not as unity but as *difference*. He sees the claim to unity as a self-idealisation of the legal order – as the legal order's questionable claim to succeed in establishing unity everywhere it encounters

²⁶⁴ Luhmann, N. '*Die Gesellschaft der Gesellschaft*', Frankfurt am Main Suhrkamp, 1997, p. 866 and ff. See also Mannheim, K. '*Ideology and Utopia*', New York, Harcourt Brace and Co, (1949), p.254 and ff.

²⁶⁵ Teubner, G. '*Self-Subversive Justice: Contingency or Transcendence Formula of Law*' 2009, *Modern Law Review*, Vol. 72, pp. 1-23;

difference. Kelsen's negation of justice,²⁶⁶ Rawls's reconstruction of Justice,²⁶⁷ Dworkin's notion of distributive justice as the "envy test"²⁶⁸, all fail - according to Luhmann - to offer a way to unity. The law *strives for* unity, that's its internal 'dogma', after all courts decide in the name of the law, that is to say in the name of a unity, not of a difference. Yet the legal system deals with differences, and solves them by means of ever-new differences. Every legal decision differentiates what is just of what is unjust. Positivists, seeing that they could not find a satisfactory solution for the relationship between law and justice, resigned themselves to the idea that justice should belong to the realm of ethics. Luhmann finds unacceptable that issues of justice should be discussed on a different level from legal ones, while arguing, at the same time, together with the positivists, that it is not possible to find a place for ethics in the legal system.²⁶⁹ As morals dominate the historical dogmatic view on freedom and equality in the realms of law as well as of politics, Luhmann sees a paradox which must be unfolded if ethics needs to be kept separate from issues of justice. This paradox inhabits the notion of freedom itself. Luhmann's argument is the following: freedom needs possibility and chance, which in turn negate necessity; yet, at the same time, freedom *is* necessity! Equality, on the other hand, fails to provide a criterion to decide what is equal and what is unequal. The solution proposed by Luhmann is to operate a distinction between freedom as exclusion of external limitation and equality as the

²⁶⁶ Kelsen H. *'What is justice?: Justice, Law, and Politics in the Mirror of Science: Collected Essays'* Berkely: University of California Press, 1957.

²⁶⁷ Rawls, J. *'A Theory of Justice'*, Oxford, Oxford University Press, 1971.

²⁶⁸ Dworkin, R. *'Law's Empire'*, Hart Publishing; New Ed edition (1998).

²⁶⁹ Luhmann, *'Law as a Social System'* Oxford University Press, USA; 1st Published in Pbk. 2008, p.212.

exclusion of inequality. A distinction of the sort shows another face of freedom and equality and becomes a matter for legal regulation and for the courts, as opposed to a matter for the individual and ethics.²⁷⁰

Validity is given by the local references within the legal system, which are part of the system's relationship with itself without affecting the content of the system. Justice itself is not strictly related to the issue of validity, which nevertheless is relevant for the system, but perhaps it is related to the self-observation and self-description of the system. In what Luhmann calls 'the old-Europe tradition', the idea of justice is associated with the idea of 'norm', which in turn is associated to an idea of a legally ordered life of the whole of society, one of the forms which the dogma of one encompassing system can take. Justice as a contingency formula is itself also one of these recursive operations. It, too, is defined as a "criterion for selection"²⁷¹, only, it cannot be added alongside other such criteria, usually described as the codes of the system, because of the specificity of its recursive aspect, and because it is not a code. Rather, what the contingency formula does is exposing code-based decision-making to external observation. What happens in the legal system is made explainable to an observer – and this without self-idealisation, without taking a common oath on common values, on common principles. The contingency formula Justice provides the system with a standard that is no longer an idealisation. It is, rather, a mere default rule – thus allowing a higher visibility of injustice. Justice does not transform indeterminable complexity into de-

²⁷⁰ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008;, p.212.

²⁷¹ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.217.

terminable complexity, and does not give a rule for orientation of the system or a criterion for decision-making. Instead, the importance of the contingency formula, although it cannot satisfy any desire for certainty or promise to do so, lies in the fact that it organises meaning specifically for each social system. Justice as the contingency formula of the legal system has the duty of providing normative expectations in the face of results, even and especially where they contradict or disappoint such expectations. “Justice is a contingency formula” means: 1- that Justice is not a *consistency* formula – say: not a program that is correct with respect to some timeless guarantee, and, 2- that Justice is not a matter of contingency alone, but of “formula”, that is to say, a matter of *form* (although this form is distinguished by its adaptive and learning capacity, its plasticity, it is empty neither of information nor of risk).

That the whole project of a contingency formula Justice looks ‘frustrating’ to some and, honestly speaking, probably to every lawyer at first looks, is rooted in the faith in a certain image of Justice, in the expectation that Justice in the form of *consistency* of judgment must exist and must and indeed can be guaranteed. This is a faith, which we all (or some, or most of us) have, or wish to have, or claim the right to have, or wish to be seen as having (or any combination thereof). The question of a differently, more modestly conceived – disappointment-sensitive Justice, that underlies Luhmann’s contingency formula Justice, becomes plausible (as opposed to: excessively disappointing in its own turn), only once the faith in consistent Justice is obliterated by doubts and acknowledged as a thoroughly secular, decidedly post-theological versions of divine justice. Luhmann tries a step out of the bipolar structure of overstatement and under-

statement of Justice, out of the bipolarity between unrealisable high hopes or claims and their everyday factual implosion. In a complex, contingent, yet structured world, the need and constraint to select is inescapable,²⁷² even if the expectations that allow to do so belong, as expectations of expectations, to situations of double contingency. If contingency, for Luhmann, is the necessity of taking risks and be disappointed, functionally differentiated systems at least offer possibilities to react to disappointment. These can be changed and integrated with the objective reality, or maintained and carried on in protest.²⁷³ In the case of the legal system, which deals with norms, (and remembering that one of Luhmann's definitions of Justice is as a "disappointment ridden norm"), which are supposed to have a unconditional validity, whether its expectations are fulfilled or unfulfilled, sees a tension between 'ought' and 'is' and between 'truth' and 'law'. But, Luhmann continues, this differentiation is not *a priori*; instead it comes with evolution. The recursive operations of the legal system - of any autopoietic system - are based on repetition. This repetition, in Deleuzian terms, is not something necessary, something which cannot be replaced. Consequently, this is also the case of evolution.

Generally, and beyond the scope of the earlier legal-positivist stance against moralisation, the autopoietic critique of morals is that they narrow the scope of appropriate ways of cognition and, thus, of action. So, if we can forget the moral element of justice and look at it only from a system theory point of view, we may see, with an eye on some of the developments of Deleuze's *Difference and Repetition*, especially his reading of

²⁷² Luhmann, N. 'A Sociological Theory of Law', London, Routledge & Kegan Paul, 1985. p.25.

²⁷³ Luhmann, N. 'A sociological Theory of Law', 1985, London Routledge, p.25.

Kierkegaard, that the two unreflected ways of reacting to disappointment that Luhmann describes, coincide in their insufficiency. We can go on contesting, protesting infinitely as does the biblical Job, or we can resign ourselves infinitely as does Abraham. In the first case, we shall find ourselves in the position of the natural law theorist who will ever re-assert the moral aspect of justice; in the second case we will be in the position of a positivist who gives himself away, forgets about anything apart from God's direct calling - and in the end needs to be stopped *manu militari* by God's angel from murdering his own son. The popularity of these two figures from the Old Testament shows already how overwhelming is the appeal for both overstatement and understatement. The two biblical heroes illustrate yet again what is so clear from the general aversive reaction to the autopoietic account of the legal system. The consistency aspect of Justice holds on to us by all its forces, still today. Media and subjects will be able to speak out against a particular miscarriage of justice, at a given occasion; yet, they will do so in the name of the promise of a consistent Justice controlled by some perfection-guaranteeing master, which is a highly unreal name and a hopelessly overstated promise. The problem the legal order has in determining how it can refer to Justice at all (in the absence of any consistent reply to that question!) enjoys no sympathy.

A cybernetic approach instead would underline that the increase of possibility and choices is the key to development. Heinz von Foerster's suggestion that it is necessary to decide in such a way that the number of decisions thus demanding to be made,²⁷⁴ quite counter-intuitive in itself,

²⁷⁴ Foerster, H. von, *'Ethics and Second Order Cybernetics'*, 1991. In Foerster, H. von, *'Understanding Understandings: Essays on Cybernetics and Cognition'*, 2002, Springer-Verlag, New York.

could be interpreted simply in terms of choices, and therefore in the case of Justice it is rather the point of (a) making for a Judge the right choice, but (b) also to have a wide variety of choices. But is the fact of having this obligation of the *right* choice in the domain of ethics? This is comparable to the concept of “good self-organisation” that we have already rejected. So if there is, as Luhmann says, no place for ethics in law and if a system cannot have a good or bad self-organisation, then the point of making the right choice is not a problem of the legal system. The legal system can only observe its own operations and the contingency formula can aid in this by giving parameters within which the choices can, not should, be made. At the same time von Foerster’s suggestion could be interpreted but also in terms of showing the system’s internal complexity and therefore its possibility. After all, as Teubner has in fact stated, there is a need for “adequate complexity”²⁷⁵ within the legal system, it is an unavoidable complexity deriving from the need of treating different cases differently, and which goes beyond Luhmann’s own definition of Justice as “adequate complexity of consistent decision making”.²⁷⁶

As discussed, social system theory distinguishes itself from the traditional theories of the manifold accounts of the legal order. Majority legal theories put the legal order under a finality of justice, while several minority groups of legal theorists suppose that there is no goal, only a internal system construction, an expression of other forces (like in Marx and economic theory of law) that takes on a mere legal appearance (where people speak

²⁷⁵ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23, pp.9-10.

²⁷⁶ Luhmann, N. ‘*A Sociological Theory of Law*’, London, Routledge & Kegan Paul, 1985.

of law there is in fact only economy, by self-delusion). This is different from one autopoietic theory, which shuns such an easy cure by mere displacement. But looking closely, Marxism also does not offer a position of which the finality is of any help. The imperative of changing the world would be to “subvert the endemic injustice of the legal order by means of modifying the legal-order-external conditions of the legal order”. Moreover, natural law theory describes justice as deductive, to be inferred from the nature either of man or of humanity of creation. While, on the other side, in Positivism, justice takes the role of a point of view, which constitutes the rationality of the professional discourse or the legal reasoning of the legal system. What is opposed by Luhmann’s system theory is the notion that there is no space for justice in any other place than in the legal system. Not outside, but only inside the system; inside, but not in a transcendentally ensured way. A place, the legal system, itself understood as a “goal”, not as its function, where everything else follows; is nothing more or else than a factor for the continuity of the exercise of the legal order. This position is like a function for Luhmann. What remains to be done for legal theory is to avoid that the proceduralised question stops, or that the legal order loses its ability to cope, which is predicated on an appropriately reduced and abstracted notion of *Gerechtigkeit*.

If the legal order no longer has space for goals, Justice obviously can no longer be considered its goal. Perhaps justice can be interpreted as something like the "intention" of the legal order, assuming counter-factually that the legal order is a person or behaves like one. If Justice is an intention, this means that it can succeed but it can also fail. It can be compared against the dichotomy between virtue and vice. One must strive to

achieve virtue in ones choices, but often one fails and falls into vice. One will try again and very likely at some point will fail again. In the secular world the same situation occurs in everyday life, see for instance the “last cigarette” of Italian novelist's Italo Svevo's Zeno Cosini, the protagonist of *La coscienza di Zeno*²⁷⁷, as an example. In these cases there is an attempt of reaching some form of perfection, which inevitably at some point will not be attained. But it is precisely this failing that shows righteousness. It would seem that all things are subject to a sort of cycle, a high and a low, our body's rhythm (inhale, exhale, systole, diastole) or as we have in music (tension and relaxation). Perhaps vaguely similarly, there is a sort justice/ injustice cycle, but without any regularity, in which precisely instead of expecting or pretending to attain perfection, virtue, or exclusivity, we should see in the cycle itself, which sometimes displays failure, the righteousness of Justice.

Luhmann starts alone, really alone, a new direction.²⁷⁸ Luhmann in his idea of contingency formula starts himself to take some distance from his own doctrine, in the sense of start looking for the successor of the consistency formula. This consistency formula can be called in one word “power” in the Aristotelic sense of *Dynamis*. Once society recognises itself in its own autopoietic image, how can it continue without a small portion of aspirations that tend to the *arché*, which can be located in creation or, at least, Divine Providence? In the name of what to speak or to decide?

²⁷⁷ Svevo, I. 'Zeno's Conscience', Penguin Classics, 2002.

²⁷⁸ See Clam, J. 'Was heißt sich an Differenz statt an Identität orientieren? Zur De-Ontologisierung in Philosophie und Sozialwissenschaft', Konstanz, Universitätsverlag Konstanz, 2002.

When there is no longer any way to decide or to speak in name of consistency? That there is a formula for contingency looks like an oxymoron.

So, if the legal system does not have justice as a goal, the objection could be that justice should then be a system in its own right. After all there are different accounts or aspects of justice, such as legal justice, moral justice and political justice. First of all, though, none of these make sense within the Luhmannian account. In analysing the legal system, Luhmann refers to juridical justice alone. This is what he refers to as *Gerechtigkeit* in the sense of the *Kontingenzformel Gerechtigkeit*. Importantly, for the non-German reader, Luhmann, speaking of the *Kontingenzformel Gerechtigkeit*, speaks unambiguously and only of Justice in the sense of the aspiration that inhabits the legal order, (the realm indicated by the allegory *iustitia* - the lady with scales and blindfold); he does not speak of Justice in an institutional sense, that is to say, he does not speak, when he uses the notion of a contingency formula Justice, of Justice in the sense in which the word refers to an agency, to an institutional system, ultimately to a synonym for “legal system”.

As the notion is thus not about *Justiz*, not about an agency, not about a system, all it does is offer a device to conceive of the conditions under which Judges can be enabled to do their work competently in the admitted absence of consistency.²⁷⁹ The fact that we are not dealing with Justice in the sense of the well-known institution is clear from the observation that the German language has a separate word for it, not *Gerechtigkeit* but *Justiz* (for instance there is a *Justizministerium*; but “*Gerechtigkeitsministerium*” would not even be a joke). Of course, in other

²⁷⁹ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008.

contexts, Luhmann talks about Justice in the sense of *Justiz* as well but not as a contingency formula. The fact is that the notion of a contingency formula Justice is – rather atypically, for Luhmann, let us face it – developed in order to take care of an ultimately aspirational rather than institutional topic (perhaps however what he suggests under the heading of *Kontingenzformel Gerechtigkeit* can be best described as the institutionalisation of an aspiration.

4 - Justice and the Legal System: The Situation Before and After “Kontingenzformel”.

4.1 - What is the Function of Law?

Luhmanns' work on society and its function systems continuously refers to science, as he is dipping his own models into a referential background constituted, among others, by cybernetics and mathematical models, some of the terminology he adopts in relation to social system theory are of an unmistakably scientific (and, more often than not, hard-sciences related) flavour. 'Function', 'code', 'coding, and 'programming' belong typically to this group of his vocabulary. These terms, referred to each of the social systems, are used for a precise reason; they “exclude asking, in particular, psychological and anthropological questions”²⁸⁰. The reason why it appears as advisable if not desirable to by-pass this type of questions, Luhmann explains, is not that such questions are intrinsically wrong. Rather, he says, in an apparently Popperian turn, that “general statements about humankind, consciousness and person are difficult to test”.²⁸¹ Luhmann presents this in contrast to his argument that, if one considers society as a whole, one can take it to exist “through ongoing communication

²⁸⁰ Luhmann, *'Law as a Social System'* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

²⁸¹ Luhmann, *'Law as a Social System'* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

(...) which can be observed empirically”²⁸². Luhmann does not intend here to say that each single statement should be, or stands in need of being, verified. What is more important is that all statements can be generalised, even abstracted, and applied throughout all social systems; however, what is most decisive for Luhmann at this level, is that the self-constitution of social reality is not a matter of so many existing human beings that co-exist, but of the far greater number of simultaneously on-going communication processes, as these processes, not those beings, are able to provide information that is both relevant and subject to further decisions.

On this basis, if we refer to the legal system, we can ask the question: what is the function of law? ‘Functions’ in a social systems are basically “reference problems”²⁸³ which are described in more “abstracted terms than [a social system, here] the law itself does”²⁸⁴. This allows to unfold the self-referential cycle, escaping its least informative (identitary) state, and to orchestrate the legal problem by allowing it to expand “into distinctive identities”.²⁸⁵ At the same time, the fact of enriching the social dimension by a time dimension thereby giving rise to expectations. In a social-systemic perspective, expectations are not features of a consciousness, i.e. a person; rather, they are “the temporal aspect of the meaning of communication”²⁸⁶. This is clearly in contrast to the traditional views of the

²⁸² Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

²⁸³ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

²⁸⁴ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

²⁸⁵ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.142.

²⁸⁶ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.143.

older sociology of law, which — from Jeremy Bentham²⁸⁷ to Roscoe Pound²⁸⁸ and further to Talcott Parsons²⁸⁹ and others²⁹⁰ — describe the function of law as “social control or integration”,²⁹¹ that is to say as a function that features, ecumenically, so to say, both on the psychological and the social level. The consequences when considering the problem of law in a temporal dimension, are of course mainly social ones; they concern the question whether expectations can be rendered stable, or predictable and secure over time, as each communication has an impact, or sets the basis for the next one; and in so doing constantly establishes the state of the system²⁹²; in other words it establishes what is legal and what is illegal and avoids arbitrariness. The legal system of course is not only about communication, it also involves “behavioural patterns”, such as are “registered by law” and normatively “referred to law”.²⁹³ All this is strictly related to dealing with expectations and disappointment of such expectations, which is another way of describing contingency in law, law's function of (contingently) “dealing with” contingency, which is an integral part or layer of the

²⁸⁷ Jeremy Bentham privileged in fact an individual perspective on law. See for instance Draper, T. *‘An Introduction to Jeremy Bentham’s Theory of Punishment’* Journal of Bentham Studies, vol. 5 (2002).

²⁸⁸ Pound, R. *‘Social Control Through Law’* (new Haven 1942)

²⁸⁹ Parsons, T. *‘The Law and Social Control’* In William M. Evan Ed. Law and Sociology (New York 1962).

²⁹⁰ For a full list see note 3 in Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.143.

²⁹¹ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.143.

²⁹² Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.143.

²⁹³ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008, p.145.

function of law. But the first need to clarify the function of law, concerns its coding and programming.

The function of law traditionally was intended as “achieving the security of expectations”²⁹⁴ to say it with Jeremy Bentham. Security has for long been supposed to provide “the disappointment preventing principle”²⁹⁵, where, if life is made of expectations and hopes, the security of law should guarantee the “maintenance of all these hopes”²⁹⁶. In social systems theory, the function of law is to deal with communication over time, and this primarily in order to achieve “the stabilisation of normative expectations”²⁹⁷. While there exist different formulations, these are really just synonymous expressions of one identical function of law.²⁹⁸ If there were to be several functions, this would lead to “problems of incomplete overlap and [to] an unclear demarcation of law”²⁹⁹. In order to refer to this one function, or functional definition of law, Luhmann chooses the concept *norm*, more exactly “the concept of the normative mode of expectations”.³⁰⁰ This concept is seen in a binary form, the distinction

²⁹⁴ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.173.

²⁹⁵ Bentham, J. ‘*Principles of the Civil Code*’ in *The Works of Jeremy Bentham*, Vol I, Sagwan Press 2015, p. 302. See also Alfange D. ‘*Jeremy Bentham and the Codification of Law*’ 55 Cornell L. Rev. 58 (1969).

²⁹⁶ Bentham, J. ‘*Principles of the Civil Code*’ in *The Works of Jeremy Bentham*, Vol I, Sagwan Press 2015, p. 308.

²⁹⁷ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.148.

²⁹⁸ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.149.

²⁹⁹ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.149.

³⁰⁰ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.149.

between expectation and disappointment.³⁰¹ Disappointment of expectations can be accepted or rejected, and that means respectively a cognitive or a normative process of such expectations.

It is interesting to observe that Luhmann himself points out in his description of the legal system and of its normative function how much its emerging has to do with the Western or European development towards modernity. While, as a sociologist, Luhmann is typically not among those fascinated or driven by questions of cultural genealogy, he wishes not to leave a doubt that what has happened in normative history, has in fact happened in Europe, not elsewhere, for instance in Asia. Luhmann claims that it is because of the longstanding presence of a strong legal culture; if instead, we would be considering technological developments, literacy and demographics, then Asia, specifically, Luhmann claims, China in the period between the 1200 and the 1300, would have seemed the best equipped and Europe the least well equipped region.³⁰² Instead, what has happened is that Europe, starting with the Roman jurists and, half a millennium later, the Byzantium-made *Corpus Iuris* or body of law, has resulted in a conspicuously successful attempt at establishing a legal culture, whose singular and indeed unique character and complexity still amazes scholars. In Italy, with the cities and counties based on laws of self-regulation, law was permeating any aspect of city life and relations among its citizens, while England developed, since the medieval centuries, and partly in conscious opposition to Roman law, a separate municipal legal order or com-

³⁰¹ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.149.

³⁰² Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.172. See also Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998, p.35 and ff.

mon law (or rather, a bi-component normative system, consisting of law *and* equity). Both of these models, and the countries following them based their exchanges and life on law, tested and developed ways of managing expectations and consequentially ways of dealing with rule and exception, with improbabilities, with conflict-solving through tribunals, from simple individual ones to more complex and all-encompassing ones, charged with duties that extended far beyond the limits of normal conditions, including e.g. war. It was in so doing that they developed a social order³⁰³. This social order was, courtesy to this kind of legally prepared background, ready to bear the brunt of more and more social complexity and able to serve as the context in which the paradigmatic shift to modernity could find its conditions.³⁰⁴

Now the mention of these historical findings constituted a narrative; they are not part of an explanation of socio-historic processes in systemic terms. Law as a system can display an autopoietic behaviour only on the basis of its function. In order to see how the law can reproduce itself two further concepts are needed.

4.2 - Coding and Programming.

The idea of a 'command' coming from a powerful and legitimate legislator, as still to be found in Bentham's view of the law, requires answers to the old question of the validity of law. These are questions which never

³⁰³ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.172.

³⁰⁴ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.172. A more in depth analysis of the historical development of Law, which is beyond the scope of this work, is given by Luhmann in chapter 6 of *Law as a Social System*. Pp 230 and ff.

receive an adequate answer other than a paradox - no matter whether one tries using the means of a *Grundnorm*, or a religious principle, as. Previously discussed³⁰⁵. There cannot be (to put it with Walter Benjamin) anything like a "super-right". All there can be found, is only *Gewalt*³⁰⁶. Therefore, in a social system theory view of law, at least in any view that goes beyond Talcott Parsons' 'structural-functional analysis'³⁰⁷ - as Parsons is still part of those who talk of a "higher order unit"³⁰⁸ - the basic step is that of swapping the term 'command' for the term 'coding'.³⁰⁹ This is the way the question of the source of validity of law can be avoided.

When first approaching the theory of Autopoiesis, one is met with the concept of the binary code, and the proviso that, far from a single one for all, what exists is one such binary code for each of modern society's function systems. These codes are quite simply explained, apparently too simply, as they tend to remain - perhaps precisely for this reason - obscure to many, including some systems theorists. For instance, if one starts from the assumption - as Luhmann does - that the study of modern society is not an ontological study of being persons, but a poietological study of ongoing events or happenings, or processes in the making, it is obvious that the notion of a function takes up, not only an importance without preced-

³⁰⁵ See infra chapter 3.

³⁰⁶ In a sense of *vis* and *potestas*, not exactly as *violence*, as explained by Luhmann, N. 'The Third Question: The Creative Use of Paradoxes in Law and Legal History' *Journal of Law and Society*, Vol. 15, No. 2 (Summer, 1988), pp. 153-165 at Note 5. Benjamin, W. "Zur Kritik der Gewalt", in id. *Gesammelte Schriften* 2.1 1977, pp179-203.

³⁰⁷ Parsons, T. 'The Social System', (1951) *Forgotten Books*, 2018, pp.17 and ff. and 175 and ff.

³⁰⁸ Parsons, T. 'The Social System', (1951) *Forgotten Books*, 2018, p.17.

³⁰⁹ Luhmann, N. 'Law as a social System', *Oxford University Press*, USA; 1st Published in Pbk. 2008, p.173.

ent, but also a wholly novel shape. The notion of a function is not new in itself; for instance, a whole and highly influent school of historical inquiry into the earliest historical (sometimes called "fringe-historical") strata of proto-indo-european cultures, has been based upon the knot of three constitutive functions, a sacerdotal/sovereign function, a warrior-function, and a productive and reproductive, fecundity-related function.³¹⁰ The function-concept of modern systemic sociology can of course not rely on anything like the pre-existing "castes" (in the widest sense) that underlie the indo-european three-function structure. The priests, chieftains, judges of the first, the warriors of the second, the peasants of the third function of indo-european societies, all belong to a specific social body. In modern, functionally differentiated society, each function system is identified by an individual's "membership" in one of these bodies, but by the incessant action of an underlying binary code. This is because functions are here embodied in systems rather than social bodies, and a system (in the sense the word carries in social systems theory and in modern systemic approaches generally) is not to be found on the level of items, substances, entities, etc., but on that of operations. The difference shows especially when one compares the way in which pre-modern functional bodies and modern functional systems develop their borders. While in the case of a function-related social body, inside and outside are separated the boundary of membership, in the case of a functional system, it is by means of the continuous reference to a specific binary code, in its constitutive recursive operations, that operates the self-distinction or self-definition. Each function-sys-

³¹⁰ See the work of French comparative philologist and historian Georges Dumézil (1898-1986), esp. his *Archaic Roman Religion*, Baltimore (Johns Hopkins) 1996.

tem involves the functioning of such a code. For the legal system, the binary code that allows continuous recursive decision-making is legal/illegal; the science system, the binary code is true/false; for the political system, it is government/opposition; for the economic system, it is payment/non-payment, to name some of the chief examples.³¹¹ They are described as a sort of on-off switch within the system³¹². Nevertheless, it is not at all that simple. Luhmann tries to bypass the need for a higher set of norms³¹³, and notices that modern society has gone beyond "relying on the abstraction that superimposed the bifurcation between fulfilment and disappointment"³¹⁴, that would be simply represented by the distinction legal/illegal - which is by no means an invention of social system theory, but it is nevertheless, a relatively "recent achievement"³¹⁵. In fact, this distinction is on the one hand, logically, what the legal system is based on; on the other hand, historically, it is a consequence of a recent evolution of society³¹⁶.

This "switch"-related nature of the function-systems he describes, finding them at work in modern society, imposes upon Luhmann's theory-writing its own particular style of presentation, perhaps a "post-ontological". Luhmann presents old and new arguments aiming at rendering, analysing, dissolving the paradox of law. For instance, if in antiquity

³¹¹ See for instance: Moeller, G. *Luhmann Explained: From Souls to Systems*, Open Court, Chicago, 2006, p.29.

³¹² On this see Luhmann, N. *Social Systems*, Stanford University Press, 1995, p.444-5.

³¹³ Cfr. Hume, D. *A treatise of Human Nature*, book III, part II, section II, Everyman's Library, London, 1956, vol 2, p. 203.

³¹⁴ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p.174.

³¹⁵ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p.174.

³¹⁶ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p.174.

(and up to the Renaissance), European societies described themselves as hierarchical, peasant or urban societies, observed in a centre-periphery way could be seen as having some kind of 'unity' and 'order' (but also 'disorder'), but when this so called - and indeed for immemorial times, so understood - 'natural order' started to disintegrate after the Middle Ages onwards,³¹⁷ law still was considered as Divine Law (or as Natural Law). Luhmann explains that this was as important move, destined to hide the systemic paradox of law behind an overarching narrative. In positive law, in modern society, this is more difficult to do, so there can be innovative - yet, still pre-systemic - attempts for the law to get out of the paradox, which, mainly, were attempts to either abstain from investing in law (or practising law), or alternatively, to find a distinction that "dissolves the paradox"³¹⁸ of law. So, instead of re-asserting the inevitable distinction between right and wrong (which comes complete with the moral dimension that they inseparably include) the law is about legal and illegal. The move shows that, whether knowingly or intentionally, or not, the threshold to positive law so in this way this move is, even exclusively, about positive law. From there it is not difficult to find the way to the quickly widening contradiction between morality and legality and the ensuing "morally-required disobedience to the law"³¹⁹.

³¹⁷ Luhmann, N. *'The Third Question: The Creative Use of Paradoxes in Law and Legal History'* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165 p. 155-6.

³¹⁸ Luhmann, N. *'The Third Question: The Creative Use of Paradoxes in Law and Legal History'* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165 p. 155. On this see Fletcher, G. P. *"Paradoxes in Legal Thought"* (1985) 25, Columbia Law Review, pp.1263-1292.

³¹⁹ Luhmann, N. *'The Third Question: The Creative Use of Paradoxes in Law and Legal History'* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165 p. 160.

Luhmann also reminds us of how in Roman law, classical as well as medieval, there often existed a third option, such as, between legal and illegal, either the common good, or the maintenance of political authority.³²⁰ This is as much as to say that both legal and illegal are acceptable. If legal is acceptable, and illegal is acceptable as well, then their opposition is acceptable; in other words, we are dealing with the acceptance of the binary code applied to itself. Nevertheless, in law *tertium non datur*; a judge - or a legislator - cannot avoid determining which side is acceptable and which one is not in each case. A functioning system has to “reformulate its own binarity as excluding third values”³²¹. This means that it has to reject the codes of other systems (political, economical, and so forth) and “accept [or, more exactly, to function continually in] its own code unconditionally”.

Another gimmick is the result-oriented practice of the law both in Court and in the law-making exercise), so it is about decisions, not theory. Even so all those tricks aiming at avoiding or hiding the paradox do not really achieve anything; “the future remains unobservable”³²² and the paradox has not gone away, a self-referential mode install very much present; in fact “the validity of a programme depends on its own execution. The execution of the programme becomes the condition of the execution

³²⁰ Luhmann, N. *‘Law as a Social System’*, Oxford University Press, 2004, p.185.

³²¹ Luhmann, N. *‘Law as a Social System’*, Oxford University Press, 2004, p.186.

³²² Luhmann, N. *‘The Third Question: The Creative Use of Paradoxes in Law and Legal History’* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165
p. 160.

of the programme”³²³ but this program gives us nothing as to the future, therefore nothing about the continuing validity of the law. There is still the need of something in power to determine this. It seems to indicate that the attempt of hiding the paradox has failed. If we cannot see the future, we need to adjust the law after each result if it is not satisfactory and so “the legal system grows by what can be called, using a linguistic term, hyper-correction”³²⁴ What all this means, to put it in terms of system theory, is that the system cannot observe itself, or, better still, “operatively, the unity of the system is continually being reproduced but one cannot observe it within the system”³²⁵ ; the strict binary coding of the law³²⁶ needs a second order observer, as it is unable to observe itself, but this “does not exclude operations on the first order level, such as non-reflective legal or illegal claims”³²⁷

All this means is simply that the binary code alone does not help the legal system’s operations inasmuch as, as previously illustrated, any legal decision on whether an issue is legal or illegal cannot be taken “on one of the two value levels without having regard to the other”³²⁸; in any legal case there must be the examination of both, and finally the refusal of one

³²³ Luhmann, N. *The Third Question: The Creative Use of Paradoxes in Law and Legal History* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165, p. 160.

³²⁴ Luhmann, N. *The Third Question: The Creative Use of Paradoxes in Law and Legal History* Journal of Law and Society, Vol. 15, No. 2 (Summer, 1988), pp. 153-165 p. 160.

³²⁵ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p.182.

³²⁶ This of course applies to all codes of each social system, not just to the legal system.

³²⁷ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p. 187.

³²⁸ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p. 186.

of the two values. Here lies the unfolding of the paradox where the two opposite values constitute the system with “one distinction that has two sides which (...) can be *relevant at the same time* but *cannot be used at the same time*”³²⁹. The idea of programming comes to help in this instance, as it allows the introduction of “other values”³³⁰ which could not be accepted at code level.

The programming Luhmann claims is apt to help the legal system in “linking self-reference and external reference”³³¹ is ‘conditional programming’, that is one or a series of statements of the same model that is found in any computer programming language³³² and which starts with a ‘if’ followed by a condition (which can be either a function or an assigned value) and if that condition is satisfied, ‘then’ there is an outcome; if the condition is not satisfied an ‘else’ statement follows instead. These conditional statements can be nested, and the program continues - both in a computer program, as well as in a social system - until one condition is met or satisfied. These conditional statements also go under the name of ‘loop’ in computer programming, as they continue to produce operations *ab infinitum* or until a condition is no longer met and then the program ends. This is perhaps the best example of what a recursive system is; it is nothing else but the recurring of an operation (or of multiple operations), which has

³²⁹ Luhmann, N. ‘*Law as a Social System*’, Oxford University Press, 2004, p.187.

³³⁰ Luhmann, N. ‘*Law as a Social System*’, Oxford University Press, 2004, p. 186.

³³¹ Luhmann, N. ‘*Law as a Social System*’, Oxford University Press, 2004, p. 196.

³³² From the older C to the more recent Python. On this see for instance <https://www.sanfoundry.com/c-question-conditional-statements-usage/> Or <http://www.openbookproject.net/books/bpp4awd/ch04.html> (last accessed 5 June 2018).

the option of back up operations in order to continue to exist; when a condition is no longer met, the system ceases to exist.

Conditional statements are of course not a recent invention. In Roman Law there was something quite similar, as processes started with '*si paret*'³³³, and albeit not in a modern and systemic worldview, the condition allowed for creating a way not discerning between differences and deviations from the expected. Luhmann mentions also the existence of conditional statements in ancient divinatory and juridical texts in Mesopotamia³³⁴, but by no means only there. In fact, in ancient populations, after writing developed, often "omens revealed a conditional future, best described as a judicial decision of the Gods"³³⁵.

In any case, conditional statements are an achievement of social evolution, inasmuch as they show an evolved way of thinking that links knowledge, norms, and regulations, creating a structure "in the realm of the possible"³³⁶ in a world that is not only rapidly expanding but it is becoming more and more complex. The sequence of "if" statements have been used to guarantee a sort of 'order' a long time before there was an understanding of logic; "this form of conditional programme survived all further differentiations in society through a change of context"³³⁷.

³³³ On this see Armgardt M., Canivez, P. '*Past and Present Interactions in Legal Reasoning and Logic*' Springer, 2015, p.37. See also Strachan-Davidson, J.L. '*Problems of the Roman Criminal Law*' People Classic, 1969, Vol 2. p. 50.

³³⁴ Luhmann, N. '*Law as a Social System*', Oxford University Press, 2004, p. 197.

³³⁵ Annus, A. At al. '*Divination and Interpretation of signs in the Ancient World*', The Oriental Institute Of The University Of Chicago, Illinois, 1984, p.3.

³³⁶ Luhmann, N. '*Law as a Social System*', Oxford University Press, 2004, p. 197.

³³⁷ Luhmann, N. '*Law as a Social System*', Oxford University Press, 2004, p. 197.

Therefore, in reference to the binary code legal - illegal, the conditional program does something rather simple: it gives the conditions on which the code can exist, on which the issue at hand is actually legal or illegal and - here is the innovation - the condition refers to past decisions (or laws), to past facts, statutes. Otherwise formulated, it assesses in the present the validity of laws made in the past. The difference with the code alone is, as previously mentioned, that the code could not be seen in a temporal context, at least not if unambiguous instructions in future decisional situations are needed, while it can be on the basis of conditional programming. Even so, however, applying the conditional programming to the legal system does not do away with the problem of expectations, which “are turned into the form of norms in precisely those cases when they are not met”³³⁸. The problem of disappointed expectation is discussed by another complex concept, or perhaps rather than a concept, a whole sub-theory within the theory of Autopoiesis, which is what Luhmann calls the *Kontingenzformel*.

4.3 - The Contingency Formula: Contingency in autopoiesis and elsewhere.

Beyond the opposition of theories which portray “Justice”, no matter whether it is in terms of a promise of natural or divine provenance, or within the framework of legal positivism, which refutes the idea of an external authority however embodied (yet does so at the price of insulating a realm of positive, or “laid down” law, thereby making itself dependent upon di-

³³⁸ Luhmann, N. *Law as a Social System*, Oxford University Press, 2004, p. 199.

verse, often in many different ways costly measures of separating inside and outside), Luhmann's autopoietic re-conception of the social system law has, at least during the ultimate decades of the Twentieth Century, revolutionised this field by emphasising the *self* of the legal system - the internal operations the continuity of which alone allows the reproduction of sustainable law under modern conditions. A tritagonist, or third wrestler, a entering the ring after a battle going on since time immemorial (for the one, natural law), and right from the beginning of modernity (for the other, positive law), the autopoietic notion of law emerges 'relativising' the former oppositions, thus allowing the common features of both adversaries appear. Whoever looks at the current situation in legal theory in this light will not be surprised about a certain general attitude, which seems to assume quite naturally that number three is really so much "like" either number one or number two, that it can and should be assimilated to it. Luhmann, in fact, has been called a *sui generis* positivist;³³⁹ yet, although Positivism, at the price of making law subject to decisions - notwithstanding the *odium* of arbitrariness that such a position was and is fated to provoke - at least could guarantee one thing of great importance for modern legal systems, specifically that law could be changed (and the enabling of change has been part of its main contribution, as a matter of legal-historical fact). This understanding of law was wedded to unity and indeed, with the possible exception of the theory of H L A Hart, to hierarchy. It is true that Positivism implicitly postulated a notion of 'separation' that involves many a common feature with that of 'distinction' - which plays such an important role in system legal theory - and further common elements. It is, in the last instance,

³³⁹ King, M. Thornill, C. '*Niklas Luhmann's Theory of Politics and Law*' London Palgrave Macmillan, 2005 p.37

the impossibility, postulated already by the early Luhmann, of establishing a coincidence between the concept of purpose (which, from Bentham to Hart, has arguably been the “drive” in the positivist enterprise) and the rationality of systems³⁴⁰, which transformed all attempts of reaching or discovering a “convergency” between the theories of legal autopoiesis and legal positivism into ultimately hopeless enterprises.

In its latest developments, the evolution of Luhmann’s theory of the legal system in particular had taken a turn letting it diverge from its apparent earlier proximity to a basically positivist conception, by suggesting that Justice is the ‘*Kontingenzformel* of the legal system’. The concept of *Kontingenzformel* first appeared in *Die Funktion der Religion* in 1977 to define the idea of one God³⁴¹. Each of the functional systems, economy, politics, religion, media, education, science and law - and the list is not complete - includes a conceptual artifact singled out to ‘represent’ a functional system’s employment – an ‘employment’ which, it should be made clear right away, is by no means to be identified neither as a function nor as a binary code, as it leaves carefully open what is the meaning of the system in question if looked at from the viewpoint of society as a whole.³⁴² *Scarcity* was identified as the *Kontingenzformel* for the economic system³⁴³, “*Limitationalität*” (the idea that certain truth-claims are excluded if certain other truth-claims are accepted) was recognised as the *Kontingen-*

³⁴⁰ On this see Luhmann, N. ‘*Theory of Society*’, vol I Stanford University press, 2012 p 336 and ff.

³⁴¹Luhmann, N. ‘*Die Funktion der Religion*’, Frankfurt am Main (Suhrkamp)1977 p. 300.

³⁴² “...bleibt offen, was sie gesamtgesellschaftlich besagen”, cf. Luhmann, N. ‘*Die Gesellschaft der Gesellschaft*’ Frankfurt am Main Suhrkamp, 1997 p. 470.

³⁴³ Luhmann, N. ‘*Die Wirtschaft der Gesellschaft*’ Frankfurt am Main Suhrkamp, 1988 p. 177.

zformel of the Science system³⁴⁴, 'legitimacy', as the *Kontingenzformel* of the political system and, in the same way, *Gerechtigkeit*, justice, was nominated as the *Kontingenzformel* of the legal system. This concept of *Kontingenzformel* is somewhat unique and gives new parameters through which to look at the theory of social autopoiesis. It obviously equals parting ways with a huge part of long-accepted positivist legal theory.

Kontingenzformel is, in fact, not at all something like a representative sample of Luhmann's theory of autopoietic systems. Even less it is a representative expression of the legal system. It merely provides an answer to what is essentially a *Folgeproblem*, a problem that does not fail to show up once the autopoietic theory of a differentiated functional system, the legal system for instance, is effectively enacted. It is important to note that Luhmann himself only in 1995 dedicates, in *Das Recht der Gesellschaft*,³⁴⁵ an entire chapter to Justice defined as the *Kontingenzformel* of the Legal system. Nonetheless, its importance has been greatly overlooked by autopoietic theorists until the past few years. Of all ingredients of Luhmann's work, this one seems to have needed most time to reach the attention of scholars. The first relevant discussions date from a decade and less. In this paper I would like to test some of those interpretations of Luhmann's *Kontingenzformel*. Doing so, I shall try to follow Heinz von Foerster's advice to always decide in favour of the solution that gives access to the greater number of choices.

To start with, it is necessary to look at what Luhmann is factually trying to point to when he uses the term "contingency" - which actually

³⁴⁴ Luhmann, N. '*Die Wissenschaft der Gesellschaft*', Frankfurt am Main Suhrkamp, 1990 p. 396.

³⁴⁵ Luhmann, N. '*Das Recht der Gesellschaft*' Frankfurt am Main Suhrkamp, 1993.

means the touching of two poles or indeed two objects whatsoever, as e.g. in electricity. Since its first steep career in medieval philosophy, the term has acquired diverse newer meanings. As it can sometimes be observed in such cases, not all of these enrichments are also contributions to the clarity of the concept. For instance, there is a tendency of using “contingent” to express what would otherwise be covered by a term like “casual”, in itself a complicated and fertile root, which has given birth both to ‘casually’ and ‘casualty’. In English, also, we find contingency used as in ‘contingent *on* something’, as in prices that are contingent on offer. None of this applies to the use of the term ‘contingency’ in Luhmann or, for that matter, in German, where ‘*Kontingenz*’ has only the philosophical meaning. This philosophical meaning is the double meaning of ‘absence of impossibility’ and ‘absence of necessity’, which together form the term’s canonic definition (even if, usually, the intended reference is either to one or to the other).

In order to avoid misunderstandings in working with Luhmann’s texts it is essential that the meaning of contingency, especially as absence of necessity, be borne in mind at all times. If this is ignored, the pairing of ‘contingency’ with ‘formula’ will tend to suggest that Luhmann is talking of a mechanism for exceptional, perhaps particularly “hard cases”, as opposed to average or normal cases. But Luhmann does not specifically differentiate hard cases from others. Yet the aspect most difficult to grasp is not the intrinsic problem of contingency, but what should be understood as the tension between ‘contingency’ and ‘formula’. Since contingency is an ingredient of all situations Luhmann describes and since, against this ingredient, no remedy, no efficient ‘formula’ exists – nothing that would, as it

were, “take away the curse of contingency”, one would think that a contingency formula is precisely what Luhmann does *not* offer.

Needless to say, Luhmann uses the concept in a different sense. By *formula*, he does not mean a device of successfully accomplishing an operation, but rather something much less ambitious, a mere shorthand for system-specific orientation. Secondly, *Kontingenzformel*, in relation to Justice, needs to be looked at specifically. Although the *Kontingenzformel* has the same attributes within any system, Justice - this is my thesis - has a peculiarity of its own as it offers a replacement solution to the divide of natural law theories and positivist postulates. For Natural law, Justice is the supreme value of law, the sole site and guarantee of the law’s consistency. For legal positivism Justice is, at best, merely an external *conditio sine qua non*, and at worst a conundrum, something it recommends to abandon to Ethics and sort it away from law. If, on the other hand, the *Kontingenzformel* Justice enshrines decisive and specific autopoietic lessons about the legal system, then it might make more sense to see in it the most concise expression of the complexity of society’s law, rather than an example of the structural device governing functionally differentiated systems in general.

4.4 - The Contingency Formula: Underlying the Autopoietic Intention.

At any rate, this double-sided aspect of the *Kontingenzformel*, as a ‘symptom’ or an expression on the one hand, and as a ‘device’ on the other hand, might be what is ultimately at stake in a conspicuous tendency

among legal scholars to get hold of what they see as the underlying problem. In fact, both tendencies are represented. Following the ‘expressionist’ reading, Gunther Teubner extends the expressive range of the notion of *Kontingenzformel* further by varying and enriching it with that of a “transcendence formula”.³⁴⁶ Taking the opposite direction, closer to an ‘instrumentalist’ interpretation, Richard Nobles and David Schiff dedicate several pages of their ‘*Sociology of Jurisprudence*’³⁴⁷, to the outline of what they call the “Formula for Variety”.³⁴⁸ It might well be that some responsibility of this blurred reception is owing to the English version of *Das Recht der Gesellschaft*, published in 2004 under the title ‘*Law as a Social System*’³⁴⁹, where *Kontingenzformel* was translated as “Formula for Contingency”. It is certainly a challenge to translate complex foreign philosophical neologisms in a way which may ultimately affect both the initial meaning and the inaugural intention that had presided over its emergence. Nevertheless, as it is always the case of complex translation issues, solutions allow for more or less understanding. An exploration of these options and consequences seems thus essential at this point.

A literal translation of the German *Kontingenzformel* would produce ‘contingency formula’. In *Law as a Social System* it is translated, as already mentioned, by “Formula for Contingency” (capitals in the original) –

³⁴⁶ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23

³⁴⁷ Nobles, R. Schiff, D. ‘*A Sociology of Jurisprudence*’, Hart Publishing, Oxford, 2006.

³⁴⁸ Nobles, R. Schiff, D. ‘*A Sociology of Jurisprudence*’, Hart Publishing, Oxford, 2006, p.112.

³⁴⁹ Oxford University Press, 2004 and 2008. Looking at the much more complex – also more ‘tendentious’ - German title of the work, *Das Recht der Gesellschaft*, the English title *Law as a Social System* appears as somehow “normalising”.

a minor change in letters, but a major change in meaning. According to the various definitions of 'for' listed in the Oxford English Dictionary, "Formula *for* contingency" could mean, among other things: "formula in favour of contingency", "formula affecting contingency", "formula to the benefit of contingency", "formula having the function of contingency". Most decisively, adding 'for' introduces finality. Finality is not what Luhmann had in mind. It is clear from his theory of social systems that modern society 'relativises' the society-embracing significance of ends and goals. If, however, it is the case that modern society, according at least to Luhmann's autopoietic account, no longer defines itself by reference to its goals, then it becomes even more difficult to see to which end *Kontingenzformel* has been translated as "formula *for* contingency".³⁵⁰

Not only does the adjunction of 'for' change the meaning of Luhmann's neologism, it also alters what 'contingency' means in the context. Contingency is generally for Luhmann an inescapable aspect of a system, its predicament and, like the complexity of its operations, not something to be cured, eliminated or controlled by the application of a "formula". The idea of a contingency candidate to a treatment characteristically collides with the underlying construction of autopoietic social systems. There are of course good reasons to use the schemes of instrumentality and finality in explaining the legal system. They not only echo positivist theories; a large part of autopoietic theory-moves are equally dependent upon them. Positivists crave a finality of norms and rules in order to avoid the pitfall of arbi-

³⁵⁰ On this see Luhmann, N. '*Das Recht der Gesellschaft*' Frankfurt am Main Suhrkamp, 1993.

trariness.³⁵¹ Yet Luhmann defines *Kontingenzformel* as self-reference “in the form of a (disappointment-ridden) norm”.³⁵²

Historically, the main challenge for the legal positivists was, and is, the problem of legitimating norms, after dismissing legal-order-transcending sources of legitimacy. The so-called separation thesis provides only a negative side-aspect. Legality must be distinguished from morality in order to exclude arbitrariness, escape contingency and allow for consistency. Luhmann takes the positivist exclusion of morality from law as a matter of course. Yet, at the same time, he imposes an entirely different part upon contingency. Leaving aside the loss of legal memory, which critics locate in the positivistic separation of legality and morality,³⁵³ Luhmann excludes morality not from the legal system alone, but from his entire autopoietic vision of modern society. There is no justification available or necessary—and the only source for legitimacy is routine. Secondly, Luhmann is interested in describing how society works, in an autopoietic manner, not in the working of ethics in society. The Positivists, on the other hand, had excluded morality, which for them was an uncomfortable element that counteracted their need and search for consistency and unity in law.

The claim that some aspects of positivism, such as the descriptive method, the examination of the legal system’s exclusive rights to law and the rejection of ethics in law, could be similar in method to the early Luh-

³⁵¹ On this see Conklin, W. E. *The invisible Origin of Legal Positivism: A Re-reading of a Tradition* Springer, 2001 pp.69 and ff.

³⁵² “Selbstreferenz in der Form einer (enttäuschungsanfälligen) Norm”. Cf. Luhmann, N. *Das Recht der Gesellschaft* Frankfurt am Main Suhrkamp, 1993 p.218; Luhmann, *Law as a Social System* Oxford University Press, USA; 1st Published in Pbk. 2008 ,p 214.

³⁵³ Conklin, W. E. *The invisible Origin of Legal Positivism: A Re-reading of a Tradition* Springer, 2001 p.66.

mann is as such perfectly acceptable. Luhmann effectively presents law as 'facts' produced by legal communications based on previous communications, which continue to operate autopoietically based on the knowledge of the factual world in the making,³⁵⁴ and thus without any moral judgment on law. Positive law is therefore described as the law of the autopoietic system law, and legal positivism could be said the appropriate self-description of the legal order analysed by Luhmann. Also, between Hart's *secondary rules*, Kelsen's *Grundnorm*, and Luhmann's own *second order observation*, the commonalities are obvious. All these conceptions are rooted in a thought figure that is based on added strata or routine, supplementing *primary rules* (Hart), the norms of the *Rechtsordnung* (Kelsen), or *first order observation* (Luhmann). Mind that an important difference consists in the fact that Hart and Kelsen attribute a superior shaping power or normativity to their supplemental routines. Luhmann's second order observation limits itself to allowing the observation of e.g. a legal system, which itself is in the process of distinguishing between what is law and what it is not law.

When Luhmann starts discussing the *Kontingenzformel Gerechtigkeit*, he shows the aspect of his theory where the similarities with legal positivism end. As mentioned, Luhmann's approach of contingency is fundamental and compassing. According to Luhmann, in spite of all that has been said about the term's conceptual structure, contingency does not need to be perceived in negative terms. He is not alone in suggesting this. Foucault explains contingency as *émergence* utilising Nietzsche's use of

³⁵⁴Luhmann, N. 'A Sociological Theory of Law', London, Routledge & Kegan Paul, 1985 p.131.

*Entstehung*³⁵⁵ and accordingly interpreting society as a series of collisions instead of a series of causes. Contingency decomposes universals (as already for Occam) and provides the distinctive feature of historicity: it indeed provides the very essence of history.³⁵⁶ Although Foucault was not concerned with society, his view of contingency is by no means far from Luhmann's, even if Luhmann sees in contingency not only a distinctive achievement of modern society, but also a determinant and productive functional pre-requisite of each of the functional systems.

It is for these reasons that *Kontingenzformel* should effectively be translated as "contingency formula": in order, that is, to avoid having teleology enter the equation. The concept of a contingency formula as a "program of programs"³⁵⁷ replaces in the system other central terms such as 'value' or 'principle', which are too inflexible to prevail in modern society. These central terms were appropriate as long as these agencies were not systems but hierarchies or orders. The advent of modernity consists in the emergence of systems and their tendency to replace hierarchies. What happens when a hierarchy is replaced with a system? What happens when the legal "order" stops to be an order and "recycles" itself as a system? Systems cannot any longer rely on values and principles on which everyone agrees casually, without thinking about it, as within a family. And the society-compassing maxims are now those communicated by the me-

³⁵⁵ Cf. Nietzsche F. '*Genealogy of Morals*', Dover Publications Inc. (2003); Foucault, M. '*Lectures on the Will to Know: 1970-1971 and Oedipal Knowledge (Michel Foucault: Lectures at the Collège de France*', AIAA; ed. edition (2013).

³⁵⁶ Arnold Toynbee's definition of history as "one damn accident after another" is an example here. See Toynbee, A. J. '*A Study of History*', Oxford Paperback 1988. p. 267.

³⁵⁷Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008;; p.212

dia (that is to say, have their own systemic reference). The contingency formula takes into account the fact that the age of spontaneously generated values ultimately in charge with governance of functional systems is over.

This applies to the *modus operandi* of the legal system's contingency formula as well. Considering that again for Foucault there is no theory of power, as there is no equilibrium, no inherent logic, or stability at work in it,³⁵⁸ functionally differentiated modern society includes this same postulate among its requirements, replacing transcending goals with the internal construction of autopoietic systems. The autopoietic theory of law describes the relationship of Justice and power by rejecting the classical approach that sees Justice as a form of exchange between equally powerful parties, and offers itself as solution to the problems modernity finds itself confronted with, problems of erosion of power or control, of the increasingly painful absence of a social agency that would combine 'irresistible force' and 'overruling power' with legitimacy. It underwrites the sacrifice of ideal, society-wide ends, but it offers itself as a means for dealing with complexity, choice, risk and disappointment management networks and multiplicities of trajectories replacing the one, society-unique necessity.

The difficulty in handling a contingency formula ultimately consists in the fact that, while the guiding values or principles of a family can be simply stated, written on a list, repeated, learned by heart, etc., contingency formulas cannot! They can be seen and identified only by an ex-

³⁵⁸ Dreyfus, H. Rabinow, P. *Michel Foucault. Beyond Structuralism and Hermeneutics*, Brighton: Harvester, 1982, pp. 187-8.

ternal observer. Therefore, either one uses the contingency formula – then accepting the “blindness” involved in this use, as there is no external reference or horizon - or one observes it, as a second order observer, a legal theorist for instance, yet, in this case, one has no power of acting. The system, as an observer, cannot see what it cannot see,³⁵⁹ Luhmann writes – which of course means that it cannot see what it can see either, as the difference between what can and what cannot be seen, escapes him. But what cannot be seen by the observer, can be seen by the observer’s observer. The second order or external observer provides, Luhmann writes, the functional system, as first order observer, with an operational object and discovers possibilities. Only a second order observer can see someone (for instance the legal system) ‘learn’. The second observer introduces a contingent dimension of what is just and unjust. This does not mean that there are no criteria; it means only that, instead of absolute values, what is elaborated within this distinction of observer positions, are only relational ‘perspectives’.³⁶⁰

While validity is given by the local references within the legal system, which are part of the system’s relationship with itself without affecting the content of the system, Justice itself is not strictly related to the issue of validity, which nevertheless is relevant for the system, but to the system’s self observation and self description. In what Luhmann calls ‘the old-Europe tradition’, the idea of Justice is associated with the idea of ‘norm’, which in turn is associated to an idea of a legally ordered life of the whole

³⁵⁹ Luhmann, N. *‘Ecological Communication’*, 1989, Polity Press, Cambridge , p. 24.

³⁶⁰Luhmann, N. *‘Die Gesellschaft der Gesellschaft’* Frankfurt am Main Suhrkamp, 1997.pp 866 and ff.

of society, the dogma of one encompassing “system” (not in Luhmann’s sense). Justice as a contingency formula is itself also one of these recursive operations. It, too, is defined as a “criterion for selection”;³⁶¹ only, it cannot be added alongside other such criteria, usually described as the codes of the system, because of the specificity of its recursive aspect, and because it is not a code. Rather, what the contingency formula does is expose code-based programming or decision-making to external observation. What happens in the legal system is made explainable to an observer – and this without self-idealisation, without taking a common oath on common values or principles.

In a complex, contingent, yet structured world, the need and constraint to select is inescapable,³⁶² even if the expectations that allow to do so belong, as expectations of expectations, to situations of double contingency. If contingency, for Luhmann, is the necessity of taking risks and be disappointed, functionally differentiated systems at least offer possibilities to react to disappointment. These can be changed and integrated with the objective reality, or maintained and carried on in protest.³⁶³ In the case of the legal system, which deals with norms - which are supposed to have unconditional validity, whether the expectations of the system are fulfilled or unfulfilled - Justice as a “disappointment ridden norm”, sees a tension between ‘ought’ and ‘is’ as well as between ‘truth’ and ‘law’. The recursive operations of the legal system - of any autopoietic system - are based on

³⁶¹ Luhmann, *‘Law as a Social System’* Oxford University Press, USA; 1st Published in Pbk. 2008 p.216.

³⁶² Luhmann, N. *‘A Sociological Theory of Law’*, London, Routledge & Kegan Paul, 1985; p.25.

³⁶³ Luhmann, N. *‘A Sociological Theory of Law’*, London, Routledge & Kegan Paul, 1985; p.25.

evolution and repetition, thus on contingency. “The solid is grounded upon the flowing”, as Luhmann often explains, paraphrasing - but also turning upside-down - an earlier suggestion by Edgar Morin (“L’ouvert s’appuie sur le fermé”).³⁶⁴

4.5 - Justice - the suggestions of Autopoiesis and the legacy of positivism.

Nobles and Schiff have taken the interpretation of *Kontingenzformel* as “Formula for Contingency” a step further. They substitute “contingency” with “variety”, thereby transforming *Kontingenzformel* into a means of choosing under the condition of a given variety of possibilities. This alleviates Luhmann’s original concept of the (unwanted? dangerous?) contingency. Nobles and Schiff say in fact that “Justice *can* (...) provide a formula for variety”.³⁶⁵ Elsewhere, they call Justice a “potential for variety”.³⁶⁶ Therefore the idea of possibility seems to have a great importance for Nobles’ and Schiff’s interpretation of this aspect of Luhmann’s theory.

In a view to further elucidate the idea of possibility in Luhmann, a look at other modern theories of possibility and contingency may be of help. As we have seen, ‘contingency’ is used, within the autopoietic account, as a reference to the fact that everything might happen, or, in other words, to the absence of impossibility. This absence of impossibility is

³⁶⁴Morin, E. *‘La Methode’*, 1980 Vol. 1 and 2. Paris: Seuil., In Luhmann, N. *‘A Sociological Theory of Law’*, London, Routledge & Kegan Paul, 1985;

³⁶⁵Nobles, R. Schiff, D. *‘A Sociology of Jurisprudence’*, Hart Publishing, Oxford, 2006, p.121

³⁶⁶Nobles, R. Schiff, D. *‘A Sociology of Jurisprudence’*, Hart Publishing, Oxford, 2006, p.117.

what occupies centre-stage for discourse analysis as well: 'history is contingent' means in a Foucaultian perspective that history is treated as the sum total, and the archive as the inventory, of all those events and configurations which, by the fact of their sheer happening, have proven their non-impossibility.³⁶⁷ Jacques Lacan's idea of contingency moves very much along the same lines: it relates to the event in connection to structural change and to the subject's overdetermination by structure and impossibility. Jacques-Alain Miller summarises it thus: "What is of the order of the event, properly speaking, is what cannot happen: everything that is outside the circle of the possible. This is the exact sense that Lacan gave to contingency."³⁶⁸ Different from Foucault and Lacan, most of the pre-autopoietic uses of 'contingent', 'contingency'— whether philosophical, cultural or media-vernacular - are determined by an emphasis laid upon 'necessitistic modalisation' rather than upon 'possibilistic modalisation'; in other words, what determines the term contingency in most of its traditional uses is the accent laid on its meaning "in-spite-of-necessity", and not on its meaning "in-spite-of-impossibility".

Luhmann makes a step beyond this frequent use of the concept. What a large fraction of Luhmann's efforts try to account for is the ability of the functionally differentiated systems upon which society has entrusted, as it were, its current affairs, to accomplish their task, at least well enough to effectively continue their operations, an ability that is surprising (or, as Luhmann says again and again, "improbable") enough, given that each and every event that falls into the functionally determined realm of com-

³⁶⁷ Dreyfus, H. Rabinow, P. *Michel Foucault. Beyond Structuralism and Hermeneutics*, Brighton: Harvester, 1982;

³⁶⁸ Miller, J. A. "Introduction à l'érotique du temps", *Revue La Cause freudienne* n°56, Paris : (Navarin/Seuil) 2004), p. 63-85.

petence of a system must be dealt with, without any possibility for the system to reject any event that presents itself (if it falls into this realm). For Luhmann, therefore, the 'point' about contingency is, in our context at least, the fact that functionally differentiated systems cannot escape the mission of having to deal, each within its boundary, with any possible and imaginable event whatsoever, if it 'crops up'. There is, at their level, no in-built relieving device, no safe-guard, selection rule or filtering mechanism that would enable the functionally differentiated system to deal only with certain types of events of their functional range, but not with others. The onslaught of the contingent has to be borne out – and its complexity reduced - by the functional systems themselves. 'Contingency' expresses in this sense the negation of 'rule', any self-imposed necessity. It serves to emphasise that there is no such thing as a pre-existing finite realm of possibilities.

One might now surmise that, if theorists choose, as their own focus of interest, *variety* rather than *contingency*, and thus replace the idea of an absence of control by the idea of a choice, that is to say of the presence of a control, however limited, the epistemic paradigm will be different. And this is indeed what happens. It has been said already that what Luhmann is striving to emphasise by his notion of a contingency formula, is to acknowledge that contingency cannot be limited, domesticated, civilised, by any rule. In contrast, it is clear that the notion of a "Formula for Variety" is able to do, precisely, and in a sense exclusively, this: endowing a given pattern, predefined and destined to recursive self-repetition, with an additional residual exposure to something heterogeneous or divergent. The small step from contingency formula to "Formula for Variety" leads one to

talk, no longer of a problem constitutive of the unity of the legal system, constitutive, that is, precisely of the legal system's identity and its business as usual, but instead, to speak merely of 'exceptions' that occasionally happen to arise within the legal system's 'business as usual' in the form of so many deviances, anomalies, or discontinuities in the flow of legal communications, discontinuities which are however tolerable providing they remain one-off affairs.³⁶⁹

Without entering into the question of the respective merits of both conceptions, I would only like to point clearly to their divergence and, indeed, incompatibility. As already discussed, the idea that appears from Luhmann's theory is that *Kontingenzformel* does not apply only to exceptional cases but to all cases, as contingency clearly refers to the legal system's dealing with each and every single case. Luhmann diagnoses that a consistency of Justice – the fact that law is believed to “operate routinely and predictably” - is not at reach of the legal order. This is why he needs to replace the consistency formula with his notion of contingency formula.³⁷⁰ It cannot be emphasised enough, therefore, to what extent the 'variety'-approach modifies, certainly the underlying concept of Justice, but also the theoretical setting as such.³⁷¹ For instance, there is no need to insist upon Luhmann's emphasis on the whole conceptual region represented by the cyberneticist idea of *eigenvalue*, which permeates autopoietic theory. *Eigenvalue* is for Luhmann, however, conceived as a merely emerging pat-

³⁶⁹Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.122.

³⁷⁰ On Justice as a form of *consistency*, see Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.115

³⁷¹ See, however, Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.114.

tern - there are no content-related directives to be taken from it. Within its interpretation as a “Formula for Variety”, Justice is, on the contrary, related to the claim that it is in its quality of an *eigenvalue* that Justice will result in stability and consistency.³⁷² But according to Luhmann this consistency is, precisely, out of reach of what the legal system can come up with, and moreover, it is what the references to notions such as *eigenvalue*, *eigenbehaviour*, and other notions of recursivity-generated stability, are supposed to replace.³⁷³ Luhmann applied these terms to autopoietic social systems, whose observations he saw as maintained by successive cognitive operations. Consequentially, a self-organised system which is able to achieve constant internal structures (*eigenvalues*) and a constant differentiation from its environment, is said to present *eigenbehaviour*. Such systems are defined as organisationally closed, as their stability is due to the internal structures, which in turn is seen to guarantee their existence.³⁷⁴ It is in this respect that neo-cybernetic epistemology is directly opposed to ‘objects’ related to a linear epistemology (without exposure to an observer).

Justice as *Kontingenzformel* is said by Luhmann to be a “disappointment-ridden norm”,³⁷⁵ yet a norm nevertheless, not a value, rather a

³⁷² Nobles, R. Schiff, D. ‘*A Sociology of Jurisprudence*’, Hart Publishing, Oxford, 2006, p.115.

³⁷³ The prefix *eigen*, as in *eigenvalue* and *eigenbehaviour* (originally *Eigenwerte* and *Eigenzustände*) was firstly used by the German mathematician David Hilbert. The term *eigen*, (sometimes translated as ‘self-’) is mostly left un-translated in English.

³⁷⁴ Pask , G. ‘*Different Kinds of Cybernetics*’, In ‘*New Perspectives on Cybernetics*’ 1992, Gertrudis van de Vijver (Ed.) Kluwer Academic Publishers;

³⁷⁵ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p. 214.

scheme for the search of values.³⁷⁶ *Eigenvalues*, on the other hand, are, as the term itself explains, actually 'values' which are directly and in this sense 'un-disappointably' linked to the operations of the system. Justice as a *Kontingenzformel* is not an operation of the system, as it has already been explained. If, on the other hand, Justice were defined as an *eigenvalue*, one would of course expect from Justice consistency, equilibrium and predictability, to the point of considering anything that is unjust as "not really law".³⁷⁷

By saying that *eigenvalue* is a "quality of Justice"³⁷⁸, the variety-formula theorists of Justice insist on its stable aspect. There is a double claim: on the one hand, the process of treating like cases alike is the source of this stability, while on the other hand, it is the factor that allows the law "to generate variety".³⁷⁹ It is difficult to see why the interpretation of Justice as the continuing application of the rule of 'treating like cases alike' and its underlying reasoning should be anything apart from a full guarantee of self-consistency (which Luhmann rules out) and indeed apart from a re-assertion, in a new form, of the idea of finality, which is at work in the notion of a "formula for variety" as such. But this means also that, when compared to the concept of contingency formula and the project underlying it, the "formula for variety" as well as the related "potential for variety" suggests, in more political terms, a reference to the classical virtues or

³⁷⁶ Teubner, G. 'Self-Subversive Justice: Contingency or Transcendence Formula of Law' 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p.8.

³⁷⁷ Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.120.

³⁷⁸ Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.115.

³⁷⁹ Nobles, R. Schiff, D. 'A Sociology of Jurisprudence', Hart Publishing, Oxford, 2006, p.125.

promises of plurality, diversity and choice, and to the liberal argumentary that uses these promises or virtues to justify Justice's behaviour as consistent. It goes without saying that all these references are known to constitute the representative aspect of legal positivism, especially in its Hartian version.

In '*Das Recht der Gesellschaft*', Luhmann talks of the way in which, historically, Justice has been understood, throughout pre-modern times, in terms of reciprocity, where its values could be "adjusted" in such a way that they would constitute a sort of unity in the system within the system. If, in modernity, a positivist approach to the problem of the perception of Justice consists in the effort of obtaining unity by the fact of treating equal cases equally, and unequal cases unequally, what autopoietic theory shows instead, is that, what the most characteristic feature of modernity is a steady increase in new law and legislation, which re-opens the possibility, on the one hand, for equal cases to be treated unequally and for unequal cases to be treated equally, due to temporal discrepancies, and secondly, to prevent this feature from being perceived, either as a failure of the attempt of establishing unity, or indeed as injustice.³⁸⁰

Certainly the system wants to be "just"³⁸¹, still, being irremediably exposed to contingency, and because Justice, as a norm, cannot any longer be considered in modernity a mirror of social harmony and unity, Luhmann points out that unjust legal systems do exist.³⁸² Denying it would

³⁸⁰ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p. 222.

³⁸¹ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.213

³⁸²Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p.214

mean not having noticed that with autopoiesis the dichotomy between natural law theories and positivist theories is overcome, it would mean also that the only way to describe the system is to posit its operations outside the system, overcoming in this way paradoxes, but not overcoming tradition.³⁸³

That the “Formula for Variety” can claim to constitute a more approachable competitor of Luhmann’s *Kontingenzformel* is very likely indeed. What this, however, shows, first of all, is the elective affinity in which this concept stands with respect to the positivist idea of relating ultimately to the unity of the legal system understood as the site of its identity (while Luhmann, ultimately, finds not unity but difference).³⁸⁴ This is perfectly consistent with the idea of finality and variety of choice embedded in the variety-guided interpretation, where Justice is presented, for instance, as “a form of consistency”.³⁸⁵ By substituting ‘contingency’ with ‘variety’ the path of research in the ambit of autopoietic theory of Justice joins the maze of positivistic paradoxes and disappointed attempts at finding unity in law. One difference, however, remains and should not be overlooked. The legal positivists, who have never been able to find a dimension for Justice within law, had it relegated somewhere into that ‘outside’ of the law, to which the understanding of the legal system has never ceased to be vitally attached since the successful introduction of the separation of law and morality, that is to say, in the realm of ethics. Instead, the idea of

³⁸³ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.227

³⁸⁴ Luhmann, N. ‘*Die Wirtschaft der Gesellschaft*’ Frankfurt am Main Suhrkamp, 1988, p. 165.

³⁸⁵ Nobles, R. Schiff, D. ‘*A Sociology of Jurisprudence*’, Hart Publishing, Oxford, 2006, p.115.

Justice as a Formula for Variety, which brings with it a system theory approach, explicitly insists on having Justice placed inside the legal system.

With its intermediate standing between old positivistic and new autopoietic approaches to law, the variety-theory of Justice successfully combines some of the more convincing arguments from each of the two sides. Yet, there are limits to this attempt. Example: if a finalistic aspect is reintroduced, the compatibility with the main trajectory of Luhmann's thought is jeopardised, because a moralistic aspect is, then, introduced, as well, as thinking in finalities cannot avoid involving moral judgments.³⁸⁶ And finally, there is the following major difference: Luhmann, otherwise than Hart, Kelsen, or Austin, fails to provide the law-expelled morality with an "outside-of-the-law", as a legitimate ground for its exercise.

The contingency formula Justice, instead, provides the system with a standard that is no longer either a goal or an idealisation. It is, rather, a mere default rule, and it generates a higher visibility of injustice. Justice does not transform indeterminable complexity into determinable complexity, and does not give a rule for orientation of the system or a criterion for decision-making. Instead, the importance of the contingency formula, although it cannot satisfy any desire for certainty, lies in the fact that it organises meaning specifically for each social system. Justice as the contingency formula of the legal system has the duty of providing normative expectations in the face of results, even and especially where they contradict or disappoint such expectations. "Justice is a contingency formula" means: 1- that Justice is not a *consistency* formula – say: not a program that corresponds to a perfection or a guarantee, and, 2- that Justice is not a mat-

³⁸⁶ King, M. Schütz, A. 'The Ambitious Modesty of Niklas Luhmann' 1994 Journal of Law and Society, Vol.21, No.3, p. 275.

ter of contingency alone, but of “formula”, that is to say, a matter of *form*, the form in which a specific functional system deals with it (although this form is distinguished by its adaptive and learning capacity, its plasticity, it is neither devoid of information nor of risk).

4.6 - Philosophical virtualities.

Every decision about what is legal and illegal in the system is an actualisation of the legal system’s *Kontingenzformel*. It is in a sense itself the risk inherent in each and every decision of the system. Still, the contingency formula does *not* supply a rule of orientation on how to decide. In fact, looking at precedents does not give judges a direction on how to judge new cases. This is so because judges, considered as observers, do not have knowledge of what is just, but only of what is unjust. There are numerous studies, including those which led to legal reports of socio-cultural levels of injustice in society in relation to gender, race, social exclusion and culture, which show that there is no positive idea of Justice, even if there is a huge amount of preparedness to denounce injustice wherever it can be seen, witnessing an overwhelming expectation of Justice.

As a rule, decisions of judges are therefore exposed to criticism. What the *Kontingenzformel* Justice thus should provide judges with, is a tool with which to observe decision-making. In fact, in the legal system, as well as in all functional systems, what the *Kontingenzformel* refers to is the extent of the exposure of the limited legal system to that which, in its day-to-day efforts, constitutes the objective of its action. Everything that is in the process of being accomplished within the system, that is, the descrip-

tion of the totality of active undertakings of society (Spinoza's *Natura Naturans*,³⁸⁷ translated and applied to modern society), falls under the system code in Luhmann's perspective, so in the legal system the contingency referred to extends to all that can be seen in society. It is described as either legal or illegal.

Teubner clarifies the notion of "contingency formula" by adding the expressions "prohibition of negation", "incontestability" (which give rise to never ending contingencies) and "social process of self-observation of law's unity"³⁸⁸ via its own programs. In a seminal article of 2008, Teubner interprets the exposure of decision-making to irritation as "unjust". The quest for Justice is in terms of a "blind spot" between law and society. Since Justice seems now outside the philosophical discourse, the possible issue lies in a reformulation of a feasible perception of Justice that fits the current, polycontextural conditions.³⁸⁹ Teubner's claim is that Justice is "self-subversive": whilst being the self-description of law, it undermines itself at every instance and instant of decision-making by creating ever-new injustices.

Polycontexturality and society's fragmentation, two extreme expressions of the complexity of modern society, are the culprits in this scenario. In the case of a polycontextural society, the relational perspectives obtained through second order observation become mutually exclusive with the consequence of being in some case also mutually damaging, making

³⁸⁷ Spinoza, B. *'Ethics'* I P2 9 School. Trans: Edwin Curley. London: Penguin, 1996.

³⁸⁸ Teubner, G. *'Self-Subversive Justice: Contingency or Transcendence Formula of Law'* 2009, *Modern Law Review*, Vol. 72, pp. 1-23, , p. 8.

³⁸⁹ Teubner, G. *'Self-Subversive Justice: Contingency or Transcendence Formula of Law'* 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p.2.

their reconciliation under a universal understanding of Justice impossible. Considering the fragmentation of society, Teubner points out that society ends up with a fragmented concept of Justice; yet, this gives rise to a new possibility, that is of a division of Justice in various coexisting “spheres” without a common “meta-principle”, and of which the one to look at in the context of the legal system is ‘juridical Justice’ – that is to say, Justice to the extent to which it presides over the Legal system, leaving aside other aspects of Justice, such as social or political. In other words, Teubner shows how this path leads to abandon once for all the idea of a unity in favour of Luhmannian ‘difference’.³⁹⁰

Yet, Juridical Justice takes for Teubner the aspect of what he conceives, equally taking his distances from Luhmann, as a ‘transcendence formula’, a formula that is no longer viewed as immanent to the law, but as transcending its boundaries. This means that Justice can respond to the requirements of the outside world, which the legal system’s closure as well as the fundamental distinction between system and environment would usually make unthinkable and contradictory. However, it is here that Justice in this interpretation should overcome its own self-referential limits. In fact, Justice is expected to operate through legal judgments, acts and practices, within its limits, and it is here that law faces its closure, the primary responsible of injustice. This is different from considering injustices as mere irritations of the system like in the case of Nobles’ and Schiff’s interpretation of injustice. Mainly because in the case of the “Transcendence Formula” there is an ‘escape’ of Justice from the boundaries of the legal system in order to consider and take in the demands of the envir-

³⁹⁰ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p. 5

onment. Moreover, this is a way of embracing all cases as Luhmann intends - rather than limiting oneself to only those which fit the bill of an idealised Justice.

In what way does Justice fulfil its transcendence? Against law's unquelled desire for certainty, Justice shows what Teubner calls its "internal subversive force", and rebels against law's fundamental failures by disrupting the recursive operations of the system. In other words, the transcendence formula Justice reacts against the positivist infatuations with stability, order, unity and self-continuation. After rendering law "self-transcendent", Justice makes law become once again immanent in order to continue its operations, although in this way the injustice also continues, as the constraints of the systems cannot be done away with. This, Teubner explains, results in a new positivisation of law, new injustices, and a new protest from the environment, creating this way a returning process of transcendence and immanence, of creation and destruction of Justice, in other words a re-affirmation of law's "necessary contingency".³⁹¹

This transcendence of juridical Justice has nothing to do with a lot that can be found in the tradition of the concept of transcendence – religious for instance. By superimposing Derrida's deconstruction theory, Teubner pushes the idea of Justice beyond the limits imposed by Luhmann and expects Justice's transcendence finally to be "beyond any meaning".³⁹² In other words, due to the fundamental distinction between system and environment, the system can see only within the boundaries of law, which means that the outside protests for Justice asking to be con-

³⁹¹ Teubner, G. *'Self-Subversive Justice: Contingency or Transcendence Formula of Law'* 2009, *Modern Law Review*, Vol. 72, pp. 1-23, pp.12-13.

³⁹² Teubner, G. *'Self-Subversive Justice: Contingency or Transcendence Formula of Law'* 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p.16.

sidered will need to re-enter the system thereby causing the all too well known “blind spot”. Here Derrida goes instead beyond this distinction and into a rationalist interpretation of Justice. Certainly, Derrida opens new paths in the discussions upon Justice by reasserting that Justice is beyond a consistency formula and even beyond a contingency formula. Yet, if correctly understood in these its own terms, is it then not as well beyond any horizon in which an autopoietic discussion might make sense?

By introducing Derrida’s concept of transcendence into a discourse of *Kontingenzformel*, Teubner, remembering the cybernetic idea of acting in order to increase the number of choices for further actions, opens wide the theoretical discourse on Justice to non-autopoietic theories which can provide us with further insights into the law and Justice relationship. Clearly, this relationship is under multiple disciplining constraints; constraints of rule-making devoid of any power of any kind, natural or supernatural, and produced only by the inherent poverty of law’s tools; constraints of decision-making, which is always only between two parties; finally, cognitive constraints of rational justification, where the dichotomy between the system internal requirements of normative consistency and the external ecological demands, from which Justice cannot escape, even as a contingency formula.³⁹³ These constraints, Teubner continues, can be ignored, but only at one’s own risk, reducing those theories of Justice to mere philosophical attempts.³⁹⁴

³⁹³ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p. 18 and ff.

³⁹⁴ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23, p.20.

In recent years Teubner has intertwined Derrida's philosophy with Luhmann's sociological theory on more than one occasion.³⁹⁵ Certainly Derrida and Luhmann have a common understanding of the inherent instability in the traditional hierarchies of knowledge. The promises of rational legal discourses and routines of legal decisions are seen by both Luhmann and Derrida as irrational and unpredictable, leading inevitably to contradictions, irregularities and paradoxes (aporias). Moreover, they both agree in taking these inconsistencies and antinomies not as hindering elements to the quest for, in this case, Justice, but as a starting point for their own autopoietic and deconstructive theories and respective techniques.

Derrida's approach to what could be called the initial or foundational paradox of law, the problem of determining what is legal and what is illegal, is unfolded through three aporias, which are nothing but three faces of the same aporia in the relationship between law and Justice.³⁹⁶ The first aporia Derrida describes is about the problem of freedom of decision in order to exercise Justice. A judge is forced by law to follow a code and cannot therefore exercise a free choice. This aspect of force inherent in Law, says Derrida, is what makes Justice impossible. A second aporia refers to the 'undecidability' of Judges' decisions. The process of being faced with undecidable decisions is a duty-bound experience, which, again, must take into account rules and law. Without this process there

³⁹⁵ See Teubner, G. 'Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann' *Theory, Culture and Society* 18, 2001, 29-47; See also Teubner, G. 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy' *Law & Society Review*, Vol. 31, No. 4. (1997), pp. 763-788, pp. 763-788.

³⁹⁶ Derrida, J. 'Deconstruction and the Possibility of Justice', New York, Routledge 1992; p. 22 and ff.

would not be free decisions, but, since a decision has to follow a rule, has to be considered, according to Derrida's reasoning, not just. Because of this, Justice is never in the present, only in a not very well defined future and, therefore, non-existent. Although, Derrida adds, this "is not to say that they are in themselves unjust, in the sense of 'illegal'. They are neither legal nor illegal in their founding moment".³⁹⁷ A third aporia relates to the fact that, although Justice is in the future, the necessity of decisions is always imminent and it is this need of urgency that makes Justice without a horizon of expectation. Derrida's Justice is "possible only as *impossible*".³⁹⁸

Luhmann views instead the legal-illegal paradox as "a unity of something that must be function as different."³⁹⁹ Luhmann's position has been widely explained earlier and this should clarify also that the Derridian idea of the impossibility of Justice is not totally incompatible with Luhmann's view, although, when delving into the concept of contingency formula, Derrida's impossibility is in many respects not equivalent to Luhmann's contingency. Apart from the concepts used, what makes Luhmann and Derrida diverge greatly is their belonging to very different fields and most of all the fact that while the one represents the continuation of philosophical discourse, the other is the promoter of a new sociological one and of course it makes a great deal of difference for legal theory which of the two is chosen and continued.

³⁹⁷ Derrida, Jacques (1990) '*Force of Law: The Mystical Foundation of Authority*' *Cardozo Law Review* 11: 919-1046. p.943.

³⁹⁸ Royle, N. '*Deconstructions: a User's Guide*', Palgrave Macmillan 2000, p. 300.

³⁹⁹ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, p. 212.

4.7 - Beyond bipolarity?

It is clear from our analysis that the “Formula for Variety” and the “Transcendence Formula” draw Luhmann’s final contributions to law into different and opposing directions, the former choosing a more accessible interpretation of Luhmann’s overly demanding conception of Justice, preferring to remain on the well-known ground of that part of Luhmann’s theory that still has its roots in a meta-theory of legal positivism, whilst nevertheless contributing important supplementary perspectives. Nevertheless, because of the problems illustrated earlier, especially in connection to the finality-bound approach, this interpretation seems to remain in a terrain of an empirically controlled present, and in a sense shuns the more inventive initiatives of Luhmann’s later contributions.

Opposite to it, the “Transcendence Formula” adds the never-ending and endlessly unfolding paradox of an impossible yet inescapable Justice. The paradox of law that cannot stop trying to produce Justice, but, due to its non-intentional side effects, produces even more injustice, is taken at an extreme point. What comes to fruition is a transcendental structure, which is un-touchable and un-foldable by the usual known theoretical remedial methods and means. Because of this, Teubner’s deconstruction of law moves close to a new type of legal theology, in which Derrida’s deconstructive figures can be discovered as functioning like a species of ‘revelation’. It would seem that Teubner is doing a theoretical discourse in which he continues a philosophical interpretation of Justice and borrows from Derrida’s ‘revelation’. At the same time he is, in a sense, going towards the old logic of the operating of the law, a sort of old referential ‘transfer’ on

behalf of jurists in which he seems to want to find some sort of rational stability. What results from this exercise is that Teubner's stance is somewhat suspended between a juridical and a philosophical discourse. There is no doubting about the fact that the author is aware of his position and perhaps chose to take here a calculated risk for the sake of leaving the recognised and accepted ground in order to find an alternative to too well known understatements and overstatements of Justice, but also in order to explore the theoretical possibilities beyond the limits of autopoiesis.

Amidst these two opposed interpretations, remains Luhmann original *Kontingenzformel*, whose significance is perhaps not yet fully realised or unearthed. The question of a disappointment-sensitive Justice, which underlies Luhmann's *Kontingenzformel* Justice, becomes plausible, as opposed to: excessively disappointing in its own turn, only once the faith in consistent Justice is obliterated by doubts and acknowledged as a secular post-theological versions of divine Justice. Luhmann tries a step out of the bipolar structure of overstatement and understatement of Justice. The system-theoretical approach distinguishes itself from the manifold traditional theories and accounts of the legal order, on both sides. The majority of legal theories put the legal order under a finality of Justice, while several legal theoretical sects suppose that there is no goal, only a internal system construction, an expression of other forces (like in Marx and economic theory of law) that takes on a mere appearance (where people speak of law, there is in fact only economy, by self-delusion). This displacement strategy is insufficient. Luhmann's most decisive claim is the notion that there is no space for Justice in any other place than in the legal system. Not outside, but only inside the system; inside, but not in a tran-

scendentially ensured way. The legal system is a place, itself understood as a 'goal', not as its function, where everything else follows; merely an occasion for the continuity of the exercise of the legal order. How can legal theory prevent this proceduralised question from stopping, or the legal order from losing its ability to cope, which is predicated on the appropriately reduced and abstracted notion of *Gerechtigkeit* which Luhmann tries to provide. A number of earlier tendencies toward modernisation, among which Cassirer's *Substanzbegriff* to *Funktionbegriff*, take an important place and have put Luhmann, first of all, into a functionalist pattern.⁴⁰⁰ In the meantime, the idea that law is not a unity but a difference, a distinction, has left the functionalist horizon far behind. The question of how society works is still an open question, as the idea of "function" of society.⁴⁰¹ Within this idea of difference as opposed to unity is the central figure of the paradox. In the very moment in which a solution to a problem seems to be found as the only good and solid possible solution, the paradox already starts, as in the very moment of solving the world's problem the solutions changes the world – and stops to be the solution. Every truth-claim, every solution, every good answer will thus be irremediably subverted, confuted, reformulated. Hence there is a recognition and at the same time a need for a routine, a circular practice of re-doing everything anew, and again and again, due to the mortality of all discoveries, claims, decisions, and this includes, of course, juridical decisions.

Still, with overwhelming appeal for both overstatement and understatement of Justice, we see that the consistency aspect of Justice holds

⁴⁰⁰ Cassirer, E. *Substanzbegriff und Funktionsbegriff: Untersuchungen über die Grundfragen der Erkenntniskritik*, Berlin (Bruno Cassirer) 1910.

⁴⁰¹ Luhmann, N. *The Third Question: The Creative Use of Paradox in Law and Legal History* (1988) 15 J. of Law and Society 153-165.

on to us by all its forces, still today. Media and subjects will be able to speak out against a particular miscarriage of Justice, at a given occasion; yet, they will do so in the name of the promise of a consistent Justice controlled by some perfection-guaranteeing master, which is a highly unreal name and a hopelessly overstated promise. The problem the legal order has in determining how it can refer to Justice at all - in the absence of any consistent reply to that question - enjoys no sympathy. Heinz von Foerster's suggestion that it is necessary to "act in a way to increase the number of choices"⁴⁰² appears as diametrically opposed to what the duty of judges is generally considered to be. Luhmann has reiterated that there is no place for ethics in law, and therefore the point of making the right choice is not a problem of the legal system. This is when the *Kontingenzformel* fulfils its role by giving parameters within which the choices *can*, not *should*, be made. In fact, although the content, the references of the juridical problems change and must change or must be recalculated at any given time, those who have to make the decisions remain anchored inescapably to the 'formula'.

⁴⁰² Foerster, H. von, 'Ethics and Second Order Cybernetics', 1991. In Foerster, H. Von, 'Undertanding Understanding: Essays on Cybernetics and Cognition', Springer, 2003;

5 - Modernity, Postmodernity, and Contingency: Why the Law Needs a Contingency Formula.

5.1 - Modernity: a structural break.

The terms 'modern' and 'modernity' are not very easy to define. They may mean different things in different contexts. If looked at it in historical terms, its beginning is set after the Middle Ages in a European context⁴⁰³, in a "post-traditional and post-medieval historical period"⁴⁰⁴. Sociologically, it has been defined as "set of attitudes towards the world, the idea of the world as open to transformation, by human intervention"⁴⁰⁵, and no longer under the spell of a religion wielding, whether admittedly or unadmittedly, political powers. The end of the society-compassing overlordship of especially the Christian and the Judaic religious traditions has not only direct implications for the evolution of social thought; it is as such postulated and understood by a representative variety of writers, that spans from Descartes to Husserl, but is also seen by a religious philosopher such as Emil Fackenheim, and Descartes with his 'Methodic Doubt', where men's subjective judgment supplanted God's guarantee of

⁴⁰³ Context characterised by colonisation, capitalism, urbanisation, industrialisation, birth of the nation-state, to mention but a few characteristics. See for instance Yamins, D. 'The Rise of Europe in The High Middle Ages: Reactions to Urban Economic Modernity 1050 - 1300', https://web.stanford.edu/~yamins/uploads/2/4/9/2/24920889/rise_of_urban_europe.pdf (Last accessed 5 June 2018).

⁴⁰⁴ Heidegger, M. 'The Question Concerning Technology, and Other Essays', translated by William Lovitt, 115–54, Harper Colophon Books (New York: Harper & Row, 1977. pp.66-67.

⁴⁰⁵ Giddens, A. 'Conversations with Anthony Giddens: Making Sense of Modernity'. Stanford, Calif.: Stanford University Press, 1998, p.94.

the truth⁴⁰⁶. So, in other words, modernity is indeed an epochal shift, a “radical break”⁴⁰⁷, involving secularisation, a general rejection of a traditional order, and the rise of individualism⁴⁰⁸. This “epochal shift” occurred after the middle ages and continued to occur over the centuries and always “with the help of a differentiation from the past”⁴⁰⁹. In any given moment of the unfolding of modernity, what is modern, what society calls “modern”, is relative to a “temporal dimension”⁴¹⁰.

Although Giddens rejects the idea of functional differentiation⁴¹¹, he still sees modernity “in a time-space-distantiation”⁴¹², and continues explaining that ‘In conditions of modernity, the level of time-space-distantiation is much greater than in even the most developed of agrarian civilisations’.⁴¹³ What happens in modernity is that these “ties between time and

⁴⁰⁶ See for instance Husserl, E. *Méditations cartésiennes. Introduction à la phénoménologie*, translated by Gabrielle Peiffer and Emmanuel Lévinas. Bibliothèque Société Française de Philosophie. Paris: A. Colin. 1931. See also Fackenheim, E. L. *Martin Buber's Concept of Revelation*. Canada, 1957 pp.272-2. Descartes, R. (1641). *Meditations on First Philosophy*. In Cottingham, et al. (eds.), 1984.

⁴⁰⁷ Latour, B. *We Have Never Been Modern*. Cambridge, Mass.: Harvard University Press. 1993, p.124.

⁴⁰⁸ Foucault, M. *The Order of Things*. New York: Pantheon, 1970. p. 128.

⁴⁰⁹ Luhmann, N. *Observations on Modernity*, Stanford University Press, 1998, p. 3.

⁴¹⁰ Luhmann, N. *Observations on Modernity*, Stanford University Press, 1998. P. 3.

⁴¹¹ Luhmann, N. *Observations on Modernity*, Stanford University Press, 1998, pp.5-6

⁴¹² Giddens, A. *The Consequences of Modernity*, Polity Press, 1991, p.14.

⁴¹³ Giddens, A. *The Consequences of Modernity*, Polity Press, 1991, p.14.

space are decreasing [and] becoming contingent”⁴¹⁴. Luhmann agrees on the temporal element, by claiming that “when society calls itself modern, it identifies itself with the help from a differentiation from the past. It identifies itself in a temporal dimension”⁴¹⁵. Luhmann does add that the problem is not so much the break with tradition, as it is modernity is “a constant creation of otherness”⁴¹⁶. In other words, the need of “a higher level of identity of the non-identical”⁴¹⁷ is the problem in modernity, as contingency is more and more evidently the primary characteristic of modern society, and a pivotal problem analysed in Luhmann’s later years.

Modernity is a consequence of what Luhmann calls a “structural break”⁴¹⁸ and the “evolution of ideas”⁴¹⁹. Both are dependent on the relationship of society with its environment, and both bring about uncertainty, contingency, philosophy, and relativism⁴²⁰. This means simply that semantics change, societal situations change, big structural societal changes happen, and have an impact to the extent of “sweep[ing] us away from *all*

⁴¹⁴ Luhmann, N. ‘*Observations on Modernity*’, Stanford University Press, 1998, pp.5-6.

⁴¹⁵ Luhmann, N. ‘*Observations on Modernity*’, Stanford University Press, 1998, p. 3.

⁴¹⁶ Luhmann, N. ‘*Observations on Modernity*’, Stanford University Press, 1998, p. 3.

⁴¹⁷ Luhmann, N. ‘*Observations on Modernity*’, Stanford University Press, 1998, p. 3.

⁴¹⁸ Luhmann, N. ‘*Theory of Society*’, vol I Stanford University press, 2012 p 331.

⁴¹⁹ Luhmann, N. ‘*Theory of Society*’, vol I Stanford University press, 2012 p 331. See all chapter on Evolution.

⁴²⁰ Luhmann, N. ‘*Theory of Society*’, vol I, Stanford University press, 2012 p 331-3.

types of previous social order in quite unprecedented fashion”⁴²¹. All uncertainty and relativism have an impact on society, but these are not “*situational evidence*”⁴²² unless they exist to the exclusion of alternatives.

These cases, the sporadic uncertain changes, “do not impose the acceptance of more complex communication”⁴²³ So, for instance, the impact that industrialisation had on people in the nineteenth century causing extreme poverty is a situational fact. The point for Luhmann is that what happened with industrialisation (and many other structural changes in society) is “a fact that could not be disputed”⁴²⁴. The question of industrialisation as a prime example of modernity, is also illustrated by Norbert Wiener, who takes a similar stance, underlining the ineluctability of it, as a “phase which was of greater mechanical than moral significance”⁴²⁵. Although he points out that “there was an exploitation of the labour of children and women to an extent, and of a brutality scarcely conceivable at the present time”⁴²⁶, Wiener also argues that the disastrous consequences of the industrial revolution “were not so much due to any moral obtuseness or iniquity. (...), as to certain technical features, which were inherent in the

⁴²¹ Giddens, A. *The Consequences of Modernity*, Polity Press, 1991, p. 4.

⁴²² Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012 p 331.

⁴²³ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012 p 331.

⁴²⁴ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012 p 331.

⁴²⁵ Wiener, R. *The Human Use of Human Beings*, Da Capo Press, 1954, P.141.

⁴²⁶ Wiener, R. *The Human Use of Human Beings*, Da Capo Press, 1954, P.141.

(...) means of industrialization”⁴²⁷. Luhmann brings more examples, such as the American War of Independence, or the Lisbon Earthquake. Situations that have in common that they cannot be controlled, yet still depend on two things: social structures and system differentiation⁴²⁸. In other words, predominantly, society remains the same on the face of it, there are still class differences, the state is organised the same way, but the innovations introduced create a sort of “reality index”⁴²⁹ to which each must subject himself, or succumb, like in the case of the factory workers the early Eighteen Century. This remains true at any point in modern times and shows what the change from societal stratification to societal functional differentiation looks like. Especially when this evolution, this structure change, is fast, “adequate self-observation and self-description are difficult if not impossible”⁴³⁰. So the consequence is that any discontinuity is not marked; what is called State, remains such, even if other attributes, such as “constitutional” or “modern” are applied to it.

At the same time Luhmann believes that the Industrial revolution or the French Revolution have nothing to do with “the breakdown of what

⁴²⁷ It is worth mentioning that Marx's most fundamental theorem about capitalism teaches that those who attribute to particularly evil capitalists the cruelty of humankind split into the two of owners and the proletariat, are misled by a wrong theory. It's the "means of production" and who owns them, which are at stake here - in Wiener's words: "certain technical features which were inherent in industrialisation;" so, as analysts of the historical situations actual content, Luhmann, Wiener, and Marx follow largely the same sober doctrine. See Wiener, R. *The Human Use of Human Beings*, Da Capo Press, 1954, P.141-2.

⁴²⁸ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012 p 332.

⁴²⁹ Luhmann, N. *Theory of Society*, vol I, Stanford University press, 2012 p 332.

⁴³⁰ Luhmann, N. *Theory of Society*, vol I Stanford University press, 2012 p.332.

German historian Otto Brunner referred to as *old-European semantics*⁴³¹; instead, this breakdown “became inevitable when society changed its primary form of differentiation, when it shifted from the very elaborate order of hierarchical stratification, conceived of as ‘the order’, to functional differentiation”⁴³². Brunner, in fact, saw those old-European semantics as basic concepts ingrained in a “concrete order”⁴³³ Previously societies were defined according to social strata, wealth, and placed in an unmovable social structure. In this structure, the highest authority was a sort of undisputed single observer “for describing, producing ontology”⁴³⁴. This world of “being or not being”, the world of ontological metaphysics is the world lost to modernity, and it is lost when, according to Luhmann, European society realised that this old order had disappeared and had been replaced by the new semantics of modernity, while, at the same time, it still was part of the

⁴³¹ Luhmann, N. *‘Deconstruction as second-order Observing’*. *New Literary History*, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.779.

⁴³² Luhmann, N. *‘Deconstruction as second-order Observing’*. *New Literary History*, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.779.

⁴³³ “*Konkretes Ordnungsdenken*” - a term Brunner took from Carl Schmitt. On this see Brunner, O. *Land and Lordship: Structures of Governance in Medieval Austria*, trans. Howard Kaminsky and James Van Horn Melton (Philadelphia: University of Pennsylvania Press, 1992. p. xiii.

⁴³⁴ Luhmann, N. *‘Deconstruction as second-order Observing’*. *New Literary History*, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.778.

European cultural heritage.⁴³⁵ All the new dual semantics⁴³⁶ that emerged - state and society, individual and collectivity, community and society - were left unexplained and uninterpreted, and created a new 'other'.⁴³⁷ Then new problems appeared, such as 'the social question' imperialism, and society was still unable to observe itself in the modern sense⁴³⁸. In other words, old pre-modern societies did have a limited way of self-description, where, keeping distinct semantics, each saw itself as the centre of the world, in its own cosmology.⁴³⁹ This old European view of the world in Europe, with a "religious control of inconsistencies"⁴⁴⁰, and of interpretation of the world more generally, is what can be described as ontology. It was an "ontological mode of observation"⁴⁴¹. This shift from ontology to functional differentiation, from a world where everything is put in a subor-

⁴³⁵ Luhmann, N. '*Deconstruction as second-order Observing*'. *New Literary History*, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.778-9.

⁴³⁶ On this see for instance Koselleck, R. '*Futures Past: On the Semantics of Historical Time. Studies in Contemporary German Social Thought*', Columbia University Press; New Ed edition (13 Aug. 2004) p. 155 and ff.

⁴³⁷ Koselleck, R. '*Futures Past: On the Semantics of Historical Time. Studies in Contemporary German Social Thought*', Columbia University Press; New Ed edition (13 Aug. 2004) p. 156. Also Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998. p.3.

⁴³⁸ Luhmann, N. '*Deconstruction as second-order Observing*'. *New Literary History*, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.780.

⁴³⁹ Luhmann, '*Law as a Social System*' vol II Oxford University Press, USA; 1st Published in Pbk. 2008, p.183-184.

⁴⁴⁰ Luhmann, '*Law as a Social System*' vol II Oxford University Press, USA; 1st Published in Pbk. 2008, p.184.

⁴⁴¹ Luhmann, '*Law as a Social System*' vol II Oxford University Press, USA; 1st Published in Pbk. 2008, p.185.

dinate position in respect to a being / nonbeing [*Seiendes / Nichtseiendes*] distinction (with no space for a possible middle ground), and where nothing else can exist; to a world, in other words, that is determined by an inside /outside distinction, as well as by the distinction of self-reference / other-reference⁴⁴². This is what Luhmann considers the latest epochal shift: from ontology to functional differentiation in society (reflected in logic, philosophy, science and religion. Ontology is a mode of observation, and so is functional differentiation. No other epochal shift occurred after this even if society has acquired many different characteristics from that time and since then, this shift is what determined a shift from pre-modernity to modernity.

5.2 - Postmodernity, Deconstruction and the Paradox.

If modernity is complex enough a matter as being predicated on discussion, 'postmodernity' is even more controversial theme, and brings to the fore some further differences between Luhmann on the one hand and some other contemporary theories, which call themselves postmodern, on the other hand; such as, for instance, Derrida, and most precisely the derridean theme best known in the English-speaking sphere, *deconstruction*. Luhmann uses the term 'postmodernity' often, but at the same time says that the discourse on postmodernity is a "discourse without a future"⁴⁴³. This is not in a negative sense. The discourse on traditional

⁴⁴² Luhmann, '*Law as a Social System*' vol II Oxford University Press, USA; 1st Published in Pbk. 2008, p.195.

⁴⁴³ Luhmann, N. '*Observations on Modernity*', Stanford University Press, 1998. p. 2.

modernity projected its promises onto the future in a way - Luhmann claims - to try and resolve the problem within the paradox of society. This does correspond to the argumentative stance of what Derrida 's deconstructionist philosophy tries to achieve.

Luhmann argues that the term 'postmodern' does not offer new information; rather, its scope is limited to that of a question of semantics⁴⁴⁴. This is mainly because there is no new epochal shift since the Sixteenth or Seventeenth Century; there have not been in the Twentieth Century new "epochal breaks" with modernity to justify the term 'postmodernity'. Nothing has really changed in the perception of society, no new structural changes within functional systems, no new mode of observation, not even with the advent of globalisation⁴⁴⁵. Sometimes, Luhmann calls it the "so-called postmodernity"⁴⁴⁶. He claims that postmodernity does offer neither new structures, nor new semantics; it only repeats modern insights⁴⁴⁷; nevertheless, Luhmann recognises that there are two points in this "so-called postmodernity" that deserve detailed attention. One is the claim by the philosophical world that postmodernity represents "the end of grand narratives"; but here Luhmann points out that this is a narrative in itself, a

⁴⁴⁴ Luhmann, N. *'Deconstruction as second-order Observing'*. New Literary History, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.780.

⁴⁴⁵ Luhmann, N. *'Theory of Society'*, vol. II, Stanford University press, 2012 p. 345.

⁴⁴⁶ This is in fact the title of the last chapter of his Theory of Society. Luhmann, N. *'Theory of Society'*, vol. II, Stanford University press, 2012 p. 345.

⁴⁴⁷ Luhmann, N. *'Deconstruction as second-order Observing'*. New Literary History, Vol.24, No.4, Papers from the Commonwealth Center for Literary and Cultural Change (Autumn,1993), pp.763-782. p.780.

“*métarécit*”. Moreover, Luhmann actually claims that, contrary to what had been claimed postmodernity, branded as the end of the ‘grand narratives’, is actually its beginning. In fact, he says, those all-encompassing ‘post-modern’ theories have in a way a claim of society and of the world as a unity. Luhmann suggests, and this is the second point in his description of postmodernity, that “the unity of society or, from its perspective, the world, can no longer be asserted as principle, but only as paradox”⁴⁴⁸. He calls this paradox also “the orthodoxy of our times”⁴⁴⁹.

The presupposition of so-called “hierarchical oppositions” in law⁴⁵⁰, manifest themselves in any legal issue at hand, for instance when a new statute is introduced. As a matter of fact, Luhmann, in an illuminating article on deconstruction, which is arguably the main theory of postmodernism, discusses various aspects of it and shows how in fact, Deconstruction leads to second order observing, as the way to deal with modernity and with its multitude of observations⁴⁵¹. On this point, Luhmann brings the example of the discussion at the time in the US about the inclusion of homo-

⁴⁴⁸ Luhmann, N. *‘Theory of Society’*, vol. II, Stanford University press, 2012 p. 345 and ff.

⁴⁴⁹ Luhmann, N. *‘Theory of Society’*, vol. II, Stanford University press, 2012 p. 345. Luhmann also refers in note 429 that the same idea was already illustrated at the very beginning of the Twentieth Century in *‘The Education of Henry Adams: An Autobiography’* (1907), where he quotes ‘but paradox has become the only orthodoxy in politics as in science’.

⁴⁵⁰ As well as in any social system, on the basis of its own distinctive code, i.e. legal / illegal for the legal system, government / opposition for the political system, payment / non-payment for the economic system, true / false for the science system to name but a few. See Moeller, H. G. *‘Luhmann Explained. From Souls to Systems’*, Open Court Publishing 2006, p.29. See also See Luhmann, N. *‘Die Wirtschaft der Gesellschaft’* Frankfurt am Main Suhrkamp, 1988;

⁴⁵¹ Luhmann, N. *‘Deconstruction as second-order Observing’*. New Literary History, Vol.24, No.4, Papers from the Commonwealth Center for Literary and CulturalChange (Autumn,1993), pp.763-782.

sexuals in the Army, where those oppositions - as well as the one coinciding with the code legal/illegal, involved also the oppositions heterosexual/homosexual; effectiveness/ineffectiveness (of the law); constitutional/unconstitutional⁴⁵². These oppositions cannot be denied, or ignored, they make up the gist of the discussion. It would be tempting to use deconstruction as a political instrument to destroy the presupposition of the hierarchical oppositions, that is to destroy the idea of an 'inherent', or 'natural' idea that one of the two terms is superior⁴⁵³, but this is - Luhmann points out - not what Derrida means. Deconstruction simply means that any of these terms can have a different meaning or importance depending on time, use and context. Derrida's term for this is the French neologism *différance*, spelt here with an 'a' in the third syllable, to indicate its derivation from *différer* in the sense of postponing, rather than of showing distinctive features (here the noun would be spelt *différence*).

The important case for social system theory, highlighted by this, refers to situations where a number of observers (second order observers) are present. The Army, the Political System, the Privates, the Officers, Heterosexuals and Homosexuals. They do not observe the issue in the same way. In other words, deconstruction does away with the boundary, there is no real 'distinction' anymore, in fact, Luhmann explains, "deconstruction seems to recommend the reading of forms as differences, to look at distinctions without the hope of regaining unity at a higher (or later)

⁴⁵² Luhmann, N. '*Deconstruction as Second Order Observing*', *New Literary History*, Vol. 24, No. 4, Papers from the Commonwealth Center for Literary and Cultural change (Autumn, 1993), pp. 763-782. p. 763.

⁴⁵³ Luhmann, N. '*Deconstruction as Second Order Observing*', *New Literary History*, Vol. 24, No. 4, Papers from the Commonwealth Center for Literary and Cultural change (Autumn, 1993), pp. 763-782. p. 763.

level”⁴⁵⁴. Moreover, it will not lead to “reflexivity, recursivity, [or] self-reference, resulting in stable meanings, objects or what mathematicians call eigenvalues[.] It seems that there is only *Différance*”.⁴⁵⁵ Deconstruction is “everything and nothing”⁴⁵⁶. It is “almost a one-word discussion”⁴⁵⁷ In modernity, paradoxes had to be unfolded, or even replaced by “stable identities” and unfoldments, then, are the result of un-asking the question.”⁴⁵⁸ The point is, Luhmann continues, that there are other post-modern theories, such as post-metaphysical theories that use difference as a starting and as an ending point, use the concepts of recursivity and self-reference in order to “fix entities in systems⁴⁵⁹ (...) and to maintain stability”,⁴⁶⁰ and as a way of unfolding (or hiding) paradoxes⁴⁶¹.

⁴⁵⁴ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p. 766.

⁴⁵⁵ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p. 766.

⁴⁵⁶ See Derrida, J. ‘*Letter to A Japanese Friend*’ in ‘*Derrida and Differance*’, ed. David Wood and Robert Bernasconi (Coventry,1985). p. 7.

⁴⁵⁷ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p. 767.

⁴⁵⁸ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p.770.

⁴⁵⁹ Mathematical or empirical. Post-metaphysical theory as Habermas’s definition of natural law and its role in modernity’s claim to normative self-foundation. See for instance Habermas, J. ‘*Postmetaphysical Thinking: Between Metaphysics and the Critique of Reason*’, The MIT Press; First Edition edition (1992).

⁴⁶⁰ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p.767.

⁴⁶¹ Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, *Papers from the Commonwealth Center for Literary and Cultural change* (Autumn, 1993), pp. 763-782. p.767.

Interestingly, in traditional Greek and Roman rhetoric, and later in theology as well (Ockham), paradox was accepted, not hidden. There were no attempts to do away with it, but it was stated, recognised, analysed and accepted as an irresolvable conundrum or even as a starting point for further inquiry and disputes (*questiones disputatae*). The paradox left open is the foundation from which all knowledge becomes possible; “the normal *doxa* is questioned by the *para-doxa*, and you have to make a decision”⁴⁶². So, we see again the distinction with two sides, like in George Spencer-Brown’s model that shows two sides (a marked and an unmarked space), where the whole distinction is then observed as a form; In this instance, the observer indicates one side or the other; reformulated in mathematical terms, this is the marking of the form (which can give rise to amazing degrees of complexity; more generally, however, any type of system, whether biological or psychological, or sociological, is described “as determined by the distinction it uses”. In other words, any system of any kind - a piece of coding, a person, a social system such as the legal system, describe themselves by their choices, and determine their next output by framing their own observations, so they self-determine on the basis of their distinctions.

Luhmann tries to put the paradox to fruition, so to speak. Law is arbitrary, and cannot get away from the legal / illegal binary code; moreover, as Luhmann rejects the idea of a *Grundnorm*⁴⁶³ of some sort, he is left with the self-referentiality of the law. He brings to his aid some old cybernetic

⁴⁶² Luhmann, N. ‘*Deconstruction as Second Order Observing*’, *New Literary History*, Vol. 24, No. 4, Papers from the Commonwealth Center for Literary and Cultural change (Autumn, 1993), pp. 763-782. p. 770.

⁴⁶³ Teubner, G. ‘*Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann*’ *Theory, Culture and Society* 18, 2001, 29-47.

acquaintances and their theory in order to explain how this is the best possible way for the law to have a creative use of the inevitable paradox inherent on the legal / illegal code of operation of the legal system; This can only be temporary, there is no possible de-paradoxification of the law. Neither Derrida, nor Luhmann succeed in this, of course, but the paradox, as Teubner has pointed out, is their “common runway which they then, however, use for a take-off in opposite directions”⁴⁶⁴. Nevertheless, Teubner, albeit recognising that autopoiesis and deconstruction or “différance does not necessarily coincide with autopoiesis, it is at the same time its necessary supplement”⁴⁶⁵. Inasmuch as Teubner continues, “the infinite network of relations, the interplay of various aspects which occurs continuously without transferring them to a closed system - these are dangerous supplements to autopoietic closure. Différance cannot be systematically integrated into autopoiesis, it comes from outside, as a threatening affliction of closed systems”⁴⁶⁶. This is an important point with regard to Justice as the contingency formula of the legal system. Let us not forget that the system is 'blind' to its environment (as well as to the other systems) insofar as it needs to construe whatever appears and happens at its outside. In modernity, it makes no sense to believe in Justice as being the absolute criterion for decision making. Due to the ever increasing complexity of observations (case law, judges' views, circumstances of each case,

⁴⁶⁴ Teubner, G. *'Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann'* Theory, Culture and Society 18, 2001, 29-47; p.35.

⁴⁶⁵ Teubner, G. *'Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann'* Theory, Culture and Society 18, 2001, 29-47; p.43.

⁴⁶⁶ Teubner, G. *'Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann'* Theory, Culture and Society 18, 2001, 29-47; p.43-44.

etc.), which go under the umbrella of contingency, justice still occupies a central position in the legal system. As Luhmann puts it “between adequate social complexity of law and its internal consistency of decisions, justice mediates internal and external requirements”⁴⁶⁷.

5.3 - A New Dawn for Legal Sociology.

Whether we agree with Luhmann on what postmodernity is or is not, we might consider that modernity has indeed changed, and most of all in matters of society. The modernity that is with us is a *new* modernity, at least from the sociological view-point,. Since roughly one generation, a new form of non-explicit social contract is dawning upon us. What is new, and what constitutes the innovative fact, is the non-explicit social contract – the way in which everyone looks at their own social conduct, and thus “thinks of society”, and this, without being in the least a sociologist, even less a social or a legal theorist), indeed without being in any way intellectually interested.

This means that institutions have changed — and are changing, as well. The primary legal positivist impetus has insisted, since Bentham and Austin, upon the separate being of the law with respect to morality, since Kelsen also upon the wholly different realm of “ought” (*Sollen*) constructions as opposed to “is” (*Sein*) constructions⁴⁶⁸. In one sense, this distinction has delivered the central modernist impetus in law – a form of the overarching enlightenment campaign the central desiderata of which con-

⁴⁶⁷ Luhmann, N. 'Observing Re-entries' Graduate Faculty Philosophy Journal 199316: 485-498 : 214 and ff . See also Luhmann, N. 'Rechtssystem und Rechtsdogmatik'. Stuttgart: Kohlhammer (1974) p. 23.

⁴⁶⁸ Kelsen, H. 'Pure Theory of Law', The Lawbook Exchange, Ltd. (2014).

sisted in assigning to religion and faith a function-specific - as opposed to a society-compassing - function, and in “emancipating” law from its communal or communitarian definition. For instance, what is known as “American Legal Realism” goes, in a different manner, into the same direction, although it does so at a pace that is, if anything, even more resolute. The first round of modernity that had been legal positivism in matters of law, was, in short, a movement of “unbinding”, of “deregulating”, of shaking off bounds and fetters of the “tradition”, of setting law free from non-legal dependencies and interventions, in short: of allowing law to reconfigure itself as an autopoietic and self-referential system, of making law into a system.

Systems theory, in its post-Parsons shape⁴⁶⁹, in short-hand: Luhmannian systems theory, takes on board these classically modern lessons. Indeed, it fits particularly well with some of the further contributions of the legal-positivist school, such as by HLA Hart’s differentiation between primary and secondary rules⁴⁷⁰. Grown on a decidedly different ground than the Luhmannian distinction between first and second order observation, the more inspired models of legal positivism carry, in their gesture, style and overall design, definite family resemblances with Luhmann’s theory architecture. Indeed, Luhmann’s theory model can be read as an improvement of Kelsen’s. Kelsen’s “*Grundnorm*”⁴⁷¹ is a term which, with its distinction of “levels” one of which serves as a “ground” for all the others, seems to point rather to some sort of a pre-existing, fundamental, dissymmetric (transcendent) super-element, than to a universe of continuous

⁴⁶⁹ cf. the US “structural-functionalist” sociologist Talcott Parsons.

⁴⁷⁰ Hart, H. L. A. *The Concept of Law*, Oxford, Clarendon Press, 1961 (second Ed. 1994, p. 81 and ff.

⁴⁷¹ Kelsen, H. *Pure Theory of Law*, The Lawbook Exchange, Ltd. (2014)

contingent-unforeseeable decisionmaking. If one of the foremost interpreters of Kelsen's work, Joseph Raz, has claimed that for Kelsen there is no duality, as "Kelsen postulates the existence of basic norms because he regards them as necessary for the explanation of the unity and normativity of legal systems",⁴⁷² one might feel tempted to nuance this criticism in drawing attention to the fact that, while Kelsen theory of law is certainly no more dualism-averse than any other positivist conception, it remains true that Kelsen's proceeding is distinction-averse, or in other words that Kelsen, instead of "drawing distinctions" (as Luhmann does, following George Spencer Brown well-known injunction), is rather identifying pre-existing splits.

Indeed, there is no argument about the claim that there is a possibility of comparing and also combining, alternatively as well as cumulatively, the Hartian re-invention, or renovation of legal positivism⁴⁷³, inseparable as it is from its own inbuilt and underlying "drive" towards self-reference, where a law may perfectly well refer to itself so long as it also refers to other laws⁴⁷⁴; with some of the easier describable thematic features of Luhmann's social systems theory. Firstly, there is the proximity of Hart's (and all legal positivists') tenet of a separation of law and morality, and the points Luhmann (a lawyer by training) makes in his challenge to the politics-via-dialogue model underlying Habermas's old-European suggestion of

⁴⁷² Raz, J, '*Kelsen's Theory of The Basic Norm*' *The American Journal of Jurisprudence*, 1974, 94-111. p.95.

⁴⁷³ Hart, H. L. A. '*The Concept of Law*', Oxford, Clarendon Press, 1961 (second Ed. 1994). See also Fuller, L. L. '*Positivism and Fidelity to Law: A reply to Professor Hart*' *Harvard Law Review*, Vol. 71, No. 4 (Feb., 1958), pp. 630-672).

⁴⁷⁴ On this point see Hart, H. L. A. '*Self referring Laws*' in '*Essays in Jurisprudence and Philosophy*' Clarendon Press 1983. Published by Oxford Scholarship Online 2013. See also Lacey, N. '*H.L.A. Hart's rule of law: the limits of philosophy in historical perspective*' (2007). *Quaderni Fiorentini*, 36, pp1203-1224.

moralising politics via, not only the an underlying universal called "rationality", but also its integral 'parlamentarisation' by means of something like a permanent and ubiquitous constituting power endlessly laying its cards open⁴⁷⁵ .

There is also, secondly, the clear similarity between Hart's re-foundation of legal positivism and Luhmann's re-appraisal (limitation, downgrading) of the political system's inherited pretension, to wield an incomparable, unique over-all rule over society, based precisely upon its "sovereign" character, in the wording of the old-European power-terminology. Hart's re-foundation of legal positivism is done by replacing its Austinian substantive base (that is, the fact of sovereignty), with a process-shaped foundation, in which the existence and permanence of the legal order results directly (or even, we dare say, autopoietically, or indeed 'heterarchically') and the systems theoretical terminology. This applies without difficulty to the step Hart makes against, (beyond, and on the basis of) Austin's mechanical and hierarchical model of Legal Positivism from the everyday behaviour of the individual legal subject.

There is, moreover, thirdly, a group of parallel developments based upon a merely procedural, horizontal, emerging order-conception – the distinction of first-order and second-order levels in either of both authors. Hart's self-referential secondary rules, which are "parasitic upon, or secondary to the first"⁴⁷⁶ as opposed to first-order which "impose duties", while

⁴⁷⁵ The debate between Habermas and Luhmann dates from the late 1960s – Hart's own Concept of law, from the early 1960s.

⁴⁷⁶ Hart, H. L. A. *'The Concept of Law'*, Oxford, Clarendon Press, 1961 (second Ed. 1994) p. 79 and ff.

“rules of the second type confer powers”⁴⁷⁷ or other-referential (command) rules; and in Luhmann developed into a *neo-cybernetic* mathematics of the cognitive approach to social matters at large, based upon the distinction of first-order and second-order observations. Briefly, this means that the system observes itself, but it is in turn observed by an observer in the environment. The importance of this in Luhmannian theory is that the two-level observation does away with “*the idea of unilateral control*”⁴⁷⁸; and also brings the system (legal, economic, political etc.) from a situation of self-organisation to an autopoietic one; and from an open system to a closed system⁴⁷⁹.

There is then, fourthly and finally, the trump card put by Hart in the hands of language, of statements, of ways of describing a factual situation. Let us think of the paradigmatic example of the difference in the accounts elicited by the respective communications with a bank-robber and a bank employee (in view of terms such as ‘obliged’ or, on the contrary, ‘obligated’), and the most radical of all of Luhmann’s theory-founding moves: the notion of society as composed of communications. Here we are confronted with the exclusion of subjects, individuals and other instantiations of the human being, which is still kept as an (for now) irreplaceable condition, but this at the same time ranks as the existence of life, of a sun (or the like), of the presence of oxygen, of the noise-carrying capacity of the air, for instance. In substance, we can say that both Hart, in the more limited region of accounting for modern law, and Luhmann, trying to elab-

⁴⁷⁷ Hart, H. L. A. *The Concept of Law*, Oxford, Clarendon Press, 1961 (second Ed. 1994) p. 81.

⁴⁷⁸ Luhmann, N., *Social Systems*, Stanford University Press, 1995, p.36.

⁴⁷⁹ Luhmann, N., *Social Systems*, Stanford University Press, 1995, pp.36-37.

orate a new type of theoretical account of the more encompassing issue of modern society, are following up one of the two branches that Western scientific culture, in loose 'followership' of Kant's philosophical distinctions - between a "human" sphere of will and duty, and one general object-sphere of knowledge - has started to distinguish throughout the 20th century. Most important here is the work of the neo-kantian philosopher Ernst Cassirer.⁴⁸⁰ Function, and difference, rather than ontology, or substance, are at the heart of both Hart's and Luhmann approaches.

So there is decidedly a communion or rather some degree of 'communality' between the reformed or later 20th Century positivist outlook and some of the bases of the systems theory account of law. Yet, the "post-modern" drive that moves the *later* Luhmannian theory,⁴⁸¹ goes far beyond the position of mid-20th century Legal Positivism even in the reformed shape that HLA Hart has given it, which appears from the point of view of Luhmannian social systems theory still much too "classically modern". Hart already is modernising positivism; he does this by way of criticising his predecessor by more than a century, John Austin. Hart's Concept of Law, which is a series of rules, as opposed to Austin's Command Theory, which instead embeds an older concept of authority, is more fitting for modern society, there is more of a modern understanding of the Rule of Law (rather than an absolute rule over people), which takes into account a pluralistic world.⁴⁸² Still, Hart's view of the law in a modern world avoids all

⁴⁸⁰ Cassirer, E. (1910). *Substanzbegriff und Funktionsbegriff: Untersuchungen über die Grundfragen der Erkenntniskritik*, Berlin: Cassirer.

⁴⁸¹ Starting with *Soziale Systeme* 1984 - In English as Luhmann, N., 'Social Systems', Stanford University Press, 1995.

⁴⁸² On this see Lacey, N. 'H.L.A. Hart's rule of law: the limits of philosophy in historical perspective' (2007). *Quaderni fiorentini*, 36, pp1203-1224;

ascription of 'functions', doubtlessly because it cannot make any other sense of it than that of an undue hermeneutical-theoretical interference in the matters of merely empirical or "descriptive" sociology (which The Concept of Law famously claims to cover simultaneously with its Legal Theory targets).

Hart, as a legal theorist, is of course careful to make sure that his multifaceted criticism of the old brand of legal positivism, still decisive in his life-time, sticks to methodological patterns commonly accepted and does not introduce a doubt that he is still dealing with the identical "real thing". In this sense Luhmann is, not only not a 'legal theorist' according to the common understanding of the term (which would generally exclude the observation of law from a law-external view-point), nor is he a descriptive sociologist under the duty of remaining faithful either to the basic outline of a jurisprudential-doctrinal program or to the claim of being the legitimate follower of the positivist tradition.

It is definitively easier to find out what the proceedings of Luhmannian social systems theory is *not* than to find terms allowing to describe what it is. Even if ultimately insufficient, the historical reference to earlier achievements of social theory is necessary. There is an original campaign underlying a large gamut of politico-philosophical movements from the Enlightenment⁴⁸³ onwards heralding the advent of modern politics, a cam-

⁴⁸³ The Enlightenment *per se* is a very large umbrella which covers many ideas, revolutions, philosophical and political currents all over Europe, not to speak of the Arts and science. Perhaps the most representative works on Enlightenment are Newton, I., '*Optiks*', CreateSpace Independent Publishing Platform, 2017; Locke, J., '*An Essay Concerning Human Understanding: Second Treatise of Government*', Wordsworth Editions, 2015; Kant, I. '*What is Enlightenment?*' In '*Foundations Of The Metaphysics Of Morals And What Is Enlightenment?*', Indiana: The Bobbs-Merrill Company (1959). Firstly published in 1784 in November 1784 in the German periodical, *Berlinische Monatschrift*; and Foucault, M. '*The Foucault Reader*', Penguin, 1991.

paign that attempts to put a stop to the indefinite recycling of earlier institutions or traditions that have started to look unacceptable in the light of recent evolutions of political ideas. Legal Positivism is clearly part of this overriding political program or campaign. It is related in this to a large part of what might be termed the common ideals of science, and of the whole bundle of attitudes that are referred as “enlightenment”: a new relationship to law and politics, weaned from the public hegemony of religion; a pursuit of the ideas, among other movements, of utilitarianism. There is a sense of the modernist pathos of liberation from the fetters of unjustified rights acquired by birth, a sense of *emancipation*, of the liberation of a slave from slavery, but also of that of a son from the dependence from his power-holding father, in the precise sense of “throwing-off some *mancipium*” (literally, the fact of being kept or captured in another person’s hand), i.e. of subjection, dependency, inferiority, in whatever form. The problem that appears at the threshold of this post-modern, or anti-modern or, if one prefers, “second stage”-modern moment, is that emancipation is not sufficient for the continuation over time of a process such as the evolution of the legal system.

To draw a watertight distinction between “expository jurisprudence” and “censorial jurisprudence”⁴⁸⁴ – calling it thus in order remind of Jeremy Bentham’s idiosyncratic, but expressive and far from unfounded Romanist terminology⁴⁸⁵ - followed by the externalisation of the latter kind, has

⁴⁸⁴ Bentham, J., *Of the Limits of the Penal Branch of Jurisprudence* (hereafter *Limits*), ed. p.Schofield (Oxford, Clarendon Press, 2011), p.17. See also Bentham, J. “Pannomial Fragments”, in *Selected Writings of Jeremy Bentham*, ed. S. Engelmann, Yale University Press, 2011, p.253.

⁴⁸⁵ On this see for instance: Arnon, B. D. 'A reading of Bentham's "Historical Preface to A Fragment on Government – Intended for the second edition."' in *Revue d'études Benthamiennes*, 13, 2014.

provided an unquestionably successful technique of unburdening the judicial *praxis* from the paralysing weight and sweeping claims to society-wide validity. As any student of Jurisprudence would remember, expository jurisprudence involves identifying the essence of law as it is: this demands purely scientific considerations of the ‘true propositions’ of English law, which will lead in turn to a study of the source of legal commands, which are at the heart of that law⁴⁸⁶.

Censorial jurisprudence instead necessitates considerations on how our law ought to be⁴⁸⁷. These two types are to be accepted as logically separate and not as an unified jurisprudential outlook. Bentham is the first to speak of the distinction between expository and censorial jurisprudence; he is knowledgeable of the main components of the old Roman-republican office of the ‘censor’, a political office which does absolutely not limit itself at designating the one who prohibits – although it is this prohibiting action that has become the only one among his many attributions for which the censor (cf. “censorship”) is known today - but also the one who, as a public household keeper or manager who is in charge of all important, existential non-political issues touching the Roman people or population.

The positivist innovation at the basis of Bentham’s distinction is precisely the distinction, the claim, or the admission, that both cannot be dealt with at the same time: it is the fact of neatly distinguishing between both attributions, on the one side, ‘expository jurisprudence’, a knowledge of the law as it has been positively established (*de lege lata*), in which quality it does nothing else apart from exposing, expounding, or repeating

⁴⁸⁶ Loring, R. ‘*The Role of Universal Jurisprudence in Bentham’s Legal Cosmopolitanism*’ in *Revue d’études Benthamiennes*, 13, 2014.

⁴⁸⁷ Bentham, J. ‘*Introduction to the Principles of Morals and Legislation*’ eds. J.H. Burns & H.L.A. Hart, intro. F. Rosen, Oxford: Clarendon Press, (1996), p. 294.

the law; on the other side, as 'censorial jurisprudence', it gives rise to a separate knowledge (*de lege ferenda*), which, perfectly compatible with the fact that its choices are not for now implementable as being valid law', takes the managerial stance the position of an administrator asking himself or herself questions of how certain issues would be best legally dealt with⁴⁸⁸.

The postulate underlying their division being readily enough explained by comparing it to a basic fact, also, of an engineering activity: a motor cannot be at once used and repaired, an argument which, in parentheses, fits perfectly the positivist onslaught against natural law. But, of course, it fits much more elegantly and much more relevantly into a technique of sense-making that Bentham could barely have encountered in his lifetime, namely into the neo-cybernetic (or second-order-cybernetic) distinction that among others, Niklas Luhmann's draws between first-order and second-order observation. For what else does the notion of an 'expository jurisprudence' stage than an actor who refers to, or observes (or precisely: exposes), a state of the world, say: the law as it stands, observing this law as it stands in order to apply it to the new cases that need *presently* to be dealt with. The reference to censorial jurisprudence, on the other hand, seems to fit equally precisely into a position taken by an actor who observes, not the law as it stands, but the process of legal decision-making that results from *her business of observing* the law as it stands, from expounding and expositing the law, that is: from observing the first-order observer.

⁴⁸⁸ Bentham, J. 'Introduction to the Principles of Morals and Legislation' eds. J.H. Burns & H.L.A. Hart, intro. F. Rosen, Oxford: Clarendon Press, (1996), p. 290 and ff.

However, when we ask whether Bentham's proto-positivist suggestion of un-coupling those two types of routines has been successful, it will be difficult to find an answer that can be entirely clear. On the one hand, Luhmann recognises the new ethics of modernity in both Kant and Bentham - thinkers who, far from merely describing what moral behaviour is, were checking the ethical foundations upon which morality is grounded. For Luhmann, "the ethics of utilitarianism and transcendental theory both aimed at a rational or vernünftig (reasonable) justification of moral judgments (...). In this way ethics was established as a philosophical discipline of a different kind and under new conditions."⁴⁸⁹ On the other hand, Luhmann cannot bring himself to agree with the attempt of pairing law and ethics together, as according to him the result of such an enterprise can only be a further blurring of the issues at stake, most especially as it would tend to further leave unquestioned the invisible action of moral discourse : "[S]uch ethics do not provide a suitable description of morality in our present society."⁴⁹⁰ It is interesting how the the unquestioned faith in the large and continuously growing gamut of claims made in the name of "ethics", and especially how the coupling of law and ethics is difficult to do away with. Even the cyberneticist Norbert Wiener defines law as "the ethical control applied to communication (...) in order for justice to be accomplished"⁴⁹¹.

Two centuries after Bentham, we are confronted with the problem that in the legal order's very own practice and proceedings, the two sepa-

⁴⁸⁹ Luhmann, N. *'Political Theory In the Welfare State'* , Translated by John Bednarz Jr. New York De Gruyter 1990. P. 21.

⁴⁹⁰ Luhmann, N. *'Political Theory In the Welfare State'* , Translated by John Bednarz Jr. New York De Gruyter 1990. P. 21.

⁴⁹¹ Wiener, N. *'The Human Use of Human Beings'*, Da Capo Press 1950. p. 205.

rate sets of rails upon which he has tried to place, on the one hand, the train of the everyday work of the legal professional (expository jurisprudence), and the train of the inquiry into the shape that the law should be given on the basis of the on-going experience of legal professionals, both sets of trains mutually, and sometimes dangerously, borrow each other's railway network. The work of the professional lawyer is only all-too often a matter of continually referring to extra-legal value-related claims, and stretches the leeway of the legal system beyond its functional attribution (exposition /application of the law as it stands) in order to have it include the 'censorial' way.

The emancipation of the legal system from external servitudes thus certainly has its importance; let us not forget that it features structurally in Luhmann's systemic account of the legal order as *functionally differentiated social system*⁴⁹². At the same time, it is true that we have reached the point at which its effect, the self-emptying of the legal system from value-dependency, appears as a false, unjustifiable claim, based on an unreal claimed innocence. Value-decisions are omnipresent in a quite micro-structural, capillary way in each bit of judicial practice, and the legal system must own up to this. It follows that the 'emancipative turn' of the first stage of legal modernity (i.e. the self-purification of law from morality, the expulsion of the question of justice out of the borders of the law, etc.) is insufficient as long as it is not supplemented by a second step, which does not abolish or neutralise the first, yet draws the necessary consequences, as they have come to appear over time.

⁴⁹² On this see Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, especially p. 142 and ff.

In the core of this second part, as it were, of law's journey toward modernity, we find what might be called 'enabling instructions', in the same way in which 'emancipatory instructions' had been in the core of the first step. What is needed for the maintenance of a decision-based, functionally differentiated social system law is not only the abolition of submission, subjection, or heteronomy - the condition, which is perfectly accomplished by the basic positivist divides (especially the most fundamental one: between law and morality). What is needed is also the legal order's positive ability to relate to its own choices and decision-making process. Positivism – Kelsen's article "*What is Justice?*"⁴⁹³ offers the most perfect illustration of this point, has undergone a surgical division from normative projections, re-united, as they are, under the notion of justice. Rather than rejecting the claim to justice beyond its borders, the legal order must explore the ways in which it can make claim to justice in its own proceedings⁴⁹⁴.

In its current understanding, the decision-process stands under the requirement of operating, on the assumption that legal decision-making is, at every moment, in line with the cumulative totality of (A) its own earlier outcomes, and of (B) legislation. From these two "archives" follow sufficient instructions for present legal decision-making. According to the underlying idea, the present is sufficiently instructed legally by the outcomes of innumerable matters decided upon earlier on.

But is this enough? The question is meant to refer to one of Luhmann's lesser spectacular postulates concerning the *contingency formulas* of the different function systems. Luhmann identifies Justice as the contin-

⁴⁹³ Kelsen H. '*What is justice? : Justice, Law, and Politics in the Mirror of Science : Collected Essays*' Berkely: University of California Press, 1957.

⁴⁹⁴ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008, pp. 212 - 214.

gency formula of the legal system, suggesting that silence of Legal Positivism about its own decision-routines, with the position that results from it, basically a doctrine of unreflected “continuation” of the routines of the legal order, does not provide enough guidance. The life of the law is also a learning process in the sense of building viable maxims, that is to say, of relating to inescapable contingency rather than simply submitting to it. The contingency of the legal system cannot be escaped, cannot be mastered, yet it still can be “formulated”, which, in the case at hand, means that it can be submitted to the one over-arching “mission” of the legal order that is, very generally, assimilated with that of Justice⁴⁹⁵.

The totality of what, concerning a particular legal matter, has been decided up to now (*stare decisis*) is a necessary but not a sufficient condition or instruction for legal decision-making. In other words, from what precedes alone, we can draw both too many and not enough instructions. This explains that the reference to Justice, thrown out through the door, has come back through the window, and why the theology-inspired natural law theory and why its many secularised successor forms – socialist during the time of Western Marxism (e.g. the Frankfurt School, Luhmann’s intimate adversary), human rights inspired since Rawls, Dworkin, and the ‘rights-revolution’, or finally, starting from the development in Jacques Derrida’s latest deconstructionist work.

Derrida famously claimed “Deconstruction is justice”⁴⁹⁶. His doubtlessly most faithful legal follower, the systems theorist Gunther Teubner,

⁴⁹⁵ Luhmann, ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p.142 and ff.

⁴⁹⁶ Derrida, Jacques.. ‘*Force of law: The mystical foundations of authority*’. In ‘*Deconstruction and the possibility of justice*,’ ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson. London: Routledge. 1992, p. 15.

claimed a notion of a transcendence formula Justice⁴⁹⁷, pushing Luhmann almost beyond Luhmann. While Teubner clearly takes his inspiration in this point from Derridean suggestion⁴⁹⁸, the more decisive issue is According to Teubner, Derrida and Luhmann propose “the most important theory irritations to law and society of the last decades, contribute two directions of thought. These are, first, reconstructing the genealogy of justice and, secondly, observing the decisional paradoxes of modern law”⁴⁹⁹. But Derrida does not seem to say with his affirmation that he is simply giving a tool for critical thinking about justice, by saying “deconstruction *is* justice” he makes deconstruction a movement about law and justice. If justice seems incalculable then “incalculable justice requires us to calculate”⁵⁰⁰, both in “territories of juridico-politicisation”⁵⁰¹ already well known and in new areas.

⁴⁹⁷ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, pp. 1-23.

⁴⁹⁸ Derrida, Jacques.. ‘*Force of law: The mystical foundations of authority*’. In ‘*Deconstruction and the possibility of justice*,’ ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson. London: Routledge. 1992.

⁴⁹⁹ Teubner, G. ‘*Self-Subversive Justice: Contingency or Transcendence Formula of Law*’ 2009, *Modern Law Review*, Vol. 72, p. 2. See also Derrida, J. ‘*Prejuges devant la loi*’ in Derrida, J. *La faculte de juger* (Paris: Minuit, 1985); ‘*Force of Law: The Mystical Foundation of Authority*’ (1990) 11 *Cardozo L Rev* 919; ‘*Specters of Marx*’ (New York: Routledge, 1994); Luhmann, N. ‘*Rechtssystem und Rechtsdogmatik*’ (Stuttgart: Kohlhammer, 1974); ‘*Gerechtigkeit in den Rechtssystemen der modernen Gesellschaft*’ in Luhmann, N. ‘*Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*’ (Frankfurt am Main: Suhrkamp, 1981) 374-418; ‘*Law as a Social System*’ Oxford University Press, USA; 1st Published in Pbk. 2008, p. 211.

⁵⁰⁰ Derrida, Jacques.. ‘*Force of law: The mystical foundations of authority*’. In ‘*Deconstruction and the possibility of justice*,’ ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson. London: Routledge. 1992, p.28.

⁵⁰¹ Derrida, Jacques.. ‘*Force of law: The mystical foundations of authority*’. In ‘*Deconstruction and the possibility of justice*,’ ed. Drucilla Cornell, Michel Rosenfeld, and David Carlson. London: Routledge. 1992, p.29.

What Derrida claims is that texts, including legal texts, need to be deprived of their powerful status, and be made part of the world of their readership, rather than an oracle that imposes its stamp upon them. A text is read without subjugating the reader; in fact Derrida says, the text does not 'prescribe' anything, but simply give many interesting indications to the reader, with the condition that the reader does not accept its command. In so doing, deconstructing it, the legal text becomes less powerful, but more true, and to put a legal text through this treatment would be the action of doing justice; "deconstruction (...) exposes the presumption of a determinant certitude of a present 'justice' as defined by any current legal system, including legal positivism"⁵⁰². The reference to anything outside positive law is being denied by positivists, as "[l]egal positivism, when left unchallenged, creates a system, a kingdom which reigns over possibility and excludes the dream of a truly different future"⁵⁰³ and "reminds us of the responsibility of judges, lawyers, and law professors for what the law "becomes"⁵⁰⁴.

The reference to Justice does not make an exception here. "Deconstruction protects the divide between law and justice. This exposure of the aporias of justice is in and of itself ethical. The aporias, or more precisely, justice conceived as aporia, is an uncrossable limit which continually returns us to an inherent and ultimately irresolvable paradox. Justice so con-

⁵⁰² Cornell, D. (1990) *'Time, Deconstruction, and the Challenge to Legal Positivism: e Call for Judicial Responsibility'*, Yale Journal of Law & the Humanities: Vol. 2: Iss. 2, Article 4. p.267.

⁵⁰³ Cornell, D. (1990) *'Time, Deconstruction, and the Challenge to Legal Positivism: e Call for Judicial Responsibility'*, Yale Journal of Law & the Humanities: Vol. 2: Iss. 2, Article 4. p.267.

⁵⁰⁴ Cornell, D. (1990) *'Time, Deconstruction, and the Challenge to Legal Positivism: e Call for Judicial Responsibility'*, Yale Journal of Law & the Humanities: Vol. 2: Iss. 2, Article 4. p.269.

ceived resists its own collapse into law”⁵⁰⁵. Strictly speaking justice needs be eliminated: but its elimination will generate unexpected outcomes. Cast out, exorcised from the legal system, it will become allocated within politics instead and pose the question of the politics-inseparability of law. It will come back, either under the heading of ‘the second, political agenda that is at stake in everything legal’, under the heading of valid rights or claims (including, in the field of theory, ‘validity claims’, as in Habermas), or under the heading of the deconstructionist philosophical take on judges as decision-makers under aporia / undecidability conditions.

It is undeniable that both Derrida and Luhmann identified the same problem with law and justice, the problem of *decision*. Not only but they “are in agreement that arbitrariness, inconsistencies, antinomies, paradoxes, and even violence, lie at the bottom of the most refined constructs in economic and legal action”⁵⁰⁶. Nevertheless, their initial agreement on where the problem lies is, alas, their only common point. If Derrida, studying aporias, rejects a original principle, a sort of *Grundnorm*, “[s]ince the origin of authority, the foundation or ground, the position of the law can’t by definition rest on anything but themselves, they are themselves a violence without ground”⁵⁰⁷, Luhmann, studying paradoxes, also sees “the paradox of the binary code applied to itself”⁵⁰⁸

⁵⁰⁵ Cornell, D. (1990) *‘Time, Deconstruction, and the Challenge to Legal Positivism: e Call for Judicial Responsibility’*, Yale Journal of Law & the Humanities: Vol. 2: Iss. 2, Article 4. p.267-268.

⁵⁰⁶ Teubner, G. *‘Economics of Gift - Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann’*, Theory, Culture and Society 18, 2001, 29-47. p. 31.

⁵⁰⁷ Derrida, J. (1990) *‘Force of Law: The Mystical Foundation of Authority’* Cardozo Law Review 11: 919-1046. p.943.

⁵⁰⁸ Luhmann, N. *‘The Third Question: The Creative Use of Paradoxes in Law and Legal History’* Journal of Law and Society 15: 153-165. p.154.

Rather than making Justice homeless within the legal system, thereby condemning it to look wherever it can to lay its head to rest, the question has become how Justice can be kept within the legal system. What role can a functioning modern legal system attribute to Justice (*Gerechtigkeit*)? The problem which positivism had found with Justice and which has led it to its expulsion from the legal order – Kelsen’s famous article on justice⁵⁰⁹ offers an excellent yardstick here – how did it come up in the first place? Kelsen points to Justice’s unruly and dysfunctional character, to the fact, in other words, that everyone has a different notion of Justice and that there is no efficient cure that helps to unify these diverging projections. For reasons profoundly integrated in its semantic build-up, essentially the incompatibility between individual identifications and borderless or universal breadth of intended validity, Justice remains an inoperative concept in law, at best a mere denominator, a means of dramatic expression, or simply the proper name of the aspirations of the ones and the others.

In these terms, the Kelsenian verdict is difficult to reject. The point is not that Kelsen was incorrect in his deductions – the point is rather that the further evolution, the most recent legal-systemic chapter of modern legal history, teaches that Kelsen has been, in a sense, too optimistic. The legal system has proven its inability to part ways with Justice (too optimistic because, for Kelsen and not only for Kelsen, ‘justice’ used as a maxim to be directly applied to the management of a legal order’s everyday life, is a pathetic and pathogenic non-starter). This poses the question

⁵⁰⁹ Kelsen H. *‘What is justice? : Justice, Law, and Politics in the Mirror of Science : Collected Essays’* Berkely: University of California Press, 1957.

of how finding a viable employment within the legal system for the notion of Justice – the question that is at stake in the Luhmannian notion of the contingency formula Justice. Consider the two ways in which a process, any process, can be understood as ‘contingent’: either in view of the large amounts of results that have come up – here it is the sheer amount of diverging results, which shows that the situation from which they commonly derive, can be seen as contingent – or in view of divergent ways of dealing with one identical situation – here, on the contrary, one speaks of contingency thinking of the width (or, on the contrary, the narrowness) of possible ways of dealing with the one situation at hand. An example of the first are the many transactions that are involved in the evolution of prices and markets, an example of the second, the way in which a person driving a car in urban traffic deals with the contingency of the situation on the road in front of him.

While the first case offers an example of what might be called bare contingency, or of contingency without a formula, of purely emergent contingency, in the second case one could speak of a contingency that is always-already underlying a contingency-processing practice, a contingency that is not merely emerging, but always-already translated into a ‘formula’ for an on-going practice – in our example the continuing (that is to say, successfully accident-avoiding) driving of a car through the urban traffic. In the first case, the regularity of the emergent over-all result is predicated upon the almost numberless contingent (or simply: unpredictable) events summarised. In the second case, contingency is understood as a state of things that a special form of human conduct can venture to act upon.

5.4 - Contingency in Decision Making.

According to a traditional view, the decision-making situation in law is perfectly expressed by means of a contingency account of the first kind. *Stare decisis* is understood to mean that “what the law is”, law made up to now, the ‘decisa’ here invoked, constitute themselves, as it were the demiurge at work in law in the making, the past of the law *is directly* the maker of the present decision⁵¹⁰. Many critics⁵¹¹ have pointed out, over the last decades, the fictional or in any case severely unrealistic character of this account of legal decision-making, where the law of precedent takes the shape of an “incomplete constraint”⁵¹² and is “often apt to fail”⁵¹³. Not only that, but also other risks of applying *stare decisis* as “a majority of the Court should continue to reject the Chief Justice’s (...) approach to constitutional *stare decisis* because it risks irreparable damage to the Court’s prestige and to constitutional law”⁵¹⁴. Luhmann’s suggestion of a contingency formula is simply more synthetic than these criticisms. The notion of the contingency formula Justice is proposed as a new theoretical account of how a functionally differentiated process can be observed – yet needs

⁵¹⁰ On this see Emmert, F. ‘*Stare Decisis - a Universally Misunderstood Idea?*’ *Legisprudence*, 6(2) · May 2012.

⁵¹¹ On this see for instance Collier, C. W. ‘*Precedent and Legal Authority: A Critical History*’, 1988 *Wis. L. Rev.* 771 (1988); Gerhardt, M. J., ‘*The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*’ (1993). Faculty Publications. Paper 991 ; 67-86; Farber, D. A. ‘*The Rule of Law and the Law of Precedents*’, 90 *Minn. L. Rev.* 1173 - 1203 (2005).

⁵¹² Farber, D. A. ‘*The Rule of Law and the Law of Precedents*’, 90 *Minn. L. Rev.* 1173 - 1203 (2005), p. 1203.

⁵¹³ Farber, D. A. ‘*The Rule of Law and the Law of Precedents*’, 90 *Minn. L. Rev.* 1173 - 1203 (2005), p. 1203.

⁵¹⁴ Gerhardt, M. J., ‘*The Pressure of Precedent: A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*’ (1993). Faculty Publications. Paper 991 ; 67-86, p.85.

to go on by its own means (not that of the observer!) regardless. The non-coincidence between the inherently legal first-order observer-perspective and that of the sociological second-order observer of society at large, or in other words, the acceptance of the notion that lawyers cannot, any more than those involved in the communications of any functionally differentiated system, make themselves dependent upon a “panoramic vision” of the social totality, and need nonetheless find resources of their own present decision-making.

Of course, the immense wager that is inbuilt in the point about the contingency formula justice as suggested by Luhmann – a point which in itself is everything but well-known (even among social systems theorists) – and that risks to be unacceptable for most readers whether social scientists or lawyers, is the one that is enshrined in the provocative co-occurrence and encounter of the two terms ‘justice’ and ‘contingency’. People are normally perfectly able to deal with the one or with the other. There are, once again, two classical possibilities – either the expulsion of Justice, the refusal to accept any reference to Justice in law, or on the contrary accepting Justice – but then *instead* of contingency. The one in front of the other, without expulsion of either, pinpoints the real difficulty of the formula, as well as of the importance of the contribution made by the notion of contingency formula.

One should understand the notion of a 'contingency formula' as referring to the attempt made by the functionally differentiated system law, like any other social system “a matter-of-fact complex of so many mechanisms”⁵¹⁵ in order to develop something like “politics [in a totally un-tech-

⁵¹⁵ Anderson P. 'A new Germany ?' New Left Review May-June 2009, 5-40. p 26.

nical understanding!] of its own"⁵¹⁶ – something comparable to the notion of the 'driving' (not 'steering' – steering comes complete with a promise of success, it includes a notion of mastery, while driving (a car, especially in an urban street network) is an open process, which comes complete with the ever unredeemed dangerousness of each new situation, and always remains subject to contingency). The 'contingency formula' thus describes a mode continually encountered by each one of those functionally defined differentiated systems which, according to systems theory, constitute modern society. The discovery and multiple exploration of contingency has resulted, in the society described by systems theory, in the build-up of these 'agencies'.

There is more. The problem of the legal system as 'driving' through the contingent situations it encounters at every turn, is that we are now living in, or with, a society without integrally omnipresent values. There might be society-compassing, overarching values, but the direction in which society evolves increasingly limits them to overarching (in the sense of "official" or macro-) contexts, while they increasingly absent from certain types of social micro-contexts. Values and certainties had structured in depth the social world contemporary to only a few generations earlier. Theirs had been a social world that was by its nature consensual. The legal order had expressed the law, the norm which the individual felt bound to accept as an ultimate standard of its decisions, as its normativity, as its normalcy as well. is this still the case? What determines behaviour today is only exceptionally law in the strict sense. Much is 'outsourced' to a wide spectre of different 'normativities' – in one account, advertisement plays indeed a

⁵¹⁶ Anderson P. 'A new Germany ?' *New Left Review* May-June 2009, 5-40. p 36.

normative role.⁵¹⁷ Yet, the legal order continues to serve a slimmed, yet still a decisive portfolio of agendas. The normative effects it bring forward allow for more precision, for a higher sustainability, for more reflections on its own interventions. It does accomplish its decision-making labour under uncontrollable, irremediably contingent conditions, yet it can relate its decision and interventions to its own earlier decisions and interventions. This is where the contingency formula presents itself as a formula that tries to enable the legal system to deal with contingency – with a new type of unescapable contingency - not as with mere happening, i.e. in an non entirely-contingent way.– one could say: precisely in a formulatedly contingent way.

There had never been, before the current chapter of the history of societies, a shortage in such common values as offering themselves to be taken for granted by everyone. This is what people are really referring to, when they refer, e.g., to a community, or indeed – and largely, though not entirely, correctly so – to a particular society. (Not entirely correctly, as Luhmann's argument, first suggested in 1970, that there is today only one society: world society,⁵¹⁸ an argument which, admittedly, makes things very complicated for empirical sociologists, has not been seriously contradicted.)

⁵¹⁷ Cfr. Coccia, E. *'La norma iconica'*, *Politica e società*, I /2015, 61-80.

⁵¹⁸ Luhmann, N. *'The World Society as a Social System'*, *International Journal of General Systems*, Vol. 8, 1982, issue 3. p. 131-138. Luhmann, N. *'Globalization or World Society : How to Conceive of Modern Society'*, *International Review of Sociology* March 1997, Vol. 7 Issue 1, p. 67. See also Albert, M. and Hilkeimer, L. *'Observing International Relations. Niklas Luhmann and World Politics'* Routledge, London, 2004.

The presence of common values has characterised society, not only as far back as reaches historical memory, ie. “for a time out of mind”,⁵¹⁹ but also at all early-modern times including those of the entire *ancien régime*, that is through in the entire time-span of humanity before positivism, when the division or differentiation between religious and legal sphere was still largely unachieved. The non-differentiation of the two meant that the common value was integrated, as it were, into the law itself. With the modernist onslaught of legal positivism, what has changed? For instance, utility itself has been such a commonly shared value, though not necessarily inside law, but within law’s overall social context. What was no longer legitimately doable under the universal heading of compassing or integrating values, was still legitimately doable under the universal heading of a notion of utility.

In any case, and importantly for the understanding of Luhmann’s conceptions, today, there is no such thing as a ‘system of values’ in contemporary social reality.⁵²⁰ This type of a ‘system’ is what is not part of the modernity we are contemporary to. Systems consisting of entities, systems in the long-time valid sense of ‘edifices of stable or structural values’, have been replaced by systems that consist strictly speaking, of nothing, as all that matters for them is their continuation through the taking place of specific events (communications, in the case of Luhmann’s teaching about society), more exactly of large numbers of those events, for only large

⁵¹⁹ In the language of the 17th century founding fathers of the common law. cf. Pocock, J.G.A. . '*The Ancient Constitution and the Common Law*', (1957), Cambridge University Press; 2 edition (2008).

⁵²⁰ On this see Leydesdorff , L. '*Luhmann Reconsidered: Steps Towards an Empirical Research Programme in the Sociology of Communication?*', in: Colin Grant (ed.), '*Beyond Universal Pragmatics: Essays in the Philosophy of Communication*'. Oxford: Peter Lang. 2009.

enough numbers are capable of giving rise, producing, sustaining, a new type of process-reality. One needs to grasp the entire width of the change. A system of that latter kind is no longer something of which it can be said that it can and will be encountered in objective reality, a “being out there”, a reality that is among other realities that are, that needs to be counted as one among the many components of the *universitas rerum*, the general inventory of the creation; instead, it is a sequence of chance happenings, overwhelmingly many enough for every new event of the same sort to be sufficiently assured that the series will not stop.

This means that all legal history looking backwards from classical antiquity toward the Ancient Empires or alternatively forwards into our own direction, including parts of the 20th century, that is including all modern history up to us, has been, schematically speaking, provided with such common values, beliefs, convictions.⁵²¹ The situation to which Luhmann’s sociological and theoretical thinking are attempts to provide the appropriate medium, is precisely that the social parameters of human existence are, in the present time deprived of such common, integrating values. Instead there are different value horizons for each of the function systems. Values need to be – like everything else – reproduced within the functionally differentiated social systems and their routines. This is also the case of the legal system, including the Judiciary.⁵²²

⁵²¹ Luhmann, N. *Theory of Society*, vol I Stanford University press, 2012; See also Halsall, F. *Niklas Luhmann and the Body: Irritating Social Systems*, the new bioethics, Vol. 18 No. 1, May, 2012, 4–20.

⁵²² See Luhmann, *Law as a Social System* Oxford University Press, USA; 1st Published in Pbk. 2008; See also Messner, C. *Introduction to Special Issue SI: Luhmann*, Int J Semiot Law (2014) 27:313–324.

5.5 - Common Values, Politics and Structural Coupling.

Within a modern legal order based on positive law, the one certainty is that the internal chain of legal events constitutes an internally homogeneous network, that there is no orientation by reference to a “nature” that would exist outside of the legal system, no common value sense of what is good and just and to which the legal order could, therefore, simply subscribe. Such beliefs in a possible guidance from the outside do persist – but, as soon as systems theoretical criteria are applied, these values disqualify themselves as being continually reproduced by *other* differentiated societal systems or quasi-systems, such as the media. This is precisely the reason why a limited internal guidance is required: the model of “unformulated” contingency, which in most cases means (under current conditions) market-type contingency, poses issues of governability, in such a way that any attempt of a reduction to the “purely ideological” (as mentioned above), confronts the legal order with the need, in order for its decision routines to make sense at all, to expose them continuously to the values and/or convictions. In other words, the chief value for law, Justice, needs to be continually invoked in order for the legal system to continue a meaningful trajectory - even if this continuous exposure or confrontation is *de-frontalised* by the fact the the legal order does not subject itself to overarching values, but refers to them exclusively as to the result of second-order observation. If, according to Luhmann, the work upon Justice as contingency-processing device or a contingency formula is to become the new *conditio sine qua non* of the production and reproduction of the legal

order,⁵²³ this should not be taken in the sense that the legal system ceases to be functionally differentiated, by finding its master in some overarching consensus. By referring to Justice, the legal order refers to the exercise of its own identity-providing function.

Moreover, whoever is speaking of 'common values' cannot avoid transgressing the border, watertight according to the requirements of legal positivist doctrine, between law and moral discourse. In the pre-modern, pre-positivist section of legal history, it is difficult to see the discourse on justice detached from an ethical dimension. In fact, however, the situation is not exclusive of the legal discourse. In politics Luhmann has allocated some theoretical effort and attention to these moral issues in relation to politics, to economy, as well as to law. As we know only today, after the publication of a number of manuscripts written especially in the 1970s, but not published in his lifetime, Luhmann's position did not change from his first publications to the last ones : politics is *not* a function of ethics; and law is *not* a function of politics.

This is certainly a point in his theory which caused much controversy and earned him strong opposition, from the consensualist sociological colleague of Luhmann, Jürgen Habermas⁵²⁴ to those on the left who were, throughout the 1970s discovering themselves as followers of Carl Schmitt. The case of Schmitt is particularly significant in the luhmannian context. Schmitt took the position that politics is the highest possible endeavour,

⁵²³ Luhmann, '*Law as a Social System*' Oxford University Press, USA; 1st Published in Pbk. 2008.

⁵²⁴ Rasch, '*Niklas Luhmann's Modernity. The Paradoxes of Differentiation*'. Series : Cultural Memories in the Present', Stanford University Press, 2000.

superior to any other by dint of its higher grade of intensity.⁵²⁵ Schmitt's "suprematist" concept of politics, which defines politics by the fact of mobilising the highest degree of 'intensity' (rather than any functional character) understands political happening in the light of what it calls the *Ausnahmezustand* or state of exception.⁵²⁶ Luhmann's efforts are animated by an ambition that is located at the opposite of the Schmittian one. In its central scope is the question of the conditions under which social systems can continue their communicating existence. His efforts are therefore directed toward an understanding of politics as a functionally defined system. For Schmitt, any significant human activity is, at its core, a political matter; politics only produces the basis of public life, the only basis which guarantee the keeping of promises in a wide, general sense. Schmitt, in Luhmann's view, fails to understand the phenomenon of modern society in terms of its sustainability as a process. Schmitt has a politicised conception of social or public life, and one which focuses not at the conditions of its continued existence, but rather at the location of the highest political stake: power. In his lifetime, Schmitt's ideas were seen, whether correctly or incorrectly so, as those of a 'conservative'. On closer looks, the notion of a "conservative" is, at least in its 20th century appearance, however, marred by a fundamental ambiguousness. There had been conservatives of the positivist type, in the centre of whose attention we find power as effectively and in-

⁵²⁵ On this see Thornhill, C. '*Niklas Luhmann, Carl Schmitt and the Modern Form of the Political*', European Journal of Social Theory, Volume: 10 issue: 4, page(s): 499-522. See also Rasch, W. '*Locating the political: Schmitt, Mouffe, Luhmann, and the possibility of pluralism*' International Review of Sociology, Volume 7, 1997, Issue 1, 103-115.

⁵²⁶ Schmitt, C. '*The Concept of the Political*', University of Chicago Press; Enlarged edition (2007); See also Szabo, M. '*Politics Versus The Political. Interpreting 'das Politische' in Carl Schmitt*', Journal of Social Theory, Vol. 7, 2006, Issue 1. 27-42.

stitutionally in use, or "constituted power"; other "schools" of conservatism followed a diametrically opposed direction. Indeed, they shared with political revolutionaries the exclusive attention not for the everyday aspects of the reference to power, but for the question of underlying, conditioning, constituent power. Ultimately their questions about power are not "how"-questions but rather "who"-questions.

It is interesting how, instead, at the very end of the 20th and in the first years of the 21st Century, Schmitt's views have given rise to a followership that was, to its largest part, politically marked as a *leftist* followership.⁵²⁷ The notion of a legal order is, as it were, integrally politicised, insofar it is dominated by political 'intensity'.⁵²⁸ It is true that politics itself appears thus not as a function but as an ethical commitment.⁵²⁹ This is easily understood in terms of yet another paradigm shift within modernity. If we compare in detail social systems theory, complete with the micro-decisionism of its conception of society as the outcome of numerous communication, with the militant, yet traditionalist argumentation of Schmitt's (and his contemporary followers') macro-decisionism, we are confronted, not only with a progressive vs conservative front, but also with an unexpected interrelation between a politico-ethical as opposed to a systemist front on the one hand . Social systems theory dares, effectively, to 'de-fundamentalise' the social fabric or process by forestaging differentiation and heterarchy in

⁵²⁷ Negri, A. Hardt, M. 'Empire' Cambridge, Ma.: Harvard University Press, 2001), p. 45-46;

⁵²⁸ Strauss, L. 'Notes on Carl Schmitt, *The Concept of the Political*,' postscript to *Carl Schmitt, 'The Concept of the Political'*, University of Chicago Press, (2007); pp. 97-122.

⁵²⁹ On this see for instance Paler, T. G. '*Carl Schmitt: The Philosopher of Conflict Who Inspired Both the Left and the Right*' Foundation for Economic education, 2016.

society; with Schmitt, it is defined by views about its totality, integrality and hierarchy.

The process of Luhmannian functional differentiation takes seriously the social phenomenon, while the process of totalisation or of Schmittian integralisation is intrinsically political - political in the traditional, old-European sense that politics is the master of society. Yet, it would not be easy to argue that Luhmann, at least in Germany or in the German-speaking world, where he has been read by a large public, has not really changed anything in the widespread mentality and perception of society. When his first works were published appeared, slightly more than fifty years ago, Luhmann was frequently misunderstood, for instance as a master-thinker of a technologically imposed eclipse of politics – classically in the influential publication of the controversy between Niklas Luhmann and Jürgen Habermas, who has co-authored with Luhmann a volume on the topic.⁵³⁰ But if we look at the perception of society now, in the 21st Century, social system theory and the functional differentiation of society is even less comprehended or "seen" by contemporaries. Even among social scientists, the interest in society as subject of evolution ranks far behind the everyday issues linked to the most recent or next elections. This is a symptom indicating that the leading discourse on society still has not taken on board Luhmann's suggestion to look at society, as at social systems generally, in a mode that no longer foregrounds traditional, e.g. left-right-related relationships. Forestaging politics at the expense of society is still the ground-line of discourses determining the media and their take on matters social. It results in the reduction of the complex, cluttered matters of

⁵³⁰ Habermas, J. Luhmann, N. *Theorie der Gesellschaft oder Sozialtechnologie. Was leistet die Systemforschung?*, Frankfurt a.M. 1971.

society to the easily imaginable because personalisable, polarities of the political landscape. It is difficult to avoid the conclusion that, under such conditions, what is at stake is nothing social, but rather a knot of relationships that boil down to personal issues or, at best, issues of personal ethics.

The need of correctly assessing society as a complex result of processes and evolutions ultimately anchored in functional differentiation should however not obfuscate the fact, repeatedly recognised by Luhmann, that the ethical perspective plays an important role – a more decisive role, precisely, than that of a merely philosophical question, to the extent to which the Social Sciences have come up with results that are not at the reach of the philosophical tradition.⁵³¹ It has been said many times that the evolution of society in the 21st Century has given rise, among other tendencies and “turns”, to an ethical turn. Whether this is so, or whether the more straightforward way of looking at this evolution would be to conclude that ethical interrogations are today an un-displaceable ingredient of media and education, is of course an open question. Nevertheless, the great distance between social system theory and the ethical interrogation remains unaltered.

The more directly confrontational issue in respect to the luhmannian systems approach to society, is however the topic of morals. It has been dealt with numberless times by Luhmann, especially in view of the deviously obtained legitimacy that the question good/evil boasts of on the back of an argument which claims that to ask the question good/evil is in itself *good*, while not to ask it, and/or to ask other questions instead, is *evil*. This

⁵³¹ Luhmann, N. 'The Sociology of Morals and Ethics', International Sociology, 1996, Vol 11, Issue 1, pp. 27 - 36.

underlying moralist argument has been used frequently, referring to the 'state of emergency' often linked to the need of preempting a terrorist attack, or to political decision-making at large about the vexed question of "just war". Social systems theory, instead of contributing to this issue as to a field of polarities, prefers to contribute to it as to a field of study. The concept of structural coupling and its foregrounding follow this theory-ethics.

That autopoietic systems are closed systems means, first of all, that, whatever their ambitions and attempts, they cannot achieve the goal of communicating with their environment, or with other systems. Functionally differentiated systems have the capability of drawing a boundary, a limit for their own system-specific operations. However enthusiastic in the pursuit of any system-transcending goals, they must end up producing gist on their own mill, that is, will reproduce their own self-reference and autopoiesis. This is what functional differentiation consists of, in practical terms. What thinkers like Maturana and Luhmann call structural coupling concerns the modality in which such autopoietic and (mainly) self-referential systems relate to each other (however, as we have already said, without communicating with each other). The idea of an open communication, enthusiastic and sympathetic as it appears, is not a possible mode for autopoietic social systems. There are nonetheless modes, if not of intersystemic relationships, at least of diverse forms of co-existence, with the proviso however, that the form of their commonality or sociability is one of "coupling". One needs to understand a term like "structural coupling" as an implicit rejection of concepts that would derive the capacity of coupling from a foregoing provision of structures, the point about structural coupling

- rather than, say: "coupling structures" - being the fact that any structures are merely emerging structures, owing to the fact of coupling. In other words, structural coupling happens when "a system permanently presupposes certain characteristics of its environment and relies structurally on the very same."⁵³² To be clear, structural coupling is not a causal relationship, it does not alter the unique code of the system involved, nor does it alter the internal communication and autopoietic operations within each system. Instead it is, as Luhmann repeatedly insists, a "highly selective form", which "excludes much more than it includes."⁵³³

To be clear, structural coupling does not avoid, nor diminishes contingency; it is simply a way of describing the workings of different systems and their interaction, albeit limited. The paradoxes of the law remain, they might be made invisible, but this does not provide a way of getting rid of them - even if the hope that such a way can be provided had an important position within deconstructionist and other postmodernist theories.

Conclusions

The aim of this thesis was to discuss the concept of the Contingency Formula Justice on the backdrop of both mathematical and philosophical theories and concepts that have influenced or at least inspired Luhmann.

⁵³² Luhmann, *'Law as a Social System'* Oxford University Press, USA; 1st Published in Pbk. 2008, p.144.

⁵³³ Luhmann, N. *'Die Politik der Gesellschaft'*, Suhrkamp Verlag KG (2002), p. 374 ; Luhmann, N. *'Einführung in die Systemtheorie'*, Auer-System-Verlag Carl, (2017), p. 116. My translation.

Cybernetics, the idea of the the steersman, evokes an image of a circumscribed situation in a position of peril; a boat in the sea as an analogy of a system in its environment. The steersman must *govern* the boat *effectively* to arrive safe to land. *Cybernetics*, with its maritime semantics, should be compared to *management* and indeed to *oikonomia*, with their “house”-related semantics. The ship is permanently in the dangerous situation of being envired by the fluid element, which threatens every passenger with drowning. The house, on the other hand, is envired by other houses, which like itself are rigorously acting in favour of their own chances and perseverance. Both images are instructive about what it is to govern. The idea of government is related to politics and power. Cybernetics associated to social system theory, and in specific in this work, to the Contingency Formula Justice, show the possibility for any social system, including law, to have the possibility to govern itself. This is obviously dissimilar from the concept of reigning or ruling, and moreover from that of politics. Interestingly, Aristotle, at the start of his treatise on *oikonomia*, identifies *oikonomia*, house-related action, with monarchy, and opposes it to politics. If one applies Agamben’s polarity between operative or *oikonomic* and inoperative or glory-related agencies in the history of Western power, there is then an apparent contradiction between Aristotle’s notion of monarchy, for which the management-like decision-making of a despot of a closed unit such as a house is characteristic, and a today widespread notion of monarchy as something rather decorative or pompous, something much closer to the spectacular visibility of a reign, than to the effective policing that is done within the logic of the house.⁵³⁴

⁵³⁴ See Agamben, G. *‘Il Regno e la Gloria. Per una Genealogia Teologica dell’Economia e del Governo’*, Venezia, Neri Pozza, 2006, p.108 ff.

Perhaps it is not possible for the law and for Justice to be considered autonomous (even only theoretically or at postulate level), but it can show effective governing. Considering the traditional institutional problematic of the King with a mortal body and an institutional body, which never dies⁵³⁵ in modern terms of multiplicity with the differentiation of separate spheres, it might be asked whether, ultimately, the law does not reign anymore, as it has deconstructed its own hierarchy⁵³⁶ but governs itself even if it has to hide its own paradoxes in non-legal discourses.

Although normally it is spoken of the 'rule of law', could it be that the reign of the law is in decline and it is left with governing? There are obviously some problems to be considered. On one side the law has a purposive program, and here it is active, adaptive and *oikonomic*, on the other, it has a conditional program, and is *rex inutilis*, perhaps glorious (as a sovereign).⁵³⁷ It seems that in modernity, especially in a modernity that sees more and more a globalised society, even within each nation, what prevails is a cybernetic administration. On the question of the opposition of rule and governing, Agamben, for instance, states that it is rather a question of tension than of opposition or dichotomies. It is how the system works.⁵³⁸ It is in a way the same conclusion to which Cybernetics arrive

⁵³⁵ On this see Kantorowicz, E. *The King's Two Bodies: A study in Mediaeval Political Theology*, Princeton University Press, 1997.

⁵³⁶ See Teubner, G. *The King's Many Bodies: Self-Deconstruction of the Law's Hierarchy*, 1997, Law and Society Review, Vol 31. No 4

⁵³⁷ See Agamben, G. *Il Regno e la Gloria. Per una Genealogia Teologica dell'Economia e del Governo*, Venezia, Neri Pozza, 2006, p.111.

⁵³⁸ See Agamben, G. *State of Exception*, University of Chicago Press, 2005.

(although not relating to law and politics) by candidly state that it is the way of effective management⁵³⁹, and allows the greater number of choices⁵⁴⁰, At the same time, Luhmann claims that the *Kontingenzformel* justice has a role only within the legal system, it is not an aspect of an external representation of the legal system. It should work to make the system not stronger or bigger, but more critical.

⁵³⁹ Beer, S. 'Cybernetics and Management', English Universities Press, 1959.

⁵⁴⁰ Foerster, H. von, 'Ethics and Second Order Cybernetics', 1991. In Foerster, H. Von, 'Understanding Understanding: Essays on Cybernetics and Cognition', Springer, 2003;

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