

The System Theory of Niklas Luhmann and the Constitutionalization of the World Society

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Abstract

The article takes a critical look at the current ‘constitutionalization vs. fragmentation’ debate and examines it on a system theory-based outlook. The historical background deals with Niklas Luhmann’s system theory and analyses whether his move ‘from territoriality to functionality’ is applicable to modern international law. The contribution analyses a possible constitutionalization in Luhmann’s “world society” in form of structural couplings and beyond a societal constitutionalism or a postnational order. The essential argument is that there is a constitutional system-theoretical element in modern, state-centered international law: a value-based, ‘structural coupling’ between the political system and the law system in terms common values such as core human rights and basic principles.

A. Introduction

The following contribution tries to examine the phenomenon of global constitutionalization through the lens of the system theory of Niklas Luhmann, the German lawyer and sociologist who lived in the 20th century. Essentially, it will be argued that there is a state-centered side of global constitutionalization as well – and not only private transnational networks and a transnational law such as *lex mercatoria* or *lex digitalis* or the societal constitutionalism by Teubner or Amstutz. Moreover, the contribution will deal with the much criticized state-centered constitutionalization.¹

B. Constitutionalization – a Short Terminology

The phenomenon of global constitutionalization is by far not a new term. In the past decades, a whole bunch of books and articles have dealt with this topic. This article is not the place to outline the entire discussion. But to understand the ‘system-theoretic side’ of global constitutionalization, a short explanation of what is meant by this term is useful. Constitutionalism and constitutionalization are often used interchangeably and are rather vague terms.² However, it makes sense to regard

¹ N. Walker, ‘The Idea of Constitutional Pluralism’, 65 *Modern Law Review* (2002) 3, 317.

² S. Gardbaum, ‘Human Rights and International Constitutionalism’, in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and*

constitutionalization more as an unfinished process, in exchange for the more static state description of constitutionalism.³ Thus, constitutionalization can be seen as an attempt to subordinate governmental action to constitutional structures, processes, principles and values, meaning to include “constitutionalistic elements”⁴ into the international legal system.

The end of this process surely will not be a one and only world constitution which is comparable to domestic constitutions. International constitutionalism has to be more regarded as a pluralistic structure.⁵ But this structure does not need to be regarded as a fragmented element, but as a networking model or a complex form of “interface-management” with common constitutional principles.⁶

C. System theory

In the following chapter, Luhmann’s system theory will be discussed shortly. Luhmann’s work is to some extent open to interpretation, as it does not follow a rigid, consecutive concept, but rather a network model of related concepts. Further, the system theory is less a theory in the common sense than a kind of (complicated) ‘language’.⁷ Luhmann, however, had a very specific understanding of the term ‘theory’. According to him, a theory is not an empirically verifiable hypothesis, but as a self-description a part of the society itself. Therefore describes the social theory – if it is to describe

Global Governance (2009), 233, 233-234; for a good overview see: A. Wiener *et al.*, ‘Global Constitutionalism: Human Rights, Democracy and the Rule of Law’, 1 *Global Constitutionalism* (2012) 1, 1, 4-6.

³ C. Walter, ‘International Law in a Process of Constitutionalization’, in A. Nollkaemper & J. Nijman (eds), *New Perspectives on the Divide Between National and International Law* (2007), 191, 192; M. Kotzur, ‘Weltrecht ohne Weltstaat: Die nationale (Verfassungs-)Gerichtsbarkeit als Motor völkerrechtlicher Konstitutionalisierungsprozesse?’, 55 *Die Öffentliche Verwaltung* (2002) 5, 195, 200.

⁴ A. Peters, ‘Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse’, 65 *Zeitschrift für öffentliches Recht* (2010) 1, 3, 11.

⁵ M. Kumm, ‘The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia’, in P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010), 201, 203-204; Peters, *supra* note 4, 10.

⁶ Kumm, *supra* note 5, 218.

⁷ M. Brans & S. Rossbach, ‘The Autopoiesis of Administrative Systems: Niklas Luhmann on Public Administration and Public Policy’, 75 *Public Administration* (1997) 3, 417, 419.

society – last but not least itself. According to Luhmann, the social theory thus has to deal with this self-reference problem at first.⁸

I. Basics

According to Luhmann, each (national) society is divided into various autopoietic and separated (sub)systems, such as the legal system, the political system, the educational, the scientific or the economic system. Social (sub)systems are structures, which “maintain in an overly complex environment a less complex, meaningful context invariant and are thus able to orientate actions”.⁹ The system theory of Luhmann is based on several essential elements, which will be introduced below.

1. Communication

The core element is communication – as the unity of “utterance, information and understanding”.¹⁰ Each social system consists of countless meaningful communications.¹¹ Moreover, society is only possible where communication is possible. Luhmann states that communication is therefore society and society communication.¹² Communication can be considered as the basic unit of observation for the assessment of the operations of social systems. According to Luhmann, communication is an ongoing, without interrupting sustained operation, which reproduces itself.¹³ Through the continuous juxtapositions of communication operations (“communication of communication”) finally develop social systems.¹⁴ Social systems are thus not stable, stagnant structures – the systems consist moreover of a multiplicity of “events”, which change easily.¹⁵ Important to mention is that

⁸ *Id.*, 418.

⁹ N. Luhmann, *Soziologische Aufklärung I: Aufsätze zur Theorie sozialer Systeme*, 8th ed. (2009), 226 (translation by the author) [Luhmann, *Aufklärung*].

¹⁰ G. Teubner, ‘Introduction to Autopoietic Law’, in G. Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society* (1988), 1, 3 [Teubner, *Introduction*].

¹¹ N. Luhmann, ‘The Unity of the Legal System’, in Teubner, *supra* note 10, 12, 18 [Luhmann, *Unity*].

¹² R. Stichweh, ‘Das Konzept der Weltgesellschaft: Genese und Strukturbildung eines globalen Gesellschaftssystems’, 39 *Rechtstheorie* (2008), 329, 335.

¹³ N. Luhmann, *Einführung in die Systemtheorie*, 6th ed. (2011), 111 [Luhmann, *Systemtheorie*].

¹⁴ *Id.*, 75-76.

¹⁵ Teubner, *Introduction*, *supra* note 10, 3.

although social systems communicate about the environment (e.g. the law system notes and observes changes of the political, educational or economic system), it cannot communicate directly with the environment.¹⁶

2. Autopoiesis

For Luhmann, the society and all (sub)systems are autopoietic systems of recursively self-producing communications.¹⁷ Autopoiesis (pronounced “auto-poy-E-sis”) is Greek and means “self-creation” or “self-making” (autos: self; poiein: make).¹⁸ Luhmann refers to autopoiesis in biology as a “circular self-production”¹⁹. Autopoiesis is based both on the so-called differentiated approach and on an operative closure – each autopoietic system is operatively closed and can be differentiated from all other systems. A system is only able to refer to the one and only unchangeable (communication).²⁰ It reproduces itself in accordance with its own code and its own programs through system-specific communications.²¹ Autopoietic systems are therefore more than just autonomous, self-contained regimes. It is important to keep in mind that, although autopoietic systems rely on constant and concrete structures, they are not resistant to evolution and change. Evolution, learning and change are possible and necessary – but only within the boundaries of the system.²² The various systems are connected via structural couplings.

3. Differentiation

Luhmann’s system theory relies on a clear and strict differentiation of autopoietic systems (as social structures) and their environment. Each autopoietic system considers the other systems as its non-systemic environment. This distinction between a system and the environment is only possible if the system is closed in itself and draws limits with its own

¹⁶ Luhmann, *Unity*, *supra* note 11, 18.

¹⁷ Teubner, *Introduction*, *supra* note 10, 3.

¹⁸ Luhmann, *Systemtheorie*, *supra* note 13, 75.

¹⁹ *Id.*; Luhmann, *Unity*, *supra* note 11, 14.

²⁰ Luhmann, *Systemtheorie*, *supra* note 13, 75; S. C. Andersen, ‘How to Improve the Outcome of State Welfare Services: Governance in A Systems-Theoretical Perspective’, 83 *Public Administration* (2005) 4, 891, 893.

²¹ Luhmann, *Systemtheorie*, *supra* note 13, 75; Andersen, *supra* note 20, 893; Teubner, *Introduction*, *supra* note 10, 3.

²² *Id.*, 7-8.

system-specific operations. This differentiation is together with the autopoiesis essential for the unity of a system. A unity of self-referential, autopoietic systems is only possible if the systems are determined by themselves, and if they determine themselves. This indeterminacy from the environment, meaning from everything outside the system is only possible if there is a strict “cut” or difference between the system and its environment.²³

a) Operatively Closure

The distinction between system and environment is only possible if the system is closed in itself and if it is able to draw limits with its own system-specific operations – and if these limits in turn can be monitored from the outside as the difference to the environment.²⁴ Due to the specificity of the system operations, a system cannot communicate with its environment. The system-specific ‘communication-logic’ is only ‘compatible’ within the system and does not work outside from the system, meaning in the environment.²⁵ A direct information transfer between the system and the environment is thus not possible.²⁶

b) Functional Differentiation

In modern societies, the diverse systems function autonomously and begin to specialize or to speak in Luhmann’s words: they differentiate functionally. Through the functional differentiation, a specialization of the various systems is possible. Thus, for example, the political system is only able to explore a particular problem in terms of its political implications, but this is achieved completely and in form of a higher complexity.²⁷ Luhmann considers a communication or activity as functional, if it serves the perpetuation of the complex structured unity of a system.²⁸ None of these

²³ Luhmann, *Unity*, *supra* note 11, 26.

²⁴ Luhmann, *Systemtheorie*, *supra* note 13, 89.

²⁵ *Id.*, 90.

²⁶ Teubner, *Introduction*, *supra* note 10, 10.

²⁷ Andersen, *supra* note 20, 896.

²⁸ Luhmann, *Aufklärung*, *supra* note 9, 12.

systems can assume functions or services of other systems. Therefore, the relationships between functional systems are of particular importance.²⁹

4. Structural Couplings

To describe the inter-systemic relationships, structural couplings can be seen as the most important instrument. Unlike temporarily operational couplings, structural couplings are permanent and exist only if “a system permanently presupposes certain characteristics of its environment and relies structurally on the very same.”³⁰ The structural couplings do not prevent the autopoiesis of the particular system; thus, there is no causal transmission from the structural coupling into the autopoiesis.³¹ Structural couplings are a two-page form and highly selective; they resort only to certain parts of the environment and exclude much more than they include.³²

Structural couplings have thus a double effect – inclusion and exclusion.³³ They connect and disconnect at the same time. Everything what is included, can be used by the coupled systems, everything else cannot be used. Through these couplings, a system is able to react on “irritations and causalities” in the relevant area and transform its structures if necessary.³⁴ The couplings lead to mutual self-irritation and to reciprocal interpenetration. In the long run, the couplings thus cause a structural drift of the coupled systems. The systems remain independent, but they do have connection points and their structural developments are coordinated. Structural couplings appear in various forms. To give some examples: Property is a structural coupling between the economic system and the legal system, the Central Reserve Bank between the economic and political system, a university between the economic and scientific systems and the constitution is a coupling between the political system and the legal system.³⁵ What is important is that the relation of two coupled, but separated

²⁹ T. Lieckweg, ‘Strukturelle Kopplungen von Funktionssystemen “über” Organisationen’, 7 *Soziale Systeme* (2001) 2, 267, 268.

³⁰ N. Luhmann, *Das Recht der Gesellschaft*, 441 (translation by the author) [Luhmann, *Recht*].

³¹ Luhmann, *Systemtheorie*, *supra* note 13, 116.

³² N. Luhmann, *Die Politik der Gesellschaft*, 374 [Luhmann, *Politik*]; *id.*, *Systemtheorie*, *supra* note 13, 116.

³³ Luhmann, *Recht*, *supra* note 30, 443.

³⁴ Luhmann, *Systemtheorie*, *supra* note 13, 117.

³⁵ Luhmann, *Recht*, *supra* note 30, 451.

systems can be recognized as a “condition of increasing mutually interdependence”.³⁶

II. The Legal System

Let us come to the domestic legal system. For Luhmann, law, i.e. the legal system, is an own autopoietic and differentiated (sub)system within the society (as a social system). In contrast to general belief among lawyers or sociologists, the core elements or the basic units are – in Luhmann’s view – neither legal norms nor actors and organizations, but communications. Law is a system of communication, like all other subsystems. It is regarded as a specific communication in the society, which is self-establishing and -reproducing.³⁷ In an autopoietic legal system, the specialty of the subsystem are communication events in form of legal acts. These communication acts or events are able to change legal structures.³⁸ Law is defined “as a structure of a social system based on congruent generalization of normative behavioral expectations”.³⁹ In a social system law is characterized by the fact that it “makes behavioral expectations mandatory”.⁴⁰ According to Luhmann, legal rules are counterfactually stabilized expectations, which are secured against disappointment.⁴¹ The counterfactual character of the law is crucial for the validity of the law. No matter whether the expectations are fulfilled or not – the validity of a legal rule is no subject of doubt.⁴² In this respect, the fulfillment or non-fulfillment of legal rules is irrelevant to their validity.⁴³ Luhmann’s sociological perspective of the legal system is theoretically motivated and based on external observation. The quality of a

³⁶ *Id.*, 438 (translation by the author).

³⁷ A. Fischer-Lescano, ‘Die Emergenz der Globalverfassung’, 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2003) 3, 717, 722.

³⁸ Teubner, *Introduction*, *supra* note 10, 4.

³⁹ N. Luhmann, *Rechtssoziologie* (1987), 105 (translation by the author) [Luhmann, *Rechtssoziologie*].

⁴⁰ N. Luhmann, *Legitimation durch Verfahren* (1983), 143 (translation by the author).

⁴¹ N. Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (1999), 17 [Luhmann, *Ausdifferenzierung*]; *id.*, *Rechtssoziologie*, *supra* note 39, 342; H. Wilke, ‘Das Recht der Weltgesellschaft’, in G.-P. Calliess (ed.), *Soziologische Jurisprudenz* (2009), 887, 894.

⁴² M. Neves, ‘Grenzen der Autonomie des Rechts in einer asymmetrischen Weltgesellschaft: Von Luhmann zu Kelsen’, 93 *Archiv für Rechts- und Sozialphilosophie* (2007) 3, 363, 373; A. Fischer-Lescano, *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (2005), 152.

⁴³ Luhmann, *Rechtssoziologie*, *supra* note 39, 43.

legal rule facilitates the autopoiesis of the legal system, i.e. the (differentiated) self-preservation towards its environment. On the other hand, the cognitive quality (of a legal rule) enables the coordination with the system environment.⁴⁴

As well as any other (sub)system in the society, the legal system has a specified code and programs. The legal system operates with the code legal/illegal and right/wrong. Via this code, the law is been created. Only the legal system operates with this code, meaning that no other system is able to state what is right and what is wrong. For the practical implementation of the law (case law, statutes, treaties, etc.) a corresponding programming for its application is required. Without this law-specified programming, the law-specified code would become a meaningless form without any significance.⁴⁵ Via the programs, certain selected environmental factors are in the long run included into the legal system, which are then adjusted by the code to the legal system. Thus, the code enables the operational closure and the unity of the legal system. Luhmann refers to the “unity of the legal cycle which endows the socio-internal difference between right and wrong.”⁴⁶ As mentioned above, only the legal system has the ability and capability to define this difference – due to the operative closure and autopoiesis is of the legal system. But that does not mean that this decision is not influenced by factors outside the system. Moreover, the environment conditions the decision because of the indirect influence via the structural couplings.⁴⁷

In a modern society the legal system is functionally differentiated and operationally self-determined. It is operationally and normatively closed. This can be recognized by the positivization of the law, meaning that the law is determined by the law itself and not by political arbitrariness.⁴⁸ The differentiation of the legal system is based on the “distinguish ability of normative and cognitive expectations”.⁴⁹ The normative character can be recognized by the above mentioned counter factuality of legal norms. Normative expectations do not need to be change even in the event of being disappointed. In contrary, cognitive expectations have to be open for change

⁴⁴ N. Luhmann, ‘Die Einheit des Rechtssystems’, 14 *Rechtstheorie* (1983), 129, 139.

⁴⁵ Neves, *supra* note 42, 376.

⁴⁶ *Id.*, 363 (translation by the author).

⁴⁷ *Id.*, 376.

⁴⁸ N. Luhmann, ‘Verfassung als evolutionäre Errungenschaft’, 1 *Rechtshistorisches Journal* (1990) 9, 176, 187; Neves, *supra* note 42, 375-376.

⁴⁹ Luhmann, *Unity*, *supra* note 11, 19.

– otherwise the legal system would lose the capability to react in case of changes in other systems.⁵⁰

According to Luhmann, legal rules are no longer justified by natural law. Rather, the stability of the law is based on a “principle of variation”.⁵¹ Basis of all the stability and validity of the law is the possibility of variation or transformation of the existing legal rules.⁵² Thereby, the law, on the one hand, has to be unchangeable, invariant and unavailable, meaning that it cannot be changed freely without further ado.⁵³ It must rather constitute a reliable constant that is beyond the possibility of access. On the other hand, the legal system has to be sufficiently variable, meaning that structures are generally subject to change, too. The legal system must not “exclude variability any longer, but rather include it into the system”.⁵⁴ Positive law is for Luhmann, the entirety of legal rules that “have been set into force by decisions and which can be accordingly repealed by decision”.⁵⁵ In addition, to all legislative acts, Luhmann counts court judgments with a normative impact.

According to Luhmann, legal rules of a society can be considered as positive law, if the legitimacy of pure legality is gaining recognition. This means that a legal rule is respected only because it is set according to certain rules by competent decision.⁵⁶ Randomness is thus becoming institutionalized. For Luhmann, this is only acceptable if arbitrariness is concretized, i.e. law is so complex that it can only be changed by modification of the existing order.⁵⁷ In addition, to prevent that this variability of positive law may occasionally lead to arbitrariness, special attention has to be paid to the decision making process and the course of justice. Therefore, the institutionalization of procedures is necessary. For Luhmann, an institution leads to an “openness and conflict (*Konfliktgeladenheit*) of decision situations” which is only temporarily uncertain.⁵⁸

⁵⁰ *Id.*, 19-20.

⁵¹ Luhmann, *Aufklärung*, *supra* note 9, 227.

⁵² *Id.*

⁵³ Luhmann, *Legitimation durch Verfahren*, *supra* note 40, 143.

⁵⁴ *Id.*, 144 (translation by the author).

⁵⁵ *Id.*, 141.

⁵⁶ Luhmann, *Aufklärung*, *supra* note 9, 211.

⁵⁷ *Id.*

⁵⁸ *Id.*

Due to the normative openness, the legal system is able to learn and adapt as a reaction to the changing environment. In contrary, the normative or operational closure prevents the dissolution of the legal system into its environment.⁵⁹ For example, the autopoiesis of the legal system sets boundaries to the political instrumentalization of the law and limits the above-mentioned variability of legal norms.⁶⁰ Necessary is the interplay of operationally closure and cognitive openness.⁶¹ Through the differentiation of the legal system, these two factors are finally possible. Otherwise, the strict distinction of the legal system towards its environment and law specific communication acts would not be possible. Every legal communication would vanish in the rest of the society and a distinction of legal/illegal and thus the creation of law would be impossible. Furthermore, the law is able to change and to adapt itself to the environment– but only according to the system, specific criteria and procedures.⁶² As a result, the unity of the legal system is guaranteed, meaning that the law is no longer directly influenced by criteria outside the legal system.⁶³ Furthermore, it is neutral against political influence and even to moral standards.⁶⁴ But this operative closure does not mean that the legal system is not open at all for environmental effects. Via structural couplings, the law is open to general social communication and to environmental effects such as changes in the political or environmental system (cognitive openness).⁶⁵

III. The Political System

In contrast, the political system is responsible to make collectively binding decisions for the entire society.⁶⁶ This involves according to Luhmann not only legal but legitimate authority, to safeguard that all decisions are followed.⁶⁷ With this “legitimacy of legality”,⁶⁸ the political

⁵⁹ Luhmann, *supra* note 44, 152-153; Neves, *supra* note 42, 377.

⁶⁰ Teubner, *Introduction*, *supra* note 10, 4.

⁶¹ *Id.*

⁶² Neves, *supra* note 42, 377.

⁶³ Luhmann, *supra* note 48, 186.

⁶⁴ Neves, *supra* note 42, 378.

⁶⁵ Teubner, *Introduction*, *supra* note 10, 10.

⁶⁶ Luhmann, *supra* note 32, 84; Wilke, *supra* note 41, 890; U. Solte, ‘Völkerrecht und Weltgesellschaft aus systemtheoretischer Sicht’, 89 *Archiv für Rechts- und Sozialphilosophie* (2003) 4, 519, 531.

⁶⁷ U. Di Fabio, ‘Verfassungsstaat und Weltrecht’ 39 *Rechtstheorie* (2008), 399, 405.

⁶⁸ Luhmann, *Aufklärung*, *supra* note 9, 201.

system is able to ensure that still undetermined, no further defined decisions could be adopted in the future as well. The confidence into the political system and its decision-makers has to be that strong, that every legal decision is being considered as legitimate and thus being accepted even from those who had a contrary position in the decision-making process. The ability to make binding decisions is provided only by differentiation and autonomy of the political system. But only if expectations are effectively restructured and if those who are affected act in compliance with these decisions due to hereby incurred new premises, this binding effect occurs. Crucial is according to Luhmann therefore a “factual learning” of the affected persons, not merely “formal validity” of the decisions.⁶⁹ Should the functional decision-makers not be able to change the expectations of those who are concerned, the political system loses its function to achieve binding decisions – the above-mentioned authority would become illegitimate.

A further function of the political system is the “generation of political power”.⁷⁰ As a result of the differentiation of the political system, the existing power throughout the society as a medium of communication increases. Therefore, a transfer of decision services becomes possible.⁷¹ In the long run, the political system is able to differentiate power, too, as it incorporates an “effective monopoly regarding legitimate physically coercive measures”.⁷² The political system works with the code government/opposition and statal power/powerlessness.⁷³ Power is the “ability to choose through self-selected decisions an alternative for others, meaning to reduce complexity for others.”⁷⁴ Political power is in turn made possible by the availability of resources of physical and coercive force.⁷⁵ Like every autopoietic (sub)system of a society, the political system needs a programming to implement and apply the code. These specific programs are on the one hand the whole election system, without a legitimate authority of the decisions-makers would not be thinkable. On the other hand the entire administration process, through the political power is set into force.

⁶⁹ *Id.*, 200.

⁷⁰ *Id.*, 201.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Luhmann, *Politik*, *supra* note 32, 381.

⁷⁴ Luhmann, *Aufklärung*, *supra* note 9, 204.

⁷⁵ J. Halfmann, ‘Nationalstaat und Recht der Weltgesellschaft’, 39 *Rechtstheorie* (2008), 279, 281-282.

In the political system, functional differentiation and autonomy are the precondition for the above-mentioned ability to make binding decisions.⁷⁶ This – permanent – ability to make binding decisions is linked with the differentiation of the political system.⁷⁷ The differentiation is based primarily on the level of the roles and usually not about specific individuals since these individuals can only be distinguished as political or administrative functionaries and not as concrete individuals from the rest of society. The differentiation takes place also not via standards or values, as the application is not specific for the political system.⁷⁸ The autonomy, or to speak with Luhmann’s words, the autopoiesis is necessary to make decisions according to the specific code of the political system and only according to this specific code.

D. The Emergence of the “World Society”

In the following chapter, we will assess Luhmann’s view of the international public law and the theory of Luhmann’s “world society”. This concept is based – like the national societies or social systems – on communications. Therefore, Luhmann’s theory of a world society described a society, which consists of all worldwide attainable communication.⁷⁹ A little encrypted, he called it “the occurrence of world in the communication”⁸⁰.

According to Luhmann, the modern society is nowadays a world society. There is only one single social system.⁸¹ Similar to national societies, it consists of various functional differentiated global (sub)systems, such as the legal system, the economic system, the religious system or the political system. Luhmann’s world society is based on hierarchical legal and political structures which develop within nation-state and territorially-delineated sub-systems.⁸² Therefore, he refers to hierarchical, nation-state

⁷⁶ Luhmann, *Aufklärung*, *supra* note 9, 200.

⁷⁷ Halfmann, *supra* note 75, 281.

⁷⁸ Luhmann, *Aufklärung*, *supra* note 9, 195.

⁷⁹ Wilke, *supra* note 41, 896.

⁸⁰ N. Luhmann, *Die Gesellschaft der Gesellschaft* (2004), 150 (translation by the author) [Luhmann, *Gesellschaft der Gesellschaft*].

⁸¹ *Id.*, 145.

⁸² M. Neves, ‘Die Staaten im Zentrum und die Staaten an der Peripherie: Einige Probleme mit Niklas Luhmanns Auffassung von den Staaten der Weltgesellschaft’, 12 *Soziale Systeme* (2006) 2, 247, 247; *id.*, *supra* note 42, 363, 375.

structures.⁸³ The world society is thus divided into nation States. Luhmann's world society is based on inclusiveness⁸⁴ and a singular concept: the transformation of all political, legal, economic and cultural differences into internal differences of the one and only world society.

However, Luhmann admits that the primary differentiation is not a functional one like in the domestic area, but a segmentary one into nation States.⁸⁵ Although there is a functional differentiation, it is secondary and less complex, meaning less developed as the segmentary differentiation. This secondary, functional differentiation is only complete in parts of the world, meaning that the inclusion into the world society is not guaranteed in all parts of the world and that some places are excluded from the world communication. Luhmann speaks of some sort of 'metacode' inclusiveness/exclusiveness which over arches and mediatizes all other codes.⁸⁶ Thus, legal programs which regulate the code legal/illegal are only for those of importance who are included. This metacode is also known as the differentiation of Center and periphery.⁸⁷ People who live in the periphery, are therefore in danger of being excluded from the global communication and thus from the world society. However, it must be stressed that – after Luhmann – the exclusion from one sub-system does not automatically lead to the exclusion from the whole world society.⁸⁸

Examples of the exclusion are the Brazilian favelas or the Indian slums. One could also mention parts of failed or failing States like Somalia and Congo (D.R.).⁸⁹ But precisely this exclusion from national legal systems (i.e. segmentary differentiated systems) ultimately leads to an increased inclusion at the global level.⁹⁰ In classical modernity, both the political and the legal systems have been characterized by a firm internal reliance on

⁸³ P. F. Kjaer, 'The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective', in C. Joerges (ed.), *After Globalization: New Patterns of Conflict and their Sociological and Legal Reconstructions* (2011), 285, 306.

⁸⁴ B. Holzer, 'Wie "modern" ist die Weltgesellschaft?', 13 *Soziale Systeme* (2007) 1/2, 357, 357.

⁸⁵ Neves, *supra* note 42, 375.

⁸⁶ Fischer-Lescano, *supra* note 42, 143.

⁸⁷ Holzer, *supra* note 84, 359.

⁸⁸ Solte, *supra* note 66, 526-527.

⁸⁹ Fischer-Lescano, *supra* note 42, 144; see J. J. Messner *et al.*, *Failed States Index 2012* (2012), 4-5.

⁹⁰ Fischer-Lescano, *supra* note 42, 144.

territorial delineations. In the past decades, this seemed to be changing.⁹¹ Even if completely functionally-delineated political and legal systems may be utopian or at an “embryonic stage”⁹² such structures did emerge.

I. The Law of the World Society

So, do we have a law of the world society? Indeed it is controversy whether there is a global law of the world society or whether international law has a systemic character. But surely, the modern international law has become more than just a coordination order, even if a possible constitutionalization at global scale will be more likely not comparable with the domestic constitutions. Additionally, one probably should not be too demanding regarding questions of legitimacy.⁹³ But at least the recognition of constitutional principles increases and one could probably speak of a “global society” or a “global law”.⁹⁴ In any case, the law communication is global or worldwide. Additionally, international law has a universal claim of validity.⁹⁵ Furthermore, one can notice an advanced functional differentiation of world society, meaning the creation of several (sub)systems of global law communication such as the trade law, the criminal law or the environmental law. Consequently, the assumption of a global law system does not appear to be beyond reason.⁹⁶

In contrast to the general belief, international law in the system theory should not regulate the conduct of States, but – similar to the domestic level – stabilize the counterfactual expectations. This does not change even in the case of non-compliance – the disappointed expectations continue to be backed counterfactually. Thus, the importance and the validity do not depend very much on the output.⁹⁷ Additionally, the legal quality does not depend on command or subordination, but is recursively justified. Essential is the perseverance of the expectations and the presentation of this

⁹¹ Kjaer, *supra* note 83, 289.

⁹² *Id.*

⁹³ J. A. Frowein, ‘Konstitutionalisierung des Völkerrechts’, 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000), 427, 428; S. Kadelbach & T. Kleinlein, ‘International Law – a Constitution for Mankind?’, 50 *German Yearbook of International Law* (2007), 303, 307-308.

⁹⁴ Frowein, *supra* note 93, 444, who raises concerns regarding the legal assessment.

⁹⁵ Fischer-Lescano, *supra* note 37, 719.

⁹⁶ *Id.*

⁹⁷ Solte, *supra* note 66, 520.

perseverance, not the possibility of physical coercive measures.⁹⁸ The Human Rights Law continues for example being law even in case of massive violations if the international community or the world society fails to interfere like at the present in Syria.

Finally, it can be said that global law includes at least those standards which are adopted globally or at least claim a global validity.⁹⁹ At least regarding these standards, the global legal system is working and follows the code legal/illegal. However, for the system theory of Luhmann, the main problem of a global law or a worldwide legal system lies in the restructuring of the segmentary differentiation of nation States into functional differentiation of specific legal issues.¹⁰⁰ International law, for example, is not only created following a special code (legal/illegal), but is also an expression of the (political) international relations.¹⁰¹ Thus, the global legal system is not fully operationally closed and the autopoiesis is not completely established. One could speak also of a possible “re-moralization” of the international law and the global legal system. International law is not followed because of normative enforceability but because of moral reasons.¹⁰² Due to the strong influence of domestic political systems and global political actors, one could refer to a “politics of international law”.¹⁰³ Therefore, international tribunals play a very prominent role, in the global legal system, so Luhmann. Only tribunals underlie a ruling-obligation which is rooted itself in the system and is not influenced by factors outside the system. Ideally spoken, tribunals have to decide on the basis of law, without moral or political aspects.¹⁰⁴

⁹⁸ *Id.*, 524-525; A. Chanos, ‘Erwartungsstruktur der Norm und rechtliche Modalisierung des Erwartens als Vorgaben sozialen Handelns und Entscheidens’, in W. Krawietz & M. Welker, *Kritik der Theorie sozialer Systeme: Auseinandersetzung mit Luhmanns Hauptwerk* (1992), 230, 236.

⁹⁹ M. Kotzur, ‘Weltrechtliche Bezüge in Nationalen Verfassungstexten’, 39 *Rechtstheorie* (2008), 191, 193.

¹⁰⁰ Luhmann, *Ausdifferenzierung*, *supra* note 41, 17.

¹⁰¹ Neves, *supra* note 42, 375.

¹⁰² H. Brunkhorst, *Solidarität: Von der Bürgerfreundschaft zur globalen Rechtsgenossenschaft* (2002), 196.

¹⁰³ Fischer-Lescano, *supra* note 42, 219.

¹⁰⁴ Solte, *supra* note 66, 529-531.

II. The Political System of the World Society

According to Luhmann, the political system of the world society is fairly coherent, too.¹⁰⁵ This applies at least in such a manner that no country can – as large and powerful it may be – ignore political shifts in the world. In Luhmann’s view, no State can consider another single State as a unit by itself any longer but rather than a part of a global system.¹⁰⁶ Nevertheless the political system remains a system of independent but interdependent States.¹⁰⁷ National States continue to form a structural element of the world society through their law-making effort, through their membership in international organizations and through an egalitarian basis structure of national sovereignty.¹⁰⁸ The code of the political system of the world society is comparable with the domestic codes: power/powerlessness.¹⁰⁹ Difficult to determine are the specific programs of the global political system, as there are no election programs or a global administration.

Despite these problems and the fact that neither the legal system nor the political system of the world society are fully operationally closed and thus no completely autopoietic and differentiated from their environment, it has to be stated that they are two different and mainly differentiated systems. As Luhmann noted, the positivization of modern law and the democratization of the political system led to a strong both-ended influence and a broad overlap of the systems. But this is the logic outcome of the increasing differentiation of the systems and they are nevertheless two different systems.¹¹⁰ This fact is very important, as there is only a structural coupling between the two system possible, if there are two systems at all – and not one, not differentiated society without any subsystem.

III. “Constitutional” Structural Couplings in the World Society?

So let us come to the crucial point of this contribution. Is there any structural coupling between the legal system and the political system in the world society, which is comparable to the coupling within the national State,

¹⁰⁵ Luhmann, *Rechtssoziologie*, *supra* note 39, 334.

¹⁰⁶ Luhmann, *Gesellschaft der Gesellschaft*, *supra* note 80, 808.

¹⁰⁷ Luhmann, *Politik*, *supra* note 32, 221 with further references; M. Schulte, ‘Weltrecht in der Weltgesellschaft’, 39 *Rechtstheorie* (2008), 143, 159.

¹⁰⁸ R. Stichweh, *Die Weltgesellschaft* (2000), 55-58.

¹⁰⁹ M. Neves, *supra* note 82, 251.

¹¹⁰ Luhmann, *Gesellschaft*, *supra* note 30, 416.

the constitution? Could the Rule of Law maybe serve as a ‘communication platform’? Even Luhmann noted that the structural coupling via the constitution has no equivalent in the world society because of the segmentary differentiation into nation States.¹¹¹

Nevertheless, the question remains – how is the relationship between the two subsystems shaped at the global level? One could argue that international law and international politics are connected through structural couplings– via the constitutions of nation States that set the validity of international law and via international treaties as the result of political decisions.¹¹² But the world society is not just segmentary differentiated but also functional into specialized subsystems. Of course any sort of world constitution could not be compared to a national constitution. But maybe there is some sort of structural coupling which would mean at least a subtle hint of constitutionalization.

At the domestic level, the modern national constitution – which was in the 18th century a “structural risk of innovation”¹¹³ – is a structural coupling and forms a special code: constitutional/unconstitutional. This code has priority over the code legal/illegal and distinguishes illegality and legality from the rest of the law.¹¹⁴ According to Luhmann, the national constitution has responded to the differentiation of the political and legal system and the demand for a linking due to the separation of the two systems. At the domestic level, the constitution guarantees the independence and the self-determination of the law. Consequently, for Luhmann, one can no longer look to the political system, in order to know what law is, but to the legal system. According to Luhmann, the constitution finally closes the law system, which now does not require a justification through/on the basis of natural law any longer. This signifies at the end the positivization of law.¹¹⁵ Key elements of domestic constitutions are conflict rules, regulations about the changeability or non-changeability as well as provisions for the judicial review of constitutionality. The question is whether the functional differentiation of the world society is at least to some extent comparable to a domestic constitution.

Certainly the above-mentioned conditions are not or not yet fulfilled on a global scale. Compared to the ideals of the French revolution, one can

¹¹¹ *Id.*, 582.

¹¹² Solte, *supra* note 66, 532.

¹¹³ Luhmann, *supra* note 48, 183.

¹¹⁴ *Id.*, 181.

¹¹⁵ *Id.*, 187.

hardly speak of a constitution at global scale.¹¹⁶ There is of course neither a solemnly declared constitutional document nor a separation of powers or a real word tribunal. But certainly, there is some kind of functional synthesis between the political system and the law system¹¹⁷ (at least through the domestic constitutions¹¹⁸). And maybe there are some coupling patterns, which lead due to a more complex legal communication both to a higher validity of legal rules and the subjection of political operations to legal control. This could also lead to the legitimacy and to the limitation of political action. This coupling could occur on the basis of certain values or principles which are beyond the simple code legal/illegal and allow the legal binding of public authority (political system). This could describe constitutionalization from form to substance, so to speak.

These common principles could represent certain fundamental values which are accepted worldwide as well as multilateral treaties which can be considered as a global *ordre public*¹¹⁹ and as a kind of overarching regime, a more or less well developed bunch of principles, norms and rules, with together form a higher order.¹²⁰

1. Constitutional Principles

These principles could be found – among others – in the human rights protection, organizing principles and standards such as the environmental protection, basic democratic principles and the rule of law.¹²¹

a) Basic Democratic Principles

Admittedly, the exclusion of many citizens and the lack of democratization are certainly a challenge. The democratic dimension of the constitutionalization is so far very little developed and a transition of State sovereignty into democratic sovereignty has not taken place (yet). Also,

¹¹⁶ Brunkhorst, *supra* note 102, 200.

¹¹⁷ Kjaer, *supra* note 83, 285.

¹¹⁸ Solte, *supra* note 66, 532.

¹¹⁹ Peters, *supra* note 4, 16.

¹²⁰ P. F. Kjaer, 'Law and Order within and beyond National Configurations', in P. F. Kjaer, G. Teubner & A. Febbrajo (eds), *The Financial Crises in Constitutional Perspective: The Dark Side of Functional Differentiation* (2011), 395, 424.

¹²¹ See Wiener *et al.*, *supra* note 2, 3.

there is no deliberative politics or a global citizenship.¹²² So in this regard, there is of course plenty to do. Given the deep roots of the democratic principle of legality under international law a constitutionalization without any democratization – no matter of what sort – would certainly not be complete or difficult to implement.¹²³

The consideration of democratic structures would surely signify “a reasonable development of the constitutionalization”¹²⁴ and the implementation of democratic procedures at all levels of governmental action – national, regional and global – as well as the strengthening of national democratic structures, could at least lead to an indirect democratization of international law.¹²⁵

But on the other hand, one could argue that the 20th century could be seen as the century of “ground-shaking” normative process – constitutional law is being transformed into global constitutionalism and State sovereignty into democratic sovereignty, at least to some extent.¹²⁶ In fact – despite many negative examples – democracy is being universalized, as the recent examples of the ‘Arabellion’ have shown.

b) Human Rights Protection

The concept of *jus cogens* norms or the *erga omnes* effect which are largely uncontroversial now, could at least indicate a certain degree of hierarchy¹²⁷ even if the specific legal effect of *jus cogens* is difficult to determine.¹²⁸ Nevertheless, several core human rights in their basic structure can be seen as “invariant privileges”¹²⁹ which constitute – together with some basic principles of international law – a fundamental, quasi-constitutional canon of values. This canon forms as a “cultural

¹²² H. Brunkhorst, ‘Constitutionalism and Democracy in the World Society’, in Dobner & Loughlin, *supra* note 5, 188; A. Peters, ‘Dual Democracy’, in J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009), 263, 296-302.

¹²³ Peters, *supra* note 4, 16-17.

¹²⁴ Frowein, *supra* note 93, 446.

¹²⁵ Peters, *supra* note 4, 17.

¹²⁶ Brunkhorst, *supra* note 122, 188.

¹²⁷ B. Simma & D. Pulkowski, ‘Of Planets and the Universe: Self-contained Regimes in International Law’, 17 *European Journal of International Law* (2006) 3, 483, 496; Walter, *supra* note 3, 209.

¹²⁸ A. L. Paulus, ‘Jus Cogens in a Time of Hegemony and Fragmentation – An Attempt at a Re-appraisal’, 74 *Nordic Journal of International Law* (2005) 3, 297, 298.

¹²⁹ Di Fabio, *supra* note 67, 411.

component”¹³⁰ a “value glue” between the subsystems in the world society.¹³¹ Examples for these rights and principles are the prohibition of wars of aggression, fundamental human rights such as the right to life, freedom from torture and slavery and the right to self-determination of the peoples.¹³²

For Luhmann one of the most important indicators for the existence of the world society was the growing awareness of human rights violations. In the past decades, awareness surely has increased a lot – despite negative examples.

c) Environmental Protection

This value glue and hierarchization can be observed regarding the environmental protection, too. Both the Climate Change Convention in Rio in 1992 and in the Kyoto Protocol of 1997 shared values were incorporated into the Treaty text. Accordingly, the treating parties referred in addition to the common but different degrees of responsibility in terms of environmental protection, the precautionary principle also to the principle of inter-generational justice.¹³³ Regarding the environmental law, this process is indeed highly fragile, as the failure of the Copenhagen conference has recently shown. But nevertheless there are some common values, even if the constitutionalization process regarding environmental standards is subject to doubt and given that there is no UN environmental organization.¹³⁴

2. Rule of Law as an Overarching Platform

As an overarching principle of “constitutional legality”¹³⁵, the ‘International Rule of Law’¹³⁶ could serve as a communication platform between the political and the legal system of the world society. Via basic

¹³⁰ Stichweh, *supra* note 108, 43.

¹³¹ Simma & Pulkowski, *supra* note 127, 498.

¹³² Brunkhorst, *supra* note 102, 191; Kadelbach & Kleinlein, *supra* note 93, 303, 312.

¹³³ See M. Koskeniemi, *The Politics of International Law* (2011), 343.

¹³⁴ D. Bodansky, ‘Is There an International Environmental Constitution?’, 16 *Indiana Journal of Global Legal Studies* (2009) 2, 565, 584.

¹³⁵ N. Luhmann, ‘Globalization or World Society: How to Conceive of Modern Society?’, 7 *International Review of Sociology* (1997) 1, 67, 75.

¹³⁶ S. Beaulac, ‘The Rule of Law in International Law Today’, in G. Palombella & N. Walker, *Relocating the Rule of Law* (2009), 197; J. Waldron, ‘The Rule of International Law’, 30 *Harvard Journal of Law & Public Policy* (2006) 1, 15.

constitutional principles such as legality, subsidiarity, adequate participation and the respect of the mentioned fundamental rights,¹³⁷ the two autopoietic and functionally differentiated subsystems could communicate with each other and use these principles in the autopoiesis of the two systems.¹³⁸ This ‘platform’ would thus signify a structural coupling and a form of global constitutionalization – at least in the language of the system theory.

E. Conclusion

Let us now come to the conclusion. Surely the relationship between the legal and the political system has undergone a metamorphosis and has led to a functional synthesis between the systems.¹³⁹ Even if completely functionally-delineated political and legal systems may be utopian or at an “embryonic stage”¹⁴⁰ such structures did emerge. So, is there a system-theoretical constitutionalization of the world society? Or should we not rather speak of some sort of fragmentation of the world society or of transnational networks beyond the State? Isn't there may be a double fragmentation of the world society with functional differentiation and regional cultures which forms just a spontaneous world order at best?¹⁴¹

From my point of view: no. Surely, the perception presented her of a constitutionalization of the world society cannot be compared with a domestic constitution in any way. But firstly the constitutionalization of the world society at the global level means no more and no less than a long and winding road and a very unstable process. In other words it is a question of nuance and gradation; it is deeply ambivalent and highly fragile should not be considered in “all-or-nothing terms”.¹⁴² But it is precisely this process which has undoubtedly been initiated in the abovementioned areas. Secondly, the national State is still the most important interface between the political system and law system of the world society. Besides, the nation-State continues to be the main lawmaker. Although non-state actors are

¹³⁷ Peters, *supra* note 4, 54.

¹³⁸ K. A. Ziegert, ‘Weltrecht und Regionale Differenzierung’, 39 *Rechtstheorie* (2008), 453, 466-467.

¹³⁹ Kjaer, *supra* note 83, 311.

¹⁴⁰ *Id.*, 289.

¹⁴¹ G. Teubner & P. Korth, ‘Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society’, in M. A. Young, *Regime Interaction in International Law: Facing Fragmentation* (2012), 23, 26.

¹⁴² Walker, *supra* note 1, 30.

playing an increasingly important role in global lawmaking, States are still by far the most important actors. That means, that, even if there are transnational networks of private actors beyond the State, global constitutionalization will mostly originate by acts of nation States. Furthermore, the law-making role of private actors is granted by the respective national constitutions.¹⁴³ A transnational constitutionalization may therefore occur in some areas, but surely cannot explain the whole phenomenon of constitutionalization.

Furthermore, the world is indeed a pluralistic, partly fragmented structure, but there is a value glue or a structural coupling between the various subsystems such as the political system and the legal system through common values and principles. This coupling binds – despite some negative examples – on the one hand policy makers in their exercise of power, on the other hand, it determines – similar to the code of constitutional/unconstitutional in the domestic area – the legal system and makes the expectations in this regard invariant. Of course, law at the global level is largely a result of political power, but given the common – constitutionalized – values, the political influence on the law is also limited.¹⁴⁴ The common 'communication ground' is the Rule of Law with its above-mentioned principles.

So, yes, from a system-theoretical point of view, there is some sort of structural coupling and therefore an ongoing constitutionalization. Maybe, international pluralism and constitutionalization need not exclude themselves mutually. So to speak of the global law not via a one-dimensional constitutionalization, but as a pluralistic structure in which global law can only be seen in relation to local, national and regional law systems. But be this as it may, it is not only transnational, but state-centered.¹⁴⁵

¹⁴³ Kotzur, *supra* note 99, 194.

¹⁴⁴ Neves, *supra* note 42, 375.

¹⁴⁵ A. Fischer-Lescano, 'Globalverfassung: Verfassung einer Gesellschaft', 88 *Archiv für Rechts- und Sozialphilosophie* (2002) 3, 349, 376.