

Chapter 2: Niklas Luhmann's Theory of Procedural Legitimation

When discussing political legitimacy, we frequently distinguish between a moral and a sociological dimension.⁴⁵ The first asks what makes the government's authority proper. The second inquires whether and why the people subjected to the authority consider it proper.⁴⁶ However, neither of the two represents a stand-alone concept. Thus, a discussion of sociological legitimacy will find it difficult to describe people's beliefs about government without referring to the sources of legitimacy that feature in normative analyses.⁴⁷ And even a normative analysis requires external moral considerations—such as democracy or justice—to unfold the critical potential that can inhere in the concept of legitimacy.⁴⁸

Therefore, it makes more sense to treat the different normative variants of political legitimacy as distinct *conceptions* of legitimacy and to locate its conceptual core in a more rudimentary notion.⁴⁹ For Rainer Forst, this core lies in the government's implicit claim that it can justify its existence. In his words, 'by legitimacy we mean in general the quality of a normative order that explains and justifies its general binding power for those subjected to it'.⁵⁰ In other words, a government that not only rules but claims a right to do so seeks to be legitimate.⁵¹

Niklas Luhmann conceptualized legitimacy differently. His concept does not involve the government implicitly claiming that it has a right to rule. For him, a government decision is legitimate if we can presume that people

45 Or, alternatively, between normative and descriptive legitimacy.

46 E.g., Richard H Fallon, Jr, *Law and Legitimacy in the Supreme Court* (Belknap, Cambridge MA, 2018) 21–4.

47 See Robert Nozick, *Anarchy, State, and Utopia* (Blackwell, Oxford, 1974) 134 (including note), and Allen Buchanan, 'Political Legitimacy and Democracy', 112 *Ethics* 689, 689 (2002).

48 See Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification* (Ciaran Cronin tr, OUP, Oxford, 2017) 132. See also Chapter 3, section I.B.

49 *Id.*, 133.

50 *Ibid.*

51 See Joseph Raz, 'Authority and Justification', in Joseph Raz (ed), *Authority* (New York University Press, New York, 1990) 115, 117 (choosing, however, to label such authority 'de facto authority' and to reserve the qualifier 'legitimate' only to those authorities whose right to rule is, in fact, justified).

will acquiesce in it.⁵² 'The concept of legitimacy denotes that the unquestioning acceptance of the political system's binding decisions is ensured independently of concrete personal structures of motivation', he writes.⁵³

Therefore, it is inaccurate to qualify Luhmann's theory as one of sociological (as opposed to normative) legitimacy.⁵⁴ Conceptually speaking, it is not a theory of legitimacy at all. In terms of political philosophy, it is best understood as a theory of stability⁵⁵ or, in Hobbesian terms, of normative order⁵⁶—that is, as an explanation for why we can expect people to comply with a political regime's decisions.⁵⁷ From the perspective of social psychology, Luhmann's analysis is one of compliance.⁵⁸

Nevertheless, we still have good reason to associate *Legitimation durch Verfahren* with legitimacy theory. By designating his theory one of legitimacy, not stability, Luhmann makes an implicit conceptual claim about

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- 52 Niklas Luhmann, *Legitimation durch Verfahren* (10th edn, Suhrkamp, Frankfurt am Main, 2017) 28, 32. Some scholars argue that legitimacy is the property of government as a whole, not of its institutions or individual decisions. See, e.g., Allen Buchanan, 'Political Legitimacy and Democracy' (n 47) 689–90. Nevertheless, individual decisions can still either contribute to or detract from the government's legitimacy. Therefore, it is more efficient to label them either legitimate or illegitimate in their own right. See also Wojciech Sadurski, *Equality and Legitimacy* (OUP, Oxford, 2008) 6–7.
- 53 Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010) 96 (my translation). See also *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (5th edn, Duncker & Humblot, Berlin, 2009) 144–5.
- 54 But see Chris Thornhill, 'Niklas Luhmann: A Sociological Transformation of Political Legitimacy?', 7 *Scandinavian J Soc Theory* 33, 38 (2006).
- 55 See also Niklas Luhmann, 'Soziologie des politischen Systems', in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6th edn, Westdeutscher Verlag, Opladen, 1991) 154, 159 (arguing that we ought to reconceptualize modern political philosophy's fundamental question as one not of lawfulness but of stability) and *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1995) 332 n 73 (stressing that *Legitimation durch Verfahren* merely sought to explain how proceedings can help manage societal conflict, not get the participants to agree with the law's implicit claim to validity).
- 56 On the concept of normative order, Talcott Parsons, *The Structure of Social Action: A Study in Social Theory with Special Reference to a Group of Recent European Writers* (Free Press, Glencoe, 1949) 91–3.
- 57 Cf John Rawls, *Political Liberalism* (Columbia University Press, New York, 1996) 141 (discussing how to achieve stability in a just society). For an analysis of Rawls's conception of stability, see Brian Barry, 'John Rawls and the Search for Stability', 105 *Ethics* 874, 880–3 (1995).
- 58 See Tom R Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006) 3.

legitimacy theory. He argues that we ought to eradicate, from the concept of legitimate authority, the one thing which distinguishes it from the concept of stability: the notion of justifiability. In the terms of Jürgen Habermas's *Between Facts and Norms*,⁵⁹ in which facticity implies stability and validity suggests justifiability,⁶⁰ Luhmann thus emphasizes the problem of facticity and disregards that of validity.

At the same time, *Legitimation durch Verfahren* is also noteworthy empirically. Thus, Luhmann's explanation for why people comply with the law parts ways with Max Weber's seminal account of obedience. According to the latter, people acquiesce in being ruled because they believe their government is legitimate (e.g., because its enactments are legal).⁶¹ Weber's analysis of people's belief in legality has attracted a lot of criticism.⁶² Nevertheless, most social scientists continue to use it as a point of departure.⁶³ Thus, David Easton, with whose work we will briefly contrast Luhmann's argument,⁶⁴ observes that no political system can be stable in the long term unless the public considers the government legitimate.⁶⁵

59 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg tr, MIT Press, Cambridge MA, 1996).

60 Cf Kenneth Baynes, 'Democracy and the *Rechtsstaat*: Habermas's *Faktizität und Geltung*', in Stephen K White (ed), *The Cambridge Companion to Habermas* (CUP, Cambridge, 1995) 201, 206 (associating facticity with stability and validity with justification). See also Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1993) 99–100 (arguing for a non-normative conception of validity).

61 See Max Weber, *Economy and Society: An Outline of Interpretive Society*, vol 1 (Guenther Roth and Claus Wittich eds, Ephraim Fischoff and others tr, University of California Press, Berkeley, 1978) 37, and 'Politics as a Vocation', in *The Vocation Lectures* (David Owen and Tracy B Strong eds, Rodney Livingstone tr, Hackett Publishing Company, Indianapolis, 2004 [1919]) 32, 34.

62 See, e.g., Peter M Blau, 'Critical Remarks on Weber's Theory of Authority', 57 *Am Pol Sci Rev* 305, 311–2 (1963) (pointing out that Weber did not explain how to determine such belief), and Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy tr, Polity Press, Cambridge, 1997) 264–7 (emphasizing that Weber's argument is circular because it fails to explain how a belief in legality can legitimize authority if the legitimacy of that legality is itself unresolved).

63 See Morris Zelditch, Jr, 'Theories of Legitimacy', in John T Jost and Brenda Major (eds), *The Psychology of Legitimacy: Emerging Perspectives on Ideology, Justice, and Intergroup Relations* (CUP, Cambridge, 2001) (deeming Weber '[s]eminal to all modern thought about legitimacy').

64 See notes 175–177 and accompanying text.

65 David Easton, *A Systems Analysis of Political Life* (Chicago University Press, Chicago, 1965) 278–81.

As the quote above demonstrates, Luhmann believed that government can be stable *without* people having to believe its decisions are justified. He writes that '[l]egitimacy is not based on voluntary recognition, on a conviction for which one personally bears responsibility. On the contrary, it is based on a social climate that institutionalizes the recognition of binding decisions as a matter of course and regards it not as the consequence of a personal decision but as the consequence of the official decision's validity'.⁶⁶

I believe Luhmann had two reasons for conceptualizing legitimate authority as not involving justifiability. In what follows, section I—which will double as a more general introduction to Luhmann's sociology—will detail one of them. Thus, the idea of justifiability presupposes that an individual stands apart from the social order whose legitimacy is in question; from this remove, they can subject the social order to critical scrutiny.⁶⁷ On Luhmann's theory, by contrast, we require the social order to orient ourselves in the world; we rely on social systems for meaning and rationality.

Section II will set out the second reason for Luhmann's skepticism of implied justifiability—namely, that he rejected the prevailing theoretical attempts to validate the claim of justifiability. For instance, he thought society's functional differentiation incommensurate with the sort of consensus potential that theories of rational acceptability, such as Habermas's, require to legitimate the government. On the contrary, functional differentiation requires a political system whose decisions create an expectation of universal compliance regardless of people's stance toward them.

Section III will summarize arguably the most important part of Luhmann's explanation for why the political regime is stable. Part of the reason for its stability, he argued, is that governmental proceedings (the 'Verfahren' in *Legitimation durch Verfahren*) help absorb and neutralize the protest of people who are dissatisfied with the proceedings' outcome and hope to rally others' support against it. Lastly, section IV will present others' and my critique of *Legitimation durch Verfahren*.

66 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 34 (my translation).

67 See, e.g., Jeremy Waldron, 'Theoretical Foundations of Liberalism', 37 Phil Q 127, 135–6 (1987) (suggesting that political liberalism is characterized by the attempt to justify the social order to the individual).

I. Complexity and Meaning, Or Luhmann's Theory of Social Systems

Luhmann presented his theory of social systems as a reaction to a perceived shortcoming of Enlightenment philosophy. What the latter failed to explain, he argued, is how a human being can process the complex information that is supposed to guide our actions.⁶⁸

A. Man's Experience of the World

Complexity constitutes a major problem of human existence in Luhmann's theory. It challenges individuals by presenting them with many more possibilities of experience than they can grasp and process.⁶⁹ Moreover, these possibilities are contingent: Every experience the individual expects could, in fact, turn out differently.⁷⁰

Therefore, Luhmann considers man—or, for that matter, any organism or matter⁷¹—fundamentally overburdened.⁷² To survive, the organism must thus unburden itself and decrease the complexity of its world.⁷³ In this premise, we can observe the influence of conservative currents in German philosophical anthropology, of which Arnold Gehlen, a twentieth-century philosopher, sociologist, and anthropologist, is perhaps the most significant exponent.⁷⁴ Seeking to distinguish man from animal without resorting to the concept of the mind (*Geist*), Gehlen argued that man is organically deficient because he lacks the specific milieu to which animals' organs have adapted. Contrary to animals, man is open to a 'world', which overburdens

68 Niklas Luhmann, 'Soziologische Aufklärung', in *Soziologische Aufklärung 1* (n 55) 66, 72–3.

69 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme', in *Soziologische Aufklärung 1* (n 55) 113, 115; *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 78 (eBook).

70 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Suhrkamp, Frankfurt am Main, 1971) 25, 32.

71 Niklas Luhmann, *Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität* (5th edn, UVK Verlagsgesellschaft, Konstanz, 2014) 5.

72 Niklas Luhmann, 'Normen in soziologischer Perspektive', 20 *Soziale Welt* 28, 30–1 (1969).

73 Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

74 For evidence of Luhmann's reliance on Gehlen, see *id.*, 115 n 9. See also Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (Palgrave Macmillan, Houndmills, 2003) 167.

him with stimuli.⁷⁵ Accordingly, 'the human being must unburden himself, that is, he must independently transform the deficient conditions of his existence into opportunities of his own life'.⁷⁶

What separates humans from other organisms, writes Luhmann, is that they unburden themselves through the meaning (*Sinn*) that imbues their actions. (We shall see shortly how that occurs.) Meaning has the advantage of diminishing complexity without eliminating the other possibilities of experience and action from the individual's consciousness. It maintains these possibilities as potentialities by relocating them to the *horizon* of the individual's consciousness, where they stand ready for immediate experience, should that become necessary.⁷⁷ This increases the number of events the individual may be able to experience:⁷⁸ although overburdened by the world, man remains open to it. In the words of Luhmann,

[t]he phenomenon of meaning appears as a surplus of references to other possibilities of experience and action. Something stands in the focal point, at the center of intention, and all else is indicated marginally as the horizon of an 'and so forth' of experience and action. In this form, everything that is intended holds open to itself the world as a whole, thus guaranteeing the actuality of the world in the form of accessibility.⁷⁹

Luhmann contends that the uniquely human capacity to negate something exemplifies this flexibility.⁸⁰ Negation (*Verneinung*) features in Sigmund Freud's theory of psychoanalysis, which describes it as a mechanism to take note of thoughts we simultaneously repress. In Freud's view, negation allows us to perpetuate the repression but to keep the thought itself at hand. If a person dream of their mother, for example, but does not wish to acknowledge that, they can accept and learn to live with her occurrence

75 Arnold Gehlen, *Der Mensch: Seine Natur und seine Stellung in der Welt* (first published 1940, re-worked and re-published 1950, Vittorio Klostermann, Frankfurt am Main, 2016) 34.

76 *Id.*, 35. ('[Der Mensch muß sich] entlasten, d.h. die Mängelbedingungen seiner Existenz eigentätig in Chancen seiner Lebensfristung umarbeiten' [my translation; emphasis omitted]).

77 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 33–4.

78 Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 30.

79 Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) 115. While *Social Systems* stems from Luhmann's later period of work, the definition of meaning did not change. See, e.g., 'Sinn als Grundbegriff der Soziologie' (n 70) 34.

80 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 35–7.

by denying it was her.⁸¹ This mechanism demonstrates our flexibility of experience, Luhmann claims, because we can always negate the negation, thereby accessing an experience that was previously pushed to the horizon of our experience.

The horizon of experience originated not in Luhmann's sociology but in the work of Edmund Husserl, the founder of phenomenological philosophy.⁸² In his theory of intentional consciousness, Husserl argues that every instance of actual perception of an object—of a cube, for instance—implies a multitude of potential experiences. Each experience features its own 'horizon' that refers the perceiving individual from the facets of the thing they have perceived to those facets they have not yet perceived but can anticipate. Thus, by perceiving the sides of the cube that lie within one's view, one can anticipate the sides one does not see. This predetermination of potentialities within one's horizon lends meaning to individual consciousness.⁸³

For Luhmann, this insight underscores the significance of meaning, as opposed to subjectivity, for man's place in the world. Humans are conscious creatures because their consciousness directs the way in which they experience the world, not because it allows us to reflect on ourselves and become one with the world.⁸⁴ Luhmann argues that the theory of subjectivity erroneously places individuals on an equal footing with their world and thus neglects the disparate levels of complexity between the environment as we imagine it and the environment itself.⁸⁵

B. Intersubjectivity

Having thus established the centrality of meaning, we can ask who or what creates it. Traditional sociology understood meaning as the individual's

81 Sigmund Freud, 'Die Verneinung', in *Gesammelte Werke*, vol 14 (Anna Freud and others eds, Fischer, Frankfurt am Main, 1955) 11–2.

82 For a detailed explanation of how Husserl's phenomenology influenced Luhmann's (late, advanced) systems theory, see Sven-Eric Knudsen, *Luhmann und Husserl: Systemtheorie im Verhältnis zur Phänomenologie* (Königshausen & Neumann, Würzburg, 2006).

83 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (Nijhoff, The Hague, 1950) 81–3.

84 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 37–8.

85 Niklas Luhmann, *Vertrauen* (n 71) 32.

subjective achievement.⁸⁶ Luhmann, however, argues that this conception became obsolete once Edmund Husserl had spelled out the problem of intersubjectivity.⁸⁷ Husserl had written that we experience the world as an object that is accessible to everyone's consciousness alike, as intersubjective, but that we also experience other individuals—*alter egos*—as having their own experiences of the world, their own 'world phenomenon'.⁸⁸ The question to be resolved, therefore, is how anything can be objective if other subjects can perceive the same thing differently. Reformulated in Luhmann's terms, the question is how social complexity can be decreased.⁸⁹

Husserl attempted to solve this conundrum and square intersubjectivity with subjectivity by incorporating intersubjectivity into the individual's own consciousness.⁹⁰ Yet that convinced no one,⁹¹ including Luhmann.⁹² Luhmann gathered from Husserl's failure that all meaning is constituted intersubjectively⁹³ and that society, not subjectivity, is the answer to intersubjectivity.⁹⁴ 'The otherness of the other becomes the finding that renders sociality not just necessary or beneficial but enables it in the first place.'⁹⁵

86 Max Weber, *Economy and Society* (n 61) 4.

87 See, e.g., Niklas Luhmann, *Politische Soziologie* (n 53) 29.

88 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (n 83) 123.

89 See Niklas Luhmann, *Vertrauen* (n 71) 5–6, and 'Soziologische Aufklärung' (n 68) 73–4.

90 Edmund Husserl, *Pariser Vorträge und Cartesianische Meditationen* (n 83) 123 ff.

91 See, e.g., Alfred Schütz, 'Das Problem der transzendentalen Intersubjektivität bei Husserl', 5 *Philosophische Rundschau* 81 (1957).

92 See, e.g., Niklas Luhmann, *Vertrauen* (n 71) 6 n 13, 'Sinn als Grundbegriff der Soziologie' (n 70) 51–2 n 25, and *Social Systems* (n 79) xli ('There can be no intersubjectivity on the basis of the subject').

93 Niklas Luhmann, 'Sinn als Grundbegriff der Soziologie' (n 70) 51–2.

94 Luhmann once remarked that 'cogito ergo sumus' is how Descartes should have formulated the link between consciousness and subjectivity. Wolfgang Hagen, 'Es gibt keine Biographie', Interview with Niklas Luhmann, *Radio Bremen*, 2 October 1997, available at <https://perma.cc/U6MA-GUM9>. See also Niklas Luhmann, 'Die Tücke des Subjekts und die Frage nach den Menschen', in *Soziologische Aufklärung 6: Die Soziologie und der Mensch* (4th edn, Springer VS, Wiesbaden 2018) 151, 154, and André Kieserling, Interview on the occasion of the posthumous publication, in 2017, of Luhmann's *Systemtheorie der Gesellschaft, Suhrkamp*, available at <https://perma.cc/62FT-TA38>.

95 Niklas Luhmann, 'Arbeitsteilung und Moral: Durkheims Theorie', Preface to Émile Durkheim, *Über soziale Arbeitsteilung* (Ludwig Schmidts tr, Suhrkamp, Frankfurt am Main, 1992 [1930]) 19, 22. The quote refers to Adam Smith's theory of moral sentiments, in which Smith argued that sympathy consists not in feeling other individuals' feelings within oneself but in 'chang[ing] persons and characters'. Adam Smith, *The*

Like many sociologists of his day,⁹⁶ Luhmann drew from George Herbert Mead's social psychology to explain how meaning is constituted intersubjectively. Mead contended that social control precedes subjectivity because an individual grows to be self-conscious and self-critical once they learn to take the attitude, or 'rôle', of an *alter ego*. Since this allows the individual to direct their conduct in accordance with their social group, the process of rôle-taking lies at the basis of interpersonal cooperation.⁹⁷ On Luhmann's reading of Mead, interpersonal cooperation requires us to learn to expect the expectations others have of our own behavior.⁹⁸ Therefore, Luhmann considers meaning the result of an intersubjective expectation regarding individual actions. As we will now see, intersubjective expectations arise in social systems.

C. Social Systems

A social system does not consist of individual actors and their biological organisms. It consists of actions that it groups together through the common

Theory of Moral Sentiments (D D Raphael and A L Macfie eds, Clarendon Press, Oxford 1976 [1759]) 317.

96 See, e.g., Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday, Garden City, 1966) 69 n 37.

97 George H Mead, *Mind, Self & Society* (The University of Chicago Press, Chicago, 2015 [1934]) 254–5.

98 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft', in Rüdiger Lautmann, Werner Maihofer and Hartmut Schelsky (eds), *Die Funktion des Rechts in der modernen Gesellschaft* (Bertelsmann-Universitätsverlag, Bielefeld, 1970) 175, 177 n 2. One can trace this reading to Talcott Parsons' concept of the 'complementarity of expectations'. See Talcott Parsons and others, 'Some Fundamental Categories of the Theory of Action: A General Statement', in Talcott Parsons and Edward A Shils (eds), *Toward a General Theory of Action* (Harvard University Press, Cambridge MA, 1962) 3, 14–5.

meaning it ascribes to them.⁹⁹ It does so by generalizing behavioral expectations,¹⁰⁰ which constitute what Luhmann called the system's structure.¹⁰¹

Generalization occurs when an expectation is rendered impervious to contradictions or fluctuations. Luhmann writes that these contradictions can result from changes over time, situational changes, or disagreement about the validity of the expectation. Accordingly, we can observe generalizations in the temporal, substantive, and social dimensions. Thus, behavioral expectations are generalized temporally once they learn to resist and survive the disappointment of deviant behavior; as of this moment, they become normative. Substantive generalization occurs once an expectation is sufficiently abstracted from a particular person or situation and attaches to a role that can be performed or a program that can be implemented regardless of other changes. Finally, expectations are generalized in the social dimension once it becomes irrelevant whether everybody concurs in them; as a result, they become institutionalized.¹⁰²

Once behavioral expectations are generalized, the plurality of different experiences that are imaginable from an intersubjective perspective is synthesized into meaning.¹⁰³ Consequently, meaning can guide the action of individuals by decreasing complexity and alleviating the problem of contingency within the system, compared to the system's environment.¹⁰⁴ It is erroneous, therefore, to conceive of a system as an entity comprised of

99 Niklas Luhmann, 'Funktionale Methode und Systemtheorie', in *Soziologische Aufklärung 1* (n 55) 31, 42, *Politische Soziologie* (n 53) 21, and 'Moderne Systemtheorien als Form gesamtgesellschaftlicher Analyse', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 7, 11–2.

100 Over the years, Luhmann shifted the emphasis from 'behavioral expectations' to 'expectations of expectations'. Compare Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (Duncker & Humblot, Berlin, 1964) 53–9, and *A Sociological Theory of Law* (n 69) 80. For simplicity's sake, I will stick with the former.

101 Niklas Luhmann, 'Funktionale Methode und Systemtheorie' (n 99) 42; *Legitimation durch Verfahren* (n 52) 42.

102 Cf Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 55–9; *A Sociological Theory of Law* (n 69) 102–114.

103 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 116.

104 The function of social systems throws into relief their similarity with Arnold Gehlen's concept of (social) 'institutions', such as religion or the law, which help man unburden himself by overcoming his 'subjective feeling of powerlessness'. See also Helmut Schelsky, 'Systemfunktionaler, anthropologischer und personfunktionaler Ansatz der Rechtssoziologie', in Rüdiger Lautmann, Werner Maihofer and Helmut Schelsky (eds), *Die Funktion des Rechts in der modernen Gesellschaft* (n 98) 61, and Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie? Eine Auseinandersetzung mit Niklas Luhmann', in Jürgen Habermas and Niklas Luhmann,

distinct parts. Instead, anything that creates an inside/outside distinction can be considered a system.¹⁰⁵

Crucially, the decrease in complexity does not diminish our potential for action. On the contrary, it augments this potential because it replaces our overload with concrete possibilities of experience and action. In Luhmann's words, social systems do not make the world smaller and thus easier to process. Instead, their selection processes create the world in the first place.¹⁰⁶ Therefore, social systems both decrease and increase complexity at the same time.¹⁰⁷ Thus, we can learn from Thomas Hobbes that submitting to sovereign power makes civilizational gains more likely: By allowing a few people to make decisions for us (that is, by decreasing complexity), we increase the complexity we can process, for we no longer have to fear death and destruction.¹⁰⁸

From a functional point of view, social systems thus solve a problem when they decrease the complexity of their environment.¹⁰⁹ Because solving a problem appears better than its alternative, the question arises whether systems theory favors the existence of a specific social system over change —i.e., whether it is inherently conservative.¹¹⁰ This charge was indeed leveled at Talcott Parsons, who was Luhmann's erstwhile mentor at Harvard University¹¹¹ and whose theory of action systems strives to explain how a system can prevent disintegrating.¹¹² Critics accused Parsons of overplaying

Theorie der Gesellschaft oder Sozialtechnologie (n 70) 142, 157. On institutions, Arnold Gehlen, *Der Mensch: Seine Natur und seine Stellung in der Welt* (n 75) 456.

105 Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 24; 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

106 Niklas Luhmann, 'Systemtheoretische Argumentationen: Eine Entgegnung auf Habermas', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 291, 307–8.

107 *Id.*, 309.

108 *Ibid.*

109 See Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 115.

110 Cf Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (Harper & Brothers, New York, 1944) 1056 (pointing out that things which have functions appear to have value).

111 See, e.g., Niklas Luhmann, *Funktionen und Folgen formaler Organisation* (n 100) 24 n 2.

112 See, e.g., Talcott Parsons, *The Social System* (The Free Press, Glencoe, 1951) 26–36 (spelling out social systems' 'functional prerequisites').

the significance of stability and failing to see that conflict and change have historically determined the course of world history.¹¹³

Luhmann, however, could circumvent this accusation because he linked systems to the creation of meaning and described the latter as the conjugation of actual and potential experiences. The potential experiences point *outside* the system; consequently, Luhmann could argue that systems address the world and the complexity that inheres in it, not their own preservation.¹¹⁴ For that reason, a system which fails to fulfill this function adequately can be replaced with a better one.¹¹⁵

By increasing our capacity to manage complexity, social systems—not the use of reason—enlighten us, Luhmann argues.¹¹⁶ Opposing Kant, he writes that ‘only systems can serve as means of enlightenment, not the public that engages in free discussions.’¹¹⁷ The process of differentiation, which we will look at now, allows social systems to manage even greater complexity and thus to enlighten us further.

D. Systemic Differentiation

Differentiation occurs when a system establishes a subsystem, that is, when it replicates the inside/outside distinction *within itself*.¹¹⁸ It can do so by creating more specific roles, thereby giving rise to new expectations that are generalized in the substantive dimension.¹¹⁹ For instance, each judicial proceeding is a subsystem of the political system because its participants—such as the judge, the parties, and witnesses—perform roles that are detached from the role performers’ other, extra-systemic roles. Thus, we expect

113 See, e.g., Ralf Dahrendorf, *Gesellschaft und Freiheit* (Piper & Co, Munich, 1961) 78–84. For a general defense of functional analysis against accusations of conservatism, see Robert K Merton, *Social Theory and Social Structure* (enlarged edn, Free Press, New York, 1968) 91–2.

114 E.g., Niklas Luhmann, *Systemtheorie der Gesellschaft* (Johannes Schmidt and André Kieserling eds, Suhrkamp, Berlin, 2017) 45.

115 See, e.g., Niklas Luhmann, ‘Funktionale Methode und Systemtheorie’ (n 99) 35.

116 Niklas Luhmann, ‘Soziologische Aufklärung’ (n 68) 76–7.

117 *Id.*, 77 (my translation). Luhmann is referring to Kant’s essay ‘An answer to the question: What is enlightenment?’, in which the philosopher argued that enlightenment requires the public use of one’s reason and provided the example of the learned scholar who addresses the reading public.

118 Niklas Luhmann, ‘Differentiation of society’, 2 *Can J Soc* 29, 30, 31 (1977).

119 See Niklas Luhmann, ‘Soziologie des politischen Systems’ (n 55) 155.

judges to adjudicate a case impartially and to withstand party-political or religious considerations that influence positions they hold outside the courtroom; and we try not to gauge witnesses' credibility by their societal status.¹²⁰

Given their higher degree of specificity, subsystems are more selective still than the system within which they originated.¹²¹ For example, judicial proceedings are more selective than the political system precisely because roles performed outside the proceeding are, in theory, irrelevant. The increase in selectivity allows the original system to funnel potentially destabilizing environmental input into subsystems that absorb and neutralize the input. It need not curtail all input for fear of destructive influences that may threaten its survival.¹²² Thus, judicial proceedings allow the political system to increase the range of demands it can accommodate, for the courts stand ready to absorb and neutralize the protest that may arise when it chooses not to satisfy a specific demand.¹²³

Incidentally, the political system is an example of functional differentiation, one of three forms of differentiation at the societal level.¹²⁴ The first form, segmentation, occurs when society creates equal subsystems (such as tribes), each of which is likewise differentiated into equal subsystems (such as families).¹²⁵ In a stratified society, secondly, the subsystems are unequal, which means that each subsystem characterizes the systems in its environments as either equal, higher, or lower in rank than itself.¹²⁶ When differentiation is functional, finally, dedicated subsystems fulfill the various functions that require fulfillment at the societal level—such as 'want satisfaction' (which occurs in the economic subsystem of society) or 'interpreting the incomprehensible' (which occurs in the religious subsystem).¹²⁷

120 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 59–65.

121 Niklas Luhmann, 'Differentiation of society' (n 118) 31.

122 See Niklas Luhmann, 'Soziologie als Theorie sozialer Systeme' (n 69) 123.

123 See below, subsection III.A.

124 Other social systems include organizations (at the intermediate level) and face-to-face encounters. See Niklas Luhmann, 'Interaktion, Organisation, Gesellschaft: Anwendungen der Systemtheorie', in *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft* (4th edn, Springer Fachmedien, Wiesbaden, 1991) 8. Organizations are social systems to which individuals only gain access if they fulfill specific criteria. *Id.*, 12.

125 Niklas Luhmann, 'Gesellschaft', in *Soziologische Aufklärung I* (n 55) 137, 148.

126 Niklas Luhmann, 'Differentiation of society' (n 118) 33–4.

127 *Id.*, 35.

By differentiating subsystems, society enters a process of evolution: Any change in one of the subsystems alters the environment for all other subsystems, whose reaction to this change constitutes yet another change, thereby potentially setting in motion a chain reaction of more and more changes. Through differentiation, society thus becomes dynamic.¹²⁸ Crucially, functional differentiation allows society as well as society's subsystems to manage a greater degree of complexity than in the case of segmentary differentiation.¹²⁹ As we will see in the following section, Luhmann believes that it also invalidates the prevailing attempts at legitimating the government.

II. The Impossibility of Justification in a Differentiated Society

Luhmann never comprehensively discussed all the sources of government legitimacy that political theorists have put forward over the past decades. But he did engage with Jürgen Habermas's discourse-theoretical—or procedural¹³⁰—conception of legitimate law. One possible reason for his selective approach is that Habermas was arguably Luhmann's most important intellectual sparring partner. In fact, Habermas debated Luhmann in a joint publication just two years after *Legitimation durch Verfahren* was published;¹³¹ it was here that he laid the groundwork for his theory of communicative action.¹³²

The other reason is that Luhmann's theory of procedural legitimation itself relies on individuals' (direct or indirect) participation in government

128 Niklas Luhmann, 'Gesellschaft' (n 125) 150–1.

129 *Id.*, 151. See also *Grundrechte als Institution* (n 53) 17–19.

130 See James Bohman and William Rehg, 'Jürgen Habermas', in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017 edn), available at <https://plato.stanford.edu/archives/fall2017/entries/habermas/> (last accessed 4 March 2022). See also Jürgen Habermas, 'Legitimationsprobleme im modernen Staat', in Peter Graf Kielmansegg (ed), *Legitimationsprobleme politischer Systeme* (Westdeutscher Verlag, Opladen, 1976) 39, 43–44 (noting that the sources of legitimacy necessarily become procedural once neither nature nor religion helps justify government).

131 Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70).

132 See Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz', in Jürgen Habermas and Niklas Luhmann, *Theorie der Gesellschaft oder Sozialtechnologie* (n 70) 101, and Elmar Koenen, 'Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung? (1971)', in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 150, 152.

proceedings to explain when and why government is stable. By critiquing the extant procedural approaches to political legitimacy, Luhmann could thus underscore how significant his conceptual transformation of participatory rights was. He believed that participating in the government's proceedings does not turn government into self-government. Instead, it ensures the regime's survival by helping to neutralize individuals who might protest the government's decisions.¹³³

A. Habermas's Discourse-Theoretical Conception of Legitimate Law

Like Luhmann, Habermas believes that only (shared) meaning can constitute an intersubjective world. But unlike Luhmann, he argues that meaning originates in communicative action, not a social system.¹³⁴ Crucially, communicative action is only successful if its subjects can accept the validity claims (*Geltungsansprüche*) that are implicit in each utterance. One such validity claim pertains to the rule that the speaker purports to follow.¹³⁵ Habermas argues that we must impute this claim to the speaker unless we wish to treat the speaker as a manipulable object. As a result, we must assume that the speaker only acts according to rules they deem justifiable.¹³⁶ This means that when the government asks people to comply with its law, it necessarily implies that the law is justifiable.¹³⁷

In his later publication *Between Facts and Norms*, Habermas specifies when the law is indeed justified. He writes that legal norms are valid if all possibly affected persons can participate in a 'legally structured deliberative praxis in which the discourse principle is applied'.¹³⁸ According to the discourse principle, a norm is valid if all those possibly affected could agree to it as participants in a discourse that seeks to 'reach an understanding over problematic validity claims' under conditions of free communication in

133 See generally Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 41–2.

134 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 194–5.

135 See Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' (n 132) 115–6.

136 *Id.*, 118–9.

137 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 244.

138 Jürgen Habermas, *Between Facts and Norms* (n 59) 127.

the public space.¹³⁹ Once the requisite political rights establish democratic procedures that allow for the discourse principle to materialize, law that accords with these procedures enjoys a presumption of legitimacy.¹⁴⁰

This presumption itself involves a presumption. After all, we establish democratic procedures to set the discourse principle in motion. But the discourse principle merely demands that the participants in the discourse *could* agree to the norm in question. In other words, we presume that democratic procedures allow us to presume that everyone could agree to the law which issues from the procedures. Habermas's theory of legitimate law thus seeks what James Bohman and William Rehg call a 'warranted presumption of reasonableness'¹⁴¹ and what Habermas himself terms a 'presumption of rational acceptability'¹⁴².

B. Luhmann's Counterargument from Functional Differentiation

1. The Impossibility of Consensus in a Differentiated Society

The first objection that Luhmann voiced against Habermas's conception of legitimate law concerns the theory of communicative action itself. In the two scholars' joint publication, he writes that we do not always impute validity claims to each other's utterances in order to constitute an intersubjective world. We also love or enter into conflict with each other and perceive, evade, or imitate others, none of which implies justification.¹⁴³ As long as there is sufficient 'operative consensus', one 'can live together very well on the basis of the mutual conviction that the other's justifications are wrong—including and especially when each knows the other's opinion about his opinion and [my] knowledge of the [other's] opinion about my opining is equally well known and has stabilized as mutual.'¹⁴⁴ Justifications do not help build an intersubjective world; they presuppose it.¹⁴⁵

In today's functionally differentiated society, mutual disagreements are bound to be ever more likely, Luhmann adds. Functional differentiation

139 *Id.*, 107–8. On communicative freedom, *id.*, 119.

140 *Id.*, 127.

141 James Bohman and William Rehg, 'Jürgen Habermas' (n 130).

142 Jürgen Habermas, *Between Facts and Norms* (n 59) 151.

143 Niklas Luhmann, 'Systemtheoretische Argumentationen' (n 106) 320.

144 *Id.*, 320–1 (my translation).

145 *Id.*, 321.

requires individuals to have distinct personalities because complete homogeneity would deprive society of the requisite divergence in attitudes and motivations.¹⁴⁶ Consequently, the rational acceptability to which Habermas attributes justificatory potential is incommensurate with the state of our society.¹⁴⁷ We cannot hope for emancipation by having the master and knave of old enter into a discourse of equals over the legitimacy of the government's authority: Because of functional differentiation, the master's reason is overburdened, and the knave's new-found specialization (in a functional subsystem of society) precludes him from gaining reason in the first place.¹⁴⁸

2. The Necessity of Decisionism in a Differentiated Society

Luhmann's second objection to Habermas's theory can be found in his review of *Between Facts and Norms*. According to the latter, the law is legitimate if it is enacted in accordance with democratic procedures that allow for the discourse principle to materialize.¹⁴⁹ Luhmann doubts that governmental proceedings lend themselves to the discourse principle. He argues that they do not necessarily seek to reach an understanding over validity claims because their primary aim is to render a decision. Therefore, Habermas's presumption of legitimacy ultimately amounts to a fiction.¹⁵⁰

Contrary to Habermas's, Luhmann's conception of governmental proceedings thus emphasizes decisionism, not deliberation. Again, the phenomenon of functional differentiation explains why this is so and why Luhmann's sociology becomes incompatible, for that reason, with prevailing attempts at justifying the government's authority. Luhmann described the impact of functional differentiation on the government in both his political sociology (a) and his sociology of law (b).

146 Niklas Luhmann, *Grundrechte als Institution* (n 53) 48.

147 Niklas Luhmann, 'Systemtheoretische Argumentationen' (n 106) 327.

148 *Id.*, 327–8.

149 See n 140 and accompanying text.

150 Niklas Luhmann, 'Quod Omnes Tangit: Remarks on Jürgen Habermas's Legal Theory', 17 Cardozo L Rev 883, 890–3 (1995).

a) Luhmann's Political Sociology

The more differentiated society is, the more possibilities of experience and action there are, Luhmann writes, and the greater the need for coordination becomes. At the same time, the attempt at coordination may turn out to be mistaken.¹⁵¹ To manage this complexity, society requires binding decisions, for only a focus on binding decisions helps us achieve both stability and flexibility.¹⁵² This is where society's political subsystem comes in: According to Luhmann, its function is to adjudicate, by means of binding decisions, those conflicts that society's other functional systems cannot manage on their own.¹⁵³ It is hence both a consequence of and a requirement for society's functional differentiation.¹⁵⁴

Luhmann defines a binding decision as one that succeeds in becoming a premise for people's behavior—i.e., as an authoritative decision.¹⁵⁵ In other words, he suggests that the point of legitimate authority is to comply with it, not question its justification. On his view, the political system does not ask us to confirm that its authority is justified because its very existence renders this question moot. Accordingly, Luhmann argues that the political system *legitimizes itself* when it provides us with binding decisions.¹⁵⁶

In consequence, democracy does not help us realize collective self-government as autonomous political equals. Luhmann argues that political elections and legislative majoritarianism are valuable insofar as they help the political system manage the complexity of a functionally differentiated environment by both decreasing and preserving it.¹⁵⁷ (In Chapter 3, we

151 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 202–3.

152 See Niklas Luhmann, 'Soziologie des politischen Systems' (n 55) 159.

153 Niklas Luhmann, *Politische Soziologie* (n 53) 36–41. See also Michael King and Chris Thornhill, *Niklas Luhmann's Theory of Politics and Law* (n 74) 70–1 (speaking of the political system's 'residual' function).

154 See Niklas Luhmann, 'Soziologie des politischen Systems' (n 55) 159.

155 *Ibid.* By 'authoritative', I mean likely to be obeyed. For this use of the term, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

156 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 30, and 'Soziologie des politischen Systems' (n 55) 167. For a version of this argument that harnesses Luhmann's later theory of self-referential—as opposed to open—social systems, see Niklas Luhmann, 'Selbstlegitimation des Staates', 15 Archiv für Rechts- und Sozialphilosophie 65 (1981).

157 See Niklas Luhmann, 'Komplexität und Demokratie', in *Politische Planung: Aufsätze zur Soziologie von Politik und Verwaltung* (4th edn, Springer, Wiesbaden, 1994) 35, 37–40.

will see how they do so, using the legislative process as an example.¹⁵⁸) By the same token, fundamental rights do not help legitimate government by helping us ‘co-determine the structure of [our] society’.¹⁵⁹ For Luhmann, the function of fundamental rights is to help maintain functional differentiation by preventing the political system from colonizing other functional subsystems.¹⁶⁰

b) Luhmann’s Sociology of Law

In his work on legal sociology, Luhmann translated these observations into the terms of legal theory. To satisfy a functionally differentiated society’s need for flexibility, society’s law—which issues from the political system’s binding decisions—must be positive, that is, susceptible to change.¹⁶¹ The law must not restrict the world to which society can have access. Any law that society requires must be capable of being enacted.¹⁶²

Now, the idea of change is not foreign to the theory of normative legitimacy either. On the contrary, political philosophers argue that the law is justified if and because our self-determination gives us the right to change it.¹⁶³ Therefore, positive law’s innate alterability is an *asset* when we conceptualize legitimacy as involving a claim to justifiability (as do most scholars): We are autonomous, the argument runs, because we can rectify past mistakes. But once we collapse legitimacy and stability into one concept (as does Luhmann), the possibility of change appears more

158 Chapter 3, subsection IV.C.2.a.

159 Rainer Forst, ‘The Justification of Basic Rights: A Discourse-Theoretical Approach’, 45 *Netherlands J Legal Phil* 7, 7–8 (2016).

160 Niklas Luhmann, *Grundrechte als Institution* (n 53) 33–7.

161 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 215, and ‘Positivität des Rechts als Voraussetzung einer modernen Gesellschaft’ (n 98) 183–4. The focus on adaptability differentiates the concept of positivity from that of positivism, which lays a greater emphasis on the question of who or what is a source of law. See, e.g., Jeremy Waldron, *Law and Disagreement* (OUP, Oxford, 1999) 44. That is not to say that legal theorists undervalue the significance of adaptability. They use it, among other things, to distinguish law from morality. See HLA Hart, *The Concept of Law* (Clarendon Press, Oxford, 1972) 171.

162 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 145.

163 See, e.g., Christoph Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (OUP, Oxford, 2013) 79.

threatening: How can we make sure that people will acquiesce not only in today's law but also in tomorrow's?¹⁶⁴

For that reason, Luhmann's theory of legitimate law does not answer the question of which requirements must be met for the law to be justified. Instead, it seeks to explain how we can demand that everyone comply with the law but simultaneously expect that law to change—that is, why we normatively expect compliance but cognitively expect change.¹⁶⁵

III. Niklas Luhmann's Theory of Why People Comply with the Law

Luhmann makes out four factors which warrant the presumption that those affected by a government decision will acquiesce in it. The first is that the political system succeeds in absorbing and thus neutralizing the protest of those who are unlikely to adapt to the decision because they were invested in obtaining the opposite outcome.¹⁶⁶ The second is that it makes people trust the political system. To do so, it must make them feel reasonably secure despite the law's perennial variability and give them the confidence that they will be able to lead a dignified life regardless of what happens.¹⁶⁷ The third factor, finally, obtains when the political system offers everyone an equal chance of achieving a satisfactory political outcome.¹⁶⁸

According to Luhmann, government proceedings play a crucial role in implementing all three factors: They absorb protest by individualizing and isolating participants who are disappointed in the proceedings' outcome,¹⁶⁹

164 See Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 47. In Luhmann's terms, the question should be formulated as follows: At what point can we assume 'that third parties expect normatively that the directly affected persons cognitively prepare themselves for what the decision-makers communicate as normative expectations'? Niklas Luhmann, *A Sociological Theory of Law* (n 69) 256.

165 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 255. On the distinction between cognitive and normative expectations, Niklas Luhmann, 'Normen in soziologischer Perspektive' (n 72) 36, and Johan Galtung, 'Expectations and Interaction Processes', 2 *Inquiry* 213 (1959).

166 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 188–9, and *A Sociological Theory of Law* (n 69) 258.

167 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 192–9, and *Vertrauen* (n 71) 69–72.

168 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 30, 198 ('Gleichheit der Chance, befriedigende Entscheidungen zu erhalten').

169 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 189.

generate the decisions that make people trust the political system, and bring the idea of outcome equality to life.¹⁷⁰

The fourth factor is coercion, for we can expect almost everyone to bow to the threat (or use) of force and acquiesce in a government decision despite initially refusing to do so.¹⁷¹ However, a government that relies exclusively on force cannot prevent people from eventually creating a united front against the state's regime of terror. Nipping protest in the bud by absorbing it as early as possible remains imperative, Luhmann writes.¹⁷²

By contrast, a belief in the justifiability of government decisions does not feature in his account of political stability. He argues that we overburden people if we expect them to form an opinion on the justifiability of every government decision. Doing so 'fails to recognize the high complexity, variability and contradictoriness of the issues and decision-making premises that have to be dealt with in the political-administrative system of modern societies.'¹⁷³

In what follows, I will not address the question of how, according to Luhmann, the political system can generate systemic trust and achieve outcome equality; Chapter 3 will do so briefly. Instead, I will concentrate on government proceedings' role in absorbing protest. We will look at three types of proceedings: judicial proceedings (A), political elections, and the legislative process (B). The first type—judicial proceedings—will receive the most attention, as it takes up the most space in *Legitimation durch Verfahren*.¹⁷⁴

A. Judicial Proceedings and the Entanglement of Self

Luhmann was not the first to discuss judicial proceedings' capacity to absorb protest. Four years before *Legitimation durch Verfahren* was published, David Easton's systems-based analysis of government argued that the process of adjudication constitutes one of several 'depoliticizing responses' with which the political system diminishes the stress caused by societal

170 *Ibid.* and *Legitimation durch Verfahren* (n 52) 199–200.

171 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 256–7.

172 *Ibid.*

173 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 32.

174 *Id.*, 57–135.

cleavages.¹⁷⁵ For Easton, two characteristics account for the depoliticizing effect. Firstly, judicial procedure excludes everyone who cannot prove a 'very special interest' in the conflict. The controversy is hence artificially confined to the litigants.¹⁷⁶ Secondly, 'adoption of judicial processes implies the antecedent acceptance of the idea that an established rule does or must exist for the settlement of the issue, that it has some degree of commonly recognized equity and justice about it, that it has the sanction of the community behind it, and that it ought to be obeyed.'¹⁷⁷

But it is one thing to acknowledge that there is a respect-worthy decision rule and quite another to accept the judge's application of that rule. Missing from Easton's account is a specific explanation for why the judge's application of the decision rule is not bound to rile the losing party and cause it to carry the conflict outside the courtroom. (We will touch upon Easton's more general answer to this question further below.¹⁷⁸) This is where Luhmann's theory comes in. It agrees with Easton's two points¹⁷⁹ but explains in greater detail why the losing party's reaction to the judge's verdict is unlikely to further societal cleavages.

Central to Luhmann's argument is the idea of individualization and isolation.¹⁸⁰ To understand it, we should take a closer look at the concepts of role reciprocity and of presentation of self (1) and consider the significance of courtroom publicity (2) and conditional programming (3). Lastly, we will discuss a specific form of depoliticization: contact systems within the judicial proceeding (4).

1. Role Reciprocity and the Presentation of Self

The concept of role reciprocity owes a lot to George Herbert Mead's analysis of 'rôle-taking'. As we saw above, Mead claimed that individuals learn to be self-conscious and self-critical when they learn to take the attitude, or

175 David Easton, *A Systems Analysis of Political Life* (n 65) 264. Easton defines cleavages as 'differences in attitudes, opinions and ways of life or as conflict among groups'. *Id.*, 235–6.

176 *Id.*, 264. See also Alexis de Tocqueville, *Democracy in America* (Arthur Goldhammer tr, Library of America, New York, 2004 [1835]) 115 (arguing that litigation's narrow procedural focus dilutes the court judgment's political impact).

177 David Easton, *A Systems Analysis of Political Life* (n 65) 264–5.

178 See n 294 and accompanying text.

179 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 114–5, 122.

180 See, e.g., *id.*, 120.

'rôle', of an *alter ego*.¹⁸¹ Following the lead of other scholars,¹⁸² Luhmann applied this theory to *societally preformed roles*. He writes that every such role implies what Ralph Turner called an 'imputed other-role'¹⁸³—i.e., a complementary role without which one's own role would make no sense.¹⁸⁴ For instance, we cannot comprehend the role of 'judge' without simultaneously acknowledging the role of the parties who bring their controversy before the court.

Every time a person performs a role, they thus imply a complementary role; their performance demands that the individual they address behave according to the complementary role's expectations.¹⁸⁵ Once we treat another person as a judge, we must thus abide by the role expectations for litigants.

One such expectation is that the litigants remain consistent in their factual and legal argument.¹⁸⁶ Now, any presentation of self gives rise to consistency requirements,¹⁸⁷ and we necessarily present our self when we perform a role in the face of others.¹⁸⁸ But Luhmann argues that the consistency requirement is more pronounced still in a courtroom. Without it, the judge would find it much harder to reach a decision, thereby failing to implement the court's manifest function of adjudicating a controversy.¹⁸⁹

The consistency requirement serves to individualize the conflict because it narrows the parties' argumentative options as the case progresses.¹⁹⁰ In systems-theoretical terms, the litigants' past statements and arguments become history. Because it decreases complexity, this history turns the concrete proceeding into a social system unto itself, one in which things

181 See n 97 and accompanying text.

182 See Ralph H Turner, 'Role-Taking: Process Versus Conformity', in Arnold M Rose (ed), *Human Behavior and Social Processes: An Interactionist Approach* (Houghton Mifflin, Boston, 1962) 20, 23.

183 *Ibid.*

184 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 85. Strictly speaking, Mead's 'rôle' describes a psychological attitude, not a sociological set of expectations. See Walter Coutu, 'Role-Playing vs. Role-Taking: An Appeal for Clarification', 16 *Am Soc Rev* 180–1 (1951). By interpreting sociological roles in the light of Mead's psychology, both Turner and Luhmann thus endeavored to blend both concepts.

185 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 85.

186 *Id.*, 91–2.

187 Erving Goffman, 'On Face-Work', reprinted in *Interaction Ritual: Essays on Face-to-Face Behavior* (Doubleday, New York City, 1967) 5, 9–10.

188 *Id.*, 5.

189 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 92.

190 *Id.*, 94–5.

that were possible at the outset are no longer so.¹⁹¹ Luhmann likens the adjudicative process to a funnel.¹⁹² Initially, the parties submit to the proceeding because they hope to win;¹⁹³ but once they do so, they themselves contribute to the de-politicization of their controversy. On this view, the inherent 'chanciness' of adjudication¹⁹⁴ is vital to the stability of the political system, for it serves to lure the conflicting parties into the courtroom.¹⁹⁵

In the course of the proceeding, the participants are thus persuaded to specify their positions with regard to the outcome that is still open in the instant case, so that their concern cannot ultimately appear to be that of any given third party. It takes on the profile of an opinion or interest, as opposed to the expectations of the public—and, in any case, no longer of truth or of a morality that is naturally taken to be common to all. After the performance of their self-presentation in the proceeding, the participants discover they have become individuals who have articulated their opinions and interests, who have voluntarily established their positions as their own, and, therefore, hardly stand a chance of mobilizing an effective formation of expectation and action by third parties for their own case.¹⁹⁶

Luhmann does not expect the losing party to agree with the judge's verdict. Because courts implement a predetermined program (regardless of how indeterminate it is), they cannot demonstrate the sort of flexibility and patience needed to keep at least one party from being disappointed when the judgment is handed down.¹⁹⁷ Therefore, it is more important to render society impervious to the loser's continuing dissent.¹⁹⁸ All is well if the losing party works off its disappointment through silent bitterness or ornery complaint.¹⁹⁹ But if it asks others for assistance and tries to undo the proceeding's success in individualizing the conflict, the following two

191 *Id.*, 44.

192 *Id.*, 115.

193 *Id.*, 116.

194 Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* (Princeton University Press, Princeton, 1949) 50.

195 Therefore, one of judicial impartiality's latent functions is to maintain the chanciness of adjudication. Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 134.

196 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 257.

197 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 112–4.

198 *Id.*, 120.

199 *Id.*, 111–2.

factors compound the individualizing effect of legal argument and isolate the loser, thus neutralizing any dissent they choose to voice.²⁰⁰

Firstly, participating in a judicial proceeding prompts the litigants to perform 'unpaid ceremonial labor', that is, to include the court's decorum and solemnity as well as its decision rule in their presentation of self. In doing so, they affirm—as Easton noted—the court and the law it applies, which makes it more difficult to attack either after the judge has handed down their decision.²⁰¹ Secondly, the character of judicial proceedings as institutionalized mechanisms of conflict resolution²⁰² forbids a party from denying its opponent the elementary right to contest the claim and make its own case.²⁰³ Accordingly, the loser will have a hard time arguing that the victor had no credible case whatsoever.

Sensing this isolation will likely help the loser come to terms with his loss, Luhmann writes.²⁰⁴ And if he refuses to do so, society will start treating him as an 'eccentric, a troublemaker, someone whose favorite topic one knows and whom one seeks to avoid. He must choose his audience very carefully and very narrowly; he cannot talk to everybody about his lawsuit.'²⁰⁵

2. Courtroom Publicity

However, other people will only isolate persistent dissenters if we can assume that they will treat the judgment as authoritative. Luhmann contends we can make this assumption if the absence of outspoken dissent suggests that people believe two things: first, that the judges are making an honest, sincere, and diligent effort at getting to the truth; and second, that everyone can, if need be, avail themselves of the courts to obtain a legal victory.²⁰⁶ Simply put, *two of the other three factors* that together warrant a presumption of universal acquiescence must be present for protest to be absorbed

200 *Id.*, 117.

201 *Id.*, 114.

202 See also Johan Galtung, 'Institutionalized Conflict Resolution: A theoretical paradigm', 2 J Peace Res 348, 349 (1965).

203 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 105.

204 *Id.*, 117–8.

205 *Id.*, 118.

206 *Id.*, 123.

efficiently: People must have trust in the overall functioning of the judiciary, and they must believe in outcome equality in the courtroom.²⁰⁷

According to Luhmann, the absence of dissent is indicative of systemic trust and the belief in outcome equality if and because people can observe judicial proceedings whenever they so desire.²⁰⁸

All the non-involved must be able to follow the course of the proceeding. What matters in this context is accessibility, not so much the actual act of going [to court] and watching. [...] The possibility [of doing so] strengthens people's trust or at least prevents the emergence of the kind of distrust that attaches to all attempts at concealment. The function of the procedural principle of publicity lies in the creation of symbols, in the configuration of the proceeding as a drama that symbolizes right and just decision-making, and the continuous presence of a more or less large part of the population is not necessary for that. The general and indeterminate knowledge that these proceedings take place continuously and that everyone can, if need be, learn about them suffices.²⁰⁹

Therefore, the role of the public is not to place a check on the courts. Luhmann argues that such a role would be unfeasible because an open court necessarily prompts the adjudicators to conduct their actual decision-making process away from the public eye.²¹⁰ Instead, what happens is a broad and diffuse exchange of sorts: the public helps the court render a binding decision, and the courts present themselves as capable of doing so. This interpretation of judicial symbolism distinguishes Luhmann from earlier functional sociologists such as Durkheim. Where the latter argued that the symbolism of law inspires societal solidarity, Luhmann claimed that judicial proceedings' symbolism wards off challenges to this solidarity.²¹¹

Because there is no need for the public to be physically present, the mass media play an important role in depicting this symbolism. One might wonder how the tidbits the press relays to its audience suffice to adequately portray judicial proceedings. However, courtroom publicity need not enable a rational analysis of a given case's outcome; trust does not require informed

207 See above, notes 167–168 and accompanying text.

208 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 123.

209 *Id.*, 123–4.

210 *Id.*, 124.

211 See Émile Durkheim, *De la division du travail social* (5th edn, Librairie Félix Alcan, Paris, 1926) 73–8, and Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 121.

judgment. What matters, Luhmann argues, is that the public can observe the law in action, and the mass media facilitates such observation.²¹²

3. Conditional Programming

Finally, Luhmann contends that a court can only depoliticize a subject matter if it can minimize the influence it is seen to have over the decision. If it succeeds in doing so, it can deflect criticism and, if necessary, redirect the parties' attention to the decision rules that forced its hand.²¹³ For this to occur, the norms that govern the case must provide *conditional programs*.

By program, Luhmann means the conditions a decision must fulfill to be considered correct. In other words, a program provides the blueprint for a multitude of individual decisions.²¹⁴ We can trace the concept back to the American economist Herbert A. Simon, whose theory of decision-making used computer programs—i.e., instructions or role prescriptions for a machine—to analyze a decision's premises.²¹⁵ Luhmann reframed the concept in systems-theoretical terms, observing that programs protect the autonomy of decision-making systems vis-à-vis their environment because they instruct the system to act only pursuant to specific, selected information.²¹⁶ On this view, judicial proceedings are programmed processes of decision-making, contrary to legislative proceedings.²¹⁷

However, a court decision is not immune to criticism simply because it is premised on a (supposedly) external program. This brings us to the distinction between purposive and conditional programs, which Luhmann took from the Scandinavian sociology of law.²¹⁸ Purposive programs instruct the decision-maker to accomplish a specific output. They do not predetermine the means to do so. If the means the decision-maker chooses prove deleterious, those affected will hold them personally responsible and blame their

212 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 125–6.

213 *Id.*, 130.

214 Niklas Luhmann, *Politische Soziologie* (n 53) 208, and *Organization and Decision* (Dirk Baecker ed, Rhodes Barrett tr, CUP, Cambridge, 2018) 210.

215 See, e.g., Herbert A Simon, 'Theories of Decision-Making in Economics and Behavioral Science', 49 *Am Econ Rev* 253, 273–5 (1959).

216 See Niklas Luhmann, *Politische Soziologie* (n 53) 211.

217 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 139.

218 See Niklas Luhmann, *A Sociological Theory of Law* (n 69) 230–1 n 53 and the references cited therein.

judgment.²¹⁹ By contrast, conditional programs correlate a decision with a specific input: 'if specific conditions are fulfilled (if previously defined constituent facts are given), then a certain decision has to be made'.²²⁰ Because they bear no responsibility for the relevant input or the decision that follows from the input, the decision-maker can deflect criticism directed against their person, the proceeding, their (non-legal) expertise, and the decision's ramifications.²²¹

The law is regularly programmed conditionally, Luhmann writes. Contrary to what the idea of 'programming' may suggest,²²² this does not mean that the law's interpretation is a foregone conclusion.²²³ Nevertheless, conditional legal programs make the uncertainty of human experience more bearable because they correlate other individuals' uncertain but possible behavior with identifiable sanctions.²²⁴ More, they unburden the judge from having to make transparent and reviewable value judgments.

According to Luhmann, the principle of judicial impartiality adds to conditional programs' depoliticizing potential because it differentiates the judge's adjudicative role from their other social positions. As a result, they need not account for any of their decision's negative effects on their other roles' areas of concern and can claim to act solely within the confines of the law.²²⁵ In fact, a judge who is expected to accomplish certain social goals could hardly act impartially and would certainly not *seem* to act impartially.²²⁶ Luhmann writes that appearing too 'active' endangers the judge's presentation of their impartiality.²²⁷

219 *Legitimation durch Verfahren* (n 52) 130–1.

220 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 228.

221 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 131–2.

222 See Ronald Dworkin, *A Matter of Principle* (Harvard University Press, Cambridge MA, 1985) 33 (suggesting that programs are somehow apolitical).

223 For Luhmann's analysis of legal interpretation, see Niklas Luhmann, *Politische Soziologie* (n 53) 216–20.

224 Niklas Luhmann, *A Sociological Theory of Law* (n 69) 229.

225 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 134.

226 *Id.*, 185.

227 *Id.*, 134. See also Torstein Eckhoff, 'Impartiality, Separation of Powers, and Judicial Independence', 9 *Scandinavian Stud in Law* 11, 41 (1965) (arguing that it is 'sometimes impossible for the active and helpful conflict-solver to avoid the unjustified suspicion of being partial').

4. Contact Systems

The arguments discussed in the foregoing paragraphs were not premised on the disputants and other participants knowing each other. Yet the participants will often be well-acquainted: The judges might know the attorneys, and the litigants' out-of-court relationship may regularly give rise to legal disputes. For Luhmann, these networks serve to depoliticize and neutralize a controversy because they help differentiate, within the judicial proceeding, a specific subsystem whose normative structure suggests that getting along is more important than winning at all costs.

Luhmann labels this system a 'contact system'. He defines it as a web whose participants depend on each other because they know that they will eventually require each other's help.²²⁸ This web becomes a social system unto itself—thereby increasing the complexity it can process—because the participants' familiarity creates more far-reaching perspectives of meaning. For example, the perspectives become more generalized in the temporal dimension because the actors within the system have to countenance not only the current proceeding but future events; they become more generalized in the substantive dimension because more and more different subject matters will likely arise over time; and they become generalized socially because each actor knows beforehand whether the other participants in the system will prefer conflict or cooperation.²²⁹

Contact systems decrease this complexity, Luhmann continues, by taking a long view of things and rationally choosing not to maximize the potential gains from the individual encounters that take place within the system. In planning their strategy for a particular court case, the participants will take into account that the other party may prove more powerful in the next lawsuit. For that reason, they will prioritize their long-term relationship over the outcome of the instant case.²³⁰ This means they will not disrupt the political system by inveighing against the court and the decision-maker's animus or bias but will instead attribute the current loss to the 'circumstances' or the disadvantageous state of the law.²³¹ In other words, they will voluntarily refrain from voicing the kind of dissent that undermines an assumption of universal compliance; they will anticipate their argumentative entanglement.

228 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 75.

229 *Id.*, 76.

230 *Id.*, 75–6.

231 *Id.*, 77.

However, this specific form of depoliticization ends once self-restraint becomes too burdensome, Luhmann writes. Intuiting when that point is reached is an integral part of being party to a contact system. The participants 'must be able to feel which impositions are still bearable for other participants and where the threshold lies beyond which concerned individuals lose control and thus their future within the system.'²³²

B. Political Elections and the Legislative Process

1. Elections

Political elections help absorb protest, Luhmann argues, because they provide a safety valve of sorts for disgruntled citizens.²³³ The reason their protest votes do not destabilize the political system is that elections never serve to reduce complexity and make actual decisions. There are too many societal controversies for parties to distill into a comprehensible platform. Moreover, the scarcity of government offices means that parties tend to assimilate their platforms to one another anyway. As a result, no voter can expect their vote to reliably secure a certain policy outcome. Instead of resolving conflicts, elections funnel them into the political system and leave it to officeholders to decrease the complexity for which the conflicts stand.²³⁴

That is also why the right to vote does not help citizens participate in government. Luhmann argues that its function is to prevent making the public's support for the political system contingent on the latter satisfying each voter's demands.²³⁵ Citizens know that they must voice their demands differently if they wish to obtain specific outcomes; they must turn to 'personal contacts and interventions, letters to the editor or other publications, petitions, interest groups, demonstrations, etc.'²³⁶

Many political philosophers consider equal participation rights crucial to the justification of government. Granting each citizen an equal vote in legislative elections and having the legislature adjudicate disagreement by

232 *Id.*, 78.

233 See, e.g., *id.*, 171.

234 See *id.*, 161–4.

235 See Niklas Luhmann, *Grundrechte als Institution* (n 53) 148, and *Politische Soziologie* (n 53) 413.

236 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 166.

majority decision accords everyone 'the greatest say possible compatible with an equal say for each of the others'.²³⁷ For that reason, we can say there is no longer any difference between the ruled and the rulers.²³⁸ But Luhmann disputes this link, which he deems too tenuous. Citizens have too little impact on legislative decision-making for us to consider participation tantamount to self-government.²³⁹ In fact, they are not even *meant* to have any substantive impact, for the government they vote into office is sovereign in its decision-making.²⁴⁰

Luhmann adds that we risk widespread frustration if we pin our hopes on participation. Thus, every political decision in favor of a particular course of action simultaneously rejects conceivable alternatives, thereby disappointing all citizens who would have preferred one of the alternatives over the enacted decision. The more diligent the political process is, the more alternative policies become conceivable, and the more rejections are implied by the decision. In a well-functioning system, each decision thus tends to beget more disgruntled than satisfied participants.²⁴¹

2. The Legislative Process

Finally, the legislative process preempts potentially dangerous protest because it forces people seeking to destabilize the political system to do so *from within*, in societally preformed roles that tend to moderate the role performers' political positions.²⁴² Central to this claim is the interrelation-

237 Jeremy Waldron, 'The Core of the Case Against Judicial Review', 115 Yale LJ 1346, 1388–9 (2006).

238 Christoph Möllers, *The Three Branches* (n 163) 71–2.

239 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 167, and 'Komplexität und Demokratie' (n 157) 39. On the concept of impact on legislative decision-making, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, Cambridge MA, 2002) 191. See also Joseph Raz, 'Disagreement in Politics', 43 Am J Juris 25, 45 (1998) (arguing that pleading one's case before an impartial yet unelected court is likely more effective in fulfilling one's autonomy than being one of the millions to elect one's lawmakers).

240 Niklas Luhmann, *Vertrauen* (n 71) 71.

241 Niklas Luhmann, 'Komplexität und Demokratie' (n 157) 39. For another theoretical objection to the justificatory potential of participation rights, see, e.g., Ronald Dworkin, *Sovereign Virtue* (n 239) 191 (highlighting that equal participation rights do too little to differentiate meaningful democracies from authoritarian states because citizens of the latter also wield political power equally, given that no one has any).

242 See Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 191.

ship between the complexity that the legislators are asked to decrease and the public's general apathy in matters political.

For starters, Luhmann emphasizes that legislation must decrease an extreme amount of complexity to enact law and to thus fulfill the political system's function. The election that determines the legislature's composition fails to decrease any complexity on its own, leaving the parliamentarians to do what the voters could not; in addition, legislation is not programmed.²⁴³ Crucially, parliamentary debate alone will not suffice to reduce complexity and help legislators agree on a decision. Instead, the parliamentarians must resort to unofficial, partly concealed means of facilitating the law-making process, Luhmann writes.²⁴⁴

Thus, any deliberative assembly splinters into groups or factions that substitute allegiance and partisanship for truth and persuasiveness. This tendency facilitates decision-making, Luhmann argues, because it demarcates the boundaries between cooperation and competition—boundaries that are blurred in simple face-to-face encounters.²⁴⁵ Furthermore, parliamentary assemblies naturally give rise to contact systems,²⁴⁶ which decrease complexity because they allow individual parliamentarians to know what they need to say to elicit the reaction they desire.²⁴⁷ Finally, Luhmann points to empirical studies of American legislation²⁴⁸ to argue that lawmakers expect their colleagues to be consistent in the presentation of their opinions. Arguments once voiced thus bind the parliamentarians and diminish their room for maneuver.²⁴⁹

More concretely, Luhmann stresses that legislation is advanced not through the back-and-forth of deliberative assemblies but through tough negotiations and artful bargaining behind closed doors. Legislators can safeguard the effectiveness of their decision-making by relying on external expert opinion, strategizing to avoid parliamentary defeat, alternating the public exchange of opinion with untransparent deal-making, and resorting to small groups of influential lawmakers to hammer out the final details.²⁵⁰

243 See *id.*, 154.

244 *Id.*, 185.

245 *Id.*, 185–6.

246 On contact systems, see above, subsection III.A.4.

247 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 186–7.

248 E.g., James D Barber, *The Lawmakers: Recruitment and Adaptation to Legislative Life* (Yale University Press, New Haven, 1965) 159–60.

249 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 187–8.

250 *Id.*, 189–90.

The public will care little about concrete law-making processes, Luhmann adds. Life has too much to offer for us to expect people to closely follow the legislative process's ups and downs.²⁵¹ As a result, galvanizing the public and creating a movement for change requires substantial effort. Luhmann argues that only seasoned actors within the political system can muster this effort because they are versed in the art of creating new political controversies and elevating them in the public's consciousness. Consequently, the legislative process defangs potential protest by creating a high threshold for outsiders.²⁵² Parliamentary debate—i.e., the official face of law-making—contributes to this effect because it bars participants from entertaining policy-making reasons that they could not defend in public.²⁵³

IV. Critiquing Legitimation durch Verfahren

Over the years, legions of scholars have criticized Luhmann's arguments in *Legitimation durch Verfahren*.²⁵⁴ In presenting and discussing some of their points, I will again distinguish between what I consider to be the book's two central claims: first, that the question of whether government decisions are justifiable is immaterial to the concept of political legitimacy (A); second, that we can expect people to comply with the government's decisions in part because government proceedings absorb the protest of those who may disagree with their outcome—and not because people believe in the government's legitimacy (B).

251 *Id.*, 191.

252 See *ibid.*

253 *Id.*, 190, and Niklas Luhmann, *A Sociological Theory of Law* (n 69) 258.

254 See, e.g., Hubert Rottluthner, 'Zur Soziologie richterlichen Handelns (II)', 4 Kritische Justiz 60, 72–88 (1971); Johannes Weiß, 'Legitimationsbegriff und Legitimationsleistung der Systemtheorie Niklas Luhmanns', 18 Politische Vierteljahresschrift 74, 77–82 (1977); Claus Offe, 'Politische Legitimation durch Mehrheitsentscheidung?', in Bernd Guggenberger and Claus Offe (eds), *An den Grenzen der Mehrheitsdemokratie: Politik und Soziologie der Mehrheitsregel* (Westdeutscher Verlag, Opladen, 1984) 150, 176–8.

A. Justifiability and the Concept of Political Legitimacy

The first author whose critique I wish to present is Habermas, whose rival conception of legitimate law we briefly looked at above (1). The second and third are Stefan Lange and Chris Thornhill, who exemplify the more recent critical response to Luhmann's political sociology (2).²⁵⁵ Finally, I will present my own thoughts (3).

1. Jürgen Habermas's Debate with Niklas Luhmann

As we saw above, Habermas argued that meaning originates in communicative action; that communicative action is only successful if its subjects can accept the validity claims implicit in each utterance; and that the government thus implies its law is justifiable when it asks people to comply with it.²⁵⁶ To deny this, he adds, we would have to posit that communicative action no longer implies validity claims. And he, for one, sees no reason for doing so.²⁵⁷ Instead, we should further democratize society, thus creating the conditions for the discourse that enables us to reach an understanding about contested validity claims.²⁵⁸

Habermas acknowledges that the political system would currently be incapable of justifying itself in a discourse.²⁵⁹ What it does instead, he writes, is promote an ideology, that is, a merely *apparent* justification (which Habermas calls a 'legitimation').²⁶⁰ Writing in the late 1960s, he argued that technocracy, whereby government action is 'designed to compensate for the dysfunctions of free exchange', represented capitalist democracies' new

255 It would be almost impossible to provide an exhaustive account of the more recent reception of Luhmann's theory. But it appears that little of that reception has focused on his theory of political legitimacy anyway. See Chris Thornhill, 'Niklas Luhmann: A Sociological Transformation of Political Legitimacy?' (n 54) 47.

256 See notes 134–137 and accompanying text.

257 See Jürgen Habermas, 'Legitimationsprobleme im modernen Staat' (n 130) 46.

258 Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 265–6. On the concept of discourse in this phase of Habermas's work, see, e.g., Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' (n 132) 115, 117.

259 Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 266.

260 *Id.*, 244.

ideology.²⁶¹ It is 'oriented toward the elimination of dysfunctions and the avoidance of risks that threaten the system: not, in other words, toward the *realization of practical goals* but toward the *solution of technical problems*.'²⁶² This requires moving away from public discussions, thereby depoliticizing 'the mass of the population'.²⁶³ Habermas adds that Luhmann's theory of legitimate law contributes to this depoliticization and thus complements the governing ideology of technocracy precisely because it leaves no room for the discussion of practical questions.²⁶⁴

2. Stefan Lange and Chris Thornhill's Nuanced Appraisal

In more recent years, Stefan Lange and Chris Thornhill have argued that Luhmann's decision to remove the notion of implied justifiability from the concept of political legitimacy leaves many questions unanswered. For instance, Lange takes issue with Luhmann's account of the public's role in making law legitimate. According to Luhmann, the more people disengage from politics, the better the political system can entangle and neutralize those who refuse to disengage. Lange objects that this premise conflicts with Luhmann's objective of preventing societal politicization. According to Luhmann, fundamental rights are crucial to this objective because they help prevent the political system colonize society's other functional subsystems.²⁶⁵ For Lange, however, it is unlikely that people will vindicate their fundamental rights—thereby maintaining other functional systems' autonomy—if they are too disinterested in politics. To make use of their rights efficiently, people require the sort of normative convictions that Luhmann deems improbable in a functionally differentiated society.²⁶⁶

In addition, both Lange and Thornhill doubt that the political system requires no extra-systemic help to legitimate its decisions. On Luhmann's theory, the political system would fail in its function of adjudicating extra-systemic conflict if it had to rely on more than its own resources. Today,

261 Jürgen Habermas, "Technology and Science as "Ideology", in *Toward a Rational Society: Student Protest, Science, and Politics* (Jeremy J Shapiro tr, Beacon Press, Boston, 1970) 81, 102.

262 *Id.*, 103.

263 *Id.*, 103–4.

264 Jürgen Habermas, "Theorie der Gesellschaft oder Sozialtechnologie?" (n 104) 266–7.

265 See n 160.

266 Stefan Lange, *Niklas Luhmanns Theorie der Politik: Eine Abklärung der Staatsgesellschaft* (Westdeutscher Verlag, Wiesbaden, 2003) 138.

however, the political system also provides society with a welfare state, writes Lange; and to do so, it must siphon funds from the economic system, which it does by taxing its output.²⁶⁷ Consequently, Luhmann appears to fail in his stated aim of both ridding us of an obsolete conception of rationality and adequately portraying the modern state.²⁶⁸

Thornhill complements Lange's objection with a more theoretical argument. If the political system's function is to adjudicate conflicts that arise between different subsystems of society, its decisions will necessarily play out *within* those systems. Consequently, they will likely only manage to adjudicate conflicts if they accord with those systems' specific rationality, argues Thornhill.²⁶⁹ I understand this objection as revealing an apparent contradiction in Luhmann's theory of legitimate law. According to the latter, the political system adjudicates conflicts between *systems*. But to do so effectively, *people*—that is, individuals—must accept its decisions unquestioningly. Because social systems consist of actions, not individuals,²⁷⁰ the question thus remains which mechanisms within these systems help individuals trust the law and learn to live with its development. And it is unlikely that none of the systems employs the sort of normative principles that Luhmann declares irrelevant.

Yet both Lange and Thornhill have also defended Luhmann's theory. From the beginning, critics have pointed out that Luhmann's political sociology is reminiscent of decisionist theories such as Carl Schmitt's.²⁷¹ Schmitt emphasized that the fact a decision has been made is frequently more significant than the decision's content.²⁷² But there is a crucial difference between Schmitt and Luhmann, Lange and Thornhill argue. The former stressed the importance of social homogeneity for democracy²⁷³ and lamented the pluralistic ascent of social and economic interest groups.²⁷⁴ In other words, he advocated re-politicizing society. Luhmann, by contrast,

267 See Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 140.

268 *Ibid.*

269 See Chris Thornhill, 'Niklas Luhmann' (n 54) 47.

270 See n 99 and accompanying text.

271 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 242–3.

272 See, e.g., Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, The University of Chicago Press, Chicago, 2005) 6.

273 Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus* (10th edn, Duncker & Humblot, Berlin, 2017 [1923]) 13–4.

274 Carl Schmitt, 'Der Hüter der Verfassung', 55 *Archiv des öffentlichen Rechts* 161, 235 (1929).

was perfectly content with accepting ‘polycentricity as the evolved condition of modern societal pluralism’.²⁷⁵ In fact, Luhmann’s sociology reveals a clear preference for functional differentiation.²⁷⁶

3. Putting Luhmann’s Skepticism of Justifiability in Perspective

I agree with Lange and Thornhill that Schmitt’s and Luhmann’s decisionism are as distinct from one another as they may be similar. Thus, Schmitt’s decisionism sought to ensure that the state can wage war against its international adversaries.²⁷⁷ Because the concept of the state ‘presupposes the concept of the political’,²⁷⁸ one might say, therefore, that Schmitt sought to decenter the state but not the political.²⁷⁹ By contrast, Luhmann’s decisionism was a response to the diversity we encounter in a functionally differentiated society. In other words, Luhmann sought to decenter both the state *and* the political.

Yet I also agree with the abovementioned scholars that Luhmann’s conceptualization of legitimate authority is ultimately unpersuasive. That is because Luhmann fails to eradicate the notion of justifiability from his very own theory of procedural legitimation.

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- 275 Chris Thornhill, ‘Niklas Luhmann, Carl Schmitt and the Modern Form of the Political’, 10 *Eur J Soc Theory* 499, 507–8 (2007). See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 146 (observing that Luhmann stepped away from Schmitt’s ontological approach by replacing Schmitt’s emphasis on sovereignty with functional analysis and Schmitt’s focus on the state and its people with the distinction between systems and their environment).
 - 276 See Michael King and Chris Thornhill, *Niklas Luhmann’s Theory of Politics and Law* (n 74) 69–70; Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 143; and Chris Thornhill, ‘Luhmann and Marx: Social Theory and Social Freedom’, in Anders la Cour and Andreas Philippopoulos-Mihalopoulos (eds), *Luhmann Observed: Radical Theoretical Encounters* (Palgrave Macmillan, Houndmills, 2013) 263, 266.
 - 277 See, e.g., Armin von Bogdandy, ‘Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen“: Zugleich ein Beitrag zur Theoriebildung im Öffentlichen Recht’, 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg J Int’l L) 877, 889–90 (2017).
 - 278 Carl Schmitt, ‘The Concept of the Political’, in *The Concept of the Political* (George Schwab tr, The University of Chicago Press, Chicago, 2007) 19.
 - 279 See Armin von Bogdandy, ‘Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen“’ (n 277) 885.

Central to Luhmann's account of political stability are both the notion of (systemic) trust and people's belief in outcome equality.²⁸⁰ As we saw above, people must have trust in the overall functioning of the judiciary, and they must believe that they, too, could successfully vindicate their rights in court. If they do not, they will likely sympathize with disgruntled litigants who attempt to extend their courtroom conflict to society at large, and judicial proceedings will fail to absorb the kind of protest that might imperil the political system.²⁸¹ Furthermore, we will see in Chapter 3 that we can only expect people to adjust to new legislation, according to Luhmann, if they feel reasonably secure and, again, believe they have an equal chance of seeing policies they like become law.²⁸²

Luhmann's theory of procedural legitimation thus relies on people's expectations about the political system. But as Peter Graf Kielmansegg has pointed out, it is hard to dissociate such expectations from our background convictions about the grounds of political legitimacy.²⁸³ Luhmann does not address this problem directly, as he does not elucidate the nature of the expectations required by his theory. The one time he does, however, confirms Kielmansegg's objection. Thus, Luhmann equates systemic trust with people's abstract belief that the political system will enable them to lead a dignified life (*eine menschenwürdige Existenz*).²⁸⁴ But people's conception of a dignified life may include the expectation that they will not be persecuted for their political opinions, and this seems indistinguishable from the conviction that a regime which *does* engage in persecution is unjustifiable.

Luhmann was likely aware of this equivocation. Consider the following caveat he added to one of his several definitions of legitimate authority. At the beginning of *Legitimation durch Verfahren*, he writes that '[o]ne can define legitimacy as a generalized willingness to acquiesce, *within certain tolerance limits*, in decisions whose content remains to be determined.'²⁸⁵ He does not specify these 'tolerance limits'. They imply, however, that peo-

280 See notes 167–168 and accompanying text.

281 See n 206 and accompanying text.

282 See Chapter 3, subsections IV.C.2. and 3.

283 See Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie', 12 *Politische Vierteljahresschrift* 367, 391–3 (1971).

284 Niklas Luhmann, *Vertrauen* (n 71) 72.

285 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 28 (my translation; emphasis added) ('eine generalisierte Bereitschaft, inhaltlich noch unbestimmte Entscheidungen innerhalb gewisser Toleranzgrenzen hinzunehmen').

ple continue to set store by their government's justifiability and that they merely refrain from second-guessing the legitimacy of the government's decisions on a *day-to-day* basis.²⁸⁶

Moreover, there can be little doubt that Luhmann not only knew that the idea of justifiability remains important but also concluded, for himself, where to look for the political regime's legitimation. According to his sociology, limited government is justified because of the benefits we accrue thanks to society's functional differentiation. And while Luhmann denied that his theory of evolution considers functional differentiation inherently valuable,²⁸⁷ his take on politicization suggests otherwise.

On his version of systems theory, politicization occurs when the political system abandons its residual function—i.e., to adjudicate conflicts that the other functional subsystems cannot manage on their own—and starts deciding matters more properly left to those systems, thus undoing society's differentiation.²⁸⁸ Luhmann did not view this de-differentiation kindly: He writes that once the political takes precedence over the economic, we run the risk of repeating the totalitarian catastrophes of the twentieth century.²⁸⁹ What he appears to be telling us is that only a small government can be justified.²⁹⁰

Consequently, the value of Luhmann's theory of procedural legitimation does not lie in its insistence that justifiability is irrelevant to the concept of political legitimacy. It is valuable because it throws into relief that inquiries into the grounds of political legitimacy may be less important, practically speaking, than the study of what makes political systems stable.²⁹¹ Of course, maintaining the traditional concept of legitimacy does not bar us from *also* investigating the causes of political stability. But perhaps such an investigation would be unduly biased in favor of those stability sources

286 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 264.

287 Niklas Luhmann, 'Gesellschaft' (n 125) 151.

288 See Niklas Luhmann, *Grundrechte als Institution* (n 53) 24.

289 Niklas Luhmann, 'Positivität des Rechts als Voraussetzung einer modernen Gesellschaft' (n 98) 201. See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 143.

290 See also Stefan Lange, *Niklas Luhmanns Theorie der Politik* (n 266) 139–40 (concluding that Luhmann's theory of procedural legitimation considers the welfare state unjustifiable).

291 See Jürgen Habermas, 'Theorie der Gesellschaft oder Sozialtechnologie?' (n 104) 264–5, and Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie' (n 283) 396.

that originate in people's beliefs about their government's legitimacy. By stripping the concept of legitimacy of the notion of justifiability, Luhmann forces us to focus on sources of stability that are less reliant on such beliefs.

Whether the sources he makes out are plausible and whether they are truly equal in importance to legitimacy beliefs is a different matter, of course. We will discuss these questions in the following subsection.

B. The Sources of Political Stability

When comparing alternative explanations for why people obey the law with Luhmann's analysis of political stability, it quickly becomes apparent that his disregard for legitimacy beliefs is not widely shared.²⁹² As mentioned above, David Easton, for instance, considered political stability impossible absent people's belief that the regime whose laws they are asked to obey is justified.²⁹³ For the most part, this belief originates in socialization processes, he added.²⁹⁴

Research into the significance of legal socialization has enjoyed a renaissance in recent years.²⁹⁵ Legal socialization aims 'to instill in people a felt obligation or responsibility to follow laws and accept legal authority'.²⁹⁶ It does so, ideally, by 'instilling values and developing attitudes' in children that help them better understand when to comply with the law and when to reject it as fundamentally immoral.²⁹⁷ These values concern the way people expect to be treated (e.g., respectfully), the manner in which the authorities are expected to make a decision (e.g., after hearing those concerned), and the areas they are allowed to regulate (e.g., none related to one's lifestyle).²⁹⁸ Three kinds of actors are deemed especially significant for legal socialization: one's parents, one's teachers, and all legal authorities—such as the juvenile justice system—with whom one comes into contact. If these actors'

292 For a comparison of Luhmann's sociology with recent theories of why people acquiesce in *constitutional-court* rulings, see Chapter 3, subsection IV.D.

293 See n 65.

294 David Easton, *A Systems Analysis of Political Life* (n 65) 280.

295 See Tom R Tyler, 'Legal socialization: Back to the future', 77 *J Soc Issues* 663, 663–4 (2021).

296 Tom R Tyler and Rick Trinkner, *Why Children Follow Rules: Legal Socialization and the Development of Legitimacy* (OUP, New York, 2018) 3.

297 *Id.*, 30.

298 *Id.*, 30–1.

behavior comports with the abovementioned values, they can create the belief in children that they ought to obey authorities that act in this way.²⁹⁹

Perhaps, then, we can expect the parties to judicial proceedings to acquiesce in the outcome not because they become aware of their isolation but because they believe they ought to comply with a judgment delivered after a fair, impartial, and respectful decision-making process. Therefore, Luhmann may have been mistaken to focus his inquiry on the individualizing nature of proceedings and disregard the significance of *procedure*.³⁰⁰

However, Tom R Tyler's strand of legal-socialization research adopts a normative perspective on compliance.³⁰¹ In other words, it analyzes the mechanisms that promote voluntary compliance with the law.³⁰² An instrumental perspective, which focuses on people's reactions to incentives and penalties,³⁰³ remains important as well. Thus, Tyler himself admits that authorities also require deterrence—such as the threat of sanctions—if they wish to ensure compliance.³⁰⁴ A recent study has borne out this assumption.³⁰⁵ In fact, it also showed that people's character—namely, their impulsivity—likewise has an impact on whether they feel obligated to obey the law.³⁰⁶ Most importantly, it concluded that 73 to 74 percent of the variation in people's felt obligation to obey the law is not yet accounted for.³⁰⁷

Luhmann would likely have felt vindicated by this finding. The variety of personalities required for functional differentiation precludes grounding

299 See *id.*, 11 and the references cited therein.

300 On the irrelevance of procedure for *Legitimation durch Verfahren*, Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 36–7, 42.

301 See Tom R Tyler and Rick Trinkner, *Why Children Follow Rules* (n 296) 17.

302 See Tom R Tyler, *Why People Obey the Law* (n 58) 3–4.

303 *Id.*, 3.

304 See Tom R Tyler and Rick Trinkner, *Why Children Follow Rules* (n 296) 16–7.

305 See Adam D Fine and Benjamin van Rooij, 'Legal socialization: Understanding the obligation to obey the law', 7 J Soc Issues 367, 384 (2021).

306 *Ibid.*

307 *Id.*, 385. Note that there is a terminological inconsistency in the theory of legal socialization here. According to Fine and van Rooij, people may feel obligated to obey the law because they fear being punished if they break it. On their view, then, the perceived obligation to obey the law can suggest that deterrence works. For Tom R Tyler, on the other hand, the perceived obligation to obey the law is distinct from deterrence. Instead, it suggests that the person feeling obligated believes in the law's legitimacy. See Tom R Tyler, *Why People Obey the Law* (n 58) 42–5. For our purposes, this discrepancy is irrelevant, however: All that matters is that there is a link between deterrence and compliance.

political stability in one single source (such as legal socialization), he suggested. That is why we ought not to place all our hope in civic-minded, cosmopolitan people who understand and accept they should follow legally enacted law. Because we need all kinds of people, we must find ways to ensure compliance regardless of individuals' personal attitudes.³⁰⁸

It follows that there is still room for the Luhmannian approach—namely, in the instrumentalist perspective on compliance. I suggest conceptualizing his theory of protest absorption as an explanation for how the political system can, without resorting to force, deter people from inciting unrest regardless of whether they consider the court's decision-making process fair. Luhmann teaches us that there is no need for coercion because the social-psychological mechanisms of individualization and isolation already immure litigants who do not feel obligated to obey the judges' verdict.

Consequently, the research into legal socialization and Luhmann's systems-theoretical hypothesis complement each other. The former explains why observers of judicial and legislative processes may conclude that the judiciary or the legislature is working well enough and choose, for that reason, to ignore querulous individuals who seek to perpetuate and enlarge political conflicts. In other words, it throws into relief the mechanisms that help people develop systemic trust.³⁰⁹ The latter, by contrast, demonstrates that we do not always need the police to enforce the law; society, it teaches us, will do the same by disincentivizing and thus deterring potential lawbreakers.

V. Conclusion

In trying to explain the reasons for political stability, Luhmann addressed a problem that John Rawls would later consider 'fundamental to political philosophy'.³¹⁰ Rawls, of course, was interested in stability for 'the right

308 See Niklas Luhmann, *Vertrauen* (n 71) 78.

309 See also Peter Graf Kielmansegg, 'Legitimität als analytische Kategorie' (n 283) 397 (arguing that the social-psychological mechanisms Luhmann describes will only work if people already believe in the government's legitimacy), and Stefan Machura, 'Legitimation durch Verfahren – was bleibt?', 22 *Soziale Systeme* 331, 348–50 (2017) (explaining that research into procedural justice helps us better understand how observers experience the government's proceedings).

310 John Rawls, *Political Liberalism* (n 57) xix.

reasons',³¹¹ in finding out how 'deeply opposed though reasonable comprehensive doctrines may live together and all affirm the political conception of a constitutional regime'.³¹² By contrast, Luhmann was uninterested in such consensus. He argued that too much conformity would diminish the amount of complexity which functional systems can manage. Ultimately, it may lead to totalitarianism.³¹³

The problem with his argument is that combatting totalitarianism undoubtedly requires *some* conformity as well. As mentioned above, it is unlikely that people will vindicate their constitutional rights—thereby maintaining functional differentiation—if too few of them affirm what Rawls calls the political conception of a constitutional regime. Therefore, Luhmann had good reason to focus on the social-psychological, non-normative causes of political stability; but he was wrong to suggest that normative causes are insignificant by comparison.

It follows that Luhmann's decision to disregard the notion of justifiability is unconvincing. Yet *Legitimation durch Verfahren* remains valuable because it suggests novel non-normative reasons for political stability. In doing so, it has the potential to help the social-psychological theory of compliance better understand why we obey the law.

The ensuing chapter will reflect this conclusion in the following way. In discussing whether judicial review of legislation is legitimate, it will refrain from adopting Luhmann's concept of legitimacy. Instead, it will conceptualize legitimacy as involving a claim to justifiability. Legitimacy, the premise goes, safeguards our political autonomy as justificatory equals. However, the chapter will also argue that Luhmann's theory of stability—coupled with his concept of personality development through functional differentiation—helps explain how constitutional courts can better protect our *legal* autonomy.

311 Brian Barry, 'John Rawls and the Search for Stability' (n 57) 882.

312 John Rawls, *Political Liberalism* (n 57) xx.

313 Niklas Luhmann, *Legitimation durch Verfahren* (n 52) 251–3.

