

Chapter 15

Religious Law as a Social System

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The End of the Beginning

This chapter explores whether it is time to make a pact with the devil. The debate on legal pluralism is characterised by a paradox: on the one hand, as the reaction to Williams (2008) lecture and subsequent headlines like ‘Sharia courts “as consensual as rape”, House of Lords told’ shows,¹ legal pluralism is considered abhorrent within the political and media debate; yet, on the other hand, socio-legal scholars have come to regard legal pluralism as ‘an accepted fact of life’ (Griffiths, 2013: 269). This fact of legal pluralism is embraced by both post-modernist thinkers who ‘love’ its ‘ambivalent, double-faced character’ (Teubner, 1991: 1443) and legal theorists more cynical about the excesses of post-modernity theory who nevertheless profess that legal pluralism now provides the ‘most convincing and workable theory of law’ that best ‘captures the nature of law in the contemporary era’ (Douglas-Scott, 2013: 23). The contributions to this volume underline this conclusion, underscoring that ‘it is normal for more than one “legal” system to co-exist in the same social arena’ (Tamanaha, 2001: 171). However, given the normality of legal pluralism, it may be questioned what can be gained by invoking the term either descriptively or normatively. How can the concept of legal pluralism advance the debate if it asserts so very little, if it amounts to nothing more than Shachar’s (2001) concept of ‘joint governance’?

Tamanaha (2001:171) has forcibly argued that, despite the apparent success and popularity of legal pluralism, the concept is ‘fundamentally flawed’. It has taken ‘socio-legal studies down a

¹ *Daily Telegraph*, 20 October 2010. <<http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html>> Baroness Donaghy actually expressed her concern that ‘the definition of mutuality is sometimes being stretched to such limits that a woman is said to consent to a process when in practice, because of a language barrier, huge cultural or family pressure, ignorance of the law, a misplaced faith in the system or a threat of complete isolation, that mutuality is as consensual as rape’: HL Deb (2012) c 1687. Note, however, that the usual misunderstandings and hyperbole surrounding the fear of Sharia was present during the debate on the Second Reading of Baroness Cox’s Arbitration and Mediation Services (Equality) Bill. Baroness Cox waned of a ‘rapidly developing alternative quasi-legal system’ that had led ‘many women [to] believe that Sharia courts are real courts’: (col 1683) while Lord Swinfen expressed his relief that ‘we got rid of’ the ecclesiastical courts following the Middle Ages (col 1704), which must have come as news to the Church of England!

fruitless path' because, although there have been 'many confident pronouncements, there is little to show by way of concrete results' (2001: 171-172). For Tamanaha, legal pluralist scholars have tended to hold 'essentialist assumptions' about law: they have assumed that law consists of a singular phenomenon which can be defined but have then failed to agree upon a definition of law meaning that their work suffers 'from a persistent inability to distinguish what is legal from what is social' (2001: 171, 174). While advocates of legal pluralism 'agree on the initial proposition that there is a plurality of law in all social arenas, legal pluralists immediately diverge on what this assertion entails because there is no agreement on the underlying concept of law' (Tamanaha, 2001: 172). Although defining law is a goal that has eluded legal theorists generally, this failure is particularly problematic in relation to legal pluralism since its advocates have tended to take one of two approaches. The first approach is a conservative one which explicitly or implicitly 'takes state law to represent the epitome of law' (Tamanaha, 2001: 178). Such legal pluralists unwittingly perpetuate the legal centralist beliefs about the pre-eminence of State law which legal pluralism is supposed to undermine (Tamanaha, 2001: 179).² The second approach is to take a generous expansive definition of law which 'raises the imminent danger of sliding to the conclusion that all forms of social control are law' (Tamanaha, 2001: 173). This means that the term law ceases to have any distinctive meaning as 'other forms of normative order, like moral norms, or customs, habits, and even table manners are swallowed up to become law' (2001: 174). For Tamanaha (2008: 393) this actually 'hinders a more acute analysis of the many different forms of social regulation involved'. He contends that what lawyers refer to as legal pluralism may be better designated as normative pluralism or regulatory pluralism given that they are simply articulating 'the old idea that society is filled with a multiplicity of normative orders or regulatory orders'.

Tamanaha is by no means alone in expressing these doubts.³ As he points out (2008: 393), even the founders of modern legal pluralism now recognise such problems. John Griffiths (2005: 63-64) has now argued that the word law should be 'abandoned altogether for purposes of theory

² See also Kleinhans and MacDonald (1997: 35-36) who criticise conventional accounts of legal pluralism for focusing on 'resistance to State law, and the accommodations that State law necessarily makes to other normative orders' with the result that they tend to reify "norm-generating communities" as surrogates for the State' and see people 'only as they may be constituted by antecedent State law'.

³ See also Merry (1988: 878-879) and Nobles and Schiff (2012: 265-266). Some legal pluralist work, such as that of Melissaris (2009), has attempted to overcome this impasse.

formation in sociology of law' with the terms 'normative pluralism' or 'pluralism in social control' as his preferred candidates to replace legal pluralism. And Sally Falk Moore (2005: 357) has written that distinctions must be made between governmental and non-governmental norms of social control. Chapter 1 of this collection recognised this problem of distinguishing between social norms and legal orders and coined the term Heterogeneous and Autonomous Legal Orders (HALOs) to describe and define the second category. However, the difficulty of drawing a line between legal and other social norms has been underlined by subsequent chapters where authors have taken radically different viewpoints. Singler has argued that the 'legalese' adopted within Scientology and Jediism should not be regarded as representing a *nomos* or a separate law while by contrast Codling contended the term HALO should extend to the social orders produced within schools and universities as well as social orderings such as gender and class. It would appear that the HALO concept, together with conventional accounts of legal pluralism, have failed to provide a means by which joint governance can be recognised (Shachar, 2001) while simultaneously allowing for a distinction to be made between legal and social norms. It is not surprising, therefore that socio-legal commentators have looked elsewhere in the sociology of law for inspiration.⁴ A number of commentators⁵ have debated the merits of social systems theory. Although derived in part from the sociological theories of Talcott Parsons (Banaker and Travers, 2013: 53), today social systems theory is most closely identified with the works of Niklas Luhmann,⁶ who is a rare example of a late twentieth century sociologist who was concerned with both law and religion (amongst other topics).⁷ The following section will outline Luhmann's social theory, while the final section will explore whether it can enhance our understanding of religion and legal pluralism.

Systematic Observations

Shortly before his death in 1998, during a talk in London and apparently with some relish, Niklas Luhmann referred to himself as 'the devil' (King and Thornhill, 2003: 203). It is not difficult to

⁴ Indeed, the development of strands of legal pluralism, as discussed in Codling's chapter, can be seen as evidence of this.

⁵ Teubner (1991; 1997); Tamanaha, (2001: chapter 7); Melissaris, (2009:35-37); Nobles and Schiff, (2012; 2013: chapter 4).

⁶ See, however, Bausch (2001) for a full discussion of the field.

⁷ In terms of English translations of Luhmann's work, for his leading works on general sociological theory see Luhmann (1984/1995); (1997 /2012); and (2002/ 2013). For his leading work on religion see Luhmann (2000 / 2013) and on law see Luhmann (1983 / 2014); (1993 / 2004).

see the appropriateness of this self-designation. Luhmann remains a controversial figure in sociology (and an increasing range of cognate disciplines) in his own native Germany and much further afield. This has meant that the mere mention of his name or reference to social systems theory can provoke certain, often negative, reactions. For this reason, there are a number of difficulties and common misunderstandings that need to be noted before attempting to summarise his social systems theory.⁸ First, social systems theory is not a meta-theory which allows no room for alternative explanations. Although his life's project was: 'the theory of society; term: thirty years costs: none' (Luhmann, 1997 / 2012: xi), Luhmann did not see his work as providing 'the last word or ... an exclusive or true account of what society, in its totality, is and how it operates'; rather he sought to offer 'a social theory of social theories – a social theory which considered multiple ways of perceiving and understanding society' (King and Thornhill, 2003: 1).

Second, although it cannot be doubted that Luhmann's theory is complex and multifaceted (King and Thornhill, 2003: 205; Nobles and Schiff, 2012: 266), this is not necessarily complexity for complexity's sake (King and Thornhill, 2003: 1). As Luhmann noted: 'A complex society cannot be understood other than by a complex theory' (1993 / 2004: 67). Third, there are many reasons why this complexity is not Luhmann's fault. It results from a range of factors such as translation issues (including the significant delay in translating many of his works into English and French);⁹ the vast secondary literature that his work has motivated leading to a number of different interpretations (Priban, 2010);¹⁰ and the dynamic nature of Luhmann's work itself. Luhmann's arguments developed overtime in light of criticism and self-reflection (Nobles and Schiff, 2012: 267), undergoing a self-professed 'paradigm change' (Luhmann, 1984 / 1995: 1, on which see Gilgen, 2013: viii) which had a considerable effect upon his theories on both law and

⁸ See King and Thornhill (2003: 204) for a discussion and refutation of 'eight common critiques' of Luhmann's work.

⁹ On which see Albrow (2014) and Nobles and Schiff (2004: 3)

¹⁰ The secondary literature is vast. Major works on law include Teubner (1988; 1991; 1993; 1997), Teubner and Febbrajo (1992); King and Thornhill (2003); Philippopoulos-Mihalopolous (2009); Nobles and Schiff (2006; 2013); Priban and Nelken (2001) and Febbrajo and Harste (2013). Important secondary accounts of Luhmann's work on religion include Beyer (2006) and Pace (2011). To date, only King (1995) has explored Luhmann's work in relation to law and religion.

religion.¹¹ This should be seen as a strength rather than a weakness of his work and should be borne in mind in relation to criticisms that stress Luhmann's conservatism.¹² Indeed, the convoluted nature of Luhmann's argument is an inevitable by-product of the fact that 'Luhmann weaves together several different strands of theoretical reflection, derived from quite different intellectual disciplines, into his social theory' (King and Thornhill, 2003: 204).

However, it would be naive to assume that Luhmann's controversial reputation results merely from the complexity, denseness and mass of his work. Luhmann's argument is controversial because he took what was already an often derided social theory – Parsons' general systems theory –¹³ and then developed it a way that represent a significant break with (and therefore challenge to) long-standing sociological orthodoxies. Luhmann regarded modern sociology as being 'in a profound theoretical crisis' (2002 / 2013: 1), failing to produce 'anything approaching an adequate theory of society' (1997 / 2012: 2; 1984 / 1995: xlv). To remedy this, his work rebooted sociological theory correcting what he considered to be a wrong-turn made at the time of the Enlightenment.¹⁴ For Luhmann, social and political theory following the Enlightenment erred in being 'obsessively preoccupied' with the essence or nature of the human being and therefore lacked the means by which it could comprehend 'the social as such' (King and Thornhill, 2003: 132). Luhmann did not abandon the theoretical plan behind the Enlightenment but dismissed 'its claim that people, not systems, are at the origin of social evolution' (King and Thornhill, 2003: 133).¹⁵ For Luhmann, the social change that resulted from the Enlightenment – the rise of Reason and the rationalisation of society – was not the result of the actions of people

¹¹ Nobles and Schiff (2012: 267 fn5) note that the most significant change within Luhmann's legal writings were between the first edition of *A Sociological Theory of Law* (Luhmann, 1972 / 1985) and *Law as a Social System* (Luhmann, 1993 / 2004). The development of his thought was shown by the new conclusion he added to the second edition of *A Sociological Theory of Law* (Luhmann, 1983/ 2014). In terms of religion, Laermans and Verschraegen (2001) highlight the developments in his thought after the publication of *Funktion der Religion* (Luhmann, 1977), culminating in his posthumous publication *A Systems Theory of Religion* (Luhmann, 2000 / 2013).

¹² King and Thornhill (2003: 34) Indeed, Moeller (2011) has argued that the political environment in which Luhmann lived led him to disguise his radicalism.

¹³ Laermans, and Verschraegen (2001: 9) note that the 'general aversion to systems theory in the post-Parsonian age was probably also responsible for the striking lack of interest' in Luhmann's theory within the sociology of religion. Parsons work has also been afforded little attention in the sociology of law: Banaker and Travers (2013: 53).

¹⁴ As King and Thornhill (2003: 129) note Luhmann positioned his theory 'as an attempt to undermine and critically to refigure the central principles of political and legal reflection deriving from the European Enlightenment'

¹⁵ This leads to further complexity since as King and Thornhill (2003: 147) note it means that 'Luhmann's sociology is extremely contradictory and dialectical, for it expressly contains both a critique and an endorsement of the defining components of liberal political theory and philosophy'.

but of systems.¹⁶ Luhmann insisted that systems rather than people are ‘the genuine “medium of Enlightenment”’; it was (and is) ‘systems themselves, not integral people, which actually stimulate and perpetuate the processes of societal rationalization.’ (King and Thornhill, 2003: 133).¹⁷

As Moeller (2006: ix) points out, Luhmann’s basic claim that ‘society does not consist of human beings can be seen as shocking, as going against common sense, or as absurd’. Many critics of Luhmann’s anti-humanism would accuse it of being all three.¹⁸ However, such criticisms are misplaced. Although it is true that Luhmann sees the claims made for ‘human agency as the shaping force in social life’ as being greatly exaggerated (King and Thornhill, 2003: 215), Luhmann does not actually devalue the role played by human beings. Rather, he simply focuses upon social rather than psychological-organic systems (Luhmann, 1983 / 2014: 104).¹⁹ For Luhmann, people are ““living systems”, which exist as bodies and bodily parts, and “psychic systems”, which produce meaning through consciousness’; these can be contrasted with society which ‘consists of interdependent social systems which make sense of their environments through their communications’ (King and Thornhill, 2003: 7). Luhmann rejects the ‘anthropocentric’ assumptions found in almost all sociological studies by focusing upon social systems as the primary unit of analysis and insisting that these systems consist of communications, not of people (King and Thornhill, 2003: 2). Indeed, in making a distinction between consciousness and communication, he also enables a truly social scientific analysis to occur. As King and Thornhill (2003: 4) point out, Luhmann enables sociology to focus upon what is observable since ‘the thoughts of people are not, whereas communications are’.²⁰ Luhmann does not deny that social and psychological-organic systems are dependent upon one

¹⁶ As King and Thornhill (2003: 132) put it, ‘the rationality which triggers social change, even that which brings social improvement, is not – for Luhmann – the reflexive rationality of concrete people, but the internal rationalization of systems, as they reduce and develop complexity in the process of their self-stabilization’

¹⁷ This distinguishes Luhmann’s work from Parson who could be summarised as being based on the proposition that: ‘Action is system’ (Luhmann, 2002 /2013: 7). By contrast, for Luhmann, ‘the autonomy which characterizes modern society is, in fact, not the autonomy of human beings at all, but the autonomy of systems themselves’ (King and Thornhill, 2003: 141).

¹⁸ For discussion of the literature see, e.g. Cotterrell (2001: 95-98).

¹⁹ As he puts it: ‘In other words: the meaningful context that ties actions to the system of society is a distinct one from the meaningfully guided, but organically based, context of real and possible human actions’ (1983 /2014: 104).

²⁰ As Nobles and Schiff (2012: 166-167) note, this means that: ‘Its hermeneutics are rooted not in the intentions of human actors, but in the meanings generated by those actors through their participation as communicators within subsystems of communication such as law, the economy, science, politics, and education’.

another.²¹ But his central claim is that the two are separate; as he puts it: ‘The social system as a structured system of meaningfully interrelated actions excludes, rather than includes, the concrete human being’ (Luhmann, 1983 / 2014: 104). For Luhmann, individuals are observers of society; observers of the communications produced by social systems which make sense and give meaning to the world (King and Thornhill, 2003: 2, 6). His theory does not deny human agency; it simply does not focus on it.²²

Given these complexities and controversies, summarising Luhmann’s social theory is by no means a straightforward task. However, it is necessary in order to assess the claim that systems theory may provide a ‘lens’ to study legal pluralism (Nobles and Schiff, 2012: 268). As a starting point, it may be observed that systems theory rests upon the notion of functional differentiation,²³ a concept which is well-known within the sociology of religion being a (if not the) core process of secularisation (Sandberg, 2014: 64). Functional differentiation describes the way in which in modern society a plethora of social institutions (or to use Luhmann’s language, social systems) discharge specific functions as opposed to the pre-modern tendency for one specific institution to discharge a plethora of functions.²⁴ For Luhmann, modern society is differentiated into autonomous social systems such as law, religion, politics, science the media and so on. He departs from the classic social theory of Durkheim and Weber by seeing these social systems as reproducing themselves by meaning, rather than being the product of labour divisions or social actions (King and Thornhill, 2003: 11). Each social system has its own functional specification and its own binary code which produces and reproduces the system, keeping it distinct from all other social systems (Luhmann, 1993 / 2004: 93).

Functional specification means that each social system focuses upon ‘a specific problem of society’ (Luhmann, 1993 / 2004: 93). Each social system creates and fulfils its own particular

²¹ In his terminology, they are ‘structurally coupled’ (King and Thornhill, 2003: 7). See discussion of this term below.

²² Indeed, Luhmann (1992: 1422) claimed that his theory ‘could bear the title *Taking Individuals Seriously*, certainly more seriously than our humanistic traditions’.

²³ See, e.g. Luhmann, (1983 /2014: 13, 110); (2000/2013: 81). Luhmann (1993/2004: 71) insists that that ‘the meaning of the concept of function not contain any normative or even teleological connotations’.

²⁴ In secularisation theory, it documents the development whereby religion ceased to perform a range of social functions as other social systems (such as education, law and the media) became autonomous. See, further, Sandberg (2014: 64-65).

function, which becomes particular to that social system.²⁵ This ‘restricts what can be considered as an operation of the system’ since social systems will not discharge functions that belong to other social systems (Luhmann, 1993 / 2004: 93-94). For instance, the function of the social system of law is the maintenance of ‘normative expectations in the face of disappointment’ (Nobles and Schiff, 2004: 8). As Luhmann (1993/ 2004: 147-148) notes:

Concretely, law deals with the function of the stabilization of normative expectations by regulating how they are generalized in relation to their temporal, factual, and social dimensions. Law makes it possible to know which expectations will meet with social approval and which not. Given this certainty of expectations, one can take on the disappointments of everyday life with a higher degree of composure.

Law, alone, fulfils this function. And this is what makes law as a social system distinct from all other social systems.²⁶ By comparison, the social system of religion, alone, ‘tries to observe the paradoxical unity of difference between the observable and the unobservable’ (Laermans and Verschraegen, 1001: 13) and has the ‘function of transforming the indeterminable into the determinable’ (Luhmann, 2000 /2013: 249-250). Each social system produces and reproduces itself through meaningful communication (Luhmann, 1993 /2004: 67).²⁷ Social systems become functional in so far as they become ‘able to organize communications and disseminate them in ways that they and other communicative systems may make use of them’ (King and Thornhill, 2003: 9). This is achieved not only through functional specification but also by means of a ‘binary coding’ (Luhmann, 1993 / 2004: 93).

²⁵ As King and Thornhill (2003: 9, 33-34) argue, unlike other social theorists Luhmann does not use the term ‘functional’ to mean ‘useful’ or to suggest that functional systems are purposively created to ensure the survival of society. Luhmann’s notion of function therefore overcomes ‘one of the major sociological criticisms of functionalism as a social theory – namely, that it is unable to explain social change’. In Luhmann’s theory, ‘social subsystems actually depend upon change for the effectiveness of their internal operations’.

²⁶ Together with the application of the law’s unique binary code (discussed below). As Nobles and Schiff (2004: 17) note, law is not unique in making communications about what ought to occur. However, law’s unique binary code differentiates it from other systems which as morality and religion which contain similar communications.

²⁷ For Luhmann, communication can be contrasted with ‘interaction’ which is the informal exchange of views between individuals. By contrast, communication refers solely to the products of social systems. It would therefore ‘misleading to see Luhmann’s theory as a theory about people engaged in different social activities using different “languages”’: King and Thornhill (2003: 11, 15).

For Luhmann, a code is ‘a guiding distinction by which a system identifies itself and its own relationship to the world’ (2000 / 2013: 45). A code is ‘the basic distinction that a social system applies in order to communicate’ (Moeller, 2006: 216). Each social system applies a code unique to that social system (Nobles and Schiff, 2012: 270). The code allows the system ‘to determine which communications “belong to” the system’ (King and Thornhill, 2003: 24). Coding is always binary in nature, ‘imposing a distinction between two opposing values and effectively excluding third values’ (King and Thornhill, 2003: 25). The only alternative to binary coding is to reject the code, holding that the matter falls outside that social system. For example, matters within politics may subsequently be considered non-political or matters within law may be found to be not justiciable (King and Thornhill, 2003: 26).²⁸

In relation to the social system of law, the coding is legal / illegal (Luhmann, 1993 / 2004: 98-99).²⁹ Any communications that use this binary code become part of the social system of law.³⁰ Luhmann notes that this provides a ‘widening of the margins of what should be included in the concept of the legal system.’ Neither ‘law’ nor ‘the legal system’ is defined by institutions, the status of individuals or ‘organised legal practice’; rather law is a system of communications, which ‘extends to all those communications that are understood as directly relating to the issue of legality or illegality’ (King and Thornhill, 2003: 35, 36). Law is not defined as being part of the State; indeed, for Luhmann, the very concept of the State is ‘a paradox or fiction which the political system itself produces (for simplicity’s sake)’ in order to perpetuate itself (King and Thornhill, 2003: 77). Only law itself can decide what law is. This means that it is ‘not possible in

²⁸ For Luhmann, coding is complemented by programming which ‘fills it with content’ (1993 / 2004: 203). Programming provides ‘the conditions, which that system establishes for when it is appropriate to apply the negative or positive side of the code’ (Nobles and Schiff, 2004: 17). They are ‘necessary filters’ given that ‘without them, the application of codes would appear as crude attempts to reduce everything in the world to simplistic binary propositions’ (King and Thornhill, 2003: 23). The content of programming is contingent and can often serve as a distraction. In law, programming takes the form of the ‘rules’ of law, such as the ‘the formula of “if-when”’ (Luhmann, 1993 / 2004: 197). Lawyers tend to focus on the rules of the game and therefore forget that they are working within a system of binary coding (Luhmann, 1993 / 2004: 203).

²⁹ As Nobles and Schiff (2004: 17) point out, ‘this does not mean that legal is good and illegal is bad, or that legal is just and illegal is unjust. Law operates a binary code whose meaning at the moment of coding is solely a distinction: something that is coded illegal has not been coded legal; and something that has been coded legal has not been coded illegal’.

³⁰ As Nobles and Schiff (2013: 100) note, this does not mean that we are in the presence of the legal system wherever there is the mere presence of a communication which takes the form ‘this is illegal’. They note that references to something being legal or illegal regularly occur in other social systems but there operate as programmes and not as code. They argue that: ‘With code one is looking for the primary distinction of the system – its basal distinction’

modern society for legal arguments to be grounded in natural laws, universal truths or even rationality'; paradoxically, and regardless of the ways in which they are presented, legal arguments 'relate only in law's own internal constructions of the external world' (King and Thornhill, 2003: 51). This shifts the focus from debates on the 'true nature of law' towards asking how law defines its own boundaries and where they are drawn (King and Thornhill, 2003: 42). It also means that other systems accept law's decisions as 'social facts' (King and Thornhill, 2003: 38). This same process occurs within other social systems. Within the social system of religion, the binary code is that of immanence / transcendence and this enables the system to 'perceive what can (and cannot) be adapted as religious communication' (Luhmann, 2000 / 2013: 73).³¹ Each social system uses a particular binary code to differentiate itself and to operate autonomously.³²

In addition to functional specification and binary coding, there are three further concepts within Luhmann's social theory that are of considerable importance, namely autopoiesis, closure and structural coupling. The first concept, 'autopoiesis' can be found in Luhmann's later works and draws upon biological theory. For Luhmann, each social system is 'self-referential'. Each system reproduces itself using its own code and achieves this by referring back to the previous communications of that system (King, 1995: 96-97). In his later work, Luhmann referred to social systems as 'autopoietic' systems on the grounds that they 'produce every type of unity that they require and employ' (Luhmann, 1983 / 2014: 281). Social systems are autopoietic in that they produce and re-produce themselves (Moeller, 2006: 215). For Luhmann, the unity of social systems is not given but is rather the result of their autopoietic reproduction (Luhmann, 1983 / 2014: 284). The unity and autonomy of social systems is also achieved through Luhmann's concept of 'closure'.

³¹ 'Religion recognizes itself as a religion whenever it refers to anything that can be experienced immanently as transcendence': Luhmann, (2000 / 2013: 196). Although commentators have been critical of Luhmann's immanence / transcendence distinction (see, e.g., Laermans and Verschraegen, 2001: 18 and Beyer, 2006: 85), Luhmann notes that 'interpretive deficiencies in the coding' are deliberate in order to allow for religious pluralism (2000 / 2013: 197).

³² Coding enables the system to 'conceal the paradox of its own existence': for social systems to operate it cannot doubt their own validity (King and Thornhill, 2003: 21). Luhmann notes that 'codes are a precise copy of the paradox that they serve to resolve' (2000 / 2013: 48). For example, the law cannot doubt the validity of its claim that its decisions are legal (King and Thornhill, 2003: 21). This paradox is concealed by the binary code of legal / illegal which requires law to decide between legality and illegality without ever questioning its validity for doing so.

For Luhmann, all social systems are ‘operationally closed, but cognitively open’ (Nobles and Schiff, 2004: 8). Systems are operationally closed in that their individual operations, their communications, ‘are identified as such by themselves’; in other words, systems are operational closed because they are self-referential (Luhmann, 1993 / 2004: 86). Each system has its own form of operational closure: the legal system is ‘normatively closed’ in that the system itself ‘produces its own elements as legally relevant units by the fact that it lends normative quality’ (Luhmann, 1983 / 2014: 283). The legal system is therefore ‘normatively closed and cognitively open’. All systems are ‘cognitively open’ in that they require ‘the exchange of information between system and environment’ (Luhmann, 1990: 229); systems confront events and communications from outside which are then ‘transformed or re-constructed’ by the particular social system (King, 1993: 460). As Luhmann (1993 / 2004: 80) stresses, this means that closure should not be understood as isolation because it ‘highlights in its own way, the intensive causal links between systems’. Indeed, understood in this way, closure is linked to the concept of ‘structural coupling’, the description given to the links that develop between social systems (Luhmann, 1993 / 2004: 385).³³ This concept is used to describe how social systems co-evolve so that one includes the other in its environment (King and Thornhill, 2003: 33).³⁴ For Luhmann (1993 / 2004: 400), ‘structural coupling is a mechanism that both separates and joins’. By evolving links with one another, systems can be both autonomous and coordinated (Nobles and Schiff, 2012: 281).

The Beginning of the End

Having outlined the main features of systems theory, the question is whether systems theory provides a means to understand the fact of legal pluralism described in the earlier chapters of this book. Is it time for legal pluralists to make a pact with the devil? Teubner (1991; 1997) has argued that it is. Teubner, who has been referred to as ‘great glossator of Luhmann’s work in the domain of law’ (Goodrich, 1999: 198), noted that in the same way that legal pluralism ‘turned from the law of colonial societies to the laws of diverse ethnic, cultural and religious

³³ As Luhmann (1993 / 2004: 381) notes: ‘The more systems theory stresses the operative closure of autopoietic systems, the greater the need to establish how the relations between the system and environment are shaped’.

³⁴ For Luhmann, each social system produces its own environment. The central form of relationship in the social world is ‘not that between individual and society, but that between a social system and its environment’ (King and Thornhill, 2003: 3-4).

communities in modern nation-states', it now 'needs to make another turn - from groups to discourses' (Teubner 1997: 4). He (1991: 1451) argued that systems theory 'delineates clearly the "legal" from other types of social action' and that this means that:

Legal pluralism is then defined no longer as a set of conflicting social norms in a given social field but as a multiplicity of diverse communicative processes that observe social action under the binary code of legal/illegal.

For Teubner, a systems approach to legal pluralism means that whenever phenomena is communicatively observed using the distinction legal/illegal then it becomes 'part of the game of legal pluralism'. As he puts it: 'It is the-implicit or explicit-invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the State to the unofficial laws of markets and mafias'.³⁵ Teubner stressed that this overcomes the central weakness of legal pluralism by distinguishing social normative orders from legal ones. Social conventions and moral norms are excluded from legal orders in the grounds that they are 'not based on the binary code legal / illegal'. It is 'neither structure nor function but the binary code' that defines what is law (1997: 14-15). It is not the inherent characteristic of a rule but rather its use in the context of a particular discourse that renders it legal rather than social: 'Rules become legal as communicative events emerge using the binary code and producing microvariations of legal structure' (1997:12).³⁶

For Teubner, there are a number of consequences of this systems theory approach to legal pluralism. First, this approach follows the legal pluralist rejection of legal centralism by no longer regarding the official law of the State with any hierarchically superior position (1991:

³⁵ That Luhmann himself was a legal pluralist is clear from his opening paragraph of *A Sociological Theory of Law*, which observed that 'a minimum amount of legal orientation is indispensable everywhere' because: 'No area of life – whether it is the family or the religious community, scientific research or the internal networks of political parties – can find a lasting social order that it not based on law' (Luhmann, 1983 /2014: 1). See also Luhmann (1982: 122) which states that the legal system 'is not confined to communication occurring within legally regulated procedures, but also includes that of daily life insofar as it raises legal questions or otherwise registers or repudiates legal claims'.

³⁶ For Teubner (1997: 12), this approach has the advantage of following the 'linguistic turn' in sociology which means that 'rule, sanction and social control, the core concepts of classical sociology of law, recede into the background' while 'speech acts, énoncé, coding, grammar, transformation of differences, and paradoxes are the new core concepts utilized in the contemporary controversies on law and society'.

1451). He observes that it is ‘not the distinction legal/illegal that separates the State's law from the “law” of organizations and groups, but the different use of the operative symbol of “validity”’ (1991: 1459).³⁷ Second, this approach provides evidence of ‘the juridification of social phenomena’, the way in which applying law’s binary code distorts social realities (1991: 1455). Teubner points out that juridification ‘happens independently of the “recognition” of this law through the State and the courts. It is, rather, the result of the increasing application of law’s binary code and the distorting effect this has. Teubner argues that:

one should distinguish carefully between (1) phenomena like micropolitical power structures and economic exigencies and moral or social conventional expectations, which are essentially nonlegal, (2) their reconstruction within genuinely legal processes of non-State character like private agreements, intraorganizational disciplinary procedures, interorganizational regimes of oligopolist market regulations, and (3) their legislative, administrative, or judicial “recognition” which produces new rules of State law.

This distinction may be particularly helpful in understandings of religion and legal pluralism not only given the importance of the juridification of religion (Sandberg, 2011a: chapter 9; Sandberg 2014: chapter 1) but also because Teubner’s threefold distinction effectively corresponds to a distinction between doctrine, religious law and religion law: between (1) religious moral or social expectations, (2) the reconstruction of such expectations as norms, rules or internal laws, and (3) the development of State law on religion. It may therefore shed light upon how religious ideas and norms become regarded as law.³⁸ Third, a systems theory approach to legal pluralism provides a means to recognise what has been referred to as the ‘subjective turn’ (Sandberg, 2014: 161). Teubner (1991: 1457) contends that the ‘immense pluralization of legal pluralism’ is not simply the result of ‘the pluralization of groups and communities’ but is also a consequence of ‘the fragmentation of social discourses’. A systems theory approach to legal pluralism which focuses upon social discourses overcomes the ‘danger that legal pluralism will be marginalized

³⁷ However, systems theory may perpetuate some State centralist notions given that, as Cotterrell (2001: 87) has argued, ‘autopoiesis theory tends to reify lawyer’s (and other orthodox) understandings of law’.

³⁸ Applying Teubner (1991: 1453-1454), this may result from a process of ‘productive misreading’ whereby internal processes reinterpret social decision-making patterns using the legal / illegal code to ‘constitute then anew as integral parts of intraorganizational law’.

if the idea of internal colonialism draws attention only to diverse groups, communities, and networks'. Teubner's (1991: 1445) argument that 'legal pluralism can be seen as a kind of test case for autopoiesis theory' would therefore seem to be successful: it overcomes the central weakness of legal pluralist scholarship by providing a way to distinguish between legal and social norms, avoids legal centralism and provides a means by which to analyse two significant trends in law and religion: the juridification of religion and the subjective turn.

Tamanaha (2001), however, was unimpressed by Teubner's arguments. Although he recognised that systems theory 'provides a sharper means to distinguish law from non-law than heretofore available' and produces 'interesting insights', he argued that it also 'contains several debilitating drawbacks' (2001: 187). However, as Tamanaha noted, these problems were mostly criticisms of systems theory *per se* rather than criticisms of using systems theory to understand legal pluralism. Many of these criticisms were based on misunderstandings of systems theory. For example,³⁹ Tamanaha (2001: 188) regarded the theory as being 'fundamentally functionalist in nature', by stating that 'law is essential to the survival and functioning of the overall social system that provides its environment. Yet, systems theory simply describes how social systems have evolved in modern society (see, further Nobles and Schiff, 2013: 115). As Luhmann (1993 / 2004: 466) points out, 'Autopoiesis is no guarantee for survival, let alone a formula for progress'.

The criticisms that Tamanaha makes of systems theory in the context of legal pluralism are equally unconvincing. He contends that systems theory's method to separate law from non law, although 'sharper' than previous attempts, 'gives rise to serious objections' in that its 'manner of line drawing produces shifting and overlapping boundaries' (2001: 189). This is to be expected, however, given the messy reality of every day social life (Nobles and Schiff, 2012: 271). It is the positivist quest for clear distinctions that have led to artificial accounts of legal centralism, defining law institutionally.⁴⁰ Moreover, ironically, Tamanaha's proposal is much closer to

³⁹ See Nobles and Schiff (2012: 271-272) for a convincing argument that Tamanaha misunderstands difference between interaction and communication.

⁴⁰ Tamanaha (2001: 191) further criticises this method on the grounds that it 'ends up including aspects ... which most people would not consider "law"'. This, however, is a superficial criticism in that the very reason why defining law is an issue is because there is a lack of consensus upon where the boundary should be drawn. If the

systems theory than he assumes (Nobles and Schiff, 2012: 274). Although he criticises Teubner for ‘characterizing law exclusively in terms of communication’ since this ‘loses direct touch with the material power and effects of law’, Tamanaha (2001: 191) recognises that his preferred method is ‘based on the same insight’.

Tamanaha’s ‘social theory of law’ recognises that law is a social construction’ (2001: 162; see further 1997: chapters 5 and 6). His ‘methodology of socio-legal positivism’ recognised ‘that the activities of private citizens and legal officials (if any) cannot be understood without attention to their internal point of view’ (2001: 163) and concluded that: ‘Law is whatever people identify and treat through their social practices as “law” (or *driot*, *recht* etc)’ (2001: 166). For Tamanaha (2001: 166), ‘other or new forms of “law” can be said to exist whenever recognized as such by social actors. Thus, what law *is*, is determined by people in the social arena through their own usages not in advance by the social scientist or theorist’.⁴¹ This approach has much in common with Codling’s concept of ‘subjective legal pluralism’ which requires the narrative accounts of people to be captured and analysed. Like system theory, Tamanaha and Codling’s proposals are based upon communication; however, unlike system theory, Tamanaha and Codling do not provide a means by which to distinguish legal norms from social norms. Given the commonality between Tamanaha’s theory and systems theory, there is a great deal to be gained from his work. For instance,⁴² Tamanaha (2001: 194) argues convincingly that there is a need to reverse the plurality: whereas conventional accounts of legal pluralism began with an often State-centric concept of law and then sought to find variations of this single phenomenon in society at large, a communication-based approach to legal pluralism by contrast rests upon the notion that ‘often different kinds and manifestations of law co-exist in the same social field’ (Tamanaha, 2001: 172). Yet, despite the value of subjective approaches such as those advocated by Tamanaha and Codling, it is difficult to disagree with the assessment of Nobles and Schiff (2012: 275-276) that:

definition of law was dependent upon the understanding of the majority then this would be an inherently conservative and discriminatory approach to take and would probably lapse into a form of legal centralism.

⁴¹ For Tamanaha, law can be distinguished from references to things such as ‘laws of nature’ and ‘laws of logic’ requires reference to context and usage (2001: 168-69). However: ‘A rough test that can be used to determine what qualifies for the purpose of a general jurisprudence is any phenomena conventionally referred to as “law” in the sense invoking a claim of authority’. Further, something is considered to be law, ‘if sufficient people with sufficient conviction consider something to be “law”, and act pursuant to this belief, in ways that have any influence in the social arena’ (2001: 167).

⁴² See also his identification of ‘religious / cultural normative systems as one of six categories of normative ordering: Tamanaha (2008: 397).

the approach of systems theory, which concentrates on coding, has more potential to extend the study of what is legal beyond a focus on formal sources than does an approach that identifies as “law” only what a significant number of participants, if questioned, would describe as “law”.⁴³

Systems theory provides a methodology for the distinction and description of legal and other norms (Nobles and Schiff (2013: 109). A systems theory approach ‘engages with the manner in which legal systems, within differentiated societies, distinguish themselves from other social systems’ (Nobles and Schiff, 2013: 129). A legal communication is one which is deemed to fulfil function of law following the application of the code legal / illegal. This means that legal communications are not the unique preserve of the State legal system.⁴⁴ Other institutions, such as the General Medical Council or a Sharia Court, produce non-legal as well as legal kinds of communication (Nobles and Schiff, 2013:111). But whenever they produce legal communications then that, according to systems theory, is law. In deciding whether a HALO exists, whether there is simply a social norm or whether there is a legal order, the key question is not institutional but is dependent upon the particular communication.⁴⁵ To return to the differing views found in the chapters by Singler and Codling: Scientology and Jedi institutions, schools and universities will become HALOs only when they make legal communications.⁴⁶

This argument can be taken a step further. The term HALO may be re-christened as referring to ‘heterogeneous *autopoietic* legal orders’. This does not mean that all communications processed by HALOs will be legal ones. However, it would recognise that HALOs self-produce themselves fulfilling their own functions and applying their own code. On the one hand, the

⁴³ They point out that unlike Tamanaha’s theory: ‘Systems theory proceeds on the basis that the process of inclusion within a functional social subsystem is not established through consensus (the number of individuals who express a similar view) but through the operations of that system’ (2012: 274).

⁴⁴ Indeed, following Luhmann, references to the State legal system can be seen as a fiction used to buttress the political social system (cf. King and Thornhill, 2003: 77).

⁴⁵ This does not depend upon actors recognising social systems as such. As Roberts (1998: 105) noted, social actors may ‘not experience or articulate the repertoire of norms available to them in that way at all’.

⁴⁶ A systems theory approach would treat as irrelevant the fact that some legal communications within schools and universities are part of the State. It might be preferable, however, to retain the notion that HALOs refer to legal orders that are not part of the State law apparatus. It is unlikely that Codling’s suggestion that social orderings such as gender and class are HALOs would be supported by a systems theory approach.

roots of this insight can be seen in Luhmann's (2000 /2013: 165) recognition that religious organisations are themselves 'autopoietic systems'. And Nobles and Schiff (2013: 126) have assumed this in their argument that pluralism 'extends to the possibilities of co-existence between systems, and the role that the legal system might play in this'. Yet, to date, there has been no discussion of religious law as a social system;⁴⁷ how religious legal systems merge the functions and binary codes of both legal and religious social systems. This insight is likely to further the debate on religion and legal pluralism.

Indeed, it reveals the real 'problem' posed by religious tribunals (cf. Shachar, 2001: 3). The continued existence of religious tribunals (and other forms of HALOs) is contentious because it offends expectations concerning functional differentiation. In a truly functionally differentiated society, religious groups simply would not perform legal functions. The growth of religious tribunals can therefore be regarded as an example of de-differentiation, the dissolution of processes of differentiation, which Luhmann saw as 'the greatest threat to modern society' (King and Thornhill, 2003: 225). Religious tribunals are seen as problematic because they are seen as a throw-back to pre-modern undifferentiated society. Yet, regarding HALOs as social systems in their own right can rebut this concern. Religious tribunals are evidence of re-differentiation rather than de-differentiation. They represent a further stage of functional differentiation where the fictional ubiquity of the State is recognised and voluntary organisations (religious and non-religious) perform functions which it was thought had become the preserve of the State. Again, this is perfectly consistent with Luhmann's writings, which recognised that 'we have to presuppose it is possible to form further autopoietic systems within autopoietic systems' (1993 / 2004: 467).

Even if this step is not taken, then it is possible to regard religious tribunals as being a structural coupling of legal and religious social systems rather than a social system in their own right. Indeed, regarding religion and law as two social systems may shed light upon a number of pressure points concerning law and religion.⁴⁸ From Teubner's work it would appear that a

⁴⁷ Indeed, other non-religious HALOs can also be seen as being their own social systems. As Hussain's chapter makes clear, legal orders are not the preserve of religious groups.

⁴⁸ Space does not permit a discussion of this point but it is intended that this will be explored in Sandberg (forthcoming).

systems theory approach may shed light upon the juridification of religion and the subjective turn, two significant trends in the regulation of religion. A systems theory approach may explain the development of the growth of religious freedom as a subjective right.⁴⁹ Systems theory is not incompatible with the modern focus on the constructive nature of personal identities.⁵⁰ In fact, it provides an explanation for this development. King (1995: 93-94) has suggested that it is ‘social systems make these different identities available for individuals to select’. It would therefore appear that there is much to be gained from making a pact with the devil.⁵¹ However, the main contribution of social systems theory to legal pluralism remains that it provides a means by which legal pluralism can be recognised while legal and non-legal norms can be distinguished. As Nobles and Schiff (2013: 130) observe, ‘it offers the possibility of what pluralist motivation has not yet produced – a common theoretical endeavour, not based on a common conception of law, but a sociologically informed understanding’.

Systems theory could therefore be the saviour of legal pluralism, providing a means by which to answer the question that has hindered the legal pluralist literature, ‘what is law?’ However, like other attempts which focus on this question,⁵² such analysis suffers from an important defect noted by Cotterrell (2009: 779): the inquiry is skewed ‘too much towards an assumed need to save certain traditional legal philosophical projects’ and so ‘neglects more urgent and less parochial concerns that might guide theories of legal pluralism – for example, how conflicts of authority between different legal orders may be understood and usefully addressed’. Addressing the question ‘what is law?’ does not answer the more pressing questions of whether and how those legal orders once identified should be accommodated.⁵³ However, it does provide a

⁴⁹ *R v Secretary of State for Education and Employment and others ex parte Williamson* [2005] UKHL 15 at para 22.

⁵⁰ Though, of course, its prime focus is on the identity of social systems, it is primarily concerned with ‘the question of how modern society can observe and describe itself’ (Luhmann, 2002: 118).

⁵¹ This is not only the case in relation to law and religion. Despite the fact that Luhmann’s work includes significant discussion of legal history, little attention has been given to the development of a systems theory approach within English legal history circles (with the exception of Roberts, 2002). By contrast, continental scholars have devoted a significant literature to this (Senn, 2012: 113-114). This lacuna is particularly concerning bearing in mind the role that legal history could ‘play in exposing the degree of legal pluralism in our system, past and present’ (Phillips, 2010: 310).

⁵² Cotterrell’s (2009) criticisms are aimed at Melissaris (2009).

⁵³ To put it another way, as Roberts (1998: 97) put it: ‘Legal pluralism is unambiguously a creature of the law school ... a lawyerly way of looking at the social world’.

starting point to begin answering such questions.⁵⁴ In recent years, no doubt inspired by Williams (2008) lecture, a number of scholars have presented a number of ‘solutions’ to the question of whether HALOs should be accommodated and if so to what extent.⁵⁵ A systems theory approach can aid those ‘solutions’ by indicating that there are autopoietic legal orders other than those of the State and that they cannot be ignored. It provides an insight into the framework in which joint governance (Shachar, 2001) occurs.

This does not mean that such legal orders should be granted a blank cheque. As argued elsewhere (Sandberg *et al*, 2013), Shachar’s (2001) concept of ‘joint governance’ can be developed in order to provide a concrete way forward. It is the solution to the ‘impossible compromise’ spoken of in chapter 1, the false choice between being a citizen and being a believer. One means by which this can be achieved is by following Shachar’s (2001: 102) focus on consent. The headline stating that Sharia courts were ‘as consensual as rape’ was offensive, crude and inflammatory.⁵⁶ However, it may also point to a way forward. Religious tribunals are not as consensual as rape but they are as consensual as sex. As Williams (1983: 227) pointed out, under English law sexual activity is generally lawful but there are two different types of sexual offence: criminal offences concerned with sexual taboo where the act itself becomes unlawful (for example, because of the age of one of the parties) and those concerned with sexual aggression where the act is only unlawful where there is coercion by one party or where one party does not consent.⁵⁷ This framework could be applied to religious tribunals. If a law was felt necessary, it could state that the activities of religious tribunals are lawful but then could provide a list of occasions where such activity would always be unlawful (akin to the crimes of sexual taboo): these could include decisions of a criminal nature and disputes about children. The law could follow the approach taken to crimes of sexual aggression by stipulating that the activities of a religious tribunal are only lawful where there all parties consent. This would

⁵⁴ It moves the debate on from focusing upon the ‘legal’ in ‘legal pluralism’ to begin focusing on ‘pluralism’. Muñiz-Fraticelli’s (2014) work provides a way forward in this regard.

⁵⁵ Examples include Eisenberg (2009), Eekelaar (2010), Newman (2011), Solanki (2011), Malik (2012) and Cumper (2014).

⁵⁶ *Daily Telegraph*, 20 October 2010 <<http://www.telegraph.co.uk/news/religion/9621319/Sharia-courts-as-consensual-as-rape-House-of-Lords-told.html>>

⁵⁷ The Sexual Offences Act 2003 effectively follows this distinction. Sections 1-4 provide for crimes of sexual aggression such as rape and sexual assault while the child sex offences found in sections 5 to 15 are crimes of sexual taboo.

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follow the precedent set by the law on arbitration⁵⁸ and the Sexual Offences Act 2003 provides an example of a sophisticated framework which could be followed, providing a statutory definition of consent buttressed by the use of conclusive and rebuttable presumptions.⁵⁹ This, of course, is just one possibility. Informed debate and dialogue with those outside and within HALOs would be needed before any legislative solution could be adopted. The reaction to Williams (2008) lecture showed how lacking our understanding of religious legal systems was. Although the scholarship of recent years, of which this book is a part, has converted some heat into light, there much more to do. Before we can begin to answer the questions of whether and how legal orders should be accommodated, we need to identify a robust yet flexible method for distinguishing legal from social norms. This chapter has suggested that this could be achieved by making that pact with the devil.

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⁵⁸ For discussion see Sandberg (2011: 184-189).

⁵⁹ These would mirror sections 75-77 of the Sexual Offences Act 2003.

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