Ludwig-Maximilians-Universität München
Institut für Soziologie

# THE DIFFERENTIATION OF LAW IN CHILE

## STUDY ON THE EVOLUTION OF A NATIONAL LEGAL SYSTEM

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**ZUSAMMENFASSUNG**

Die vorliegende Arbeit untersucht die Differenzierung des Rechtssystems in Chile. Die grundlegende Frage der Arbeit ist: Welche Bedingungen ermöglichen die Entstehung eines funktional differenzierten Rechtssystems in Chile. Diese Fragestellung führt unweigerlich zum Problem des funktionalen Differenzierungsprozesses. Während die soziologische Diskussion über funktionale Differenzierung in Chile in vollem Gange ist, findet die Frage nach der Ausdifferenzierung des Rechtssystems in der aktuellen Debatte kein Platz.

Die Hypothese der vorliegenden Arbeit weist darauf hin, dass die funktionale Differenzierung des chilenischen Rechtssystems Teil eines evolutionären Prozesses ist, der mit der Eroberung und Kolonisierung der Spanier im 16. Jahrhundert begonnen hat. Diese Entwicklung wird außerdem durch Veränderungen der Form der Differenzierung der chilenischen Gesellschaft sowie der Entstehung einer Reihe spezifischer evolutionärer Errungenschaften geprägt. Anhand von historischen, soziologischen und juristischen Dokumenten wird dieses Prozesses analysiert.

Die Dissertation gliedert sich in sechs Kapitel. Jedes Kapitel beschäftigt sich mit bestimmten Problemen, die der Analyse ihre Struktur geben.

Im ersten Kapitel „Einführung" werden der Hintergrund der Dissertation sowie ihre Ziele, Thesen und Methodik erläutert.

Das Weitern wird auf die Struktur der Arbeit eingegangen. Die funktionalistische Analyse orientiert sich an einer Reihe von Problemen und Fragen, die auch die Arbeit strukturieren. Im Folgenden gehen ich auf diese „Probleme und Fragen" ein.

In Kapitel 2 werden die Kernaspekte der Rechtssoziologie erläutert und die Genealogie der Rechtssoziologie aus den Bewegungen der sogenannten „soziologischen Jurisprudenz" aus Europa und den Vereinigten Staaten untersucht. Dafür werden die Ideen der vier klassischen Autoren der Rechtssoziologie, nämlich Émile Durkheim, Max

Weber, Talcott Parsons und Jürgen Habermas charakterisiert. Ein separater Abschnitt für die Rechtssoziologie von Niklas Luhmann wird präsentiert, der als Grundlage für die späteren Kapitel dient. Das Kapitel endet mit einigen Überlegungen zu einer regionalen Analyse des Rechts.

In Kapitel 3 wird die Analyse der Begriffe „Evolution" und „Differenzierung" aus einer systemtheoretischen Perspektive in Betracht bezogen. Es werden Ähnlichkeiten und Unterschiede zwischen beiden Konzepten diskutiert. In diesem Zusammenhang werden zwei Begriffe, die die Analyse leiten, eingeführt. Diese sind: „evolutionäre Errungenschaften" und „Formen der Differenzierung". Schließlich werden vier theoretische Ansätze in Bezug auf funktionale Differenzierung in Chile diskutiert.

In Kapitel 4 wird die Entwicklung des chilenischen Rechtssystems dargestellt. Hier teilt sich die Arbeit auf in zwei Analysestränge. Zum einem werden eine Reihe von „evolutionären Errungenschaften" erörtert, die das chilenische Recht strukturieren. Hierzu wird sich auf die Rolle der Justizbehörden, der subjektiven Rechte, Verfassungen und Menschenrechte bezogen. Zum anderen werden drei „Formen der Differenzierung" charakterisiert, nämlich: Stratifikation-Zentrum/Peripherie, funktionale Differenzierung mit Klassenstruktur und funktionale Differenzierung. Das Kapitel endet mit einem kurzen Exkurs über die semantischen Beschreibungen der chilenischen Rechtssoziologie im Hinblick auf die Rechtskultur.

In Kapitel 5 werden zeitgenössische Tendenzen der Differenzierung des chilenischen Rechts untersucht. Diese Tendenzen werden im Kontext der Sinndimensionen und bestimmten Paradoxien thematisiert. Schließlich wird die Situation mit anderen nationalen Rechtssystemen in Lateinamerika verglichen.

In Kapitel 6 werden die Schlussfolgerungen dieser Forschung dargestellt. Probleme und Fragen werden abschließend ausgewertet, die zuvor in Kapitel 1 identifiziert wurden. Schließlich wird auf einige zusätzliche Beiträge und allgemeinere Überlegungen, die sich aus dieser Forschung ergeben, hingewiesen.

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**ACKNOWLEDGEMENTS**

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## 1. INTRODUCTION

There is a wide tradition of explanations coming from the sociological, political, juridical, cultural, historical fields, which indicate that the Chilean legal system (besides the political and the economic system) has the *stability* that is hardly achievable by other Latin American countries. This juridical stability would be the result of a relatively stable constitutional order,[1] among several other factors (from 1833 up to this writing, Chile has had only three constitutions; Bolivia has had seventeen and Peru, twelve).

The early enactment of a Chilean civil code in 1857 served as model for the rest of Latin America and signified a relative stability in all the institutions of the Chilean State. Internally, it helped establish a long tradition of respect and widespread obedience to the law and its institutions.[2] Political stability in the country further complemented the state of affairs. Until the military coup of 1973, it is worthy to note that Chile has had more than forty years without a political disruption or disorder. Even so, since the end of the military regime that governed Chile from 1973 to 1990, Chile has elected five presidents in a peaceful manner. Moreover, the corruption perception rates in Chile are the lowest in all of Latin America (in 2010, Chile ranked 21° in the International Ranking of Transparency International, with 7.2 points, placing the country two places above the United States and directly behind the United Kingdom).

Several decades of stability and economic growth also transpired. After the economic and banking crisis of 1982, Chile has since experienced sustained growth,

[1] Hans Kelsen (1926) himself was interested in the Chilean constitutional order expressed in the Constitution of 1925.

[2] Bravo Lira (1986: 82) notes that in 1541, Pedro de Valdivia, founder of Chile, asked to leave a written record of his appointment and the circumstances under which he assumed the post. This fact, according to Bravo Lira, would already demonstrate the respect that Chileans have for the law. This would reveal the "deep juridical consciousness" of the founders of Chile and a "strong sense of law" of the Cabildo (council) that named Valdivia as governor.

driven by a set of policies of economic liberalization. The country has signed free trade agreement with forty-nine states, including United States, Canada, the European Union, Korea and China, and is in constant negotiation for new agreements. In 2010, Chile became the first country in South America to be a member of the Organisation for Economic Co-operation and Development (OECD). The institutional stability of Chile, almost as a paradigmatic example of the neoliberal formulae, would be the key to its development.

Nevertheless, each of the three above-mentioned dimensions of the *Chilean stability* has its dark side, their *unmarked spaces* (Spencer-Brown 1979). Correspondingly, the economic growth in Chile is shrouded by deep economic inequalities. Chile appears to be one of the countries, which have greater income inequality in international measurements. It obtains the lowest record in the GINI index among the countries of the OECD (2012) and is located in one of the most backward positions of the world (in the 2012 rankings, it occupies the Nº 127 place, from a total of 147 countries, according to Gini Coefficient. In comparison, Germany is located in the Nº 10 position).

In spite of the political dimension, the stable Chilean democracy not only has a low rate of public credibility, which appears constantly in opinion surveys, but also an increasingly low turnout of new voters. This variance with Chilean politics has been expressed in recent years through massive protest movements. Put simply, Chile exists in a political system that combines *indifference* and *indignation*. On the legal side, the juridical stability of the Chilean institutions is offset by the increase in urban crime, the victimization of the population, the high rates of incarceration (Walmsley 2011) – and this rate is, in South America, surmounted only by Suriname -, and a low evaluation of the legal system (Latinobarómetro 2011).

This dual panorama can be characterized as a *particular way of deployment of the modernity in Chile*. There are voluminous studies that feature the central role that the economy, as well as politics, plays in this process. However, the traditional stability of Chilean

law has not been treated in the discussion as a decisive contribution to such *modernization*.

In this dichotomic picture of stability and change, a capacity to adapt to changes that occur in their environment rather than from an inner development seems to be demanded of the law. In this context, institutional responses, which have occurred in the judicial system during recent decades under the slogan of *reforms,* appear. An example of this is the so-called *Criminal Justice Reform* that was implemented in the nineties throughout the country to replace the old Chilean criminal justice system, the inquisitional character of which was not only extremely slow but also not very transparent. Instead, the new procedure possesses a faster character, provides warranties, and is more transparent, not to mention oriented to equity (Witker & Nataren 2010).[3] The main context in which this reform has been tangible is on the issue of *urban crime*. In this particular type of crime, there are also changes to *Adolescent Criminal Liability,* and these amendments aim to adjust punishments to the age of the accused, establish rehabilitation, and implement precautionary measures (Hernández 2007). Another amendment that must be mentioned is the *Reform to the Family Courts*, which was launched in the nineties and oriented to expedite judicial processes in matters of family law, juridical protection of children, divorce, and cases of domestic violence (Casas et al. 2006).

[3] This procedural change also has taken place in other Latin American countries with impacts comparatively more limited. Indeed, the above cited study of Witker and Nataren mentions that the Chilean Criminal Justice Reform is the only one in the region that may be called "of second generation", since it has achieved goals far superior to other countries. "The only country that goes along such reforms of the second generation is Chile, since it had the advantage of creating from the beginning a Public Prosecutor and a Criminal Defence. (…) Chile adopted a basic definition, in the sense of all judicial actions, except very precise and few exceptions, must be held in public and contradictory hearings, being the suitable aptitude of the system to organize these hearings, the best effectiveness indicator." (Witker and Nataren 2010: 15).

However, these reforms do not seem to fully address the tensions, which currently accompany the law in Chile, whose character seems to rest instead in the visibility of conflicts and incongruities. Most relevant conflicts include: the prosecution of human rights violators (Skaar 2003), the judicialisation of environmental conflicts (Vallejos 2005), the problem of urban crime (Dammert 2005; Lagos & Dammert 2012), the protection of consumers' rights (Guerrero 2008), allegations of pedophilia, the cases of political and economic corruption (Latinobarómetro 2010; 2011; CEJA 2010), and, more recently, the judicialisation of educational conflicts. The worsening of these conflicts allows for serious consideration of the relevance that normative expectations pose concerning the law, or simply: *legal decisions are increasingly expected in areas where, earlier, they were not expected to be made or applied.*

A question that remains unanswered in this situation is if these conflicts are due to a growing loss of the (old) *stability* of the law, in reference to problems of *integration* or *adaptation* to the environment, or is instead due to a radicalization of its *functional differentiation*. The present considerations lean towards this second hypothesis.

This question about *social change* in the law is present throughout the long history of the sociology of law. Questions as: 'What relevance do social changes in law have?,' 'How is the change in the law a social change?,' or: 'How important are changes in the law to the society?' - all of them appear within the oldest concerns of sociology. These questions about social change in the law has been answered varyingly, understanding this change, for example, like a special process of *rationalization* (Weber 1922a), as a change in *social solidarity* (Durkheim [1893] 2001), as a *universal evolutionary* change in the society (Parsons 1964), as a change in the *moral integration* of the society (Habermas 1982b), or as a process of *functional differentiation* (Luhmann 1995a).[4] In each of these strategies lies a wide diversity of explanatory principles. Consistent with Weber's theory of the law, rationalization largely explains the changes in the law by increasing *predictability* and *proceduralization*. With regard to the

[4] On this latter, in detail in Luhmann (1987; 1991a; 1991b; 1997a; 1999a; 1999b).

theory of change in social solidarity of Durkheim, for his part, the problem of change appears in the form of *integration of society* through the law - a problem that starts with Durkheim and, thereafter, reaches its highest complexities with Parsons and Habermas. Only the last type of explanations, i.e., in the theory of the functional differentiation, renounces the assignation of a *socio-integration* function, at the very least, to the law, but also puts to doubt the *rationalization* of the same. This way, it problematizes the aspect of social change in the law from the description of its own functioning and limitations. Thus, the theory of differentiation is better prepared than other theories of social change and the law to understand the changes in the law on a more widespread sense and attend to the problems of an increasingly complex society. This functions without having to justify the predictability of the law at all costs, even when the increase in its *contingency* is evident (Luhmann 1995a; Münch 1990) and without having to be stylized as a normative theory that prescribes mechanisms for *social integration*, but then also highlighting the *social differentiation* process without having a normative *telos* towards a unit, but a declared vocation for describing differences (Luhmann 1991a).

Since the moment that the theory of the differentiation made its entry into sociology, it has had the task of describing a *universal* model of social change. This also applies to the theory of differentiation of functional systems, as it describes a set of "forms of differentiation" (Luhmann 1977), which indicates general structural arrangements. However, this *universalistic* character of the differentiation theory has been complemented in recent decades by a promising field of research on the functional differentiation applied to regions of the world. This development unfolded following the analyses on the consequences of the world society (Luhmann 1997a) and the problem of radicalization of social inclusion and exclusion in certain regions of the world (Luhmann 1995b; 1995c). Thus, the study has encompassed the process of functional differentiation of the politics in China (Tang 2004), the role of the constitutions in the Brazilian functional differentiation (Neves 1992), the university system in Latin America (Arnold Cathalifaud 1987), and the structural and semantic aspects of the functional differentiation also in Latin

America (Birle et al. 2012), to name a few. It is precisely within the context of regional functional differentiation that the foregoing research is inscribed.

### 1.1. Objectives and hypotheses of the research

This thesis aims to *analyze* the *functional differentiation of the legal system in Chile* in the context of the evolution of a "national legal system" (Stichweh 1990, 1991). The fundamental *question* that this work wants to answer is: *How has the evolution of a juridical system been functionally differentiated in Chile?* This brings us to the problem of the functional differentiation process itself. The sociological discussion on functional differentiation in Chile is in full force, although its treatment of the concept of functional differentiation seems to serve largely as a functional equivalent to the classical explanation of *modernization*, whose semantics have fallen into disuse since the 1990s. Indeed, it is held in the current literature that since the last decades, Chile has been subject to a wide process of functional differentiation of social systems (see Cousiño and Valenzuela 2012; Mascareño 2000; 2010; Robles 2005; Rodríguez 2007), which would appear exemplarily in the differentiation of an autonomous market economy and, to a lesser extent, in the differentiation of the political system. According to this idea, it would only be towards the end of the 20th century that an evolutionary leap towards functional differentiation takes place. Nevertheless, neither the functional differentiation of law nor the relations that this functional differentiation process has, with regard to the form of differentiation that Chile would have adopted in the last decades, has been discussed in this debate.

For this reason, it is necessary to add to the present work a general hypothesis that is useful in the preparations for further reflections on the subject. The *hypothesis* of the present investigation points out that the functional differentiation of the Chilean legal system consists of an *evolutionary process* initiated together with the conquest and colonization of Spain over the territory in the 16th century. This development is characterized by changes in the *form of differentiation* of Chilean society in the emergence of a set of specific legal *evolutionary acquisitions*. The consequence of this

process would be that at the end of the 20th century, Chile could have a functionally differentiated legal system.

### 1.2. Methodological Approach

It is necessary to point out, that the present work corresponds to an *analytical* research constructed from previous works on the Chilean legal system transformations within the scope of history, sociology, and law. The aim of this work is to characterize the evolution of Chilean law, based on historical, sociological, and juridical documents. Given the character of such sources in formal terms "documentary analysis" is used (Bohnsack 2010; Vogd 2010). Nonetheless, since attention is given to the evolutionary explanation, the material will not be discussed in separated units or in consideration of manifest and latent concepts (Bohnsack 2010; Vogd 2010) or in other indicators. However, the work uses documentary sources in subordination to "problems" and "central questions."

Since the main instruction of the theory of the differentiation is to analyze the historical material in order to discuss theoretical-evolutionary hypotheses, this work then uses sociological research based on historical remarks, although guided by a theoretical reflection of the system differentiation. Given this methodological character, a clarification of the methodological approach herein is necessary. The sources used herein have been selected in consideration of the following themes: Classical Sociological Theory of Differentiation (9 Books and Monographs and 9 Articles in Journals or Chapters in Books), Social Systems Theory (28 Books and Monographs and 53 Articles in Journals or Chapters in Books), Law and Sociology of Law (37 Books and Monographs, 92 Articles in Journals or Chapters in Books and 4 Statistical Compendia), Chilean and Latin-American Sociology especially dedicated to Differentiation (13 Books and Monographs, 13 Articles in Journals or Chapters in Books and 2 Statistical Compendia), History of Chilean Law (17 Books and Monographs and 12 Articles in Journals or Chapters in Books), and National and International Jurisprudence (14 Legal decisions).

These sources have been selected in accordance with the following problems and research questions:

1) First, we analyze the observation problem of the *sociology of law*, especially around the constitution of an own observation point. With this, the formation of the sociology of law from the figure of the *sociological* differentiation of law, i.e., a sociological field of observation for the juridical phenomenon, is brought into focus. The problem to develop in this reconstruction of the sociology of law is the reflexivity of the sociological observation of the law, i.e., not only the identification of the differentiation process of a social system as an *object of research*, but at the same time the highlighting of the *conditions of possibility* of its observation in sociology. The questions that guide these reflections are: *what are the fundamental aspects of a sociological observation of the law and how does the sociology of law allow for an understanding of the differentiation of social systems at the regional level*? To resolve this compound problem, the study will deal with the main works in the sociology of law.

2) Second, the problem of the status of the theory of the differentiation as a *theory of social change* will be investigated. To face this problem, it will be necessary to clarify differences between the explanatory strategy of the *theory of differentiation of social systems* and the *theory of social evolution*. Clarifying this relation is a significant factor to this study since the relation, as it is, tends to confuse both concepts, especially at the level of its explanatory yields (Stichweh 2007b). The key point in this task is to clearly define the particular characteristics of the differentiation of social systems theory, so as to be able to test their respective assumptions. The question that guides this task is: *which elements characterize the explanation of social change in the system differentiation theory and how is this explanation related to the theory of social evolution?* Addressing this problem requires theoretical documents framed inside the systemic theory of differentiation and evolution, especially the reflections of Parsons and Luhmann. Moreover, we will examine the ways in which differentiation theory in the Chilean sociology has been understood.

3) Once the general theoretical guidelines are developed, the specific problem concerning the concept of "evolutionary acquisition" (Luhmann 1997a: 506) will then be addressed. Thus, we will analyze the historical concurrence of certain acquisitions in Chilean legal system, which allows for an observation of movements across certain thresholds of social change. The questions that guide the reflections on this matter are: *do evolutionary acquisitions that have been a key factor to the process of differentiation of law in Chile exist and, if so, what would these be*? To attend to this, we will discuss historical and sociological documents that deal with changes introduced to Chilean law, highlighting significant elements therein.

4) The concurrence of certain factors that may characterize a set of changes in the functional differentiation of the Chilean law also poses as a problem that will need to be discussed. Along with the identification of certain evolutionary acquisitions, we also settle: *if it is possible to identify relatively defined periods or phases in the differentiation of Chilean law and if so, what its features, characteristics, and processes are.* At this point, this work draws anchor on the theorem of the "forms of differentiation" (Luhmann 1977). Here, the problem of *functional differentiation in Chile* based on sociological *diagnoses*, which indicate some characteristics of this process at regional level, will be discussed. Thereafter, these diagnoses will be contrasted with historical materials related to the evolution of Chilean legal system. It serves to note that consideration will not only be drawn to a set of concepts that serve as explanations of Latin-American sociology, but also the relation of these concepts to legal change.

5) Finally, we consider certain current tendencies in the differentiation process of Chilean law. Based on the previous analyses, a set of phenomena that would characterize the differentiation of the Chilean law in recent years will be investigated. The key question here will then be: *which tendencies can currently be observed in the development of Chilean law?* To deal with this problem, sociological, historical and juridical literature will be used. Comparatively, similar trends in other Latin American countries will be analyzed.

The model problems/questions belong to the methodological strategy of "functional analysis" (Luhmann 1974a, John 2010). This type of strategy, as noted by Knudsen (2011: 125) "can be characterized as a scheme for observation, a scheme observing in the frames of problem and solution" or, rather, between a problem and its possible solutions. Stemming from the functionalist strategy, this work adopts an "operational" approach. That is to say, this work tackles problems and solutions, bearing in mind a horizon of contingency with regard to the problems that are solved by means of certain solutions. As noted in Nassehi (2011: 67), the question is: "What problem solves this solution?"[5] As an observation scheme, functional method states that problems should be constructed from theoretical formulations and from these, possible problem/solution schemas can be identified. Thus, the relationship between theory and method is "circular" (Knudsen 2011: 127).

The functional model is expressed in the research in two ways. First, theory is used to define problems to be solved in the analysis and, in another respect, as guided by evolutionary theory that this study proposes, referring to the way how certain problems in the treatment of complexity make it possible to observe solutions that later generate different orders. The strategy question/problem gives form to the first level, while the second level will be accounted for by way of concepts of "forms of differentiation" and "evolutionary acquisition."

The systemic methodological approach proposed is guided by an opening to an *interpretive* approach with regard to the observed material (Schneider 2010). This interpretation is not given in the sense of a *comprehensive sociology* (Weber 1922b), but rather in the treatment of the material concerning *explanatory complexes oriented by central problems and guiding questions*. As rightly noted by Marcelo Neves (1992: 112) in the context of systemic sociology of law, research of this type should be concerned

[5] "Welches Problem löst diese Lösung?]"

with "social and legal interpretation" adapted to the historical and empirical material that has been observed.

### 1.3. Methodological Projections and its Boundaries

As noted by Saake (2010: 76), it is very important for systemic approaches to also recognize their boundaries. To carry out the analysis on the differentiation of law in Chile, it is necessary to develop a research strategy according to the research problem. As we have seen, this implies problems of definition and focus.

First, it should be noted that the theory of *differentiation*, in spite of its antiquity, which in its systemic version can be traced back at least to Spencer ([1876] 1912) and Durkheim ([1893] 2001), does not *describe a specific methodology of study*. Although researches on the social systems differentiation are located between *evolutionary* and *historical* approaches (Luhmann 1976), history is largely subsumed within evolutionary schemes. This is the case of Spencer, Durkheim, Parsons and Luhmann. An "Evolutionary sociology", more than a historical sociology, is developed in all of them (Holmwood and O'Malley 2003). In general terms, this predilection for the type of evolutionary explanation is clearly in Parsons' studies on social change (1966; 1971) and in Eisenstadt on modernization (1964; 1990) or civilization (1999; 2000). It also appears clearly in the reconstructions on the differentiation of law in Luhmann (1991b; 1995ta; 1999a; 1999b) and in other theoreticians with regard to other functional systems, as the differentiation of science (Stichweh 1979), of mass media (Alexander 1990), of educational system (Vanderstraeten 2004), or art (Krauss 2012), to mention some cases.

The present research makes use of an analytical strategy that declares from the beginning the type and subject of its sources and the way in which these are organized concerning problems and questions. This constitutes an advancement with regard to the weak methodological explanations of the previous works on differentiation, which specify neither the type nor the subject of their sources, nor

their explanatory strategy. By means of a methodological perspective that arranges its ideas from questions and problems, it is possible then to identify the points of rest and also the blind spots of the research, the type of sources, the approaches, the hypotheses, or the scope of the results that can be then discussed. This is one of the contributions of the chosen methodology, which allows a projection for other researches focused on the processes of differentiation of social systems.

This strategy, nevertheless, consists of an election that is aware of its own boundaries. In contrast to qualitative researches based on interviews or content analysis, the setting of work units must be wider and hence, less accurate. Working with large sources as classic monographs, new theoretical treatises, or historical compilations cannot be made on the basis of reduced analysis units, as in other qualitative methods, but based on central subjects of every bibliographical source, which are then structured concerning research objectives. For this reason, the material is arranged around *questions* and *problems*, by means of which makes it possible to arrange a diverse material, based on central subjects for every source. In spite of the advantages and possible projections of such election, the nature and the limits of the method are undoubtedly still tentative and they need further explorations in the future.

### 1.4. Structure of the Thesis

This document is organized into six chapters. Chapter 1 corresponds to the present introduction which reviews the background of the dissertation, its objectives, hypotheses, and methodology.

Chapter 2 presents the analysis of the central concepts of sociology of law. In this chapter, we investigate the origin of the sociology of law in the so-called movements of "sociological jurisprudence" in Europe and in the United States. It then characterizes the ideas of four classic authors of the sociology of law, namely: Émile Durkheim, Max Weber, Talcott Parsons, and Jürgen Habermas. A separate section

is reserved to characterize the sociology of law of Niklas Luhmann, which serves as basis for subsequent reflections. The chapter ends with some considerations on a regional analysis of law.

Chapter 3 is dedicated to the analysis of the concepts of "evolution" and "differentiation" from the perspective of social systems theory. Herein, similarities and differences between both concepts from a formal point of view are discussed. Moreover, two concepts that will guide the development of this study are introduced. These are "evolutionary acquisitions" and "forms of differentiation". Finally, we analyze a set of four proposals with regard to functional differentiation in Chile based on the ideas of the sociologists Eduardo Valenzuela, Carlos Cousiño, Aldo Mascareño, Fernando Robles, and Darío Rodríguez.

Chapter 4 presents the analysis of the evolution of Chilean legal system. This analysis is structured in two main axes. One is a set of "evolutionary acquisitions," which structured Chilean law explained. For this, the analysis refers to the role fulfilled by judicial organizations, subjective rights, constitutions, and human rights. Additionally, three "forms of differentiation" in which the evolution of the Chilean law is located are characterized, namely: stratification-center/periphery, functional differentiation with class structure, and functional differentiation. The discussion in this chapter concludes with a brief excursus on the semantic descriptions of the Chilean sociology of law with regard to legal culture.

Chapter 5 is dedicated to the analysis of a set of contemporary tendencies of differentiation in Chilean law. The analysis is organized around the dimensions of meaning and has indicated additionally a set of paradoxes in each of them. Finally some comparisons with other national juridical systems in Latin America are indicated.

Chapter 6 presents the conclusions of this research. Here, the problems and questions previously identified in chapter 1 are recapitulated and, accordingly,

indicate some additional contributions and general considerations arising from this research.

## 2. THE DIFFERENTIATION OF THE SOCIOLOGY OF LAW

The perspective, which we take in the observation of the differentiation of the legal system is the *sociology of law*. It is from this tradition that we focus our issues and problems. Therefore it will be necessary for this work to first recognize some general aspects of this type of observation, its historical precedents, as well as its relevant problems.

The sociology of law arose in the late nineteenth century between the margins of the reflections of philosophy of law and the rising sociology. It thus clearly shares both sociological aspects as well as reflections of a philosophical character. This is brought about by its predecessors, which are made up of some early sociologists and some influential jurists.

The purpose of sociology of law was to put in place a polemic proposal of sorts. Before its emergence, law was largely understood in a purely conceptual and rational way. The positivist and formalist movements of law encouraged the idea of a conceptually "pure" law, i.e., beyond any social contamination. Justice was at most the social problem (rather political) of the law. With the emergence of the sociology of law, paraphrasing Max Weber (1922b), law suffered a "disenchantment". The old law charisma, its image of perfection and purity, with its rational or natural origin (or a mixture of both), was questioned. Of this rupture, two major consequences are highlighted.

The first one made way for a 'social question' with regard to the law: how separated from society can the law be? Or rather: how can the presence of law itself be justified independently from other social phenomena? From this 'opening' of the observation of law towards society, the 'sociological jurisprudence' in the United States and Europe arose, as parallel movements with similar objectives. One main objective was to improve existing law. In both cases the reorientation of law towards society was caused by a 'pragmatic' intention and with 'empirical' emphasis.

The audience towards which these efforts were headed were the juridical science and the philosophy of law, and only secondarily to sociology.

The second consequence is the production of 'sociology of law' with sociological orientation, through the conceptual and rational vision of law, and the opening to the social question of law. Since the study of law was now understood as a segment of the society, sociology finds an object within its jurisdiction and could conceptualize it in a historical, evolutionary, and structural way. This 'sociology of law' shapes the 'sociological differentiation' of law, along with the understanding of law as a social phenomenon dependent on sociological conditions of observation.[6]

This chapter discusses these two phenomena: on one hand, the opening of law 'towards society' in sociological jurisprudence and, on the other hand, the understanding of law 'within society' made by sociology. The distinction will serve as a guide to describe the concerns and objectives of the discipline. The causal relations sought are of a functional type, i.e., no questions (or suspicions) for the reasons of the emergence of sociology of law will be sought, but rather the question for the functions fulfilled by sociology of law or, in other words, the way in which sociology of law defines a specific problem to resolve. To address these questions, it is necessary to point out some theoretical backgrounds.

Tomasic (1985: 6-7) has noted that the history of the sociology of law can be seen in three phases. The first is the 'European phase,' where the 'founding fathers' (Weber, Durkheim, Ehrlich, Petrazycki, Gény, Pashukanis, Gurvitch, Renner, and Timasheff) appeared. Its main themes were: the macro-social and abstract

[6] Certainly, the distinction between 'sociological jurisprudence' and 'sociology of law' has been subject of many discussions. For example Friedmann (1962: 2) argues that the terms 'sociology of law' and 'sociological jurisprudence' differ only "artificially" since their concerns are similar. This work shares the position of other authors as Machura (2001: 41), who notes that both concepts refers to two scientific movements with different purposes, or Deflem (2006), who understands sociological jurisprudence as a special application of sociology for legal ends.

theorizing, the study of the relationships between law and social evolution, or the emergency of capitalism. An almost parallel 'North American' phase, which would have initiated in 1911 and reached its peak in 1960, including Roscoe Pound, E.A. Ross, W.G. Summer, R.T. Ely and J.R. Commons. Its main foci would have been: legal realism, 'social engineering,' and empiricism. Finally a phase called 'international', which would have begun about 1970 where Parsons, Habermas and Luhmann are the main figures. In this phase, the main themes would be: macro theories and the substitution of empirical approach in favor of historical researches. Although this work will largely agree with the Tomasic classification, since he accurately describes different stages of development of the socio-legal thought, the study will nevertheless focus on 'three problems of reference' rather than 'chronological phases' of sociology of law, since we are not interested in the historical correlation itself, but its particular functional configuration during the differentiation of sociology of law.

Following this scheme, we will address first the problem of the North American and European sociological jurisprudence of the late nineteenth and early twentieth century. In this particular locale, we will observe the introduction of a 'social dimension' in law. Then we will analyze first the sociological perspectives of law in Durkheim and Weber and will see its extension up to the structural-functionalist proposal of Talcott Parsons and the synthesis of Habermas. Accordingly, we will problematize the idea of 'sociological differentiation of law' as a separated segment of the society. Finally, we will address the problem of differentiation of law from the sociology of law of Niklas Luhmann, where we will emphasize the main mechanisms that serve as background to the description of the process of 'differentiation.'

### 2.1. The Sociological Jurisprudence

In studies made in the early years of the sociology of law (Baumgartner 2001; Deflem 2006; Friedmann 1962; Kidd 1938; Krawietz 1998; Machura 2001, 2010;

Rehbinder 1972; Tomasic 1985) exists an agreement in pointing out that by the end of the nineteenth century, both in Europe as in the United States, 'antiformalist' juridical movements appeared, which criticized the idea of law as a 'coherent unit' and questioned the absence of the society in the study of law. Granting that before that time, criticism of this type can be found – among the oldest and with philosophical inspiration, the historical school of law of Von Savigny (1850) and Puchta (1828-1837), the German free law movement (Flavius [Kantorowicz] 1906) and the jurisprudence of interests of Ihering (1894)[7] - the truth is that it was only in the late nineteenth and early twentieth century that these descriptions become plausible and were able to connect with other descriptions. Next, the development of these criticisms and the formation of a sociological thought of the law in the so-called "sociological jurisprudence" will be explained.

### 2.1.1. The North American Sociological Jurisprudence

Scholars of the sociology of law as Baumgartner (2001) or Deflem (2006) argue that sociological interest in law first appeared in the United States in the works of the judge Oliver Wendell Holmes (1897), who laid the basis of 'realism' in the study of law. His ideas were later further explored by the North American jurist Roscoe Pound (1911a; 1911b; 1912), in what he called "sociological jurisprudence." This has served as a guide-concept to understand the phase of development in the socio-legal thinking. We will follow this line of development, knowingly that the thought of Wendell Holmes also had a ramification in the 'legal realism,' which was rather related to the conceptual interpretation of law than to a subsequent sociological development (cf. Llewellyn 1930, radically in Frank 1930).

Oliver Wendell Holmes was a judge of the Supreme Court of the United States, a remarkable jurist and an author of several treatises on Common Law (Wendell

[7] Eugen Ehrlich (1916: 583) even proposed to include *L'Esprit des Lois* of Rousseau as a pioneering work in the sociology of law.

Holmes 1881). In 1897, he published a brief essay about what should be understood under the concept of law and the relations of law with morality. In this work is the statement that the law is a set of "prophecies of what the courts will do in fact" (Wendell Holmes 1897: 461). This citation is well known, although the implications that his ideas have in the sociology of law have not been quite studied. Three of them we will distinguish here. First, the component of 'sanction' in the law is emphasized from its formulation. In the discussion on the relationships between law and morality, Wendell Holmes points out that to understand the separation between law and morality should be marked by the difference between good and bad morality. Undoubtedly, it would be that the law protects good morality and is dependent on its nature. Nevertheless, if one wants to understand what distinguishes law from morality, it is necessary to adopt an opposite position to good morality and to observe how this one allows the outlining of the contours of law. In simple terms: one must observe how one understands the law - not the good man but the bad man. For the bad man, who deviates from the norm and the good morality, law is a 'prophecy' that is possible to be fulfilled. That means, law is, unlike morality, an expectation of sanction:[8]

> But what does it mean to a bad man? Mainly, and in the first place, a prophecy that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. (Wendell Holmes 1897: 459)

Second, in a doctrinaire sense, the concept of 'prophecy' is also related to what Wendell Holmes understands by 'norms.' The North American system of Common Law, as is known, is a system based on precedents, which constitute the basis for later decisions. As soon as the decision is made and is registered, the precedents become part of the corpus of knowledge to make decisions in the future. For Wendell Holmes (1897: 458), "[t]he primary rights and duties with which

[8]One can also easily read here 'normative expectations', i.e. a sociological idea of law that indicates that points at the law as an expectations horizon. We will revisit this idea as we discuss Luhmann.

jurisprudence busies itself again are nothing but prophecies," that is to say, the value of this knowledge is accidental and not systematical. It indicates only mere linkage possibilities in a future temporary horizon. The law is a prediction because its normative content consists only of fulfillment probability. The knowledge of law is of an empirical and practical character, and in no case provides exact causal relationships. Norms are precedents, which, as 'prophecies,' point to a horizon of possibilities and whose realization in the decision has to be defined a posteriori. In other words, they are prophecies that are tested only *in the praxis of judicial decisions*.

Finally, the idea of law as "prophecy" contains an 'organizational' component. What is considered as knowledge by law corresponds neither to a logic of the system nor to an order of a higher instance. The law is settled, on the contrary, in the decisions of the courts and those decisions do not necessary produce a coherent normative system (Wendell Holmes 1897: 465). Moreover, law comes not from the authority of a sovereign power but from judicial decisions, especially in common-law jurisdictions. On these two ideas Wendell Holmes builds his criticism of the legal formalism. The law cannot be understood as a coherent system, or as a command of the sovereign power (such as Rousseau or Hobbes). The law is created in the courts that operate in the law and which decide about cases, and while the result of its operations attempts to create a coherent body of norms, its coherence is a matter of operative character and not structural a priori. Thus, Wendell Holmes (1897: 469ff.) indicates that law should be viewed from a historical and also economic perspective and that the science of law has to deal first with social desires that move the law, and later with the coherence of a system or a normative tradition.

From his point of view, it is not possible that a legal theory would lose its social conditionings, hence his attempt to establish an 'empirical concept' of law, based on the result of specific decisions that are produced in it. Any philosophical consideration about the law must be made, therefore, under the scrutiny of the results of its social aspects. The science of law is the jurisprudence that takes in

consideration nothing more than what happens empirically in the law. This particular doctrine will bear fruit in the early twentieth century.

Roscoe Pound, jurist and professor of law at Harvard University, was a connoted follower of the ideas of the judge Wendell Holmes. Pound (1911a; 1911b; 1912) established a programmatic axis called "sociological jurisprudence", which inserted into the teachings of the law schools in the United States. While Pound (1921) recognizes Wendell Holmes as one of his main influences, unlike the Holmes, Pound was aware of the 'sociological' movements of law in Europe and he used them to strengthen his position (cf. Pound 1938; 1943).

For Pound (1910), sociological jurisprudence is based on a distinction with critical purposes, namely: 'law in books' and 'law in action.' This distinction points to two ways of understanding the law. In the first case it is a question of a doctrinal and conceptual understanding of law, and in the second case of the observation of the current conditions within which it operates. The focus of sociological jurisprudence is "law in action," which allows for a better understanding of the dynamic and social character of law and, thus, improves its performance. Sociological jurisprudence, which deals with 'law in action', would have developed, for Pound (1912: 491), in four stages: mechanical, biological, psychological, and unified. The first one is associated with the positivism of Comte; the second stage is related to Spencer's sociology and evolutionary theory; the third stage would have been influenced by the ideas of Gierke, Ward, and Tarde; finally, the stage of unification, according to Pound, would contain the foundations of sociological jurisprudence program, since it would already be given the conditions to establish the study of 'law in action.'

Sociological jurisprudence aims to observe law in a critical and comparative way and in relation to social conditions and social progress, paying more attention to the real operation of the law ("the working of the law") than to its abstract content, which is identified as "law in books" (Pound 1912: 516). The program of sociological

jurisprudence, according to Pound (1912: 513-515; 1914: 20-21), dictates that it has to deal with six fundamental issues:

1) Study of the actual social effects of legal institutions and legal doctrines;
2) Sociological study in preparation for law-making;[9]
3) Study of the means of making legal rules effective;
4) A sociological legal history;
5) The importance of reasonable and just solutions of individual cases;
6) That the end of juristic study is to make more effective efforts in achieving the purposes of law.

Pound later added to these tasks, 'social control' as a social function of the law. With this, law would gradually subordinate other modes of control and 'social engineering' as morality and religion. Social control as a function of the law is, according to Pound (1942), the arrangement of human relations to carry out requirements, demands, and desires within a politically-organized society at personal, individual, or collective level.

Pound's sociological jurisprudence is similar to the approaches of Wendell Holmes, since Pound considers that law is not necessarily logical or coherent but mere doctrine applied with extra-legal criteria (social ends, preferences, etc.). Both Wendell Holmes and Pound assume that law has performative functions for social order and that sociological jurisprudence is an 'auxiliary discipline' for the optimization of the social function of law. In doctrinaire terms, sociological jurisprudence is the nexus of jurisprudence with empirical foundations for its decisions. As long as jurisprudence becomes more sociological, its decisions would be more pertinent and law enforcement would become more effective. The concept of law – as an object for the discipline - would be the same, since sociology would not deal with its formulation but only with the improvement of its functions. In any

[9] This issue is discussed in detail in Pound (1913).

case, it is a question of formulating a concept of the law, not embedded in the State, but rather one that reinforces the functions of law attending the existing social conditions.

Following the foregoing, it turns out to be clear that sociology of law must be understood separately from sociological jurisprudence, which constitutes a special use of sociological knowledge for legal purposes. For this reason we need to examine further the particular case of sociology of law in sociological jurisprudence developed in an almost parallel way in Europe.

### 2.1.2. The European Sociological Jurisprudence

The European sociological jurisprudence in the late nineteenth century was more of a reaction to the so-called 'jurisprudence of concepts' from the Kantian idea of natural law, than a definition of a sociological program for the study of law. This must be emphasized, since in the studies on the origins of the sociology of law, sociological concerns are often confused with the purely legal. Indubitably, sociology of law has ties with the sociological movements of the North American and European jurisprudence. We will later see Max Weber and Talcott Parsons reflecting some of these ideas in sociological formulations. This confusion usually occurs because, although in the United States sociological jurisprudence clearly differed from sociology of law (cf. Pound 1943). In Europe, the use of sociology for the interpretation and application of law was commonly called 'sociology of law,' without reaching a sociological program for the study of law. It is worth insisting on this. The main concern of these movements was to provide guidelines for science and philosophy of law in dealing with social conditions and the effects of the law. For these reasons, we prefer to call this movement as 'sociological jurisprudence' and not 'sociology of law,' a term we reserve for later.

In the context of the European sociological jurisprudence, the works of Thimashef (1939), Gurvitch (1947), or Ehrlich (1989) surface. Ehrlich provided a connection

between the North American sociological jurisprudence and the European and later with the sociology of law of Max Weber. With regard to Gurvitch, Mc Donald (1979) supports that his sociology of law was despised in the United States for a long time, partly by the wide diversity of influences of the Russian thinkers settled in France, which ranged from phenomenology, Marxism, structuralism, the sociology of Durkheim (whom he succeeded as scholar in La Sorbonne), and empiricism, and also because he supported a position that was more philosophical than sociological. The work of Thimashef meanwhile, although recognized by Pound (1943), did not have the impact that, on the contrary, Eugen Ehrlich obtained.

Ehrlich significantly influenced the North American sociological jurisprudence. Oliver Wendell Holmes was interested in his works and took up contact with him, as related by Ehrlich (1916: 582). Nevertheless, his ideas will take force only up to the programmatic formulation of the sociological jurisprudence of Roscoe Pound. In his first writings, Pound (1914) commented that the work of Ehrlich was an important influence for the consolidation of the sociological jurisprudence. Later in 1922, Pound (1922: 130) published a brief Laudation to the work of this author, in which occasion he lamented that, because of the First World War, Ehrlich had to decline the invitation to travel to the United States and present his ideas. The similarities between the thought of Pound and of Ehrlich are evident. Perhaps the clearest of all is the use of a dichotomy that distinguishes the traditional study of law and the new approach of sociological inspiration. The Ehrlich dichotomy (1989: 409ff.) between "state law" and "living law" was re-formulated by Pound in his first writings as the distinction, as already discussed, between "law in books" and "law in action". In both cases, it is a question of differentiating an ambience of explanation of law from social considerations, separately from the traditional understanding of law. This distinction served to open the interpretation of precedents and doctrine towards social aspects and thus adjust judicial decisions in the North American sociological jurisprudence. Meanwhile, in case of European sociological jurisprudence, this distinction served to deal jurisprudence with concepts of Kantian inspiration. Indeed, in contrast to North American sociological jurisprudence, which

tried to reorient judicial decisions towards sociologically empirical aspects, Ehrlich, his contemporaries, and predecessors (Ihering, Kantorowicz, Savigny, etc.), aside from trying to reorient this judicial praxis, faced constant attacks of conceptual jurisprudence.

The criticism towards sociological jurisprudence in Europe was based on a famous postulate of Kant about the impossibility of founding an 'empirical science of law.' Kant (1797: 32) was referring to this option pejoratively: "A doctrine of law that is merely empirical may (like the wooden head in Phaedrus's fable) be a beautiful head, but unfortunately it has no brain!,"[10] since the true source for the science of law had to be reason and not empirical experience. Sociological jurisprudence was stubborn on developing a science of law of empirical character and, thus, subordinating the pretensions of rationality to the results of current and operative knowledge of the law. Facing this Kantian idea of the impossibility of an empirical science of law, Ehrlich (1989: 33) argues that: "the sociology of law is the scientific doctrine of law,"[11] since jurisprudence as science is a part of the theoretical science of society, i.e., sociology. Moreover, for Ehrlich (1907), conceptual and rational jurisprudence obey only the products of historical conditions, for example, an interpretation of Roman law concerning customary law.

Sociological jurisprudence to Ehrlich (1989: 405, 421) – which he refers to as sociology of law - would deal with the living content of law and not with its conceptual abstractions. This living content of law is the 'living law', i.e., non-state law produced by society beyond legal formalizations; it is also the law that dominates social life but one that is not reduced to formal or conceptual legal postulates (Ehrlich 1989: 415) and that while it can take state law – legal documents or judicial decisions - as a source, this type of law is not the main theme. Living law

[10] "Eine bloß empirische Rechtslehre ist (wie der hölzerne Kopf in Phädrus' Fabel) ein Kopf, der schön sein mag, nur schade! daß er kein Gehirn hat."

[11] "Die Soziologie des Rechts ist die wissenschaftliche Lehre vom Rechte."

comes from social relations that occur empirically and historically, since "social order" precedes state law (Ehrlich 1922: 132) and the "social function" of living law is aimed exactly at the production of such order (Ehrlich 1989: 422). State law is located in the opposite bank. Following Ehrlich's own writings, *state law* can be defined as a counter-concept of *living law*, since the former is located in judicial and administrative norms. In Ehrlich words: "[t]hat is living law in contrast to that which applies only to the court and authorities"[12] (Ehrlich 1989: 415) or also "[s]tate law consists for the greater part of rules of administration (instructions addressed to administrative officials). Still it includes also rules of decision (instructions to the judge as to how to proceed and how to decide in litigation)" (Ehrlich 1922: 137). Every law that is not reduced to administrative or judicial disposals constitutes living law and, for Ehrlich, many norms are not formalized in state law.[13]

Ehrlich' idea of 'living law' will serve as input to sociology of law for over half a century.[14] His sociological postulates are, nevertheless, rather scarce and are not systematized towards a social theory of law of major scope. An example of this is the idea that the social and economic order produced by living law would be based on four fundamental (juridical) facts, namely: "Exercise, domination, property, declaration of interest"[15] (Ehrlich 1989: 84) and in five necessary (juridical) institutions: "marriage, family, possession, contract, succession" (Ehrlich 1922: 131). This conjunction would produce society: "Society is the totality of human relations that are in close contact with each other. These relations that they form society are

[12] "Das ist also das lebende Recht im Gegensatze zu dem bloß vor Gericht und den Behörden geltenden."

[13] The problem of state law seems to be for Ehrlich a problem of complexity, i.e. a problem of "requisite variety" (Ashby 1957: 202ff) to answer to its environment.

[14] Recently attention has turned to the idea of living law of Ehrlich and its possibilities for a 'juridical pluralism' (cf. Nelken 2008; Hertogh 2009).

[15] "die Übung, die Herrschaft, der Besitz, der Willenserklärung."

of very different types"[16] (Ehrlich 1989: 34). If we pay attention to these facts, institutions and bonds, we see that what Ehrlich understands about 'social order' is rather a 'non-state' juridical order. The way in which social order is understood tends to rather justify an idea of law, as an idea of society. Put another way, the idea of living law tends to be a *juridical description of society* and not a *social description of law*.

The fundamental difference between the ideas of sociological jurisprudence of Pound and Ehrlich is that, for Pound, 'law in books' is a situation that should be improved by sociological jurisprudence, while for Ehrlich, 'living law' is the true law and not the juridical fictions that create doctrinaire concepts. In spite of this, in both cases it is a question of a *practical* task. In both cases, the concept of law is incomplete and in both cases, the nation-state law must be either replaced or improved.

### 2.2. The Sociology of Law

Sociological jurisprudence served as a base for the emergence of the sociology of law, though its main concerns were rather oriented towards the internal improvement of law. By establishing criticism on the way in which law is understood, sociological jurisprudence allowed sociology to emphasize the social character of law and transform law into an object of sociological observation.

The distinction between living law and state law made the question about a 'social dimension' of law possible. This social character of law was taken as a rudimentary argument by sociological jurisprudence for a more empirical rather than conceptual treatment of law. In its formulation, as we know, a 'sociological' concept of the right was not pursued, but the practical knowledge of law was to be perfected. However,

[16] "Die Gesellschaft, das ist die Gesamtheit der menschlichen Verbände, die miteinander in Fühlung stehen. Und diese Verbände, die die Gesellschaft bilden, sind sehr verschiedener Art."

sociology will soon take charge of this opening of law towards social aspects, formulating approaches to law with clear sociological orientations.

This process, which may be called 'sociological' differentiation of law, can be understood as a part of a broader process of differentiation of law, which includes the differentiation of sociology as a science. The law, in its own process of differentiation, enters into a crisis with regard to the delimitation of its borders, which appears clearly in the disputes between sociological jurisprudence and rational ideas of law. The borders of law from thereon cannot be understood in purely ideal terms, and, with the emergence of sociological jurisprudence, every setting of limits must seek its own justification.

If we agree with Luhmann that law takes charge of "normative expectations" and science of "cognitive expectations" (Luhmann 1991a: 440-441) and that these expectations are opposites, this differentiation process will then be less dramatic for sociology than for law. The differentiation of knowledge in sociology oriented to law occurs as part of a novel process but without relevant critical repercussions. On the other hand, in the differentiation of the legal system, which is eminently normative, this differentiation process occurs with various problems, like those we have previously described.

It might seem that the emergence of sociological jurisprudence announces the appearance of a social dimension in law, although this 'social dimension' of law must be understood in a slightly different way. It is not in any way a social differentiation between alter egos (Luhmann 1991a: 119), but rather that social aspects of law are treated as 'themes' in the law and that they serve to satisfy certain normative demands. In other words, it is a question of a differentiation in the factual dimension (Luhmann 1991a: 123-124), i.e., in the internal understanding of law and its praxis. Sociological jurisprudence can also be seen as a symptom of the differentiation of law and sociology and also as a curious "structural coupling" (Maturana & Varela 1984; 1998) between sociology as science and law.

So far, we have concentrated on the side of law, its reflections in sociological jurisprudence and its pretensions. We have therefore seen this process only from one side of the "form" (Spencer-Brown 1979), namely of law, where the fundamental problem of reference is normative production and decisions, an interest that appears clearly in sociological jurisprudence. Next, we will see the problem of reference of sociology and how a sociological differentiation of law appears, that is to say, law as a sociological object.

Similar to the development of a sociological jurisprudence into juridical praxis, sociology of law emerges under cognitive pretensions of diverse character. In this initial situation, the first classics of sociology of law appear. In this section we will deal with the ideas of Durkheim, Weber, Parsons and Habermas with regard to law. The motive for highlighting these authors is because their ideas contain fundamental premises that pave way for the understanding of various aspects of this 'sociological differentiation of law', i.e., a specific field of sociology which horizon is the law. For this reason, we will discuss the central aspects of their sociological proposals to understand law. Once this is done we will deal with the sociology of law of Luhmann as a theoretical closure on the sociological differentiation of law.

### 2.2.1. Durkheim: Law and Morality

In a different way from sociological jurisprudence, the position of law in society is, for Émile Durkheim (2001),[17] an essential element for understanding the social whole. For Durkheim, law is the fundamental social organism in which the 'form of differentiation' of society, so to speak, can be seen. In any case, his understanding of law pointed to an improvement in juridical praxis, but knowledge of law allows the accounting for society and its transformations. Thus, law is a fundamental condition

[17] Translation from Spanish.

of society and also of modernity. Therefore, to understand modern society one has to pay attention to the conditions under which law appears and shapes society.

His study on the moral character of law in the *Leçons of sociologie* (Durkheim 1958) closely follows the distinctions used in *De la Division du Travail Social* (Durkheim 2001) with regard to the type of sanctions (Durkheim 1958: 3ff.). Durkheim addresses law from an essentially moral perspective and analyzes the different manifestations of this morality, on law, on the relations between the individual and the State, up to property law. For him, as for many of his contemporaries, the problem of the law was a problem of morality, which was especially evident in the punitive character shared between law and morality (Durkheim 1958: 2).

This 'moral problem'[18] appears throughout all his works and is problematized in a particular way in *De la Division du Travail Social* (Durkheim 2001). The social division of labor, per Durkheim (2001: 65), resolves a moral problem more than an economic problem, and its function lies in morality. The moral character of the society is expressed in the solidarity, which comes from society and its obligations, representations, and reciprocal commitments between individual and society. In these moral terms, social solidarity must be understood as the fundamental social tie. The task of sociology is exactly to study the solidarity: "the study of solidarity thus grows out of sociology. It is a social fact we can know only through the intermediary of social effects" (Durkheim 2001: 78).

Law appears for Durkheim as a problem of observation. When attempting the study of solidarity, Durkheim (2001: 75) focused his remarks on the law, which he considered as a "visible symbol" of such solidarity. The study of law is, therefore,

[18] Durkheim did not develop an explanatory term about its conception of morality, it is possible to conclude that, from its position, morality resembles altruism, and sociability is a consequence of this disposition of conscience towards others. With regard to the uses that Durkheim gives to the term "moral", see Catoggio (2004); Coterrell (1991).

the study of a social fact which tangible manifestation allows the accounting for the predominant solidarity in society. Solidarity is expressed in customs, of which there exist some whose knowledge is obligatory and whose non-compliance is punished. These customs are the core of law and of social life itself.

Every law is, in principle, 'customary.' Each social group has certain representations and collective feelings that are inherited by successive generations. Certain aspects related to social practices acquire a mandatory character, and respect and responsibility are demanded. Some of these aspects acquire such relevance that organs emerge to guarantee its respect, such as the Courts (Durkheim 2001: 113). When this happens, moral judgments become 'juridical formulae' and a legal order is constituted.

Since the society is understood by derivation of morality and, in turn, morality is understood by its juridical manifestations, the types of social solidarity that are transformed with the advent of modern society are directly related to the preponderance of certain juridical forms. The categories of "mechanical solidarity" and "organic solidarity", which correspond to a "repressive" and "restitutive" law respectively (Durkheim 2001: 80ff.), show a differentiation process of law based on sanctions and, consequently, a process of social differentiation represented in the transformations of law.

The differentiation of society is the result of moral differentiation, which is expressed in law. From penal forms of law, which are placed on mechanical solidarity, up to civil forms of law, which come from organic solidarity, society maintains solidarity as basis for the relations between individuals and only changes the way that these relations are established in laws. The differentiation of society also occurs at the level of its representations, in what Durkheim (2001: 94ff.) calls "collective conscience", which is gradually fragmented as division of labor advances in front of individual conscience (Durkheim 2001: 124). With force in mechanical solidarity, collective conscience punishes crimes (Durkheim 2001: 96ff.) since its

presence in this kind of solidarity is more intense and its concrete manifestation occurs by punishment (Durkheim 2001: 101ff.), which primarily makes mechanical solidarity a form of 'criminal law.'

The transition to modern society occurs through the division of labor, in which not only specialized tasks are developed in a differentiated way, but wherein the kind of social bond are also differentiated, i.e., the solidarity that characterizes it. The law that symbolizes this kind of solidarity is the "restitutive law" (Durkheim 2001: 131ff.) and it appears under the aspect of an "organic" solidarity, or solidarity based on "differences" (Durkheim 2001: 153ff.). In such solidarity, complementarity relations prevail and these gradually replace "mechanical solidarity" (Durkheim 2001: 181ff.). Organic solidarity does not eliminate collective conscience, but this is differentiated in diverse perspectives.

> This is not to say, however, that the common conscience is threatened with total disappearance. Only, it more and more comes to consist of very general and very indeterminate ways of thinking and feeling, which leave an open place for a growing multitude of individual differences. (Durkheim 2001: 205)

The function of law to produce 'solidarity' and maintain the cohesion of society and the integrity of the collective conscience remains unaltered in this evolutionary transition, even if the social division of labor demands to enact a specification of its tasks and to take form in organs increasingly specialized.

In modern society, based on organic solidarity and restitutive law, collective conscience (and morality) is increasingly reduced to the State. This is one of the reasons by which, on the one hand, Durkheim has been classified to be within the so-called "methodological nationalism" (Smith 1983: 26) and, on the other hand, his ideas about law are explained to have greater impact when in a state concept of law. Durkheim (2001: 216) also took care to emphasize that organic solidarity is only possible when a "center" in society exists. Such center belongs to the State

(Durkheim 2001: 259). Hence, the problem of "integration" in society is a moral problem, fundamentally between the individual and the State (Durkheim 1958: 42ff).

Durkheim's sociological concept of law has no doctrinaire function or concerns for its internal character. Law is a normative representation of the moral character of society. The same distinction between two types of law follows a classifying principle based on tangible aspects, i.e., on the social facts that form law. Law is relevant for sociology as long as this manifests in its punitive functions that the conditions of solidarity have changed. It is interesting to observe that the understanding of law in Durkheim is situated far from the schism between philosophy of law and practice of law (such as in the North American sociological jurisprudence), without discussing with some of them (such as the European sociological jurisprudence). Instead, he looks first of all for a differentiation of law as a proper object of sociology itself. However Durkheim does not go so far as to obtain a 'proper object' of law but he uses the sanctioning character of law as a moral equivalent to determine the type of social solidarity, as a social fact. Finally, a sociological theory of the law is not intended, but rather a sociological theory of morality based on the law (Durkheim 1958) or a theory of differentiation starting from the law (Durkheim 2001).

The question about law is nevertheless a question of purely sociological character. The law manifests not only relevant aspects of social life – a matter that sociological jurisprudence had also emphasized - but this is a concrete manifestation of social morality that governs the social order altogether. The study of solidarities and law of Durkheim shows how relevant the knowledge of the law is in understanding social phenomenon. The study of law is, for Durkheim (inversely to the study of sociology for sociological jurisprudence), an input of primary importance for understanding the social change and the moral character of society. Durkheim not only initiates this type of sociological reflection about law but also opens relevant questions about

the function of law, which, from the idea of 'solidarity' and 'differentiation,' will echo in the later formulations of Parsons, Habermas, and Luhmann.

### 2.2.2. Max Weber: Rationalization of Law

In a different way from the appreciation of Durkheim about law and its character, Weber argues that the law operates and is obeyed, not for its "coercive" character but for its "legitimacy" and, especially in modern societies, for its "rationality" (Weber 1922a).[19]

The juridical element, from Weber's perspective, must be understood from a 'historical' and 'comprehensive' point of view and also according to a generalized process of 'rationalization.' In this study of law, it is necessary to explain its transformations, from its irrational and magical origins up to the abstract and formal character of modern law, and, in parallel, to study those factors, which contribute to the historical constellation of this rationalization. In this process of rationalization, Weber pays special attention to the theoretical phases (ideal types) of the rationalization of law.

The starting point of the sociological knowledge of law is the distinction between the 'sociological' and the 'doctrinaire' approach to law. Here, Weber follows closely the ideas of Ehrlich and of the German Free Law Movement.[20] For him, the 'dogmatic' uses an abstract and formal 'normative-logical method', which looks for the coherence of juridical propositions. While, on the other hand, 'sociology' uses 'empirical methods' to discover causes and effects of the factual existence of a particular legal system. Sociology wonders:

[19] A recommended guide for a socio-legal reading of Weber is in Fariñas-Dulce (1989).

[20] In more detail in Fariñas-Dulce (1989: 57-74).

> What actually occurs in a community owing to the probability that persons engaged in community action, especially those exerting a socially relevant amount of power, subjectively consider certain norms as valid and practically act according to them, in other words, orient their own conduct towards these norms. (Weber 1922a: 368)[21]

The ability to develop sociology of law for Weber depends on the definition of an object of study for the new discipline. The object of sociology of law is the understanding [*das Verstehen*] of behavior, subjectively oriented by a legal order considered as "valid" (Weber 1922a: 19), i.e., regular social actions resulting from the representation of this order regarded as valid. Therefore, sociology of law, for Weber, does not study the juridical order as a set of rules or logically coherent normative propositions, but as a "complex of factual determinants of human conduct" (Weber 1922a: 369).[22]

Law, i.e. the legal order, expresses itself empirically since it is a causal factor of social action. What produces social action oriented by a juridical order is a representation that actors have of that order. The legal order is: "A complex of maxims in the minds of particular empirical people, which causally influences their factual action and thereby indirectly the action of others" (Weber 1922c: 348).[23] Therefore the legal order consists not only of that which is 'in accordance with law' but also of its nonfulfillment, since both cases are orientated by the legal order.

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[21] "Was innerhalb einer Gemeinschaft faktisch um deswillen geschieht, weil die Chance besteht, daß am Gemeinschaftshandeln beteiligte Menschen, darunter insbesondere solche, in deren Händen ein sozial relevantes Maß von faktischem Einfluß auf dieses Gemeinschaftshandeln liegt, bestimmte Ordnungen als geltend subjektiv ansehen und praktisch behandeln, also ihr eigenes Handeln au ihnen orientieren."

[22] "Komplex von faktischen Bestimmungsgründen realen menschlichen Handelns."

[23] "Komplex von Maximen in den Köpfen bestimmter empirischer Menschen auf, welche deren faktisches Handeln und durch sie indirekt das anderer kausal beeinflussen."

**a) Legitimacy and coercion**

This empirical character of the legal order ensues owing to the special conjugation of two key elements, namely 'legitimacy' and 'coercion.' As we have seen, for Durkheim, the second element was the most relevant in understanding law from a sociological perspective. For Weber, however, coercion is not sufficient to account for legal order as a social factor of an action.

The legal order is characterized more by its 'legitimacy' than by its coercion. The legitimacy of the legal order is related to the subjective representation that makes an actor, with regard to his acceptance of the legal order, a model of action. The law, as model of action: "enjoys the prestige of being considered exemplary or binding" (Weber 1922a: 16).[24] The recognition of the legitimacy of the legal order implies "fundaments of validity" (Fariñas-Dulce 1989), through which the actors attribute meaning to a given legal order.

According to Weber (1922a: 19-20), the validity of the legal order can be given in four ways:

1. According to *tradition*: The validity of the legal order is given by the "validity of what has always been" (Weber 1922a: 19).[25] It is the most ancient and universal type of validity and is related to the respect and fear for the holiness of the tradition. For the same reason, it is a validity of conservative character.

2. According to an *affectual belief, especially emotional*: The validity of the legal order is given by the "validity of what is newly revealed or exemplary" (Weber

[24] "Prestige der Vorbildlichkeit oder Verbindlichkeit."

[25] "Geltung des immer Gewesenen."

1922a: 19).[26] Through oracles and other prophetic forms, law turns out to be associated with the legitimacy of the "prophet" and the belief in its virtues.

3. According to a *rational belief in its absolute value*: The validity of the legal order is given by the "validity of what has been considered as an absolute" (Weber 1922a: 19).[27] This validity is represented by the pure type of "natural law", and is associated with the orientation of the action on values considered as absolute.

4. According to a *belief in legality*: The validity of the legal order is given by "the readiness to conform with rules which are formally correct and have been imposed in the usual manner" (Weber 1922a: 19).[28] The validity of the legal order is obtained by compliance with the rules and procedures and not with individuals, traditions, or specific values.

Weber then relates these types of legitimacy to the emergence of 'ideal types' in the rationalization of law.

From the point of view of the actor, "legitimacy" is a factor that operates in an "internal" way (Weber 1922a: 17) with regard to beliefs that guide his orientation for action. Nevertheless, it is not the only factor. In addition to legitimacy, legal order turns out to be guaranteed by "coercion" which operates in an "external" way (Weber 1922a: 17). By means of these two factors: legitimacy and coercion, social action is reinforced towards legal order.

[26] "Geltung des neu Offenbarten oder des Vorbildlichen."

[27] "Geltung des als absolut gültig Erschlossenen."

[28] "die Fügsamkeit gegenüber formal korrekt und in der üblichen Form zustandegekommenen Satzungen."

This is the plane of the 'guarantees', with which law makes probable its acceptance as model of conduct. Thus, law, as legitimate order, is characterized by having "specific guarantees of the probability of its empirical validity" (Weber 1922a: 369).[29] These guarantees can be 'internal' or 'external' to the actor. The "internal guarantees" are given by "beliefs" that an actor possesses about the legal order and that grant "validity" to this, as an emotional and affective feeling to law, and a rational appreciation of law as having an absolute value (moral, aesthetic, etc.) or a religious belief in law as a mean of salvation (Weber 1922a: 17). The "external guarantees" are related to the expectation of "external consequences", i.e., "sanctions" of some kind (Weber 1922a: 17). The latter type of guarantees operates independently of the actor and reinforces that the action be guided by law beyond the mere belief in the validity of an order, which, by itself, cannot be considered as a causal factor of the action for the legal order. To execute these external guarantees, a "coercive apparatus" is organized (Weber 1922a: 369) in which a group of individuals are in charge of coercion (physical or psychic) to force the observance of this order or to punish its transgression. In a way similar to Durkheim, Weber pays special attention to the role played by sanctions in the law. Nevertheless, as we have indicated, sanctions are not the decisive factor in understanding the reasons why a legal order is causal and empirically related to real human behavior. Indeed, the rationalization of law and its legitimization are focused on its fundaments of validity and not on its sanctioning character.

Since 'coercion' is not a fundament of legitimacy of the order (internal to law) this has a role only as 'external guarantee.' Within the external guarantees of law this is the most relevant but it is not unique. In effect, 'coercion' disputes its place as external guarantee against 'convention', since there is the expectation of certain 'external consequences' and situations of interest in both.

[29] "spezifischen Garantien für die Chance ihrer empirischen Geltung."

For Weber, coercion plays a double role in the legal order. On the one hand, it allows the understanding of the empirical character of law as a guide for behavior and, on the other hand, it allows for the delimitation of a specific type of social action that is coupled with law. 'Coercion' serves mainly to distinguish the legal order against other social orders as convention and custom. The force of legal order is greater than the force of custom or of convention because it is not only established in social action, but also possesses structures that affirm its compliance.

With regard to 'custom,' Weber points out that this is an action that is repeated without having any more fundamental rationale than the mere fact of its regularity:

> We understand for "custom" a typically uniform activity which is kept on the beaten track simply because people are "accustomed" to it and persist in it by unreflective "imitation". It is an "action of masses", the perpetuation of which by the individual is not "required" in any sense by anyone. (Weber 1922a: 374)[30]

'Convention', on the other hand, is based on the probability of reprobation, which can be empirically sensitive to the actor in its immediate environment:

> For convention, on the other hand, we understand that this exists wherever a certain behavior is sought to be induced without, however, any coercion, physical or psychological, and, at least under normal circumstances, without any direct reaction other than the expression of approval or disapproval by those persons who form the "environment" of the actor. (Weber 1922a: 374)[31]

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[30] "Wir wollen unter „Sitte" den Fall eines typisch gleichmäßigen Verhaltens verstehen, welches lediglich durch seine „Gewohnheit" und unreflektierte „Nachahmung" in dem überkommenen Geleise gehalten wird, ein „Massenhandeln" also, dessen Fortsetzung dem Einzelnen von Niemanden in irgendeinem Sinn „zugemutet" wird."

[31] Unter „Konvention" wollen wir dagegen den Fall verstehen, daß auf ein bestimmtes Verhalten zwar eine Hinwirkung stattfindet, aber durch keinerlei physischen oder psychischen Zwang, und überhaupt zum mindesten normalerweise und unmittelbar durch gar keine andere Reaktion als

What distinguishes law as a normative order is not only coercion as a guarantee of order, but its application by a "coercive apparatus." The law is guaranteed by this external coercive apparatus, i.e. for the probability of coercion exercised by this organ composed by individuals with the mission to compel the observance of the order and to punish its transgression. Therefore, a norm is 'legal' (and not 'custom' or 'convention') when it appears sanctioned by this 'apparatus.' Weber recognized that coercion is not in all laws and that there are diverse kinds of law in which coercion does not play a fundamental role. Nonetheless, for the delimitation of the specific field of the law, coercion plays a very relevant role as external guarantee.

In short, the probability of the emergency of a legal order is both in internal guarantees (validity of law) and in the mechanisms that guarantee its compliance at the external level (coercion). The sociological differentiation of law by Weber defines law based on these two manifestations, which allow the law to be a decisive factor in social action.

**b) Sources of Law**

For Durkheim, law is inherently 'customary.' For Weber, on the contrary, it is indeed probable that law has custom for its source, but also the creation of law institutes customs and conventions, without thereby diminishing either the compelling character of the law or its empirical validity.

According to Weber the law arose to protect "situations of interests" as that guaranteed by customs or conventions, but at some point they were not sufficient to guarantee the legal order (Fariñas-Dulce 1989: 192). These situations of interests could be due to the existence of a stratified social structure and to the demands of

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durch die bloße Billigung oder Mißbilligung eines Kreises von Menschen, welche eine spezifische „Umwelt" des Handelnden bilden.

social groups located in the summit of this structure on grounds of legal safeties. Other factors such as environmental alterations or wars could have also been relevant, so that they altered the existing living conditions and pressed for changes in social structure.

However, the law is largely a product of deliberate actions and it appears as a social invention, either through the natural transit of custom to the law, via conventions, or by means of the creation of a new law that imposes itself to preexisting customs and conventions. Indeed, the latter way of creating law leads to the formation of a more complex law. Among these sources, with which law is deliberate created, are contracts, judicial decisions, charismatic revelations, and the positive law.

In this process of artificial creation of law the "bearers" [*Träger*] of law play a fundamental role in the historical process of creation of law. They determined the different stages of the process of rationalization of the legal order. These "bearers" of law are the following:

> Theoretically, the general development of law and procedures may be viewed as passing through the following "stages of development:" charismatic legal revelation through "law prophets;" empirical creation and finding of law by legal honoratiores (i.e., law creation through cautelary jurisprudence and adherence to precedent); imposition of law by secular or theocratic powers; and finally, systematic elaboration of law and professionalized administration of justice by persons who have received "legal training" in a learned and formally logical manner. (Weber 1922a: 503)[32]

[32] Die allgemeine Entwicklung des Rechts und des Rechtsgangs führt theoretisch in „Entwicklungsstufen" gegliedert von der charismatischen Rechtsoffenbarung durch „Rechtspropheten" zur empirischen Rechtsschöpfung und Rechtsfindung durch Rechtshonoratioren (Kautelar- und Präjudizienrechtsschöpfung) weiter zur Rechtsoktroyierung durch weltliches Imperium und theokratische Gewalten und endlich zur systematischen und zur fachmäßigen Rechtssatzung, auf Grund literarischer und formallogischer Schulung sich vollziehenden „Rechtspflege" durch Rechts gebildete (Fachjuristen).

Each of these "bearers" of the law helped in the rationalization of the law from its own specificities. The 'legal prophets,' who obtain the law by means of a charismatic revelation, certainly contributed to the "pacification" (Fariñas-Dulce 1989: 254) of revenges and social conflicts; 'honoratiores' (both theoretical and practical), who, after the revelation of law by legal prophets, interpreted this already existing norms (that they should have been specializing in; their work was becoming progressively increasingly secular). They contributed by developing 'procedures' and the 'formalization' of the legal order. The 'princes' and 'magistrates' also played an important role since, although they initially respond to criteria of substantial and practical character, they influenced the 'rationalization' and 'secularization' of the law, both in its procedures as in its fundaments. Finally, from a point of view of the modern law, the specializing jurist, i.e., the 'professionals of the law', contributed to the development of the 'codification' and the modern 'proceduralization' of the law.

In all these cases, the "bearers" are part of the sources of law in their different theoretical stages, as well as the sources of legitimacy of law in each of them. The contribution is observed as not only relating to the general rationalization process, but also to the emergence of a specific legal order. Each of these 'theoretical stages' corresponds to an 'ideal type' of law, which is related largely to these "bearers."

**c) The Types of Law**

For Weber, law must be appreciated both from a subjective point of view (as legitimate order) and from a historical-theoretical point of view (as an ideal type). About the first approach we have already seen the rudiments of legitimacy of the legal order and also how these are expressed historically in theoretical stages and "bearers."

In the second aspect, that is to say, the study of law as an ideal type, law is understood as the conjugation of a constellation of value orientations that determine

the type of a historically predominant legal order. Weber constructs the ideal types of law by means of the oppositions 'rational/irrational' and 'substantial/formal.'

We know that the concept of 'rationality' plays an important role in Weber's theory, but in the analysis of law, the temporal factors of "predictability" and "calculability" of the actions and decisions in the law are added to this concept (Fariñas-Dulce 1989: 214), namely: "the rational calculation of legal consequences and likely outcomes of purposeful actions" (Weber 1922b: 468).[33] The largely unpredictable and arbitrary character of a legal order, which does not permit this 'rational calculation' of the action, therefore instigates the irrationality of law.

Accordingly, the 'rationality' of law must, thus, be understood from the point of view of the predictability of decisions inside the legal order, from its generalization or systematization. The 'formal' or 'substantial' character of law, on the other hand, denotes the orientation of the decision with regard to its contents. The law can be understood in a 'formal' way when its orientation is towards the system itself as a source of content, while the 'substantial' character of law is expressed in the adoption of contents, whose source is external to the system.

> They are formally irrational when in lawmaking or law-finding means which cannot be controlled by the intellect are applied, for example recurring to oracles or substitutes of them. Lawmaking and law-finding are substantively irrational on the other hand to the extent that decisions are influenced by concrete factors of the particular case as evaluated upon an ethical, emotional, or political basis rather than by general norms. "Rational" lawmaking and law-finding may be rational in a formal or a substantive way. (…) Law is however "formal" to the extent that, in both substantive and procedural matters, only unambiguous general characteristics of the facts of the case are taken into account. (Weber 1922a: 395)[34]

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[33] "die rationale Berechnung der rechtlichen Folgen und Chancen seines Zweckhandelns."

[34] "Irrational sind sie formell dann, wenn für die Ordnung von Rechtsschöpfung und Rechtsfindungsproblemen andere als verstandesmäßig zu kontrollierende Mittel angewendet

Based on these oppositions, Weber indicates the 'ideal types' of law:

a) *Irrational-Formal* Law: This type is sometimes called 'revealed law' and is related (though not exclusively) to the law that originated from the 'legal prophets' and its 'charismatic revelations.' To regulate the creation of norms or judicial activity, rationally uncontrolled procedures are used, for instance: religious divination. Due its characteristics of irrationality and materiality, this type of law would be present in primitive societies. The irrational-formal law is unforeseeable and rationally incalculable with regard to the result of its decisions, although it is accompanied in its procedures by a marked ritual formalism, which gives it its character of formality. "This ancient legal procedure was rigorously formal like all activities oriented towards the invocation of magical or divine powers; but, by means of the irrational supernatural character of the decisive acts of procedure, it tried to obtain the substantively "right" decision." (Weber 1922a: 469).[35] Put another way: one doesn't know the possible results of the procedure or even the reasons for the decision, but one can expect a ritual formalism. When compared with the types of domination, this law corresponds to the type of 'charismatic domination.'

b) *Irrational-Substantive* Law: This type of law presents uncertainty not only about the result in the decision but also the contents within which the decisions are taken. It consists in situational and substantive character and orients not to general norms

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werden, z. B. die Einholung von Orakeln oder deren Surrogaten. Materiell sind sie irrational insoweit, als ganz konkrete Wertungen des Einzelfalls, seien sie ethische oder gefühlsmäßige oder politische, für die Entscheidung maßgebend sind, nicht aber generelle Normen. „Rationale" Rechtsschöpfung und Rechtsfindung können wieder in formeller oder in materieller Hinsicht rational sein (…) „Formal" aber ist ein Recht insoweit, als ausschließlich eindeutige generelle Tatbestandsmerkmale materiell rechtlich und prozessual beachtet werden."

[35] "Streng formal, wie alle auf Anrufung magischer oder göttlicher Mächte ausgerichtete Tätigkeit, erwartete dieser Rechtsgang ein material „richtiges" Urteil durch den irrationalen, übernatürlichen Charakter der entscheidenden Prozeßmittel."

but to concrete evaluative judgments. Weber places in this type the so-called "Kadi's Justice" (Weber 1922b: 485), wherein cases are judged by representatives of the community, who claim to represent the feelings of the community. "The finding of the judgment, to the extent that it is not magically conditioned, is oriented towards substantive rather than formal standards. When measured by formal or economic "expectations," it is thus a strongly irrational and concrete type of fireside equity." (Weber 1922a: 485).[36] Weber called this type of law, 'traditional law.'

c) *Rational-Substantive* Law: This law is a modern type of law, which is present especially in the countries with common law tradition. Here, the resolution of legal problems are influenced by "ethical imperatives, utilitarian, and other expediential rules, or political maxims, all of which diverge from the "external characteristics" variety as well as from that which uses logical abstraction" (Weber 1922a: 396).[37] In any case the content of the decision is uncertain, as the fundaments of these are external to legal system. That's why semantics of justice, equity, peace, etc. are included in this law. Its rational character comes from firmly established procedures, while its substantial character derives from the source for its decisions. It is, however, a modern law.

d) *Rational-Formal* Law: For Weber, this corresponds to the most rationalized state of law. It is formal because it does not take into consideration anything aside from the specific aspects determined in the system, and it considers the facts with regard to its systematization and generalization. Originating from the changes introduced by the ecclesiastical natural law and the influence of the Roman law, rational formal law arose from the internal needs of law: "[i]t was the consequence of intrinsic

[36] "Die Urteilsfindung ist, soweit sie nicht magisch bedingt ist, an materialen, nicht an formalen Maßstäben orientiert und daher, an den ersteren oder an ökonomischen „Erwartungen" gemessen, stark irrationale und konkrete „Billigkeits"-Justiz."

[37] "ethische Imperative oder utilitarische oder andere Zweckmäßigkeitsregeln oder politische Maximen, welche sowohl den Formalismus des äußeren Merkmals wie denjenigen der logischen Abstraktion durchbrechen."

intellectual needs of legal theorists and their disciples, the doctors, i.e. of a typical aristocracy of legal literati" (Weber 1922a: 492).[38] The rational formal law consists of abstract norms, which are applied through logical interpretation in the decision of a singular case, and its orientation in these decisions is towards the logical coherence of the system. Weber thinks that the European continental law is the best example of this type, since both the procedure and the content of the decision are foreseeable and calculable. This law is oriented towards itself and produces, as a result, a rational and highly specializing legal order.

The types of law explain not only the changes within the law, but also the relations of law with other institutions, which are similarly rationalized in the transition to modernity. Thus, the rationalization of law goes hand in hand with the rationalization of the 'bureaucracy' in the modern State and the modern 'capitalist enterprise.' Rational-formal law granted the possibility of rational calculation to capitalist enterprise, and this, in turn, gave structure to the administration of law. With regard to the State, rational-formal law granted legitimacy to legal domination exercised by the State and its monopoly of physical coercion. For its part, the State acted as a guarantor of the legal order, which, due to its legality, is legitimate.

Weber discerns between the rationality and irrationality, and formality and substantively with which the types of law are characterized, and which are related to the way law gains predictability and self-orientation. For Weber, the bureaucratic character of modern law, in its substantive and formal aspects, shows a law whose fundaments of legitimacy should be sought in the political structure of society. This point will be further developed later by Habermas (1982a; 1982b; 1987), although he replaces the instrumental rationality (or formal) by "discourse."

[38] "es waren interne Denkbedürfnisse der Rechtstheoretiker und der von ihnen geschulten Doktoren: einer typischen Aristokratie der literarischen „Bildung" auf dem Gebiet des Rechts"

For Weber, the sociology of law as autonomous discipline faces a, 'cultural' concept of law, so to speak. This is understood as the result of 'representations' from which its legitimacy comes. From this, Kelsen (1915) claims a lack of an object for the sociology of law. The caution that must be taken with regard to this criticism relates to the inability of sociology to establish itself as support for the science of law and not because sociology must be a concept itself that holds and provides its own explanations.

By the mid-twentieth century, the situation of the sociology of law changes. On the one hand, the differentiated observation of law is radicalized with regard to sociology. The ancient legal realism movements take form as criticism to the fundamentals of the 'law in books.' In the United States, this occurred in the so-called 'critical legal' studies, which had their greatest popularity in the early seventies, and, similarly, in peripheral theoretical formulations of law, partly heirs of the behavioral phase of Parsons, and especially the theories of law of Donald Black (1976).

Indeed, along with Parsons, an attempt for conciliating the ideas of Durkheim and Weber in a general theory of social systems can be observed. Herein, law has a special place. From his studies on social systems, Parsons formulates a theory of law embedded within a scheme of the society. This does not admit disciplinary or conceptual exceptions, thus transcending the distinction between 'doctrine' and 'sociology' and formulating a sociological and universal concept of law.

### 2.2.3. Talcott Parsons: Law and Social Integration

Both Durkheim and Weber describe the process of differentiation of law in social life. As we have seen, for Durkheim this differentiation came from the crystallization of moral norms of collective conscience into legal norms with organized sanctioning power. Weber, for his part, observed this "differentiation of

the factual areas of law" (1922a: 386ff)[39] in the rationalization of law, its ways of legitimization, and action. Parsons go back to these approaches, paying special attention both to Durkheim's functionalist formulations and to Weber's culturalist principles for the development of a general theory of action systems. Indeed, at this point in the sociological theory of legal differentiation, the concept of a system appears clearly and the differentiation of law as a 'social system', which fulfills 'functions' for the social whole, is problematized.

**a) The Functional Differentiation of Law**

It should first be noted that while law plays an important role in Parsons' system theory, its function, structural elements and core features are, compared to other aspects of his own theory, underdeveloped. This can clearly be observed from his 'structural-functionalist' up to his 'cybernetic' phase. In both periods, reflections on the law appear, but without a clear status of an institution or of a functional system. Within the wider spectrum of the action, law is located inside the social system as an institution. Nevertheless, its specific function or, rather, its place as a system of action inside a social system is not clearly defined.

It is necessary to emphasize that Parsons early addressed the analysis of law in his structural-functionalist perspective and in the context of a role theory. He was interested in the place that legal profession has within a general theory of social action. This context appears in his first definition of the law: "Law, of course, consists in a body of norms or rules governing human conduct in social situations, that is, involving the relations of men to other men." (Parsons 1954: 372-373). This definition is certainly general and it is difficult to see in it a characteristic aspect of Parsons' ideas, but it is nevertheless his first approach to law in a systematical way. What is particularly interesting of this stage is that although his reflections are focused on legal profession and in very general terms on law as a social system or

[39] "Differenzierung der sachlichen Rechtsgebiete."

institution, in the analysis of the functions of legal profession, with regard to the society, a description of the legal function of law as a mechanism of social control already appears, to wit:

> The professions in this sense may, sociologically, be regarded as what we call "mechanisms of social control." They either, like the teaching profession, help to "socialize" the young, to bring them into accord with the expectations of full membership in the society, or they bring them back into accord when they have deviated, like the medical profession. The legal profession may be presumed to do this but also two other things, first to forestall deviance by advising the client in ways which will keep him better in line, and also "cooling him off" in many cases and, second, if it comes to a serious case, implementing the procedure by which a socially sanctioned decision about the status of the client is arrived at, in the dramatic cases of the criminal law, the determination of whether he is innocent or guilty of a crime. (Parsons 1954: 382)

There are two theoretical axes that appear in Parson's whole theoretical development of the law. One of them is the definition of a function of 'social control' for law (to which he later added other functions). The other refers to the analysis of law not as a differentiated social subsystem related to a function – as economy or politics - but like a 'mechanism' – in some cases as an 'institution' - that *is part of a set of other mechanisms or institutions*, which together collaborate in performing specific functions. These two theoretical paths are present during all his formulations on law.

In the sixties, Parsons writes systematically about law, and these reflections are present throughout the whole development of his ideas, from the socio-cybernetic analysis in the context of the AGIL scheme (which already appears in 1953 in the "Working Papers") up to the evolutionary ideas of the seventies.[40]

[40] Regarding the transformations from the 'interactive' model to the 'systemic' in Parsons, see Almaraz (1979).

In the context of a theory of social systems, Parsons maintains the idea of law as a mechanism of social control, as part of a set of other mechanisms:

> It seems justified to infer from these considerations that law should be treated as a generalized mechanism of social control that operate diffusely in virtually all sectors of the society (…) Nevertheless, it is one of the most highly generalized mechanisms in the whole society. It is located primarily, as I said, on the institutional level. It is not isolated but is one of a family of mechanisms of control. (Parsons 1962: 57)

Besides reaffirming this paradoxical trend of emphasizing the importance of law while also relativizing its differentiated status, Parsons points out that law not only deals with social control, but also assumes functions of 'social integration.' In his view, both functions, 'control' and 'integration,' seem to be compatible with the need to be solved by these functions, namely, that both social control and integration refer to the way law treats conflicts and maintain the social order: "Let us suggest that in the larger social perspective the primary function of a legal system is integrative. It serves to mitigate potential elements of conflict and to oil the machinery of social intercourse" (Parsons 1962: 58).

Parsons seems to see the problem of control and integration as the tendency of social system in the maintenance of its "equilibrium" (Parsons 1962: 71). This equilibrium in the exchanges of social system refers primarily to the cybernetic controls of information flows inside the system, which are needed in order to maintain the structure of the system, and its equilibrium with respect to its flows. For this reason, the ways in which the relations of "interpenetration" between law and other subsystems are so important, as with politics, economy (Parsons 1961a: 55), or societal community (Parsons 1965a: 258ff.), as well as the problem relative to the way with which social system could maintain its "stable structure" by means of generalized norms (Parsons 1961b: 223ff.; Parsons & Shils 1962: 108ff).

In spite of plausible compatibilities between the old function of 'control' and the new function of 'integration,' the latter function in Parsons' theory seems to be explained by the coherence of law with the AGIL scheme, rather than by a theoretical delimitation of the functions of law. In this new functional paradigm, there are indeed no functional imperatives for social control, but for integration. Thus, Parsons located law to be inside the quadrant of social integration, along with other institutions that pursue the same function inside the social system. As outlined below, in spite of the semantic insistence of Parsons' theory relative to social control, the operative and binding function of law in the social system is ultimately related to social integration.

**b) The Law of Modern Society**

Before delving into the situation of modern law, some formal aspects that allow for a better explanation of the central characteristics of law must be considered. For this, we will briefly refer to the aforementioned AGIL scheme.

Parsons introduces the idea of a four-function scheme with regard to conditions that constitute a boundary for the maintenance of a system of action, such as organic, psychological, social, or cultural system. What remains in the environment is the "ultimate reality" (Parsons 1966: 8), i.e., everything that does not constitute a system of action. The system theory appears then as a formalization of the principles of the action theory and derives from four fundamental questions. For Parsons, all action takes place in four systems, which are 'opened' up for inputs and outputs of the environment:

> More specifically, the theory of social systems belongs within the more general class of conceptual schemes seen in the frame of reference of *action*. Within that framework, the boundaries of social systems have been defined in terms of their relations, first to each other, then to the behavioral organism, to the personality of

> the individual, and to cultural systems. The relation to the physical environment is mediated through these others, and hence is not direct. (Parsons 1961a: 30)

A 'social system' is, therefore, a part of a wider system, defined as 'a system of action.' The boundaries thereof are marked by the social system's relations towards the 'behavioral organism', the 'personality,' and the 'cultural system.' In each of these systems are the same functional requests. Every action system must be able to satisfy at least four fundamental functions so as to maintain the structure of the system and its internal and external equilibrium: "I have suggested that it is possible to reduce the essential functional imperatives of any system of action, and hence of any social system, to four, which I have called pattern-maintenance, integration, goal-attainment, and adaptation" (Parsons 1961a: 38).[41]

In other formulations of this idea, Parsons calls the function of 'pattern-maintenance,' as 'latency.' The model is known by its acronym in English as AGIL or LIGA. According to Parsons, this model is applicable to any action system, and that social systems are action systems.

Inside a 'social system,' these four functional imperatives must be satisfied as well, and certain institutions are in charge of these functions. Thus, economic organization pursues "adaptation," and, in a similar vein, politics carries out the "goal-attainment" element of social system (Parsons 1961a: 40ff). The function of "pattern-maintenance" is, on the other hand, fundamentally religious and evaluative (Parsons 1966: 11). The function of the "integration" inside social system – which is, from a general point of view, the system responsible for the function of integration of action – is to provide for a set of institutions, among which law is located.

[41] In detail in Parsons (1971: 4ff).

**Table 1 Action System AGIL**

| Adaptation | Goal Attainment |
|---|---|
| Latency (or Pattern Maintenance) | Integration |

Source: Own elaboration based on Parsons (1971: 6)

The scheme of differentiated functions is only fully reached in highly differentiated modern societies, wherein each of these functions is associated with specific institutions. The law appears, then, as one of the most relevant institutions for the "integration" of modern society (Parsons 1961a: 40). According to Parsons, along with this, law is one of the key institutions for the "industrialization" in the West (Parsons 1965b: 142) and for the evolutionary leap from the "intermediate society" to "modern society." The relevance of law in this sense is only comparable with language:

> For the transition from primitive to intermediate society, the focal development is in language, which is primarily part of the cultural system. In the transition from intermediate to modern society, it is in the institutionalized codes of normative order internal to the societal structure and centers in the legal system. (Parsons 1966: 26)

In modern societies, the functional differentiation of legal norms finally occurs (Parsons 1961a: 55). This allows for law to actively participate in the exchange processes inside a social system and to fulfill its integrative function. Thus, law appears as an "evolutionary universal" of modern society (Parsons 1964: 351) and as an intrinsic and indispensable aspect for these highly differentiated modern societies (Parsons 1965c: 191). In this sense, the scheme of four functions certainly applies to modern society and it is here that law properly fulfills its functions.

Although we have seen that Parsons gives considerable importance to law from a functional and evolutionary standpoint, this does not have a clearly differentiated role inside the AGIL scheme. The closest formulation to this refers to the identification of four fundamental problems for modern law, namely: "legitimization," "interpretation" of norms, "sanction," and "jurisdiction" (Parsons 1962: 58-59). But Parsons himself does not explicitly include these problems inside an AGIL analytical matrix. What is usually known as an AGIL scheme of law corresponds to the approach of Bredemeier (1962), regarding the inputs and outputs of law, or to the ideas about rationalization of law of Münch (1990). Parsons himself did not develop an analysis of functions and exchanges for law under the AGIL scheme.

Law is located, as a partially responsible institution for social integration, in a normative level. Parsons emphasizes that the integrative institutions of the social system consist of norms, which institutionalize cultural values, which acquire a moral character in the quadrant of the integration, and which circulate along social system as information (Parsons 1972: 256f). This allows for the control of the system and the integration of its parts. In the late 60's, Parsons begins to call this quadrant of integration in social system, "societal community" (Parsons 1969).[42]

> This subsystem of the society is of special importance for purposes of the present paper because, as part of the structure of a society, it is in this subsystem that I would place the legal system, in a sense of paramount functional significance, although of course concretely it involves other functional components, notably political. (Parsons 1977: 32)

One of the central aspects in the transition from the primary bases of social solidarity towards solidarities of major generalization appears in societal community

[42] Although the idea of 'community' was already present at least four years before, law appears clearly as a central structure for community by means of the concept of "jurisdiction" (Parsons 1965a).

law (Parsons 1965b: 142f). This appearance makes the generalization of legal norms and its circulation throughout the society possible. For this generalization, the moral character of norms (an issue that Durkheim had already assumed) is not only necessary, but this normative character of law must also be generalized for the entire social system by means of the legal principles of "universalism," "specificity," and "proceduralization" (Parsons 1965b: 14; Parsons 1966: 27), which embody cultural values legitimized in legal norms and, in turn, is justified by the same. Thus, law – within societal community - can build relationships with other subsystems of society and, this way, ensures social integration.

Parsons emphasized on the function of integration of law until the end of his career. His subsequent writings on law seem to adopt a position much closer to Weber, with regard to the "legitimate" character of law (Parsons 1977: 33ff) and to the importance of cultural values for this institution. Despite these ideas on law and some accurate defenses of its importance for the sociology of law (Deflem 2006), Parsons did not build a unitary description of law in his theory. The importance of Parsons as a 'bearer' for the sociological differentiation of law lies primarily in his character as a mediator between socio-legal traditions. His ideas are bridges for the continuity of the sociological reflection on this phenomenon and they also represent an interesting, though incomplete, essay for determining the character of the social and sociological differentiation of law.

We will discuss the attempt of Jürgen Habermas for conciliating the ideas of Talcott Parsons with a subjectivist phenomenology and a liberal philosophy, wherein law appears as a central actor. This reflection will serve as a link between this section on sociological differentiation of law and the sociology of law of Niklas Luhmann, with which we will conclude with these reflections and then continue with our analysis.

### 2.2.4. The Consensual Synthesis: Habermas

It would be a mistake to categorize Habermas as a mere sociologist of law, since he has sought to go beyond sociology and to construct a theory of society from a philosophical-political perspective. Nevertheless, this theory of society is developed in narrow relation –and it cannot be otherwise - to sociology, particularly in dialogue with the classic sociological theories of Durkheim, Marx, Weber, and Parsons. It is precisely from the latter that Habermas finds the connection between a theory of society and a sociological reflection on law.

#### a) System and Lifeworld

To some extent, Parsons serves as a constant background to the social theory of Habermas. Thus, it may not be entirely wrong to place Habermas in the history of sociology as a prominent follower of the work of Parsons, similar to Richard Münch (1981; 1982), Jeffrey Alexander (Alexander & Colomy 1990), Neil J. Smelser (1962), or Shmuel Eisenstadt (1964). Indeed, the debate with Luhmann in the seventies was focused precisely on how to rebuild a social theory based on the concept of action systems (cf. Habermas & Luhmann 1990) and in one of his first approaches of his theory of society, namely, *Legitimationsprobleme im Spätkapitalismus* (Habermas 1973), there already exists a clear mention of the need for a division of Parsons' AGIL model, in accordance with a rupture between instrumental and phenomenological logics, i.e., between "system" and "lifeworld."

> From the lifeworld perspective, we thematize the normative structures (values and institutions) of a society. We analyze events and states from the point of view of their dependency on functions of social integration (in Parsons' vocabulary, integration and pattern maintenance), while the non-normative components of the system serve as limiting conditions. From the system perspective, we thematize a society's steering mechanisms and the extension of the scope of contingency. We analyze events and states from the point of view of their dependency on functions of system integration (in Parsons' vocabulary, adaptation and goal-attainment),

> while the goal values serve as data. If we understand a social system as a lifeworld, then the steering aspect is screened out. If we understand a society as a system, then the fact that social reality consists in the facticity of recognized, often counterfactual, validity claims is not taken into consideration. (Habermas 1973: 14-15)[43]

System and lifeworld are differentiated by the type of social action on which they are configured and for the rationality that characterizes them. A social system is a network of instrumental success-oriented actions, where individuals pursue selfish purposes and the purpose of the system is to maintain a level of consistency and autonomy. Instrumental rationality guides the action of systems. These social systems are self-regulated and self-governed, and they developed by themselves beyond the participants in communication. In this systemic level, systemic mechanisms of social coordination, as money and power, which are "delinguistified media" (Habermas 1982b: 230), operate under their own logics without taking into consideration the communicative pretensions of the subjects around them. The economy and administrative politics are the clearest examples of these systems since they function based on money and power respectively (again, A and G of Parsons' AGIL).

[43] "Unter dem Aspekt der Lebenswelt thematisieren wir an einer Gesellschaft die normativen Strukturen (Werte und Institutionen). Wir analysieren Ereignisse und Zustände in Abhängigkeit von Funktionen der Sozialintegration (in Parsons' Sprache: integration und pattern maintenance), während die nicht-normativen Bestandteile des Systems als einschränkende Bedingungen gelten. Unter dem Systemaspekt thematisieren wir an einer Gesellschaft: die Mechanismen der Steuerung und die Erweiterung des Kontingenzspielraums. Wir analysieren Ereignisse und Zustände in Abhängigkeit von Funktionen der Systemintegration (in Parsons' Sprache: adaptation und goal-attainment), während die Sollwerte als Daten gelten. Wenn wir ein soziales System als Lebenswelt auffassen, dann wird der Steuerungsaspekt ausgeblendet; verstehen wir eine Gesellschaft als System, so bleibt der Geltungsaspekt, also der Umstand, daß die soziale Wirklichkeit in der Faktizität anerkannter, oft kontrafaktischer Geltungsansprüche besteht, unberücksichtigt."

With regard to this type of instrumental action – and Habermas asserts its argument against Weber - the specific rationality of modern society is not only a success-oriented rationality (of means-ends adequacy or strategy), but one that is oriented to understanding. If systems are characterized by instrumental action, lifeworld is characterized by communicative action, and communicative rationality is its *telos*. Communicative rationality is the ability of social actors to give reasons and arguments about their actions and "they can orient themselves to criticizable validity claims" (Habermas 1982b: 224). Converse to the success-oriented instrumental action, understanding and consensus are central. Lifeworld would be a "transcendental place," where communicative action is fully developed as well as the recourse to arguments with the aim of a rational understanding that is oriented to consensus.

> Lifeworld is, so to speak, the transcendental place where speaker and hearer meet, where they can reciprocally raise claims that their utterances fit the world (objective, social, or subjective), and where they can criticize and confirm those validity claims, settle their disagreements, and arrive at agreements. (Habermas 1982b: 192)[44]

Lifeworld provides evidences and certainties about the world to individuals. Understanding or consensus is supported by language, which creates bonds between persons. This is possible since, according to Habermas, world objects are only such insofar as they are exposed, i.e., as states of affairs in sentences expressed. This supposes that "thoughts are propositionally structured" (Habermas 1994: 26), and the structure of sentences would allow for the structure of thoughts to be read.

[44] "Die Lebenswelt ist gleichsam der transzendentale Ort, an dem sich Sprecher und Hörer begegnen; wo sie reziprok den Anspruch erheben können, daß ihre Äußerungen mit der Welt (der objektiven, der sozialen oder der subjektiven Welt) zusammenpassen; und wo sie diese Geltungsansprüche kritisieren und bestätigen, ihren Dissens austragen und Einverständnis erzielen können."

Lifeworld operates culturally based on tacit assumptions that serve as a background for understanding and rational consensus, and it enables interactants to find pre-structured convergence points on which arguments can be developed. For this motive, cooperations and social solidarities are reproduced by means of communicative action. None of these would be possible without a specific discourse ethics, which allows the reproduction of this rational principle.

The distinction system/lifeworld is present throughout all the sociological ideas of Habermas (cf. Habermas 1973; 1982a; 1982b; 1987; 1994), and based on this, he problematizes the long-standing issue of the integration of society, since even the modern societies must be confronted with the problem of integration – an idea that Habermas shares with Durkheim and Parsons.

The integration of society according to Habermas (1973: 14; 1982b: 226-227) occurs on two levels: there is the integration that occurs at the level of the subjects engaged in a level of reasoning and communicative understanding, which he calls "social integration," and, on the other hand, there is the integration produced by self-regulated mechanisms of money and power, foreign to the subjects, namely the "systemic integration." These two mechanisms are respectively associated with the two types of social formations previously mentioned: system and lifeworld.

Based on this, Habermas argues that societies evolve in two ways. On the one hand, systems gain in "complexity" while lifeworld is "rationalized," and both are decoupled (Habermas 1982b: 180ff). Nevertheless, a hierarchy exists between these two evolutions. Through rationalization of society, that is, by means of communicatively increasing the rational understanding between actors, systemic complexity of society is made possible. Systems could only gain autonomy and complexity when anchored upon "institutions," which belong to lifeworld (Habermas 1973: 230).

In the heart of this two-level analytical theory of society, a conflict between these two social formations appears. Social systems would be constantly threatened with the "colonization" of lifeworld (Habermas 1982b: 522ff), and thus impose its instrumental logic over discursive logics aimed at understanding. Democracy, civil society, and the rule of law would be the keys in the resistance to colonization processes of lifeworld. It is precisely in this relation between system and lifeworld that the place and function of law in society lie.

**b) Law and Social Integration**

Like Parsons, Habermas argues that the function of law is social integration through universal subjection to rationally created norms and the regulation of conflicts orienting them to consensus. By means of the generalization of norms, law can stop the colonization of lifeworlds of social actors and, on the other hand, legitimizes political power that, without law, is a mere facticity. Therefore, the possibilities of social integration (not systemic) lie in the possibilities of establishing a law that is anchored in lifeworld.

For Habermas, social integration, in spite of being problematic for modern societies, is made possible by the dichotomy system/lifeworld. Durkheim and Weber had already identified how difficult it is to consider the integration of modern society under some kind of unique mechanism. The situation resulted in a paradox. Division of labor caused no satisfactory levels of social and moral integration and generated a dysfunctional state of "anomie" (Durkheim 2001: 433) or bureaucracy itself generated an "iron cage" (Weber 2002: 224).[45] Habermas argues in a different way and, from this paradox, postulates that modern societies have two integration mechanisms tied by law.

[45] "stahlhartes Gehäuse."

Modern law emerges as a structure destined to mediate between system and lifeworld as organizational spheres of society. So that law could carry out this mission, certain essential conditions must be met. One of them is the positivación of law.

Positivación of law, for Habermas, effectively allows for law to have a relative degree of autonomy – not in the sense of the constitution of an autonomous system - of morality. It permits, first of all, the separation of law from morality and the institutionalization of the formation and application of norms into its very own structure. In other words, norms fall within the law as means of formulation and diffusion. Nevertheless, this moral autonomy is always partial since it always remains to be a moral conscience, which evolves together with society.

**Table 2 Stages of Legal Evolution**

| **Stages of moral consciousness** | **Basic socio-cognitive concepts** | **Ethics** | **Types of law** |
|---|---|---|---|
| Preconventional | Particular expectations of behavior | Magical ethics | Revealed law |
| Conventional | Norm | Ethics of the law | Traditional law |
| Postconventional | Principle | Ethics of conviction and responsibility | Formal law |

Source: Habermas (1982b: 260, fig. 26)

In modern societies, the integration of society is only possible in forming legal institutions that embody a moral conscience of a conventional or postconventional level. As an original phenomenon, morality suffers deinstitutionalization and remains anchored, on the one hand, in the personality of the subject. For its part, law becomes an external power sanctioned by the State based on a system of abstract norms. From this evolution, it is understood that modern law owes its legitimacy to the rational production of its norms. The norms of the law rest on ethical principles of discourse that obey a proceduralized morality.

Law in modern societies operates as a maintenance structure of social integration because it assembles both elements of lifeworld and the sphere of the self-regulated systems.

> Law functions as the "transformer" that first guarantees that the socially integrating network of communication stretched across society as a whole holds together. Normatively substantive messages can circulate *throughout society* only in the language of law; without their translation into the complex legal code that is equally open to lifeworld and system, these messages would fall on deaf ears in media-steered spheres of action. (Habermas 1994: 78)[46]

Still, this social integration is tied only to one side of the legal system. The authentic place of social integration in law is given – inside the legal system - in the production of norms, which is the place of understanding and communicative reason, and not in the application of law, which is systemic. This is due to the fact that in the production of norms, communicative action oriented to understanding should be used. Hence, on the basis of law, a certain political community must be included.

The political community is a supposed rational consensus among subjects who decide on their self-legislation and determination. A political community presume a "democratic principle" in society, which is reflected in the same sense as positivization of law: "[p]ositivity of law expresses, not the facticity of an arbitrary, absolutely contingent choice, but the legitimate will that stems from a presumptively

[46] "Das Recht funktioniert gleichsam als Transformator, der erst sicherstellt, daß das Netz der sozialintegrativen gesamtgesellschaftlichen Kommunikation nicht reißt. Nur in der Sprache des Rechts können normativ gehaltvolle Botschaften *gesellschaftsweit* zirkulieren; ohne die Übersetzung in den komplexen, für Lebenswelt und System gleichermaßen offenen Rechtskode, würden diese in den mediengesteuerten Handlungsbereichen auf taube Ohren treffen."

rational self-legislation of politically autonomous citizens" (Habermas 1994: 51).[47] Social solidarity in modern societies is given in terms of the (self-determined) citizen and, ultimately, it comes from communicative action. Positive law can only aspire to social integration if recipients of the legal norms can be assumed as rational authors of the same norms, as co-producers of the norms under a postconventional morality: "The members of a legal community must be able to assume that in a free process of political opinion- and will-formation they themselves would also authorize the rules to which they are subject as addressees" (Habermas 1994: 57).[48] This assumption of political autonomy of individuals (self-legislation) is, according to Habermas, the only one capable of performing or solving the pretension of legitimacy of rules, since it makes its rational acceptance possible. In this sense, law finds its foundations on rational assumptions of lifeworld and not on systemic mechanisms of self-regulation and control.

In the production of norms, the recourse to arguments occurs. Thus, for Habermas, modern law succeeds on tying the problematic bond of facticity and validity. The validity of a (linguistic) proposition must achieve its validation in fact; that is, it must be subjected to the examination of its arguments by a community of interpreters, who analyze its pretention of validity (Habermas 1994: 47f). In other words, truth is subject to a rational acceptability. This relationship between facticity and validity is always manifested as a tension, which becomes stable in modern society by means of the positivization of law and its emergence as a normative structure. Within this tension, argumentation plays a fundamental role. By means of the use of arguments, the actors display its rationality and inject such into the law with communicative rationality. In practical terms, legal argumentation enables law to persist as a

[47] "In der Positivität des Rechts gelangt nicht die Faktizität eines beliebigen, schlechthin kontingenten Willens zum Ausdruck, sondern der legitime Wille, der sich einer präsumptiv vernünftigen Selbstgesetzgebung politisch autonomer Staatsbürger verdankt."

[48] "Die Rechtsgenossen müssen unterstellen dürfen, daß sie in freier politischer Meinungs- und Willensbildung die Regeln, denen sie als Adressaten unterworfen sind, auch selber autorisieren würden."

normative structure in lifeworld and constantly perform its possibilities of legitimacy to society. Law, in this sense, has a relative autonomy, precisely with regard to its rational ability to produce a consensus that legitimizes it in society.

Modern law has three legitimating institutions that release a permanent argumentation.[49] Institutions are a kind of reformulation of the normative principles of society, in which those principles are settled in social configurations that enjoy relative stability and obligation. These legitimating institutions of law are: the principle of popular sovereignty and the fundamental rights, on the one hand, and the constitution of the bourgeois State, on the other. Both emerge with modernity and positivación of law.

Law produces social integration; either by means of the social solidarity of a political community, or by means of services that law performs to economic and administrative systems. Those systems are ultimately possible because they are regulated (morally grounded) by means of communicative action. Thus, the operations of systemic integration performed by economic system and state apparatus, through money and administrative power respectively, must be connected to the process of social integration of the praxis of self-determination of citizens (Habermas 1994: 59).

In synthesis, law can be characterized as an evolutionary acquisition of society in order to the rationalization of the norms on which it is based. This way, law plays a fundamental role in the integration of society (of the systemic spheres and of the lifeworld) since, on one hand, it establishes the normative boundaries on which systemic differentiation can be unfolded and, on other hand, it provides lifeworld with legitimacy for the pretensions of validity of the subjects when they claim norms for their daily praxis.

[49] In this respect Habermas uses the concept of "institution" of Arnold Gehlen (1973: 94-105).

In a certain way, law is, to Habermas, the most powerful normative structure to stop the uncontrollable deployment of complexity of self-regulated systems. Only by means of law is it possible to compel the systems and the subjects to obey a legitimate rational consensus. Certainly, this consensus is not a mere achievement of law but rather the ability of a political community to agree on a normative universe for its action. Law, thus, operates as a normative instrumentality of that community in order to rationalize the limitations of its own freedom and guide society towards a reasoned agreement.

Habermas' position concerning law has a pronounced normativism, which decanted into principles that societies must pursue in order to achieve its integration. Law appears precisely as a mechanism to ensure this integration with regard to communicative rationality. This is the social function of law. Discourse ethics and the principles by means of which communication must be the guided aim for society to achieve its integration protected by legal institutions. This theory of social integration through law, unlike that of Parsons, not only analytically assumes the integration of society through law, but it postulates conditions under which it is possible to achieve this purpose.

This understanding of modern law correlatively has not only a sociological theory but also a political program for the building of consensus. From this, the tension between facticity and validity of the social order can be handled at a social level. Law clearly appears as the key element for the maintenance of social order performing a specific function. Much of this function is achieved in the political side of the law, i.e. in the production of norms. Nevertheless, the problem of the inner functioning of law cannot be appreciated. That is to say, the specificity of the law – either as system or institution - in the social order as a whole. It is, so to speak, a theory of the political functions of law and not of the legal functions of law.

Habermas attempts to reconcile, on the one hand, the theories of social solidarity of Durkheim by arguing that law produces solidarity (Habermas 1994: 51ff) and

evolves in accordance with the evolution of morality (Habermas 1982b: 260), with ideas relative to the increasing rationalization of law similarly to Weber (1922a) – although distinguishing a different type of rationality. The connection between both traditions is undoubtedly Parsons – who also tried to reconcile both classic authors - based on the idea of the integration of society. Like Parsons, Habermas looks at the law with the integration of society in mind, without delving into the role of social control that legal institutions have – which worried Parsons. In both – and primarily in Durkheim - the recomposition of social solidarity is an essential task of law. However, Habermas advances beyond the cybernetic synthesis of Parsons and postulates a program of building the social order from a particular political praxis. In this sense, Habermas' sociology of law abandons the mere theoretical reflection on law in favor of a practical proposal for improving the social order based on the law.

Everything related to the inner working of the legal system is, for Habermas a mere procedural facticity. As long as a communicatively rational process of social action of the courts does not exist, legal specialists or schools of law have no practical relevance for the integration of society. Nevertheless, this theoretical decision ignores much of the complexity that characterizes the law. This theoretical decision is not exclusive to Habermas or Parsons, but is captured to a great extent by the whole sociology of law. Still, to understand the differentiation process of legal system, it is necessary to consider not only an 'external' theory about the 'effects' of law on society, but a theory that points to the specific functioning of this particular social system. To this purpose in the following section we will work in depth on the sociology of law of Niklas Luhmann.

## 2.3. Sociology of Law and Differentiation of Law in Niklas Luhmann

Though similar elements to the ideas of Durkheim, Weber,[50] and Parsons can be traced in Luhmann's sociology of law, Luhmann devoted not only to describe law in its relations with other social systems, but also to understand particular features of the legal system[51] and thus addresses the lack of a legal object for sociology. This lack comes from the criticisms of Hans Kelsen (1915) on the sociology of law.

Niklas Luhmann's sociology of law suffers various changes over time, making it difficult to establish a unique line of theoretical development. As in his theory of society, his sociology of law evolves in accordance with his conceptual use. Nevertheless, unlike other social systems, such as science, economics, or art, in the case of the sociology of law, numerous conceptual variations appear, which necessitates a differentiated treatment for that system.

In strict terms, two main stages can be distinguished with relative clarity. In the first stage, ranging from his early writings to 1984, Luhmann seems to concentrate on improving a broader legal theory and on the formation of concepts for sociology of law. At this stage the most relevant issues are related to: the determination of the function of law (1999d [1974]), problems of evolution and differentiation of law (1999a [1970]; 1999b [1976]), discussions concerning elementary juridical concepts

[50] Although an assimilation of the ideas of Luhmann with those of Weber was attempted, it is not entirely correct to equate the relation of the Weberian rationality and the systemic analysis of law of Luhmann. One of the most relevant objections to this is that law as social system is not characterized by its "predictability" but by its "contingency" and "risk" (cf. Capps & Palmer Olsen 2002).

[51] With regard to Habermas, the known opposition between both authors persists with respect to the law. The criticisms that Luhmann dedicates all his works to Habermas are numerous. The most direct criticism to the legal analysis of Habermas can be found especially in his review (Luhmann 1995d) to the book "Faktizität und Geltung" (Habermas 1994). For an overview on this, see Cadenas (2006).

as positivization of law (1999c [1970]); individual rights (1993b [1981]; 1999e [1970]), fundamental rights (1974e [1965]), violence (1999f [1981]), justice (1999g [1973]; 1974f), legal dogmatics (1974f), interpretation of norms (1969), ideologies and law (1974g [1967]), the problem of the procedural legitimization of politics through law (1983 [1969]), among others. In this stage, the following monographs are highlighted: *Grundrechte als Institution* (1974e [1965]), *Legitimation durch Verfahren* (1983 [1969]), the theoretical synthesis of *Rechtssoziologie* (1987 [1972]), and the compilation in *Ausdifferenzierung des Rechts* (1999a-g [1981]).

The second stage is marked by the publication of *Soziale Systeme* (1991a [1984]) and extends to the final theoretical synthesis *Die Gesellschaft der Gesellschaft* (1997a). Luhmann's sociology of law at this stage is guided by a theory of self-referential and autopoietic systems. While maintaining much of his reflections on the role of positivization of law, fundamental and subjective rights, the evolution and differentiation of law, among others, a shift towards a constructivist system theory following the movement of the "second order cybernetics" can be observed (von Foerster 1981) as well as the adoption of the novel concept of "autopoiesis" (Maturana & Varela 1984; 1998). Here, concepts as operational closure and structural coupling of law (Luhmann 1991b), the problem of the sociological observation of the law from a self-referential systems theory (1986a; 1989), the paradoxes of law (1988b; 2000 [1984]), its binary coding (1986b), the problem of constitutions as evolutionary acquisitions (1990b), among other subjects, appear. In this stage, the monograph especially dedicated to law *Das Recht der Gesellschaft* (1995a) and other works concerning law in *Soziale Systeme* (1991a [1984]) and in *Die Gesellschaft der Gesellschaft* (1997a) appear.

Although it is possible to distinguish a significant change of paradigm in Luhmann's theory from 1984, there are clear continuities in the development of a sociology of law throughout all his writings. As Parson's transit of the actionalist theory towards cybernetics, the persistence of core elements, as well as the incorporation of new concepts and theories and the abandonment of previous ideas, can be stated in the

systemic thinking of Luhmann. With regard to the above-distinguished two stages, however, the theoretical consolidation only occurs in the second stage. In the first one various explanatory essays, which remain without further development, can be found, i.e., there is an abundance of what Luhmann himself called theoretical "prototypes" [*null-series*] (Baecker & Stanitzek 1987: 142). Some of them are discussed later, as it is not our purpose to pursue an exhaustive study of the abandonments and theoretical continuities of Luhmann but rather of the specificities and advantages of his sociology of law for the study of the differentiation of law, which is our central subject.

From the foregoing, we will focus especially on the writings of Luhmann in the second stage but with the intention of comprehensively rebuilding a sociology of law, that is to say, to rescue some previous theoretical elements that can be connected with later developments of Luhmann. From this examination, it will later be possible to establish a definition of determined conceptual domains for a concrete study on the differentiation of the legal system in Chile.

### 2.3.1. Sociology of Law and Legal Dogmatics

The distinction between sociological and doctrinaire approaches goes across the entire history of the sociology of law. Based on this distinction, not only the sociology of law itself was constructed but also different objects for every discipline – legal sciences and sociology - were defined. For Luhmann, the fundamental difference between both perspectives are not caused by any particular 'object' – such as the *living law/State law* approach of Ehrlich or the *law in the books/law in action* dichotomy of Pound - but by the perspective adopted by an observer and the functions that both kinds of studies of law represent. Luhmann argues against the notion that it is impossible to observe an extralegal law, which is not recognized by the law itself.

> Likewise there is no concept of a 'supra-legal law' (for sociologists) at a special level above legal operation from which an assessment could be made as to whether or not law is actually law. Rather, law makes this assessment of itself by itself, and if this does not happen it, does not happen. (Luhmann 1995a: 31f)[52]

Although sociology and dogmatic produce self-descriptions (Luhmann 1987: 360), sociology is located in a different position in respect to dogma: "sociologists observe the law from outside and jurists from inside" (Luhmann 1995a: 16f).[53] This consequently shows that the audience to whom the descriptions of the sociology of law are addressed is not the legal system but science. This does not certainly imply two kinds of law – as in the European or North American sociological jurisprudence - but only one system observed from two different perspectives (Luhmann 1995a: 31f).

This way, the sociology of law is not interested in understanding the "unity" of the legal system but to see the legal system as a "difference," as a system differentiated from an environment (Luhmann 1987: 361). Along with the above, the functions performed by both approaches are different. The dogmatic function has an important value for the internal differentiation of the legal system. The dogmatic function made possible for the system to observe its observations, to distinguish between norm and decision, and transfer contingency to decisional procedure (Luhmann 1974f). The sociology of law, for its part, does not perform internal functions for the legal system since, unlike the dogmatic function, it does not point at the internal arranging of the system. The sociology of law seeks comparisons not legitimizations (Luhmann 1987: 360). This certainly marks a rupture with all previous movements of sociological jurisprudence.

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[52] "Auch entfällt (für Soziologen) die Vorstellung eines »übergesetzlichen Rechts« als einer besonderen Geltungsebene oberhalb der praktizierten Rechtsordnung, von der aus geprüft werden könnte, ob das Recht überhaupt Recht ist oder nicht. Vielmehr prüft das Recht sich selbst, und soweit dies nicht geschieht, geschieht es nicht."

[53] "Der Soziologe beobachtet das Recht von außen, der Jurist beobachtet es von innen."

In spite of these differences, the sociology of law should not content itself with a mere external description of the law, as a pure examination of its consequences or effects on society, but should be capable of describing the internal functioning of this system. The waiver of a mere legal doctrine precisely points to open the debate on the law from a purely normative ambience to a comparative perspective. If law is a social system, then it should be viable to study it, as other social systems are studied, not only from the consequences of law in social morality (Durkheim), in its global rationality (Weber), or in its mere contribution to the social whole (Parsons, Habermas), but as a social system differentiated but comparable in its specificities. This way, the sociology of law formulates a proper law concept – a sociological concept of law - with which it is possible to observe and describe the functioning of this social system and its characteristics.

### 2.3.2. The Change of Law as Institutionalization

Luhmann is interested in describing the changes in legal system through the concept of *institutionalization*. Due to its peculiar development in the Luhmann's theory, this concept constitutes one of the biggest obstacles for a coherent composition of his sociology of law and for a differentiation theory according to this paradigm. Indeed, it can be argued that there exist two big obstacles, which appear at the first stage of Luhmann's theoretical development, for this task: (1) the matrix: *person*, *role*, *program*, *value*; and (2) the confusion between the concept of institutionalization and the theories of the change in law. We will briefly analyze these two problems, before focusing on our subject.

Central to the writings of the first stage are the categories *person*, *role*, *program,* and *value*. Luhmann uses these concepts to refer to levels of social systems construction. The scale goes from the most concrete (person) to the most abstract (value) and is crossed by the opposition *static/dynamic*. The external axis (person/value) would be

the most static thing and the internal axis (role/program) would be the most dynamic aspect of the system (Luhmann 1987; 1974g).

**Table 3 Levels of construction of Social Systems**

| | Static | Dynamic |
|---|---|---|
| Concrete | Person | Role |
| Abstract | Value | Program |

Source: Own elaboration based on Luhmann (1987)

Although these four categories, *person*, *role*, *program*, and *value,* are similar to those used by Parsons in relation to *roles, collectivities*, *norms,* and *values* (Parsons 1961a: 41; 1966: 19; 1965c: 71; 1971: 7), which are associated to the AGIL matrix, Luhmann does not link these abstraction levels with the formation of functional systems but with the attribution of expectations. Normative expectations may be directed to these four levels and, from them, may be generalized. This understanding of social systems based on abstraction levels is not deepened and appears briefly in *Soziale Systeme* (Luhmann 1991a: 429) in the same sense. Although these four concepts persist in different ways in the work of Luhmann, they don't have the complexity of previous writings. The *person* reappears later in the concept inclusion/exclusion (Luhmann 1995c), *programs* are conceptualized within a cybernetic theory (Luhmann 1991a), *roles* are subsumed to differentiation theory (Luhmann 1977), and *values* acquire a new sense in the theory of generalized symbolic media (Luhmann 1997th). In spite of this, the problems of both the levels of abstraction and the relative dynamism between these four concepts are not analyzed again. From these concepts, at this first stage, the idea of law as a system constructed at level of *programs* (Luhmann 1974g: 182ff), which is not continued or later deepened by Luhmann, also appears.

The concepts of *institution* and *institutionalization* are ubiquitous in this stage. Much of Luhmann's writings on sociology of the law prior to 1984 are focused on the problem of law as an institution and on its institutionalization. The latter is partly understood in a procedural way, as an equivalent to the concept of differentiation or evolution of law, and also as being related to the problem of legal legitimization. The concept of institution allows for the observance of the strong influence of Parsons in this stage on the socio-legal ideas of Luhmann, since Parsons dedicates much of his theory to study the problem of the institutions and how these are generalized, which Luhmann assumes partially as a research program.

In *Grundrechte als Institution* (1974e), the problem of the institutionalization is explicit, although such refers only to the field of fundamental rights and assumes a thesis, which is later abandoned, i.e., that legal and political institutionalization are part of a wider process of "civilization of expectations" (1974g: 95). In *Legitimation durch Verfahren* (1983), the analysis of institutionalization focuses on the ways in which certain procedures become institutionalized to give legitimacy to the political and legal order. Nevertheless it is not until the *Rechtssoziologie* (1987) where a special treatment to the institution concept occurs.

The sociological problem behind the *Rechtssoziologie* (1987) is –based on the idea that the function of law is the stabilization of normative expectations- how an answer to disappointment is institutionalized. The expectations stabilize the disappointments and, depending on the type of expectation, emerge as a type of social system: a learning system or a non-learning system. The institutionalization of normative expectations of behavior meets evolutionary functions of selection and stabilization of procedural consensus in all the dimensions of meaning:

> Institutionalization produces an evolutionary selection when by means of consensus normative projections usable in a society are chosen. The factual identification produces, meanwhile, an evolutionary stabilization of these acquisitions incorporating the norm in a coherent meaning relation, which remains

> so fastened and clear that she is capable of producing consensus qua interpretation and reasoning and of surviving to fluctuations in the mechanisms of institutionalization. (Luhmann 1987: 64)[54]

The law would have also internally suffered a process of institutionalization, which would be probabilized by means of three evolutionary acquisitions: (1) the self-commitment to the "contract;" (2) the differentiation of "groups of reference" specifics to certain expectations; and (3) the "institutionalization of institutionalized functions" in certain roles (Luhmann 1987: 74).

The law is, in this stage, a social structure that owes its ability to guide action to institutionalization processes. This institutionalization makes law relevant and allows its social reproduction:

> Law must be seen as a structure that defines the boundaries and selection types of the societal system. Of course, it is not the sole societal structure; apart from law, we have to take account of cognitive structures, the media of communication, such as, for example, truth or love, and particularly, the institutionalisation of the scheme of societal system differentiation. However, law is essential as structure, because people cannot orient themselves toward others or expect their expectations without the congruent generalisation of behavioural expectations. This structure has to be institutionalised at the level of society itself, because it is only here that we can build beyond preconditions and create those establishments which domesticate the

[54] "Institutionalisierung leistet evolutionäre Selektion dadurch, daß über Konsensbildung ausgewählt wird, welche Normprojektionen in einer Gesellschaft- brauchbar sind. Und sachlich-sinnhafte Identifikation leistet evolutionäre Stabilisierung des so Errungenen dadurch, daß die Norm in einem konsistenten Sinnzusammenhang aufgenommen, befestigt und so klargestellt wird, daß sie nun ihrerseits qua Auslegung und Begründung Konsens zu erzeugen und Schwankungen der institutionalisierenden Mechanismen zu überdauern vermag."

> environment for other social systems. It therefore changes with the evolution of societal complexity. (Luhmann 1987: 134)[55]

In this juncture, his "evolution of societal complexity" refers to two forms of differentiation, namely: *segmentation* and *functional differentiation*. The evolutionary problem of law is then characterized by the treatment of temporary complexity by means of selectivity, to the emergence of procedures to generalize social validity and to the capacity for factual abstraction of normative expectations in the system.

In this first sociology of the law the concepts of differentiation and evolution are constantly related to institutionalization. However, there is no clear definition of each explanatory field. Meanwhile, the evolutionary theory is not developed beyond the *evolutionary acquisitions*. Also, the theory of system differentiation only provides an opposition between *segmentation* and *functional differentiation*, which only seems to replicate the dichotomy of two solidarities of Durkheim (2001).

Luhmann later abandons the institutionalization concept and this has no subsequent connections either to his sociology of law or to his theory of society. Unlike the theoretical transit from action to communication, which is properly argued (cf. Luhmann 1982; 1991a), the abandonment of a theory of institutionalization occurs 'silently.' It is possible to hypothesize however that the loss of a theory of

[55] "Das Recht muß demnach als eine Struktur gesehen werden, die Grenzen und Selektionsweisen des Gesellschaftssystems definiert. Es ist keineswegs die einzige Gesellschaftsstruktur; neben dem Recht sind kognitive Strukturen, Medien der Kommunikation wie z. B. Wahrheit oder Liebe und vor allem die Institutionalisierung des Schemas der Systemdifferenzierung der Gesellschaft zu beachten. Aber das Recht ist als Struktur unentbehrlich, weil ohne kongruente Generalisierung normativer Verhaltenserwartungen Menschen sich nicht aneinander orientieren, ihre Erwartungen nicht erwarten könnten. Und diese Struktur muß auf der Ebene der Gesellschaft selbst institutionalisiert sein, weil nur hier ins Voraussetzungslose gebaut werden kann und jene Einrichtungen geschaffen werden können, die für andere Sozialsysteme die Umwelt domestizieren. Sie wandelt sich deshalb mit der Evolution gesellschaftlicher Komplexität."

institutionalization is due, to a great extent, to the development and deepening of the concepts of differentiation, evolution, and to the theory of generalized symbolic media, all of which have their maximum expression in *Die Gesellschaft der Gesellschaft* (1997a) but is part of a development that redesigns a theory of differentiation of law without reference to a theory of institutionalization.

### 2.3.3. Evolution and Differentiation of Law

Luhmann's sociology of law cannot be appropriately explained without referring to the differentiation process of the law. In this sense, he shares much of the vision of the sociology of law. Indeed, a distinctive element of the sociology of law is, from its beginnings, the formulation of a general evolutionary theory of law. The stages of rationalization of law embodied in the various types of law in Weber (1922b), the social division of labor in Durkheim (2001) from the repressive to the restitutive law, or the phases of moral and legal evolution in Habermas (1982b; 1994) are clear examples of this. As Habermas pointed: "The development of law belongs to the undisputed and, since Durkheim and Weber, classical research areas of sociology" (Habermas 1982b: 523).[56]

The distinctive element in the description of the law in all these traditions seems to be functionalist criteria, i.e., what function the law in the social whole plays. As we previously saw, the function of law for Durkheim had to do with the maintenance of the socially integrating morality, something shared to some extent by Habermas and Parsons, although in both, the analysis is complemented with the problem of legitimacy noted by Weber. For Luhmann, law also fulfills functions for society, although this fulfillment is not guaranteed a priori but it is a product of a particular historical process. For this motive, it becomes necessary to review the elements that allow the differentiation of law.

[56] "Die Rechtsentwicklung gehört zu den unstrittigen, seit Durkheim und Weber klassischen Forschungsgebieten der Soziologie."

Luhmann's sociology reserves a special place for the evolution and differentiation of law. The concepts of evolution and differentiation have different emphasis on the theoretical development of Luhmann and constitute, in some terms, two different perspectives of observation. In his early formulations, both concepts are treated inside a hierarchy, where differentiation is subordinated as *stabilization* operation within a theory of evolution. Such is crafted in a very similar way to Parsons (1971: 26), who distinguishes *differentiation* as a particular evolutionary mechanism among four: *adaptive upgrading*, *inclusion*, and *valued generalization*. Differentiation is for Parsons (1971: 26): "the division of a unit or structure in a social system into two or more units or structures that differ in their characteristics and functional significance for the system", i.e., differentiation is functional specialization, or, as for Spencer (1912: 449ff), "structural" and "functional" differentiation. Nevertheless, in *Die Gesellschaft der Gesellschaft* (1997a), Luhmann separates the two strategies as two independent research programs. We will later return to this subject in chapter 3.

As previously indicated, although we focus on the second stage of Luhmann's sociology of law, we do not treat the problem differentiation and evolution of law from two separated perspectives. Instead, we argue that in the case of law, it is more fruitful to integrate both theories using the differentiation theory inside the evolutionary theory and to also consider the evolutionary theory inside the theory of functional differentiation. This strategy seems to follow Luhmann himself in *Ausdifferenzierung des Rechts* (1999a-g) and in *Das Recht der Gesellschaft* (1995a). Differentiation is part of the evolutionary mechanisms of social systems and, simultaneously, the evolutionary processes appear inside the explanation of functional differentiation. That is, the differentiation process is explained by means of a theory of the evolution of law, which indicates the specific mechanisms by which this differentiation actually occurs in the system. The differentiation of the functional system is understood, in turn, as the stabilization of an evolutionary process. From the point of view of the theory of evolution, differentiation theory is a theory of the stabilization of functional systems. And from the point of view of

the theory of the differentiation, the theory of evolution describes mechanisms by means of which changes within the system are produced and stabilized. Added to this, the theory of differentiation of society corresponds – from a evolutionary perspective - to a theory that describes certain evolutionary thresholds, which constitute "forms of differentiation" as segmentation, stratification, and functional differentiation (Luhmann 1977). In sum, both approaches are complementary, although two problems must be properly indicated before proceeding with our explanation.

First, to understand the complementary character of both approaches, it becomes necessary to leave the general use that Luhmann himself gives to the differentiation concept. This usage makes it difficult to distinguish by simple sight a theory of evolution from a theory of differentiation. This is mainly due to the processual sense that Luhmann gives to the differentiation concept without specifying the formal mechanisms by which differentiation occurs. In a general sense, the differentiation concept in the use of Luhmann appears as a general description of social change. In a lax sense, the differentiation of law is understood in these general semantic terms as the differentiation of a sphere of meaning: "[i]n the course of social development, law has differentiated itself as a sphere of meaning of its own kind" (Luhmann 1969: 15).[57]

The second problem is related to the amplitude of both theories to describe social change. In this sense, if one follows the distinction - horizontal to whole society - between "social structure" and "semantic" (Luhmann 1993a), differentiation theory only covers the structural side, while evolution theory is compatible with both sides. Luhmann himself used the evolutionary study of semantics, while reserving differentiation theory only to structural changes. There is no explanation on how operational closure, coding, or programming operate inside semantics, since they

[57] "Im Laufe der gesellschaftlichen Entwicklung hat sich vielmehr das Recht als eine Sinnsphäre eigener Art herausdifferenziert."

correspond to a different explanatory domain. The theory of evolution in this sense has a greater explanatory scope, but lacks the conceptual elements that do provide the theory of system differentiation.

From this, we note that for our study we understand the differentiation of law as *functional differentiation of law* and exclude therefore the too general treatment of the concept of differentiation. The focus of our research is the reconstruction of the functional differentiation of law based on an evolutionary study with regard to the process. For this reason, it becomes necessary to understand the evolution concept.

### 2.3.4. Evolution of Law

Luhmann's theory of evolution is based on neo-Darwinian developments concerning the factors and basic processes of organic evolution. Luhmann's theory of evolution uses these concepts, especially the reconstruction of Darwinian evolution of Donald T. Campbell (1965). As previously noted, Luhmann recognizes in evolution three special functions: *variation*, *selection,* and *stabilization*. Based on these processes, the evolution of society and the law as social subsystem are characterized.

Evolution is considered to be a circular process, in which the above-mentioned functions appear. First, (1) variation is characterized by an overproduction of communication possibilities of the system; (2) selection refers to those possibilities that are chosen by the system according to its possible connection capabilities with other communications; and finally, (3) stabilization refers to the structure of the system that becomes stable for the reproduction of new selections (Luhmann 1999a: 14). In a more precise formulation, Luhmann argues that these three functions refer respectively to the elements of the system, to its structures, and to the unit of the system (Luhmann 1995a: 242).

In the legal system, these three processes can be characterized according to those specific mechanisms:

> If mechanisms for production of variety, selection and stabilization in the area of law are sought, can be distinguished three functional areas, as: (1) *enrichment and production of conflict of normative expectations*, (2) *decision procedure* and (3) *regulatory formulation of valid law* (Luhmann 1999a: 16).[58]

According to Luhmann, the *variation* ability in legal system comes from the formation of normative expectations, whose diversity may increase. Crucial to this process is the invention of *writing* and its respective symbolic formalization. From an evolutionary standpoint, writing enables the duplication of meaning in the form text/interpretation (Luhmann 1995a: 256ff) an only secondarily the contents fixation. Thus, writing appears as an element that promotes first the variation of the system and not its fixation. Normative expectations can be more easily confronted with its disappointment (with past expectations) and a normative overproduction can be generated. Although the three evolutionary functions affect all dimensions of meaning, it can be argued that the variation that allows the writing has its greatest impact on the *temporary* dimension. It is precisely the possibility of recurring to writing, as a memory condensed on texts, which enables the extension of expectations in a wider temporary horizon. Based on writing, it is possible to confirm a normative expectation in the present, contrast it with the past, and test its congruence or the need for change. Thus, the variation of elements of the system appears first as a temporary problem of maintenance or change.

*Variations*, as mutations in living organisms, may be capable (or not) of prevailing. For its continuity, the function of *selection* becomes necessary. For the function of selection, the law specifies formalized *procedures of decision*, independence from social influence of the strata, and arguments based on this dimension of meaning: "Thus,

[58] "Sucht man im Bereich des Rechts nach entsprechenden Mechanismen der Erzeugung von Varietät, der Selektion und der Stabilisierung, so stößt man auf drei Funktionsbereiche, die sich (1) als *Reichhaltigkeit und Konfliktsträchtigkeit normativer Erwartungen*, (2) als *Entscheidungsverfahren* und (3) als *regulative Formulierung des geltenden Rechts* unterschieden lassen."

social structures outside the law, specially strata-related status and familial relationships, friendships, and patronage are prevented from having an excessively direct influence on the administration of law" (Luhmann 1995a: 263).[59] The function of procedures is, from the perspective of the dimensions of meaning, distinctly *social*. The procedures allow the system to become detached from social relations of support of those that are affected in the conflict, which may shortcircuit the search of a resolution. For this, the system uses the principle of "[s]ome for all" (Luhmann 1995a: 262),[60] that is to say, from a few who represent the law and execute the procedures, the fiction of a generalized consensus is maintained and the conflicts are isolated into a functionally specialized social system.

Finally, *stabilization* comes from the hand of the differentiation of regulatory formulations of the valid law, or more precisely, from a proper *legal dogmatics* (Luhmann 1995a: 274). Dogmatic functions enable the formation of stable structures for reproduction of normative contents, the capacity of self-observation of law, and its binary coding. As previously noted, the legal system owes its operational closure, to a great extent, to the formation of a legal dogmatics, which also performs functions for the evolution of law. In the dogmatics, the main problem is *factual,* i.e. the content to be taken into consideration for the law and the continuity of the system from its own operations.

In addition to these above-described three functions in the evolution of law, a set of "evolutionary acquisitions" appears (Luhmann 1997a). These acquisitions have a higher degree of development at the moment of appearance and later allow structural linkage with other communications.[61] Although the list of evolutionary

[59] "Denn damit ist ein allzu direkter Einfluß von außerrechtlichen Sozialstrukturen, vor allem natürlich: von schichtbedingtem Status und Zusammenhängen der Verwandtschaft, der Freundschaft, des Klientelismus, auf den Rechtsbetrieb abgewehrt."

[60] "Einige für alle."

[61] In this sense Luhmann refers to these acquisitions as "preadaptive advances" (Luhmann 1981c: 191).

acquisitions of law is difficult to synthesize, the existence of some of them as support in the evolution of law can be indicated. One of these acquisitions is the universalization of "subjective rights" (Luhmann 1995a: 291; 1999e), since they allow the formation of normative expectations based on the protection of freedom by negation, that is, through the possibility of denial of the freedom. Another evolutionary acquisition of importance for the differentiation of functional systems, such as law, has to do with the differentiation of roles. Differentiation would have, in the social dimension, the differentiation of roles and its complementary expectations as a precedent. By extending and generalizing these expectations, a process of differentiation of functional systems would begin. The function becomes gradually relevant first for these "complementary" or "limits" roles and then for the rest of society (Luhmann 1976a: 291; 1977: 35; 1999e: 367). Additionally, the emergence of "conditional programs" (Luhmann 1995a: 196), legal procedures (Luhmann 1995a: 209), "property," and "contract" (Luhmann 1995a: 459) must also be understood as acquisitions of this nature.

These three mechanisms, along with certain evolutionary acquisitions, support the evolution of law. This evolution can be characterized by a new kind of evolutionist approach that considers not only environmental factors or solely internal factors. That is, social evolution presupposes "structural coupling" – or in the old parsonian terminology of Luhmann, "Interpénétration" (Luhmann 1991a: 294) or "double interchanges" (Luhmann 1999f).

The relations with politics are certainly a key element of the evolution of law. Not only because politics support *variations* in law, but also because political proceduralization of law reinforces its *selections* (Luhmann 1988c). The common element between both systems is the use of the same *symbiotic mechanism*, i.e., violence. Based on this mechanism, however, two different generalized symbolic media are differentiated and two different functional systems can take the form of the rule of law (Luhmann 1999f: 158).

From internal conditions of the system and its ability to deal with its own complexity, the emergence of certain evolutionary acquisitions and the structural coupling with other subsystems, law produces that specific case of structural change called evolution.

Luhmann understands the evolution of law as a circular process of structural change in the system. In this sense, this concept has been criticized for having a strong *ontogenetic* accent, that is to say, for focusing in changes of the state of an individual without considering the collective character of evolution, i.e. the *phylogeny*. Hendrik Wortmann (2007; 2012) has argued that the theory of social evolution of Luhmann is based on a "cladogenetic" fallacy (Wortmann 2012: 377), since it only considers changes inside an *organism* (legal system), without considering the collective character of the evolution of *populations*. Although his reflections on the applicability of social sciences of concepts of "allopatric speciation" (Wortmann 2012) and "reproductive isolation" (Wortmann 2007) are very interesting and with undeniable projections for a theory of social evolution,[62] his criticism of the evolution concept based on the dichotomy individual/group or organism/population is based on an evolutionary theory belonging to the old paradigm of system theory, i.e., *whole/parts*. This kind of questioning in a theory of the evolution of social systems based on meaning finds serious problems when it tries to explain – in lax terms - the populations as social systems, which Wortmann himself recognizes when he decides to adopt the vague concept of "social forms" (Wortmann 2012: 380) to explain the evolution as allopatric speciation. On the other hand, if the very theory of evolution of populations is followed, the evolutionist explanation of Luhmann is "morphogenetic" (Luhmann 1991a: 481ff.), which is compatible with the population theory postulated by Wortmann.

In this sense, the theory of evolution of law is a theory that seeks to explain structural changes in the system based on variation, deviations, or mutations, which

[62] In fact, we will discuss some of these ideas later.

are subsequently selected without prior planning, based on random events that allow later the reproduction of the system unit.

The differentiation of law is associated with this kind of structural exchange, as the 'final' step inside the evolutionary changes and is therefore a product of social evolution itself. This way, functional differentiation of law describes the emergency of a social system dedicated to a function, but whose genesis is due to specific evolutionary factors.

### 2.3.5. Functional Differentiation of Law

As previously noted, the legal system arises by evolutionary mechanisms. However, it only acquires its status as a specific social system when its differentiation occurs. This differentiation is achieved by means of a set of reciprocally related factors, which are the product of the evolution of society. Thus, the functionally differentiated modern law emerges. To understand the characteristics of the functionally differentiated law, it is necessary to examine those factors that contribute to its differentiation.

#### a) The Law as Social System, Operational Closure and Positivation

The system of law is a social system, that is to say, a system that belongs to society and reproduces it (Luhmann 1995a: 55). Like any social system, law is based on the difference between system and environment and, like all social systems, law is a product of its own evolution and has no assured place in the social structure, but its viability depends on real conditions, that is to say, on every communicative event of society:

> We do not understand "system", like some jurists, as a context of congruent rules, but as a context of factually enacted operations, which, as social operations, have to be communicated. In addition to that, whatever that defines them have to be

> communicated as legal communication. This means, nevertheless, that the basal distinction is not a typology of norms or of values but a distinction between system and environment. (Luhmann 1995a: 40f)[63]

While this idea of social systems as communication systems appears clearly in his writings after *Soziale Systeme* (1991a), in the case of law, this is an older idea. Law appears early in his analysis as a modernizing institution that protects the social communication by means of "fundamental rights" (Luhmann 1974e). The evolution of law – along with fundamental rights - is seen within a wider process of "civilization of expectations" (Luhmann 1974e: 94ff), which are a condition for a modern differentiated order. Fundamental rights constitute a key factor against the threats from the called "dedifferentiation" (1974e: 24), which is, in turn, defined as "politicization." Fundamental rights have as a function the protection of the "dignity" and "freedom" of the symbolic presentation of the person in the communication (Luhmann 1974e: 63) and thus also protect the form of modern differentiation (Luhmann 1974e: 71ff.).

As a social system, law establishes a communication domain on which it performs its operational closure. Such operational closure refers to conditions of real functioning of legal system and not to a hierarchic or harmonic normative order, and refers to the way in which legal communication, which circulates through society, stabilizes certain connection capabilities, i.e. structures for the reproduction of the system.

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[63] "Unter »System« verstehen wir dabei nicht, wie manche Juristen, einen Zusammenhang aufeinander abgestimmter Regeln, sondern einen Zusammenhang von faktisch vollzogenen Operationen, die als soziale Operationen Kommunikationen sein müssen, was immer sie dann noch zusätzlich als Rechtskommunikationen auszeichnet. Das aber heißt: die Ausgangsunterscheidung nicht in einer Normen- oder Wertetypologie zu suchen, sondern in der Unterscheidung von System und Umwelt."

> Structures are necessary for a highly selective interrelation of operations, but law becomes its reality not by any stable ideality, but exclusively by those operations that produce and reproduce a specific legal meaning. Additionally, we assume that these operations have to be always operations of the legal system itself (which can be, naturally, observed from outside). This and no other thing implies the thesis of operational closure. (Luhmann 1995a: 41)[64]

Like any event in the social system, operational closure of law is due to historical circumstances. This closure is historically based on the positivization of law, that is to say, when decisions of legal system gradually cease to operate on the basis of assumptions of natural law or of social consensus, when they decisively separate from the morality, religion and illegitimate political influences. The positivación of law would have occurred in Europe in the nineteenth century (Luhmann 1999c: 126) and, along with this, legal decisions are not anymore based on wealth, lineage, class, political pressures, or morality.

The positivization implies that the validity of law is based on the specification of procedures that originated only in decisions produced within the legal system: "The concept of positivity suggests an explanation through the concept of decision. Positive law would be valid qua decision" (Luhmann 1995a: 38f).[65] In the positivization of law, as understood by Luhmann, the system specifies its foundation on the basis of its own procedures, which are, in turn, decisions. In these decisions, which are legal, the legal system affirms its own validity on the basis of the

[64] "Strukturen sind zur jeweils hochselektiven Verknüpfung von Operationen erforderlich, aber das Recht hat seine Realität nicht in irgendeiner stabilen Idealität, sondern ausschließlich in den Operationen, die den rechtsspezifischen Sinn produzieren und reproduzieren. Zusätzlich gehen wir davon aus, daß dies immer Operationen des Rechtssystems selbst sein müssen (die natürlich auch von außen beobachtet werden können). Das und nichts anderes besagt die These operativer Schließung."

[65] "Der Begriff der Positivität legt eine Erläuterung durch den Begriff der Entscheidung nahe. Positives Recht gelte qua Entscheidung."

application of its own code and its transformation capabilities.[66] Positive law owes then paradoxically its stability to its instability, that is to say, to its capacity of internal transformation, to its own contingency: "Thus, positive law can be characterized by awareness of contingency" (Luhmann 1987: 209).[67]

This idea of operational closure indirectly attacks the description of the legal system of the legal positivism, but unlike other critical positions of the sociology of law, Luhmann's reflection is not a mere criticism to the idea of 'law in the books' or 'state law,' aimed to propose an alternative concept of law. Instead of following this classic strategy of the sociology of law, he criticizes those theories that see too much coherence, order, and hierarchy in the law, and confronts them with the image of the law as social system, whose operations are communications and, as such, must be faced with their own reproduction and viability. It is the legal system, which is seen from another perspective: only one legal system and not two or more opposite normative orders. The operational closure of law allows the understanding that a legal system has to manage the temporality of its own operations, with the frugality of every communication event and with reductions of complexity of the environment. There are no guarantees of ideal functioning for law beyond their own operations.

Positivization is only one of the specific evolutionary acquisitions of modern law. Nevertheless, the operational closure of law, according to Luhmann, must be supported by other phenomena, as the binary coding of legal communication (Luhmann 1995a: 60), a subject that we address next.

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[66] En este sentido De Giorgi (1998: 258) ha afirmado que "el derecho positivo es la *legalización* de la *transformabilidad* del derecho."

[67] "Positives Recht läßt sich somit durch Kontingenzbewußtsein charakterisieren."

### b) Coding and Programming of Law

The positivization of law achieves the sustenance of legal communications by operations of the system itself, i.e. legal decisions. This partially allows the operational closure of the system. For this closure of the legal system, further development is necessary, that is, the binary coding of communication (Luhmann 1991b: 1427).

The legal system's ability to code its operations is also an evolutionary acquisition (Luhmann 1991b: 1431). Along with law, positivization operations are produced, which gradually and selectively distinguish the legal communication based on the code *legal/non-legal* [*Recht/Unrecht*]. On having closed a code that differentiates the legal from the non-legal, the system can guide its operations towards its own reproduction, acquire the character of observer of its own observations (on what has been decided and on what will be decided), and develop legal forms that allow the reproduction of legal norms through other legal norms.

With the existence of a communicational code, it is not indicated that the legal system should have preference for the positive side of it, but what is relevant to the system is that communication allows the regulation by the code (Luhmann 1995a: 69). The coding of the system is, simultaneously, a scheme of observation of observations and a mechanism for the autopoietic reproduction of the legal system:

> The code itself is not a norm. It is merely a structure for a procedure of recognition and attribution of social autopoiesis. Whenever there is a reference to legal or non-legal, such a communication attributes itself to the legal system. (Luhmann 1995a: 70)[68]

[68] "Der Code selbst ist keine Norm. Er ist nichts anderes als die Struktur eines Erkennungs- und Zuordnungsverfahrens der gesellschaftlichen Autopoiesis. Immer wenn auf Recht bzw. Unrecht referiert wird, ordnet sich eine solche Kommunikation dem Rechtssystem zu."

The idea of justice becomes inseparable from the idea of equality before law and legal action begins to define events from a moral standpoint as legal or non-legal and not as good or bad, right or wrong. The fundaments of legal decisions are self-validated in a recursive way and thereafter: "Only law itself can say what law is" (Luhmann 1995a: 50).[69]

Since the code does not specify determined contents for its applicability, it is easily universalized in all social situations and it also allows law to establish connection capabilities between its operations. The way in which the code is applied in every case depends on the programming of the legal system.

In general terms, the legal system operates through the combination of two decisional programs, which are located differently in relation to the decisions of the legal system. It is a question of the "conditional programs" and "goal programs" (Luhmann 1995a: 195).[70] The *conditional programs* constitute rational schemes of decision making, which indicate stable conditions regarding the consequences of the decision, as well as predetermined means and ends. That adopt the form of 'if this/then,' so they have a high capacity of technification and trivialization. The *goal programs,* on the other hand, have a great flexibility with regard to its decisions and adapt themselves to contextual conditions. These goal programs indicate that in the selection of means and ends, it is possible to change the means in accordance with the ends, which can be also changing.[71]

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[69] "Nur das Recht selbst kann sagen, was Recht ist."

[70] In its earliest formulation this distinction is based on the model of open systems. See Luhmann (1974g).

[71] Parsons speaks of "generalized patterns" when referring to institutions: "Institutions are generalized patterns of norms which define *categories* of prescribed, permitted and prohibited behavior in social relationships, for people in interaction with each other as members of their society and its various subsystems and groups. They are always *conditional* patterns in some sense" (Parsons 1965c: 177).

From the point of view of legal decision – and deciding is precisely what is expected from the law - the difference between both decisional programs can also be seen like the form *jurisprudence/legislation*, respectively (Luhmann 1987: 241). From this perspective, the legal system is differentiated into center and periphery, having jurisprudence, as legal decision, in the center, and in the periphery, legislation. The main objection to this distinction is given by that hierarchic traditional conception, which argues that: "The judge applies the law obeying the instructions of legislators. (…) Courts are understood as executing organs of the legislation and the legal-methodology as deduction" (Luhmann 1995a: 302).[72] Against this position, Luhmann argues that only the courts need to decide on all the possible cases that are presented before them and which deserve legal attention. Only in the courts does the convergence of three key elements for the constitution of law: the need to decide, the freedom of interpreting the norm, and the restriction of deciding in a fair way, becomes possible. Only the courts transform necessity into freedom. Thus, the legal operation is more present in the decisions of the courts than in legislation.

Since the legal decision is in the center, the legislation is in the periphery and opened to the environment and its demands. In the periphery, the demands can be absorbed, regardless of whether they are *legal interests/non- legal interests* since there, the imperative of decision does not exist. The center operates with a more rigid cognitive closure ceremony and in the periphery, the cognitive expectations appear.

This difference between jurisprudence and legislation, allows us to understand the programmatic duality of the law: "The legal system us a *normatively closed system* (…) but at the same time is a *cognitively open system*" (Luhmann 1987: 356f).[73] This refers to the conditional programs and goal programs, which dominate the center and the

[72] "Der Richter wendet die Gesetze an, gehorcht den Weisungen des Gesetzgebers (…) Das Gericht wird als ausführendes Organ der Gesetzgebung begriffen und die Rechtsmethodik als Deduktion."

[73] "Das Rechtssystem ist ein *normativ geschlossenes System* (…) Zugleich ist das Rechtssystem ein *kognitiv offenes System*."

periphery of the law respectively. Both programs characterize two types of decisions: "programmed decisions" and "programming decisions" (Luhmann 1969: 5ff; 1999c: 135ff).[74]

Between these two forces, the legal praxis is located. Between the constant openness of the legislation to political demands and the imperative of decision that appears in the courts. This internal form of differentiation of center/periphery (jurisprudence/legislation) generates this constant tension that determines the evolution of law like a constant pressure and resistance to change.

Nevertheless, this relationship of openness to legislation and to the most 'political' side of the law, brings advantages for the legitimacy of the system. For Luhmann, the social legitimization of the law, that is to say the "*generalized willingness to accept decisions whose content is as yet undetermined, within certain limits of tolerance*" (Luhmann 1983: 28),[75] is given in part thanks to this relation with the legislative production. The political elections, the parliamentary procedures, and the legal processes are the procedural ways with which law obtains its factual legitimacy (Luhmann 1983; 1987: 264; 1999c: 133). Thanks to these procedures, the law is legitimized and its social influence can be generalized. The State is that social system that arises from the coupling between politics and law.

The positivization of law and its coding constitute special conditions with which the modern law is operationally closed and defines, this way, a specific field for the reproduction of its operations. Nevertheless, the social autopoiesis of law, that is to say, the ability of the legal system to reproduce itself based on the network of its own operations, supposes a function from which the social system is differentiated (Luhmann 1995a: 60f.). The law not only has an operational area delimited by its

[74] "programmierten Entscheidens" "programmierende Entscheidens."

[75] "generalisierte Bereitschaft, inhaltlich noch unbestimmte Entscheidungen innerhalb gewisser Toleranzgrenzen hinzunehmen."

positivación and the capacity of observation of its own operations based on a binary coding, but it also possesses a function of widespread relevancy that allows its differentiation as social system.

**c) The Function of Law and its Symbolic Media**

The positivization of the law and its coding, as well as the programming of law and its legitimization, appear as distinctive features of the communication system of law. Nevertheless, in a functionally differentiated society, it becomes necessary to specify the *functions* performed by a particular social system. On this point there is convergence in the whole sociology of law of Luhmann. The legal system performs the function to stabilize or guarantee "normative expectations" (Luhmann 1987; 1989; 1991a; 1995a; 1997a; 1999c; 1999d).

According to Luhmann, the expectations can be characterized in two opposite ways regarding acceptance or denial of learning. There are those expectations that suffer a change due to disappointments and those that, on the contrary, remain unchanged. The first are "cognitive expectations" and the second are "normative expectations" (Luhmann 1991a: 437ff; 1995a: 133ff). Cognitive expectations are largely a problem of *science* and normative expectations of *law*.

This concept of norm moves the concept out of a theory of values and places it inside a theory of social time. Thus, the function of law is primarily temporal since it seeks handling disappointments of expectations by means of a social system wherein function is essentially counterfactual: "Norms do not promise conduct that conforms to norms but they protect all those who are expecting it" (Luhmann 1995a: 135).[76]

[76] "Die Norm verspricht nicht ein normgemäßes Verhalten, sie schützt aber den, der dies erwartet."

The legal system does not have as a function social integration (as for Durkheim, Parsons or Habermas), because not only does it lack the necessary complexity to perform this task[77] but it is also not capable to ensure the compliance with certain behaviors, since this would be impossible from a sociological standpoint and the law would also be constantly concerned with its own inefficiency (Luhmann 1995a: 152). Luhmann puts it as follows: "Contrary to the "moral functionalism" assumptions of Durkheim or certain philosophers of law, the primary function of law is not the moral integration of society but the intensification of conflict possibilities in forms that do not endanger social structures" (Luhmann 1997a: 468).[78]

The function of legal system is to stabilize normative expectations, that is to say, expectations that behavior complies with the valid law. Law enters into action when conflicts appear between normative expectations that demand the attention of a particular social system. Regarding conflicts law can be seen as an "immune system" (Luhmann 1991a: 509ff.; 1995a: 566ff.)[79], since it is characterized by the formation of structures to deal early with conflicts and regulate them through procedures. A functional paradox of the legal system emerges from this orientation towards conflicts, namely that legal system is *irreplaceable* in its function but simultaneously constitutes only a *functional alternative*. Not all the conflicts have to go through the legal system and its procedures; but in its function of treatment of valid normative expectations, this one is irreplaceable.

[77] For an overview of this subject, see Cadenas (2006).

[78] "Entgegen den Annahmen eines „moralischen Funktionalismus" eines Durkheim oder mancher Rechtsphilosophen dient das Recht also nicht primär einer moralischen Integration der Gesellschaft, sondern der Steigerung von Konfliktmöglichkeiten in Formen, die die sozialen Strukturen nicht gefährden."

[79] For Luhmann protest movements also perform the same social service. See Luhmann (1996: 1954ff).

The function of law, this way, points to a social system that tends to stabilize expectations in a counterfactual way. It is only possible to claim learning from law, as positive learning, that is to say, by means of the very structures of the law. The recurrence of the deviation is not a main source of learning for law, but it operates as a reinforcement of its operational closure. If behavior evades the law, this system is normatively reinforced by means of a disposal to 'not-learn.' Criminality statistics only inform law that it is necessary to reinforce the normative expectation and not to learn that the world goes largely behind the law and, thus, the motivation of the normative expectation must be moderated.

This function of law is of universal relevance, although not all normative expectations are legal, as well as not all knowledge is scientific. On normative expectations, largely religious beliefs, ideologies and images of the world are formed, although these do not constitute legal normative expectations. The coding of law and its functional specification lean towards the determination of a sphere of meaning for the maintenance and reproduction of law. However, legal system operations require not only coded rules of identification or the specification of procedures by means of which the disappointments are canalized. Legal communication is also symbolically generalized.

Not all normative expectations are *ipso facto* legal. The normative expectations that law protects are those that have the symbol of legal "validity" (Luhmann 1995a: 98ff.) which means that its acceptance is probabilized by the legal system. Legal validity points at the capacity of change of the system and the way in which legal communication appears in its decisions, that is to say, not any legal communication transmits validity but only those related to decisions are possible to apply (Luhmann 1995a: 107).

Although the concept of *validity* as symbolically generalized media appears clearly only in *Das Recht der Gesellschaft* (1995a), this symbolic media is part of the constellations of media previously identified by Luhmann (1975), although there it is

simply called *law* and appears within the frame of a theory of action as a secondary media with respect to power (Luhmann 1975b: 179).

The symbolically generalized communication media constitute a special type of media. The communication media have, as a general function, making the communication of society probable (Luhmann 1981d: 28). Since communication, in its minimal concept, is the result of the coordination of psychic systems - operationally closed - decreases the probability that both systems are oriented by a shared meaning. Social communication cannot be understood based on the model of "transmission," but according to the model of "emergency" (Luhmann 1995e: 117), because psychic systems cannot send thoughts through communication, but only resort to communication that is outside of them and that operates in an independent way. In this sense: "only communication can communicate" (Luhmann 1995e: 113).

Considering the normal fragility of the communication system, this system must face diverse difficulties, which are nevertheless normalized by means of the formation of certain structures, such as the media. There would be three most significant improbabilities of communication.

First, it is improbable that in a simple situation of communication, *ego* understands what *alter* wants to communicate, since both systems are operationally closed. The improbability of understanding is overcome by means of the formation of 'language.' This medium "uses symbolic generalizations to replace, to represent or to put together perceptions and to solve the resulting problems of mutual comprehension" (Luhmann 1981d: 28) and this way makes understanding probable.

The second improbability is related to the diffusion of communication beyond the simple interactions. Since it is improbable that a communication reach beyond the people who interact, the 'media of diffusion' emerge, and the first one of them is

'writing.' By this means, media communication can transcend interactions and spread the selections of meaning of communication (Luhmann 1981d: 28).

Finally, the third improbability is related to the success or expected consequence of communication. Such success implies that one of the communication parties accept the selections of the other as a premise or starting point for his own selections. For this improbability, the 'symbolically generalized communication media' emerge, which generalize selections in a more considerable amplitude than it does interaction. They are oriented for generalization, i.e., to a plethora of situations. Based on orientations of generalized meaning, these media provide symbolic orientations that guide the acceptance of selections and therefore make the success of communication probable. Scientific truth, love, power, and money, are examples of these media (Luhmann 1975b).[80]

These three previously mentioned types of media: language, diffusion media, and symbolically generalized communication media, constitute mutually supposed 'evolutionary acquisitions.' Writing presupposes the existence of language, as the symbolically generalized communication media presuppose the existence of diffusion media, especially writing (Luhmann 1997a: 316).

To explain the function of the symbolically generalized communication media, Luhmann presents a microsociological reduction of an ideal situation of interaction between *alter* and *ego*. The variety of possible solutions to the problems of acceptance to communication is simplified into four solutions characterized by the form *action/experience* (Luhmann 1975b). The concepts of action and experience – which come from the interpretation that Luhmann does of the phenomenology

[80] In spite of their evident similarities and connections, the differentiation of functional systems and the emergence of the symbolically generalized communication media must not be confused, since not all the functional systems have these media.

earlier and of the action theory of Parsons - are reformulated in *Die Gesellschaft der Gesellschaft* (1997a) within a theory of communication, as communication selections.

> It is possible to put the accent of the attribution, either in the information (experience) or in the give it-to-know (action). And that is valid for both sides: for the one that initiates the communication and for that one who consequently must decide on the acceptance or the rejection of communication. If a selection is ascribed (no matter by whom) to the system itself, then we are speaking about *action*; if is attributed to its environment, we are speaking about *experience*. (Luhmann 1997a: 335)[81]

In all these cases, it is a question of attributions, internal or external, and applies to the selections of communication. The *information* is perceived as *experience*, while the *giving it-to-know* [*Mitteilung*] as action. At the same time, if the selection is attributed to the *system* then it is an *action*, if instead it is attributed to the environment, then *experience*. Luhmann explains the congruence between its previous actionalists concepts and the theory of communication this way.

**Table 4 Symbolically Generalized Communication Media: Action and Experience**

| Alter \ Ego | Experience | Action |
|---|---|---|
| Experience | Ae → Ee<br>Truth<br>Values | Ae → Ea<br>Love |
| Action | Aa → Ee<br>Property/Money<br>Art | Aa → Ea<br>Power/Law |

[81] "Kann der Akzent der Zurechnung entweder auf Information (Erleben) oder auf Mitteilung (Handlung) gelegt werden; und dies gilt für beide Seiten: für die, die eine Kommunikation initiiert und für die, die daraufhin über (Kommunikation von) Annahme oder Ablehnung zu entscheiden hat. Wenn eine Selektion (von wem immer) dem System selbst zugerechnet wird, wollen wir von *Handlung* sprechen, wird sie der Umwelt zugerechnet, von *Erleben*."

Source: Luhmann (1997a: 336)

The reference problem of the symbolic media 'law' is related to the acceptance of a selection on by an *ego*, which demands a respective action by an *alter*. The acting of *alter* provokes an action of *ego*. In contrast to truth, which is experienced as mere *information* for alter and ego, power and law demand an *action*, that is to say a give it-to-know [*Mitteilung*] by both systems.

Between this theory of the symbolically generalized communication media as attributions of meaning, consolidated in *Die Gesellschaft der Gesellschaft* (1997a), and the theory of 'validity' as symbolically generalized communication media, as it appears in *Das Recht der der Gesellschaft* (1995a), a theoretical gap exist. Nevertheless the relations between these two positions can be explained based on two interrelated elements.

First, it is clear in this model that normative expectations constitute action attributions both for the one who has the expectation and for the one who must comply with the expectation. In contrast to cognitive expectations, *ego* demands *alter* to change its behavior in accordance with a previously determined action scheme.

Second, the attribution of the action by ego and alter is only understood if there is a symbolic media, flexible enough to interpret the motives of the action in a generalized way and, from it, claim for the correction of the expectation in case of disappointment. The validity of legal norms appears here as a central element.

Thus, on the one hand, normative expectation of ego constitutes an action for the one who possesses the expectation and against whom compliance is demanded and, on the other hand, normative expectations are symbolized in legal validity, since they find place inside legal system.

Validity constitutes the symbol that represents the unit of the system for the system. It is not deduced from a hierarchically superior norm or of latent values, but of the proper current operations of the legal system and its internal capacities of linkage. The validity of positive law is also contingent validity. It can change according to hardly predictable circumstances. Nevertheless, its viability is due precisely to this instability. Justice or equality are functionally equivalent symbols to validity, even in a system of substantive law (as in the *common law*) where not previously codified objectives are pursued. The consistency of decisions based on previous decisions is then based on this validity.

The validity of law constitutes the symbolic media of the system, without excluding the use of legal validity by other functional systems, such as the validity of the contracts for the economy or the validity of the use of power (Luhmann 1975b; 1997a). However, from the positivization of law the symbol of validity has value only inside the legal system and it is necessary to refer to this when the performance of this symbol are required.

### 2.3.6. Theoretical elements of the regional functional differentiation of law

The theory of functional differentiation of law indicates those aspects that affect the system in a universalistic sense. That is, this theory addresses the development of systems without considering local or regional specificities. When analyzing the differentiation of law in Chile, however, we must explain how we address the apparent epistemological obstacle that involves explaining the functional differentiation of a social system on a regional level (Luhmann 1997a: 25), and in our case, the functional differentiation of a *national* legal system.

While functional differentiation as a structure of modern society presupposes the globalization of functional systems, it does not exclude the formation of regional differentiations. In case of law, it assumes neither centralization of decisions, nor the

formation of a world State.[82] Functional differentiation does not eliminate other forms of differentiation as *stratification* or *segmentation* and, even in some cases, sharpens them or reshapes them in a functional way in the interior of systems (in case of the politics, the *segmentation* in States or in law in the difference between *center* and *periphery*, jurisprudence/legislation). The diverse constellations of differentiation forms are reflected in what has been named "multiple modernities" (Eisenstadt 2000, Nassehi 2003a), in which ones particularists accents and special structural conditions appear.

If the analysis focuses on the dimensions of meaning we can say that, in the case of law, the social dimension and the spatial dimension constitute the most critical factors for the explanation of the functional differentiation at the regional level.

The consideration of a possible *spatial* dimension has always been a controversial issue inside system theory. In the original approach of Luhmann this dimension is largely absent. The reasons for this absence are not properly explained at a theoretical level. For this reason, it is even possible to speculate that it should not be due to a theoretical problem but to a mere stated *disinterest* of Luhmann with regard to the space as an aspect of the society. Luhmann himself said this in an interview:

> I don't want to sound categorical and say "I have no interest," but I've always had problems with spatial orders. As much as I enjoy being in Brazil and I'm interested in its political situation, Brazil as a unit doesn't interest me at all. Or think about the city of Bielefeld, it is not a system. So all spatial or regional units do not interest me much. (Niklas Luhmann, In: Hagen 2009: 98)[83]

[82] An improbable scenario, according to Albert and Stichweh (2007).

[83] "Ich will nicht apodiktisch ein für allemal „nicht interessieren" sagen, aber z.B. habe ich immer Schwierigkeiten mit räumlichen Ordnungen. So gern ich in Brasilien bin und mich für die politischen Verhältnisse dort interessiere, aber Brasilien als Einheit interessiert mich nun wieder nicht. Oder nehmen Sie die Stadt Bielefeld, das ist kein System. Also alle räumlichen, regionalisierenden Einheiten interessieren mich nicht so sehr."

Stichweh (1998: 344) has pointed out that the omission of the spatial dimension in the Luhmann formulation is not explained by clear analytical intentions and that the predominance of time over space does not seem theoretically justified. According to Stichweh (1998), the idea of a spatial dimension *insi*de the *factual* or *social* dimension does not solve the problem of this possible dimension. Luhmann only uses the concept of space as a *medium* for the "neurophysiological operation of the brain" for the measurement and calculation of the objects (Luhmann 1997b: 179). Space - as time - appears like *medium* and *form* by means of the distinction *place/object* (Luhmann 1997b: 180) and it makes its own invisibility visible by means of the crossing from one side to another.

Indeed, it is empirical evidence that not all social systems give the same relevance to the spatial distinctions of their communications, and in some cases, these problems are derived in organizations; nevertheless the space in modern society can be a crucial dimension to understand the *differentiation* of specific functional systems (cf. Kuhm 2000: 334; Stichweh 1998: 347). By means of the distinctions "near/far" and "here/there," space appears in communication (Nassehi 2003: 222) and the central problem of this dimension becomes operative in communication and it is used in the differentiation. The question is, in short, how space refers to "operational limits" of society (Nassehi 2009: 447) and lets a phenomenological dimension of space that serves as medium for communication appear. From this distinction, it is clear that the problem of the differentiation at spatial level is solved in various ways by the functional systems. In the case of law, a usual manner of treating the spatial problem is through communication distinctions that point at operational boundaries of the system. Semantics as *sovereignty*, *nationality,* or *jurisdiction*[84] permits exact definitions of spatial limits in the functioning of the system. In this way, and on a

[84] Parsons tried to relate this idea of "jurisdiction" with a relationship between law and societal community, for which the spatial location is very important (cf. Parsons 1965a: 258ff).

political level, law is organized under State principles with self-limited powers (autonomous) and thus defines its boundaries of organization and application.

In addition to the spatial dimension, the *social* dimension of meaning is of great interest for the differentiation process. It can be observed that, in modern society, it is possible for law to connect with politics through these two dimensions of meaning. Both law and politics as functional systems are at the *factual* and *temporal* level separated by its functions, but at *spatial* and *social* level, they are coupled. This coupling occurs in the *spatial* delimitation of a *territory for the law* and in the *social* delimitation of *a collective for the politic.* Armin Nassehi (2009: 333) has noted out that politics "visibilizes a collective" in the social dimension, an idea that emerges from the concept of politics of Luhmann. Indeed, Luhmann adopts from Parsons, almost without modifications, the symbolic media of the political power, that is to say, the media that produces "collectively" binding decisions (Parsons 1963, 1964). The idea of 'collective' appears almost without discussion in the formulations of Luhmann although it has a decisive importance to understand the configuration of politics in the social dimension of meaning. It is possible that in the adaptation of Luhmann of the symbolically generalized media of power from Parsons, (who had himself developed theoretical formulations about the concept of collective) this concept has been not further developed.

While at the factual and temporal level there are also couplings (for example in the political constitutions or in the rules of administration) in both directions, social and spatial, the differentiation of law and politics are *visible* and they have marked *empirical* effects. Following this perspective, it is necessary to have a complementary perspective in which law is considered as a social system factually and temporarily *mundialized*, but also as a social system that demarcates *territories* and *collectives* in its communications and specific decisions, in order to observe the differentiation of law in Chile.

For this reason, the problem of regional functional differentiation cannot be reduced to a spatial problem only. The regions of the world are, as Japp writes it (2007: 186): "units of social communication that refer to region-specific links in the context of global functional differentiation and (with different relevance) to territoriality."[85] This is why particular importance should be given to the social character of the regions and their role in functional differentiation.

In the case of law the "segmentary differentiation" of politics in States is of vital importance (Stichweh 1990: 259). This has implications for the development of law, which also adopts this form of differentiation. In contrast to science and economy, which adopt a wider social and spatial generalization, politics, education, and law are segmentarily differentiated in regions (Stichweh 1990: 260). As we have indicated, the relation between law and politics results from vital relevance and helps to understand the differentiation of the legal system at regional level. This applies not only to the Latin-American region, but also to the differentiation of the European law. As noted by Stichweh (1991: 381): "The emergence of modern legal systems is accomplished through *national differentiation of European common law* (ius commune)."[86]

Hereinafter we will try to recompose the differentiation of the Chilean legal system from this regional perspective and will try to clarify the particular ways in which this process occurs. For this, we must analyze the concepts of "differentiation" and "evolution" and then test their applications on the specific regional context of Chile.

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[85] "Einheiten gesellschaftlicher Kommunikation, die auf regionsspezifische Verknüpfungen im Kontext globaler Funktionsdifferenzierung und (mit unterschiedlicher Relevanz) auf Territorialität referieren."

[86] "Diese Entstehung moderner Rechtssysteme vollzieht sich durch *nationale Differenzierung des europäischen Gemeinrechts* (ius commune)."

## 3. SYSTEMIC DIFFERENTIATION

Among the wide range of conceptions on differentiation, the present work has chosen the *systemic version* of the theory of differentiation developed by Niklas Luhmann. The substantiation for this approach stems from the fact that the interest of the present work is to observe the differentiation of a *social system,* and in this approach such provides the most developed and suitable conceptual tools for such analysis. However, various dialogues with other theoretical currents in way of enriching the future reflections will be developed in the course of the present text.

In this sense, this work joins an old tradition of sociological studies on *system differentiation*. The theory of differentiation is characterized by a large "theoretical family" (Tyrell 1998: 119) whose diversity, coherences, and conflicts are difficult to summarize. The concept of differentiation is one of the classic concepts in social theory and it has been used for various purposes: to understand the "social evolution" from its purely formal aspects (Spencer 1912); to describe the moral consequences of the growing "division of labor" in the emerging industrial society (Durkheim 2001); to understand the expression of the phenomenon of the "individualization" (Simmel 1992); or also the "spheres of value" in the rational capitalism (Weber 1922a); up to the "functional specialization" of action systems (Parsons 1961a). In all these cases a common diagnosis appears: "the process of social modernization as *differentiation process* is described" (Nassehi 1999: 12). There are several problems associated with the differentiation theory since, in spite of its stage of development, it is still subject to debates and discussions (cf. Nassehi 1999; 2004; Schimank 1985; 2000; 2005; Schwinn 2004; Schwinn et al. 2011; Tyrell 1978; 1998; 2008).

The differentiation concept is present both in the studies on the "factual" [*sachlich*] differentiation of law in Max Weber (1922a: 386ff.), as in the theory of the social division of labor "symbolized" in the law (Durkheim 2001), and in the approach of Parsons to institutional differentiation of law as a mechanism of social "control"

and "integration" (Parsons 1961a; 1962; 1971; 1977). In Luhmann, for his part, the law appears like a mechanism for the treatment of normative expectations (Luhmann 1995a; 1987). We will delve into each of these theories later.

The systemic tradition refers to system differentiation as a *universal* process at a formal level. This universalism is staring into the analysis of the social organism of Spencer (1912) and in the division of labor in Durkheim (2001), as well as in the analysis of action systems of Parsons (1961a). It was only in the mid-1960s, with the development of the structural-functionalism in the USA by Parsons' followers, that a set of questions concerning to the way of observation of system differentiation from a *regional* perspective opened. These reflections were built around of the concept of "modernization" (cf. Parsons 1966; 1971; Eisenstadt 1964; 1974) *and in this scenario, the theory of system differentiation was opened for the first time to interpretations concerning to the nature of differentiation under specific regional conditions*. Thanks to this opening, not only the emergence of the first reflections on the modernization in Latin America but also the debate on how to make politically viable this process was made possible (cf. Germani 1969, Cardoso & Faletto 1969).

Since our theoretical reconstruction recognize that the differentiation concept has a central role, a theoretical clarification of this concept becomes necessary before initiating a discussion on the specific topic of the law regarding the regional differentiation in Chile.

### 3.1. Differentiation and Evolution

The theory of differentiation is located at the core of social systems theory. The way system differentiation is addressed varies according to the different development phases of the system theory. In the phase of self-referring systems (Luhmann) the analysis of the concept of system differentiation is characterized by a – in a certain way – cryptic sentence: "[s]ystem differentiation is nothing more than the repetition within systems of the difference between system and environment" (Luhmann

1991a: 22), i.e., the system differentiation would be an iterative process of distinction operations between system and environment within a system. Hence, the theory of system differentiation, in Luhmann's words, would replace the old idea of the specialization of "parts" of a system with a differentiation of "systems" (Luhmann 1990a: 416ff.). This characterizes the "paradigm change" in "Soziale Systeme" (1991a) and is perhaps the most common starting point in understanding the problem of social systems differentiation.

Nevertheless, any attempt for a theoretical construction towards a theory of systems differentiation under this situation immediately collides with problems of understanding from an analytical point of view. How can differentiation process at the empirical level in a temporal perspective be understood? Do all communication processes entail differentiation? How can the formation of social systems from this basic operation be distinguished? Is differentiation slightly different from evolution? These questions do not find a simple answer from the elegant theorem of the iteration of the distinction system/environment within the system. That is why a reconstruction (deconstruction?) of the concept of differentiation of social systems is necessary in order to respond to those questions.

Even if one considers that Luhmann's assertion that before "Soziale Systeme" everything previous is just a theoretical "prototype" [*null-series*] is sufficient (Baecker & Stanitzek 1987: 142) and thereon starts the theoretical reflections, it is however entirely plausible to argue that the concepts of social system and system differentiation remain, in some core aspects, relatively constant in spite of the changes that Luhmann system theory has experienced over three decades. Hence, system differentiation concept deserves to be studied against the background of its own differentiation. Paradoxically, differentiation is akin to recognizing a self-inclusive process.

The social system concept was initially conceived by Luhmann within the framework of a theory of *action systems*, inspired by Parsons and with a marked

influence of the phenomenological concept of *meaning*. The system concept concerns human actions, which in their reciprocal relationship allow distinguishing an *inside* from an *outside*, and from there, it differentiates a *system* of an *environment*. The point of interest is a relational problem, as well as the way in which that problem evolves and moves to another state.

> Here, social system should be understood as a context of meaning from social actions, which refer each other and make a frontier from an environment of no-related actions. (Luhmann 1974b: 115)[87]

Social systems emerge as a result of the construction of a *problem of* meaning, derived from human actions that have reference to other human actions and can be addressed from a functional point of view, i.e., by *selecting alternatives* (Luhmann 1974a: 35). Since no person has full access to the world, no one can entirely experience it or act upon it in all its dimensions. Therefore, is impossible to reduce the world complexity for his/her whole understanding; instead, one must resort to actions and experiences of others (Luhmann 1974b: 126). The paradigmatic example of this situation is the so-called "double contingency," that is to say, the mutual and daily understanding or uncertainty between two persons, which is solved by expectations formations, for instance through a process of "self-selection" (Luhmann 1975a: 9f) or "autocatalysis" of selections (Luhmann 1981a: 14f), which has its origin and connection capacity only in social systems.

Hence, constitutive problems of social systems can simply be topics to choose from in the frugality of an interaction, the membership or non- membership in an organization, or the resolution of generalized problems of reference, as an acceptance of money, the legitimacy of power, the validity of a normative

[87] "Unter sozialem System soll hier ein Sinnzusammenhang von sozialen Handlungen verstanden werden, die aufeinander verweisen und sich von einer Umwelt nicht dazugehöriger Handlungen abgrenzen lassen."

expectation, or the reciprocity of the love, among others. In other words, these are problems in interactions, or of organizations, or problems at the level of the differentiation of functional systems (Luhmann 1975a).

Since these problems and the pressure to select arise from human actions that are related to the actions of others, difficulties relative to the handling of uncertainty appear: of allocation, motivation, and of temporality. This situation is summarized in the concept of *complexity*. By function, social systems, says Luhmann, have the treatment and reduction of complexity (Luhmann 1974b: 116), both internal and external. The concept of complexity includes both the number of possible relations, and the potential simultaneity of them in the system. Social systems, as relations between actions referred to in specific problems, must choose alternatives and, thus, operate selectively and build structures. The environment opens a horizon of possible selections that exceeds the current and concrete operations of system events. Hence, Luhmann points out that social systems are always less complex than their environments (Luhmann 1975a: 9).

System differentiation in itself sends in general terms to the problem of the treatment of the complexity. Given the temporal character of the social system operations, these can only keep on operating when they are internally differentiated, in a certain threshold (Luhmann 1974b: 123). That is, differentiation is triggered as a result of this type of problems, for which internal selections have to be settled and specific structures have to be stabilized. This way, every new system establishes differences and generates specific autonomies.

In short: social systems emerge on the basis of reference problems; they form and stabilize structures (i.e. expectations) for reduction of complexity. These systems distinguish a world of differentiated meaning, which selectively directs attention to new and changing events.

The change from a theory of action towards a theory of communication happens gradually and is visible both in the works of Parsons and Luhmann. In the former, it is observed in the increasing relevance that the theory of the *Symbolic Media of Exchange* acquired, as money and power, which appear as communication media (Parsons 1961a: 66ff.; 1966: 20ff.). For Luhmann, the relativization of the concept of action first occurs in the postulate that social systems should be treated like systems of action only at *empirical level* (Luhmann 1974a: 39), since they make their selections visible this way. In the middle of the 1970s, the importance of communication is clearly outlined.

> As soon as communication takes place among persons, emerge social systems; since with each communication begins a story by interrelated selections differentiated, realizing only some of many possibilities. (Luhmann 1975a: 9)[88]

This transition towards communication as the central element of social systems was consolidated along with the adoption of the concept of "autopoiesis" (Luhmann 1982) and is finally synthesized in "Soziale Systeme" (1991a).[89] In this monograph, social systems are understood as "self-referential systems:" "there are systems that have the ability to establish relations with themselves and to differentiate these relations from relations with their environment" (Luhmann 1991a: 31). Such systems can not only (and in some cases they don't have another alternative) orient their operations towards themselves and determine their own constraints from this,

[88] "Sobald überhaupt Kommunikation unter Menschen stattfindet, entstehen soziale Systeme; denn mit jeder Kommunikation beginnt eine Geschichte, die durch aufeinander bezogene Selektionen sich ausdifferenziert, indem sie nur einige von vielen Möglichkeiten realisiert."

[89] Rudolf Stichweh (2000:7) explains it from his own experience: "I remember well that in the late 1970s/early 1980s Luhmann repeatedly said in lectures and seminars that he did not yet know how to take a major theoretical decision: if one looks for the constitutive elements of social systems, which is the best candidate for element status, actions or communications? Some years later in Soziale Systeme from 1984, the decision is taken. Systems theory is reformulated as communications theory, with the concept of action relegated to a secondary status."

but also produce themselves in an autopoietic way. Social systems not only maintain its character as distinction but that character is radicalized as a central aspect of a system. A system is, then, a distinction between system and environment.

Despite this reformulation of the theory of social systems as communication theory, the concept of action is still present throughout the whole development of the theory, albeit with different emphasis, sometimes with important variations, and sometimes with scarce changes. An example of this is the analysis of the phenomenological problem of attribution between *action/experience* [*handeln/erleben*]. The analysis of this duality does not suffer major alterations from its initial formulation (Luhmann 1981b) up to its appearance in the final synthesis "Die Gesellschaft der Gesellschaft" (1997a: 316ff).[90] This occurs parallel to the transition from phenomenology towards cybernetics. In this transit, the old notion of system/environment based on a phenomenological concept of meaning also acquires an additional abstract formalism with the introduction of the *calculus of the form* of George Spencer-Brown (1979) and the ideas of the radical constructivism.

Behind this *accumulative* character of the theory, so to speak, where changes of *emphasis* and conceptual development take place, lies a core of basal reflections. Without claiming to be exhaustive: reflexivity, the observer, system as a difference, function, temporalization of social structures, the problem of social order, evolution, and differentiation, are permanent topics, which acquire greater depth and sophistication over the years. Next we will explore two of these concepts in

[90] Something similar happens with the concept of "collective" that appears in the description of the political system. Luhmann adopts almost unchanged the symbolic media of political power from Parsons, i.e. producing "collective binding decisions" (Parsons 1963, 1964). The idea of collective discussion appears virtually without discussion in Luhmann formulations, although it has an importance that is decisive in understanding the configuration of the politics in the social dimension of meaning. It is possible that, in Luhmann's adaptation of the symbolically generalized media of power from Parsons (who had developed theoretical formulations about the concept of collective), this concept has stayed without later revision (cf. Luhmann 2002).

order to clarify the characteristics of the system differentiation. We refer to the concepts of differentiation and evolution.

Although, in his last writings, Luhmann concedes a similar conceptual status to *differentiation* and *evolution* as part of the study of social change, which appears already clearly in his lessons on "Theory of Society" at the early nineties (cf. Luhmann 2005) and also in the separate chapters covering each concept in "Die Gesellschaft der Gesellschaft" (1997a), it is possible to observe, as Stichweh states, that systems theory usually faces the problem of social change by means of the "differentiation" concept – especially with regard to those changes that take place in the modern society – and only secondarily by means of the "evolution" concept (Stichweh 2007b: 529ff.). This asymmetric situation is a part of a long relation between both concepts. Indeed, the concepts of evolution and system differentiation in their origins have a relation of interdependence that is relevant to highlight.

In its initial formulation, the concept of system differentiation describes only a part of the evolutionary process. In terms of an explanation of social change, *system differentiation is subordinated to social evolution*. We will support that it is possible to maintain this distinction in so far as it allows locating system differentiation inside a theory of social change with a wider scope and, simultaneously, allows clarifying differences between both concepts. This subordination is not largely altered in the development of the evolution theory itself, but it remains present, as we shall see below.

Evolution, in a systemic perspective, refers to the structural changes arising from historical relations of processes of variation, selection, and stabilization (Luhmann 1976a: 286). Evolution is described as a "specific mechanism of structural change" (Luhmann 1981c: 184), which consists on differentiation and reintegration of variation, selection and stabilization functions. This means that not all social change redounds to an evolutionary change, but only those structural changes that can be described as a *stabilization of a selected variation*. These three functions operationally

come into play in a circular way, i.e., the distinction between the three moments corresponds to an analytical judgment. As Luhmann indicates, the variation corresponds to a possible selection inside a social system; such variation can be selected and only at that point opens the question of whether and how the system stabilizes the selection.

> The variation produces, however it operates empirically, a difference, i.e. a deviation in contrast to the hitherto usual. This difference forces a selection -for or against the innovation. The selection in turn forces, in choosing the new, cascades of adjustment or delimitation movements within the system, and when it leaves things as they were, it needs confirmations of this operation, because that heretofore taken for granted has become contingent. (Luhmann 1997a: 451)[91]

In its early writings on evolution Luhmann identifies a particular evolutionary acquisition for each of these functions. For "variation," the emergency of "language" and with it the possibility to refuse an offer of selection; for "selection," the emergency of "symbolically generalized communication media," which make the success of a selection probable by means of meaning generalizations; and for "stabilization," he identifies the "differentiation of social systems," since it is only after the formation of systems that the reproducibility of successful selections in a stabilized structure is made possible (Luhmann 1976a: 286ff; 1981c: 185ff.). This specific function of systems differentiation will remain present up to "Die Gesellschaft der Gesellschaft" (1997a) through the *implicit* description of stabilization as a demand of "self-organization" of social systems (Luhmann 1997a: 427) and through the *explicit* consideration of stabilization by means of social systems differentiation.

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[91] "Die Variation erzeugt, wie immer sie empirisch operiert, eine Differenz, nämlich im Unterschied zum bisher Üblichen eine Abweichung. Diese Differenz erzwingt eine Selektion - gegen oder für die Innovation. Die Selektion wiederum erzwingt, wenn sie das Neue wählt, Kaskaden von Anpassungs- oder Abgrenzungsbewegungen im System, und, wenn sie es beim Alten beläßt, Bestätigungen für diese Option, da das vordem Selbstverständliche kontingent geworden ist."

> During the later evolution of society, restabilization function moves increasingly to partial systems of society, which have to steady themselves in the internal environment of society. It is a question, ultimately, of the problem of sustainability of systemic differentiation of society. (Luhmann 1997a: 455)[92]

Connectivity of selections is, by means of system differentiation, made probable. System differentiation, thus, is linked as an evolutionary process with a special function. In this way, it can be understood that the evolution of partial systems of society were made possible only by means of systems differentiation, since it was only in this situation the three evolutionary functions (variation, selection, and restabilization) are already differentiated (Luhmann 1997a: 557).

System differentiation particularly addresses an evolutionary problem, namely the *problem of restabilization of evolutionary selections*. Nevertheless, this has led us only by the path of differentiation of functional systems, which is a particular segment of the systems differentiation theory; and, therefore, it becomes necessary to clarify the process of differentiation of levels, i.e., differentiation of society in systems of *interaction*, *organizations* and *society*.

This systemic differentiation of levels is also part of the process of social evolution.

> The socio-cultural evolution can be described as an increasing differentiation of levels on which interactions, organizations and social systems are formed. Considering firstly the start and end points of this development: In the simplest

[92] "Im weiteren Verlauf der gesellschaftlichen Evolution verlagert die Restabilisierungsfunktion sich dann mehr und mehr auf Teilsysteme der Gesellschaft, die sich in der innergesellschaftlichen Umwelt zu bewähren haben. Dann geht es letztlich um das Problem der Haltbarkeit gesellschaftlicher Systemdifferenzierung."

> archaic social formations, interactions, organizations and society are almost identical. (1975a: 13)[93]

Each of these systems is formed around diverse reference problems. *Interactions* are formed concerning the problem of double contingency that develops in the *presence* of actors (Luhmann 1975a: 10; 1997a: 814). It is about social systems supported through performing *face-to-face* relations and by changes in communication *topics*.

*Society*, for his part, corresponds to all possible communications or in the actionalist terminology of the early Luhmann, to the "encompassing system of all communicational reachable actions" (Luhmann 1975a: 11). Unlike interactions, society reference problem is not presence, but the availability of communication at the transversal level. Although it includes organizations and interactions, it is a system of a different type, which does not serve as a model for the formation of the others. Not all social systems are constructed like social system *society*. Neither interactions nor organizations share the wide boundaries of society, but they built their own borders of meaning. Differentiation of social systems, as we have seen until now, refers to this systemic level.

*Organizations*, finally, arise around the problem of functional *membership* to certain systems (Luhmann 1975a: 12; 1997a: 829). Organizations problematize membership and they maintain themselves by means of autopoietic reproduction of decisions (Luhmann 1997a: 830). In contrast to the system of society and interactions, organizations do not constitute a universal phenomenon but a special evolutionary acquisition (Luhmann 1997a: 827). For this reason, organizations mark a special

[93] "Man kann die soziokulturelle Evolution beschreiben als zunehmende Differenzierung der Ebenen, auf denen sich Interaktionssysteme, Organisationssysteme und Gesellschaftssysteme bilden. Betrachten wir zunächst die Anfangs- und Endpunkte dieser Entwicklung: In den einfachsten archaischen Gesellschaftsformationen sind Interaktion, Organisation und Gesellschaft nahezu identisch"

type of differentiation that distinguishes itself from the system of society and of interactions, which in turn are present from the earliest forms of differentiation.

We have already drawn up the coordinates in which the differentiation of social systems is located; therefore it is possible to build problems in a different level of complexity. Having made these clarifications with regard to interactions, organizations, and society, the problem of differentiation of functional systems can finally be addressed. With regard to this subject, the possibilities of system formation are limited, according to Luhmann, to certain "forms of differentiation" (1977: 32ff; 1997a: 609ff.), which allow for the way in which the evolution of society occurs at level of the coordination and reciprocal observation of their functional systems to be described.

### 3.2. Forms of Differentiation

Unlike the differentiation concept of the old systemic tradition, which goes back from Spencer up to Parsons, Luhmann points out that differentiation is not intended to meet needs of a system in order to adapt it to an environment, but it occurs in a system from its own structural determinations, which – in the case of social systems – corresponds to communication as a particular operation (1991a: 60ff). The concept of *function* itself can no longer be subordinated to a *structure* that should be maintained thanks to the performance of functions (1974b: 114f). This concept does not have a structural determination, but it is based on the comparison of causally arranged alternatives with respect to a "reference problem" (Luhmann 1974c). Consequently, functional differentiation lacks an environmental determinism and rather refers to an internal systemic process. Hence, differentiation appears as a *disjunctive* process that tends to generate differences, which are reproduced from event to event, from operation to operation.

Society is understood as a communication system, which reproduces itself in an autopoietic way, regardless of who or what is attributed as the cause or origin of

communication, i.e., "Communications construct, when they reproduce themselves autopoietically by recursions, an emerging sui generis reality. Humans cannot communicate, only communication can communicate" (Luhmann 1997a: 105).[94] Differentiation occurs at the level of communications and at this level, the differentiating character of these operations appears in a dramatic way. This means, of course, that the *iteration* of the difference system/environment inside social systems (Luhmann 1991a: 22) takes place only through communication (Luhmann 1991a: 210). It is by means of communication and concatenation of successive communications that differentiations in social systems occur and, simultaneously, a combination of dependences and independences.

> Therefore one can also describe the differentiation of a system as an increase in sensitivity for what has been determined (what is capable of being connected internally) and an increase of insensitivity for everything else –that is an increase in dependence and independence at once. (Luhmann 1991a: 250)[95]

Modern society is understood under the primacy of *functional differentiation*, which consists of functional specification of social communication concerning specific problems (Luhmann 1997a: 707ff). In terms of dimensions of meaning, functional differentiation means, at *factual* [*sachlich*] level, the specification of *problems of reference* in *autonomous* functional systems and the *freedom* to select solutions in comparison to others, in a certain *contingent* way; at *social* level, it implies both the emergence of *symbolically generalized communications media* in order to generalize acceptance of communicational offers and generalized inclusion in functional systems; at *temporal*

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[94] "Kommunikationen bilden, wenn autopoietisch durch Rekursionen reproduziert, eine emergente Realität sui genesis. Nicht der Mensch kann kommunizieren, nur die Kommunikation kann kommunizieren."

[95] "Deshalb kann man die Ausdifferenzierung eines Systems auch beschreiben als Steigerung der Sensibilität für Bestimmtes (intern Anschlußfähiges) und Steigerung der Insensibilität für alles übrige –also Steigerung von Abhängigkeit und von Unabhängigkeit zugleich."

level, it implies diversification of temporalities in various social systems and the problem of synchronization of these temporalities.

Although differentiation is at the core of communication operations, the thesis of an *increasing differentiation of systems* as central tendency – a common reproach to differentiation theory from Spencer up to Parsons –should be discarded, since differentiation produces different forms only in certain occasions. For this reason, Luhmann argues that the idea of increasing differentiation should be subordinated by the thesis of the "change in the forms of differentiation" (Luhmann 1997a: 615), which indicates a change at general level.

The concept of *form of differentiation* refers to two interlaced phenomena. On the one hand, it is a question of how different social systems are "coordinated" between themselves (Luhmann 1997a: 609) and, secondly, of the way in which partial systems observe themselves and other partial systems as partial systems (Luhmann 1997a: 610). In both cases, it is a problem of the general order of society and of the type of relations that are considered fundamental.

There are four[96] forms of differentiation that have arisen evolutionarily: segmentation, stratification, center/periphery, and functional differentiation. These forms of differentiation are based on the combination of two dualities, namely: *system/environment* and *equality/inequality* (Luhmann 1977:33). Based on these two dualities, or forms of two sides (Spencer-Brown 1979), the differentiation theory derives these four forms:

[96] Luhmann adds a fifth form of differentiation "conform/discrepant (official/non-official, formal/informal)" (Luhmann 1991a: 260-261), which however does not develop later. In his early works, Luhmann distinguishes only *segmentation* and *functional differentiation*, closely following Durkheim (Luhmann 1974d: 148ff).

**Table 5 Forms of Differentiation based on Equality/Inequality**

| Form of differentiation | Equality | Inequality |
|---|---|---|
| **Segmentary Society** | Equality inside the system | Inequality to the environment (other societies) |
| **Stratified Society** | Equality in the high strata of the system | Inequality to the low strata of the system |
| **Center/Periphery Society** | Equality in the center of the system | Inequality to the periphery of the system |
| **Functional Differentiated Society** | Equality of access to the social systems | Inequality among each system (functional) |

Source: Own elaboration based on Luhmann (1977)

Segmentary societies are based on the principle of *equality*, usually focused on kinship and lacking a major specialization. Its evolutionary catalysts were wars, economic diversification, or internal stratification based on kinship units (Luhmann 1997a: 657).

Societies differentiated by stratification or center and periphery, for their part, are organized by *inequality* as regulating principle (Luhmann 1997a: 680). The symmetry system/environment aligns with equality/inequality, namely that equality is the normal situation of communication in a social system (i.e. center or summit of society), while inequality prevails in communication with the environment. In this society, the problem of distribution and "social justification" of inequality arise.[97]

A functionally differentiated society is the differentiation form of *modern society*. In this society, communication systems that are responsible to treat problems of generalized social relevance emerge. Thus, a political system differentiates itself concerning the problem of "collectively binding decisions" (Luhmann 2002), an economic system focused on the problem of "scarcity" (Luhmann 1994), a legal system with regard to "normative expectations" (Luhmann 1995a), etc. Each

[97] It is interesting that for Parsons, stratification legitimizes inequality and this left precisely the contrary as a problem, i.e., the justification of equality (see Parsons 1977: 327).

communication system treats their problems in an autonomous and operationally closed way. In a *social* dimension system, differentiation manifests itself first as a differentiation of complementary roles (Luhmann 1976a: 291) and later in the *factual* form from symbolically generalized communications media and codes and programs in the system. In the *temporal* dimension, different temporalities to each different system appear.

In this form of differentiation, the duality equality/inequality is treated in society, through the consideration of functions of each partial system, as unequal, but of equal access. Functional systems have to be, therefore, considered unequal (as long as their functions are unequal), but their environments have to be taken into account as equals (as social systems) (Luhmann 1977: 36).

> Functional differentiation emphasizes therefore, as a form of social differentiation, inequality of functional systems. But in this inequality they are equals. This means that the entire system waives any requirement of an order of the relationship (for example, rank order) between functional systems. (Luhmann 1997a: 746)[98]

Functional differentiation then becomes the specific form of differentiation of modern society, which does not imply the replacement of the other forms, but only the loss of their primacy in the form of social differentiation. Stratification, class differences, differentiation between center, and periphery are maintained but remain in a "secondary" position with regard to functional differentiation (Luhmann 1997a: 612). In this analysis, it can be observed that *system differentiation* refers to a change in the way of coordinations between systems and their self-observations. At this general level, the forms of differentiation are also *evolutionary acquisitions*, which have been structurally stabilized. Between these acquisitions, functional differentiation

[98] "Als Form gesellschaftlicher Differenzierung betont funktionale Differenzierung mithin die Ungleichheit der Funktionssysteme. Aber in dieser Ungleichheit sind sie gleich. Das heißt: das Gesamtsystem verzichtet auf jede Vorgabe einer Ordnung (zum Beispiel: Rangordnung) der Beziehung zwischen den Funktionssystemen."

appears as the last form of differentiation, but this does not exclude other possible forms of differentiation in the future (Luhmann 1997a: 614).

This *formal* analysis of differentiation can have an *empirical* turn with the change in focus, from the basal *equality/inequality* situation towards the empirical situation of *inclusion/exclusion*. As it is well known, the inclusion/exclusion concept appears in the late theoretical formulations of Luhmann as result of his observations of the caste system of India and the *favelas* in Brasil and, at the same time, of their own doubts about the universality of differentiation theory.[99]

Inclusion/exclusion concept refers, on the one hand, to the form in which individuals are considered as "persons" in communication (Luhmann 1995c: 241) and, in parallel, refers to the multiple dangers caused by overloading concepts like "functional differentiation," "class society," or "stratification" in developing regions, or where a dual situation of institutional modernization along with a big inequality would persist (Luhmann 1995c: 238).

It is possible to say that in the late formulations of Luhmann about forms of differentiation, the *equality/inequality* concept is displaced by the *inclusion/exclusion* concept. It seems to be only a change of terms between *equality* and *inclusion* when it is stated, with regard to segmentary societies, that *inclusion* occurs in the segments of society (communities of family and residence) or that, in a stratified society, *inclusion* is given through membership to a caste, class, i.e., certain strata, which closes itself by means of inclusion/exclusion (using rules of inbreeding) (Luhmann 1995c: 242ff).

[99] The concept of inclusion was initially formulated by Parsons as part of the processes of social change, among which the *differentiation*, *adaptive upgrading*, *inclusion,* and *value generalization* appear (Parsons 1971: 26). Luhmann apparently refers to this concept for the first time in 1976 in the context of the theory of evolution (see Luhmann 1976a: 303).

Nevertheless, in the special case of functional differentiation, , this transposition does not seem equally plausible, as we shall see.

**Table 6 Forms of Differentiation based on Inclusion/Exclusion**

| Form of differentiation | Inclusion | Exclusion |
|---|---|---|
| **Segmentary Society** | Inclusion inside the system | Exclusion of the environment (other societies) |
| **Stratified Society** | Inclusion in the high strata of the system | Exclusion of the low strata of the system |
| **Center/Periphery Society** | Inclusion in the center of the system | Exclusion of the periphery of the system |
| **Functional Differentiated Society** | Inclusion in each partial system | Exclusion from each partial system |

Source: Own elaboration based on Luhmann (1995c)

In the form of functional differentiation, the inclusion concept does not seem to simply the replacement of equality. Indeed, the postulate concerning "equal access" to functional systems (Luhmann 1977:36), does not seem comparable to "total inclusion" (Luhmann 1997a: 630), since the theoretical situation of equal access corresponds to a structural condition of any functional system (there are no *social barriers* for the use of money, to have political power, to believe in gods, to appreciate art, to claim love or to initiate a trial, etc.), which does not mean a total inclusion, which implies in turn an *effective participation* in systems. In other words, an abyss is opened between the initial postulate of *formal* equality of access to functional systems and the *empirical* inclusion in differentiated functional systems. Over this abyss in the theory of differentiation, we will stretch a bridge with some guidelines to understand functional differentiation in Chile.

This previous assessment about the inclusion/exclusion concept in the forms of differentiation does not only constitute a theoretical curiosity or a mere coincidence without consequences. This change implies questions on the universality of functional differentiation at operational level and is of utmost importance for a *regional* observation of differentiation.

If we consider the basic postulate of *equality of access* to functional systems, then universality of functional differentiation as a structural assumption of differentiation seems unquestionable. If instead we replace equality by *inclusion* in functional systems, this universality is quite unclear. System theory itself has made these questions on universality of functional differentiation visible. Luhmann indicates in some of his writings in the 90's that functional differentiation does not constitute a necessary condition of the evolutionary development of society, but this would rather be a sort of "European anomaly" (Luhmann 1995a: 586),[100] a form of differentiation that has emerged only once in Europe and from there spread to the rest of the world (Luhmann 1993a: 27): "All in all, it is no wonder that *only in Europe* has occurred the change on social systems towards primacy of functional differentiation" (Luhmann 1997a: 683, emphasis supplied).[101]

In the analysis on the concept of inclusion/inclusion as "supercode" in underdeveloped or developing regions (Luhmann 1995c: 260) and in the reflections on southern Italy (Luhmann 1995b), this questioning on universality of functional differentiation appears clearly. Inclusion/exclusion concept is, in my view, the key to give functional differentiation not only a theoretical-formal character but also a historical referent, enabling, for example, functional differentiation to be located in the horizon that begins in Europe of 18th century, which then spreads to the rest of the world and extends up to the present (Luhmann 1997a: 734).

Precisely, these two phenomena, namely the *regional character of functional differentiation* and the *diffusion of forms of differentiation*, allow the contextualization of the reflection about the differentiation of legal system in Chile, which not only deals with an analysis of the emergence of a functional system in a *universal* sense, but is also

[100]"europäische Anomalie"

[101] "Alles in allem ist es also kein Wunder, daß sich nur in Europa die Umstellung des Gesellschaftssystems auf einen Primat funktionaler Differenzierung ereignet hat."

devoted to the study of extra-European *regional* forms of differentiation. This allows the mentioning of, within the context of the discussion on "multiple modernities" (Eisenstadt 2000, Nassehi 2003), a *peripheral modernity*, which has structural differences from central European modernity.

Up to this point, we have elucidated the central elements of our analysis, i.e., the theoretical foundations of the systemic approach, the difference between evolution and differentiation, and the connection points to theories of differentiation with regional emphasis. We will return next to the issue of regional functional differentiation in Chile, in the regional context of Latin America.

### 3.3. Functional Differentiation in Chile

Latin-American sociology was constructed, concerning the reflection of modern society like a foreign imposition. In this region, modernity acquires a surname, it is a "Latin-American modernity" (Larraín 1997; Mascareño 2010) or a "peripheral modernity" (Robles 2005; Neves 1992; Brunner 2001; Sarlo 1988),[102] usually expressing discomfort (Martin Barbero 2003). This position is ancient in Latin-American sociology and virtually covers the entire discipline. In thick terms, it refers to the constitution of the modernity in the countries of the region by means of diffusion processes from Europe and the United States. In various sociological trends, this idea is not only a part of a diagnosis of modernization at comparative level, but also a criticism of the way in which this modernization process has been planned and conducted. For the *Dependence Theory* inspired in Marx, for example, the condition of periphery came due to economic subordination of Latin-American countries to European or North American capitalist centers (Cardoso & Faletto 1969).[103] A similar thesis relative to this problematic status of periphery can be

[102] Supported by Luhmann himself, see the introduction made by Luhmann to the book of Neves (1992).

[103] A thesis that is certainly parallel to that of "world system" of Wallerstein (1974).

founded in Functionalist (Germani 1969) and Culturalist analyses (Brunner 2001). In all of these diagnoses, Latin America appears in a situation of backwardness or shortcoming, in an asymmetric structure of modernization worldwide. Systems theory in Chile also adopts this position, but with some reservations.

To answer the question on the possibility of identifying a set of phases inside the evolution of law, we must have clarity about the sociological diagnosis that serves as context. As the ideal types of law of Weber (1922a), which correspond historically to the types of domination, we must make an effort to understand the correspondences between certain "forms of differentiation." For it, we will review four perspectives that are outlined like the main ones.

**a) Modernization as Politicization and Monetisation**

The monograph "Politicization and monetisation in Latin America," published originally in 1994 (2012), presents the ideas of the sociologists Carlos Cousiño and Eduardo Valenzuela, which are counted within the first systemic analyses on the conditions of modernity in Latin-American region. For these authors, system theory provides an explanatory model for the latest modernization wave in Chile, which would be guided by a growing influence of economy in society. In general terms, rupture processes with traditional order characterize the arrival of modernity. On a global scale, the *first* rupture occurs with the religious wars in Europe and concludes with the *Peace of Westphalia* in 1648, which ended the *War of Thirty Years* (Cousiño & Valenzuela 2012: 31), the second rupture is the experience of misery of the working classes in the 19th century (Cousiño & Valenzuela 2012: 53). The experience of the European war of extermination would have resulted in a reflexivization of social relations, i.e., the consciousness of the existence of social ties that were previously "pre-reflexive," These ties are characterized by "presence:"

> To account for experiential dimension contained in this form of sociability, we propose the concept of "presence." The term alludes to a form of social relation

> based on co-presentiality, in a being-together. In addition, it wants to rescue the dimension of "presence" that catholic world places in Eucharistic celebration, and that is the foundation of "communion" between God and men and among men themselves. The core of "presence" is the person as an experience that requires neither has a fundament. In this regard, the world of presence is the ambience of a pre-reflexive experience, where the given thing is not a fundamented thing. Experiences such as love, family, religion, friendship and sociability [*comensalidad*], for us are privileged examples of this realm. (Cousiño & Valenzuela 2012: 19-20)

In the opinion of these authors, the advent of modernity breaks this type of ties in two different ways: through *reflexivization* processes of social relations, which follow a discursive logic – in allusion to Habermas (1982a; 1982b) – and through *differentiation* processes of autonomous social systems – in allusion to Luhmann (1991a). Both discursive rationalization and systemic differentiation would unsuccessfully attempt to recompose or replace pre-reflexive social ties. Cousiño and Valenzuela thus attempt to build a model of *social integration* in three levels: pre-reflexive (presence), reflexive (consciousness), and systemic (communication) (Cousiño & Valenzuela 2012: 210ff.). This model can be characterized as an attempt to introduce a deeper level of integration to the *two-level* model developed by Lockwood (1964) and later by Habermas (1982a; 1982b; 1994). In addition to systemic integration and social integration, there would exist a type of so-called "cultural" integration based on pre-reflexive (pre-discursive) and pre-systemic relations (Cousiño & Valenzuela 2012: 210ff).

In Latin America, and particularly in Chile, these three integration levels would have taken shape in three differentiation forms. The institution of a *rural Hacienda*, as a model of traditional society, which founded a pre-reflexive type of tie between the *Señor* and the *servant*, is located as a starting substrate. Together with processes of urban development of early 20th century and migration of peasants to the cities, a transposition of social organization of the Hacienda to the cities occurs, which takes the form of *political populism*. For Cousiño and Valenzuela, populism artificially reproduces a pre-reflexive paternity relation between a populist leader and his

*servants* (workers of the Haciendas and their families arrived in the city and are impoverished in their peripheries). The populist leader establishes confidence relations with his followers and rewards their allegiance by recreating a "presence" relation type. The final fall of populisms is caused by its politics of *spending*, which later becomes *inflation* and, consequently, *crisis*.

> Populist leader substitutes the *Patrón* [Boss], and solves the question of absenteeism that defines the problem of popular transit of country to city. The ability of populist leader consists in to perform itself in the mode of presence. It is true that the leader speaks and its charisma is often a charisma of the word: the leader is placed really in an order of magnitude that requires the use of the word. But populism is not discursively validated. Populism does with the word the same that it does with money: sins by excess. Excess of words –that we commonly call demagogy and think is a peculiar feature of populism– invalidates discourse, likewise money excess –that we call inflation– depreciates currency. The word, as the money, lacks value when there is overabundance of it. (Cousiño & Valenzuela 2012: 167)

After its crisis, populism model is replaced by a reflexivization of broken social ties through a *Politicization* process, which occurs strongly in the 1970s and covers a wide social spectrum. Politicization would be the first manifestation of modernity in Chile. This would be a conscientization process and a reflexive creation of social ties, which does not attempt to rescue a pre-reflexive tie, but build them by means of reflection. An example of this process of politicization would be the development movement driven by the ECLAC in the region and in Chile, which contained in its program not only a substitution of the "economy of spending" typical of the populist regime with a "economy of work," but also a definition of social classes and their consciousness to prepare "a program of constitution of a reflexive social tie" (Cousiño & Valenzuela 2012: 145). In this context of politicization, social sciences, which reinforce politicization process and react to the emergence of urban misery (Cousiño & Valenzuela 2012: 70ff), arise. As politicization dominated as a

modernizing strategy, a reflection on social relations by means of semantics of social classes, work, and political freedom took place.

While the crisis of populism occurs due to its own inability to stop economic splurge and wastage of the politics based on presence, politicization is abruptly terminated by its incapability to process conflicts of a polarized country between right and left radical political positions. The *coup d'état* that occurred in Chile in 1973 marked the end of modernization as politicization. The government of the self-designated military "Junta" dissolved the National Congress and punished their political opponents with exile, torture, and death. Partly instigated by Chilean political and economic elites and middle classes, as well as by an anti-communist policy of the United States, the military government, which remained in power for 17 years, gave a draft modernization of the country.

Modernization as *Monetization* begins in this period and is characterized by Cousiño and Valenzuela by *differentiation* of an autonomous economic system: "When we talk about monetization, as the currently followed way of modernization in Latin America, we understand that process as a result and consequence of the differentiation of economic subsystem" (Cousiño & Valenzuela 2012: 116).

To understand the differentiation of economic system, these authors examine the theory of differentiation of Luhmann. According to them, system theory would allow the understanding of how economy closes itself in an autonomous way and lead a modernization process differently from the reflexive model of politicization. Monetization, they argue, differs radically from politicization, as long as it does not try to rebuild pre-reflexive ties, but only to maintain an autonomous social order through coordinations. Differentiation of the economy would bring, as a result, "the increasing inability of societies to be thought of as totality, i.e., to establish reflexively the social tie." (Cousiño & Valenzuela 2012: 121). This occurs mainly since differentiation of economy is made at the expenses of its political

dependencies, and, once it is disembedded from reflexive mechanisms of politics, any attempt to reflexivize the social tie disappears.

In contrast to populism, based on pre-reflexive presence, and politicization, based on reflexive conscientization, monetization has developed more effective mechanisms to deal with its crisis. Indeed, according to Cousiño and Valenzuela, differentiation of economic system not only stays current, but also has extended itself into the realm of politics. Once military regime left the power in 1990, after a democratic plebiscite, differentiation of political system occurred.

> Return to democracy has not been return of politics, in the sense in which we have referred to it. (...) Return to democracy is identified, therefore, less with the reconstruction of the principle of citizenship than with the formation of the political system. (Cousiño & Valenzuela 2012: 157)

This change in politics would be a consequence of differentiation of economy from politics, to which politics reacts by becoming independent from economy. This *systematization of the politics* is based on the increasing capacity of self-observation of politics without taking into account economy as relevant environment, but rather public opinion. After economy becomes autonomous, politics cannot yet be represented therein and must resort to its own political means for this.

> This self-referential of politics does not imply any kind of solipsism: simply occurs that politics begins to observe itself from politics, i.e. politics observes and processes only political communications. Politics can observe everything, including labor unions, but politically. Systematized politics isn't thematic closed, but operationally. Labor problems are relevant only insofar as they are capable of observation and political processing problems. Public opinion is the medium that allows this class of outsourcing of politics. (Cousiño and Valenzuela 2012: 183)

For Cousiño and Valenzuela, both processes, *differentiation* of an economic system and *systematization* of politics, are a part of a same transformation, which has a

political face, as well as an economic one. In both cases, it is a question of a *systemic functional differentiation*, which represents a change in the social structure as a whole.

From a systemic perspective, distinctions as "system/world of life" are certainly largely covered (in what place but in the society would be located a "world of life"?) (cf. Cadenas 2006), and the existence of pre-reflexive ties are also difficult to sustain beyond a self-conviction in a non-communicable realm, which in turn is possible to communicate (how, if not, can its social character be discussed?). More interesting is perhaps a reflection on the *regional character of functional differentiation*. In the analysis of Cousiño and Valenzuela, differentiation of politics and economy occurs at regional level although its dynamics obey universal principles of differentiation. For this reason, it is plausible to deepen the analysis, since they indicate exactly the possibility to establish not only parallels in forms of differentiation and of social integration, but also indicate specific differentiation processes of functional systems, something that is of great interest for the present work.

**b) Concentric and Polycentric Functional Differentiation**

Aldo Mascareño closely follows the systemic aspects of the thesis of Cousiño and Valenzuela, specifically in regards to monetization and systematization of politics, although this author observes from an exclusively systemic perspective. For him, the form of systemic functional differentiation in Latin America is characterized by a *concentric order*, opposite to a *polycentric* (or acentric) *order*, typical of European functional differentiation:

> Contrary to European societies, whose functional differentiation process resulted in a pattern of social organization of polycentric type, where social systems operate decentrally in an autonomous way although connected, establishing communicating bridges that allow them a coordinated functioning, Latin-American societies have been characterized by being structured around a dominant system. Thereby, the autonomous development of every sphere became dependent on the central

> system, and couplings became in dedifferentiation processes that hindered the deployment of functional specializations. (Mascareño 2003a: 9)

According to Mascareño, in the concentrically oriented social order, functional systems appear with diverse autonomy grades, since certain differentiated systems block the self-reference of differentiating systems (Mascareño 2003a). Systems that have occupied this central position have historically been politics and, towards the end of the 20th century, economy (Mascareño 2000). This is an idea closely related to the ideas on politicization and monetization of Cousiño and Valenzuela.

Concentric differentiation would correspond to a structural variant of functional differentiation, which is characterized by arranging the specificity of social subsystems under a hierarchy. Paradoxically, it is not a type of differentiation of centre and periphery, but of a particular type of functional differentiation, though in conditions of peripheral modernity.

To support this argument from an operational point of view, Mascareño recurs to mathematics of diffuse distinctions or "fuzzy logic" of the mathematician Lotfi A. Zadeh (1988), to indicate the existence of distinctions of "imperfect continence," which he opposes to distinctions of "perfect continence" indicated by George Spencer-Brown (1979), which serve in turn as basis for the late Luhmann theory. "Fuzzy logic" would be in Zadeh's words:

> In more specific terms, what is central about fuzzy logic is that, unlike classical logical systems, it aims at modeling the imprecise modes of reasoning that play an essential role in the remarkable human ability to make rational decisions in an environment of uncertainty and imprecision. This ability depends, in turn, on our ability to infer an approximate answer to a question based on a store of knowledge that is inexact, incomplete, or not totally reliable. (Zadeh 1988: 83)

These fuzzy distinctions would be the base for operations of functional systems in Latin America, which have been historically affected by periodic *dedifferentiation*[104] processes that produce in these an irregular operation. Concentric functional differentiation of the Latin-American region would have the feature of provoking this type of arranging, where self-reference and autopoiesis operate with *fuzzy* distinctions. A central system intervenes functional systems in its selections, producing centrifugal communications towards it and applying its distinction schemes in the symbolic media or functional communications of each subsystem.

Concentric order additionally produces inability in functional systems to draw self-referential distinctions and to reduce complexity of its environments. The consequence of this structural problem is, in the opinion of Mascareño, a denial of or blindness to the complexity of environment, which unleashes a *complexity crisis* for the central system, i.e., "the inability of a totality to process the consequences of the deployment of its own processes of entanglement, densification and consecuenciality" (Mascareño 2000: 196). When this type of crisis occurs in the central system, due its centrifugal characteristics, the crisis casts to the rest of intervened systems, which reproduce the crisis in other systems, forming a network of incompetence. This network operates with *ignorance* as dominant communication and reproduces the concentric structure, unable to process its externalities, not even the increasing complexity of its relevant environments.

Systemic *dedifferentiation problem*, that Mascareño indicates, may be largely due to what in system theory is known by the name of *integration*. Systemic integration is defined differently from sociological tradition: "We want to understand integration as

[104] The *dedifferentiation* concept was object of an important debate in the 1980s thanks to the neo-functionalist revival in North American. Frank J. Lechner, for example, applies the concept with regard to "fundamentalism" (Lechner 1990: 88ff), while Gary Rhoades treats "dedifferentiation" as a return to a "status quo" in the process of differentiation (Rhoades 1990: 192). In Germany, Karin Knorr-Cetina mainly took the discussion regarding the problem of "dedifferentiation" in a direction against Luhmann (Knorr-Cetina 1992).

nothing else than reduction of freedom degrees of subsystems" (Luhmann 1997a: 603).[105] Social systems are integrated when, due to their recursive structural relations, important limitations take place in their internal operations. A systemic order that propitiates the entire integration under distinctions of one of its functional systems has to handle large amounts of exclusion, due to their inclusion criteria.

Although Mascareño's thesis indicates certainty various empirical elements that are very useful to understand regional functional differentiation – some of which we will use later – the main theoretical problem of his proposal lies in their deep epistemological foundations. In a simplified way, we might say: the adoption of *fuzzy logic* strategy fails to understand the real operation of social systems, but only describes certain semantic contents. Operationally speaking, a fuzzy distinction cannot be constituted in a diffuse way if one wants to distinguish it (to distinguish!) from a not-fuzzy distinction (as in Spencer-Brown). The consequence of this vagueness is that the concept of *dedifferentiation* – that seemingly must be described by means of fuzzy distinctions – remains theoretically adrift, although it has a great explanatory value to understand institutional irregularities.

For Mascareño, the legal system has been subject to the same dedifferentiation processes than the rest of functional systems.

> That is to say, in spite of political dedifferentiation operations in much of the 19th and 20th century, law focused on the development of its role and won in reflexivity during that time, slowly –it can be undoubtedly said– but it does it, as it is demonstrated at present by the reform of criminal procedure and the demands of autonomy of the judicial. Nevertheless, in certain historical periods law seems to be totally dispensable, especially when legal order is suspended by states of emergency or when its changes takes place through facticity of power (military coups, civil

[105] "wollen wir unter Integration nichts anderes verstehen als die Reduktion der Freiheitsgrade von Teilsysteme."

> authoritarianism). In such cases, power is observed as a functional equivalent of legal validity, dissolving dissent in a factual expression of power without procedural validity claim. (Mascareño 2004: 81)

According to this author, a differentiation of law undoubtedly occurs, although this process is mediated by periodic dedifferentiation episodes motivated largely by politics. Differentiation of legal system, this way, would be characterized by periods of increased autonomy and reflexivity interrupted by dedifferentiation episodes.

Following this thesis, it can be understood that towards the end of the 20th century and coinciding with the process of monetization indicated by Cousiño and Valenzuela (2012), the legal system would have suffered its last great dedifferentiation process, due to actions of the military government. In that period, while courts did not suspend their actions, they were largely politically biased and operated with great indifference to denunciations of human rights violations.

In later works, Mascareño added to his theory of concentric functional differentiation and dedifferentiation, the influence of reciprocity networks based on not-proceduralized inclusion (and exclusion) mechanisms:

> This way, it is possible to talk in Latin America of a combination of functional differentiation and its respective media with networks of stratification and reciprocity that operate based on mechanisms of violence, corruption and coercion that dedifferentiate formal procedures of functionally differentiated institutions and constitute a region concentrated on political communications with strong semantic associations ('cultural' if wanted) for this propose. (Mascareño 2010: 91f)

These networks of stratification and reciprocity would fulfill "the function to achieve inclusion in the performance of functionally differentiated institutions" (Mascareño 2010: 94). Means, which achieve this unproceduralized inclusion, would fundamentally be violence, corruption, and coercion. With the incorporation of the idea of networks of reciprocity, Mascareño complements its analysis of functional

differentiation in Chile and in Latin America, following closely Luhmanns' analysis on peripheral regions of modernity. It should be recalled that, according to Luhmann, networks of inclusion and exclusion an important influence across functional differentiation have in these regions, and they can even overlap it (Luhmann 1995b; 2008b: 235ff). Mascareño puts a major emphasis on this negative character of the networks, emphasizing that they are mechanisms that "dedifferentiate" formal procedures of functional systems, like democratic politics, by means of violence, corruption, coercion, etc. (Mascareño 2010: 103). In short, Chilean and Latin American modernity is described by Mascareño as a concentric functional differentiation with the influence of inclusion/exclusion networks.

The concept of inclusion/exclusion is, so to speak, transversal to systemic theories of functional differentiation in Chile. This relates to the importance that this concept had for understanding the form of regional functional differentiation. As we saw, this concept is present in the latter works of Mascareño, but also in the theory of Chilean functional differentiation of Fernando Robles (2005).

**c) Peripheral Modernity: Inclusion and Exclusion**

For Robles, Chilean and Latin-American modernity is characterized by a particular constellation of inclusions and exclusions which differ from the European matrix. Also, Robles maintains that it is not possible to speak about a dominant condition of either functional differentiation or stratification, but rather to come up with a combination of various differentiation forms. Nevertheless, he argues – closely to Luhmann (1995b; 1995c) and to Mascareño (2010)– that inclusion/exclusion predominates as a principle of differentiation.

> In peripheral societies, the abyss between inclusion and exclusion assumes the *primary function of social differentiation* and it is the axial principle of peripheral societies, which means that a part of population is excluded from functional systems or that access of some of them it is possible (for example, to political system through

> voting exercise, but not to education), but not to others systems that might endanger exclusion mechanisms. (Robles 2005: 46)

Robles compares central modernity societies and peripheral societies based on inclusion/exclusion and its consequences in the formation of individual life projects. Following the ideas of Ulrich Beck (1986), central modernity would be characterized by "individualization" processes, while peripheral modernity of countries, like Chile, would be characterized by "individuation" processes. While in the first case, it is a question of identity formation projects in an assisted and institutionally regulated manner, by means of solid support-structures – like for example a Welfare State –, in case of individuation, individuals build their biographies in a helpless and deregulated manner, which appears in situations such as precarious employments or subcontracting, gender discrimination or others (Robles 2005: 33).

These two manners of individuality construction can be summarized, so postulates Robles, into two formulas: "make what you want with your life" in case of individualization of central modernity and "sort it out as best you can" in individuation of peripheral modernity (Robles 2005: 44). One of the consequences of this second way of identity construction is the maintenance and reproduction of family solidarity and of confidence networks. Unlike societies of central modernity where the pursuit for the "other" is a result of an autonomous decision, in peripheral modernity, the pursuit of social relations is not an alternative but an imperative to achieve daily subsistence. Robles recognizes that individuation situations, as for example an unemployed person who cannot have access to an allowance or has an inadequate one, illegal immigrants, or those who live on streets in big cities (Robles 205: 50), also appear in regions of central modernity. However, it is not a dominant situation as in peripheral modernity.

To understand how inclusion and exclusion in countries of peripheral modernity, as in Chile, are structured, Robles proposes to distinguish between two types of inclusions/exclusions: *primary* and *secondary*. In the first case it is a question of

inclusion/exclusion of services from *differentiated functional systems*, while the latter refers to inclusion/exclusion of *network-organized interaction systems*: "networks of favors, of sale of advantages, of exchange of influences, of parasitic activities, which basic resource is to know someone who-should-know-someone and that exchange of favors and actions should impose face-to-face relations" (Robles 2005: 47).

Based on this distinction Robles formulates a matrix of inclusions and exclusions which would characterize regions of peripheral modernity as Chile, and in which four types of inclusions and exclusions appear: 1) *inclusion in inclusion*: characterized by full participation in functional systems and in interactional social networks of confidence and reciprocity. This inclusion appears in countries of peripheral modernity, mainly in higher strata of society; 2) *exclusion in inclusion*: which refers to inclusion in functional systems, but exclusion of interactional social networks of confidence and reciprocity. Here, *hedonism* as an individual orientation appears, which leads to typical anomic situations of the first world as loneliness; 3) *exclusion in inclusion*: characterizes exclusion of services of functional systems, but inclusion in interactional social networks of confidence and reciprocity. This is the dominant type in countries of peripheral modernity; finally 4) *exclusion in exclusion* is the extreme situation of exclusion of the two levels, which not only would be theoretically necessary but empirically possible (Robles 2005: 48ff.). It is possible to appreciate the abovementioned types in the following table.

**Table 7 Typologies of Inclusion/Exclusion**

| | **I. Inclusion in inclusion** | **II. Exclusion in inclusion** | **III. Inclusion in exclusion** | **IV. Exclusion in exclusion** |
|---|---|---|---|---|
| **Primary Exclusion** | No | No | Yes | Yes |
| **Secundary Exclusion** | No | Yes | No | Yes |
| **Social Integration** | High | Low | High | High |
| **Risk of Uncertainty (exclusion)** | Low | High/Low | High | High |
| **Construction of Identity** | Individualization *"make what you want with your life"* | Individualization *"make what you want with your life"* | Individuation *"sort it out as best you can"* | Individuation *"sort it out as best you can"* |

Source: Robles (2005: 50)

Robles points out that obviously "individuation," typical of peripheral modernity, appears in most cases in the dimension of "inclusion in exclusion," i.e., in exclusion of functional systems, but inclusion in interactional social networks of confidence and reciprocity. This situation assumes the emergence of differentiated functional systems, but also, simultaneously, the presence of interactional social networks of confidence and reciprocity, which operate parallel to them. Particularly, he does not deny system differentiation, but that this does not have a *primacy* in the differentiation of society.[106]

In synthesis, what Robles argues is the structuring character of inclusion and exclusion in the social differentiation in Chile and, simultaneously, the way in which a constellation of inclusion and exclusions occurs. In contrast to Cousiño and Valenzuela and also Mascareño, who opt for a structural diagnosis that directly indicates the character of functional differentiation in Chile, Robles points to

[106] In the case of Brazil, Marcelo Neves also questioned the primacy of functional differentiation, although he emphasizes the problem of *complexity* (see Neves 1992).

individual conditions, which the individuals have to deal with in the process of formation of their identities and biographies. Nevertheless, despite not inquiring directly in diagnosis of functional differentiation, Robles emphasizes the presence of functional systems in the form of inclusion and exclusion in Chile, and also the way in which individuals are located in the context of these systems. In this sense, it is a systemic reflection of Chilean modernity under functional differentiation.

For Robles, and to a lesser extent for Mascareño, the concourse of interactional social networks of confidence and reciprocity constitutes a central aspect in the diagnosis of modernity in Chile, namely as alternative mechanisms to inclusion in functional systems. Although for Cousiño and Valenzuela, these networks are understood as not being suitable for systemic analysis – given its pre-reflexive character – but nevertheless its presence can be noted as characteristic element of Chilean modernity.

**d) Functional Differentiation and Trust**

In a close relation to the three former versions of systemic analysis, Darío Rodríguez (2007) highlights some cultural elements that underlie functional differentiation in Chile. For him, a functional differentiation has occurred in Chile, which is mainly encompassed with the world society.

> Confidence in institutions or in the functional systems on the other hand, is a matter of fact in Chile. Chileans are disciplined people who firmly believe in authority, science, education, law, economy, etc. (…) Chile's functional differentiation allowed the easy integration of all its national functional systems into the corresponding functional systems of world society. (Rodríguez 2007: 215)

Rodríguez claims – following a Luhmann's distinction between "Confidence" and "Trust" (Luhmann 1988a) – that functional differentiation in Chile has occurred without altering an old cultural pattern. Chilean culture, argues, rests rather on

*confidence* that in *trust* (Rodríguez 2007: 210). The fundamental difference between both patterns is that *trust* is structured concerning the calculation of *risk* while *confidence* refers to the denial of *danger*.[107] As Rodríguez indicates: "Confidence occurs when an individual believes that his –or her- expectations will not be disappointed. (…) Trust refers to risk and must be assumed as such" (Rodríguez 2007: 212).

The reasons by which Chilean culture is structured concerning this principle are due to the importance of family institution. Family is supported rather on *confidence* relations and Chilean culture would be founded in a family representation. Emphasizing in what Robles called "inclusion in inclusion," i.e. the form of inclusion in higher strata of society, Rodriguez points out:

> Cultures which are based on family don't need too much trust because they rest on confidence more than on trust. In Chile »everybody knows everybody«. Only two universities and no more than ten private schools provide fifty percent of the chief executives for both private and public enterprises. This data implies that the familiar world includes all the meaningful people, and that being unfamiliar means being dangerous. (Rodríguez 2007: 213)

One of the consequences of this cultural pattern based on family is that functional differentiation in Chile has to deal with a problem of complexity, since personal and familiar *confidence* reduces the possibilities of relation in an increasingly differentiated society. For Rodríguez, while Chile was country distant and isolated from global dynamics, the absence of *trust* and predilection for *confidence* in social relations were not an obstacle. In a world society, in whom Chile is inserted, maintenance of the

[107] Matías Dewey has shown a similar although inverse situation in the analysis of functional differentiation in Argentina. According to him, a "mistrust" predominates that country, especially toward institutions. Instead of following the procedures that institutions dictate, in Argentina one would decide on the basis of certain conferred distrust to an institutional history marked by corruption and a generalized disappointment with respect to authorities. See Dewey (2012).

old familiar order is not enough, but a different cultural base is needed, namely one oriented to *trust* and not to *confidence*.

In short, for Rodríguez, the transit towards a full functional differentiation "has only partly happened in Chile" (Rodríguez 2007: 215), so although the increasing system differentiation is testified, a cultural substratum that is largely stagnant in an already different social structure persists.

**e) Functional differentiation in Chile: Summary**

After having reviewed the ideas of Cousiño and Valenzuela, of Mascareño, Robles and Rodríguez, some common elements in all systemic analyses on functional differentiation in Chile can be regarded.

In a synthetic way, the authors' proposals can be summarized as follows:

**Table 8 Functional Differentiation in Chile: Summary**

| | **Cousiño and Valenzuela** | **Mascareño** | **Robles** | **Rodríguez** |
|---|---|---|---|---|
| **Previous condition** | Traditional Order | Social Networks of Reciprocity | Social Networks of Inclusion | Family Relationships |
| **Chilean Modernity** | Politicization | Concentric Functional Differentiation: Politics | Individuation (Peripheral Modernity) | Functional Differentiation based on Confidence |
| | Functional Differentiation of Economics and Politics (Monetisation) | Concentric Functional Differentiation: Economy | | |
| **Central Modernity** | European and American Modernity | Polycentric Functional Differentiation | Individualization (Central Modernity) | Functional Differentiation based on Trust |

Source: Own elaboration based on Cousiño y Valenzuela (2012), Mascareño (2010), Robles (2005), Rodríguez (2007).

A recurring theme in these descriptions is the marked *institutional* or *organizational* character that would have functional differentiation. For Cousiño and Valenzuela, functional differentiation appears with a clear organizational accent, their analyses largely refer to the *State* as an actor of a functional differentiation process (Cousiño & Valenzuela 2012: 70ff.). Mascareño for his part insists on the relevancy of "procedures" as functional equivalents to inclusion via social networks and rescues the concept of "institution" for these purposes (Mascareño 2010: 87ff.). The idea of individualization/individuation of Robles seems to point also to an institutional dichotomy, namely: "Neoliberal State/Welfare State," implicitly alluding to modernization processes initiated in the 1980s in Chile and in Latin America (Robles 2005: 41). Rodríguez is much more direct in his allusion to institutions as a synonym for functional differentiation (Rodríguez 2007: 215). In all cases, functional differentiation is largely seen as a process of differentiation of institutions or certain organizations. Although organizations have an important role in modern society, a reduction of functional differentiation to its organizational aspects leaves aside much of the universalistic character of system differentiation.

Another omnipresent aspect in all these analyses, and which covers a fundamental relevance for the theory of differentiation in Chile, is the persistence of a *social dimension* underlying *factual functional differentiation* (Nassehi 2009: 401). This social dimension is present, as in the denial of the universalistic character of functional differentiation by Cousiño and Valenzuela, as well as in the importance that Mascareño and Robles give to interactional social networks of confidence and reciprocity, and also in the role that Rodríguez sees in a family-like metaphor of an extended social structure of *confidence*. This social dimension of differentiation is seen like a regional aspect of peripheral modernity in Chile, which should not be sidestepped in the diagnosis of Chilean functional differentiation. An element that emerges from the foregoing and that crosses all systemic analyses is the absence of a mechanism of relation between *social* differentiation and *factual* differentiation of systems. Both, the pre-reflexive, the networks of solidarity and reciprocity or

cultural patterns, do not seem to have relevant relations with functional differentiation of systems. That is to say, together with differentiation of functional systems, there would be a decoupling process of a social dimension that would operate in an indifferent way from systemic operations. Functional differentiation appears, in this way, as a process that affects only a certain level of society and *below* or *beside* of it appear networks that somehow escape to this process.

In this widespread diagnosis of a Chilean functional differentiation characterized by certain structural conditions, such as politicization and monetization, concentric functional differentiation, individuation, or the importance of family, have been scarce analyses about the role that law plays in functional differentiation in Chile. On this subject, it is necessary to identify some relevant characteristics.

## 4. THE EVOLUTION OF LAW IN CHILE: EVOLUTIONARY ACQUISITIONS AND FORMS OF DIFFERENTIATION

Our research is supported by the assumption that it is possible to distinguish a functionally differentiated legal system in Chile. From this assumption, we have hypothesized that functional differentiation of the Chilean legal system consists of an *evolutionary process* initiated with the conquest and colonization of Spain over the territory in the sixteenth century, and the development thereof is characterized both by changes in the *form of differentiation* of Chilean society and by the emergence of a number of specific legal *evolutionary acquisitions*. The following reflections are intended to delve into this hypothesis. For this we have chosen the path of the historical and evolutionary explanations from the perspective of the theory of social systems.

The explanation of the differentiation of the Chilean legal system will be developed following three lines of research:

- In a first line we will develop the evolutionary strategy of identifying specific functions and *evolutionary acquisitions*. We will investigate the origins of the Chilean legal system and try to relate this change processes with the analysis of other processes of social differentiation that serve as background thereto, as well as the problems and conflicts that go through this process.
- The second task of our research will be the reconstruction of evolutionary stages in the differentiation of the Chilean law. In this context we discuss how legal system is structured according to certain *forms of differentiation*. We will use the evolutionary criteria to try to reconstruct the stages of development of the Chilean law.
- Finally we will deal with a number of current tendencies of the differentiation of law in Chile according to what was previously studied. We will base the discussion of these tendencies on an analysis of the dimensions of meaning,

specially considering the regional aspects of the differentiation of the legal system.

### 4.1. Evolutionary acquisitions in the evolution of Chilean law

When trying the reconstruction of a legal system as the Chilean variety, it is necessary to have a particular element that characterizes its history and later developments in mind. Chilean law comes largely from Spanish law, which was gradually imposed in the Chilean territory in the process of colonization that began in the mid-sixteenth century and was accompanied by successive wars and conflicts.

The evolution of Chilean law can be described according to the model of "allopatric speciation" (Wortmann 20120) or "reproductive isolation" (Wortmann 2007), although some precisions must be done, as noted above. According to Wortmann (2012: 381) allopatric speciation may be described as follows:

> In the beginning, (1) a *population* of certain forms settles in a given environment. That population gets (2) divided into two separated populations by the *formation of certain barriers*. Once that happens, these populations face different environmental conditions and might (3) *diverge in their evolutionary trajectories*, for example, by the process of natural selection. Finally, (4) evolution gives rise to *isolative mechanisms* that prevent the once-united populations from melding again, after the barriers disappear that disconnected them. Once all of these steps have been completed, speciation (or, in sociological terms, differentiation) has occurred and has given rise to a higher level of diversity.

The concept of 'population' is one of the biggest problems of this theory. If this approach is followed, as mentioned above, a paradigm of *whole/parts* emerges, which is hardly reconcilable with a theory of social systems based on meaning. Nonetheless, we can say that this type of understanding considers very relevant empirical aspects for the evolution of Chilean law.

Following the recommendations of Stichweh (1990: 259) for national legal systems, the Chilean law can be understood as a "segmentation" of the world system of law. In this sense, its evolution, from the perspective of the 'allopatric speciation,' is characterized at first by the separation of a sphere of meaning, which is settled in a territorially bounded law. Considering the history of Chilean law, it is clear that its development is due to disposals emanating from Spain during the epoch of formation and development of the State in the mid-sixteenth century. Unlike other types of legal development, the Chilean case is characterized by a colonial origin, which gives form to differentiated legal institutions and unlike the analysis of the world law, in this particular case of national law, the external influence in law plays a very relevant role. To this, the geographical isolation of Chile with regard to the metropolis of Spain and the low development of own legal customs must be added.

There is agreement among historians on the fact that the Chilean legal order is established for the first time with the arrival of the Spanish conquest to Chile in the sixteenth century (Bravo Lira 1986, 1996; Eyzaguirre 2004, 2006; Góngora 1951, 1981; Villalobos 2011). On this, there is nevertheless a polemic philosophical and anthropological character relative to the law of the indigenous people at the arrival of the Spaniards. There is, however, no evidence that shows that the law of the aboriginals permeated significantly into the law of the conquerors, although of course its customs had an impact on the conquerors (Eyzaguirre 2006: 19). The Chilean law, as well as the State, was erected independently of the institutions and customs of the aboriginal population.

### 4.1.1. Legal organizations and roles

The *organizations* of the Chilean law are one of its first *evolutionary acquisitions*. The first Chilean legal organization was the *cabildo* (council). This arises along with the foundation of Chile in 1541 and it was in this instance that the first authorities in the new territory were appointed. This was a representative organ of the new colonists

and Santiago was established for the first time as the capital in the same day of its foundation.

> The origins of the Judicature are confused with those of the nationality. In March 1541, before a month of the foundation of Santiago, the oldest city of Chile, the first ordinary courts were instituted: the mayors of the nascent population, bearers of the real pole of the justice. (Bravo Lira 1996: 32)

The *cabildo* had multiple administrative and economic functions, from the care of the public works and common goods, up to the organization of small militias or the announcement of the time by means of *serenos* (night dews) (Campos Harriet 1956: 64). The *cabildo* had the administration of justice in its territory and the application of the Spanish laws among its functions: "In every city a *cabildo* is established which is integrated, among others, by two mayors. These mayors are ordinary judges of first instance inside the city" (Bravo Lira 1986: 86). This organization model was designed in Spain and its application was ordained to the colonies along with the foundation of the cities. The authority of the *cabildos* came from Spanish laws, specifically from the functions and powers conferred by the so-called "capitulations" to the conquerors, which, however, should establish a special figure for the administration of justice by means of the *cabildos* and its mayors. Along with the capitulations was a set of "instructions" (Eyzaguirre 2006: 132) that specifically pointed to the political and religious obligations of the conquerors.

> (The) capitulation of conquest and discovery is a bilateral contract, by which the entrepreneur, future discoverer, pact with the Spanish crown. It is a written document. By the capitulations mutual obligations and laws are contracted. Thus, the entrepreneur, the conqueror, has the faculties to discover, colonize, distribute lands and plots, erect forts, provide charges and public offices, govern the uncovered region, found cities, towns, rivers. (…) It can be said that they were the bridge over which the Spanish institutions and customs passed to America. (Campos Harriet 1956: 56).

The *cabildos* constitute one of the most stable legal organizations in the evolution of Chilean law, since the Chilean legal tradition is inaugurated with them in the sixteenth century, and by these means, three centuries later or in the nineteenth century, independence from Spain was declared. But legal life was not only limited to the *cabildos*. While the organization of the justice at this time is "confusing," as Campos Harriet noted (1956: 66), the same author points out that three general levels can be distinguished: a first instance justice administered by the mayors or governors, a second instance justice by the Real Hearing of Chile, and finally the superior justice of the Council of the Indies residing in Spain.

Any assumption regarding a supposed equality of the colonists in front of the *cabildo* should be dismissed. Although these were guided by the principle of the 'common good', they were also an expression of the power of the local aristocracy (Villalobos 2011: 68). This aristocracy was formed by the legal-economic figure of the *encomiendas,* which distinguished between those who owned lands granted by the crown from the rest, who were called simply "inhabitants." Those who were receiving real incomes from Peru, were holders of "pensions placed on the *encomiendas* of other neighbors," "spears and muskets" paid by the king, men of war, landowners, big traders, and also artisans and minor shopkeepers (Góngora 1951: 181). This principle of stratification is also applied in the form *center/periphery* since the colonization presupposed the centralization of the administrative functions (including justice) in the foundation of "cities" (Góngora 1951: 69; 1975).

The *cabildo* establishes the first roles and legal responsibilities and thus begins the legal development of Chile. This has a high importance because Chilean law first appears as a result of an organization with defined roles. Therefore, the Chilean law is, from its origin, structured in *organizations*. This has caught the attention of legal historians, specially the ancientness and stability of the legal organization, which would have been a mainstay of the formation of the State of Chile (Bravo Lira 1996: 20ff.). Indeed, the changes of the organization of Chilean law shows changes to be rather cumulative and of transference of functions. The biggest change occurs at the

beginnings of the nineteenth century, along with the independence from Spain, with the suspension of the Real Spanish Hearing as the supreme court of the territory and the beginning of the development of Chilean judicial organizations. This autonomous process continues during the nineteenth century and at the end of this century, there are administrative acts relative to the courts and to the administration of justice (Campos Harriet 1956: 562; Eyzaguirre 2004: 152ff.). During the twentieth century a higher specialization of courts happens, together with the dictation of new acts relative to commerce, mining, work, etc. (Eyzaguirre 2006: 207ff).

The early foundation in 1738 of the first Chilean university, the University of San Felipe, was the first step in the formation of Chilean lawyers. Law, medicine, philosophy, theology, Latin, and mathematics were taught. Distributed in four faculties, the university conferred the degree of doctor in theology, jurisprudence and canons (licensed), in medicine and mathematics, but "it was primarily a School of Law" (Campos Harriet 1956: 47f.). That is, the organizational development of Chilean law can be observed not only in the regular functioning of its courts, but also in activities of the universities, which began in the eighteenth century and had an additional impulse with the creation of the University of Chile in the late nineteenth century.

As previously noted, Chilean law does not arise spontaneously and based on customs, but is established by the Spanish colonial power before the aboriginals. Chilean law is, this way, a law embedded in organizations and within them it finds its niche and reproductive capacity. In this period of the evolution of Chilean law, there is no "living law" in the sense of Ehrlich (1989: 409ff.), since the decisions, the operative and binding law, were in the hands of organizations of law.

### 4.1.2. The Subjective Rights

The Spanish law in force in Chile in the sixteenth century in spite of its stratified character had in its origin a principle that can be considered as an *evolutionary*

*acquisition* of the modern Chilean law. It is the universalist concept of *subjective rights*. This institution is particularly important because, throughout the period of influence of Spanish law, it enters in contradiction to the local social structures and allows the anticipation of other later developments, such as the first constitutionalist attempts of the nineteenth century.

The figure of subjective rights comes from the evolution of the Spanish law itself, especially influenced by Castilian law of the ninth century (Eyzaguirre 2006: 76). This universalist element of law meant to provide freedom to the American aboriginals, as well as to establish obligations for them.

> Although the inhabitants of the occupied territories might have become slaves, in accordance with the principles of the Common Law, the Catholic Monarchs recognized early the freedom of the natives. (…) In the Meeting of 1512 celebrated in Burgos a protective Ordinance of the Indians was issued. (Eyzaguirre 2006: 138)

Along with this legal protection of the Indians, there was a systematical practice of abuses that were promptly denounced by the priest Bartolomé de las Casas (1552). Due to this situation of effective inequality, the legal problem seemed to be solved by giving a special legal status to the Indians, which were considered to be "relative incapable and, as such, subject to protection" (Ezyzaguirre 2006: 183). Nevertheless, the laws from Spain repeatedly insisted on the freedom of the Indians and its subjection as subordinates to the kings of Spain, which brought innumerable problems of the application of these laws in the colonies (Villalobos 2011: 70). Laws concerning the system of work of the Indians, by means of which tribute to the king was paid, such as the *Rate of Santillán* of 1561 or the *Rate of Gamboa* of 1580, always found opposition on the part of the colonists and slavery often became a common practice (Hanisch Espíndola 1991).

The contradictions of this principle of equality of rights, with the effective practice of abuses in the treatment of the Indians by the conquerors, are well-known and

documented. We shall not dwell on these contradictions but rather on the effective consequences for the differentiation of the Chilean legal system. Suffice to say, the universalist principle of the subjective rights, according to which not only the colonists but also the aboriginal population had inherent personal freedoms, enters in contradiction with the existing social structures of its epoch, because it was a *pre-adaptive evolutionary acquisition* inside a highly stratified society. That is, it is precisely this temporal contradiction that allows us to speak of an evolutionary phenomenon of this type, while it refers only to communicative conditions that they later use to make possible linkages with other structural developments.

From our perspective, the main achievement of subjective rights is the *symbolic generalization of normative expectations of the legal communication* in all dimensions of meaning, but especially in the *social* plane. At this level, where the generalization is clearer, normative expectations can be attributed to the whole collective as defined by the law for its application. Thus, normative expectation can be kept available for any conflict that opposes rights of *persons* as identified by the system. At *temporal* level, subjective rights allow the stability of normative expectations for the future, which are available in a future that is not yet accurately distinguished. At the *factual* level, the generalization appears at a level of operations that point at contents of normative expectations recognized by the system, in spite of it still not operating in a differentiated way. From a *spatial* dimension, this generalization identifies a territory from which it gives validity to its dispositions. This universalization of the subjective rights has also been studied by Luhmann (1995; 1999e) in the context of the functional differentiation of law. Nevertheless in our analysis these rights are related to the symbolic generalization, which later allows the differentiation of a national legal system.

It is interesting to emphasize that the subjective rights, in the context of the evolution of Chilean law, constitute a principle of universalization of normative expectations, something that does not happen in the same way in other functional communications. The religious, political, and economic inclusion, are largely crossed

by the social stratification of their epoch. This is expressed in that the lower strata and the periphery could only have the role of "public" in these communications and not that of "performer" (Luhmann 1992: 626). For religion, all are God's children but not everyone can belong to the religious strata or explain the dogmas; politics recognizes all individuals as subjects to the crown, but only the aristocracy can make binding decisions; the economic activities are required for all the strata (even the *encomenderos* have to manage their lands), but not all can receive or execute payments (Luhmann 1994). In the field of law, however, it is possible to maintain normative expectations, although empirically it is more probable that conflicts resolution will be guided for social interests (of the high strata). This makes it clear that the figure of subjective rights does not allow an encouragement of unfounded optimisms, but rather enables a higher reflexivity in the system concerning the validity of law.

Spanish law was in force in Chile for more than three centuries in which the crown was incessantly faced with the armed resistance of the Indians in southern Chile: the Mapuche. Until the mid-nineteenth century, Spanish law remains to be a reference for the national law and its abandonment occurs rather gradually. The declaration of the independence of Chile in 1810 marks a milestone in the history of Chile but it did not mean, as pointed in the historiography, an immediate separation of the Spanish law.[108] This separation was somewhat gradual throughout the nineteenth century. While Spain maintained control over the territory of Chile, the legal institutions of the Chilean law did not distinguish between political and legal functions (Campos Harriet 1956: 57).

*Cabildos* and hearings were both political and legal institutions. By the end of the eighteenth century the Spanish government of the Bourbons had already established a set of measures of centralization of its colonial administration. Along with the intervention of the crown in the *cabildos* (Eyzaguirre 2004: 42ff.), the *encomiendas* and

[108] For a comprehensive study on this situation in the field of criminal law, from the independence until the twentieth century, see Matus (2012: 3-173).

the personal service were abolished and, thus, the idea of the Indian as a legally incapable was also abolished. This is the situation during the early nineteenth century, when under the political sign of the independence movements and the drafting of the first constitutions, the relationship between law and politics is, for the first time, problematized.

### 4.1.3. The Constitutions

The first Chilean constitutions had, as a main feature, the attempt to resolve the political problem of the national 'sovereignty,' which was ambiguously understood: located between the recognition to the king of Spain and the delimitation of a national territory. This is evident at least from the first provisional constitutional regulation of 1811 and it was only in the constitution of 1822 that the ambiguity relative to the sovereignty seems to be partially cleared (according to article 1 of the constitution of 1822, sovereignty resides in the Chilean nation), along with a major sophistication in issues of nationality, citizenship, and individual freedoms (Campos Harriet 1956: 440ff). The common problem that these constitutions try to solve is mainly the kind of political organization that the government of Chile has. Meanwhile, the validity of the Spanish is not assumed as a problem.

Both the first and brief provisional constitutional regulation of 1811 and the second and most extensive of 1812 recognize the sovereignty of the king of Spain. Still, the second constitutional regulation of 1812 introduces a principle of ambiguity about colonial sovereignty (article 5), established individual rights (article 24), and freedoms of the press (article 23). The third constitutional regulation of 1814 focuses again, like the regulation of 1811, on administrative functions and its greatest achievement is the definition of the figure of the "Supreme Director" whose "faculties are vast and unlimited" (article 2). According to Campos Harriet (1956: 428), this latter regulation represented "a regression in the constitutional evolution" since it indicated few advances in terms of political laws and freedoms, and reinstated colonial customs.

Something similar happened with the constitution of 1818, which, in spite of indicating personal freedoms (Title I, article 1) and a principle of *Habeas Corpus* (Title I, article 3), the powers granted to the Supreme Director were considered "dictatorial" (Galdames 1925: 505). Although this constitution provided specific judicial functions for the courts, it indicated the need to ask the Senate, in certain cases, to provide solution in cases of conflict with the current system of government (Title V, article 2). That is, the courts should consider "goal programs" (Luhmann 1987) in their options, according to the current political situation.

Later, both the "moralist" political constitution of 1823 – which lasted only "a few months" (Eyzaguirre 2004: 74) - as the federal acts of 1926 and the "liberal" constitution of 1828 essentially share the problem of the political organization. In all these cases, in spite of their diversity, the problem was solved using the formula of the "constitutional State" (Palm 2005: 172ff). From a comparative point of view, this period can be seen as an evolutionary stage of *variations* concerning the legal problem of the constitutional form to adopt. An oversupply of constitutional possibilities is produced and a pressure for *selectivity* gradually grows. This phase of constitutional variations becomes *juridically stable* in 1833, with the enactment of the constitution of the same year, and which stayed in force for more than ninety years.

The constitution of 1833 is, from this point in time, an *evolutionary acquisition* with long-term consequences.[109] This constitution also marks the beginning of the *political stabilization* of Chile, which will not suffer important institutional ruptures for over sixty years. The constitutions are mechanisms of a structural coupling between the legal system and the political system, and thus have effects on both systems: "The novelty of the constitutional concept of the 18th Century is that the Constitution provides a *legal* solution to the problem of self-reference of *political* system and at the

[109] In the traditional historiography the name of Diego Portales is immediately mentioned. See Gongora (1981).

same time a *political* solution to the problem of self-reference of the *legal* system" (Luhmann 1990b: 202).[110] This implies that the constitutions already suppose a differentiation between law and politics, and react to this differentiation (Luhmann 1990b: 179f.). This can be argued in the Chilean case only by accepting a set of nuances, for example, that while the constitution observes this distinction, since it defines differentiated *functions* for the judiciary and for the other political powers, it is only in some cases that it is established with relative clarity the autonomy of the law. Also, during this process that we have called 'variations,' most of the constitutions contemplate the use of "extraordinary faculties" of the political power and a possible "suspension of some articles of the constitution" in favor of that power (Palma 2005: 183), which was modified only by the end of the nineteenth century in the framework of the constitution promulgated in 1833 (Campos Harriet 1956: 479ff).

The constitution of 1833 is only the first stabilization of the constitutionalism, but this means neither its greatest perfection nor a better situation. By far, the constitution of 1833 stayed in force for nearly a century, surviving the civil war of 1891, and represented the increasing *differentiation of Chilean politics*. In the context of this constitution, the Chilean political power was organized, i.e., the "republic" (Campos Harriet 1956: 473ff.). The figure of the "president" as center of the power is also consolidated and his limits and attributions are defined (Bravo Lira 1996: 30ff).[111] In this period, the Chilean political parties emerge, which some historians as Eyzaguirre (2004: 117ff) attribute to the so-called "question of the sacristan," a problem of jurisdiction between the Catholic Church and the State.

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[110] "Die Neuheit des Verfassungskonzepts des 18. Jahrhunderts liegt darin, daß die Verfassung eine *rechtliche* Lösung des Selbstreferenzproblems des *politischen* Systems und zugleich eine *politische* Lösung des Selbstreferenzproblems des *Rechts*systems ermöglicht."

[111] Alberto Edwards (1945: 271) indicates, as an element of institutional stabilization of Chile, the aristocratic resistance to the monarchy - the "frond" -, where "constitutions had little or nothing to do." But Edwards does not refer to the political system, but rather to the vague concept of "institutions".

As noted by Bravo Lira (1996: 44), the 'parliament' is a political institution that only appears in the nineteenth century in Chile, while the figure of the 'president' is much older and dates back to the judicial presidents of the colonial period. The constitution of 1833 defined broad attributions to this power and by the end of the nineteenth century, this power should be limited through liberal constitutional reforms.[112] The contemporary sociology of law has also criticized this excessive "presidentialist" character that stems from this tradition and the loss of legislative functions of the parliament, which "no longer exercised legislative power but in the shade, under the dependence of another power, the Executive" (Cordero 2002: 511). For some authors, this "centralist" and also "ritualistic" character – in an obviously negative sense - is a general feature of the Latin-American legal systems (Witker and Nataren 2010: 13, Binder 2007: 14ff).

Chilean law received important stimuli during this period of constitutionalization. The Spanish law was losing legal validity by the enactment of the so called "Marianan acts" in 1924 and the successive codifications of Chilean laws initiated in 1855 with the civil code, and followed by the commercial code in 1867, the mining code in 1874, and other enactments by the end of the nineteenth and early twentieth century.[113] Nevertheless, this process has contradictions. All the constitutions, from 1833 until 1980, considered "exceptional" measures, as those indicated in the constitution of 1833. The constitution of 1925 reserved diverse powers to the presidentsin according to exceptional situations (Palma 2004: 40) and the constitution promulgated during the dictatorship of Augusto Pinochet in 1980 and its idea of a "protected democracy" continued this tradition (Palm 2004: 96).[114]

[112] Some historians as Villalobos (2011: 139) see here even the origin of the Chilean institutions, in the "perfect order" of the liberal governments of the late nineteenth century.

[113] At length in Campos Harriet (1956: 537ff) and Eyzaguirre (2006: 207ff).

[114] Based on the case of Brazil, Marcelo Neves (1992: 61) has pointed out that the Latin-American constitutions should be considered a mere weak "symbolic power" in front of the real political

The constitutional stability initiated in 1833 constituted however an extremely important structural element for the evolution of Chilean law. While this process further supported the differentiation of politics, the legal side of the State and the possible limitations of its power are distinguished in every case. The form of the "Constitutional State" (Palm 2005: 218) or "the legalistic rule of law" (Bravo Lira 1996: 204) strengthened the procedural character of the law and its most relevant institutions and also produced a *factual* stabilization of contents regarding the valid law. This way, a set of structural supports is constituted, and it is by means of this support that a political power based on valid law is constituted to be increasingly independent from Spanish law.

During the twentieth century there was a sustained development of the Chilean judiciary and national laws. The constitution of 1925 indicated a tendency of secularization of the State that had already begun in the late nineteenth century, by means of the law of secular cemeteries of 1883, the acts of civil marriage and civil registration office of 1884, and finally the elimination of the state jurisdiction over the catholic church (the called "patronage") and the suppression of an official religion for the State. Constitutionalists like Palma (2004: 20ff.) argue that after the reforms made to the constitution of 1833: "the constitution of 1925 is only a reform: we are not in the presence of a revolutionary phenomenon, a case of discontinuity or constitutional rupture," because it maintains much of the nineteenth century order. One of the achievements of the constitutionalist and codification movements of the nineteenth century was, from a semantic point of view, the extension of the *legalism*[115] that goes back to colonial times.

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power. The reflection of Neves is, nevertheless, exaggerated in diverse points, since he seems to overestimate the functions of the constitutions. See also Neves (2004).

[115] We will return to this subject later in the context of the discussion on "legal culture."

Along with the figure of the *subjective rights* and the development of the *constitutions,* there is a third evolutionary acquisition of vital importance for the evolution of law in Chile and it is possible to argue that it gives a definitive impulse to the differentiation of Chilean law. We refer to the reaction of the Chilean law in the late twentieth century to the human rights violations that took place during the dictatorship of Augusto Pinochet judged in the nineties by the democratic governments. This has to do with two interrelated elements: the importance that the international law acquires and the autonomization of the Chilean courts against political pressures.

### 4.1.4. The "Permanent Kidnapping" in Human Rights

The emergence of the human rights issue in Chilean law is a long-standing subject. It can be argued that throughout the twentieth century, a particular development of the semantics of equality in Chile is produced. In the early twentieth century, along with the flourishing mining and industrial development of the country, a set of demands arises under the called "social question" (Osrrego Luco 2000), which described a number of social problems arising due to the migration of workers, the misery, the poor nutrition, the promiscuousness, problems of healthiness (such as the high infant mortality) and low income. From a legal standpoint, the "social question" meant a shift from the universalist principle of subjective rights for the law, since inequality now appears as a problem that must be compensated by means of rights. In this regard, various acts were enacted to protect the population in poverty situations and the political parties were differentiated concerning this problem (Eyzaguirre 2004: 182ff).

In the 70's of the twentieth century and during the Cold War came the military coup led by the generals of the army, the air force and the navy, with the support of Chile's economic elites and the government of the United States of North America. The purpose of the coup was to overthrow the socialist government of President Salvador Allende, after an acute economic crisis. Certainly, it is not the first coup

d'état in the history of Chile, but this caused the systematic persecution, torture, and murder of opponents of the regime.[116] These crimes were only judged after the state's return to democracy as influenced by international pressure.

Human rights coexist with the structural situation of modern society, i.e., functional differentiation. From this perspective, it must be emphasized that human rights are a product of the evolution of society and its characteristics meet the structural situation that society experiences. On this matter, Luhmann (1974e: 23ff.) argues that human rights have the function to protect and stabilize the functional differentiation. This definition should not be interpreted through the prism of the classic criticism to the system theory as a theory of social stability, but through the interdependence of social systems in a functionally differentiated environment. The main characteristic of human rights in modern society is to transform the basis of law, from the objective rights (based on the social order) that characterized stratified societies; to subjective rights, which consider the individual as a whole, regardless of its social position.

Through this change, human rights are structured around functional differentiation, based on "fundamental freedoms" and "rights of equality" (Verschraegen 2002: 268ff). The fundamental freedoms give the person rights of "communicative self-presentation" (right to life, physical integrity and freedom of movement; articles 3, 4, 5, and 13 of the Universal Declaration of Human rights) that are based on "the presence, posture and expression of the body" (Luhmmann 1974e: 79), that is to say, on basic conditions that allow communication. The rights of equality, meanwhile, allow a selective indifference, that is to say, that inequality should be established only by inclusion processes of functional systems and not by an ascription of the person to a social group, area, or class situation.

[116] See Loveman and Lira (2000).

With this, human rights communication exceeds the scope of the national legal system and goes beyond the idea of these rights as a protection of the individual from politics –as a self-limitation of the political system. This is why human rights goes beyond the law of States and rather refer more directly to world society, since they represent a wider problem than the ones referred to the administration in a territory; they relate to the conditions of the communication in general. The subject of human rights in Chile is related by both international law and its recognition in legal doctrine.

The main initiators on the subject of human rights in Chile were international courts, especially the Inter-American Commission on Human Rights (IACHR), the mediation instance before to the Inter-American Court of Human Rights. Chile ratified the Convention and accepted the jurisdiction of the Court on August 21, 1990, only including crimes later than March 11, 1990. The court nevertheless admitted older cases. By the late twentieth and early twenty-first century, the number of cases relative to Chile that were reviewed by this international court increased. In them we can see, the international discomfort to the Chilean legal system and the explanations given by the State of Chile to the demands presented in the court.[117]

In virtually all the cases presented before the IACHR, three arguments are established on behalf of the Chilean government that will be reiterative in its position on the commission for more than a decade: 1) the maintenance of the independence of the judiciary, this is, what indicates the valid law in constitutional and administrative matters; 2) the political non-interference in judicial decisions, not directly due to dispositions of formal law, but for "respect" to judicial decisions, an ethical dimension in the semantics of the separation of State powers; and 3) the expectation of future modifications to law, that is to say, projects of law that try to modify a legal situation that cannot be transformed without this procedure.

[117] See www.cidh.oas.org.

This type of arguments is repeated and the explanations attend to formal questions of every case and not aimed to refute the substantive demonstrations presented.[118] This occurs in cases of various kinds, as case 11.863, of 1998, which denounces the figure of the Designated and Lifetime Senators, case 11.725 of 1999 concerning the murder of the Spanish diplomat Carmelo Soria, and case 11.803 of 1998 relative to the censorship of the film "the Last Temptation of Christ." It can be pointed out that these three arguments of the government on the topic of the human rights summarize the dimensions of meaning: the *factual* dimension on the argument relative to the written norm that establishes the separation of the powers, the *social* dimension on the argument of institutional respect and the political will to maintain the autonomy of the legal system, and the *temporal* dimension on the argument of the valid law and the expectation of transformation of this through legislation. All of them present an image of the State from the argumentation of the government, which tries to establish that the law has not been violated but, above all, that legal decisions are respected.

The legal norm, which constantly blocked all the attempts of judging in Chilean courts cases of human rights violations, was the Decree Law 2.191 of 1978 called "Amnesty Law." This law, enacted in 1978 during the military dictatorship – and still in force- establishes a pardon for crimes happened between 1970 and 1974. Its first article states, "Amnesty be granted to all the persons that, as perpetrators, accomplices or aiders, had incurred in criminal acts, during the situation of the State of Siege, ranging from September 11, 1973 and March 10, 1978, just in case that they are not currently processed or condemned." This law was invoked by the State of Chile against the demands before the IACHR in case 11.725 of 1999 on the murder of the Spanish diplomat Carmelo Soria and in case 11.771 of 2001 on the murder of Samuel Catalán Lincoleo.

[118] An exception to this rule is the case 12.142 of 2000 on the "Libro Negro de la Justicia Chilena," wherein the government argues against the facts and evidence presented.

This may be seen in various ways. On the one hand, the international law dispositions are accepted by the State but they would not have effective validity due mainly to the aforementioned decree. This appears, then, as a relic of the political supremacy on legal validity that recognizes the system itself. In substantive terms, it is possible to observe that the (political) "territorialization" of the law (i.e., sovereignty) dominates as a principle of legal legitimacy over the proper legal communications, which point towards recognizing the proper decisions of law. In other words, the law (as a world system) points to the (legal) *validity*, while sovereignty as principle of state law would point to the (political) *legitimacy*.

Focusing on the topic of human rights from national legal jurisprudence, we draw our attention to decisions of the courts involving Decree Law 2.191 of 1978 (Amnesty Law). This law bestowed no jurisdiction to the courts to judge murders that happened in the military coups of 1973 until the year 1978. In 1994, Chilean courts resolved, in the first instance, to apply sentences for three members of the intelligence organ of the dictatorship called DICOMCAR (Direction of Communications of Carabineers) for the crime of three communist professionals in 1985. The sentence constituted the first occasion in which condemnations were applied by a case of human rights violation in Chile. A year later, after an extensive judicial process, the retired Army General Manuel Contreras and the Brigadier in active service of the same entity, Pedro Espinoza, were condemned to seven and six years of prison, respectively,

The amnesty law will be losing its force by the end of the twentieth century by means of legal resources. The legal concept that appears as an improbable achievement in the evolution of Chilean law, and therefore constitutes an *evolutionary acquisition*, is the legal argument of the *permanent kidnapping*, which allowed binding communication in the valid law for the legal system. This figure, it might be said, constitutes an important event in the evolution of law: a surprising communication that is selected and stabilized in the system. This figure was applied on several

occasions and appeared as an interpretation of law that allowed the pursuit of respective responsibilities for crimes. In 1998, the Chilean Supreme Court refused to apply, for the first time in a case of human rights violations, the amnesty law. The figure of the permanent kidnapping indicated that if the body of a victim does not appear, it is presumed to be a crime of kidnapping and continues to be so. Therefore amnesty should not be applied because the investigation is not yet exhausted.

Between the historical reasons of this shift, the most frequently cited one is the detention of the dictator Augusto Pinochet in London in 1998. In January of that year, the Supreme Court decided to reopen the case of the murder of twelve opponents of the Pinochet dictatorship called "Operation Albania," annulling the previously dictated sentence by the military courts, which ordered the dismissal of the process. That same year, the Court of Appeals reopened the case of the murder of the union leader Tucapel Jimenez and the Supreme Court later reopened another case called "Caravan of the Death," accepting again the thesis that permanent kidnapping is imprescriptible when the person kidnapped or the body of this person is not returned, released, or recovered. Therefore it cannot be amnestied." With this sentence, the Supreme Court considers that the amnesty law does not prevent from investigating kidnappings and disappearances that happened after September 11, 1973. International treaties are also considered to have precedence over the amnesty law.

In a sentence issued in 2004 relative to the kidnapping and disappearance in 1975 of the militant Miguel Ángel Sandoval, the importance of the international law and the figure of the "permanent kidnapping" are indicated. Paragraph 76, letter C, states: "That, in view of the above, and having the mentioned kidnapping crime the character of permanent, on prolonging it in the time, there does not proceed, in this case, the application of the mentioned Law of Amnesty, since this refers to crimes completed in the period of time that points, this is, between September 11, 1973 and March 10, 1978; nor the prescription of the criminal action, since the illicit

action has not stopped from its consequences for the victim, which is still missing." The sentence argues that presuming the death of the victim involves violating constitutional norms of a correct process.

Permanent kidnapping as an argument is interesting because it shows the operational closure of law with regard to "common sense" and the political pressures. According to common sense, because of the time elapsed and the indications that the victim may have been murdered, a kidnapping is unlikely. Still, the law does not recognize this "reasonable" argument based on common sense, but instead seeks for a "valid" argument. The law can be operatively closed regarding "common sense" and communicate solely from legal validity. The argument states that "crime continues to be committed" so it does not apply either the amnesty law or the prescription of the crime. The victim "keeps on suffering the consequences" of the crime, so that by the legal system the illicit keeps on being perpetrated. The system decides that there exist "well-founded suspicions" about the kidnapping of the victim; therefore, there is a crime. Instead of abandoning the case, due to the absence of the body of the victim, it is preferred to follow the "presumption" of another crime, in this case: the aggravated kidnapping. The pressure of decision for the courts provoke that these have to decide before all the cases (Luhmann 1995a: 303).

Common sense indicates that in a situation of dictatorship and human rights violations, it is more probable and reasonable to consider that the victim has died. Nevertheless, the legal decision is supported on arguments of legal validity that are surprising with regard to the dogmatic tradition in legal interpretation, but not contradictory. The figure of the permanent kidnapping illustrates then how the legal system can decide without taking into consideration extra-legal criteria but only the possibilities that legal communication provides. This goes along with the differentiation of the legal system and its operational closure, since the systemic guarantees of communication, carried by the human rights, are safeguarded by the legal system, beyond acts inherited from the dictatorial regime that impede the flow

of a legal process to decide on these issues. This is relevant given that the autonomy of the legal system does not only involve the operational closure and cognitive openness, but also allows the observance of the legal system, as a system that administers justice, from an external point of view. This means, as legal doctrine (representing an internal version of the complexity of the law), justice appears as the relation between its internal operations and its environment. As we have seen in previous chapters, the dogmatic function is the self-presentation of the decisional coherence of a system's internal unit, while justice is a reflection of the internal operations of the law as just or unjust, for society.

From this figure, the legal system only recognizes its internal decision criteria and abrogates an interpretation of the political world. Following this principle, the Chilean legal system crosses a threshold in its differentiation with the use of its own medium –legal *validity* - for its autopoietic reproduction. Thus, from internal arrangements, it was possible to block the capacity of connection of the amnesty law and, this way, it was possible that the growing allegations of human rights violations could have a procedural treatment within the legal system. Along with constituting an evolutionary acquisition, the figure of the permanent kidnapping also constitutes a reduction of complexity of the environment by means of treatable forms within the system.

Up to this point, we have confronted – following the evolutionary perspective of Luhmann (1995a) - a handful of evolutionary acquisitions that have occurred in the evolution of Chilean law. From them it is possible to identify thresholds in the evolution of the Chilean law, from the *organizational* totalization of the law in its origin, also the legal universalism of the *subjective rights*, the *constitutional* order as element of its differentiation and the reaction to human rights by means of the figure of *permanent kidnapping*. We have dwelt especially on the last one since it is the most recent and speaks about an operational closure of the legal system, although it does not make the previous acquisitions disappear. All these acquisitions involve

managing the complexity of the environment through legal forms that become stable in time.

The explanation of the evolutionary acquisitions has always served as background to the problem of the social structures appropriate to their emergence. If subjective rights are defined as an evolutionary acquisition, it is because the structural situation of Chilean society in the sixteenth century does not have a specific correlation for these rights. Chile was primarily a stratified society; therefore the universal subjective rights present characteristics that will have a greater relational density only during later periods. The same occurs with the first judicial organizations, which implies that a degree of bureaucratization was hardly attainable in the mid-sixteenth century. Constitutions are very advanced evolutionary acquisitions in a political situation characterized by instability, which is attested in a dozen of these regulations enacted in the mid-nineteenth century. Finally, the figure of permanent kidnapping is also highly improbable in the context of a legal system that assumes a politically complex and legally underdeveloped problem, using formulas for the treatment of such complexity produced only within the legal system, in its operational closure.

So far we have dealt with the evolutionary acquisitions of Chilean law. We will refer in the following section to the "forms of differentiation" in the evolution of law in Chile. For this, we will use structural sociological analyses.

### 4.2. Forms of Differentiation of Law in Chile

As we have seen in previous chapters, the line that seems to dominate the sociological diagnoses on the emergence of modernity in Chile indicate that this is established only in the middle of the twentieth century, mainly due to the crises of massification of urban poverty in the early part of this century and the subsequent ascent of the middle strata (Godoy 2000: 325ff.). The agrarian economic organization that was prevailing as stratification factor since the sixteenth century

(Morandé 1987; Medina 2000) is now faced with demands for reform on the distribution of land and also produced the first systematical attempts of industrialization.

The main problem that arises from this idea is the fact that Chilean law mends to the epoch of the Spanish conquest and its transformations, as we have previously noted, gradually occur. Although it is only towards the end of the twentieth century that we can speak of a functionally differentiated law, law as a social system performing a function undoubtedly has a much greater antiquity. Leaving the analysis of the structural conditions prior to modernity under the figure of "tradition," "networks" or "familiarity" then seems to dissolve the status of law as a functional system. But, is this possible?

The question we must address now is: to what kind of social system does the Chilean law correspond before the emergence of modernity in Chile? If we follow the analysis of Weber (1922a) concerning the types of law, Chilean law is, from its beginnings, "modern" as it is based on legal authority (even if it comes from the natural law of kings) and not of charisma, tradition, or materiality. This leads to significant problems of interpretation, since it supposes only a political order and not the proper character of the system of law. A different panorama appears when the law is analyzed as a system based on restitutive norms (Durkheim 2001) coming from industrial development, because in that place only the late industrial development of Chile in mid-twentieth century – or at best cases, in its beginnings - could one speak of a "modern" law.

From the perspective of systems theory, it is possible to observe that the specification of a functional problem for law is given from the time of the conquest. As Bravo Lira notes (1996: 26ff), the Spanish law of the conquest has, as a function, the treatment of the justice in its colonies and that justice consisted in normative expectations. Also, the figure of subjective rights is present since the arrival of the Spanish law as well as organizations for the administration of justice.

> In the colony and amid a fierce and unwavering stratification, in politics unfolds an incipient functional differentiation similar to the Spanish hegemonic center. Within the State of the political system, the Council of the Indies (1524) had the most formal relevancy. The delegation of royal power was strictly hierarchical: Viceroys, Governors, Magistrates. The Real Hearing was the summit of the legal system. (Robles 2006: 249)

The constitutions of the nineteenth century, in fact, only change the names of the former colonial administration of justice and perfect aspects of it. Throughout this century, national legal norms would be gradually developing. Based on these criteria, legal system would be a highly differentiated system in contrast to that in the eighteenth century.

The historiography is right in diagnosing specific developments of Chilean law from an institutional standpoint, but it lacks a sociological perspective that allows the observance not only of the self-reference of law, but also of its hetero-reference. The various periodizations of historiography, therefore, do not correspond hundred percent to the evolution of law from the perspective that we have adopted.

Next, we will try to trace the lines of an evolution of the law, together with the evolution of Chilean society. For this, we will use the distinction of "forms of differentiation" of Luhmann (1977, 1997a).

### 4.2.1. The Law of the Stratified Society, and of Center and Periphery

The first period extends from the foundation of Chile in the sixteenth century to the early twentieth century. In this period, a law that combines elements of the *stratified society* with the gradual advances towards a *functional differentiation* towards mid-nineteenth century appears. Unlike the analysis of Robles (2006), we support that it is not possible to argue that it is a mere "stratified colonial society," but in this

period, advances concerning the functional differentiation of systems surface. That is, it is not a question of *pure types* in the forms of differentiation, but rather of a framework that considers both the advances of functional differentiation, and the stratificatory order.

The law in this epoch is permeated both by social stratification and by social stratification spatial distinctions of center and periphery. From the mid-sixteenth century, the *Cabildos* were, as we have previously noted, the most important legal and political institution of the colonial social order. The *Cabildos* clearly distinguished the "main neighbors" in their membership rules (Eyzaguirre 2004: 27ff), which then corresponded to the summit of the stratified structure at this epoch. The main neighbors were, at the beginning, Spanish *encomenderos*, but later bureaucrats and others administrative roles are also included. The *Cabildo,* thus, diffusely defined the capacity of certain *persons* and *families* in making legal decisions concerning the community.

Nevertheless, during the sixteenth and seventeenth centuries, there were spaces for social mobility, due to the scarcity of aristocratic lineages and the semi-functional nature of the conquest, in which a partial social mobility could happen based on royal honors, prestige and economic activities (De Ramón 2000).

Nevertheless, by the late seventeenth and early eighteenth century, the stratification sharpens and is reflected in the law. The "Royal Pragmatics on marriage of the family children" dictated by King Carlos III of Spain in 1776, prohibited marriage without parental consent. This led to the so-called "trials of dissent" (Vial Correa 2000). These trials were referred, in the core, to the ability of families to oppose to the marriage of their children when they considered that the future spouse was not worthy of the family and caused a prejudice to them. Ethnic prejudices abounded in those trials, as a possible African ancestry of the candidate (Vial Correa 2000: 72), but also the so-called unworthy jobs, such as mechanical in nature (Vial Correa 2000: 73).

These trials show an attempt for maintaining the stratification by means of exogamy prohibitions. In a biological sense, this blockade of the freedom to choose spouses corresponds precisely to a principle of differentiation, as it is a rule that prohibits the *reproduction* between different social strata (Wortmann 2007: 108).

Besides this *social* stratification, there was a *spatial* stratification. The law was a matter not only affected by the social position of persons and families, but also by the spatial location in *cities* as centers versus *rural* peripheries.

> In the Indies, by contrast, the land was more jurisdictionally "empty." At the level of ordinary justice and administration, the authority of the king had been delegated to the cities, which were the fundamental nuclei of settlement and institutional organization. (Góngora 1975: 422)

The institutional history of Chile is essentially urban, which certainly does not mean that the social structure is always due to urban spaces. Nevertheless the law was concentrated in the cities, while the lands lacked jurisdiction, except for the authorities of the "towns of Indians" (Góngora 1975: 422). The cities were the center from which justice administered and dispensed. The law was thus differentiated in *centers* and *peripheries* with scarce contacts. The legal activity was developed in the centers and only in the middle of the seventeenth century did a shift in this situation happen, although at a level far form the central administration of the cities.

Until the mid-seventeenth century, the Chilean economy was based on mining. The high social status of the *encomenderos* came precisely from the use of indigenous labor force for mining, with which they paid taxes to the crown. Mining is losing importance in the late seventeenth century with the growth of agriculture, with the help of the increasing demand for wheat from Peru. Due to the concentration of land in rural areas and the formation of an economic unit different from the mining

production, a new differentiated social order is established in rural areas, namely, the *hacienda*.

On the *hacienda,* there is a wealth of historical and sociological studies (cf. Cousiño & Valenzuela 2012; Morandé 1987; Medina 2000; MacBride 2000; Góngora 1975; Bauer 1971). All these emphasize its character as a main economic institution until the mid-eighteenth century. The *haciendas* included large farms and cattle areas, which belonged to a family. The *hacienda* had its own stratification, as noted by Godoy (2000: 57).

> The highest status symbol is here the landowner and its family that concentrate wealth, power and prestige in their vast domains and their influence reaches the city. (…) They are followed by the employees of confidence: butlers, housekeepers or administrators; to greater social distance there are located the white or half-caste *inquilinos* [tenant farmers], from which the domestic service is recruited. The free farmhands constitute the last stratum of the hacienda.

In contrast to the big properties of other Latin-American countries, the Chilean hacienda was not intensively exploited. Its labor force was not based on African slavery, but on work remunerated in goods, land rights, or money. This type of labor work gave rise to the spontaneous legal institution of the *inquilinage*. The *inquilinos*, usually impoverished half-caste or Spaniards, were the dominant labor force in the hacienda. By means of a *verbal contract,* the landowner agreed to lease a portion of land in peripheral areas to the *inquilino*. This lease was paid by the performance of certain functions, such as surveillance, administration, or workforce.

The *inquilinage* was a type of *contract* celebrated without the incumbency of the urban legal order, and it established a set of duties and rights for the parties. That is, a set of *normative expectations*, which had, however, a binding validity only in the socially separated context of the social structure of the hacienda and which was judged asymmetrically by the landowner. It was, in fact, a law of the hacienda, which

allowed the order of property and work, through regulations based on the stratified nature of the hacienda.

This division between center/periphery also had differentiation tendencies in other functional systems as correlations and, depending on the functional point of view, it is possible to observe an oscillation between center and periphery. From an economic point of view the haciendas were the production center and the source of wealth. The wealth of the haciendas was such, both in the rural and in urban areas, and was a source of status in both sides of the form. The problems of the hacienda, from this perspective, were largely concentrated in the political and legal systems. Although the hacienda was a relatively autonomous social order, the increasing differentiation of the national State from these power centers constituted a problem for urban administration. From the point of view of the law, the "confidence" from which the legal relations were constituted in the hacienda (cf. Cousiño & Valenzuela 2012; Morandé 1987; Rodríguez 2007) was unable to densify in the urban bureaucratic structures. The verbal contracts between *inquilinos* and landowners were only binding in the stratified order of the hacienda.

In the Chilean stratified society, we therefore find a *dual legal system* with different development grades. On the one hand, a highly bureaucratized and proceduralized *urban law*, which, although it had incipient universalist pretensions, was permeated by the prejudices of its time; and, on the other hand, a *rural law*, based on the validity of the stratified social structure of the hacienda, had scarce organizational development. Both systems had little to do with each other. While in the cities, courts were organized, procedures were dictated and new legal developments took place, the hacienda law referred primarily to the binding capacity of the contract, to the resolution of specific conflicts and occasionally to the contact with the urban administration through the police. Although both systems solved the problem of the maintenance of normative expectations, their hetero-orientation was very different. While urban law was gradually constructed along with the political system, the law of the hacienda has a purpose that primarily facilitates economic activity.

During all this period, this double movement of the Chilean law, between the social distinctions originated by the principles of stratified differentiation and the dynamics of differentiation between center and periphery, can be observed. The element that allows the identification of a threshold between this type of law and the following form of differentiation is precisely the weakening, not of the stratified order by itself, but of the dissolution of the form *center/periphery*. The duality of urban and rural legal systems will continue until the decline of the economic activity of the hacienda. With the decline of the hacienda, the barriers for the reproduction between urban and rural legal communications are diluted. This occurs due to a number of factors that must be carefully analyzed.

### 4.2.2. The Politicized Law of the Functionally Differentiated Society with Class Structure

The concept of "functionally differentiated society with class structure" corresponds, as Luhmann points out (1985: 139), to a transition stage between the stratification and the functional differentiation, which expresses the stratification from certain special conditions.

The concept of class society corresponds to a "semantic of self-description of society" (Luhmann 1985: 129) based on the problem of the absence of a central instance to regulate the multidimensionality of the distribution and that generated, from this, social equality and inequality. In historical terms, this self-description coincides with the change in the form of differentiation, from the primacy of stratification to functional differentiation (Luhmann, 1985: 129). The class concept, thereby, reflectively refers to how individuals are distributed in unequal classes, i.e., unequal distributions. In other words, the class concept refers to the "distribution of distribution" (Luhmann, 1985: 128) and its amplitude exceeds the merely economical. What is different about this stratification expression lies in the way in

which classes are configured and how these adhere to different logics from these dominants in pre-modern stratified society.

The class concept, although it refers to a manifestation of stratification, has some specific characteristics. First of all, the 'functionally differentiated society with class structure' regulates the problem of the distribution in a different way from stratified society. While in stratification, unequal communication is regulated through interaction (that is to say, through the 'presence' in the communication), in the functionally differentiated society with class structure, the inequality and the distribution cannot be treated at this level:

> Social classes are therefore *strata*, i.e. groups which, considering a difference between better and worse, *must renounce to regulate the interaction*. (Luhmann, 1985: 131)[119]

With such 'renounce to regulate the interaction,' inequality is universalized and is generalized beyond the presence of the speakers. Then the problem of how to justify an unequal distribution in a society of equals, opposite a stratified society, where the problematic was reversed, arises i.e., it had to justify an equal distribution in a society of unequals.

The stratified society is, meanwhile, a society of presences, which appear steadily in interactions. With the shift to functional differentiation, the requirement of referral to presence disappears and the problems that were earlier treated at interactional level can be moved in an abstract way towards functional systems and organizations. For this reason, societies structured in social classes allow major freedom that stratified societies, since individual roles allow for vertical mobilities and horizontal diversities, which are prohibited or have diverse obstacles in stratified societies. The

[119] "Soziale Klassen sind demnach *Schichten*, also Gruppierungen im Hinblick auf eine Differenz von besser und slechter, *die darauf verzichten müßen, Interaktion zu regulieren*."

social inequality in the functionally differentiated society with class structure is reproduced by means of systemic mechanisms and not by means of familiar or stratified ascriptions.

According to Luhmann (1985: 145), the systemic mechanisms around which social classes would form are fundamentally three, namely: money, career, and prominence, which structure, in turn, three social classes: the economic, the organizational, and the prominent. The classes depend on parasite specific systemic mechanisms. After payments in money were introduced as symbolically generalized communication medium, the rich class depends on them to maintain its inequality position; once organized in chains of decisions, political power must resort to procedures and legal resistances to physical violence to preserve the domination; and the prominent class can only maintain its status based on the complex network of communications that maintains them as a theme in the communication. The semantics of the classes, in the interim, are only possible in a functionally differentiated society, where *classes have no function* and where the inequality in the distribution itself may only appear transverse to the society, while this specifies functions of a partial way.

This form of differentiation emerges in Chile along with the loss of centrality of the hacienda. The social stratification in this period experiences a significant shift due to the change in the form center/periphery. It does not exactly cause a radical change in social stratification, but centers and peripheries are repositioned. If, in the previous period, the hacienda was the core of organization, now it is the city.

In the mid-nineteenth century, a number of institutional changes that had structural consequences for Chilean society happened. The independence from Spain in 1810 was followed by an eight years' war that concluded with the withdrawal of the Spanish troops. After this experience, the first attempts of organization of the Chilean State occur. In 1811, the abolition of slavery is decreed and in 1813, the same occurs with the titles of nobility. The greatest social mobility came,

nevertheless, by changes in economic activities. The economic activity of the hacienda declined mainly due to its lack of productivity, which by the end of the nineteenth century was no longer able to meet the domestic demand (Godoy 2000: 225). The center of economic activity shifted to mining and with it begins the first great migrations to the cities and to mining centers of northern Chile. Along with this, the commerce and banking activities developed.

By the late nineteenth century, the problems of misery in the cities, which gives way to the "social question," (Orrego Luco 2000) and to the first strike of workers in 1890, exacerbate. The semantics that accompanies the historical and sociological diagnoses of this period is the so-called "moral crisis" (Recabarren 2000, Mac Iver 2000, Jacobet 2000), which denounced the loss of unity and social integration of the country.

Indeed, throughout the nineteenth century, changes in social stratification are produced, which no longer had the marked *presential* nature of the hacienda.[120] For this reason, it is more appropriate to speak of 'social classes' and not of 'strata.' Owners of mining companies, banks, and other businessmen are now the privileged classes. Alliances occur between these groups and the former landowners, although the latter gradually lost their power, while wealth and ostentation takes a specifically urban shape: "The landowners tend to move away from the land to settle in Santiago or in Europe, living of the incomes provided by its administrators and tenants" (Godoy 2000: 171), which produces a gap in the face-to-face relations between them and the inquilinos, thus weakening the social structure of the hacienda (cf. Cousiño & Valenzuela 2012; Morandé 1987).

The new social classes are not yet regulated, as rural strata, by relations of confidence based on interactions, but by the functional ties of private enterprises or

[120] In the sense of "sociability" of Cousiño and Valenzuela (2012) and also in the sense of "interaction systems" noted by Luhmann (1975a).

the State administration. These changes contributed to the development of the Chilean legal system. After the independence of the country, diverse constitutional essays appear and a number of acts that tend to organize the State and its institutions are issued, as well as financial and commercial activity. In 1860, the banking law is enacted and in 1865, the commercial code; in 1883, the law of secular cemeteries; in 1884, the law of civil marriage and the civil registry office is created for that purpose; in 1855, the civil code is issued; and in 1881, the organic law of courts (cf. Eyzaguirre 2004: 126ff.).

The old urban/rural duality of law begins to disappear due to a major functional specialization of urban law. Indeed, the social structure of colonial stratification suffers little changes with the independence (Veliz 2000: 221) and at administrative level there was no significant revolution, but rather a gradual change. The main shift in the law of the functionally differentiated society with class structure is the increasing problematization of the internal inequality.

Lacking the legal validity provided by the authoritarianism of the landowner, urban law can only resort to the procedural validity of the state bureaucracy (Luhmann 1983) and since the law lacks elements to treat the new inequality that arose by the mining and commercial heyday, the problems ended in deep political crises and explosions of violence. In the early twentieth century, the situation has become more acute. The strike of the dockworkers in Valparaiso in 1903, the strike in Antofagasta in 1906, and the massacre at the Santa Maria school in Iquique in 1907 are the result of a policy of violent repression against the lower classes of miners, workers, and wage earners. The legal and political systems were unable to address the problems of the lower classes. In a certain way, the disdain of the politics of the nineteenth and early twentieth century for the lower classes was an attempt for closing the structure of classes – in the absence of a rule of closing through kinship relations, as in the seventeenth century - by means of a rule of *exclusion*: the exclusion of the lower classes of political participation, economic well-being, and access to the justice.

The situation is clear, however, as regards the economic system. From the mid-nineteenth century until the early twentieth century, the *pulperías*, in which workers exchanged products by means of special coins received along with its salary, were established in saltpeter mining in northern Chile. These special coins only had value in the mining industry and only for the purposes stipulated by this industry, without being able to be replaced by money. That is, an *organizational barrier* interferes with money payments, which was intended not only to further enrich the owners of the mines where the *pulperías* were operated, but it also had, as a purpose, the partial exclusion of the workers on the circulation of money.

The formation of social classes came under the wing of these exclusions, which took shape primarily as economic classes and secondly as organizational classes. The gradual introduction and generalization of money in the cities had, as a consequence, the growth of an economic class different from the agrarian structure, which was rather dedicated to speculation and financial capitalism (Godoy 2000: 170). In the other side the impoverished and marginal masses, which survived in conditions of misery and neglect, remained in the cities. Inclusion, in this case, was regulated by access to money.

With regard to organizational classes mediated by careers, a gradual advance of this class is primarily produced by the growth of the public administration and the industries, which, in the twentieth century, will give rise to the so-called 'middle classes' and they, in turn, produce a change in the structure of political parties (Pregger-Roman 1983: 39). As noted by Góngora (1981: 58), it was not a bourgeois class but a class "of university professionals and bureaucrats, or of provincials owners."

How does the law react to this change in the principles of differentiation? Only from its contact with politics does the law react to the sharpening of class conflicts. The constitution of 1925 is undoubtedly the biggest change in this regard, but also

worth mentioning is the so-called "social" and labor acts from the early twentieth century, as the act of working rooms of 1906, the act of industrial accidents of 1916, the labor code of 1931 among others (cf. Palma 2005: 348ff). The feature that characterizes the law in this period is a *politicized law*, which is located in the transition between a stratified law and marked by the duality center and periphery, and an urban law centered on the State and its administration, which is increasingly responsible for the problems in the political system. This excessive instrumentalization of the law by politics for much of the twentieth century has been characterized by Mascareño (2004) as "dedifferentiation" between law and politics, and as "politicization" by Cousiño and Valenzuela (2012).

Whereas the politicized law of functionally differentiated society with class structure was in force, the problems of inclusion and exclusion in law were regulated mainly by means of political guidelines. The political affiliation and affinity increases or decreases the probability of compliance of normative expectations, whether with regard to goods produced and distributed by the State or by the repression of the State against its enemies (Mascareño 2010). The form inclusion and exclusion are not closed with regard to the form hacienda/city as in the stratified law, but by means of the form ally/enemy that comes from the *political over-coding* of the law. This over-coding develops gradually with the political patronage systems of the twentieth century and enters a crisis in the 70's due to the "politicization" of society (Cousiño and Valenzuela 2012) and the "crisis of complexity" produced by the coup d'état in 1973 (Mascareño 2003b). The military dictatorship imposes in turn the logic of a politicized law expressed in denials of justice against the human rights violations.

Until the late twentieth century, it can be argued that a politicized law tributary of a functionally differentiated society with class structure predominates in Chile. Nevertheless, as we will show, it is not a change in the principle of differentiation of classes (which has not yet been totally overcome) what, by the end of the twentieth

century, causes a change in the form of differentiation of the law, but the relations between law and politics.

### 4.2.3. The Functional Differentiation of Law

Since the mid-twentieth century and specially by the end of that century, a number of conditions that allow a functionally differentiated legal system converge. This occurs along with the differentiation of other functional systems.[121] As noted by Cousiño and Valenzuela (2012), during this period politics and economy differentiates and, as noted by Robles (2006), the situation is similar in education, health, and mass media.

It is through the separation between law and politics that a legal system is established as a functionally differentiated system, which in the Chilean case was achieved by means of the resolution of the conflict with human rights through appeals to international law. We analyzed this situation previously in the context of the evolutionary acquisitions of law.

While the denial of justice survived, politically influenced until the late twentieth century in cases of human rights violations, the boundaries of inclusion in law were influenced by politics. The dissolution of this difference allows the crossing of the threshold from the mere *institutionalization* of law towards its *differentiation,* as an operationally closed functional system. Based on this, law can have real pretensions of inclusion of the entire politically delimited collective delimited within its jurisdiction, without considering more than the legal criteria. At this point, its *autonomy* and *operational closure* are problematized.

[121] On the contrary, Marcelo Neves (2012) had recently noted that in Latin America there would be no primacy of functional differentiation. His thesis on the importance of corruption is, however, exaggerated.

Being a problem usually treated in the science of law and marginally seen by the sociology of law, it is necessary to add some thoughts on this. The discussion concerning the autonomy of the law in Chile is old. This discussion focuses on a traditional vision of the autonomy, or rather of *independence*, according to which, it is necessary to encourage this aspect in judges and lawyers (Luhmann 1995a: 63). The relevance of the concept of autonomy to describe the modern legal system is due to the specification of the law as a social system with capacity to distinguish and operate in a unitary way (Luhmann 1995th: 62). The *autonomy* appears as a result of the *operational closure* of the legal system.

> Unlike the usual understanding of autonomy, we distinguish strictly between questions of causal dependence or independence (which can be judged by an observer in any or other way, depending on its selection of causes and effects) and questions of reference that always involves the system as observer. (Luhmann 1995a: 77)

These issues of 'dependence' or 'independence' refer to the indication of the system or to its environment as a point of observation, that is: self-reference or hetero-reference. It should be noted that the autonomy of a system means that this operates as a unit and has 'self-limitation,' which in turn means that operational closure is a determinant of this situation and not its cause (Luhmann 1995a: 63). These problems of dependence or independence can be treated in at least two ways: from the function (operation) and from the coding (observation), respectively. In this sense, the self-reference – from the perspective of the system - refers to the self-limited maintenance of the normative expectations in spite of its disappointment, while the hetero-reference refers to the self-limited possibilities of learning of the system, i.e. doctrinaire or legislative learning. This produces the operational closure and cognitive openness of law (Luhmann 1995a: 77; 1987: 356f).

The autonomy of the system refers, in short, to the conditions under which legal procedures are properly limited from their own operational closure. A system is not

autonomous when it operates in a state of autarky, but when the system is determined by its own structures (operational closure) and its influence limits are self-determined. The problems of autonomy in the system happen when these limits are somewhat altered, jeopardizing not only the structure decision of the system but also its legitimization, as the generalization of expectations about its procedures is affected.

This autonomy of law does not mean, of course, the triumph of functional differentiation over stratification. As noted by Robles (2006), and we agree with his diagnosis, the Chilean functional differentiation has not completely overcome its class structure, in spite having functionally differentiated systems as economics or politics. The law seems to belatedly react to these differentiations and only from the interference of the international human rights law is it geared towards the universal inclusion as principle. For this same reason, the full validity of *human rights* by the end of the twentieth century characterizes the functional differentiation of law and thereby shows its openness to the law of world society.

In the case of Chile, the differentiation of various social spheres has increased, from a modernization process whose tendency, although it has been of economic-liberal character, has separately plausibilized the differentiation of other social systems. The differentiation of autonomous social systems is a direct expression of the modernization process in Chile and its effects extend not only to the State, as an institutional axis, and to economics, but also to other communications, as for instance communications on sport, religion, education, environment, etc. The expansion of the communications via electronic social networks has increased these differentiations, making more complex politics, family, etc. All these phenomena show the tendency to differentiation of communications on specific problems of reference.

The differentiation between law and politics was not achieved, as in the formal diagnosis of Luhmann (1990b: 179f) by means of constitutions only, which began in

the nineteenth century. Constitutions were rather a pre-adaptive advance on further differentiation. Indeed, in 1980, during the period of repression of the military dictatorship a new constitution was issued, which is in force until today, in spite of the deep political changes of the country. This constitution has rather had, in a certain way, a "symbolic power" (Neves 1992) and has been, in various aspects, an obstacle for the differentiation and diversification of politics and law. For this motive, it is not possible to identify constitutionalism as a source of differentiation between law and politics, but this occurs rather in the center of the legal system, that is, in the decisions of the courts.

In summary we can indicate that the change in the form of differentiation towards functional differentiation involves a change in the principle of legal inclusion.

In a stratified society the problem of inclusion and exclusion comes from privileges of strata. In a society with the form center/periphery this problem is based on the duality between a highly bureaucratized urban law and a rural law based on relations of confidence between the landowner and its dependents.

Meanwhile, in the functionally differentiated society with class structure, the politicization of law permeates this inclusion and the law tries to re-introduce, by means of "social laws" and other types of acts, the disadvantaged social classes. Nevertheless, the political patronage and its influence in the decisions of the law make it difficult to see a universalist principle of inclusion in the system.

Only with the rupture of the impunity for human rights violations and its prosecution in courts does the law demarcate a boundary with regard to politics and its influences. From there, the problem of the law is managing its own procedures and the counterfactual use of legal arguments as the figure of the "permanent kidnapping" that we have discussed previously.

**Table 9 Forms of Differentiation in Chile, Law and Evolutionary Acquisitions**

| Form of Differentiation | Types of law | Inclusion/Exclusion | Evolutionary Acquisitions |
|---|---|---|---|
| ***Stratified society and of center/ periphery*** | Stratified and dual law (urban/rural) | Strata privileges and residence | Subjective rights, Bureaucracies |
| ***Functionally differentiated society with class structure*** | Politicized law | Economic functions and political patronage | Constitutions |
| ***Functionally differentiated society*** | Functionally differentiated law | Legal procedures and principles | Human rights |

Source: Own elaboration

While it is somewhat artificial to place the types of law parallel to evolutionary acquisitions, since they rather constitute intermediate thresholds, it is possible to indicate that the main evolutionary acquisitions of the stratified and dual law corresponds to its early structuring in organizations and under the principle of subjective rights. These two acquisitions allowed a further development of the legal bureaucracy and the expansion of the inclusion in the law. We have seen, however, that both acquisitions were limited in scope. The rural law never achieved stabilized organizations within the haciendas, and subjective rights functioned only as an abstract principle of inclusion.

In a society functionally differentiated with class structure, constitutions are those that present an advance with regard to the differentiation between law and politics. By means of these constitutions, a differentiation between politics and society is achieved, and from them, the organization of the State is made possible. Nevertheless, the law remains tied to political caprices and the constitution only gives form to structures in its political side, considering law as a mere administration of justice.

The figure of permanent kidnapping, that allows the prosecution of human rights violations, is located in the transit from the politicized law and the functionally differentiated law. From this, the legal system is capable of treating political complexity through legal procedures. The closure of the system with regard to politics is produced and the autonomy of the law is problematized.

A functionally differentiated law is not a "better" law, in the sense of an advance, progress or perfection of a system. The functional differentiation of law has, as a result for the system, the challenge of dealing with its own complexity, without being able to resort to politics as support for its operations. This means a release of the political structures, but simultaneously, the deployment of new complexities. This new law has to deal now with self-created problems that made the system more complex in its own operations. New problems and paradoxes are created. Before we discuss subsequent tendencies, problems, and contemporary paradoxes of Chilean law deals, we must briefly review the remarks of the Chilean sociology of law concerning the concept of legal culture. Why had the Chilean sociology of law only paid attention to the "culture of law" and not to its structural changes?

### 4.3. Excursus on the semantics of the Chilean sociology of law: the legal culture

The Chilean sociology of law was established around the concept of "legal culture." By means of the *legal culture* concept, sociology of law, juridical sciences, and philosophy of law, work together in order to problematize the unit of a national or regional legal system and search for distinctive elements. Legal culture, thus, has been a conceptual contribution of social sciences – or rather an adaptation of the concept of culture of sociology and cultural anthropology. The particular reasons for which legal culture has been one of the favorite concepts of Chilean sociologist are not entirely clear; nevertheless it turns out to be evident that the use of this concept has deeply permeated the reflection of legal system in Chile.

The most cited Book on the concept of legal culture corresponds to the studies of Lawrence Friedman, who defines the concept as one of the components of legal system. Specifically, he refers to:

> Values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole. [...] It is the legal culture, that is, the network of values and attitudes relating to law, which determines when and why and where people turn to law or government, or turn away. (Friedman 1969: 34).

Later Friedman placed this specific concept on the *external side* of legal culture, since he differentiates between an *internal* legal culture and an *external* one, with regard to participation in procedures and juridical functions: "[t]he external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks" (Friedman 1975: 223). This dual conception of legal culture has been very important as praxis of observation of the legal system in Latin America and Chile in particular, where the concept has a long tradition of interpretations.

For instance, to Agustín Squella – one of the most influential expert in these issues –, it must be clearly differentiated between an internal and external legal culture as a general starting point: "beliefs, ideals, traditions, ways of feeling, ways of thinking" constitute a legal culture (Squella 2000: 661), an opinion shared by Valle (2001: 87ff). Some critics have argued that this concept must be replaced by a less pretentious version or by a broader category such as *ethos* (Peña 1992; Barahona 2010). Others critics argue that the concept would be like "a ubiquitous Procrustean bed" (Alfaro 2002: 341-342), i.e., a category that most of the time forces the facts in an arbitrary and artificial way. However, these critics occupy a marginal position.

In general terms, it can be argued that the concept of legal culture in Chile has been mostly used as a *self-description of the unit of legal system*. By means of this concept,

national legal system is made visible as a *comparable unit*. This concept of legal culture is confronted with the old notion of "juridical system" (Raz 1986).[122] Thus, legal culture allows problematizing permanence or structural change in legal system, without direct references to specific regulatory bodies or to political or economic systems. The concept demands only a clear distinction between self-reference and hetero-reference of the unit.

For authors like Edmundo Fuenzalida, a legal system can be viewed as a cultural unit. For him, social changes occur when they are able to change social normative patterns. An abrupt and non-consensual change in normative patterns affects society as a whole. The *coup d'état* of 1973 in Chile is an example of an abrupt normative change, which causes a rupture in the legal culture:

> For this reason, when the commanders in chief of the Armed forces and Carabineers gave the coup d'état of September 11th of 1973, a crisis took place, not only of the democratic institutions, but also of the *legal culture* built around it and of the behavior of many jurists who had contributed to its development. (Fuenzalida 2003: 203, emphasis supplied.)

For Fuenzalida, the *coup d'état* in Chile marks a rupture with a long juridical *tradition*, which has been very difficult to recompose. For this author, before 1973 an external legal culture of *opaqueness* with regard to institutional legal system, i.e. law inspired *fear* but also *respect* to legal institutions, and an internal legal culture of "adherence" and "obedience" to law dominated in Chile (Fuenzalida 2002: 328). This situation drastically changed with the occurrence of the *coup d'état*. After that, an external legal culture of loss of "respect" and "confidence" towards law appeared (Fuenzalida 2002: 329-330; 2002: 226), and in the last years, an external legal culture of

[122] It is possible to hypothesize that the abandonment of this conception is due partly to the complete reformulation of the concept of *juridical system* from the sociology of law of Niklas Luhmann, who conceives this system as a of global scope and of supranational-state character (Luhmann 1995a; 2008a).

consumerism, where "the justice is like another good of those that one acquires on market" existed (Fuenzalida 2002: 334). With regard to internal legal culture, Fuenzalida points out that after the return to democracy, there have been positive changes such as the creation of the "judicial academy" (Fuenzalida 2003: 219) and the entry into force of the "criminal procedural reform" (Fuenzalida 2003: 226).

Other experts like Aldo Valle share the idea of Squella and Fuenzalida that the distinction of internal and external legal culture is a key factor to properly describe this unit of analysis. For him, legal culture primarily regards "convictions" or "beliefs."

> *Legal culture*, *which can be internal or external*, generically, designates the subjective domain of the juridical system, i.e. juridical-normative convictions of subjects that intervene in processes of systematization, creation, declaration, application and execution of law in a given social community or the beliefs that about law and justice any member of the community has, although he does not intervene in any juridical activity. (Valle 2001: 88-89)

Among these beliefs and convictions, one of the most significant is that concerning the importance that has *legalism,* or adherence to positive law, for internal legal culture in Chile:

> The aforementioned legalism and exegetical method is not an exclusive characteristic of judges, but of diverse actors and operators of the law in Chile. Lawyers, academicians, legislators, officials of the administration, district attorneys and comptrollers, take part of the same conception. (Valle 2001: 102)

The characteristics of the Chilean legal culture would be characterized by some additional elements such as: beliefs in a "higher wisdom" of the law, the idea of "obedience" (vs. criticism) to law on judges, and a conception of law as a "static, specific and reduced" order (Valle 2001: 103ff.). All this has as a corollary a "professional" legal culture in terms of qualification and legitimacy of its operators

and, simultaneously, "traditional" in terms of their interpretations and transformations (Valle 2001: 108).

Other authors also share the diagnoses of Fuenzalida and Valle with respect to the legalism of the Chilean *internal* legal culture. For Orrego, for example, this feature is a part of an ancient positivist tradition of interpretation of law, which is kept in force as it hardly contains questionable premises, such as the separation of powers of the State or demands for moral, religious, and political autonomy of the judges (Orrego 2002: 462ff.). Other authors, such as Toro argues, in turn, that legalism is a legacy of national independence movements:

> The historical context that preceded and succeeded to political independence of Chile is a determinant point of heading to define which has been the configuration of its juridical way of thinking. On the one hand, American colonies shared the enlightened ideology of French Revolution. Thus, the postulate of the omnipotence of law, sublime instrument of the reason to materialize the desire of justice and security sought by all peoples, was acquired by Chile and by other Latin-American countries. (Toro 2002: 495)

This legalism increased until it definitively concluded in the *codifications* of the 19th century, which reinforce this first impulse in national legal culture (Toro 2002: 496). For Barahona, this legalism is the result of a mixture of Spanish and French influences, as reflected in the scholastic thought and in the canon law, and which was passed as part of the national law (Barahona 2010: 429-430) and was later reinforced by the codifications of *Andrés Bello* and still later, in the 20th century, by *German positivism* – mainly of Kelsen – in the pyramidal conception of the institutional system (Barahona 2010: 436).

Legalism has been seen, on the other hand, as a cultural obstacle to development and legal change. Authors, like Manson, point out that this element is rather a factor of deviation from law and more than a virtue, since "legalism it is not synonymous of literalism.' But in Chile many juridical operators pay an excessive cult to the letter

of the law, betraying its sense" (Manson 2002: 355). Others support that this legalistic culture turns out to be a problem for the deployment of materially oriented new legal methods, like alternative conflict resolution systems (Gómez 2002), or due to its orientation a set of relevant legal matters left unregulated (García Huidobro 2002). It has also been criticized as the excessive presidential character derived from this tradition, as well as the loss of legislative functions of the parliament, which "does not already exercise the legislature but is the shade under dependence on another power, namely the Executive" (Cordero 2002: 511). For some authors, this "centralist" and also "ritualistic" – in an obviously negative sense – character is a general feature of the Latin-American legal systems (Witker & Nataren 2010: 13; Binder 2007: 14ff).

On the *external* Chilean legal culture, there are fewer consensuses, mainly because researches on legal culture in Chile have not successfully held a dialogue with other social sciences nor have they done such in a very superficial manner. This situation is not exclusive of Chilean sociology of law. Diagnostics of external legal culture in Brazil, for example, are particularly diffuse in analyses of possible "contradictions" between both sides of legal culture (Botelho 2003: 189-190). Other diagnoses on the external legal culture in Latin America tend to emphasize only the negative side of such culture. An example of this is in the diagnosis on "disobedience" and "evasion" of law as aspects of the external legal culture in Mexico (López-Ayllón 2003: 515ff), which is also present in Argentina (Bergoglio 2003: 38ff.), "distrust" as key element in legal culture of Venezuela (Pérez-Perdomo 2003: 711-712), or "corruption" as internal and external element in Colombia that is common to a big portion of Latin America (Uprimiy et al. 2003). While these elements point to obvious situations that actually affect the functioning of Latin-American legal systems, in these diagnoses *in negation* to external legal culture, a deeper analysis on external culture of national legal systems is lacking. Legal culture not presents only a conceptual weakness, but also there exist problems of distinction that deserve to be more accurately defined between effective *internal* and *external* factors.

In global terms, we find that the concept of legal culture in Chile has been seen, following the tradition of Friedman (1969; 1975), as a primarily ideational aspect or, using that old anthropological nomenclature, "emic" (Pike 1967; Harris 1976). The concept of legal culture as *values*, *beliefs*, *ideals, convictions,* or *traditions*, precisely seek to emphasize that culture builds an *abstract unit*, whose simplified character allows delimiting a *state-national* or *regional legal systems.*[123] This way, the concept can maintain its *comparative* character –defended for Nelken (2010) and Cotterrell (1997) – and emphasize distinctive aspects of each unit, but it has not been able to account for the reasons of its maintenance or for significant relations that it could have with society or individuals.[124] The insistence of sociology of law on the legal culture concept has certainly allowed a relative openness to consider relations of legal system with its social environment. Nevertheless, this openness has been given without a clear definition of the *social system of law*, which can only be elucidated by a clear analysis on the differentiation of that system, as we have previously made.

[123] Only in recent years has the supranational character of legal cultures been discussed. See in this regard Gessner (2010).

[124] This type of problems also gave much of the traditional difficulties of the anthropological concept of culture. Once the concept left its emphasis as merely a description of the 19th century and was used to characterize the genesis and maintenance of social order, a dispute not only with the sociological concept of society, which only founds a way out in the disciplinary (and secondarily conceptual) armistice of Kroeber and Parsons (1958), but also with regard to the scope of the concept in structural and temporal terms, opened.

## 5. CONTEMPORARY TENDENCIES ON THE DIFFERENTIATION OF LAW IN CHILE: HYPOTHESIS FOR A RESEARCH PROGRAM

The law in Chile has been affected in recent years by deep transformations of formal and procedural character. These transformations have also been present in most of the countries of the region and have been accompanied by other modernization processes. Reforms and changes of diverse type have happened in the last decades. In the context of an investigation like this one, it is necessary to discuss all these changes within a particular theoretical and evolutionary overview. Since we don't have sufficient precedents to speak about "evolutionary acquisitions" or changes in the "form of differentiation," it seems appropriate to simply speak about "tendencies" in the differentiation of law, that is to say, movements which persistence is accentuated in the last years. We speak, in any case, of present tendencies and not of future projections.

The sociological analysis of law in Chile has had a comparative accent, i.e. *cultural* (Luhmann, 1999h: 47 y ss),[125] which has been marked, as previously noted, as the concept of legal culture. At the level of systemic analysis, the discussions of functional differentiation in Chile also use a comparative approach, especially with regard to more developed regions of the world (Mascareño 2010; Robles 2005; Rodríguez 2007). While these approaches correctly addresses fundamental problems in the form of functional differentiation and the emergency of multiple and specific modernities, we have not only dealt with these structural aspects, but also with boundary demarcation problems and self-limitation at spatial and social level. It is exactly there, where the differentiation of the system ceases to be a purely organizational problem (of the administration of law), and the practical and empirical character of the law of society is accentuated.

[125] If we follow the approach of Luhmann on comparative observations, it could be noted that this type of cultural descriptions corresponds to *cultural descriptions*, since they emphasize similarities and differences between world regions.

Although we are aware that they are still tentative approaches, we will discuss the dimensions of meaning identified by Luhmann (1991a: 114ff) current tendencies of the differentiation of law in Chile, in order to emphasize not only the complexity of its differentiation, but also its different problems of reference, self-referential semantics, and even paradoxes. These reflections are therefore, only a number of hypotheses whose subsequent development can only be outlined here.

We will proceed with our analysis distinguishing structural tendencies, problems of reference, semantics, and also tentative paradoxes. It is necessary to clarify two of these elements. When we refer to "problems of reference" we directly refer to the functional scheme, which, although it maintains a relatively stable core in different functional systems, has variations depending on the perspective adopted for its observation. When, on the other hand, we refer to semantics, we continue the use that Luhmann (1993a: 7) makes of this concept, especially as a way of *historical-cultural* observation and that refers to generalized and available meaning as communication (Luhmann 1993a: 19). A parallel for the distinction between social and semantic structure, as noted by Luhmann, is (although re-formulated) the distinction between *social system* and *cultural system* of Parsons (Luhmann 1993a: 16). Based on these axioms, we will try a characterization of the current tendencies of differentiation of Chilean law.

### 5.1. Autonomy

In the *factual* dimension, we identify a tendency in the differentiation of the law in Chile in the last years that is directly related to the most visible consequence of the operational closure, that is to say, the tendency towards *autonomy*, whose development was limited during the dictatorship of Pinochet and recaptured as a project during the democratic governments that followed (Ruiz Tagle 2003). Processes of distinction that use legal communication are developed, and they gradually point out that, within the scope of legal communication, everything

relevant to law cannot only be the subject of legal decision, but also that the criteria by which these distinctions are develop are the criteria defined by the legal system itself (Mascareño 2004).

The problem of the revealed reference is the *maintenance of operative boundaries* of the system, that is to say, the problem of the maintenance of its operational closure. At *semantic* level, the development of the differentiation of the law goes along with semantics, which highlight the need for *independence* of the law, which is then emphasized by diverse professionals and legal experts (Cadenas 2008). The tendency towards a major autonomy of law in Chile has been reinforced in the last years by the human rights trials and denunciations of corruption (Skaar 2003).

This increasing autonomy has brought with it a strong specialization of law and an orientation towards its own procedures. This has led not only to an increasing procedural specification, but also to the autonomy of the law in its decisions, which have become more and more dependent on *experts'* knowledge from various fields. This phenomenon has been marked most in the demands experts' from medical and scientific disciplines in the new criminal process (Ritz et 2005; Riffo 2004) and in requests of mediation and diagnosis in the new family courts. This way, the semantics of the *independence* of the decisions have its counterpart in the *dependence* on external knowledge, without which the legal decisions may be very questionable.

This phenomenon has become particularly relevant in the case of the above-mentioned reforms and has emerged not only as the problem of scientific authority in legal procedures, but also as the problem of the grade of autonomy of law in matters that are gaining their own autonomy and sophistication. This gives form to a paradoxical situation of *dependent independence*, because, although the semantics of independence is still very present, the legal decisions are increasingly affected with substantive aspects of the cases and their specificities.

## 5.2. Acceleration

At *temporal* level, law also has suffered transformations in its most decisive functional aspect, which is the treatment of normative expectations. That is, the differentiation of law also implies a differentiation of norms and these are located in the temporal dimension of meaning (Luhmann 1995a: 124ff). The reforms implemented in Chile in recent years have largely attacked this factor, though within an organizational context, and have been comparatively successful in the Latin-American region (Azócar & Undurraga 2005; Witker & Nataren 2010). Within a strategy of the modernization of law, the *acceleration of the time* in its processes has become a central aspect and an element and indicator of *efficiency*, which acts as a dominant semantic (Santibáñez 2000).[126]

The decisions inside the legal system now have stricter execution times, since time is considered a limited resource. The *temporal horizon* of law in these cases is restricted, while normative production significantly increases. This would lead to a new problem of reference in this plane, i.e., the problem of the *congruence of decisions* in a context of transformations. Deciding quickly leads to problems of compatibility between past and future decisions. The system has to face the problem of a constant request of decisions, in front of the necessity of maintaining a dogmatic unity.

This gives rise to a paradox that we might call *desynchronizated acceleration*. While the reduction of time in legal processes has been identified as an efficiency factor, this acceleration brings synchronization problems at normative level. Time itself involves the paradox that this only exists in time, and its observation has to consider it in every distinction (Nassehi 2008: 223ff.). This paradox can only be eliminated through the displacement of the problem towards other dimensions, for example, towards the factual dimension through memory (Luhmann 1999h). At comparative

[126] Luhmann (1993a: 38f) also indicates that *acceleration* is a tendency of differentiation. On acceleration as an element of modernization, see Rosa (2003: 27ff).

level, the legal system is immersed in the situation of the "simultaneity of the non-simultaneous" (Nassehi 1994: 53), because what happens in its environment is simultaneous but inaccessible, as a *simultaneous* operation in the time. The consequence of these paradoxes is expressed in law and its acceleration and synchronization problems. The operations are accelerated in its procedures but the normative congruence of its decisions (as problem of reference) is tested in every event.

This has been manifested in discomfort in public opinion, for example, as the problem of the "revolving door" of court procedures, according to which, at penal level there is acceleration in the processes but, simultaneously, impunity in the sanctions (Duce 2005). The desynchronization problem of law is sharpened, since the efficiency criterion is purely administrative and does not point to either social or factual conditions of law, but purely to a "mechanical" or merely chronologically indicator of the time (Luhmann 1976b: 137f). The problem of *efficiency* as a semantic of law is that the temporal conception of efficiency uses exactly a *mechanical* function of time, as an administrable resource, and does not consider a *phenomenological*[127] conception of the temporality of the legal system. This desynchronization of the times in the law has, as a consequence, that at the level of the efficiency of the system, indicating a future that, operationally, "cannot begin" (Luhmann 1976b).

### 5.3. Internationalization

In its *spatial* background, the law in Chile has been *internationalized* along with the processes of penetration of competitions of international law (Mereminskaya & Mascareño 2006) and the globalization of legal regimes (Teubner 2002). In the various internal levels of organization of law, the spatial references become visible in the light of diverse legal competitions or legal collisions. What, at one time, could be decided under the context of the empire of sovereignty, is now a subject of

[127] See Luhmann (1976b) and Nassehi (1994, 2008) on this phenomenological conception of time.

controversies and disputes. Now, how law can be distinguished from a spatial background and how specific competitions are determinate through decisions are problematized. For this reason the problem of reference in this dimension is the *operation capacity on jurisdictional boundaries*, since the spatial background of law has been altered.

As previously noted, the spatial dimension is a key element in the differentiation of law since, in contrast to other functional systems as science or economics, this recognizes a special relevance for the problem of the borders, where law can operate in a structurally coherent manner. Although in the scientific system, a globalization of knowledge and theories can be seen, and also in the economic system a deterritorialization of economic operations through the use of the medium money, both systems consider spatial aspects as relevant. Economy is still related to concepts, as *property* and science distinguishes, in spite of its globalization, between *centers* and *peripheries* of scientific production. The semantic correspondent for the internationalization of law is the *globalization* and its consequences for the functioning of the system (Gessner 2010; Günther 2003).

Latin America is not exempt from problems, since the role played by international law in national legislation is mostly secondary and controversial, alongside the increasing supranational role played by the law (López-Ayllón 2010: 141ff.). Gessner (2010: 115), for example, mentions nine aspects in which a 'globalized legal culture' overcomes the national regimes: 1) international law, regional law (for example, EU), national law (applied in accordance with private international law); 2) the rules of the regimes, the networks, soft law, lex mercatoria, the commercial customs; 3) international standars (for example, the ISO), the norms of the ILO; 4) the self-obligations of companies for the achievement of global regulatory objectives; 5) the judgments of international or supranational courts: International Court of Justice, European Court of Justice, WTO; 6) the international arbitral courts in matters of international law or private law; 7) the adjudicative practice of international, regional executive organs (EU, NAFTA, etc.), in the context of cross-border administrative

activities; 8) the legal practice of companies, law firms, associations, and NGO, regarding global law; and 9) the practice, awareness, and acceptance of law for civil society in relation to global law.

The paradox of this internationalization process of law in Chile is in what we should call a *fragmented integration*. In this context, although the tendency of law in Chile, like other national systems, is towards a normative convergence (Gessner 2010: 99), a process of fragmentation of autonomous legal regimes can simultaneously be observed. At spatial level, the borders are expanded and they become simultaneously more tenuous, but on the contrary, once these legal regimes are integrated, they are fragmented in increasingly autonomous spheres from the national law. This paradox is the result of the spatial differentiation of law in Chile, along with that of a factual convergence of normative contents, which makes these spatial differences gain in *particularism* and allows factual references gain in *universalism*. The spatial boundaries remain relevant for the formation of national law, but this relevance now constitutes a problem of reference for the operations of law, which has for its result the differentiation of law, which cannot be understood only as the empire of state sovereignty or as a mere supranational legal pluralism. Although this situation had its most clear beginning during the trials on human rights violations, it now spreads to various fields as the environmental, economic, and sports problems (Mereminskaya & Mascareño 2005).

### 5.4. Juridification

Finally, in the *social* dimension of meaning, we want to emphasize that following an expression of Habermas, the changes in the law in recent years have resulted (1982b) in a growing juridification of lifeworlds of persons, and with them new spaces of *legal inclusion* have been opened, such as family regulations (Casas et al. 2006), environmental problems (Dourojeanni & Jouravlev 1999), and religious, educational or ethical ties (Bascuñán 2004). In this dimension – which expresses the relations between alter and ego in the communication -, law gradually penetrates and

does so in ways that permeate people's daily life. The problem of reference at this level is *competence over the social relations* of diverse nature.

These effects can be visualized both at the level of civil and penal regulations, i.e., both in the relationships that persons have with each other as in their relations with the State.[128] The differentiation of the system at the social level has even caused recent social movements in in Chile to have a marked accent on juridification, either to reject or propose new legal norms, such as various educational movements of the last decades (Bellei et al. 2010). In all these cases, the semantic indicator is the *inclusion* in the law, but these processes have paradoxical consequences.

The growing juridification of social relations seems to bring with it a paradox that could be described as one of *exclusive inclusions*. As noted above, the problem of inclusion and exclusion refers to how persons are considered in terms of their participation in social systems (Luhmann 1995c). There exist two sides in this form: inclusion indicates the attribution to persons for its participation in social systems, while exclusion indicates the side of the form in which persons are not considered by social systems. This form has been usually used to indicate the problems of modern society, preferably on the side of exclusion (Robles 2005, 2006). Nevertheless, the problems of participation of persons also occur – and strongly, at that - on the side of inclusion.

As noted by Nassehi (2002: 134), inclusion means participation, but not necessarily "successful participation," since an over-indebted or sick person, or one undergoing criminal justice proceedings is also included in a functional system. These *exclusive inclusions,* in the case of law, are expressed phenomenally in terms of the high rate of prison population in Chile, which make up one of the highest rates in Latin America (Walmsley 2009) and the high level of indebtedness of Chilean households (Cox et

[128] In this context of juridification, an interesting study on the person's ability to make decisions, from a medical and legal standpoint, is in Bórquez, et al. (2007).

al. 2006; Banco Central de Chile 2010), liability to legal prosecution, among other phenomena. In any case, this type of inclusions that are regulated by the legal system produces exclusions in diverse social ambiences, such as economic marginalization or the loss of civil rights. Interestingly, inclusions and exclusions are produced along with the differentiation of law, and in both sides of the form, paradoxes emerge (*inclusive exclusions*, for example, in the case of the prison population). This aspect is not always emphasized by the sociology of exclusion, whose focus is rather on the side of exclusion.

In general terms we can see these tendencies in the following table:

**Table 10 Tendencies of Differentiation of Law in Chile in the dimensions of meaning**

| | **Dimensions of meaning** | | | |
|---|---|---|---|---|
| | **Factual** | **Temporal** | **Spatial** | **Social** |
| **Tendencies** | Autonomy | Acceleration | Internationalization | Juridification |
| **Problems of reference** | Maintenance of operative boundaries | Congruence of decisions | Operation capacity on jurisdictional boundaries | Competence over social relations |
| **Self-referential semantics** | Independence | Efficiency | Globalization | Inclusion |
| **Paradoxes** | Dependent independence | Desynchronized acceleration | Fragmented integration | Excluding inclusions |

Source: Own elaboration

In all the aforementioned levels, the paradoxes can be displaced in various ways. The *exclusive inclusion* can be transferred as a problem to other systems (for example, to the financial system through economic measures, to the education like temporal utopia of a future equality or to the family as functional alternative for rehabilitation). The *dependent independence* can be considered as a virtuous condition for the development of knowledge in the law (and put the accent on other blind spots, such as on the quality of the information). The *desynchronized acceleration* can be a problem to be solved in the future (!) and the *fragmented integration* can be seen as a

problem of jurisdictions (and not of contents). In any case, the paradoxes of differentiation are diverse and remain latent, since problems allow the operations of functional systems.

In the multidimensional analysis shown above, we have presented some hypotheses on tendencies of the differentiation of law in Chile in recent decades. We highlighted tendencies on differentiation, its problems of reference, semantics, and paradoxes that are associated with these processes. For the constitution of new lines of research, a brief comparison with other Latin-American legal systems becomes necessary, apart from the analysis of the plausibility of the hypotheses that we have outlined for the case of Chile.

### 5.5. Tendencies on the differentiation of law in Latin America: Comparisons

First, we would like to point out some aspects that are relevant for the extension of these reflections to other regions. In Latin America, the conditions of the national legal systems are quite uneven. While the entire region certainly shares a strong continental legal tradition, the differences in the development of every national legal regime are highly variable. In spite of this – and following an ancient sociological custom -, it is possible to indicate similar structural elements between these national legal systems, although the temporality and causalities are indeed dissimilar.

The aspect where, possibly, a common tendency in the region can be observed more sharply is the tendency towards *autonomy*. Only in Colombia can it be noted that from 1957, its legal system has an apparent autonomy, although this was a work of the military junta of that epoch, and, with highs and lows, has been reactivated in the eighties (Uprimy et al. 2003: 242). On the other hand, the country has lived, between 1949 and 1991 - more than thirty-two years - under a situation of martial legality. Nevertheless, it was not the problem of autonomy or the excessive use of the 'states of emergency' that motivated the reforms in Colombia, but the problems of corruption and drug trafficking. The corruption that swept the system, which was

derived from "fixed point" democracy, are identified also as the cause of the legal reforms in Venezuela in the nineties (Pérez Perdomo 2003: 713).

The constitutional reforms of 1994 in Mexico were also aimed to increase judicial independence (Báez Silva 2010: 224). In Brazil, it can be said that the Constitution of 1988, which was strongly oriented towards human rights and citizen participation, supported this general tendency as well (Botelho 2003: 128ff). Finally, in Argentina, with the creation of the Council of the Judiciary by the Constitution of 1994, there was also a reinforcement of this tendency (Bergoglio 2003: 52f.). We already saw how this problem is developed in Chile. The semantics are also similar, since autonomy is usually treated as a problem of 'judicial independence.'

The tendency towards the *acceleration* in decisions and the problems of congruence can be seen in all the national legal systems that have experimented reforms in recent years. It is necessary to indicate that only in terms of procedural reforms from 1991 Argentina, Guatemala, Costa Rica, El Salvador, Venezuela, Chile, Paraguay, Bolivia, Ecuador, Nicaragua, Honduras, Dominican Republic, Colombia, Peru, Mexico, Brazil, and Panama had experienced reforms in their legal systems (Witker & Nataren 2010: 6). In this regard, it is significant that in all these cases, the orientation of the reforms – in their organizational level - had the temporal orientation as a main element, and, regarding this, its effectiveness have been measured.

At the social level, the *juridification* of social relations has been observed also in Mexico since the nineties with regard to the increasing interference of law in the lives of people (López Ayllón & Fix-Fierro 2003: 503ff). Similar situations have been analyzed in Brazil in the context of the constitution of 1988, which encourages citizen participation (Botelho 2003: 144ff), and, in Colombia, through the paradox of an increasing visibility and social relevance of law, along with a generalized disinterest (Uprimy 2003: 231ff). In any case, the institutional changes in the law have partly encouraged this increasing social relevance. This has also caused

increasing *social* demands of justice. It is necessary to emphasize that legal institutions in Latin America have a low reputation and more than one third of the population believes that it is justified to ignore these legal institutions if necessary (Latinobarómetro 2010). In this context, the tendency towards a major juridification in the region can be seen in a less pessimistic way.

Finally, with regard to the *internationalization,* the law in Latin America has been gradually opened to international law. This tendency is observed in the entire region. We must emphasize that the relations between national and international law are diverse; in Argentina, Mexico, Ecuador, and Nicaragua, their constitutions establish, explicitly or implicitly, the supremacy of constitutional law over international law. In Peru, article 101 of its Constitution states that "the international treaties celebrated by Peru with other States are part of national law. In case of conflict between a treaty and a law, the first one prevails." This situation is similar in Costa Rica, El Salvador, and Honduras. In Peru and in Chile, constitutions grant a quasi-constitutional status to international norms on human rights matters (López-Ayllón 2010: 141f).

The openness to international law has been largely favored by economic globalization and the expansion of international relations. This phenomenon is relatively new in the region. In Mexico, for example, it has observed in the nineties, that since until the late eighties at least, this country was rather closed to international law (López Ayllón & Fix-Fierro 2003: 582). A similar situation occurs in other countries of the region. In addition to this relationship between *national/international* law, spontaneous legal regimes emerge (Teubner 2002, 2005), which appear in a "hybrid" way (Gessner 2010: 99) between national and international law, as commercial, technical or sports norms (Mereminskaya & Mascareño 2006), along with human rights (Skaar 2003). In all these transformations, internationalization and a greater tolerance, so to say, to an increasing normative plurality can be seen.

In general terms, it can be argued that the hypotheses that we have raised as tendencies on the differentiation of law in Chile can be examined to a great extent in other national legal systems of the region. This way, the regional dynamics of the differentiation of legal system can be studied. The evolution of Chilean law is, however, different from that of other national legal systems. The early evolutionary acquisitions and the relative constitutional stability are elements that are not present in other countries.

Our theoretical and evolutionary trip has tried to show the main elements that characterized this development and made the emergence of a functionally differentiated law in Chile possible. What only remains for us to do are to summarize our way and indicate the main results of our study.

## 6. CONCLUSIONS

The aim of our study was to analyze the evolution of Chilean law under the hypothesis that Chilean law is a functionally differentiated social system that owes its level of current development to a set of evolutionary acquisitions and to a process of change in its structures, which we have characterized by the concept of forms of differentiation. At the beginning of this research, we considered a set of *questions* and *problems* around which we organize our analyses. We will briefly summarize each of them and then indicate some general considerations, indications, and recommendations for further researches.

Our first questions were: *What are the fundamental aspects of a sociological observation of the law and how does the sociology of law allow the differentiation of social systems at the regional level to be understood?* Concerning this question, we made a theoretical trip around the sociology of law, its history, and main currents. In this analysis, we dealt in detail with the systemic sociology of law of Niklas Luhmann as the starting point for the analysis proposed in this study. From this approach, we pointed out that the possibilities for a regional observation of law through a systemic perspective are made possible when the analysis focuses on the *social* and the *spatial* dimensions of meaning. We indicated then that law and politics are functionally differentiated at *factual* and *temporal* level, but at *spatial* and *social* level they are coupled. We characterized this coupling as a *spatial* delimitation of a *territory for law* and the *social* delimitation of *a collective for politics*. Based on this theoretical element we pointed out that this allows for an understanding of the study of the national law as a regionally differentiated functional system, plus the segmentary differentiation of politics in States.

Our second research questions were: *Which elements characterize the explanation of social change in the system differentiation theory and how is this explanation related to the theory of social evolution*. From this concern, we delved into the diffuse explanatory field that separates the studies on differentiation and evolution. We concluded that, in spite of

the apparent confusion between two different research strategies, it is possible to observe that is a single model, in which the differentiation appears as a subordinated concept to an evolutionary theory. This way, it was possible to postulate that the research on differentiation of functional systems should be complemented with a research on evolutionary processes and acquisitions, along with the study of forms of differentiation that indicate large-scale structural changes. From this difference, it was possible to then characterize theories of functional differentiation in Chile, compare them, and observe their possible projections.

Our third research inquiries were *if there exist evolutionary acquisitions that have been a key factor to the process of differentiation of law in Chile and if so, what these would be*. From the theoretical reflections of the previous chapter we dedicated ourselves to the study of a number of evolutionary acquisitions in order to understand the evolution of law in Chile. We postulated the legal organization, subjective rights, constitutions and human rights as elements that served as pre-adaptive advances in the evolution of Chilean law. From this analysis, it was possible to understand how certain institutions gave rise to further developments and enabled structural changes of major scope.

The fourth research issues were *if it is possible to identify relatively defined periods or phases in the differentiation of Chileans law and if so, what would its features, its characteristics, and processes be*. From this, we observed a number of elements that make the characterization of different forms of differentiation possible. In this context we distinguished three forms of differentiation in Chile, which had, as a correlate, a kind of law: the dual form *stratification* and *center/periphery*, the form of *functional differentiation with class structure,* and the *functional differentiation*. For each of these forms we indicated the presence of a type of law: a *law stratified* and crossed by the duality *estate/city* as center/periphery form, a *politicized law* in the functionally differentiated society with class structure, and a *functionally differentiated modern law* with operational closure and differentiated from politics. We established in that place that, however, neither the forms of differentiation nor in the types of law are "pure" phenomena,

but they constitute core principles that organize the formation of social systems, and, therefore, it is possible to speak of overlaps and hybridizations in such forms and types.

Finally, we asked about *which tendencies could currently be observed in the development of Chilean law*. We addressed this question suggesting a set of hypothesis on possible current tendencies of Chilean law, its problems and paradoxes. Our work was structured around four dimensions of meaning: factual, temporal, social, and spatial. We observed that in each of these dimensions arise new problems for legal system, such as the pressure for efficiency, internationalization, juridification, and autonomization. We complemented our analysis with a projection of these hypotheses in other Latin-American national legal systems.

There is no doubt that in all these tasks we had to be cautious of not closing the research in favor of a totalizing coherence. Our purpose was not to generate a fully coherent scheme of the evolution of Chilean law. All the same, the evolutionary acquisitions and the forms of differentiation have an undeniable bias that arises from the theoretical approach used and the problems that have been previously mentioned. It is difficult for us to avoid the situation that the surprising findings remain largely invisible in the writing of the text, since, in its presentation, the results seem to be too coherent with the questions. But all this must be judged from our initial position. Since we have explicitly declared our problems and questions, as well as the sources with which we have constructed our analyses, future researches may refer to the matter and see with more clarity the blind spots and explanatory deficits in our research. This is the point for future possibilities of connection in the field of science.

This way, it is possible to have certainty that the analyzed elements do not constitute an *endpoint* in the analysis of the differentiation of Chilean law, but, instead, *starting points* for further explorations. Trying to close the reflections by way of an integrative model – as Parsons' model- is undoubtedly unsatisfactory. However,

despite being aware that the evolution of Chilean law is a constantly moving process, we have postulated a set of hypotheses on current tendencies that mark evidence for subsequent differentiation processes.

A similar situation occurs in the analysis of the forms of differentiation of Chilean law. Indeed, here, and in a similar way to the analysis of the evolutionary acquisitions, we have emphasized forms of differentiation partly distant from the canon of the differentiation theory of luhmannian stamp. Due to our historical analysis, it was barely possible to add something about the law of segmentary society, since this form was present only in Chilean indigenous societies, which had a scarce impact in the current law (if there is, at all, any influence). We initiate our periodification with the *stratification* and *center/periphery* forms and through them we described a long period of validity of a stratified and territoriality dual law. We recurred to an alternative analysis in order to understand the passage of stratification to functional differentiation, and we spoke of a law of a functionally differentiated society with class structure, following a recommendation of Luhmann (1985) of his main model of forms of differentiation (Luhmann 1977, 1997a). There, we dealt with a politicized law, which remained stable in most of the twentieth century and caused a crisis only by the end of this century, which was rather motivated by external influences. We speak only of functional differentiation with respect to the law of ends of the late twentieth and early twenty-first century, where political dependencies of legal decisions have largely been dissolved.

The sociological diagnoses that we have analyzed indicate different conditions from the ones raised by this research. As we saw, for Mascareño (2010) and Robles (2005, 2006), Chilean functional differentiation is characterized by a duality between social networks and functionally differentiated systems. Robles (2006: 262) even speaks of a "functionally differentiated capitalist society"[129] whose social classes have disappeared. Cousiño and Valenzuela (2012) in turn, choose to only emphasize the

[129] A concept that also uses Uwe Schimank (2009).

differentiation of politics and economy, while Rodríguez (2007) points to a fully functional differentiation. Our approach allows us to indicate for future researches the hypothesis that functional differentiation in Chile is the result of parallel processes of system differentiation, which are governed by their own temporalities and structural characteristics.

Unlike the aforementioned general diagnoses, and following the research we have conducted, it is possible to hypothesize that functional differentiation in Chile would be a process that is currently evolving, and it is crossed by conflicts and tensions inherent to it. Current social movements that protest in favor of educational rights would precisely indicate a change in the bearing points on which Chilean educational system has developed, which also had an impact on the self-reflection of politics. The almost-total dependence on the market economy of Chilean education, mass media, and health system, allow us to question their possible differentiation as functional systems. This way, functional differentiation appears, not as a model or a central instance from which other systems would be sorted, but as a "horizon" of meaning (Nassehi 2004), which allows social systems to structure problems of order and of treatment of complexity, taking functional differentiation in systems as a possibility.

The Chilean law constitutes a special case of a system that, although has a very large evolution, has developed a structural orientation towards functional differentiation only in recent decades, at the expense of its political dependences, which in turn allowed it to function throughout the twentieth century. Nevertheless, other social systems have failed to distance themselves from their dependences. Chilean educational system, health system, and mass media, for instance, are still marked by an "economization pressure" (Schimank 2009), which undoubtedly hinder their own development. As correctly indicated by Cousiño and Valenzuela (2012), the military dictatorship opted for the development of a market economy lacking of legal regulations, which leave education, health, and mass media subject to the swings of the markets. For law, this situation did not constitute a greater problem, as it was a

question of constitutionally regulated freedoms and whose norms must come only from the executive power. This situation is currently in a transition state towards major regulations, which come from the hand of a major judicialization of the "economic freedoms." Nevertheless, this does not seem to demand further developments to the existing law, but only a canalization capacity through law for the generalized discontent with a neo-liberal economic development model.

A distinctive aspect of Luhmann's theory of differentiation lies in the *non-teleological* character of his approach. The autopoiesis concept reinforces this character, as this indicates that the system is reproduced to avoid its ending and is, therefore, *anti-teleological* (Luhmann 1991a: 395). Differentiation processes have the same characteristic, since, similar to morphogenesis, its results cannot be anticipated but only deviations to its selectivity in every operation can be added (Luhmann 1991a: 484ff). This change of perspective is of vital importance for differentiation theory. Unlike the "happiness" in Spencer's industrial society (Spencer 1912: 600), "solidarity" for Durkheim (2001: 65) and "equilibrium" for Parsons (Parsons and Shils 1962: 108), differentiation process in Luhmann's vision does not seek to satisfy these or other needs, but is largely a process related to the *communicational* character of society, its *temporal* operation capacity, and its orientation towards *contingency*.

Functional differentiation rather disappoints the expectations of happiness, solidarity, or equilibrium, since its *complexity* makes the possibility of linking a wide temporal order explode. In this sense, modern society at operative level and in its risk awareness, not only has "no time for utopias" (Nassehi 1994: 71), but these, or the goal-oriented claims, are returned to society under the form of *paradoxes*. While the differentiation process can be understood as a modernization of law, it leads neither to a fairer nor better-oriented law. The sociology of law, in this context, should refocus its classical concern about *social* conditions of law for *justice* or *inclusion,* to the "unmarked state" (Spencer-Brown 1979) of differentiation process, to the recesses of a process, whose goals cannot be decided and that at operational level consists of a specific "praxis" of distinction (Nassehi 2009: 220). In the praxis

of law, the *goals* have the feature of appearing at *empirical* level for an observer. They can be attended, formulated, and reformulated, and their effects evaluated. For this praxis of law, however, these goals are only one side of the process whose *unity* can be described by the *difference* of *paradoxes*. The sociological perspective of law can, this way, describe the empirical operations of law in a contingent present, thus unlocking traditional semantics of the discipline and the inexhaustible modernization theory.

Functional differentiation of law in Chile constitutes an interesting case in the evolution of national legal systems in the Latin-American region. From their analysis, it is possible to observe how a number of evolutionary acquisitions, which give rise to later developments, are selected and stabilized in the legal systems, in a different manner from the universalist analysis of law, such as that of Luhmann (1995a). The above discussion does not imply, of course, that Chile would represent an exceptional situation in Latin America, due to an evolutionary development near to that described by social systems theory regarding developed regions of the world. We have shown how various elements that characterize functional differentiation in a formal sense are not met in the Chilean case, such as the function of the separation between law and politics of constitutions, or the marked phase of functional differentiation with class structure with evident effects even today. What we can sustain, analogous to the explanations of cybernetics, is that social evolution of Chilean legal system has an equifinality that is similar to other world functional systems, namely, functional differentiation.

The greatest current challenge for the law of a functionally differentiated society is its capacity to regulate conflicts in a society crossed by deep inequalities, as in the paradoxical Chilean modernization, where wealth production is similar to a developed country but the inequality in the distribution is equivalent to a third world nation (OECD 2012). On the capacity of law to operate as an "immune system" (Luhmann 1991a) in dealing with the conflicts caused by these inequalities, this depends on its structural stability or its possible changes to other forms of

differentiation that are difficult to foresee at present. Normative expectations are pinned on it, in the context of a growing discontent with politics and market economy that prevails today.

Differentiation theory has several elements that can contribute to this analysis. Without the teleological optimism of a "classless society" or a "social equilibrium," the theory of social systems differentiation indicates elements that allow us to understand how, in a micro and macro sense, structural changes are developed. Differentiation theory makes new phenomena visible from a functional standpoint, i.e., from the perspective of the duality *problem/possible equivalent solutions*. This interpretive framework abandoned semantics of "unity" or "integration" that permeated the whole sociology to the mid-twentieth century (Parsons 1966; Habermas 1973) and suggest instead an approach that stresses differentiation as central dynamic of social changes. This way, the functionally differentiated Chilean law is not destined to be a guarantor of the integration of society, but to be a functional mechanism for the treatment of differentiated normative expectations, as a mechanism equivalent to other possible solutions. Nevertheless, the distinction that law holds is the capacity of its symbolic medium for connecting with other functionally differentiated communications - a specific achievement of modernity whose yields have not yet been fully developed.

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