

Chapter 1: Introduction

This book has two objectives. The first is to introduce non-German-speaking scholars of law, sociology, or political theory to a famous work of German political sociology: Niklas Luhmann's *Legitimation durch Verfahren*, which I suggest translating as 'Legitimation through Proceedings'.¹ Published in 1969 and disputed by contemporaries such as Jürgen Habermas, Luhmann's book seeks to redefine the concept of political legitimacy and expose some of the latent mechanisms through which the political system makes people comply with the law.

Like most of Luhmann's work that predates his more well-known theory of autopoiesis, *Legitimation durch Verfahren* has not been translated into English.² At the same time, it remains as relevant today as ever. While Luhmann's redefinition of political legitimacy is ultimately unpersuasive, his explanation for why people comply with the law remains instructive. Moreover, the political sociology of which *Legitimation durch Verfahren* is a part can undergird novel approaches to longstanding problems of legal philosophy and political science. Therefore, the second objective of the present book is to improve our understanding of two such problems with the help, in part, of Luhmann's early political sociology. Both concern constitutional adjudication.

The first problem, which is normative, consists of reconciling judicial review of legislation with our autonomy as individuals. After concluding that certain tensions between judicial review and our political autonomy are impossible to avoid, at least in the United States and Germany, I argue that Luhmann's political sociology helps us reconcile judicial review with our *legal* autonomy. Thus, his theory of personality development in a functionally differentiated society teaches us that constitutional courts can

1 Niklas Luhmann, *Legitimation durch Verfahren* (10th edn, Suhrkamp, Frankfurt am Main, 2017).

2 Luhmann's book *A Sociological Theory of Law*, which has been translated into English, briefly summarizes some of the core claims in *Legitimation durch Verfahren*. See Niklas Luhmann, *A Sociological Theory of Law* (Elizabeth King-Utz and Martin Albrow tr, 2014) 257 (eBook). Furthermore, *Legitimation durch Verfahren* has been translated into Bosnian-Croatian-Serbian, French, Greek, Japanese, and Portuguese.

safeguard our legal autonomy if they do their best to ensure that everyone will acquiesce in their rulings.

The second problem, which is more analytical, lies, first, in determining at what point judicial appointments politicize constitutional adjudication in America and Germany and, second, in gauging politicization's effect on constitutional courts. Some of the questions left unanswered by the concept of politicization are to what extent the confirmation stage contributes to judicial politicization and what it means for a court to be captured by party politics. Moreover, we do not know whether politicization will truly be as detrimental to constitutional adjudication as we fear. Relying in part on Luhmann's early systems theory, I suggest that only partisan confirmation votes help politicize constitutional adjudication; that a group of parties acting together can capture a court just as well as a single party; and that politicization's disadvantages depend on the extent to which a court is politicized.

I. The Radicality and Currency of Legitimation durch Verfahren

There is no shortage of English-language biographies of Niklas Luhmann. Nor do we lack summaries or analyses of his work.³ Yet there is less focus in the English-speaking world on *Legitimation durch Verfahren*. Perhaps that is because the book predates Luhmann's turn to autopoiesis. After this turn, Luhmann conceived of social systems—the touchstone of his theory of society—as self-referential and closed, not open,⁴ and as composed of

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- 3 See, e.g., Eva M Knodt, 'Foreword', in Niklas Luhmann, *Social Systems* (John Bednarz, Jr, tr with Dirk Baecker, Stanford University Press, Stanford, 1995) ix–xxxvi; Alex Viskovatoff, 'Foundations of Niklas Luhmann's Theory of Social Systems', 29 *Phil Soc Sci* 481 (1999); Chris Thornhill, *Political Theory in Modern Germany: An Introduction* (Polity Press, Cambridge, 2000) 174–207; William Rasch, *Niklas Luhmann's Modernity: The Paradoxes of Differentiation* (Stanford University Press, Stanford, 2000); Christian Borch, *Niklas Luhmann* (Routledge, London, 2011); Martin Albrow, 'Editor's introduction', in Niklas Luhmann, *A Sociological Theory of Law* (n 2) 10–35; Magnus Ramage and Karen Shipp, *Systems Thinkers* (2nd edn, Springer, Milton Keynes, 2020) 213–7; Jiří Šubrt, *The Systemic Approach in Sociology and Niklas Luhmann: Expectations, Discussions, Doubts* (Emerald Publishing, Bingley, 2020) 43–102.
- 4 Niklas Luhmann, *Social Systems* (n 3) 63.

communication, not action.⁵ For him, the books he published prior to the autopoietic turn represented something of a ‘pilot run’.⁶

Nevertheless, he did not think of *Legitimation durch Verfahren* as obsolete. In his later works on political and legal sociology, he stood by its findings, presenting them as part of his theoretical counteroffer to Jürgen Habermas’ conception of legitimate law in *Between Facts and Norms*⁷ and updating its terminology to better reflect his new conceptual approach.⁸ For that reason, we can consider it a testament to the intellectual potential of Luhmann’s early theoretical work. This potential will only become more apparent in the future as early and previously unpublished studies successively become available to the public.⁹

Legitimation durch Verfahren centers on government proceedings that terminate in or contribute to a binding decision, such as judicial proceedings, political elections, and the legislative process. It describes why and how such proceedings create the expectation that the decision’s addressees will acquiesce in it. It does not primarily concern itself with the role of procedure,¹⁰ nor does it explicate the decision-makers’ thought process.¹¹ Instead, it concentrates on the series of events that, while being *regulated* by procedure, require the participants’ input to come to life and terminate in a binding decision.

For that reason, it is inaccurate to translate ‘Legitimation durch Verfahren’ as ‘legitimation through procedure’.¹² Procedure is relevant to legitima-

5 *Id.*, 192.

6 See Niklas Luhmann, *Archimedes und wir: Interviews* (Dirk Baecker and Georg Stanitzek eds, Merve Verlag, Berlin, 1987) 142 (my translation) (‘Null-Serie der Theorie-Produktion’).

7 Niklas Luhmann, ‘*Quod Omnes Tangit*: Remarks on Jürgen Habermas’s Legal Theory’, 17 *Cardozo L Rev* 883, 892 (1995).

8 See Niklas Luhmann, ‘Selbstlegitimation des Staates’, 15 *Archiv für Rechts- und Sozialphilosophie* 65, 81–2 (1981), and *Das Recht der Gesellschaft* (Suhrkamp, Frankfurt am Main, 1995) 208–9.

9 Past examples include Niklas Luhmann, *Politische Soziologie* (André Kieserling ed, Suhrkamp, Berlin, 2010), *Systemtheorie der Gesellschaft* (Johannes Schmidt and André Kieserling eds, Suhrkamp, Berlin, 2017), and *Die Grenzen der Verwaltung* (Johannes Schmidt and Christoph Gesigora eds, Suhrkamp, Berlin, 2021).

10 See Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 36–7, 42.

11 *Id.*, 3.

12 As do Elizabeth King-Utz and Martin Albrow in Niklas Luhmann, *A Sociological Theory of Law* (n 2) 257, and Thomas McCarthy in Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Thomas McCarthy tr, Polity Press, Cambridge, 1997) 265.

tion because it helps constitute the proceeding as a social system. But it does not as such help legitimate the decision.¹³ That part falls to the proceeding precisely because it—not procedure—represents a social system.¹⁴

German-speaking readers should be made aware of this distinction as well. The term ‘Verfahren’ is ambiguous in German, as it can mean ‘procedure’, ‘proceeding’, and ‘proceedings’. I suspect, therefore, that most readers of *Legitimation durch Verfahren* think of ‘legitimation through procedure’, too, when they read the book’s title.¹⁵

Most social scientists both before and after *Legitimation durch Verfahren* have maintained that people’s belief in law’s justifiability is one important reason why they comply with it.¹⁶ Luhmann’s book is noteworthy because it sets out to explain why neither an appeal to people’s reason nor the threat of coercion accounts for their obedience. People’s attitudes and beliefs cannot matter, it argues, because they a functionally differentiated society is too diverse for the political system to base its stability on consensus, be it real or presumed.¹⁷ That is why Luhmann makes another remarkable decision, namely, to label the political system ‘legitimate’ once people comply with its decisions regardless of their personal stance toward them.¹⁸ Again, this stands in stark contrast to the theory of his contemporaries. Only one

13 Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 42. For the sake of convenience, I will refer to Luhmann’s theory as one of ‘procedural legitimation’ in Chapter 2.

14 See Niklas Luhmann, *A Sociological Theory of Law* (n 2) 257, and Chapter 2, subsection III.A.1.

15 See also André Kieserling, ‘Legitimation durch Verfahren (1969)’, in Oliver Jahraus and others (eds), *Luhmann-Handbuch: Leben – Werk – Wirkung* (JB Metzler, Stuttgart, 2012) 145, 149 (pointing out that many scholars continue to conflate *Legitimation durch Verfahren*’s proceedings with procedure or the decision-makers’ thought process).

16 See Max Weber, *Economy and Society: An Outline of Interpretive Society*, vol 1 (Guenther Roth and Claus Wittich eds, Ephraim Fischhoff and others tr, University of California Press, Berkeley, 1978) 37, and ‘Politics as a Vocation’, in *The Vocation Lectures* (David Owen and Tracy B Strong eds, Rodney Livingstone tr, Hackett Publishing Company, Indianapolis, 2004 [1919]) 32, 34, and Tom R Tyler, *Why People Obey the Law* (Princeton University Press, Princeton, 2006) 46 (treating the perceived obligation to obey the law as indicative of a legitimacy belief and finding that this obligation motivates many people to comply with the law).

17 See Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 167–8, 251–2.

18 *Id.*, 32–3.

year before *Legitimation durch Verfahren* was published, Jürgen Habermas argued that the government's authority must be justifiable to be legitimate.¹⁹

Luhmann's 'radicality'²⁰ prevented his book from being widely received, with most scholars preferring to use its arguments as a foil for their own approach.²¹ While they tried to reconcile liberal democracy with the demands of the student protestors of 1968, Luhmann evinced ironic disdain for the uprisings²² and doubled down on the very proceedings that the protestors rejected as manipulative and authoritarian.²³

Today, by contrast, the response to *Legitimation durch Verfahren* ought to be, and is, more measured. Thus, I argue in Chapter 2 that Luhmann's critics are right to reject removing the idea of justifiability from the concept of political legitimacy. But I also point out that his explanation for why people comply with the law is valuable because it *complements* theories that foreground people's legitimacy beliefs. After all, we already know that people do not comply with the law solely for the 'right' reasons. For instance, their fear of being punished if they break the law likewise accounts for their compliance.²⁴ Consequently, we should not reject out of hand the possibility that the compliance-inducing mechanisms Luhmann makes out can explain people's obedience at least in part.

Therefore, *Legitimation durch Verfahren* is not only radical but also current.²⁵ This gives us two reasons finally to commence the reception that the book failed to prompt in the first half-century of its existence.²⁶ In part,

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

20 Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren: Zum Entstehungskontext und zur Aktualität eines Nicht-Klassikers', 22 *Soziale Systeme* 1, 11, 12 (2017).

21 *Id.*, 10, 4.

22 See, e.g., Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 191 n 29, and Chapter 2, subsection III.B.2.

23 See Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren' (n 20) 3–4.

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

25 Justus Heck, Adrian Itschert and Luca Tratschin, 'Legitimation durch Verfahren' (n 20) 11.

26 See also André Kieserling, 'Legitimation durch Verfahren (1969)' (n 15) 149 (hoping for a new generation of critical readers who respond more appropriately to the book).

this process has already begun.²⁷ In Chapters 3 and 4, I try to extend it to an institution that Luhmann almost completely ignores in *Legitimation durch Verfahren*: constitutional adjudication.²⁸ To do so, I harness two aspects of his work that feature both in *Legitimation durch Verfahren* and in his larger political sociology: the theory of what makes people comply with the law in a functionally differentiated society and his more general theory of social systems and systemic differentiation.

II. Luhmann's Early Political Sociology and Constitutional Adjudication

A. Applying Luhmann's Sociology to a Normative Problem: Chapter 3

In Chapter 3, I apply Luhmann's theory of legitimate law in a functionally differentiated society to the judicial review of legislation. Because I reject his attempt to redefine the concept of political legitimacy, I do not argue that constitutional review is normatively legitimate if it meets Luhmann's legitimacy criteria. In other words, we still ought to focus on whether judicial review is worthy of our respect when we ask whether it is normatively legitimate; contrary to what Luhmann suggests, we should not content ourselves with people's acquiescence in it. However, his legitimacy theory does teach us something about an idea that lies behind the concept of legitimate authority: our autonomy.²⁹

After discussing the various cases for judicial review that exist today, I conclude that none of them covers all of the constitutional court's rulings, at least not in the United States or Germany. The decisions that are not covered thus interfere with our political autonomy, i.e., our right to be the authors of the law that binds us³⁰. To remedy this problem, many scholars argue that the courts should exercise some form of moderation. I suggest focusing on a different dimension of people's autonomy.

27 See the contributions in 22 *Soziale Systeme* (2017), which is dedicated to *Legitimation durch Verfahren*.

28 He mentions it only once, in a footnote toward the end of the book. Niklas Luhmann, *Legitimation durch Verfahren* (n 1) 245 n 3.

29 Cf Rainer Forst, 'The Justification of Basic Rights: A Discourse-Theoretical Approach', 45 *Netherlands J Legal Phil* 7, 10–1 (2016) (arguing that autonomy is the ground for the basic rights that, in his view, help justify the normative order to the individual).

30 See, e.g., Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (Jeffrey Flynn tr, Columbia University Press, New York, 2012) 135–6.

Thus, a chief ingredient of our *legal* autonomy is the right not to have to agree with the law we obey.³¹ According to Luhmann's theory of personality development in a functionally differentiated society, this autonomy diminishes if the law is not legitimate in a Luhmannian sense—that is, if we cannot expect everyone to comply with it. The less likely it is for people to acquiesce to constitutional courts' decisions, the less legally autonomous we are, in other words. Consequently, constitutional courts can strengthen at least one dimension of our autonomy if they make their decisions as authoritative as possible.³² I conclude Chapter 3 by discussing how constitutional courts can make their decisions more authoritative according to Luhmann.

B. Using Systems Theory to Remedy an Analytical Problem: Chapter 4

One of the reasons the political system can harness its proceedings to make people comply with the law is that it is internally differentiated into subsystems of party politics and of bureaucratic decision-making. According to Luhmann, this differentiation renders its decision-making both flexible and responsive, thereby making people trust its overall functioning. In Chapter 4, I apply the model of internal differentiation to the question of when judicial appointments politicize constitutional adjudication.

First, however, I describe the concept of politicization by judicial appointment in general, as there are few such accounts to date. I then discuss some of the questions that the concept leaves unanswered.

For example, it is unclear to what extent the parliamentary confirmation of judicial nominees contributes to politicization. If we apply the concept of politicization by judicial appointment strictly, it does so whenever the confirmed nominee's constitutional positions implement the nominating institution's party-political preferences. It does not matter what the parliamentarians intended with their vote. This conflicts with common parlance, whereby only partisan—not unanimous—votes constitute politicizing confirmation behavior.

Furthermore, politicization's effect on constitutional adjudication remains uncertain. Current empirical research is more ambiguous than polit-

31 See, e.g., *id.*, 134–5.

32 I use the term 'authoritative' as a synonym for 'likely to be obeyed'. For this use, see, e.g., Richard H Fallon, Jr, 'Legitimacy and the Constitution', 118 Harv L Rev 1787, 1828 (2005).

icization scholars suggest. Lastly, the concept of politicization by judicial appointment may be too inflexible to accommodate the German judicial selection system. It suggests that the Federal Constitutional Court is not politicized even though the latter's composition is subject to complete party-political control and the parties that have concluded an informal agreement on how to fill new vacancies have excluded certain, ideologically more distant parties from nominating candidates of their own.

Luhmann's early systems theory helps us address these issues. Thus, the model of the political system's internal differentiation both accommodates and contextualizes the phenomenon of party politics. This helps us distinguish between politicizing and non-politicizing confirmation behavior because it highlights that parliamentarians can choose, by virtue of their position within the political system, whether to act as party politicians or as government decision-makers. More, Luhmann's argument that a functionally differentiated society gives rise to a multitude of attitudes and beliefs suggests that a constitutional court can diminish politicization's negative impact if it does its best to present itself as at least somewhat ideologically flexible.

III. How to Characterize this Book

In closing, a few words are in order on this book's method (A), its place in the research landscape (B), and its structure (C).

A. Methodology

This book brings (some of) Luhmann's observations to bear more or less directly on problems of constitutional adjudication. Accordingly, it treats *Legitimation durch Verfahren* as a current theory that is waiting to be received, not as a classic that merits reinterpretation. It is not interpretive in a methodological sense.³³ Instead, its method is best described as directly associated with Luhmann's own approach.

33 A more interpretive approach would consist of reading the book in the light of current problems to draw lessons from it for these problems. See Armin von Bogdandy, 'Das Öffentliche im Völkerrecht im Lichte von Schmitts „Begriff des Politischen“: Zugleich ein Beitrag zur Theoriebildung im Öffentlichen Recht', 77

Luhmann's method was one of systems-theoretical functional analysis. Classical functional analysis investigated the contributions of specific recurrent activities to 'the maintenance of the structural continuity' in social life.³⁴ Luhmann, however, made functional analysis more comparative. His functionalism foregrounds the variety of *different* activities that are equally capable of addressing a specific problem (and are hence called functional equivalents).³⁵ Systems theory complements this analysis because social systems help specify which possibilities of action can be considered functional equivalents. Thus, only possibilities that allow the social system to react to changes in its environment, i.e., that are compatible with different problems it has to manage, are eligible as functional equivalents.³⁶

Even though this book focuses on both the Supreme Court and the German *Bundesverfassungsgericht*, I do not conceive of it as an example of comparative legal scholarship. To be sure, I feature the two courts because I hope to understand each better. What undergirds this attempt is not a comparison between the two, however, but Luhmann's sociology;³⁷ my primary aim in including both courts is to exemplify how Luhmann's sociology can be applied to two distinct forms³⁸ of constitutional adjudication.³⁹ Of course, this does not mean that this book is spared the challenge typical of

Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg J Int'l L) 877, 879 (2017) and the references cited therein.

- 34 Alfred R Radcliffe-Brown, 'On the Concept of Function in Social Science', 37 Am Anthropologist 394, 396 (1935).
- 35 See Niklas Luhmann, 'Funktionale Methode und Systemtheorie', in *Soziologische Aufklärung 1: Aufsätze zur Theorie sozialer Systeme* (6th edn, Westdeutscher Verlag, Opladen, 1991) 31, 35–6.
- 36 *Id.*, 38, 43–4, 47–8.
- 37 On the comparative goal of understanding either one's own or another system better, Vicki C Jackson, 'Methodological Challenges in Comparative Constitutional Law', 28 Penn State Int'l L Rev 319, 319–20 (2010). On yet another goal—that of establishing best practices—see *id.*, 321.
- 38 In very general terms, the German Federal Constitutional Court exemplifies centralized, specialized constitutional review, whereas the Supreme Court represents decentralized, diffuse judicial review. See Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber, 'Constitutional Adjudication in the European Legal Space', in Armin von Bogdandy, Christoph Grabenwarter and Peter M Huber (eds), *The Max Planck Handbooks in European Public Law*, vol 3 (OUP, Oxford, 2020) 1, 12.
- 39 Ralf Rogowski's systems-theoretical analysis of the Supreme Court and the *Bundesverfassungsgericht* has the same approach. See 'Constitutional courts as autopoietic organisations' (n 43) 124.

comparative studies—namely, achieving a ‘deep’ understanding of the legal order with which the author is less familiar.⁴⁰

B. The Research Landscape

This is not the first book to bring systems analysis to bear on courts.⁴¹ More, there is no lack of scholarship that focuses on both the United States Supreme Court and the German Federal Constitutional Court.⁴² One article even analyzes the two courts from a systems-theoretical perspective.⁴³ However, it engages with Luhmann’s scholarship after the latter’s autopoietic turn and does not feature *Legitimation durch Verfahren*. Therefore, the present book is the first to interpret constitutional adjudication in the light of Luhmann’s early political sociology. As I set out in Chapter 4, the theory of open, not closed, social systems may even be more instructive than its successor, at least when it comes to the problem of politicization by judicial appointment.⁴⁴

C. Structure

To appeal to as many readers as possible—including those who are less interested in *Legitimation durch Verfahren* than in constitutional adjudication—the ensuing chapters are independent of each other and do not assume that the reader has read the rest of the book. Consequently, those

40 See Pierre Legrand, ‘How to compare now’, 16 *Legal Stud* 232, 234–8 (1996).

41 See Sheldon Goldman and Thomas P Jahnige, *The Federal Courts as a Political System* (Harper & Row, New York, 1971).

42 See, e.g., Marcel Kau, *United States Supreme Court und Bundesverfassungsgericht: Die Bedeutung des United States Supreme Court für die Errichtung und Fortentwicklung des Bundesverfassungsgerichts* (Springer, Berlin, 2007), Ralf Rogowski and Thomas Gawron (eds), *Constitutional Courts in Comparison: The U.S. Supreme Court and the German Federal Constitutional Court* (2nd edn, Berghahn, New York, 2016), and Nicole Schreier, *Demokratische Legitimation von Verfassungsrichtern: Eine rechtsvergleichende Analyse am Beispiel des Bundesverfassungsgerichts und des United States Supreme Court* (Nomos, Baden-Baden, 2016).

43 Ralf Rogowski, ‘Constitutional courts as autopoietic organisations’, in Michael Wrase and Christian Boulanger (eds), *Die Politik des Verfassungsrechts: Interdisziplinäre und vergleichende Perspektiven auf die Rolle und Funktion von Verfassungsgerichten* (Nomos, Baden-Baden, 2013) 123.

44 See Chapter 4, subsection IV.E.

who do read the entire book will have to tolerate a certain amount of repetition: To describe how *Legitimation durch Verfahren* can improve our understanding of constitutional adjudication, Chapters 3 and 4 will have to reiterate parts of the summary of Luhmann's theory I present in Chapter 2.

To minimize the repetition, I add details to these recapitulations that do not already feature in Chapter 2. For instance, I wait until Chapter 3 to describe how, according to Luhmann, the political system contributes to its stability by generating systemic trust and creating an expectation of outcome equality. Furthermore, I fill in some details regarding the political system's differentiation in Chapter 4, where they help us better understand judicial politicization.

