

Committing Sociology (of Law):
The Autonomy of Law in Canada's 'War on Terror'

by

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Abstract

Critical sociologists often argue that post-2001 counterterrorism policies, which depend on extraordinary powers and various executive provisions, are the ultimate example of sovereign power's victory over the rule of law. Such opprobrium often ignores the empirical study of legal communications in lieu of policy documents and political discourses. As such, this thesis advocates for an analysis of legal communications in the context of Canada's 'war on terror'. The aim is to provide an alternative sociology of anti-terrorism law by engaging with a theoretical perspective often overlooked in sociology: Niklas Luhmann's social systems theory. Through an analysis of Supreme Court of Canada decisions, this thesis examines the impact of anti-terror legislation on the autonomy of law. It is argued that while the system of law is always 'endangered' by threats from the outside, law's creative maintenance of anti-terror legislation can be read as an example of the reinforcement of law's autonomy.

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1 Introduction

1.1 Introduction

I think that in terms of radicalization, this is obviously something that we follow. Our security agencies work with each other and with others around the globe to track people who are threats to Canada and to watch threats that may evolve...I think, though, this is not a time to commit sociology, if I can use an expression...¹

Terrorism is by no means a new phenomenon. Violence in the pursuit of politics, ideologically or politically motivated violence, or violence intended to inspire fear and intimidation in mass collectivities of people has been observed in various forms for centuries. The concept of ‘terrorism’ can be traced back to (at least) the French Revolution (Murphy, 1989), where *la terreur* (‘the terror’ in English) designated a period of politically charged violence that occurred between rival political factions – the *Girondins* and the *Jacobins*. The search for a legal definition, however, is a much more recent development. As Levitt (1986) notes, the first organized legal attempt to define the problematic of terrorism came in a series of international conferences held in different European capital cities during the 1920s and 1930s. Since then, various legal experts, governments, policy makers, and academics have attempted to define the concept – resulting in countless ‘legal’ definitions of terrorism.² The quest for a formalized legal definition has been criticized as a search for the ‘Holy Grail’ (Levitt, 1986), a vexing international problem (Scharf, 2001), a definitional quagmire (Schmid, 1995), and a

¹ Prime Minister of Canada Stephen Harper made this comment in response to a question about a 2012 foiled plot to derail a Via Rail passenger train travelling between Toronto and New York. Comments can be found at <http://www.cbc.ca/news/politics/harper-on-terror-arrests-not-a-time-for-sociology-1.1413502>

² In 1988, Schmid and Jongman observed over 100 different definitions. One could argue that we would see a higher number today.

regretful search to define an imprecise, ambiguous term that serves no operative legal purpose (Baxter, 1974). Still, legal jurisdictions around the world have hitherto been able to respond to the phenomenon of terrorism through existing legal forms;³ thus raising questions of how to understand law's terrorism.

Prior to 2001, Canadian legislation concerning terrorism was primarily restricted to immigration and refugee regulations, border security, and aviation security. Beforehand, Section 19(1) of the Canadian Immigration Act⁴ provided perhaps the most robust characterization, stating that those involved in 'terrorism' or 'terrorist organizations' were to be refused entry into the country; however it fell short of formally defining terrorism. Other legislation, including the *Aeronautics Act* (1985), the *National Defence Act* (1985), and the *State Immunity Act* (1985) also failed to provide legal definition of the concept. In 2001, following the attacks on the World Trade Center in New York and in line with many other western jurisdictions, Canada passed its *Anti-terrorism Act* (2001), which for the first time introduced the definition of 'terrorist activity' into section 83 of the *Criminal Code of Canada*.⁵ Still, however, this failed to specify a legal definition of 'terrorism', instead focusing on situational activities and circumstances under the umbrella of 'terrorist activity'.⁶ Nonetheless, Canadian law has

³ As noted, law has been able to respond to problems related to terrorism, through existing legislation, for many years.

⁴ Now repealed and replaced by the *Immigration and Refugee Protection Act* (2001).

⁵ *Criminal Code*, RSC 1985, c 46. Section 83.01.

⁶ Section 83.01(1)(b)(i) and (ii) provide adequate definitions of 'terrorist activity' however, they fall short of defining 'terrorism' as such. The 'activity' outlined in s. 83.01 (b) (ii) can be summarized elsewhere in the criminal code: causes death by the use of violence (murder, s. 229(a)), endangers a person's life or cause serious risk to the health or safety of the public (criminal negligence, s. 219(1)), causes substantial property damage or causes serious interference or serious disruption of an essential service (mischief, s. 430(1)).

been able to (legally) address problems associated with terrorism with this rather vague definition, stating that it provides “a sufficient basis for adjudication and hence is not unconstitutionally vague” (Suresh v. Canada, 2002). What is meant here by law’s ability to ‘address’ or ‘deal’ with problems associated with terrorism is that prior to 2001 the Canadian legal system was able to respond to certain types of problematic behaviour with existing legal structures – for example, prior to 2001 ‘terrorism’ was criminalized using existing provisions outlined in the *Criminal Code of Canada* and the *Immigration and Refugee Protection Act*, among other statutes – conceptualized as ‘terrorism’ by the legal system. Here law’s ability to ‘address’ problems associated with terrorism is not understood within a traditional functionalist input-output model. In contradistinction and as I will show, the function of law in responding to ‘terrorism’ is understood as a juridical response (through communication and meaning-giving) which is not only constructed by, but also constructs, particular conflicts between individuals and society. This will be explicated in great detail in the pages to come; however, what is important for introductory purposes is that notwithstanding law’s ability to deal with problems of terrorism prior to its adoption, post-2001 anti-terror legislation has emerged as a primary mode of combating terrorist activity.

In Canada, irrespective of criticisms over its utility, numerous politico-judicial justifications for the upsurge in anti-terrorism legislation have emerged over the past decade and a half – for example, that it serves to provide security to citizens and national interests, that it is necessitated by the global ‘war on terror’, or that it strengthens international cooperation efforts. But such rationales have been increasingly observed to be, from various points of view, problematic. Post-2001 anti-terrorism legislation

infringes upon citizens' rights and freedoms, marginalizes certain cultural groups, and weakens international relationships. Amidst such criticisms, anti-terror legislation is increasingly being used in legal operations to combat terrorist activity, raising questions such as: what does the law see when it observes terrorism? In light of criticism, why does the legal system maintain the use of anti-terror law? How does the Canadian legal system justify the use of anti-terror legislation? How does the law communicate about terrorism? And what function does anti-terrorism legislation serve in law's relationship to other social systems?

In the context of counterterrorism law, scholars tend to agree that the rule of law has surrendered to sovereign power. Often, such literature is heavily grounded in the empirical study of policy and political debates or approach law from a highly normative standpoint. In contradistinction, the present work is an attempt to offer a sociology of Canadian anti-terror law grounded in the empirical study of the law itself. The emergence of anti-terrorism legislation gives us an opportunity to reflect on the relationship between law and other social systems. More traditional sociologies of law tend to hold that boundaries between law and other social systems are increasingly blurred, particularly so in the context of legal responses to the terrorism phenomenon. A radically different approach is presented in the work of Niklas Luhmann, who maintains that society is differentiated into systems of organized and recursive communication and their self-reproduced environments. In this theoretical framework, law is understood as an autonomous social system which cannot be determined from the outside. While I will clarify what is meant by society as functionally differentiated, autonomous, and self-produced in subsequent chapters, what is important here is that this thesis offers an

account of the autonomy of legal decision making in what has been observed, by various observers, as the ultimate demonstration of the heteronomous quality of the legal apparatuses of Western liberal democracies: post-2001 anti-terrorism legislation.

1.2 Research Question

It is thus my aim to offer an understanding of how the Canadian system of law observes and communicates about terrorism. The focus is on the Canadian legal system for several reasons: first, Canadian political discourse on the definition of terrorism has led to significant questions regarding its utility.⁷ Second, even without a ‘strict’ definition of terrorism currently available in Canadian law, the legal system has been able to function in ways that include the phenomena as part of legal operations. Third, prior to 2001, Canadian law was able to address problems related to ‘terrorism’ through (at the time) current legislation and case law. Since that time however, many forms of ‘anti-terror’ legislation have been created and are increasingly being used, inevitably raising questions relating to how Canadian law justifies the maintenance of anti-terrorism legislation.

As such, this research will be guided by the overarching question: is post-2001 Canadian anti-terrorism legislation the ultimate demonstration of sovereign power’s victory over rule of law? In other words, can we observe the juridical response to terrorism as proof of the heteronomous quality of the Canadian legal system, or is there an alternative way to theorize law’s relationship with other social systems in the face of Canada’s ‘war on terror’? In an effort to address such important questions, this thesis will

⁷ For example, in 2010, the *Special Senate Committee on Anti-terrorism* raised the question of legally defining ‘terrorism’ to various security ‘experts’. See *Proceedings of the Special Senate Committee on Anti-terrorism Issue 4 – Evidence*.

also be guided by subsequent questions: how is the concept terrorism observed, or in other terms constructed, constituted, or produced, by the system of law? What is the *function* of Canadian anti-terror law as a system able to combat ‘terrorism’? What is the law’s discourse on the history of ‘terrorism’ in Canada? Can legal decisions be observed as political (or economic, or scientific, or religious)? Or can we view anti-terror legislation as the ultimate example of sovereign power’s victory over the rule of law?

In Luhmann’s theoretical framework, functionality must not be confused with some sort of ideal state or benchmark for societies, or the logical “outcome of progress or as a system with superior efficiency” (Luhmann, 1984, p. 64). As we will see, Luhmann suggests that each of society’s subsystems, including law, represents a system of organized and recursive communication existing within an environment which is constructed from the systems’ own operations. Social systems thus reproduce their own identity within the environment that it has itself produced through communications (i.e., through meaning-giving). For Luhmann, functionally differentiated systems in their production of communications transform information into meaning, and each system has its specific function in relation to the organization of such meaning. Each organization of meaning is proper to each system, so that one system’s particular way of organization cannot be taken over by other systems. As such, Luhmann advances a concept of functionally differentiated subsystems which organize meaningful communications through a collection of autonomous but interdependent processes. In sum, Luhmann differs quite concretely from traditional scholars in the functionalist tradition, and in so far as he differs, his framework allows for the analysis of the *function* of the legal system without traditional functionalist assumptions.

1.3 Structure of the Thesis

Chapter 2 details previous scholarly endeavors into the study of terrorism. In particular, the focus is on how law has been used to address problems associated with terrorism. The chapter is divided into three sections: the first, anti-terror law as an instrument, where I highlight existing research on how anti-terror law is used for the prevention, identification, and suppression of terrorism; the second, the ambiguity of post-2001 anti-terror law, underlines a growing body of critical legal scholarship that presents anti-terror law as an overly broad and ambiguous attempt to solve problems associated with terrorism; the final section, exceptionalism and the ‘war on terror’, features an exploration into critical Canadian scholars that argue anti-terror legislation is the example *par excellence* of the victory of sovereign power over the rule of law.

Chapter 3 introduces the theoretical framework of sociology of law. In particular, I present Niklas Luhmann’s social systems theory as the theoretical lens that will be applied to investigate Canada’s anti-terrorism law.

Chapter 4 outlines the methodological implications of selecting Luhmann’s social systems theory as the foundation for my analysis. Here I focus on Luhmann’s functional method and form analysis in addition to his concepts of communication, deparadoxification, and openness through closure.

Chapter 5 analyzes several Supreme Court of Canada rulings on the constitutional validity of various post-2001 anti-terrorism provisions. In particular, I focus on how law

has been, and continues to be, able to maintain and transform the use of anti-terrorism legislation in spite of growing concerns about its utility.

Chapter 6 reflects on one of the main questions regarding the autonomy of law in the context of Canada's security certificate mechanism. Here, I analyze the 2007 Supreme Court of Canada decision *Charakaoui v. Canada*, to illustrate how the legal system autonomously maintains the mechanism while being influenced from the outside.

Chapter 7 concludes by rearticulating the arguments made about law's creative maintenance of anti-terrorism law in general. Here I focus on the main research question about whether we can observe law as an autonomous subsystem of society in what is often taken to be law's ultimate defeat by the hands of political power: the 'war on terror'.

2 Contextualizing the Field

Until very recently, sociologists (and criminologists alike) have by and large ignored the study of terrorism and counter-terrorism. Most terrorism-related research had been conducted in other disciplines, most notably political science (Lacqueur, 2003; Jenkins, 1985; 2003; Heymann, 2001; 2003) international affairs (Brown, 2002; Sterba, 2003) and psychology (Horgan, 2003; Borum, 2004; Crenshaw, 2000). There is little doubt that such diverse insights on terrorism are relevant and practical, but the relative absence of sociology from the dialogue is certainly noteworthy. Since the events of September 11, 2001, however, terrorism-related literature has experienced an upsurge within sociology (Beck, 2002; 2003; Denzin and Lincoln, 2003; Deflem, 2004; Turk, 2004; Tosini, 2007). These analyses highlight the evolution in the governance of terrorism; nevertheless they mostly fail to problematize the relationship between law and other systems of society (i.e., politics, economy, religion). This existing body of literature focuses on terrorism-related law mainly as one aspect of broader themes of legislative jurisdiction (Heymann, 2001), international policy relations (Cole, 2003; Peers, 2003), and the practical arrangements and strategies to fight terrorism at the local level (Deflem, 2004). Much less debated is how anti-terror law affects, and is affected by society. As such, the ensuing pages will address various substantive and theoretical approaches to anti-terror law prior to advocating for a return to sociology of law in the context of anti-terror legislation in the following chapter.

The discourse on post-2001 anti-terror law can generally be articulated in four (sometimes overlapping) ways: (1) post-2001 anti-terror law provides the state with tools

to locate, intervene, counter, and incapacitate ‘terrorists’ and ‘terrorist’ organizations; (2) anti-terror law has led to the proliferation of the security and surveillance apparatus, and as such has led to pervasive surveillance of global proportions (Haggerty and Gazso, 2005; Lyon, 2003); (3) post-2001 anti-terror laws can be vague and potentially threatening to human rights (Roach and Trotter, 2005); or similarly, (4) post-2001 anti-terror laws act as a modern form of normative exceptionality that violate traditional standards and principles of law (Bell, 2006; Larsen and Piché, 2009; Aradau, 2009). This chapter will examine these discourses in sequence⁸ and argue that although each approach produces significant accounts of law’s relationship with the fields of surveillance, risk, techniques of government, critical legal studies, and public policy, they tend to approach law in a rather determinist way; that is, the legal system *determines* or is *determined by* systems of society external to law. Inasmuch as they provide critical accounts of anti-terror law, I shall argue that these accounts generally suffer from problems associated with their own normativity. From a sociological standpoint, this is a problem of tension between two of society’s social systems, namely politics and law. The question (sadly missing from studies of terrorism) of law’s relationship with other social systems thus remains important in discussions of anti-terror law; the important question of the relationship between law and other discursive formations is thus left unasked. Can an alternative sociology of anti-terror law be of value here? In an attempt to contribute to such debates, this thesis proposes an approach that is often overlooked in current

⁸ Discourses (1) and (2) will be collapsed into the heading “Anti-terror law as Instrument”

sociologies (and criminologies) of law, namely Niklas Luhmann's social systems theory.⁹ As such, in the pages that follow, I will submit Luhmann's sociology to what has come to be taken by some as the ultimate sovereign victory over the rule of law: Canada's anti-terrorism law.

2.1 Anti-terror law as Instrument

The bulk of existing research on terrorism has focused on the identification and prevention of individuals and groups engaging in various definitions of 'terrorist' activity (see Barak, 2004; Noricks, 2009; Daly & Gerwehr, 2006; Gartenstein-Ross & Grossman, 2009; Barlett, Birdwell, & King, 2010; Ellis, James, & Parent, 2011). These studies generally inform policy by constructing the figure of the 'terrorist' and 'terrorism' more broadly as the result of some sort of *pathologizing process* – individual, biological, psychological, social, and so on – and seek to identify, intervene, and 'prevent/pre-empt' 'risky', or 'radicalized', individuals or groups before the manifestation of violence. To address these problems, law is perceived (and often presupposed) as a tool providing intelligence and law enforcement agencies greater authority and prerogative to counter 'emerging threats of terrorism'. For example, many have suggested that legislation passed across the west the months immediately following September 11th – such as the United States' *Patriot Act* (2001), Canada's *Anti-terrorism Act* (2001), and the United Kingdom's *Anti-terrorism, Crime and Security Act* (2001) – expands the regulatory power of intelligence agencies, broadens the discretion of law enforcement and immigration authorities, and reduces restrictions on the gathering of intelligence in various contexts (see Wark, 2001; Donohue, 2008; Roach, 2008).

⁹ As Moeller (2012) observes, Luhmann's work has yet to spread to a wide scholarly audience, especially in North American Anglo-saxon academic traditions.

Contributions in the sociology of social control have typically focused on the police aspects of counter-terrorism. Many academics argue that police powers have rapidly expanded in the post-2001 environment (Deflem, 2002a; 2002b; Roach, 2004; Friedland, 2001). For example, Canada's *Anti-terrorism Act* adds provisions for preventative arrest¹⁰ when there are reasonable grounds to believe that a 'terrorist activity' will be carried out and reasonable suspicion to believe that detention is necessary to prevent it. In addition, the Act introduced investigative hearings that compel individuals to answer questions relating to any 'terrorist activities'¹¹. The individual cannot refuse to answer on the basis of self-incrimination, but the evidence gathered cannot be used in subsequent legal action against the person compelled. As Stewart (2004) argues, these provisions may indeed give the police and the Crown powers to conduct 'secret' investigations with little regard for the liberty of individuals under investigation. Some even explicitly argue that the war on terror has expanded executive authority in such a way that government administrations have shifted dangerously close towards autocratic practices (de Lint, 2004). Similar observations have been made in the substantive areas of privacy (Austin, 2001; Donohue, 2008), financial surveillance (Davis, 2001; Duff, 2001; Donohue, 2008), border security (Amoore, 2006), and immigration (Bigø, 2002). On the other hand, at least one Canadian legal scholar has advocated for additional police powers, including permitting undercover operatives to commit crimes in the course of their duties (Friedland, 2001). While such literature aims

¹⁰ One under preventative arrest could be held for up to seventy-two hours, but the individual could be placed under recognizance for up to a year.

¹¹ Although investigative hearings and preventative arrest expired in 2007 due to an original sunset clause, they were reinstated by Bill S-7 in 2013.

to empirically examine the practical implications of anti-terror law it often ignores the systematic study of the relationship between law and societies other social systems.

Another area that has experienced rapid expansion since 2001 is the study of surveillance. Across many Western jurisdictions, the ease at which governments can access and obtain information is widely viewed as a by-product of counter-terror policy. As Laura Donohue (2008) maintains, “[p]owers of surveillance in the United Kingdom and the United States have played out in different ways. Yet both states now find themselves courting the shadow of Big Brother” (p. 272). In Canadian context, Wesley Wark (2001) has noted the implications of anti-terror law on the surveillance and intelligence gathering community. He shows that Canadian anti-terror law explicitly led to the emergence of FINTRAC (Financial Transaction and Activities Tracking Centre) under the Department of Finance; this centre is responsible for the analysis of money flows inside and outside of Canada. He also illustrates how the Communication Security Establishment of Canada (Canada’s signal intelligence agency) has been given the power to, under Ministerial directive, intercept Canadian communication even if the other end of the network is located outside of Canada. This seems to highlight much of what Lyon (2003) highlights in his book *Surveillance After September 11*. He argues that although surveillance is by no means a new phenomenon, its development has been extended and intensified since 2001. This has led, according to him, to systems that sort people into categories for differential treatment and although these extraordinary legal measures promise security, such claims are difficult to justify (Lyon, 2003). These discourses on surveillance in the post-2001 environment seem to converge around similar dystopian

themes, as if they come straight out of an Orwellian novel.¹² They also tend to be rather speculative in nature, often presuming that there is a direct relationship between law and surveillance without qualifying their claims. While empirically grounded in policy documents, intelligence reports, governmental data, and legal documents, this work does not provide a sociology of law *per se*. Instead of an analysis of law's relationship to society vis-à-vis society's other social systems, this body of work approaches law and politics as mutually exclusive – as dependent upon one another in both function and operation. In other words, it presupposes the relationship between law and politics and offers a normative discussion about the direction of anti-terror law.

In sum, it is clear that much work has been done in the area of anti-terror law and its practical implications for substantive areas such as police, surveillance, executive power, and security. Missing from critical analysis, however, is a sociology of anti-terror law (particular in the context of the Canadian legal system) where the relationship between law and society's social systems is problematized. From a sociological point of view, the tension between law and other social systems (politics, economy, religion, etc.) is of great concern. This thesis situates itself within this framework by analyzing law's relationship with other social systems in the context of the global 'war on terror'. Prior to this analysis, however, I will outline some of the legal literature on the multiple forms of anti-terror law that has emerged since 2001 (with a focus on Canada). Following this, I will introduce some work that attempts to apply sociological and criminological concepts to the study of terrorism.

¹² Influential surveillance scholar David Lyon himself has noted this tendency (Trottier & Lyon, 2012).

2.2 The Ambiguity of post-2001 Anti-terror law

Kent Roach (2004) argues that the problem which led to the events of September 11th 2001 was a failure of intelligence gathering and the inability of police to enforce laws rather than the ambit of criminal law itself (p. 515). The Canadian government seems to have disagreed as barely a month after 9/11 the federal government introduced an enormous anti-terror bill (*Bill C-36*) that for the first time attempted to introduce defining characteristics of terrorism into the *Criminal Code of Canada*. Legal scholars tend to agree that the bill's definition of terrorist activity, clearly inspired by other Western jurisdictions own anti-terror legislation, was too far-reaching in regards to the burden of proof required and the commission of a broad range of harms to society. For example, Roach (2004) observes that the bill as first introduced:

“Would have defined as acts of terrorism politically motivated acts that intentionally caused a serious disruption of any public or private essential service. Such acts had to be designed to intimidate a segment of the public with regard to its security, but this could include its ‘economic security’. Alternatively they had to be designed to compel a government, an international organization or any person to act. The only exception from this sweeping prohibition was for ‘lawful advocacy, protest, dissent or stoppage of work’” (p. 513).

The bill's overly broad definition of terrorism led to widespread criticism among many civil groups (including unions, churches, charities, pro-life groups, and Muslim and Aboriginal groups, to name but a few) that the act would lead to classifying many legitimate protests and strikes as terrorism (Roach, 2001). The concern led to

amendments which dropped the requirement that only protests deemed ‘legal’ would be exempted and permitted the expression of ‘normal’ political, religious, or ideological thought or opinions. Although the amendments did indeed narrow the definition of terrorist activity, it remained overly broad in comparison with the functional definition of terrorism used in past legal operations (Roach, 2005).¹³ For example, the definition used to classify the *le front de libération du Québec* (FLQ) as an unlawful association in the emergency orders of the October 1970 crisis was: “any group of persons or association that advocates the use of force or the commission of crime as a means of or as an aid in accomplishing governmental change within Canada” (*Public Order Regulations*, 1970, s. 3). This differs in a concrete way from the current definition of ‘terrorist activity’ in Canada’s *Criminal Code*, which defines terrorism as an act committed “in whole or in part for a political, religious or ideological purpose, objective or cause” with the intention of intimidating the public (or sections of the public) “...with regard to its security, including economic security, or compelling a person, a government or a domestic or an international organization to do or to refrain from doing any act” (*Criminal Code*, 1985, s. 83.01). The difference in permanence between emergency regulations and legislation was also the site of significant criticism. Legal experts argued emergency regulations (such as those used in the October 1970 crisis) were adequate to deal with terrorism. As a result of such critique, the bill was amended to include a sunset clause after five years on two of the most controversial provisions of the bill: namely, preventative detention and

¹³ Prior to 2001, there were an abundance of *Criminal Code* offences that made various terrorist activities illegal including: murder (s.230), offences relating to explosives (ss. 81 and 82), hijacking (s. 76), uttering threats (s. 264.1), kidnapping and hostage taking (ss. 279 and 279.1), various offences in relation to immigration, among many others.

investigative hearings, and the requirement of a Parliamentary review of its operations.¹⁴ However, as Ashworth (2002) suggests, the permanence of the Act increased the risk of investigative and trial power provisions spreading to other parts of criminal law, thus blurring distinctions between the definition of terrorism and other criminal phenomena such as organized crime.

There were also questions surrounding anti-terror law's jurisdiction. As several scholars have noted, the *Anti-terrorism Act* is Canada's effort to contribute to international counter-terrorism initiatives that exploded after September 2001.¹⁵ The Act covers a broad range of acts committed both inside and outside of Canada. Under the *Anti-terrorism Act*, one is committing an offence if:

“[A]n act or omission, *in or outside Canada*, that is committed: (b) in whole or in part with the intention of intimidating the public, with regard to its security, including its economic security, or compelling a person, a government or a domestic or international organization to do or to refrain from doing any act, whether the public or the person, government or organization is *inside or outside Canada*” (*Criminal Code of Canada*, 1985, s. 83, italics added).

Individuals can be prosecuted in Canada for sending support (financial or otherwise) to conflicts in foreign countries (s. 83.02 of the *Criminal Code*), knowingly participating in

¹⁴ In February 2007, the House of Commons voted 159-124 against renewing the provisions, leading to their expiry. In April 2013, bill S-7 was passed which reinstated investigative hearings and preventative detentions. The bill was again subject to a sunset clause of five years set to expire in 2018.

¹⁵ As Brunné (2001) and others point out, the *Anti-terrorism Act* is an effort to show Canada's commitment to counter-terrorism strategies specifically as a response to United Nations conventions on anti-terrorism.

a terrorist group directly or indirectly (s. 83.18), knowingly facilitating a terrorist activity (s. 83.19), instructing the carrying out of a terrorist activity (s. 83.22), or harbouring any person who has carried out a terrorist activity (s. 83.23), all of which can be committed outside of Canada. Critical legal scholars have agreed that such provisions (in addition to the definition of ‘terrorist activity’) extend Canada’s criminal jurisdiction to align with the international community’s counter-terrorism policy. The cost of which, according to Brunnee (2001), is the “the subordination of means to ends” (p. 342) or in other words, the rush to legislate new terrorism offences may have significant implications for fundamental cornerstones of justice such as rule of law, jurisdiction, use of force, and human rights.

Such assessments have also led to an upsurge in critical scholarship on the implications of post-2001 anti-terror law on civil liberties. Socio-legal scholar Lucia Zedner (2005) observes that, borrowing from the likes of Dworkin (2003) and Waldron (2003), notions of *balance* between security and liberty are often used to justify and defend as well as challenge legislative anti-terrorism frameworks. Zedner goes on to suggest that fear caused by the catastrophic threat of terrorism “tips the balance” in favour of security against the protection of civil liberties (2005, p. 511). Although criminologists have long argued that it is practically impossible to determine how far threats should be permitted to tip the balance of security and liberty (O’Malley, 1992; Garland, 2003), what is important here is that legal scholars tend to accept that catastrophic events (such as September 11) can systematically reconfigure criminal law in favour of security over liberty. Although Zedner problematizes the dichotomy of liberty/security and the concept of balance, her point is clear: when the pursuit of security

proceeds at rapid speeds following catastrophic events it quite often contradicts fundamental aspects of civil liberty. She calls for a return to critical judicial scrutiny and an emphasis on the promotion of juridical values of due process and rule of law rather than trying to subordinate law through vague administrative procedures. Although this work indeed examines the relationship between law and politics, it does so by offering normative critique of counterterrorism law in which traditional legal values and rule of law are given superiority. Additionally, it tends to assume that communications resulting from catastrophic events inevitably ‘reconfigure’ criminal law, without problematizing how law includes such communications as part of its operations.

The motives of such reconfigurations are often articulated as beneficial to all. However in practice, Heymann (2002) contends, anti-terror law is often imbalanced and negatively affects a minority of people who find themselves subject to state investigation (p. 446). For example, Kruger, Mulder, and Korenic (2004) maintain that in the post-2001 environment the discriminatory immigration practice of dividing immigrants into preferred and non-preferred groups underwent a shift from questions of integration into Canadian society to protection from immigrants who are perceived as threats to security. In addition, much of the scholarly discourse on anti-terror law has focused on the discrimination of particular groups – most often members of the Arab and Muslim communities (Bahdi, 2003; Razack, 2008; Thobani, 2007). Bahdi (2003) argues that anti-terrorism neither officially condones nor endorses racial profiling, and thus opens a space for discrimination to occur *in practice*. Canadian law may not explicitly target individuals on the basis of race, the author argues, but tends to exclude minority groups in its application (Bahdi, 2003, p. 297). As such, in the context of anti-terrorism, law is often

perceived as a device that not only weakens civil liberties but also leads to the discrimination of minority groups both officially and in practice.

This body of legal scholarship presents mainly empirical studies of the effects of anti-terror law on police powers, surveillance, investigative techniques, and individual rights and freedoms. In addition, it mostly offers normative discussions about law's (mis)direction in the face of mounting criticism of its utility. Legal scholars in this area tend to propose a vision of law in which the power of politics is presupposed. Sadly missing, however, is an analysis of anti-terror law that problematizes this relationship between law and society's other social systems, most notably politics. Critical criminology, on the other hand, has begun to examine the relationship between anti-terror law and other social systems. By employing sociological concepts such as Agamben's (2005) *state of exception* and Ericson's (2007) *counter-law*, criminological scholars have attempted to show how these theoretical frameworks can be deployed in the analysis of anti-terror law (specifically in the Canadian context). Law notably makes observations about terrorism which are not seen as contrary to the rule of law by law but by scholars. Scholars have been able to criticize law on the grounds that anti-terror legislation suspends rule of law; but without attempting to understand how such legal observations are possible in the first place. For instance, without ever asking the question of what is law's liberty anyway? To answer such questions I will advocate for a turn to Luhmann's social systems theory. In this perspective, law's relationship with other social systems can be understood through the concepts autopoiesis and deparadoxification, and through the paradox of openness through closure. Although I will devote many pages to outlining his theory in the chapters to come, Luhmann's sociology allows us to analyze legal

translations of political communication (and vice versa) and as such can be deployed fruitfully in the quest for answers to the questions: what is law's 'terrorism'? What does law see when it observes and communicates about terrorism? What is the law's discourse on anti-terrorism legislation? Before I attempt to answer these questions in chapter's five and six, I would like to introduce some critical criminologists' attempts to apply criminological theory to the relationship between law and society in the context of terrorism.

2.3 Exceptionalism and the 'War on Terror'

2.3.1 Exceptionalism

In recent years, critical criminological scholarship has started to draw attention to the paradoxical nature of counter-terror law in the post-9/11 environment. For instance, some criminologists have utilized Giorgio Agamben's (2005) re-visitation of Carl Schmitt's *state of exception* to analyze the relationship between exception and sovereignty in this 'new' climate (Larsen & Piché, 2009; Bell, 2006; van Munster, 2004; Comaroff, 2007). In *Homo Sacer: Sovereign power and bare life*, Agamben (1998) locates *state of exception* in the construction and revision of the Foucaultian notion of biopolitical power, where the goal of politics is not only stimulation of life (biopolitics) but exclusion of the 'naked life' to preserve the political. Premised on the ancient Greeks' central distinction between *bios* (form of life that is proper to an individual or group) and *zoē* (the simple fact of living), Agamben revised Foucault's argument that the distinction of modernity is the politicization of men (and thus the biopolitical body is the production of sovereignty) (Foucault, 1966). He highlighted that the creation of the 'biopolitical' body is not premised on biopolitical production *per se*, but rather on the exclusion of *zoē*,

the ‘naked life’, from biopolitics (Agamben, 1998; 2005). To put it differently, for Agamben, instead of a binary of politics between enemy/friend, what is central to the West is the distinction between ‘naked life’/political existence. It is about including the ‘naked life’ through an exclusionary act. The result of the paradox of inclusion through exclusion is what Agamben calls the *homo sacer* (1998) – an individual who is more than ‘naked life’ because of her political inclusion but who is excluded from rights bestowed upon her within a state by virtue of living (Spencer, 2009) – a state of (in)distinction between the biopolitical body of the citizen with rights (*bios*) and the body reduced to the naked life (*zoē*).

Agamben departs from Foucault in a concrete way when he argues that governmentality and biopolitical power cannot be deployed analytically to address exemplary forms of modern biopolitics; the locales where the ‘naked life’ is most clearly exposed to *homo sacer* – namely the concentration camp (Spencer, 2009). For Agamben, the camp emerges as the hidden structure of contemporary politics – the ‘nomos of the modern’ – and thus evinces “the space that is opened when the state of exception begins to become the rule” (Agamben, 1998, p. 168-169). Here, the ‘traditional’ nation-state connection between land, order (the State), and inscription of life (birth or the nation), is disrupted by the camp (state of exception) and enters into a ‘lasting crisis’ where the ‘naked life’ is now inscribed within the localization (land) and order (the State) (Agamben, 1998; 2005). “The state of exception”, Agamben argues, “which [is] essentially a temporary suspension of the rule of law on the basis of a factual state of danger, is now given a permanent spatial arrangement, which as such nevertheless remains outside the normal order” (1998, p. 169). The camp thus opens up a space that

allows for the suspension of the law in order to preserve its own existence. As Salter (2006) observes, under this state of exception individuals are subject to the law but not subjects in the law; they are thus reduced to the naked life – included by exclusion.

2.3.2 State of Exception and Security Certificates

Recently, critical criminologists have used Agamben's framework to direct attention to modern manifestations of the state of exception in the global 'war on terrorism'. Empirically, a growing group of critical Canadian scholars have brought attention to the security certificate mechanism and its evolution in this 'new' environment. Introduced in Canada in 1991, the security certificate is legislated under section 77 of the *Immigration and Refugee Protection Act* (hereafter, IRPA). It is a mechanism by which the Canadian government (notably the minister of public safety and the minister of citizenship and immigration) can sign a document – which becomes the security certificate – ordering the detainment and/or deportation of any non-citizen (including permanent residents) deemed 'inadmissible' to Canada on 'reasonable' threats "of security, violating human or international rights, serious criminality or organized criminality" (*Immigration and Refugee Protection Act*, 2001). It is important to note that the individual in question need not be actually charged or convicted of a crime. Additionally, the process is not absolute; the security certificate is issued at the *discretion* of the ministers. Once the certificate is signed it is referred to the Federal Court where a judge determines whether the certificate is reasonable and cancels it if he or she determines that it is not. The judge does not review the legitimacy of the grounds on which the certificate was signed, he or she merely determines whether it was 'reasonably' issued. If the judge does not quash the certificate as unreasonable the certificate is taken

as “conclusive proof that the person named in it is inadmissible and is a removal order that is in force without it being necessary to hold or continue an examination or admissibility hearing” (*Immigration and Refugee Protection Act*, 2001). Once determined to be ‘reasonable’, the individual subject to the security certificate and his or her legal counsel are not permitted to view all of the evidence used to issue the certificate.

Some Canadian critical scholars have advanced the idea that security certificates are a manifestation of the normalized state of exception problematized by Agamben (Larsen & Piché, 2009; Bell, 2009; Aitken, 2008). Bell (2009), for instance, argues that the security certificate mechanism is a product of the state of exception because, under the political paradigm of the ‘war on terror’, security certificates function as a “moment of legal exception for the assertion of sovereign power and legitimation” (p. 65). Here the ‘moment of legal exception’ opens up a space for the political justification of ‘special’ extra-legal proceedings such as secret evidence, pre-charge detention, or convictions under questionable provisions of national security (Bell, 2009). This leads to, Bell posits, a “suspension of law-by-law, a form of sovereign power is enacted that subverts normal juridical procedures of argument and evidence”, where law acts as a “tactic of government rule in the name of security” and thus renders any distinction between law and politics invisible (Bell, 2009, p. 74).

Although Bell demonstrates one possible way that security certificates could be read as a contemporary manifestation of exceptionality, her analysis seems to collapse the dialectic between norm and exception. As I will discuss to some length in the discussion on counter-law, exception is posited on the existence of a normative framework to which it can distinguish its exceptionality. As such, the exception is only exceptional in relation

to a norm. If we follow Bell and contend that the exception undermines the juridical ‘norm’ and thus becomes a ‘state of exception’ then we see that exception itself becomes the norm. Only when this ‘norm’ is given the quality of ‘exceptionality’ is it deemed exceptional. Inasmuch as law cannot observe any situation as legal and illegal at the same time, how can we, theoretically speaking, see the quality of ‘exception’ as anything other than an exception in relation to a particular normative framework? Alternatively, is there a theoretical foundation that can provide for an analytic of situations of ‘exception’ without imposing a normative standpoint? In the quest of such an approach, this thesis will propose a turn toward social systems theory which will be discussed at length in the following chapter.

In addition, Bell’s (2006) contention that security certificates enact a “form of sovereign power” (p. 63) that undermines ‘normal’ juridical procedures (i.e., argument and evidence) leaves no room for reform or a ‘critical’ dialogue to take place because it assumes that traditional juridical procedures are ‘normal’ and any new procedure is thus somehow ‘abnormal’. Framed in this light, any successful challenge of ‘traditional’ juridical procedure is viewed as a problem to the established order of law – an exception, if you will. Following this, any juridical operations that successfully engage section one of the *Canadian Charter of Rights and Freedoms* – which states that the Charter “guarantees the rights and freedoms set out in it only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (Charter, 1982) – must be observed as ‘exceptional’ because the ruling undermines previous ‘normal’ juridical procedures. If we are to approach law in this way, all Supreme Court of Canada (SCC) decisions that overturn existing juridical procedures must be observed as

‘exception’ insofar as it is the opposite of the ‘norm’. As such, the exception thesis advanced by Bell clearly prefers the status quo of legal operations (i.e., traditional legal procedures), and is also paradoxically built on ‘exception’ rather than norm.

Larsen and Piché (2009), on the other hand, try to illustrate how security certificates can be understood as a mechanism of ‘normalized exceptionality’ realized through a form of ‘law against law’ (p. 225). Positioning their argument within the conceptual framework of Richard Ericson’s (2007) *counter-law*, the authors suggest that the Kingston Immigration Holding Centre (hereafter, KIHC) – an immigration detention facility located in Bath, Ontario, which operated as an “enclave within the walls of the [maximum security penitentiary] Millhaven Facility” for placing individuals subject to security certificates (*Standing Committee on Citizenship and Immigration*, 2007) – can be understood as a contemporary manifestation of the camp (state of exception). As Salter (2006) observes, individuals here are “subject to the law, but not subjects in the law” (p. 9). The authors here focus on the use of law (rather than simply its suspension) to give legitimacy to a normalized exception (Larsen and Piché, 2009). Through the creation and maintenance of this ‘enclave’ within the Millhaven Facility “whereby laws are drafted or reinterpreted with the goal of circumventing barriers to preventative action” the security certificate mechanism is perceived as a “textbook example of counter law” due to its precautionary logic (Larsen and Piché, 2009, p. 209). For example, established law that protects the right of trial and conviction of criminal offences is deemed inapplicable to non-citizens and replaced by “an obscure component of immigration law” (Larsen & Piché, 2009 p. 209). For the authors, this is evidence of the manifestation of the camp as a direct result of the “bureaucratic absolutism” (p. 225) of the security certificate regime

and thus call for not only its obliteration, but propagate the idea more broadly to a prison abolitionist program.¹⁶

Larsen and Piché offer a more nuanced approach to how the KIHC can be understood as spatial manifestation of ‘normalized exception’. However, they too suffer from the (in)distinction of exception and norm. This is perhaps made even more obvious by the notion of ‘normalized exception’ advanced by the authors. As I have argued above, the concept of exception implies the presence of a norm that differentiates it from exception. Implying the concept of ‘normalized exception’ demonstrates the paradox that is evident in both the state of exception and counter-law theses on security certificates: the exception has become the norm and thus we can no longer speak of the existence of any exception. In addition, the authors suggest that the solution to the ‘problem’ of security certificates (the opening of a space of legal exceptionality) is to obliterate the mechanism. Thus, the solution to this space of exception is a new exception. Finally, by articulating the annihilation of the security certificate mechanism within a broader prison abolitionist program, Larsen and Piché further demonstrate how exception is itself a political, not juridical, question. In other words, by proposing abolition, the authors suggest that the juridical paradox of ‘law against law’ (state of normalized exception) can be solved by making the political decision to abolish prisons.

¹⁶ Here the paradox of exceptionality discussed above is not only present, but in some ways highlighted by its appropriation to an abolitionist framework. The authors employ state of exception to critically analyze the security certificate mechanism. What follows is an attempt to present another exception – that of prison abolition – as the solution to such exceptionality. From a normative standpoint, it is clear that the authors’ attempt to advance their own abolitionist program may indeed lead to prison reform, but such attempts remain problematic inasmuch as the paradox of exceptionality is not only visible, but highlighted in their analysis.

In light of this discussion, it now becomes important to consider the concept of counter-law and its relationship to exception. This concept is able to make a contribution to the analytical foundations of the state of exception by demonstrating its modern utility in sociological analyses of law.

2.3.3 Counter-law

The concept of counter-law has been influential in recent criminological analyses of anti-terror law in Canada and the United States (see Amoore & de Goede, 2008; Aradau & van Munster, 2009). Richard Ericson (2007) sees the state of exception within a double form of counter-law I and counter-law II to illustrate the emergence of contemporary modes of governance in the ‘war on terror’. The first form according to Ericson, counter-law I, is what Larsen and Piché discussed in their dialogue of ‘law against law’:

New laws are enacted and new uses of existing law are invented to erode or eliminate traditional principles, standards, and procedures of criminal law that get in the way of preempting imagined sources of harm (Ericson, 2007, p. 24)

As Ericson contends, counter-law I is expressed when legal order (i.e., legal principles, standards, and procedures) is suspended in the wake of emergency, uncertainty, and necessity to “save the social order” (Ericson, 2007, p. 26). The legal norm is thus separated from its application in order to protect the application of the legal norm (Ericson, 2007). In other words, an exception is engaged in order to protect the legal norm. Accordingly, Agamben’s state of exception is articulated as the ‘official’

manifestation of this notion of counter-law I. To demonstrate this, Ericson cites Agamben:

The normative aspect of law can thus be obliterated and contradicted with impunity by a governmental violence that – while ignoring international law externally and producing a permanent state of exception internally – nevertheless still claims to be applying the law (Agamben, 2005, p. 87).

The most important point here is that, for Ericson, the state of exception – and thus counter-law I – is not an exception at all, but rather has become the ‘normal’ state (Ericson, 2007).

The second form, counter-law II, takes the form of what is referred to as the ‘surveillant assemblage’ (Ericson, 2007; Haggerty & Ericson, 2003). Building on the work of Foucault, Gilles Deleuze, and Félix Guattari, the ‘surveillant assemblage’ “operates by abstracting human bodies from their territorial settings and separating them into a series of discrete flows. These flows are then resembled into distinct “‘data doubles’ which can be scrutinized and targeted for intervention” (Haggerty & Ericson, 2003, p. 606). This assemblage works in similar fashion to counter-law I, by constructing and maintaining new uses of extra-legal technologies of surveillance to undermine existing legal norms (Aradau & van Munster, 2009). For Ericson, exceptionality refers to the practice of breaking ‘normal’ legal principles, standards, and procedures, even when this is a result of the creation of ‘new’ laws. Central to his thesis is that the “legal order must be broken to save the social order” in times of extreme uncertainty caused by the threat of terrorism (Ericson, 2007, p. 26).

The criminological literature outlined above on exceptionality thus focuses on the assumption of a pre-existing normative frame of law. Following this we can see that at the bottom of law is the violence of law. Agamben quite distinctly suggests that in order to grasp the state of exception one must first have to look at the role of necessity played in legal orders. Although he may not be entirely clear in his distinction between state of exception and necessity, Agamben maintains that “any discussion of the structure and meaning of the state of exception first requires an analysis of the legal concept of necessity” (2005, p. 24). To put it differently, he sees the legal suspension of legal norm as protection for that norm that is external to law. Thus we can see a deautonomization of law in the state of exception where law is no longer concerned with what is legal or illegal, but instead focuses the question of political ‘necessity’ while not recognizing the fact that any exception comes from law in the first place. This (in)distinction between law and politics is also evinced by an (in)distinction between legal norm and political fact. This perspective raises interesting questions for critical scholars: If we see political necessity at the bottom of law, can we distinguish between law and politics? Can law itself be viewed as anything other than legal? Does it make sense to talk of a ‘state of exception’ if, following Agamben, the exception has become the rule (norm)?

The argument that the ‘exception has become the rule’ or the ‘normal state’ seems to undermine the utility of Agamben’s state of exception because any statement of permanence as it relates to exceptionality collapses the distinction between norm/exception. Where the state of exception is particularly useful is when it is engaged to illustrate times where a sovereign power invokes exception – when it is perceived as a possibility rather than a ‘permanent state’. In addition, Ericson’s assertion that counter-

law works to ‘erode or eliminate traditional principles, standards, and procedures’ seems to provide an ideal of law that ignores that ‘counter-law’ comes from law itself. To put it differently, Ericson seems to ignore that law which acts ‘against law’ is actually juridically validated by law. In this light, not only is reform or a critical dialogue impossible, because any new law can be (and is) viewed as exception, but we can no longer observe exception itself. The collapse of norm/exception, clearly articulated by Ericson and Agamben, seems to undermine the entire thesis of exceptionality. For example, an exception is premised on the establishment of a norm to which it can distinguish its exceptionality. If the ‘exception has become the rule’ (read: norm) then exception cannot be seen as anything other than the norm and thus it cannot be observed any longer as exception. Therefore, we cannot live in a ‘state of exception’ because the current ‘norm’ was once considered exceptional, and it was previously developed from an earlier exception or is inevitably coming to be considered what was once exceptional. We enter an inescapable paradox where today’s exception will always become tomorrow’s norm. Thus, as Andrew (2005) argues, Agamben’s analysis can no longer be observed as being about exception, rather it is about the state of the norm. Consequently, the ‘exception’ itself can no longer be observed as exceptional; it can only be the norm articulated as an exception (by politics, media, the economy, etc.). It is here where we see how the state of exception can be engaged in relation to the ‘politicization of law’ because, if we follow state of exception to its logical conclusion, we see that the quality of ‘exception’ is not a product of law itself but rather a political articulation of the norm. Furthermore, when we open up state of exception in this way, we can observe that it is premised on the assumption of a conventional understanding of liberty and security. If we

approach contemporary ‘exceptions’ such as security certificates (or other counter-terrorism policy) in relation to that norm we can see the value of state of exception as an analytic for contemporary political practices. However, we can only see law as a mere reflection of sovereign power because the ‘exception’ itself comes from law. Law cannot at once be observed as both illegal and legal, or as I have argued, both exception and norm.

2.4 Conclusion

Until the events of September 2001, sociology largely ignored the study of terrorism and counter-terrorism, leaving it for the disciplines of political science, international relations, and law. Since that time however sociologists have started to provide their insights to the study of terrorist activity and its corollaries. Much of the work tends to focus on the identification, intervention, and prevention of individuals and groups who are at risk of committing terrorist activity. Others focus on the application of sociological concepts (e.g. Beck’s ‘risk society’, Agamben’s ‘state of exception’, and Ericson’s ‘counter-law’) to the study of terrorism. In addition, legal scholars tend to agree that post-2001 counter-terrorism policy raises questions regarding its overly broad nature and subsequent effect on police powers, surveillance, investigations, and jurisdiction. Although these discourses point out important practical implications for law enforcement, security, law, and human rights, it is clear that sociology has yet to provide an adequate self-description of anti-terror legislation, particularly in the Canadian context.

The state of exception and counter-law theses seem to follow sociologies of law that see the relationship between law and politics as increasingly dependent upon one another. A radically different perspective is presented in the work of German sociologist

Niklas Luhmann, who suggests that law is an autonomous social system, which cannot be determined externally. In this theoretical framework, society is functionally differentiated into systems which have a number of (self-referential) environments. Here, law's relationship to its environment can be understood through the concepts of *autopoiesis* and *deparadoxification*, and through the paradoxical notion of openness through closure. It is argued that concepts such as state of exception and counter-law cannot be read as a product of the juridical system because they are self-produced by the scientific system which, as I have suggested, is not a product of the distinction illegal/legal but a product of distinction between exception/norm. Law may very well, and indeed often does, communicate about exception/norm – for instance, the first section of the *Canadian Charter of Rights and Freedoms* (hereafter, *Charter*) is a legal rule about exception that has juridical validity – however the critiques of anti-terrorism legislation founded in Agamben's state of exception or Ericson's counter-law are not to be confused with juridical communications. Although they may be communication about law, they are not juridical communication as such. As we will see in the next chapter, such discourses can be read as an example of a scientific translation of juridical communication. Insofar as these discourses are observed as scientific translations of juridical communication, I am able to here analyze the influence they have on juridical operations. Influence here is not to be understood as a linear domination of law by other discursive formations. Rather, I am concerned with how law observes these discourses in order to autopoietically transform itself to include anti-terrorism legislation in its operations.

Thus, I turn to Luhmann's theoretical framework to analyze law as more than simply exception because it is deemed exceptional. This perspective allows for the

analysis of the relationship between law and other social systems. In the context of anti-terror legislation, observers often argue that law has come out on the losing end in a battle with sovereign power. The present work situates itself as a project to submit Luhmann's sociology of law to this commonly taken-for-granted notion. That being said, prior to engaging in a dialogue illustrating how this approach can be deployed as an alternative to state of exception and counter law, the next chapter of this thesis seeks to provide conceptual clarity in relation to the complex sociological theory of Niklas Luhmann. My aim is not to argue that Luhmann provides the 'holy grail' of theoretical frameworks for the analysis of law and society. My goal is much more humble: to deploy one observation (Luhmann's) of society's relationship with law to offer a different observation (mine) of the function of anti-terror law in Canada.

3 Theoretical Framework

3.1 Sociology of Law

Sociology of law analyzes the relationship between law and society. It is not simply, as Friedmann (1962, p. 1) maintains, the rejection of analytical positivism as the only way to study jurisprudence. It is rather about how law affects society and how society affects law. Its roots can be traced back to the massively influential work of Max Weber and Émile Durkheim who in many ways laid the foundation for modern sociology of law (Deflem, 2008). Contemporary socio-legal scholars (such as Deflem, Nelken, Gurtvitch) often point to Eugene Ehrlich's *Fundamental Principles of the Sociology of Law* (1936) as the first modern attempt to develop a sociological approach to the study of law. Ehrlich argues that law is an outcome of social change and thus considers social norms and developments as most influential on law (Gurtvitch, 1973, p. 116). Similarly, Gurtvitch (1973) considers society itself, rather than formal statutes and law, as the focus for social development and thus supports Ehrlich's claims that stable norms are the foundation for law (p. 119).

Contemporary legal sociologists such as David Nelken (1984) and Roger Cotterrell (1992) contend that law functions as social engineering and thus possesses disciplinary power which is able to organize society. Here, the role of legislators is to constitute the norms of society within law that meet the expectations of those subject to law (Nelken, 1984, p. 162). Others refuse to see law and society as somehow distinct or even competing as forms of influence (Fitzpatrick, 1995). Some even problematize the propensity of sociologists to subsume legal studies within the discipline while maintaining sociology's interpretive power (Cotterrell, 1998).

Whether law functions as social engineering (Nelken, 1984), an outcome of social change (Ehrlich, 1936), a safeguard for expectations and values of society (Banakar, 2000), or that law is both constitutive of society and constitutes its own understanding of its social environment, modern contributions to the field of sociology of law tend to consider law to be a product of society (legal pessimism; Banakar) or the primary driver for the constitution of society (legal optimism; Nelken, Cotterrell). As such, sociology of law raises the question of *how* law functions within society. It lays the theoretical framework necessary to examine the relationship between law and society as an observer. A radically different sociology of law presents itself in the work of Niklas Luhmann's *social systems theory* which proposes that law is an autonomous social system, which cannot be determined externally. The next section of this chapter will introduce you to Luhmann's sociology.

3.2 Luhmann and Sociology of Law

Luhmann's theory of law maintains that law is a *functional* subsystem of society. As such, he advocates the differentiation of society into various subsystems (law, economy, religion, education, science, and so on) and their related environments. Law is here presented as a closed system of society that cannot be dominated by social systems external to it and each system is primarily responsible for a different function of society. For example, the function of law is the maintenance of normative expectations in the face of counterfactual examples; the economy regulates scarcity for society via payments; science provides society with the means to distinguish between truth and that which is not true; the function of politics is to make collectively binding decisions possible; and

religion functions to manage contingency. Each system maintains their identity through self-reproduction. According to Luhmann, one way to make sense of how society's other subsystems are able to influence law (and vice versa) is through a process of *structural coupling*¹⁷. Sociology, for example, cannot provide a self-description of law; it can only provide its own observation of legal operations (i.e., description). For Luhmann, as a result of functional differentiation, law is concerned with *norms*, whereas sociology is concerned with *facts* (as part of the scientific system) (Luhmann 2004: 455). Sociology has the ability, as an observer, to provide a description of law (and vice versa), but it cannot access law's own operations. For example, sociology may very well observe that the emergence of anti-terror law has 'widened the surveillance net' so much so that individual rights and freedoms are encroached, however that description – which, as a product of the scientific system, functions to provide truth – operates outside of law. Law can, however, observe this information as part of its operations – in the form of 'expert' testimony or including research findings in legal decisions – which can then form the basis of a legal justification for its decisions (for example, to rule anti-terror legislation as unconstitutional). But the communication provided by the system of science (sociology), in the final instance, is translated by law for use in law's application of the form legal/illegal.

For Luhmann, science (and politics, the economy, religion, art) cannot access legal operations; it can only offer a description of such functions. As such, operations of the legal system will inevitably surprise sociology in its own self-description of law. This framework provides an opportunity to reflect on this relationship between law and other

¹⁷ The concept of structural coupling will be discussed at length in section 3.3 of this chapter.

social systems. As I suggested in the previous chapter, in the context of counterterrorism legislation, scholars often view law as, in varying degrees, dependent upon the deployment of State power. This body of research tends to avoid the empirical analysis of law in favour of policy debates and documents and discussions of theoretical consequence. As such, the present work is an attempt to bridge the gap between theory and the empirical study of law and its relationship to society. In submitting Luhmann's sociology of law to what is taken to be the ultimate example of sovereign rule over law, this thesis aims to provide a convincing account of law's autonomy in the context of anti-terrorism law. The following pages are devoted to introducing the reader to Luhmann's theory of autopoietic social systems prior to the analysis of law's autonomy in the context of anti-terrorism legislation.

3.3 The Sociology of Niklas Luhmann

Niklas Luhmann's social theory can be as discomfiting as it is controversial and as irritating as it is complex. Yet the conditions of modern society – characterized by a mass of complexities – demand a theory which adequately accounts for such complexity. Although Luhmann offers a highly peculiar, and at times puzzling, general theory of society, he does not do so without purpose. No social theory, according to him, had yet captured the complexities of society without falling victim to excessively simplistic and reductionist claims¹⁸. Indeed, Luhmann's basic tenet that “the world as it is and the world as it is observed cannot be distinguished” (Luhmann, 2000, p. 11) illustrates his refusal of any theory which claims to capture the ‘truth’ of any social reality (King & Thornhill,

¹⁸ Outlined quite clearly in Luhmann's magnum opus, *Die Gesellschaft der Gesellschaft* (The Society of Society), where he asserts that sociologists have failed in their project to produce an adequate theory of society.

2003). What Luhmann did accept was the possibility of infinite possibilities; of the possibility that any ‘reality’ not only could *have been* different but also could have been *observed* differently (King & Thornhill, 2003). In this way, no theory could ever be advanced as the definitive account of society. As a result, while one could never ultimately escape reductionism, Luhmann intended to provide a “grand theory” of social theory which accepts multiple ways of interpreting society. This led to a highly abstract, extremely complex, and often difficult to read theory which has largely been ignored in the (at times) exceedingly selective academy of sociology¹⁹. This chapter seeks to illustrate that a ‘turn’ towards systems theory within sociology is not nearly as problematic as its critics would like you to believe.

In comparison to more ‘traditional’ accounts of society, Luhmann’s claim that the social world does not consist of individual human beings or relations between human beings has been observed as provocative, nonsensical, and evidently radical²⁰. His refusal to accept the traditional human being(s)=society relationship may be seen as controversial or ‘antihumanist’ – particularly in North American academic and political discourse – however, Luhmann advocates for a theory which accounts for the complex assemblage of thoughts, feelings, beliefs, rights, bodies, and values that make up the ‘human being’. For him, to say that collections of people form ‘society’ is too simple and thus he proposes a society whose primary unit of analysis is *systems*; not systems of people, but of *communications* (King & Thornhill, 2003). A detailed discussion of systems and communications will follow in the body of this chapter, however, what is

¹⁹ For an interpretation of possible reasons why Luhmann has been largely ignored in North American sociological and political academic discourse, see Chapter One in Moeller (2012).

²⁰ For a discussion of the refutation of humanism, see Moeller (2012).

important here is that the shift from the traditional ‘human society’ to a society of social systems, which indeed may cause headaches for ‘classical’ sociologists everywhere, could lay the ground for a renewed dialogue where we, as observers who identify as ‘sociologists’, are able to observe a world that is marked by both contingency and complexity.

Although Luhmann’s sociology is undoubtedly complex and irrefutably controversial, it allows its readers to become observers of the vast observations of the social world. This statement is already filled with suppositions which will be addressed in-depth throughout the chapter (for example, that society is indeed made up of systems of observation and meaning), but what this leads to is a highly nuanced approach to the complexities of modern society – a society, I maintain, which can be adequately characterized as functionally differentiated.

Part one of this chapter consists of epistemological and phenomenological prolegomena to Luhmann’s general theory of social systems. Following from this, parts two and three will address (some of) the major theoretical elements of legal autopoiesis particularly in relation to power, politics, justice, and decisions. I will then conclude with a discussion I have called ‘decision-making as threat to the autonomy of law?’ Here, I will demonstrate how systems theory can inform a sociological analysis (or as Luhmann might put it, an observation of an observer) of decision-making and in particular its relationship with the system of law as an autonomous subsystem of society. The goal of this chapter is to provide a thorough introduction to the ways in which contemporary social systems theory observes law as an autopoietic system. Prior to engaging in an analysis of Canadian anti-terror legislation, the pages that follow offer an outline of

Luhmann's social systems theory which, as I will argue later, provides an opportunity to reflect on the relationship between law and other social systems in the context of what scholars have identified as an example of the victory of sovereign power over the rule of law: counterterrorism legislation.

3.4 Part I: Social Systems Theory and Society

It is not possible to begin a discussion of how social systems theory observes law as both a subsystem of society and one that observes itself through its own operations without first clarifying what Luhmann means when he writes about 'society'. As I have mentioned above, society, according to Luhmann, is not made up of a collection of individuals, but rather, of systems and their related environments. In this way, social systems theory can be expressed as a theory of system/environment. It represents a shift from traditional analyses of society which focus on action or structure as society's primary basis – for example, a group of *people*, a *community*, or a set of relations between groups of people – to instead focus on actual *events* which occur within society's subsystems (Moeller, 2012). These events are operationalized by Luhmann as *communications*.

However, Luhmann is by no means ignoring the existence of human beings within society; he simply sees people as belonging to biological and psychic systems rather than social systems (King & Thornhill, 2003). For Luhmann, there are three types of self-referential, autopoietic systems²¹, each with their own media for their particular modes of reproduction, which are central to his general theory of society: biological, psychic, and social systems (Luhmann, 1986). For the purposes of this chapter, I will put

²¹ The concepts of *self-reference* and *autopoiesis* will be discussed at length in part II of this chapter, specifically as it relates to legal autopoiesis.

biological and psychic systems aside in order to focus on *social systems*²² (although I will refer to these systems throughout the thesis). According to Luhmann, people (i.e., their minds, their bodies, their thoughts, their feelings) are outside of social systems, and thus, do not form part of society, but form part of society's environment. Luhmann's controversial proclamation that "humans cannot communicate...only communication can communicate" (Luhmann, 1988, p. 371) may be observed by some to be counterintuitive, however it becomes clear when one considers that observing unity between these three systems is impossible (Moeller, 2012). For example, if one wants to understand the brain, it is rather unproductive to describe thoughts, feelings, or communications. Physiological and biological processes such as cell reformation, or brainwaves, must be followed by the reformation of cells or further brainwaves, not of thoughts or communications about them. In the same way, thoughts must be followed by further thoughts, and communications must be followed by further communications (Moeller, 2012). This does not, however, mean that a system cannot translate other systemic operations into their own operations – for example, communicating about thoughts and feelings in the form of psychotherapy – it simply means that each system is 'closed' in terms of its operations²³. To put it rather bluntly, society is indifferent to individual thoughts, feelings or actions until they are communicated within one of society's subsystems of meaning.

3.4.1 Functional Differentiation

Luhmann observes functional differentiation as a product of evolution. In his work, he makes reference to four different types of differentiation: segmentary (i.e.,

²² Biological systems perform their operations on the living world (i.e., cells, brains, and organisms) (King & Thornhill, 2003; Luhmann, 1986). Psychic systems exist within and perform their operations using the medium consciousness (King & Thornhill, 2003).

²³ The concept of 'closed' systems will be clarified in part II of this chapter.

divided by descent or communal living), center/periphery²⁴ (i.e., similar to segmentary, however this allows for multiple segments based on structural inequality), stratified (i.e., of society hierarchically divided into social classes) and functional (i.e., a society differentiated by social function systems – politics, law, economy, science, and so on) (Luhmann, 1995; Moeller, 2012). It is important to note here that Luhmann does not ignore that other types of differentiation indeed operate within a functionally differentiated society (for example, he admits that social ranks have not disappeared, rendering everyone ‘equal’), but, as Luhmann contends, “...[functional differentiation] by no means eliminates social strata...what has changed is that this is no longer the visible social order as such, that it is no longer the order without which no order would be possible at all” (Luhmann in Moeller, 2012, p. 48). The period of functional differentiation, Luhmann argues, became the primary type of differentiation during the sixteenth and seventeenth centuries (Moeller, 2012). Accordingly, Luhmann suggests, society “is (functionally) differentiated into the political subsystem and its environment, the economic systems and its environment, the scientific system and its environment, the education system and its environment and so on” (Luhmann, 1982, p. 132; King & Thornhill, 2003, p. 4). In this framework however, there is no single ‘world environment’, rather each of society’s subsystems produces its own environment self-referentially (an in-depth discussion of the self-production of society’s subsystems will develop in part II).

²⁴ Luhmann defines center/periphery differentiation as “a kind of inequality is tolerated that transcends the principle of segmentation, and thus allows for a multiplicity of segments (households) on both sides of the new form” (Luhmann, 2000).

According to Luhmann, modernity is characterized by a society which is differentiated into subsystems, each charged with a specific function – for example, the *function* of the subsystem of law is to establish and stabilize normative expectations; the function of politics is to make collectively binding decisions. As noted by King and Thornhill (2003), saying that modern society is occupied with ‘functional’ subsystems does not assume that these systems are ‘useful’ or that subsystems have been purposefully created by society’s members. Luhmann is clear when he posits that the evolution of society into a society characterized by functional differentiation did not happen in a rational or purposeful way, but rather through an improbable and contingent process of selection of information which is given meaning as communication (King & Thornhill, 2003). Society, therefore, becomes functionally differentiated when other communication systems begin to rely on their communications (King & Thornhill, 2003). As noted in the previous chapter, critical scholarship tends to argue that counterterrorism law is an example of the defeat of the rule of law at the hands of political power. However, much of the work is based primarily on empirical studies of political (or mass media) communications with very little legal analysis. This theoretical framework allows us to analyze the autonomy of anti-terror legislation in the context of such growing concerns over law’s domination by other social systems.

3.4.2 *Meaning*

In the second chapter of *Social Systems*, Luhmann (2005) provides a definition of meaning which appears as a horizon of possibilities:

“Meaning is the continual actualization of potentialities...The instability of meaning resides in the untenability of its core of actuality; the ability to

restabilize is provided by the fact that everything actual has meaning only within a horizon of possibilities indicated along with it. And to have meaning means that one of the possibilities that could be connected up can and must be selected as the next actuality...understanding happens only if one projects the experience of meaning or of meaningful action onto other systems with a system/environment difference of their own. Only with the help of the system/environment difference can one transform experience into understanding, and only if one also takes into consideration that the other systems and their environments make meaningful distinctions...observation is any operation that makes a distinction; thus it is the basic operation of understanding.” (p. 67-73)

Thus, Luhmann does not see meaning as being limited to the psychic systems (i.e., consciousness). Rather, as we will see in our discussion of *communication*, he contends that meaning is reproduced as a social fact (Luhmann, 1995). Meaning defined as a horizon of selections which operates as the ‘continual actualization of possibilities’, means that “only the concept of meaning, the system/environment concept, and self-reference taken together clarify the scope of application for a special methodology for understanding” (Luhmann, 1995, p. 74). Observation is thus dependent upon an act of distinction which can never be empty of meaning; it can never be *meaningless* (Luhmann, 1995).

Here, Luhmann maintains that every social subsystem produces meaningful distinctions in three distinct dimensions: the social, temporal, and fact dimensions which are linked modern society’s functional differentiation (Luhmann, 1985; 1995). Each

dimension of meaning cannot be interchanged and each is meaningful only in congruence with the others (Luhmann, 1995). But the paradox ‘all meaning has meaning’ is unfolded by differentiating the three dimensions of meaning (Luhmann, 1995). The fact dimension constructs the difference between system/environment, the temporal dimension produces the difference between past and future, while the social dimension produces the difference between Ego and Alter (Luhmann, 1995). As such, the phenomenal world can only be given meaning through the act of distinction (Carrier, 2008); which actualizes meaning from the selection from a horizon of possibilities (Luhmann, 1995).

3.4.3 Communication

Social systems consist of interactions, organizations, and societies which each use *communication* as the medium by which they reproduce their operations (King & Thornhill, 2003; Luhmann, 1986). All social systems are communication systems, and all communication systems are social systems (Moeller, 2012). That being said, communication for Luhmann has a much different meaning than it does for more traditional theories which begin with the concept of action (Luhmann, 2002). Here Luhmann attempts to separate any concept of communication from reference to biological systems and psychic systems (i.e., life or consciousness) (Luhmann, 2002). As Luhmann contends, communication is “a synthesis of three different selections, namely the selection of *information*, the selection of *utterance* of this information, and selective *understanding or misunderstanding* of this utterance and its information.” (Luhmann, 2002, p. 157, italics in original). What this leads to is a highly nuanced approach to communication characterized by a refusal to see it as a ‘linear’ process – that is, as transfer of ‘something’ from one individual to another (Carrier, 2007; Luhmann, 2002).

Rather, communication consists of the three moments of 'selection' (information, utterance, and understanding), which are brought together in congruence. As Luhmann suggests, "communication therefore takes place only when a difference of utterance and information is first understood" (Luhmann, 2002). The fact that I have written (utterance), I have written this sentence (information), and it is given meaning by you (understanding) is the synthesis of the three elements. For example, legal communication in the form of a ruling on the constitutionality of anti-terror legislation is written (utterance) with legal justifications for the decision (information), which can then be given meaning by various other social systems (i.e., the political system can then observe an unlegislated area and draft new legislation; the political system would then *understand* the legal communication).

For Luhmann, the distinction between communication and perception is critical to understanding the concept of communication (Luhmann, 2002). The assertion that "humans cannot communicate" simply leads to the conclusion that communication is not a psychic or biological product; rather it is a social one. This supposes, for example, that if one communicates her love for her partner, she cannot enter into her partner's mind to know what meaning was given to the communication. Of course, communication depends on consciousness; otherwise no communication could be possible, however, the congruence of the three elements is divorced from consciousness (Carrier, 2007). As Luhmann suggests, "[o]ne can neither confirm nor refute, neither interrogate nor respond to what another has perceived. It remains locked up within consciousness and nontransparent to the system of communication as well as to every other consciousness" (Luhmann, 2002, p. 158). Since observing the unity of the three elements of

communication is impossible, because one cannot see into another's consciousness, any understanding of others can only be a product of the system through which we give ourselves unity; namely, our consciousness (Carrier, 2007). As such, our understanding of meaning given to communications can only ever be taken as a construction of one's own psychic system (i.e., consciousness). This means that social systems, as organized operations of communication, and psychic systems as organized operations of consciousness, can only access their environments through their own operations (Carrier, 2007). And as such, can be conceptualized as products (i.e., constructions) of each system.

3.4.4 Autopoiesis and Operative Closure

The concept of *autopoiesis* was originally developed by two Chilean biologists Maturana and Varela (1980; 1987) to refer to the ability of a system to construct for itself the components of which it consists. In the first instance, it was used to explain the particular nature of living as opposed to non-living elements, of the emergence and reproduction of cells and living systems (Mingers, 2008). Luhmann, however, deviates from the biological concept of *autopoiesis* in a rather definitive way insofar as he distinguishes between systems of meaning (i.e., psychic and social systems) and non-meaning systems (i.e., biological living systems) (Neves, 2001). Prior to his seminal work, *Social Systems* (1995), Luhmann saw systems in a more traditional open-system way – that is, that systems are able to adapt to their environment; they are ‘open’ to direct influence of other systems (Neves, 2001). When Luhmann's attention shifted to the concept of *autopoiesis*, he was no longer able to see systems operate in this input-output

model advanced by other systems theorists²⁵; rather, he began to pay attention to the internal operations of self-production (i.e., autopoiesis) of systems. In distinguishing social autopoiesis from biological autopoiesis, Luhmann identified *communication* as the medium by which social systems are given meaning (Neves, 2001). In short, an autopoietic system produces and reproduces its elements through the operations that constitute the self-reproduction of the system. Luhmann quite explicitly argues that a psychic system cannot communicate itself, but it can give meaning to communication. For Luhmann however, only communication can communicate.

What this means for social autopoiesis is that, “the network of events which reproduces itself, and structures are required for the reproduction of events by events” (Luhmann, 1986; King, 1993, p. 220). Social systems, as systems of communication by which meaning is given, produce that very meaning (King, 1993). As King (1993) illustrates, however, “[social systems] do not...perform operations of interpretation and selectivity upon ‘facts’ gleaned from the social environment...they construct that environment and perform their operations upon the environment that they themselves have constructed” (p. 220). Each social system gives meaning to the world, and that meaning is a product of their own self-constructed environment. This, it seems, runs counter to many of the critiques of Luhmann’s ‘functional’ tendencies; namely, that people ‘exist’ within systems only as ‘semantic artefacts’ (Teubner, 1989) – only according to the meaning given to them by one of society’s subsystems (King, 1993). This is precisely where Luhmann has been criticized for his apparent ‘anti-humanism’²⁶;

²⁵ See Luhmann, *A Sociological Theory of Law* (1985).

²⁶ I have outlined some critiques of Luhmann’s sociology in the introductory pages of this chapter.

however, this is also where his placement of human beings within psychic and living system is most useful. Human beings are themselves autopoietic systems, just not of the social kind. Humans can think and feel (as autopoietic operations of psychic systems) or metabolize food and digest (as autopoietic operations of biological, living systems), but as soon as one *communicates* about these operations they are no longer psychic or biological operations, they are given meaning by the social system.

Operating with a concept of autopoietic social systems that construct their own environment and perform their operations on that environment, then, leads to the conclusion that social systems are indeed *closed* social systems. According to the concept of autopoiesis, a system cannot communicate directly with another system because they give meaning to the world through the use of different codes (the coding of social systems will be introduced at length in part II of this chapter). For example, the legal system gives meaning to the world by placing the code of illegal/legal on events; the political system uses the code government/opposition to give meaning to its operations (Moeller, 2012; Luhmann, 2004). In this sense, systems are *operationally closed* systems (Luhmann, 2004). Through the drawing of a distinction (such as illegal/legal, or government/opposition) an autopoietic system is able to differentiate itself from its environment, and thus, it can observe its environment in its own terms. This observation, according to Luhmann, is also referred to as *cognitive openness* (Luhmann, 2004). Cognitive openness allows for a closed system to observe its environment (Moeller, 2012). For example, once the legal system becomes operationally closed, it can observe everything through the distinction legal/illegal. Accordingly, Luhmann asserts that since each of society's subsystems (politics, law, economy, science, religion, art, and so on)

gives meaning to the world through the drawing of a distinction (i.e., code) which simultaneously forms the subsystem's environment, each system cannot communicate directly with one another. That is, they cannot give meaning to an event by using the same code. Each system must give meaning to an event through their own distinct code. This does not, however, mean that a system's environment cannot include other social systems (King, 1993). A system may respond to its environment; it may reduce the complexity of its environment by responding to it with communication which may then become a communication within that system (Luhmann, 2004; King, 1993). As such, the system is able to 'learn'²⁷ from its environment (Luhmann, 2004). The key here is that the system is cognitively open to *its* environment – that is, its self-constructed environment. This framework takes law as system closed in terms of operation, yet highly dependent on, and thus 'open' to other social systems through the self-referential construction of its environment. In the context of anti-terror legislation, it allows for an analysis of law as an autonomous system which can bring in communication from various other social systems for use within the legal. For example, law can utilize 'expert' information – which is provided as a form of 'truth', as part of the scientific system – on the risks associated with terrorism and as a result justify legal operations. However, in this theoretical approach, it does not mean the autonomy of law is in jeopardy. It thus provides an opportunity to analyze counterterrorism law as part of the functioning of an autonomous legal system. A question which is, I have noted, essential to the present work.

²⁷ The concepts of cognitive openness and a system's ability to 'learn' will be discussed in more detail in part II of this chapter.

Central to Luhmann's definition of law as a social system are the related concepts of *autopoiesis* and *operative closure*. As Luhmann (2004) proclaims, "[a] theory of the autopoietic, operatively closed legal system envisages that this system is able to draw a distinction between itself and other functioning systems" (p. 357). As an autopoietic, operatively closed social system, law draws its distinction through the application of its binary code: legal/illegal (Luhmann, 2004). This binary code (which will be discussed at length in the next section) forms the basic distinction necessary for what is referred to as the autonomy of the legal system. As I noted in the previous chapter, scholars often suggest that, in the context of the 'war on terror', the application of law's code legal/illegal is replaced by other distinctions, such as security/insecurity. This framework allows for reflection on the relationship between anti-terrorism legislation and law's application of its binary code. This will be expanded on further in subsequent chapters.

3.5 Part II: Law as an Autopoietic Social System

Now that I have clarified the some of the theoretical and epistemological prolegomena of Luhmann's general theory of social systems, we can move to a discussion of how social systems theory observes law as both a subsystem of society and one that observes itself through its own operations. This type of analysis, however, is filled with suppositions which must first be clarified in order to advance the discussion; most pressing, that law is indeed a subsystem of society which observes itself through its own operations. It is important to note, however, that this discussion is meant to be an introduction to how the system of law operates as an autopoietic social subsystem of

society²⁸. One is unable to do justice to the complexity of Luhmann's theory of law as a social system in such limited constraints (i.e., this thesis). That being said, this discussion may very well provide the reader with a point of departure into a refreshed approach to the legal system.

3.5.1 Law as a Social System

Before I go any further, I feel that it is important to answer the questions: what makes the law a system? And what do systems theorists mean when they talk about the *function* of a system? I have already discussed to some length how Luhmann observes society characterized by functional differentiation; however, it is not enough to say that the social world is differentiated into function systems of politics, law, economy, science, and so on. Accordingly, Luhmann does not see the legal system as the sum of institutions, courts, courtrooms, and lawyers offices which exist in physical existence and are often referred to in the mass media or politics as the 'legal system'. What is more, law is not even made up of individuals (lawyers, judges, plaintiffs, defendants, and so on) (King & Thornhill, 2003). Rather, law is best described as a *system of law* (King & Thornhill, 2003). That is, a "system of law which identifies itself as law and is able to distinguish between those communications which are part of itself and those which are not" (King & Thornhill, 2003, p. 36). As Luhmann (2004) declares, the legal system is "a context of factually enacted operations, which have to be communicated because they are social operations, whatever defines them – and in addition to that – have to be communicated as legal communications" (p. 78).

²⁸ Alas, the institutional constraints which this thesis is situated (i.e., limited in size and scope in order to be feasibly presented to my department) does not allow for a full analysis of the complexity of Luhmann's theory of law as a social system. For a detailed description see Luhmann's seminal work, *Law as a Social System* (2004).

As a social system, the system of law consists of communications and only of communications (Luhmann, 2004; King & Thornhill, 2003). When one considers which communications form part of the system of law, he confronts a typical Luhmannian *paradox* – all communication that is recognized by law belongs to the legal system because only the legal system can communicate what belongs to it (King & Thornhill, 2003). It is here where the *code* of the system of law emerges (I will engage with the concept of *code* as it relates to law below). Any communication based on the distinction between legal/illegal is recognized as a legal communication (Luhmann, 2004). The legal system is a system insofar as it recursively recognizes events through this distinction. A legal communication extends to all communications that are understood²⁹ as referring to this distinction (King & Thornhill, 2003). What this means is the moment that a communication is given meaning by the distinction legal/illegal, it becomes part of the legal system (Luhmann, 2004; King & Thornhill, 2003; Nobles & Schiff, 2013). This theoretical framework allows for the analysis of how law applies this basic code, which I will return to in the context of anti-terror legislation in the coming chapters.

The concept of system is relative to its self-referentially constructed environment (Moeller, 2012). In this way, systems theory can be referred to as a *systems-environment* theory. A system always reproduces itself within its self-referentially produced environment. For the legal system, drawing the distinction between legal/illegal leads to the closure of the system; that is, to the closure of a system from its environment (Luhmann, 2004). It is this closure which allows the legal system to observe events as part of the system. As such, it is the drawing of the distinction legal/illegal is what allows

²⁹ See the discussion here on the triple unity of communication (utterance, information, and understanding).

the legal system to produce and give *meaning* to conflicts that arise in society. This also allows for the operative closure of the system of law. As Nobles and Schiff (2013) expressively observe, “finding out how a system establishes restrictions on its openness to its environment, its closure, *is* the basis of its openness to its environment” (p. 6, italics in original). For example, it is the distinction legal/illegal which allows the system of law to observe communication as important to legal operations. To put it differently, law can use information from other social system, such as testimony from ‘expert’ counterterrorism strategists, in order to apply its basic code.

3.5.2 The Function of Law

According to Luhmann, operative closure is common to all systems of society (Luhmann, 2004). This allows for the functional differentiation of each of society’s subsystems. What differentiates each subsystem – law, politics, education, science, economy, and so on – is how they achieve this operative closure (Luhmann, 2004; King & Thornhill, 2003; Nobles & Schiff, 2013). As such, the function of law is to maintain normative expectations in the face of counter-factual examples (Luhmann, 2004; Nobles & Schiff, 2013). For example, in the context of anti-terror law, the legal system maintains that one can expect not to be subject to ideologically or politically motivated violence regardless of counter-factual examples (i.e., factual violence). Although society’s subsystems may duplicate other system’s performance (i.e., politics may seek to resolve conflicts), the function of the system is peculiar to each subsystem (Nobles & Schiff, 2013). That being said, Luhmann sees the function of each system as its “surplus value” rather than something that steers the system itself (Luhmann, 2004; Nobles & Schiff, 2013). What this means is that the function is something to be observed rather than an

internal operation of the system itself. For example, sociologically, we can observe the function of the system of law as maintaining normative expectations in the face of counter-factual examples, however that is merely a way for us to give meaning our environment³⁰. We can observe how law maintains and stabilizes expectations that we will not be subject to terrorism-related violence despite possible disappointments (i.e., terrorist activity).

Here it is important to clarify Luhmann's distinction between function and performance. The function of law, in this case the maintenance and stabilization of normative expectations despite disappointments, is specific *only* to the legal system (Luhmann, 2004). Here, Luhmann reveals the concept of *time-binding*³¹ (Luhmann, 2004; Nobles & Schiff, 2012). Law's function, according to Luhmann, of stabilizing normative expectations, gives it a unique ability to generate communications of expectations which link the present with the future (Luhmann, 2004; Nobles and Schiff, 2013). These communications (which are not thoughts nor feelings, as those would form part of the psychic system) produce expectations about what is approved and what will be approved in the future (Luhmann, 2004). And as such, the repeated communication of expectations creates meaning for those expectations. This includes meaning for other social systems (Luhmann, 2004). As Luhmann (2004) asserts:

“The repeated use of communicated meaning fulfills a double requirement: the results are, finally, a meaning that is fixed by language and a differentiated societal communication. On the one hand, such repeated uses of

³⁰ For a discussion of how the function of systems gives meaning to society, see Nobles & Schiff (2013) or King (1997).

³¹ See Luhmann (2002a), chapter three, ‘Time Binding: Material and Social Aspects’.

meaning must condense the used description in order to make sure that the meaning is recognized as the same, even in a new context...On the other hand, such repeated uses of meaning must confirm the reused meaning and demonstrate that the meaning can also apply in a different context” (p. 144)

What this means is that the repeated communication of expectations create fixed meanings for its norms which are able to survive counter-factual disappointment (Luhmann, 2004). For example, as we will see in chapter six, the security certificate mechanism is constructed through repeated communication of expectations which creates meaning – that suspected terrorists may be detained, that terrorist activity is unacceptable and has consequences, and so on – that is able to survive despite counter-factual examples (for instance, if a foreign national successfully committed a terrorist activity). Even in the case of dissent, of rival norms, the expectations of law are more stable than dissenting norms because of their internal relationship as well as their relationship with the rest of society (Luhmann, 2004). For Luhmann, the operative closure of the legal system has not only made law the sole system in charge of maintaining normative expectations through the manipulation of symbols of juridical validity, but also a system with the ability to provide norms which support the operations of other systems (Luhmann, 2004). In the example above, security certificates not only organize juridical operations, but also supports operations within other systems (i.e., politics and the economy). Consider also the example of criminal law reform, it is a legal form by which organizes legal operations but also supports operations within politics (i.e., given meaning by the political system). The result of the communicated expectation given meaning by other systems is a *performance* of law.

3.5.3 Coding and Programming

In order to understand how law functions as a subsystem of society, we must begin to consider the idea that a system is differentiated by its codes and programmes. Codes, as I have said, are the basal distinction by which we can distinguish between belonging to the system and not belonging to the system (Luhmann, 2004). For law, this takes the form of the distinction legal/illegal. However, the code is meaningless in and of itself (Nobles & Schiff, 2013). The code is simply a distinction between two sides – for example, coding ‘x’ as legal means that it has not been coded illegal, and vice versa. Although this binary coding is essential to the reproduction of the system – that is, to produce further legal communications – the coding simply produces two states which can be linked to further communications (Luhmann, 2004). Introducing a third value (for example, legitimate) to the binary code undermines the reproduction of the system because it can no longer link communications of this type (Luhmann, 2004). For example, to be told that stealing another individual’s lunch is illegal is only to know that the other side of the distinction (legal) does not apply; but if legitimate is added to law’s basal code, one could select legitimate and thereby undermine the reproduction of law’s operations (as it would no longer be part of legal operations).

This is where the distinction between coding and programming comes in. As Luhmann (2004) asserts, “codes enable us to distinguish between belonging to the system and not belonging to the system, while programmes, which attribute the values legal/illegal, are the object of judgments of valid/invalid” (p. 209). Programmes compliment coding and ‘fill it with content’ (Luhmann, 2004). As Nobles and Schiff (2013) observe, meaning is generated through communicating about the application of

the distinctions of the binary code. This communication about the application of the code produces programmes (Nobles & Schiff, 2013; Luhmann, 2004). As such, the legal system's programmes are the conditions for how to apply one side of its binary code (Luhmann, 2004).

3.5.4 The Unfolding of the Paradox of Law

A paradox always results where the code is applied to itself (Luhmann, 2004). For example, if one attempts to apply the code legal/illegal to distinguish between what is legal and illegal (Luhmann, 2004). To this end, Luhmann sees codes and programmes as essential to the 'unfolding of the paradox' of the legal system (Luhmann, 2004; King & Thornhill, 2003). As previously stated, simply knowing that something is illegal (and vice versa), in itself, does not tell us very much. All this means is that 'x' has been given the value of illegal, and as such, has *not* been given the value legal. Inevitably, then, this involves a paradox: 'x' is illegal by virtue of it being coded by the legal system as illegal (Luhmann, 2004). This is a logical byproduct of operative closure, as only the law operates through the code legal/illegal. As Luhmann (2004) illustrates, when the legal system applies its code legal/illegal on a given situation, the code is not applied on two different situations, it is applied simultaneously to the same situation. And as such, both sides of the code are always applied at the same time to any event. This ultimately takes the form of a tautology: that which is legal is legal because it is deemed legal by law (and correspondingly, that which is illegal is illegal because it is deemed illegal by law) (Luhmann, 2004). As Luhmann puts it, if the legal system "relied on its code the system would be incapable of performing and concealing the intolerable acknowledgement that law is what it is (not)" (Luhmann in King & Thornhill, 2003, p. 60). As such,

programmes are mechanisms which are able to unfold the paradox facing the application of the code legal/illegal which has no meaning other than signifying one side of the code. For example, the legal system's treatment of scientific data (i.e., research and academic studies) on the harms of drug use as self-evident truths allows law to use these distinctions in the application of its code legal/illegal.

As such, the legal system develops conditional programmes for the application of its code (Luhmann, 2004). "Programmes of the legal system", Luhmann (2004) declares, "are always conditional programmes" (p. 196). He goes on to say, "the conditional program (if...then) spells out the conditions on which it depends, whether something is legal or illegal, with these conditions it refers to past facts, which are stated in the present" (p. 197). This involves a process of second order observation³² - in this case, the operation of observing coding. However, as I have shown, the operation of coding has no meaning, in itself, other than assigning facts to one side of the distinction. As a second-order observation, conditional programmes 'unfold the paradox' by placing it within this an observation (Luhmann, 2004). What this leads to is precisely what Luhmann means when he says conditional programmes are constitutive of the form 'if...then': these second-order observations cannot apply the code onto itself, that is, to answer the question of whether the distinction between legal/illegal is itself legal (Luhmann, 2004). What the form 'if...then' of law's conditional programme produces is a rationality: "if fact x is present, y is legal" (Luhmann, 2004). For example, s. 83.01 of the *Criminal Code*, which deals with terrorism, presents this form: if an act is committed for a political religious or ideological purpose, objective or cause that intentionally causes death or

³² Second order observation refers to the observation of observers, see *Part II: Paradox and Observation* in Luhmann (2002)

bodily harm to a person by the use of violence (if fact is present) then that act is illegal (legal/illegal). This form offers the legal system a kind of stability in its operations, “what the form of the conditional programme does is to prevent any future facts, not accounted for at the time of the decision, from being relevant to a decision concerning legal and illegal” (Luhmann, 2004, p. 198). By virtue of being structures which lead to the unfolding of the paradox of law’s code, conditional programmes allow law to continue its function of stabilizing normative expectations (Luhmann, 2004). For example, law’s communications of what it is legal/illegal allows for further meaningful communications about what is legal and illegal. As such, it continues its function of stabilizing normative expectations in the face of counter-factual examples. We shall explore later the consequences of mobilizing the unfolding of the paradox of law in relation to anti-terror legislation.

3.5.5 Justice as a Formula for Contingency

Luhmann’s analysis of conditional programmes leads to some very novel observations of the operations of the legal system. For Luhmann, law will never be able to observe itself as operating unlawfully in the present, as there is nothing to establish in the first instance what is legal or illegal. This insight appears to be the apology of any notion of ‘justice’ within the system of law. As Luhmann (2004) argues, justice cannot be placed within law as a third value of its binary code, as this will interfere with law’s ability to link its communications with further communications (and thus, cease to function). What is more, justice cannot be considered a conditional programme in itself, “as if it were to exist alongside construction law, road traffic law, the law of succession,

and the law of copyright” (Luhmann, 2004, p. 212). This does not, however, resign justice to societies other subsystems:

“[L]egal rule, nor a principle, nor as a value, nor as a decision-criterion within the law. Neither does justice appear as something external to the law against which the legal decisions can be measured, neither as a moral virtue, nor a political objective, nor as a regulative idea. All of these could be weighed against other internal rules, principles, values, criteria and against other external virtues, objectives and ideals” (Teubner, 2009, p. 8-9).

In Luhmann’s theory of a functionally differentiated society, justice has been mostly disconnected from its more traditional conception based on some variations of natural law which see justice as a fixed value for legal decision-making. Justice, according to him, has been freed from any such normative roots. It is approached as a formula which can be applied across the multitude of situations in which law must respond. This conceptualization of justice makes infinite contingent situations amenable to legal decision-making and presents information for legal decisions in a way that maintains the appearance of a positive law based on legal rules and principles. By referring to justice, as Luhmann does, as a ‘formula for contingency’, law is able to solve some of the problems that face the system of law in modern society. First, law must describe itself as a system for justice, but law cannot at the same time define what is meant by justice unless it assumes that its own operations are irrelevant to the question of justice (King & Thornhill, 2003, p. 66). Law cannot describe itself as just without the assumption that its operations are just (i.e., the operation of describing itself as a system for justice is an operation of the legal system). Secondly, the legal system, at a time when

a notion of justice based on natural law has disappeared, must define “justice in such a way as to make it clear that justice must prevail and the system identifies it as an idea, principle, or value” (Luhmann as cited in King & Thornhill, 2003, p. 66). According to Luhmann, since nature is in no way inherently just, as is assumed in the natural law tradition, law must solve this problem by “replacing the assumptions about nature with assumptions concerning justice as a self-specified formula” (Luhmann as cited in King & Thornhill, 2003, p. 67). This is what he means by justice as a ‘formula for contingency’ – law must be able to refer to notions of ‘justice’ and ‘injustice’ to validate its own operations, but such references are produced by law itself. Just as the political system validates itself by referring to legitimacy, law validates its own operations by referring to notions of justice that are produced by the legal system.

In this way, justice can be seen as the self-description of the unity of the system to itself (Luhmann, 2004). Justice, as law’s formula for contingency, acts as the mechanism by which the autopoietic system of law can internally maintain its responsiveness to the rest of the social system; to develop internal mechanisms which trigger change within the system (Luhmann, 2004). It makes law’s innovation possible. What this means is that law, in referring to justice, can be innovative in its own communicative operations. Consider the rule of treat cases alike, which Luhmann argues is central to the question of justice. According to Luhmann, the rule that like cases should be treated alike (and different cases differently), as a guiding principle of the legal system, gives the appearance that law is indeed just through the application of consistency in decision-making – through the consistent application of rules and principles of justice. However, since no cases can ever be exactly alike – that all legal norms and decisions, reasons and

arguments, could inevitably take a different form – law is able to take liberties in observing different ‘facts’ of the case while maintaining that it is just.

For Luhmann (2004), justice is “adequate complexity of consistent decision making” (p. 219). And as such, it is not internal or external to law; rather it is communicative process of self-description of the unity of the system to itself (Luhmann, 2004; Teubner, 2001; Teubner, 2009). In the chapter on justice as a formula for contingency in *Law as a Social System* (2004), Luhmann devotes much of his attention to the guiding principles of justice and equality. The programme ‘treat like cases alike’ is an example of justice as a formula for contingency. One could observe that this leads to the application of existing law in a similar fashion to the form ‘if fact x is present, y is legal’, however on the level of second-order observation (observing past applications of the distinction legal/illegal as unequal/equal) law is able to revisit earlier decisions, and if necessary, make different decisions (Luhmann, 2004). Consider the example of the 2007 Supreme Court of Canada decision on the constitutionality of security certificates³³. The Court ruled that the security certificate mechanism, which was once observed by that very Court as being constitutional, was now observed as unconstitutional (i.e., illegal). This is possible by reference to *fundamental principles of justice* – namely, the case to meet principle (i.e., through a second-order observation of the original application of legal/illegal). Through the principle of adequate complexity in decision making, the system of law is able to acknowledge the complexity generated by other social systems while, at the same time, protect the internal consistency of its own operations (King & Thornhill, 2003; Luhmann, 2004).

³³ *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9.

In this (at times) rather sporadic and seemingly unsystematic observation of how the law operates as an autopoietic subsystem of society, I have tried to introduce (and I stress, introduce) some of the theoretical elements of legal autopoiesis. That being said, Luhmann's 500-page volume on the subject clearly illustrates the improbability of doing justice to his theory of law in such little time. Indeed, this thesis may be observed as an observation of observation (i.e., second-order observation). It is meant to illustrate Luhmann's theoretical approach to meaning production as a selective reduction of the world's complexity. The next part of this chapter will consist of an analysis of the relationship between law and politics from the point of view of systems theory.

3.6 Part III: The Relationship Between Law and Politics

As noted by King & Thornhill (2003), interpreting the complex relationship between law and politics is indeed a very difficult task. Although, understanding how law and politics are distinct as autopoietic social systems helps one appreciate the complexity of each system. To start, by referring to law and politics as systems, the theory assumes that each are differentiated systems of communication (Luhmann, 2004). The legal system, with its function of stabilizing normative expectations and code of legal/illegal, remains operationally closed from the political system, with its function to make mutually binding decisions possible and code of government/opposition. Any deviation from this would inevitably lead to the dedifferentiation³⁴ of both systems. That being said, systems theory does provide us with some tools for analyzing the complex relationship between politics and law.

³⁴ See my discussion below on dedifferentiation.

3.6.1 *Structural Coupling*

In his later works, Luhmann increasingly uses the concept of *structural coupling*, borrowed from Maturana, to explain how autopoietic, operationally closed systems can co-evolve and ‘interact’ with one another. This is not to say, however, that systems can *communicate* with one another directly³⁵. The theory of autopoiesis does not ignore the presence of reality outside of communications (Luhmann, 2004). That is, that the natural world forms the environment of society (Luhmann, 2004). The theory of autopoiesis admits that there is a continuing relationship between humans (as psychic and biological autopoietic systems) and communications (social systems) (Luhmann, 2004; King & Thornhill, 2003). The relationship between systems here can be described as structures which reduce complexity to allow a system to function in its environment (Luhmann, 2004). As Luhmann puts it,

“Brains with their eyes and ears are coupled with the environment only in a very narrow physical range of frequencies within a given band. And that is exactly why they sensitize the human organism to the environment to an improbably high degree. Reduction is a necessary condition for the ability to resonate; reduction of complexity is a necessary condition for building complexity” (p. 382).

As a system of communication, society cannot function (that is, reproduce communication) without stable relationships with systems of consciousness or living systems. One cannot communicate without consciousness, just as one cannot think and

³⁵ To say that operationally closed systems can ‘interact’ with one another is not to say that systems can *communicate* with one another in an input-output model. This will be discussed more in this section, see Luhmann (1992).

feel without a body and brain (Luhmann, 2004). Stated otherwise, social systems do not feel nor think, although they can be approached as ‘epistemic sites’ (Teubner, 1989). This is not, however, a causal relationship. Consciousness does not cause society to appear just as living systems do not cause consciousness: “conscious systems cannot become social and do not enter the sequence of communicative operations as part of them; they remain environmental states for the social system” (Luhmann, 1991, p. 1433). As such, these systems ‘co-evolve’ while at the same time remain operatively closed (for Luhmann, the environment of a system is self-referentially produced). Luhmann has called this response between systems ‘irritation’ (Luhmann, 2004).

In order to communicate with its environment, the legal system must engage a process that triggers “irritations, surprises, and disturbances” (Luhmann, 2004, p. 383). But as I discussed at length in the discussion on operative closure, society’s subsystems remain operatively closed to both their environment and to other social systems. As such, the operations of the legal system can only connect with the communications of the legal system. Rather than communicating *with* other systems, structural coupling could be described as multiple systems communicating *about* each other. For example, the constitution can be described as structural coupling between politics and law. It forms part of political communications, as a process which depends on the coding government/opposition, and legal communications, since it leads to the application of the binary code legal/illegal (King & Thornhill, 2003). Through constitutional law, politics and law “co-ordinate” their operations, yet act as ‘irritants’ or ‘resistance’ to each other (Nobles and Schiff, 2013). Consider for a moment the process of policy making which is required for the drafting of legislation (such as the constitution). For politics, the process

of policy making is key to its own internal operations. Once a statute has been passed, it becomes law and thus forms part of the legal system. The legal system can then communicate about the statute as it relates to other legal operations (i.e., as politics attempting to impede on law) and law can still be thematized by political communications (i.e., as an achievement in electioneering, as having been distorted by law in its application). For example, if law decides that the statute should be given the value illegal and refer it back to parliament, the legal decision (i.e., the placement of the value illegal) can once again become a political communication. As such, Luhmann would maintain that this does not mean that law in any way ‘steers’ the political system (or vice versa), as each use a distinct basal code to give meaning to the world; it does, however, mean that the two systems can ‘co-evolve’ by acting as ‘perturbations’ to one another³⁶. Central to Luhmann’s theory of autonomous social systems is the concept of structural coupling and as such will be analyzed in great detail in the coming chapters. As the present work is an effort to analyze the autonomy of law in the context of anti-terror legislation, the structural coupling of law and politics will be of central concern throughout the analysis.

3.6.2 Law as a Permeable, Yet Autonomous System

The vision of society as systems of communication acting as structurally coupled yet operatively closed to one another has important implications for law. For one, it rejects traditional critical scholars’ efforts to deconstruct law as a tool used for political or economic objectives. Observations of law as the sole regulator of social behavior or that law is used for political or economic objectives are countless within sociological and

³⁶ See King (1993).

political discourse (King, 1993). In these self-descriptions, society's subsystems are often described as being capable of 'steering' other subsystems. Take one look into a sociological or political journal and you will probably find an analysis which refers to the 'juridicalization of politics' or the 'politicization of the juridical'. In chapter two I highlighted how such approaches have been mobilized in sociological, legal, and criminological literature on counterterrorism legislation. The rejection of politics' monopoly over law, however, has implications which must be addressed here.

In the theory of autopoietic social systems, law is no longer conceived of as the sum of all institutions, judges, courts, and judicial activities; it is not even the sum of all communications communicated by individuals traditionally placed 'within' the legal system (i.e., lawyers, judges, and so on).³⁷ Rather, law is conceived of as any event in society that is given its meaning through the binary code of the legal system – legal/illegal (King, 1993; Luhmann, 2004). As such, Luhmann would argue, any utterance that codes a social event through the code legal/illegal forms part of the legal system (King, 1993; Luhmann, 2004; Nobles & Schiff, 2013). Whereas scholars outside of this tradition argue that coding something as illegal (or in some cases criminal) and therefore authorizing various forms of intervention (i.e., use of force, incarceration) is an example of disciplining bodies, shaping souls, or regulating behaviours, Luhmann does not ignore such claims. He indeed acknowledges such complexity, however he sees the justification for such interventions as being based in law. For example, law justifies modes of intervention through self-referentially constructing its environment; this may

³⁷ Luhmann distinguishes between the system of law, conceptualized as the sum of juridical communications, and legal organizations made up of lawyers, judges, and other legal professionals (King, 1993; Luhmann, 2004).

indeed include utterances outside of law which are translated into legal communications (i.e., ‘expert’ knowledge about terrorism risk which form part of a legal decision which justifies security certificates).

For Luhmann, communications (or operations) produce structures which can be linked with further communications within the legal system. The operative closure of law is possible only if the application of the code (i.e., distinction between legal/illegal) is made possible by a decision (Luhmann, 2004). As Luhmann (1987) suggests:

“While for the emergence of the autonomy of the social system it is enough to have communication that is ultimately constituted by the distinction of information and communication of information, functional systems like the legal system are dependent on a particular coding. Accordingly, law emerges only if, and only in so far as, the need is communicated to distinguish between legal and illegal” (p. 346).

Or to put it differently, the moment “legal communications on the fundamental distinction between legal and illegal begin to be differentiated from general social communication, they inevitably become self-referential and are forced to consider themselves in terms of legal categories” (Teubner, 1993, p. 33). This is not to say, however, that the autonomy of law merely originates from a decision’s function of stabilizing normative expectations. As Luhmann (2004) points out, “since the values legal and illegal are not in themselves criteria for decisions between legal and illegal, there must be further points of view that indicate whether or not and how the values of the code are to be allocated *rightly* or *wrongly*” (p. 192, italics in original). These *programmes* of law consist of principles, statutes, rulings, and procedures in which law

“refers to past facts, which are stated in the present” (Luhmann, 2004, p. 197) and are observed as *valid* by past decisions using the same coding (legal/illegal). What this means is that the function, code, and programmes, of law produce a differentiated system consisting of operations which cannot be determined by other social systems (Luhmann, 2004; Nobles and Schiff, 2013).

This is what Luhmann refers to as the autonomy of law. As long as the code legal/illegal is the basal distinction referred to by law, the legal system will remain differentiated, and thus autonomous. Or, as Luhmann (1987) puts it: “The law’s autonomy is in danger only when the code itself is in danger” (p. 347). As such, it remains operatively closed from the political system (and society’s other subsystems) because of the continuous application of its basic code. This does not, however, mean that structural coupling leads to the end of autonomy (i.e., dedifferentiation). An analysis that implies the domination of the political system over law because of the fact that statutes are created by the political system simply misses the point. The mere fact that that statute is a product of the political system does not necessarily mean that the political system can steer law. As I argued earlier, when a statute becomes law, the legal system has to observe it through its own operations, and as such, translate (i.e., construct) it into something with which it can link with its own communications. When law observes the statute, it does not apply a different system’s code – for example, whether the statute will produce an economic payment – it decides on the statute by applying a value of legal/illegal. One may argue that, for example, the creation of a new constitution would be an example of the political steering of law. However, Luhmann would argue, that in a functionally differentiated society, law would have to observe any such constitution has

legal in order for it to be considered legal. As such, law would have to decide on the legality of a new constitution through the application of its basal code, legal/illegal.

3.6.3 *Decision-Making as Threat to the Autonomy of Law?*

Luhmann's sociology of law is premised on the assumption that the legal system is indeed an autonomous social system. The opposite of autonomy here is *dedifferentiation*. That is, of the operative openness of society's function systems to direct penetration by other social systems; of the abolishment of any differentiation between society's subsystems – law, politics, science, religion, economy, and so on. Law can also be observed, as in most sociologies of law, as heteronomous yet differentiated – as a differentiated system of society that remains subject to external domination. In contrast to such critiques, the key question for this thesis is whether, in the context of post-2001 anti-terrorism legislation, we can observe law as an autonomous subsystem of society or if sovereign power reigns victorious over the role of law. As I argued earlier, theses on state of exception in the context of anti-terror legislation maintain that law is subjected to domination by sovereign power. For Luhmann however, law is a functionally differentiated subsystem of society which is dependent on the autopoietic application of the distinction legal/illegal. Subsequently, the application of any code other than legal/illegal to legal operations would disrupt law's autonomy – the notion of autonomy is here accompanied by a conception of law as highly dependent upon its environment (see above for discussions on system co-evolution, structural coupling, deparadoxification, and system 'learning'). As such, law's autonomy is not in danger when it, as a system, makes reference (observes) to moral, or scientific, or religious, or political, or economic communications (Luhmann, 2004). As long as law is able to

observe these communications through the code legal/illegal, law's conditional programmes can be used to ensure the autonomy of the system. In this theoretical framework, the autonomy of law is in jeopardy in cases where the decision applies a code other than legal/illegal. For example, Tosini (2012) argues that, employing Luhmann's theory, current counterterrorism legislation and policies have led to State's attempts to apply the code efficiency/inefficiency in place of the code legal/illegal. In a slightly different manner than critical scholars operating within the state of exception framework, Tosini sees in anti-terrorism legislation an example of the deautonomization of law – that is, he observes anti-terror legislation and policy to be an example of State's usurpation of law for political means.

Some scholars have attempted, within this theoretical framework, to suggest that a legal decision itself is something other than a product of law (Fischer-Lescano & Christensen, 2012; Tosini, 2005; 2012). Such approaches, which directly question the autonomy of law, see legal decision-making as either a product of the political, rather than legal, system or conceptualize the decision itself as political in nature, even when it happens legally.³⁸ This leads to the dedifferentiation of law, the authors' suggest, because the basic code of the legal system (legal/illegal) has been compromised. As Tosini (2012) puts it: "the function of law is threatened first because the reference to the coding "legal/illegal" is superseded by other kinds of concerns related to extra-legal criteria" (p. 121). This extra-legal criteria³⁹ can "result in the fusing of otherwise

³⁸ For Fischer-Lescano and Christensen (2012), legal-decision making in the light of undecidability is observed as a political act. For Tosini (2012), state subordination of legal-decision making is what leads to the dedifferentiation of law.

³⁹ For Tosini (2012), the extra-legal criteria is emergency legislation, particularly post-2001 counterterrorism legislation produced in the US and UK. Fischer-Lescano and

autonomous social spheres” (Fischer-Lescano & Christensen, 2012, p. 111). The authors see decision-making itself as an example of secondary coding being given preference over the coding legal/illegal (2012, p. 111). For example, Tosini (2012) maintains that post-2001 antiterrorism legislation and executive provisions lead to states’ attempt to subordinate decisions related to counterterrorism policies to test their “efficiency/inefficiency” as guarantors of security rather than questions about their “legal/illegal” status (p. 128-198). Again, anti-terrorism legislation is approached as the example *par excellence* of law’s defeat at the hands of sovereign power.

These analyses raise some important questions regarding the relationship between law and politics which I have introduced throughout this chapter: can we see a Supreme Court of Canada decision as anything other than a product of the system of law? Is the decision, in itself, outside of law?

Scholars in this framework have tried to address such questions. First, in their analysis, Fischer-Lescano and Christensen suggest (2012) that a decision, any decision, cannot decide itself. This observation is uncontested. Luhmann himself concedes: “the decision itself does not appear within the choice of form of alternative. The decision is not one of the options, which one might choose” (2004, p. 134). He goes on to argue that “in the absence of alternatives, no decision can exist; alternatives make the decision a decision” (2004, p. 134). It is precisely here, in the paradox of decisions, where Fischer-Lescano and Christensen, citing Teubner, see the penetration of a secondary coding: “the ‘political’ expresses itself within law as: ‘a decision in a context of undecidability: as the resolution of breakdowns of meaning into antagonistic arrangements...as the dissolution

Christensen (2012), provide a more general description of ‘extra-legal’ criteria which see the decision itself as a non-legal product.

of the paradox of law into conflicts between law and non-law” (Fischer-Lescano & Christensen, 2012, p. 110; Teubner, 2006, p. 57). However, the authors are unclear in how a decision, as a third party to alternatives, becomes a question of politics. Stating, as the authors do, “the performance of law is distinguished from the performance of power because power is concerned with a decision” (Fischer-Lescano & Christensen, 2012, p. 112), seems to only detract from their point; systems theory allows for a theoretical and empirical distinction between the function and performance of social systems. This lack of foundation can be extended to the logic of form, to observation, to any distinction – to suggest that a decision is political because it has no other foundation than power is but one possible observation; seeing it as just, as legitimate, as false, as dangerous, as noble, or as poetic, are possible alternatives. On what grounds can we, as observers, privilege one observation over the others? Arguing, as Fischer-Lescano and Christensen do, that a decision is a *performance* of the political system does not lead to its usurpation of law. It simply speaks to the structural coupling of the two systems. What is more, this type of analysis seems to underestimate law’s formula of contingency: justice. For Luhmann, justice, as a formula for contingency, allows law to ‘learn’ from its environment; it allows for law to provide itself with adequate complexity in decision-making. It allows for law to be innovative in its decisions; to look to its environment (which may be political communications, economic communications, artistic communications) to give justifications for its decision and to appear as escaping tautology and self-referentiality (i.e., violence of law). And as such, it allows law to communicate about the political, the economic, the religious, the scientific, and so on, while maintaining its autonomy.

In addition, Tosini (2012) observes the differentiation of law as being endangered by politics in the form of post-2001 counter-terrorism legislation. He argues that states attempt to subordinate decisions take the form of the distinction ‘efficiency/inefficiency’ rather than ‘legal/illegal (Tosini, 2012). Yet, this analysis fails to account for the *time* it takes for law to observe a product of the political system – in this case, anti-terror legislation – as something which it must apply its basic code upon. The author repeatedly quotes politicians and policy documents which fail to apply the code legal/illegal (especially in times of exception). However, he fails to acknowledge that these communications are not, in themselves, legal communications. It takes time for the products of the political system to be ‘decided’ on by the legal system. As I have argued earlier, policy documents or speeches about counter-terrorism legislation do not necessarily form part of legal communications. Conversely, a legal communication (i.e., decision) does not form part of the political system until it is observed (and thus translated) by the political system. Although legislation acts as a structural coupling between politics and law, these systems can still remain autonomous in their operations. This is what allows the legal system to apply the binary code legal/illegal on political communications (i.e., statutes). If politics and law were *not* autonomous in operation, Courts would not be able to observe political communications by applying the value illegal. If this were the case, however, law would have already ceased to exist.

Finally, Luhmann does not ignore that social systems are under constant threat of dedifferentiation (Luhmann, 2002; 2004). In fact, Luhmann himself offered some predictions of possible crises that could result from dedifferentiation of society based on over-extension of the economy (Nobles & Schiff, 2013; Moeller, 2012; Luhmann, 2004).

As such, opening a discussion about the *threat* of dedifferentiation is perhaps counterintuitive and barren. If the threat is always present, but never manifesting itself in fact, it is not much of a threat, or is it? This is where sociological analyses seek to implant themselves in the self-description of society. So, as much as the threat may, or may not, be threatening, it is valuable to produce observations about it. As such, it is the goal of this thesis to contribute to theorizing about law's relationship to society's other social systems. More specifically, I hope to advance the argument that, in contrast to a growing body of critical scholarship on anti-terror legislation, the legal system remains an autonomous subsystem of society. While constructing law as an autonomous, autopoietic system does not contradict with observing it as being strongly influenced by other social systems. As Carrier (2007) suggests, turning to Luhmann's social systems theory "provides a way to observe empirically the topology of influence" (p. 137). Insofar as interpretations of anti-terrorism legislation as testifying to the power of the sovereign are framed as influence, we can look to how the juridical system observes such interpretations to creatively reinvent and transform itself.

While this chapter has introduced Niklas Luhmann's social systems theory, some elements are notably central to the research question presented in chapter one. Indeed, I devoted much time to explicating Luhmann's conceptualization of the *function* of law. This aspect of his sociology raises insights in which this thesis will attempt to explore in detail in chapters five and six. Notably, this thesis will aim to interrogate how law presents its relationship to other systems in the context of terrorism (in particular, to politics), how questions of justice are raised and dealt with in law in relation to terrorism, and how law deparadoxifies itself when it communicates and decides on issues related to

terrorism. While the term ‘function’ may to some suggest that law works to produce some ideal state or produce a logical “outcome of progress” (Luhmann, 1984, p. 64), I advocate for a conception of function detached from such a narrow view. This thesis approaches functional systems of society not as producers of an ideal state, but as systems of organized and recursive communications which exist within an environment constructed from the system’s own operations. This allows for the empirical analysis of legal communications not based on how law responds to terrorism ‘better’, but how the of organized and recursive legal communications reproduce the system of law within an environment that it has itself produced through communication.

Luhmann’s sociology presents an opportunity to reflect on law’s relationship with society’s other subsystems. In the context of the global ‘war on terror’, critical sociological work tends to see counterterrorism policies as the ultimate example of law’s dedifferentiation – that is, the victory of sovereign power over law. The present work is an effort to analyze this question in the context of anti-terrorism legislation while providing an account of anti-terror law’s relationship to other systems of society. While much critical sociological (and criminological) work has addressed the various impacts of counterterrorism policies on society, a sociology of Canadian anti-terror law has yet to be fully established. It is the goal of this thesis to submit Luhmann’s sociology of law to what is taken as the example par excellence of law’s surrender to State power. Prior to engaging with the question of law’s autonomy in the ‘war on terror’, however, there are methodological implications of deploying Luhmann’s sociology. The next chapter will outline some of these implications and set the methodological base for the following analysis.

4 Methodology

With the theoretical foundations presented above, this thesis will explore several significant Supreme Court of Canada decisions to ascertain whether the autonomy of law is indeed endangered by anti-terror law. By selecting Luhmann's sociology as a starting point, I must clarify some of its methodological implications. Perhaps the most logical point of departure in this instance is systems theory's concepts of observation and communication.

Luhmann maintains that observation is the *unity of the distinction indication/distinction*. For example, when we observe something as sociology of law, we indicate that it is indeed *sociology* (and not something else). Sociology can only be indicated within a distinction sociology/non-sociology. Non-sociology here could be anything (fiction, journalism, art, and so on). It is only in the unity of the distinction (i.e., this is sociology, that is not) that an observation is made. This approach has methodological implications, as we must distinguish between first and second-order observation. First-order observation is what I just described – the indication of something through the manipulation of a distinction. Second-order observation is the observation of a first-order observation (i.e., the observation of an observer). As such, sociology operates on the level of second order observation – of observing observers – but it must recognize that it is itself a communication within society. This has implications which, prior to any analysis, must be unpacked and examined in detail. It is the goal of this chapter to answer the following questions: to what extent is Luhmann's social systems capable of supporting empirical research? What are the implications of selecting social systems as a theoretical framework? How will this approach allow us to empirically

analyze the relationship between law and society's other social systems in the context of anti-terrorism legislation?

4.1 Communication, Deparadoxification, and Openness Through Closure

Although I devoted some pages to Luhmann's concepts of communication and deparadoxification in the previous chapter, I think it is important to reconsider them here in a discussion of methodology. In order to understand the process of translation which takes place in intersystemic relations, I must clarify what is meant by Luhmann's concept of communication. As I noted in the previous chapter, Luhmann shies away from the common approach to communication where something is "passed" from one point to another. This type of model, Luhmann's theory maintains, supposes the transfer of information from one to the other. For Luhmann, the self-referentiality of meaning makes such a model impossible because any meaning given to an utterance is realized from a particular viewpoint. Accordingly, any utterance is not merely "received" by an individual, but rather moves through a process of interpretation – which can also be read as a self-production. In other words, Luhmann's concept of translation does not suppose that information is "passed" from one observer to another. Rather, any utterance that is interpreted by a system is actually constructed by the reference system. Consider this example, the system of law notably communicates about 'national security', which one may observe to be part of the political or economic systems, but as I will demonstrate, when the juridical system communicates about 'national security', the form is actually self-produced by law. I will return to this point several times in the coming pages.

In Luhmann's framework, communication consists of the synthesis of utterance, information, and understanding in which none of them are given logical or ontological

priority (Carrier, 2007, p. 128). Communication is only possible when three moments of selection are brought together in congruence and as such lead Luhmann to suggest that “humans cannot communicate”. For Luhmann, social systems do not think, write, or speak, because that would imply that they possess some sort of consciousness. Although Luhmann often spoke of social systems as if they are able to “learn”, he never argues that they have some sort of internal being. However, humans are not expelled from this schema. For Luhmann, communication is, in the first instance, not a psychic fact but a *social* fact. I cannot enter into your mind as you read this and know the meaning you have given to this sentence. Communication is very much dependent on consciousness, but as the synthesis of utterance, information, and understanding, it is also separated from consciousness (Carrier, 2007). What this means is that any understanding of others is a product of the system through which we give ourselves unity: our own consciousness. As such, the meaning given to communication is taken as a construction of our own system of consciousness. On this topic, Carrier (2007) thus concluded: “any hetero-referential act of consciousness is self-referential” (p. 128).

If we accept Luhmann’s notion of communication as self-referential, we find that social systems do not have access to their environment otherwise than through their own operations. Here the distinction self-reference/hetero-reference is used because it allows for the deparadoxification of its self-referential basis. For instance, when we use a distinction to indicate something out of the horizon of possibilities, the indication itself eliminates the self-referentiality of the distinction. We cannot at once indicate something with the use of a distinction and indicate the distinction itself. As I noted earlier, what this

leaves us with is a blind spot, since observations are dependent on the use of unobservable distinctions (Carrier, 2007).

Further, Luhmann's concept of communication, as the synthesis of utterance, information, and understanding, suggests that communication itself is unobservable. This would lead to, as some systems theorists argue, to a concept of communication only observable if it is attributed to action. What this means, according to Luhmann, is that communication is only observable when we attributed a selection to a specific system. For instance, legal communication is only observable when we attribute a selection to the legal system. In this way, Luhmann maintains, "communication communicates". Carrier (2007) thus notes, "[w]e are the condition of the possibility of this communication, although we are limited to producing a mental, not communicational, construct of it. We have to keep that point in mind every time it is proposed that a social system, such as law, "decides," "observes", and so on" (p. 129).

As I have suggested, Luhmann defines social systems as organized and recursive operations of communication. All elements used in social system's operations are produced by those social systems. In addition, Luhmann maintains that social systems are autopoietic. That is, systems reproduce themselves from their own products. Here it is important to introduce the distinction between elements and structure that is central to Luhmann's concept of autopoiesis. Structure, according to Luhmann, refers to both the organization of the process linking elements with elements and the organization of elements that are to be excluded from a system's operations. Luhmann's notion of element, on the other hand, "is constituted as a unity only by the system that enlists it as an element to use in its relations" (Luhmann, 1995, p. 22). For instance, the threat to

national security presented by terrorism can be observed as elements of the political system, economic system, scientific system, or even the juridical system, but the systems' structures which constitute these elements are proper to each system. The juridical system is thus able to translate various political communications on how terrorism threatens national security, but only if national security is constructed as an element to be included in legal operations.

An important part of Luhmann's concepts of elements and structure is that they are connected within a paradox. What I mean by this is that structures enable the autopoietic production of elements from elements, and the production of elements enables the production of structure. As Carrier (2007) suggests, "[a] particular law thus makes juridical decisions possible and juridical decisions maintain or transform this particular law. Since a selection is necessary in each case, the autopoietic movement can be taken as a *fleeing act of creation*" (p. 130; italics in original).

The paradox of this autopoietic movement, according to Luhmann, is accomplished through the attribution of the motives of their operations to external elements. However, the hetero-reference of such an operation does not eliminate the system's self-referential basis. As I have noted, Luhmann suggests that in order to be included as elements to a particular system, they must be made internal by the reference system. What this means is that elements have to be selected by the system as elements to be used. The hetero-reference to such elements is thus translated by the system – hetero-reference becomes self-reference.

In the case of law, the paradox in which the system ultimately finds its unity is the difference legal/illegal. The deparadoxification of which takes place through hetero-

reference to observations from its environment (elements which are, in the final instance, self-produced by the legal system) that enable the system to modify legal structures. What this means for the case study to follow is – and this is precisely why I have included this discussion in a chapter on methodology – that the study of autopoietic social systems brings us to examine the juridical constructions of extra-judicial communications. For example, instead of understanding the relationship between law and politics (or the economy, or science, or religion) as one of a linear, dominating relations, we can begin to examine the juridical translations of political elements – elements which are made internal by the process of autopoietic translation accomplished by the juridical system.

4.2 Selection of Sources

With some of the methodological concerns raised in departing from Luhmann's social systems theory highlighted, I must now turn attention to questions that are more traditionally included in a methodology chapter, including: which texts (i.e., legal communications) will this thesis analyze? Why have these texts been selected? And how will the texts be interrogated? Using the theoretical framework presented in the previous chapter, I will examine (some elements) of the five Supreme Court of Canada decisions on the constitutionality of various dimensions of anti-terrorism legislation, in which the autonomy of law is made explicit: *R. v. Khawaja*, *Sriskandarajah v. United States of America*, *Application under s. 83.28 of the Criminal Code (Re)*, *Suresh v. Canada (Minister of Citizenship and Immigration)*, and *Charkaoui v. Canada (Citizenship and Immigration)*.

Each case was selected because it represents the highest, most definitive, ruling of any Court in Canada. In addition, each case deals directly with issues relating to the Constitutional validity of certain elements of anti-terrorism legislation. The 2007 SCC decision *Charkaoui v. Canada* has been selected because, as I mentioned in chapter two, Canadian criminological debate has highlighted how the security certificate mechanism is an example *par excellence* of the heteronomous character of the legal system in the context of terrorism. This case raises some significant questions that are central to this thesis: is the security certificate mechanism in Canada an example of sovereign power's victory over the rule of law? How does the legal system construct liberty in this context? What is the relationship between politics and law in relation to security certificates? These central questions will be considered in chapter six.

In chapter five, I will analyze four SCC decisions in some detail, including: the 2012 *Khawaja* decision and its companion *Sriskandarajah* case, and rulings from 2002 and 2004 in *Suresh* and *Application under s. 83.28 of the Criminal Code*, respectively. The 2012 decisions represent the first SCC ruling including an individual charged under provisions introduced in 2001 as part of the *Anti-terrorism Act*. The SCC ruling put an end, at least temporarily, to questions of how the juridical system would respond to claims that post-2001 counter-terrorism legislation was enacted haphazardly and without respect for individual rights and freedoms. It also represents the most recent SCC decision that communicates directly about 'terrorism'. In addition, chapter five also explores some elements of the 2004 decision *Application under s. 83.28 of the Criminal Code*, in which the legal system decided on the constitutionality of some changes brought to investigative hearings under the *Anti-terrorism Act*. In particular, this case was selected

because it represents juridical communications about liberty and judicial independence in the context of terrorism. Finally, the 2002 *Suresh* decision is included in the analysis because it represents how, prior to 2001, the juridical system was able to respond to terrorism through existing legal structures. As such, *Suresh* is directly related to the question of law's discourse on terrorism prior to the introduction of new legislative frameworks.

While the inclusion of each case represents legal communications of only some elements related to anti-terrorism legislation in Canada, together they raises significant questions that this thesis seeks to explore in the following chapters: can Canada's post-2001 anti-terrorism legislation be read as an example of law's dedifferentiation? What is law's discourse on 'terrorism'? What does law 'see' when it observes and communicates about terrorism? How does law's observation relate to observations rooted in other social systems (i.e., politics, science, the economy)? How does law justify the continued maintenance of anti-terrorism legislation in the face of mounting criticism over its utility? Each case, while selected because of their relation to some of the key questions I raised in the first chapter, represents a selection from a horizon of possibilities. I do not intend to advance the argument that I have exhausted all legal communications on terrorism in Canada. Nor have I selected extra-legal communications for inclusion in this work. This is done both intentionally and justifiably (from my perspective at least). In regard to my first point, that I do not intend to exhaust legal communications about terrorism, I have chosen to include *some* legal communications pertinent to terrorism that relate directly to my research questions. I could very well (attempt to) include all legal communications related to terrorism; this however would have great implications on the goal and overall

trajectory of this thesis. Similarly, I have chosen to make legal communications central to this analysis of anti-terrorism legislation. While law may be the logical point of departure for such an analysis, it is by no means the only system that observes law related to terrorism. By selecting juridical communications related to anti-terrorism, this study inevitably suffers from its own blind spot. That is, this thesis represents the empirical study (an observation) of an observing system (law). I may uncover some legal translations of extra-legal elements (i.e., of some political elements), but I cannot at once observe the autopoietic movement of elements within other social systems (such as politics, or science). A different study could very well look to the self-referential construction of politics' terrorism, however I have chosen to focus on law's terrorism for this thesis.

Yet the question remains: how does one observe legal communications? One answer is presented in the *functional method* advanced by Luhmann and some of his contemporaries. I will now turn to a discussion of functional method and some methodological implications of selecting it to elucidate some observations of the relationship between law and other social systems in the context of anti-terrorism legislation.

4.3 Interrogation of Legal Communications: Functional Method

Luhmann has been criticized, I would argue incorrectly,⁴⁰ for producing a grand theory of society without actively engaging in empirical work (Esser, 2007 in Lee and Brosziewski, 2009). Luhmann mostly worked within a sociological tradition more aligned with traditional sociology, where he was able to teach and mentor students while

⁴⁰ For an example of Luhmann's strenuous empiricism, see *Love as Passion (1998)*.

for the most part avoiding the need for external grants and fellowships. In fact, Luhmann himself once proclaimed: “When I joined the faculty in sociology at the University of Bielfeld when it established in 1969, I found myself confronted with the obligation to name the research projects I was conducting. Then and now, my project is described as follows: Theory of Society; Time frame: 30 years; Costs: none” (Luhmann, 1997, p. 11). Although Luhmann’s work may indeed seem highly theoretical – evinced by his description of his work – it does not mean that systems theory is essentially non-empirical. Aspersion to Luhmann’s research often surrounds the appearance of an easily recognizable methodological structure. Such obloquy often finds support within an academy whose methodological tools are often perceived as constant and established. However, on closer inspection, it is clear that Luhmann’s allergy to empiricism can be easily rejected by empirically evaluating Luhmann’s own work. What systems theory does propose, then, is an approach to methodology as a contingent self-description of the system of science. Any critique that maintains current methodologies are static, and thus will not further evolve, fails to recognize that methodology is itself an observation of the observing system. With this in mind, I will focus on some methodological implications that are part and parcel of selecting systems theory as a point of departure for this thesis.

By selecting Luhmann’s systems theory, I accept a basic proposition: that any theory about observing systems (any observed system) must first designate its reference point – its point of observation. The researcher must determine the basic distinctions that an observing system uses to make and organize observations that can yield information. For example, I might focus upon the activity of terrorism. ‘Terrorism’ is then indicated. However, this indication is only recognizable within a distinction – for example,

terrorism/not terrorism. The other side of the distinction could be activism, political action, social movements, social unrest, and so on, and this other side makes a difference to the way terrorism appears to the observer (as different to activism, political action, social movements, social unrest, and so on). What this means for empirical research within this theoretical framework is that the observer must concentrate on the guiding distinctions made by observing systems which can yield information. This is often referred to in Luhmannian circles as *form analysis* (Andersen, 2003) (form analysis will be elucidated in detail below).

So what, then, does systems theory propose for engagement with, and analysis of, empirical data? For Luhmann, a function can be defined as the unity of the difference between a problem and various solutions (Luhmann, 2000, p. 116). This brand of ‘functionalism’ is much different than earlier forms of structural functionalism advocated by sociologists like Parsons. The function is never the only solution, as the solution is only such in relation to a specific problem. Conversely, the problem can only be located in relation to a solution. One cannot observe such problems in themselves because they are only observable in the unity of the distinction (problem/solution). Defined as the unity of the distinction problem/various solutions, functional analysis can be related to problems and seeks to find solutions to such problems. Knudsen (2010) outlines two steps which characterizes functional analysis: (1) the development of a perspective demonstrating the problems, and (2) the analysis of the phenomenon studied showing possible solutions (Knudsen, 2010). As Lee and Brosziewski (2009) note, “[s]cientists seem to enjoy suggesting ideas about the origins of problems: the problems of individuals, the problems of politics, the problems of the economy, the problems of

science, and even the problems of society... this is exactly the place to work empirically” (p. 213). Problems must be constructed and as such can take on different forms when associated with different solutions. Founding modern observations on the assumption that observers operate under conditions of complexity and contingency, functional method allows us to examine which problems are formulated by law, and what solutions are considered to address such problems. Further, Luhmann (1995) highlights a central problem of social systems: how communications (i.e., elements) that are constantly disappearing are reproduced by the system of reference. In this way, Luhmann provides us with some methodological tools for documenting formulations of problems, solutions to problems, and systems’ reference points. Functional method allows us to examine the “selectivity of problems and the selectivity of solutions, assuming that every given combination represents a contingency on each side” (Lee & Brosziewski, 2009, p. 212). In the case presented here, we can use Luhmann’s functional method to explore problems related to terrorism that are formulated by the legal system, and what solutions were considered to address such problems.

So how, then, do we make the connection between functional method and the empirical study of legal communications? As I suggested in the previous chapter, specifically in the section on functional differentiation, Luhmann maintains that modern society primarily differentiates its communications according to a distinct set of problems. For example, law is oriented to solve the basic problem of maintaining norms in the face of counter-factual examples, politics solves the problem of making collectively binding decisions, and science solves the problem of providing new claims to knowledge. Within these problem-solution formulations, there can never be only one

solution to a systems problem. As such, the functional method allows us to observe such problem-solutions in terms of their selectivity and contingency. In the case of anti-terrorism legislation and law, it allows us to examine how the legal system maintains norms about terrorism in the face of counter-factual examples and how it does so through the recursive selection of elements from its environment. The functional method will thus be mobilized to highlight how the juridical system formulates problems associated with terrorism, and how it provides solutions to those problems.

That being said, the empirical analysis of such problem-solutions is not the only methodological issue of concern for this thesis. As I have mentioned, Luhmann's functional method also allows us to engage in the analysis of specific distinctions in relation to how communication plays itself out (Andersen, 2003). This type of inquiry is often referred to, by scholars working within this theoretical framework, as *form analysis*.

4.4 Form Analysis

Central to Luhmann's concept of observation is the guiding distinction. As Andersen (2003) maintains, form analysis focuses on specific distinctions in which communication is based. As such, form analysis analyzes the "boundaries of communication and the paradoxes that communication unfolds when it connects with one particular distinction" (Andersen, 2003, p. 178). Form, as the unity of a difference, is thus similar to observation; however, we are not provided with a system's reference to meaning-shaping systems of communication (Andersen, 2003, p. 178). For example, we observe the observations of law communicating about terrorism. We also note that several systems are focusing on different aspects terrorism in relation to the economy, to politics, to science, and so on. We, as the observer of observers, notice a 'recursivity'

(Andersen, 2003, p. 178) in communication about terrorism. So the question becomes, is there a *form* within such communications (i.e., unity of a difference). As such, which difference allows observers to observe in terms of terrorism? And subsequently, what is the blind spot (i.e., unmarked space) left by this indication? Form analysis is the analysis of the kind of communication which can develop within a distinction (Andersen, 2003, p. 179). Form analysis, as the examination of the unity of a difference, has thus been compared to Derrida's *deconstruction*, Laclau's deconstructive analytical strategy (Andersen, 2003), and is perhaps not so different from Fairclough's (1995) *discourse analysis*. Whereas deconstruction may highlight a certain 'logicity' (Anderson, 2003) given a particular guiding distinction in communication, form analysis attempts to locate the unity of a distinction, which includes communication that the distinction both enables and excludes (Andersen, 2003).

For the purpose of this thesis, I wish to start with form analysis. That is, I will analyze some observations of an observer (in this case, the Canadian legal system) that focus on 'terrorism' to try and localize a guiding distinction (i.e., 'terrorism'/unmarked space). Here, the observing systems communications – in this case Supreme Court of Canada rulings on the constitutionality of anti-terrorism legislation – will be read, examined, and interpreted in relation to how the juridical system formulates problems and in turn how the system also formulates solutions in response to terrorism. These problem-solutions will then also be examined to highlight a guiding distinction – that is, 'terrorism'/not 'terrorism', which then justifies the systems continued application of its basic code: legal/illegal. In doing this, I seek to address some significant questions: in what way does the legal system communicate through the form 'terrorism'? Which

differences allow the system of law to see certain things as ‘terrorism’ and others as something else? And more specifically, what is the ‘unmarked space’ of the difference ‘terrorism’/unmarked space? Given the fact that the concept ‘terrorism’ is itself paradoxical (or tautological, in that ‘terrorism’ is currently defined commonly as ‘committing terrorist activities’) we can then look at the unfolding of this paradox through legal communication. What I mean by the unfolding of the legal paradox is that we can document juridical translations of elements from its environment to be used in the form of its guiding distinction (i.e., that elements of anti-terrorism are legal/illegal).

4.5 Conclusion on Methodology

Although Luhmann’s social systems theory may at first sight appear as unsuited for conventional methods of empirical research, it provides us an innovative analytic for understanding law’s relationship with its environment without reducing such relations to that of dependence. Rather than accepting that which appears to be unities in the form of data, it allows us to analyze how the observing system itself constructs the data which it uses to back up some sort of claims. What this means for sociologists conducting research, then, is a method of analyzing the construction of empirical investigation in itself. As I have argued, Luhmann’s theoretical framework provides us with a theoretically rich, and empirically driven, analytic for understanding intersystemic relations that refuses to accept the linear domination of one system over another. Rather, it provides a framework for analyzing the “topology of influence” (Carrier, 2007) in which systems are able to constantly transform and reinvent themselves through contingent selections. In the case presented here, law is notably able to observe other system’s communication (i.e., political, scientific, and economic communication) in the

maintenance of anti-terrorism legislation, the autopoietic movement of which will form the foundation of the following chapters.

The chosen methodology however, as I have noted, is not without its limitations. As mentioned earlier, documenting how law formulates its problem-solutions and how it uses communications from its environment to deparadoxify its own communications results in a rather large bank of data. As such, this thesis is only able to document some legal communications in relation to law's terrorism. This means that a thesis of this type inevitably suffers from a blind spot: in the pages to follow, I admittedly ignore the ways in which other systems of organized communication communicate through the form 'terrorism'. By focusing on the system of law, this thesis represents an attempt to highlight how law translates elements from its environment to deparadoxify its own operations. Likewise, I do not analyze all juridical communications related to terrorism, as including all legal communication on the phenomenon would not be possible in the format of this thesis.

In addition, some may argue that the deployment of Luhmannian functional method with its companion form analysis results in nothing more than a *description* of legal operations. I will address this supposition throughout the thesis (and in particular in chapter seven), however it is important to devote some words to it in the context of methodology. Admittedly, a goal of this thesis is to document legal communications about terrorism and as such is partly descriptive in nature. However, as Andersen (2003) notes, form analysis inquires about the very distinction in which observation is oriented and about the paradoxes established as a result of this distinction. It allows us to interrogate the unity of the distinction and how social systems deparadoxify the very

paradoxes on which they are built through communication (Andersen, 2003). It begins by analyzing about the other side of the side indicated. For example, it allows us to locate law's terrorism through inquiring about the unmarked space left by the very indication of terrorism itself. We can then observe how law deparadoxifies its own operations through the selection of elements from its environment. Such selection, as I hope to demonstrate, is contingent as it inevitably involves communication that the distinction both enables and excludes. This will be particularly evident in the discussion of terrorism/not terrorism in chapter five. What is important here is that it allows for the analysis of the legal system's contingent, and I will also argue arbitrary, selection of elements from a horizon of possibilities (i.e., its environment) to maintain and transform juridical communications about terrorism, liberty, security, and dissent.

With the methodological concerns discussed above, the overall aim of this thesis is submit Luhmann's social systems theory to an analysis of anti-terrorism legislation in Canada in the hopes of illuminating law's relationship with other social systems in what has come to be known as the global 'war on terror'. In particular, I will focus on the autonomy of law and various deparadoxification processes that are used by the juridical system to maintain and transform anti-terror legislation. Further, I will employ Luhmann's methodological approach to reflect upon the system of law's reference point as it relates to the distinction terrorism/not terrorism. In doing so, I hope to offer new insights into law's relationship with other social systems – such as politics, the economy, and so on – in the face of mounting criticism over its apparent surrender to sovereign power.

5 The Juridical Maintenance of Anti-terror Law

In the previous chapters, I introduced current scholarly debates about the relationship between law and society's other system in the context of what is commonly referred to as Canada's 'war on terror'. I also presented Niklas Luhmann's social systems theory as an alternative framework to analyze this relationship and discussed some of the methodological concerns resulting from this selection. In the pages that follow, I will shift focus to an analysis of the juridical maintenance of anti-terror law. More specifically, I will analyze (some dimensions of) four SCC decisions to highlight how law justifies the continued use of anti-terror legislation: *Sriskandarajah v. United States of America* (2012); *R. v. Khawaja*, (2012), *Application under s. 83.28 of the Criminal Code (Re)* (2004), and *Suresh v. Canada (Minister of Citizenship and Immigration)* (2002).

Prior to 2001, the juridical system was able to respond to the problem of terrorism using existing legislation and criminal law. Since then, a myriad of post-2001 anti-terrorism laws have been enacted. Much of which has been observed, from various points of view, as ill-founded, haphazard, and rushed, thus raising questions of how law maintains the use of anti-terrorism legislation in the face of mounting criticism. This chapter will focus on the juridical maintenance of anti-terror law with particular interest in how law upholds its autonomy in what is often taken to be its most poignant defeat: the war on terror.

5.1 *R. v. Khawaja, Sriskandarajah v. United States of America, and the juridical maintenance of anti-terrorism law*

In December 2012, the SCC ruled on the constitutionality of (some) elements of the *Anti-terrorism Act*. Mohammed Momin Khawaja, the first person charged under the Act, challenged the constitutionality of the legislation on the ground that the “motive clause” – which provides that a terrorist activity must be an act or omission in whole or in part “for a political, religious or ideological purpose, objective or cause” (*Anti-terrorism Act, s. 83.01(1)(b)(i)(a)*, 2001) – would produce a “chilling effect on the expression of beliefs and opinions and thus violates s. 2 of the *Charter*” (*R. v. Khawaja*, 2012). The SCC also ruled on a companion case, *Sriskandarajah v. United States of America*, where the appellants claimed that s. 83.18 of the *Criminal Code* which makes participation in or contributing to the activity of a terrorist group an offence is unconstitutionally overbroad. The SCC considered all constitutional claims in the *R. v. Khawaja* decision.

The SCC ruling put an end, at least temporarily, to questions of how the juridical system would respond to claims that that post-2001 anti-terror legislation was created haphazardly and without respect for innocent expressions of support for terrorist groups. In the unanimous ruling, the Court held that s. 83.18 of the *Criminal Code* did not violate s. 7 of the *Charter* and that s. 83.01(1)(b)(i)(A) did not violate s. 2 of the *Charter*.

5.1.1 *The unpredictability of fundamental principles of justice*

In the companion case, the appellants argued that the combined effect of the definition of ‘terrorist activity’ under s. 83.01(1) and of the provision prohibiting participation in terrorist activity under s. 83.18 is a case of legislative overbreadth, by

criminalizing activity that creates no risk of harm and is problematically linked to Parliament's counterterrorism objectives. The legal element of overbreadth has long been translated in cases of criminal law, and continues to be juridically maintained as a "fundamental principle of justice" (R. v. Khawaja, 2010, para. 35). The principle requires that any means chosen by the state, in pursuing a legitimate objective, must not be broader than is necessary to accomplish said objective. The juridical system could thus state:

"Pursuant to s. 7 of the *Charter*, laws that restrict the liberty of those to whom they apply must do so in accordance with the principles of fundamental justice. Criminal laws that restrict liberty more than is necessary to accomplish their goal violate principles of fundamental justice. Such laws are overbroad" (Khawaja, 2010, para. 35).

The SCC thus observed as a juridical operation the question of deciding whether the definition of terrorist activity and the prohibition of participation in activities related to terrorism were indeed overbroad. Here the law selected some of its elements, namely "the legal test for overbreadth" outlined in the 1994 *Heywood* decision, the system stated that "a law is overbroad if the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective. In determining overbreadth, a measure of deference must be paid to the means selected by the legislator" (R. v. Khawaja, 2012, para. 37). The system further maintained,

"The appellants argue that the law is overbroad because it is grossly disproportionate to the objective it seeks to achieve. The appellants conflate overbreadth and gross disproportionality. *Heywood* suggested that gross

disproportionality was a concept subsumed by overbreadth: “The effect of overbreadth is that in some applications the law is arbitrary or disproportionate” (R. v. Khawaja, 2012, para. 38).

However, in the 2003 *Malmo-Levine* SCC decision, the juridical system concluded, “In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government’s legislative measures...were, in the language of *Suresh*, “so extreme that they are *per se* disproportionate to any legitimate government interest...the applicable standard is one of gross disproportionality, the proof of which rests on the claimant” (R. v. Khawaja, 2012, para. 143, emphasis in original).

The system further maintained that gross disproportionality itself is a “constitutional standard” which is “recognized as a distinct breach of principles of fundamental justice” (R. v. *Malmo-Levine*, 2003, para. 158-159; R. v. Khawaja, 2012, para. 38). However, the juridical system also stated, “some confusion arises from the fact that *Malmo-Levine’s* companion case *R. v. Clay*...could be read as suggesting that gross disproportionality is simply the standard by which overbreadth is measured” (R. v. Khawaja, 2012, para. 38). The system thus observed the apparent juridical confusion over fundamental principles of justice. Selecting some of its own communications, notably a 2011 decision⁴¹, and some scientific elements, namely legal authority Peter Hogg’s (2007) reference to gross disproportionality as the “sister” doctrine of overbreadth, the juridical system was able to conclude “certainly, these concepts are interrelated, although they [overbreadth and gross

⁴¹ *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134.

disproportionality] may simply offer different lenses through which to consider a single breach of the principles of fundamental justice” (R. v. Khawaja, 2012, para. 40).

Through the selection of extra-judicial elements the juridical system could thus conclude that overbreadth and gross disproportionality were interconnected legal elements rather than distinct constitutional standards. While it noted that a previous legal decision – *Malmo-Levine* – called on the Court to interpret each element in its own right, the SCC selected other legal and extra-legal elements to justify the decision to interpret the elements “in a single step”, thus allowing the juridical system to refuse to observe gross disproportionality as a distinct constitutional standard. A liberty that then allowed the juridical system to observe external elements vis-à-vis overbreadth as internal elements to the ‘constitutional standard’ of gross disproportionality. By refusing to observe gross disproportionality as a distinct standard, the juridical system was able to avoid deciding on whether, in the context of s. 83.18, legislative responses are disproportionate to any legitimate state interest in essence. Rather, the system could justify disproportionate legislative responses through reference to the law not being overbroad. The system was thus able to stop regarding disproportionality as a stand-alone constitutional standard. Rather, in the context of s. 83.18, the juridical system was able to transform gross disproportionality into part of its interpretation of overbreadth.

While the juridical system could have observed the two elements as separate constitutional principles, as had been observed in past legal decisions, the system’s selection of extra-judicial (and legal) elements to construct their interconnectivity quite clearly illustrates that law’s autopoietic movement can be observed as a fleeting act of construction. As we will see, a liberty taken by the juridical system was to refuse to

observe gross disproportionality as a distinct legal element. Although, as I mentioned, in *Malmo-Levine*, this was observed as a distinct fundamental principle of justice, in this case it was interpreted as an element to be included in the juridical observation of overbreadth. Law thus stated:

“I need not decide whether overbreadth and gross disproportionality are distinct constitutional doctrines...overbreadth occurs when the means selected by the legislator are broader than necessary to achieve the state objective, and gross disproportionality occurs when state actions or legislative responses to a problem are “so extreme as to be disproportionate to any legitimate government interest”...[t]hus, I will examine both overbreadth and gross disproportionality in a single step, without deciding whether they are distinct constitutional doctrines”” (R. v. Khawaja, 2012, para. 40).

The paradoxicality of this fundamental justice was solved by the juridical selection of both juridical elements and extra-judicial “authority” about how to interpret the fundamental principle of overbreadth: fundamental justice requires that laws not be broader than necessary, while in the context of the prosecution and prevention of terrorism, it is “appropriate to exhibit due deference” to the government’s determination of the proportionality between the legislative impact and state objectives. The system was then able to conclude:

“s. 83.18 captures a wide range of conduct...the scope of that conduct is reduced by the requirement of specific intent and the exclusion of conduct that a reasonable person would not view as capable of materially enhancing

the abilities of a terrorist group to facilitate or carry out a terrorist activity”
(R. v. Khawaja, 2012, para. 62).

This quite clearly illustrates how law’s observation of gross disproportionality and overbreadth as connected constitutional standards allowed the juridical system to refuse to decide directly whether legislative responses were grossly disproportionate to state objectives. Instead, the juridical system observed as a juridical operation the question of deciding both within its interpretation of overbreadth. Because of a heightened requirement of specific intent, and exclusion of conduct which a reasonable person would accept – elements used to justify the system’s decision that the legislative response is not overbroad – the juridical system need not decide on whether state actions were indeed disproportionate with state objectives. The juridical system thus observed the definition of terrorist activity to be not overbroad, because of the heightened mens rea requirement, but could defer to Parliament the determination that the impugned legislative response is necessary and thus not grossly disproportionate.

Moreover, in order to decide on the constitutionality of some *Criminal Code* provisions introduced in the *Anti-terrorism Act*, the juridical system observed as a juridical operation the question of deciding which activities would be attributed “materially to the creation of a risk of terrorism” (R. v. Khawaja, 2012, para. 42). Such activities which have been observed by the scientific system as legislatively ambiguous. For instance, Kent Roach (2001) has argued that, under new *Criminal Code* provisions for terrorism, even lawyers and doctors who provide professional services to a known terrorist could be convicted under s. 83.18 (p. 161).

The juridical system also observed as a juridical operation the question of interpreting activities that are to be attributed to the creation of a risk of terrorism with “regard to its legislative purpose” (R. v. Khawaja, 2012, para. 43). The juridical construction of the legislative purpose came directly from Professor Roach, who maintained elsewhere that “the use of the words “for the purpose of” in s. 83.18 may be interpreted as requiring a “higher subjective purpose of enhancing the ability of any terrorist group to carry out a terrorist activity”” (R. v. Khawaja, 2012, para. 45; Roach, 2007, p. 285). This however was not the only scientific element to influence law’s autopoiesis. The system further concluded,

“The effect of this heightened *mens rea* is to exempt those who may unwittingly assist terrorists or who do so for a valid reason. Social and professional contact with terrorists – for example, such as occurs in normal interactions with friends and family members – will not, absent the specific intent to enhance the abilities of a terrorist group, permit a conviction under s. 83.18. The provision requires *subjective fault*, as opposed to mere negligent failure to make reasonable steps to avoid unwittingly assisting terrorists” (R. v. Khawaja, 2012, para. 47; Roach, 2007, p. 285, italics added).

The liberty taken by the juridical system in its observation of the interconnectivity of gross disproportionality and overbreadth thus allowed the system to justify the continued maintenance of legal norms regarding the vagueness of some provisions of the *Anti-terrorism Act*. Through reference to scientific “authority” on the issue, namely one of Professor Kent Roach’s interpretations, the system was able to conclude that the legislation shall not be considered overbroad because of a heightened requirement of

specific intent. In other words, the juridical system was able to legally continue s. 83.18 by justifying its maintenance through reference to one particular scholar's interpretation of the purpose of the legislation. Through this selection, however, emerged a blind spot: other interpretations not to be included in law's construction of broadness. As I noted above, the system could have selected a different interpretation of the vagueness of s. 83.18. For instance, the system could have observed Roach's conclusion that even professionals, such as doctors or lawyers, who treat or defend those suspected of terrorist activity could be implicated under the provision. The system could have also selected among numerous scholarly interpretations that observe anti-terrorism provisions to be the basis of inequality and institutional racism due to its all-encompassing nature (Bahdi, 2003; Razack, 2008; Diab, 2008). The juridical translation of particular scientific authority on the purpose of s. 83.18 thus illustrates the selectivity of law in the context of its construction of legal norms about the breadth of certain anti-terrorism provisions. The system could very well have concluded that s. 83.18 was overbroad through reference to other scholarly (or political, or economic) interpretations. But the selection and translation of extra-judicial communication about the purpose of the legislation is here argued as a product of the *legal system* rather than the political or scientific systems.

The decision was also grounded in the juridical observation of scientific "authority" on the intended purpose of the legislation (R. v. Khawaja, 2012, para. 39). The juridical system could thus confidently state,

"Although s. 83.18(1) punishes an individual who "participates in or contributes to...any activity of a terrorist group", the context makes clear that Parliament did not intend for the provision to capture conduct that creates no

risk or a negligible risk of harm...While nearly every interaction with a terrorist group carries some risk of indirectly enhancing the abilities of the group, the scope of s. 83.18 excludes conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to *facilitate or carry out a terrorist activity*” (R. v. Khawaja, 2012, para 50-51, emphasis in original).

Here, the juridical system observed the concept *reasonable person* as a legal element. The concept, which is form of legal fiction that refers to how a typical person, with ordinary prudence, would act in certain circumstances, was thus used by the juridical system to define which actions are to be interpreted as ‘terrorism’. Here, the task of the juridical system was to determine those activities which are considered ‘terrorism’ from those which are to be accepted by the standard of the reasonable person. Through hetero-reference to scientific “authority” on the scope of s. 83.18, the juridical system stated,

“The determination of whether a reasonable person would view conduct as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity hinges on the nature of the conduct and the relevant circumstances...the conduct of a restaurant owner who cooks a single meal for a known terrorist is not of a nature to materially enhance the abilities of a terrorist group...by contrast, giving flight lessons to a known terrorist is clearly conduct of a nature to materially enhance the abilities of a terrorist group” (R. v. Khawaja, 2012, para. 52; Davis, 2001, p. 301).

Through the self-referential selection of both scientific and legal communications, the juridical system could thus conclude that terrorism excludes “innocent or socially useful

conduct that is undertaken absent of any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity” (R v. Khawaja, 2012, para. 53). This demonstrates the contingent nature of juridical selections. The juridical construction of how a ‘reasonable person’ would interpret activity as terrorism includes conduct that “materially enhances the abilities of a terrorist group”. Does this therefore not also include performing medical or other professional services on “known terrorists”, as some commentators from various points of view continue to suggest (Diab, 2008; Roach, 2004; Herman, 2002)? Could the system not have selected other communications that maintain that ‘terrorism’ is itself difficult to define and any interpretation is “in the eye of the beholder” (Canadian Council for Refugees, 2001)? For the juridical system, a ‘reasonable person’ is one who would be able to distinguish between “materially enhancing” the abilities of a terrorist group and innocuous and acceptable conduct. Further, the juridical system’s reference to the distinction terrorism/not terrorism highlights some of the defining characteristics of law’s terrorism. For instance, law made use of the reasonable person standard to justify its decision that terrorism does not include “innocent or socially useful conduct that is undertaken absent of intent to enhance the abilities of a terrorist group”. The juridical construction of terrorism thus does not include conduct that a “reasonable person” would find “socially useful”, but what does “reasonable person” and “social useful” mean? No answer is to be found in law. As I will demonstrate, law makes reference to extra-judicial authority and consensus about socially useful conduct to maintain the use of anti-terrorism law (this will be particularly evident in my discussions regarding law’s terrorism and the distinction terrorism/dissent).

In addition, through reference to one particular scientific study (Davis, 2001), the system added “a purposive interpretation of the *actus reus* and *mens rea* requirements of s. 83.18 excludes convictions...for conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out terrorist activity” (R. v. Khawaja, 2012, para. 53, italics in original). The juridical system thus observed terrorist activity to be activity that a reasonable person would observe as capable of “materially enhancing” the abilities of known terrorist groups or to carry out activities deemed “terrorist” under s. 83 of the *Criminal Code*. Through the selection of scientific elements, law was able to observe that a “purposive” interpretation of s. 83.18 reveals a heightened *mens rea* requirement, which the juridical system observes to be “narrow” rather than overbroad (R. v. Khawaja, 2012, para 54). The juridical construction of the purpose of s. 83.18 thus allowed the system to maintain its use. Through hetero-reference to external elements made internal by the system, the law was able to justify its decision that ‘terrorist activity’, as outlined in the *Anti-terror Act*, could be maintained and was not in violation with the rule of law.

5.1.2 The juridical construction of ‘terrorist activity’

As I noted in previous chapters, Luhmann maintains that any social system ultimately finds its unity in a paradox, such as the legal system’s difference legal/illegal. The deparadoxification of law is accomplished through the attribution of motives for its operations to elements observed as external. In this framework, such external elements are to be made internal through selection and observation, and are thus translated, transformed, which can also be read as self-produced, by the reference system. However, as I have suggested, such hetero-referential observations do not eliminate law’s self-

referential basis. In this framework, the openness of law refers to the possibility that a system can modify its structures from observations from its environment. The juridical observation of elements is thus observed as a selection among a horizon of possibilities (i.e., the selection of one particular study that communicates about the purpose of the legislation, or the selection of the reasonable person standard). As each selection is also self-produced by the reference system (in this case the legal system), law must hide its foundational paradox through reference to external elements. Rather than concluding that anti-terror provisions are legal because they are law, the juridical system makes references that are external to the system – and through such reference, law is able to deparadoxify its decisions.

In this case, law observed legal elements, such as the juridical concept of the reasonable person, and scientific elements, such as scientific “authority” of the purpose of s. 83.18, to juridically maintain the anti-terrorism provisions outlined in s. 83 of the *Criminal Code*. The deparadoxification of its decision came through hetero-reference to expert “authority” on the “true” purpose of the legislation and through the application of an accepted legal standard of the “reasonable person”, concluding,

“The appellants argue that, in relation to its objective, s. 83.18 is broader than necessary...because it criminalizes acts (1) which do not disclose a risk of harm, (2) which are not connected to a real or contemplated terrorist act, and (3) which are preliminary to the commission of an inchoate offence. The first two arguments are answered by the limited scope of s. 83.18. As we have seen, conviction under s. 83.18 entails (1) an *actus reus* that excludes conduct that a reasonable person would not view as capable of materially enhancing

the abilities of a terrorist group to facilitate or carry out a terrorist activity, and (2) a high *mens rea*” (R. v. Khawaja, 2012, para. 57).

Furthermore, in order to decide on whether s. 83.18 is grossly disproportionate to the government objective of preventing terrorism, the juridical system observed as a juridical operation the question of deciding which acts that are preliminary to the commission of an inchoate offence are to be observed as terrorist activity and whether “it is unnecessary and disproportionate to reach back further and criminalize activity that is preliminary or ancillary to those preparatory acts” (R. v. Khawaja, 2012, para. 58). Here the task of the juridical system was to define terrorist activity – outlined in s. 83.18 – in a way that included preliminary, preparatory acts that were already criminalized elsewhere in the *Criminal Code*⁴². The appellants argued, relying on a 2006 SCC decision in *R. v. Déry*, that criminal liability does not attach “to fruitless discussions in contemplation of a substantive crime that is never committed, nor even attempted, by any of the parties to the discussion” (R. v. Déry, 2006, para. 37). Moreover, they argued that activities under s. 83.18 go even further in criminalizing indirect and fruitless contributions to non-terrorist activities “where the intention is to enhance the ability of a group to commit such preliminary acts as conspiring or counselling, even where no terrorist act is facilitated or carried out and the accused is unaware of the specific nature of the act contemplated” (United States of America v. Nadarajah, 2010, para. 43). However the juridical system interpreted legal elements in *R. v. Déry* much differently,

“*Déry* does not assist the appellants...*Déry* was concerned with interpretation, not constitutional boundaries. Indeed, the reasons contemplate

⁴² For example, conspiracy is criminalized in s. 465 of the *Criminal Code*.

that Parliament could, if it wished, create an offence of attempted conspiracy:
“Recognition of attempted conspiracy as a crime might well capture cases of feigned agreement, but this sort of chance in the law is best left to Parliament”” (R. v. Déry, 2006, para. 36; R. v. Khawaja, 2012, para. 60).

The juridical system thus refused to observe as a juridical operation the question of deciding on the legality of Parliament’s rationality for criminalizing activity that is preliminary to ‘terrorist activity’ – a deference that is commonly displayed in juridical operations. Instead, the juridical examination of the purpose of the legislation is observed, by the juridical system, as a matter of deciding which harms are to be associated with acts preliminary to ‘terrorist activity’. The system thus stated,

“The reason given in *Déry* for not punishing acts preceding commission of an inchoate offence is that such acts would not be sufficiently proximate to a substantive offence and the harmful conduct that it seeks to address...Here, there is no problem of remoteness from a substantive offence because Parliament has defined the substantive offence, not as a terrorist act, but as acting in ways that enhance the ability of a terrorist group to carry out a terrorist activity” (R. v. Khawaja, 2012, para. 61)

Those acts may or may not ever lead to an offence outlined in s. 83 of the *Criminal Code*. The juridical system thus observed extra-judicial communications, in the form of the government’s determination that inchoate offenses reflect a degree of harm that justifies its criminalization, as part of the juridical construction of terrorist activity. The juridical system’s conclusion that acts preliminary to the commission of an inchoate terrorist offence are to be included in the juridical interpretation of terrorist activity is thus based

on hetero-reference to communications that stem (in part) from the political system. The juridical system observed that such preliminary acts form part of ‘terrorist activity’ because “there is a substantive harm inherent in all aspects of preparation for a terrorist act because of the great harm that flows from completion of terrorist act” (R. v. Ahmad, 2009, para. 60) and could thus conclude, “in the context of the present analysis, it is appropriate to exhibit due deference to this determination [by Parliament]” (R. v. Khawaja, 2012, para. 63). The principle of harm has long been translated by the legal system in cases of criminal law. In this case, the juridical system observed Parliament’s determination of the possibility of substantive harm associated with the completion of terrorist acts, as a legal element included in the juridical construction of terrorist activity. The juridical system thus observed the high degree of potential harm associated with terrorist activity as a justification for the criminalization of what would otherwise be taken as “a broad range of interactions” (R. v. Khawaja, 2012, para. 63). The criminalization of which is based on the application of the code legal/illegal. While the system makes hetero-reference to other systems communications in its decision, namely the political system’s determination that there is substantive harm that justifies criminalization of activity preliminary to inchoate offences, the SCC concluded,

“The criminalization under s. 83.18 of a broad range of interactions that have the potential to – and are intended to – materially enhance the abilities of terrorist groups is not grossly disproportionate nor overbroad in relation to the objective of prosecuting and, in particular, of preventing terrorism” (R. v. Ahmad, 2009, para. 60; R. v. Khawaja, 2012, para. 63).

A decision that was not based on the application of a distinction other than legal/illegal. Even the juridical decision using the distinctions overbroad/not overbroad and grossly disproportionate/not grossly disproportionate are ultimately utilized to decide on the legality anti-terrorism legislation (and thus are based in the distinction legal/illegal). The juridical construction of ‘terrorist activity’ may very well, and in this case did, include extra-juridical communications based on different binary codes, but through the juridical observation of extra-juridical communications those elements were included as part of the legal system’s operations and thus used to legally decide using the code legal/illegal. For instance, the conclusion that criminalization of activity preliminary to inchoate terrorist offences assists in national security or that it efficiently prevents the completion of terrorist acts may very well be based on distinctions made by the political system (or the scientific system, as evinced elsewhere). However, as illustrated by the SCC, the juridical system is not concerned with such rationality, only whether the criminalization of such preliminary activities is legal – and thus to be maintained by the juridical system. The deference paid by law to Parliament in cases of anti-terrorism does not abolish any notion of law’s self-referentiality. Such deference is an example of juridical *selection* of political communications. And since any selection is inevitably translated and transformed, the autopoietic movement can thus be read as an act of juridical construction of external elements, which are made internal through recursive selection. Further, this deference speaks to the boundaries of legal communications as created by law. In this framework, law self-referentially constructs its own environment based on its communications. The fact that law is communicating about the deference it must show to the political system’s determination that “X” is terrorist activity

demonstrates law's self-referential construction of its own environment. Law thus observes that defining "terrorist activity" *in itself* forms part of the political system. The legal system indeed observes 'terrorist activity' as a legal element, and as such defines the element for itself as it pertains to law, but the system defines it for use in a decision based on the distinction legal/illegal, whereas the political system may use any number of distinctions to indicate terrorism. In other words, the legal system observes the government's determination that "X" is terrorism for use in deciding whether "X" is legal or illegal. Politics, on the other hand, may use an entirely different distinction to indicate terrorism – for example, terrorism/social unrest, terrorism/dissent, risk/not risk – but law observes this indication as *external to law*. Law may very well, and in this case did, observe the political determination of 'terrorist activity' as an legal element, but translated the element in a way so to decide based on its own binary code. As I have tried to demonstrate, this can be read as an example of law constructing the boundaries of legal communications. Law's autonomy is not obliterated by hetero-reference. Such hetero-reference is how law deparadoxifies its own operations. In the context of anti-terror law, which is often taken as the example *par excellence* of the victory of political will over the rule of law, the juridical system is able to maintain its use through the selection of extra-judicial elements; elements which are autopoietically produced by the legal system itself.

5.1.3 Juridical freedom of expression and 'terrorist activity'

The appellants in both *R. v. Khawaja* and its companion case, *Sriskandarajah v. United States of America*, also advanced the argument that the activities targeted by s. 83.01 of the *Criminal Code* infringe s. 2(b) of the *Charter* which states that everyone has the fundamental freedom of thought, belief, opinion, and expression. The defendants also

maintained that activities targeted by terrorism provisions violate s. 2(a) of the *Charter* which protects individual “freedom of conscience and religion”, however as the SCC concluded, “if freedom of expression is not infringed, on the facts of this case there is no basis to contend that freedom of religion and association are infringed” (R. v. Khawaja, 2012, para. 66). The Crown argued that s. 2(b) protections do not apply to terrorism provisions of the *Criminal Code*, because the *Charter* cannot protect activity that takes the form of violence. While the appellants accepted that activity which takes the form of violence is not protected by the *Charter*, they maintained that the violence exception remained juridically vague; an observation that was also made by the SCC, which stated “this Court has not yet set out the exact parameters of the violence exception to the broad meaning of expressive activity protected by s. 2 (b)” (R. v. Khawaja, 2012, para. 68). The juridical system thus observed as a juridical operation the question of deciding whether the conduct captured by the legislation’s definition of ‘terrorist activity’ was protected by the freedom of expression.

The first task of the juridical system in deciding this was to define freedom of expression in a way that excludes activities targeted by anti-terrorism legislation – conduct such as committing a terrorist activity, assisting in the commission of a terrorist activity, enhancing the ability of others to commit a terrorist activity and instructing others in the commission of a terrorist activity. Conduct in which the SCC observed as “in a sense expressive activities” (R. v. Khawaja, 2012, para. 67). The appellants argued that the violence exception – which states that activity that takes the form of violence is not protected by freedom of expression – should be interpreted narrowly to exclude from s. 2(b) protection only expressive conduct that involves actual physical violence. As

such, the juridical system observed as a juridical operation the question of defining precisely what conduct captured by the definition of “terrorist activity” falls within the *Charter* protection of freedom of expression. Here the system was able to observe its own communications, notably the 2009 *Greater Vancouver Transportation Authority* and 2002 *Suresh* SCC decisions, the juridical system stated:

“This Court’s jurisprudence supports the proposition that the exclusion of violence from the s. 2(b) guarantee of free expression extends to threats of violence...It makes little sense to exclude acts of violence from the ambit of s. 2(b), but to confer protection on threats of violence. Neither are worthy of protection. Threats of violence, like violence, undermine the rule law” (R. v. Khawaja, 2012, para. 70).

The system further stated that “even if conduct captured by the definition of “terrorist activity” fell within s. 2(b), the conduct would nevertheless not be protected because it undermines the values underlying the right to freedom of expression – the pursuit of truth, participation in society and individual self-fulfillment” (R. v. Khawaja, 2012, para 69). Here, the juridical system observed external elements as part of one of the fundamental structures of the system. Law thus stated: “threats of violence take away free choice and undermine freedom of action. They undermine the very values and social conditions that are necessary for the continued existence of freedom of expression” (R. v. Khawaja, 2012, para. 70). The juridical system thus observed the values and social conditions that are “necessary” for the continued existence of the structuring element of freedom of expression: the maintenance of freedom of expression is necessitated by the interpretation of values and social conditions that make its very existence necessary. The

paradox of which is solved by the juridical construction of “social conditions” which justify a narrow interpretation of freedom of expression in regard to terrorist activity. The SCC could thus confidently conclude, “I therefore reject that the violence exception to s. 2(b) is confined to actual violence, without however deciding the precise ambit of the exception” (R. v. Khawaja, 2012, para. 70).

The juridical system also stated, “most of the conduct caught by the terrorism provisions in Part II.1 of the *Criminal Code* concerns acts of violence or threats of violence” (R. v. Khawaja, 2012, para. 71). However, the provision also captures counselling, conspiracy, and being an accessory after the fact in relation to terrorist activity – conduct which may not be intimately linked to violence. As such, the juridical system was tasked with deciding whether such preliminary activity to inchoate offences falls under *Charter* protection of free expression. The system thus observed as a juridical operation the question of defining what is meant by “danger to Canadian society” in the context of terrorist activity. The system concluded that “counselling, conspiracy or being an accessory after the fact to conduct enumerated in s. 83.01(1)(b)(ii)(A), (B), (C) and (D) can find no protection under s. 2(b)” (R. v. Khawaja, 2012, para. 71). The “danger to Canadian society” presented by terrorist activity thus justified its exclusion of non-violent activity from the juridical construction of free expression. In contrast, the juridical system observed elsewhere that the danger associated with threatening aspects of hate propaganda can be “categorized as expression so as to bring it within the coverage of s. 2(b)” (R. v. Keegstra, 1990). In that case, the system observed that threats of violence could only be “so classified by reference to the content of their meaning”, and as such are protected so long as they are not “communicated directly through

physical harm” (R. v. Keegstra, 1990). While the juridical construction of freedom of expression in *Keegstra* referred to acts communicated directly through violence, the system concluded here that even threatening aspects of terrorism not linked to direct physical violence could find no protection in the *Charter*. Juridical freedom of expression thus refers to threatening hate propaganda while at the same time does not protect conduct related to threatening aspects of ‘terrorism’. In addition, the SCC noted:

“More problematic is the extension of the meaning “terrorist activity” in s. 83.01(1)(b)(ii)(e), which catches “an act or omission...that...causes serious interference with or serious disruption of an essential service, facility or system, whether public or private, other than as a result of advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (a) to (c)”” (R. v. Khawaja, 2012, para. 72).

The juridical system thus observed as a juridical operation the question of deciding whether the definition of “terrorist activity” captures conduct that involves neither violence nor threats of violence, and could thus be protected by the free expression guarantee of s. 2(b) of the *Charter*. Here the juridical system stated that the provision “read as a whole and purposively...is confined to the realm of acts of violence and threats of violence” (R. v. Khawaja, 2012, para. 73). The system further stated that “[t]he clause is directed to acts that intentionally interfere with essential infrastructure, upon which people depend, and without which life may be seriously disrupted and public health threatened” (R. v. Khawaja, 2012, para. 73). In reference to conduct that would not be considered terrorist activity, the SCC concluded,

“[T]he clause specifically excludes “advocacy, protest, dissent or stoppage of work that is not intended to result in the conduct or harm referred to in any of clauses (A) to (C)”. Clauses (A) to (C) respectively target death or bodily harm by violence, endangering a person’s life and serious risk to the health or safety of the public. This removes from the ambit of clause (E) a large slice of expressive activity, provided it is not aimed at the violent, dangerous ends contemplated in clauses (A) to (C)” (R. v. Khawaja, 2012, para. 73).

The system thus observed the disruption of “essential infrastructure, upon which people depend” as violence, even in cases where it “is not aimed at the violent, dangerous ends” outlined elsewhere in s. 83.18. While threatening hate propaganda may be juridically observed as free expression, non-violently disrupting the subway outside of what is deemed dissent or activism is juridically maintained as terrorism (and thus illegal). Dissent thus formed part of the ‘unmarked space’ created through the juridical indication of terrorism. For the system, dissent in the form of advocacy, protest, interruption of essential services due to labor unrest, and even some forms of threatening activity were observed outside of law’s definition of terrorism. While in cases under anti-terrorism provisions, even non-threatening disruption of essential infrastructure is included in law’s terrorism. This clearly demonstrates the contingency of law’s construction of terrorism. The system could have observed *Keegstra* as justification for striking down clause (E) or it could have even observed the decision as an incorrect application of legal structure. However, the system ignored the decision completely, while still being able to select elements to justify the continued maintenance of the clause.

The juridical interpretation of the legislation thus justified the conclusion that clause (E) does include violence or threats of violence, without being explicitly stated in the provision. However, the SCC tempered its own interpretation stating, “I would not rule out the possibility that s. 83.01(1)(b)(ii)(E) might in some future cases be found to capture protected activity” (R. v. Khawaja, 2012, para. 74). In falling short of defining precisely what non-violent conduct is included in the definition of ‘terrorist activity’, the system was able to refuse to decide on the provisions legality “as a general matter”. Rather, the juridical system observed ‘terrorist activity’ to include any act, including both violent or in some cases non-violent and non-threatening expressive acts, but deferred the determination of “danger to the security of Canada” to the government. The juridical deference shown in this case may very well be observed as a promotion of political domination over law. For instance, that the political system could arbitrarily label activity as a “danger to the security of Canada” thus justifying criminalization. However, as I have argued, the juridical system’s observation of political (or scientific) elements, such as the government’s determination that activity poses a “danger” to Canada or scientific authority on the purpose of the legislation, is based on contingent selections by the system – selections that are autopoietically maintained and self-produced by the legal system. The system could have, as it did in *Keegstra*, observe non-violent but threatening expressive acts to be outside of the legal definition of terrorism – for instance, as dissent or social unrest – however, the system chose to include even activity that is not violent and in some cases non-threatening deemed as a “danger” to Canada’s essential infrastructure as part of law’s terrorism.

The creativity that law displays in establishing which freedoms are to be juridically protected leads to the argument that non-threatening expressive activity need not be criminalized, since the activity is protected by fundamental principles of justice. While some threatening hate propaganda is juridically protected, activity linked to “terrorism” is observed by the juridical system as threatening by very nature, regardless of the presence of actual violence or threats of violence, and excludes the possibility of self-fulfillment through law’s conception of terrorism. The juridical observation of freedom of expression clearly illustrates the autonomy of law. The principles of fundamental justice are constructions by the juridical system itself: the system must constantly reinvent them through a series of contingent selections. The paradoxicality of this fundamental justice is broken through hetero-reference to extra-judicial consensus on the purpose of the legislation in addition to “fundamental” values of society. Law here observed the “danger” associated with terrorism as justification for the legislation’s legality. The juridical system certainly makes reference to the “fundamental” values of Canadian citizens, observing the prevention of terrorism as important to Canadian society, but assigns the political system with task of ascribing such danger. As such, the juridical system could observe that anti-terrorism legislation is constitutional, founding such legality in the translation of particular scientific and political elements and in the observation that its constitutionality is not contrary to the values of citizens.

As I have argued, the *Khawaja* decision can be read as an example of the legal construction of legal norms about terrorism. While the juridical conception of terrorism may be influenced by political and scientific communication, the legal norms produced as clearly a product of the legal system. Indeed, the Luhmannian perspective

acknowledges that systems may be heavily *influenced* by other discursive formations. Influence does not inevitably mean dependence, just as hetero-reference does not imply domination. The self-referentiality and autopoiesis of social systems calls on us to study the juridical translations of political (or scientific, or artistic, or economic) communications and the political translations of juridical communications. In doing so, Luhmann rejects notions of law's subordination to other social systems. While this is one weakness of the various state of exception theses mentioned in previous chapters, Luhmann provides a way to observe the influence political and scientific communication on law.

Since 2001, a growing number of critical scholars have criticized Canada's anti-terror legislation for being overly broad and ambiguous. In *Khawaja*, the SCC was faced for the first time with deciding on the constitutionality of certain elements of the *Anti-terrorism Act* in relation to an individual charged under its provisions. The ruling represented the juridical system's response to those critiques and answered some of the questions relating to the juridical vagueness of anti-terror provisions. It was argued that the creativity law displays in its maintenance of s. 83.18 of the *Criminal Code* could be read as the autonomy of law. In contrast to some critical scholarship, political and scientific domination over law is here observed as *influence*. In doing so, we are provided with a framework for analyzing intersystemic relations while refusing to accept the domination of law by other social systems. In this way, I have argued, we are able to analyze the juridical translation of various political and scientific communications relating to 'terrorist activity' to highlight what terrorism means to law. This however was not the only case where the juridical system creatively maintained post-2001 anti-

terrorism legislation. In the 2004 ruling *Application under s. 83.28 of the Criminal Code*, the SCC was tasked with deciding on the constitutionality of some *Criminal Code* provisions enacted by the *Anti-terrorism Act*. In the section that follows, I will analyze the decision while focusing specifically on the juridical construction of judicial independence in the ‘war on terror’.

5.2 The Juridical Construction of Judicial Independence in the ‘War on Terror’: Application under s. 83.28 of the Criminal Code (Re)

The legislative provision at the focus of this case, s. 83.28 of the *Criminal Code*, is related to two (at the time) alleged acts of terrorism, both of which occurred on June 23, 1985: an explosion during baggage transfer at the Narita Airport in Japan and a second explosion that caused Air India Flight 182 to crash off the coast of Ireland. In all 331 people were killed and four others were injured. Ripudaman Singh Malik and Ajaib Sing Bagri were jointly charged with several offences in relation to both explosions. Shortly after the beginning of their trial, the Crown brought an *ex parte* application for an order that a Named Person (a Crown witness at the Air India Trial) be compelled to attend a judicial investigative hearing. Investigative hearings, under s. 83.28 of the *Criminal Code*, allow a peace officer to apply to a judge for an order that a person be examined, and possibly produce possessions relevant to the investigation, before a presiding judge regarding information about a suspected terrorist offence. The counsel for the Named Person applied to challenge the constitutional validity of investigative hearings under s. 83.28. The appeal raised for the first time in the SCC fundamental questions about the constitutional validity of (some) provisions of the *Anti-terrorism Act*.

Specifically, one of the arguments advanced by the appellant was that judges acting under s. 83.28 do not act independently because they are co-opted into performing executive functions. As the SCC observed, “juridical independence is the “lifeblood of constitutionalism in democratic societies”” (Application, 2004, para. 80). The element of judicial independence has long been translated by the juridical system in the common law tradition. As such, the system could confidently state, “judicial independence...represents the cornerstone of the common law duty of procedural fairness, which attaches to all judicial, quasi-judicial and administrative proceedings, and is an unwritten principle of the Constitution (Application, 2004, para. 81). The question before the SCC in this case was whether, under the new *Anti-terrorism Act* provisions, judge’s powers compromise the judicial independence guarantee which is observed as a foundational principle of the Constitution.

In order to decide this, the juridical system observed as a juridical operation the question of defining the role of the judiciary in the context of anti-terrorism provisions in relation to that of executive legislative branches of government. To define this, the system selected some juridical elements, notably *R. v. Lippé*, to conclude:

“The overall objective of guaranteeing judicial independence is to ensure reasonable perception of impartiality; judicial independence is but a “means” to this “end”. If judges could be perceived as “impartial” without judicial “independence”, the requirement of “independence” would be unnecessary. However, judicial independence is critical to the public’s perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for

judicial impartiality” (R. v. Lippé, 1990, para. 139; Application, 2004, para. 82).

The juridical system thus observed as a juridical operation the question of deciding whether a “reasonable and informed” person would conclude that the judiciary under s. 83.28 acts independently of executive power. The system further observed juridical elements, notably the SCC decision *Therrien* and other *Criminal Code* investigative provisions, to conclude:

“Judges routinely play a role in criminal investigation by way of measures such as the authorization of wire taps (s. 184.2 of the *Code*), search warrants (s. 487 of the *Code*), and in applications for DNA warrants (s. 487.05 of the *Code*)...The place of the judiciary in such investigative contexts is to act as a check against state excess” (Application, 2004, para. 86).

The system further stated, “the function of the judge in a judicial investigative hearing is not to act as “an agent of the state”, but rather, to protect the integrity of the investigation and, in particular, the interests of the named person *vis-à-vis* the state” (Application, 2004, para. 87). To define the parameters of the judicial role in the context of s. 83.28, the system observed extra-judicial element, notably communications about Parliament’s intention *vis-à-vis* the drafting of s. 83.28 provisions, as a legal element:

“Where a judge, acting pursuant to s. 83.28, imposes terms and conditions or exercises his or her discretion in a manner which goes beyond the role of the judiciary as a guardian of the Constitution, that judge will have acted unconstitutionally. This accords with Parliamentary intention. During the third reading of Bill C-36 in the House of Commons, the Parliamentary

Secretary to the Minister of Justice characterized the direct judicial supervision of s. 83.28 as one of the “very significant limits and controls” that brought the legislation into compliance with the *Charter*” (Application, 2004, para. 88; House of Commons, 2001, para. 7620).

The overall conclusion by the system that “judicial independence is not compromised in this case...s. 83.28 requires the judge to act “judicially”, in accordance with constitutional norms, and the historic role of the judiciary in criminal proceedings” is thus based on a foundational tautology: a judge must act “judicially” based on norms outlined by judicial system. This tautology is solved through hetero-reference to extra-judicial communications regarding the government’s *intent* that the judiciary acts in an impartial and independent manner. The system further maintained, “[t]he ultimate question, however, is “whether a reasonable and informed person, viewing the relevant statutory provisions in their full historical context, would conclude that the court or tribunal is independent” (Application, 2004, para. 90; Valente v. The Queen, 1985, para. 689). To answer this question, the juridical system selected another extra-judicial element, notably a 2002 essay written by legal scholar David Paciocco, as an internal element to law, stating “[e]ven though the legislation does not purport to command judges to [decide whether a reasonable person would conclude that the court or tribunal is independent], but leaves them with the discretion as to whether to conduct such a hearing, the *appearance* of independence is compromised” (Application, 2004, para. 90; Paciocco, 2001, p. 235; emphasis added). The system thus observed that the test for judicial independence relies on whether a reasonable and informed person would conclude that the court or tribunal is independent in appearance. However, in this

context, the system observed, “the concern about the judicial investigative hearing stems largely from its being held *in camera*” (Application, 2004, para. 91). The question thus for the SCC thus became whether *in camera* hearings violated the “fundamental principle of openness of the courts, a hallmark of the Canadian judicial system” (Application, 2004, para. 91). To decide on this the system observed several legal communications, notably from SCC decisions *Vancouver (Re)*, *Dagenais v. Canada Broadcasting Corp.*, and *R. v. Mentuck*, to maintain that,

“[J]udicial investigative hearings are to be held presumptively in open court and the onus is on the Crown to rebut that presumption...in our view, the presumptive openness of the judicial investigative hearing is another factor that militates in favour of our conclusion that judicial investigative hearings do not compromise the independence or impartiality of the judiciary” (Application, 2004, para. 91).

For the juridical system, the ultimate question in regard to investigative hearings is whether or not a reasonable and informed person would conclude that the court or tribunal is independent, *in appearance*. But in hearings which occur *in camera*, such appearance to a “reasonable and informed person” is impossible. Only those who attend the hearings would know what has occurred. However, the juridical construction of the investigative hearing under s. 83.28 is based on its *presumed openness*. The presumptive openness, through reference to the legal “test” laid out in *Dagenais* and *Mentuck*, of the provision thus justified any apparent violation of the “fundamental principle of openness of the courts”. The presumptive openness of the investigative hearing under s. 83.28 may be conducted *in camera* and sealed from public record, but so long as there is a

presumption of openness, then a “reasonable and informed person” – whom would never be able to observe the hearing – “would conclude, on the facts of this case...that the judicial impartiality and independence have not been compromised” (Application, 2004, para. 92). The system could thus conclude, “where a hearing is held within the parameters discussed above, justice will not only be done, but it will also manifestly be seen to be done” (Application, 2004, para. 92).

Juridical freedom can be taken as referring to the juridical construction of judicial independence in the context of s. 83.28 of the *Criminal Code*. A liberty taken by the system was to refusal to observe perception of impartiality as an element to the principle of judiciary independence. Although, in the 2003 *Ell v. Alberta* Supreme Court decision, the system observed the principle of judiciary independence to requires independence in “both fact and perception” (*Ell v. Alberta*, 2003, para. 23), the system here inferred the existence of judicial independence from the individual independence of the judge in acting pursuant to s. 83.01 (Application, 2004 para. 93). In addition, another liberty taken was to conflate “reasonable person” with individuals who would be present in such investigative hearings – lawyers and others who would be familiar with the complexities of s. 83.28 provisions. As SCC Justice Lebel noted in dissent,

“It is important to note...that “reasonable person” does not for this purpose mean an experienced legal professional who understands the intricacies of legal issued based on subtle distinctions of which lay persons would generally be unaware. In short, the objective test of the reasonable person should serve to determine whether the public has a positive perception of judicial independence” (Application, 2004, para. 176).

The system's refusal to observe both individual independence and institutional independence, which had been observed as fundamental to the principle of judiciary independence, clearly demonstrates that the juridical construction of judicial independence is indeed an act of creation. The paradoxicality of this fundamental justice was solved by the juridical systems hetero-reference to legal, scientific, and political communications about the 'appearance' of judicial independence in the context of s. 83.28 investigative hearings, without including perceptions based on the traditional juridical construction of the "reasonable person" standard. Indeed, as demonstrated by the system's conclusion that an "objective test of the reasonable person" exists, the juridical system can narrowly interpret its own constructions.

The juridical system concluded that "a reasonable and informed person would conclude, on the facts of this case, and in light of the institutional function of the judiciary, that judicial impartiality and independence have not been compromised or diluted" (Application, 2004, para. 92). But as I mentioned, the juridical system observed a rather narrow definition of the "reasonable person" standard. In the context of investigative hearings under s. 83.28, the juridical system observed the presumptive openness of the hearings to be a factor in justifying the judiciary's discretion as to whether to conduct such a hearing. However, as Lebel maintained in dissent, "section 83.28...requires judges to preside over police investigations; as such investigations are the responsibility of the executive branch, this cannot but leave a reasonable person with the impression that judges have become allies of the executive branch" (Application, 2004, para. 180). This clearly demonstrates the contingency of juridical decisions. The system could have been much more liberal in its observation of the reasonable person.

For instance, as noted by Lebel, the system could have observed the relationship between the judiciary and the executive branch with much more scrutiny. Through the self-referential selection of some of its elements, notably other instances where judges have increased investigative powers such as warrants relating to forensic DNA analysis (s. 487.05), the juridical system concluded that a judge exercises a judicial function when carrying out such an examination, since the judge's role is to protect interests of the person being examined. Furthermore, through hetero-reference to Paciocco's study and House of Commons debates, the juridical system maintained that judge's discretion as to whether to conduct such a hearing is enough for a "reasonable person" to ascertain judicial independence. However, such conclusions were based on the juridical system's refusal to observe how the public might perceive the judiciary's role in investigations conducted pursuant to s. 83.28. For instance, the juridical system could have selected Paciocco's description of how the judiciary's role could be perceived: "the government is clearly counting on the oath of the witness and the threat of contempt of court to enforce this system, and it is using the power of judicial office, not to obtain a legal ruling or to resolve a question of fact, but as a form of coercion to compel information in the advancement of the executive, investigative function" (Paciocco, 2002, p. 233).

Finally, the juridical observation of other *Criminal Code* provisions such as ss. 184.2 (authorization to intercept private communications, ss. 487 (search warrants), and ss. 487.05 (warrants relating to forensic DNA analysis), which require judges to authorize the use of specific investigative techniques, did not make any distinction between indirect involvement and direct involvement. For instance, in the *Criminal Code* provisions outlined above, the judge is involved in the investigation only directly vis-à-

vis the authorization that is granted. In contrast, the judge's involvement under s. 83.28 is not limited to making an order to authorize the executive branch to conduct an examination; rather the judge may even preside over the investigation. In such cases, s. 83.28 does not allow the judge to act as a protector of the fundamental rights of the person being examined – the judge would take on an active role in the investigation. Observed in this way, a judge who presides over an examination under s. 83.28 takes part in the exercise of executive power. As Justice Lebel concluded,

“In the pursuit of the undeniably important objective of suppressing and preventing terrorism, the distinction between the judicial and executive branches has been blurred. The public's perception that the judicial and the executive branches do not act separately in an investigation under s. 83.28...will be heightened when the investigation is held *in camera*. In such a case, a reasonable, well-informed person would be justified in questioning the role the judge is really playing in the investigation. The judge is therefore at risk of being perceived as a true ally of the executive branch in a secret investigation that is not subject to scrutiny” (Application, 2004, para. 189-190)

As the dissenting Justices noted, the juridical system could have observed some of its elements, and elements constructed as external, much differently. For example, the system could have observed interpretations of the blurring of roles between judiciary and executive in the context of investigative hearings (Roach, 2003; Stewart, 2005). In this case, the juridical system justified the continued use of investigative hearings under s. 83.28 on the grounds that a judge's discretion on the use of such a hearing would be

accepted by reasonable people and in reference to an extra-judicial consensus that the hearings display the appearance of judicial independence.

The juridical system's refusal to observe alternative interpretations of how the public would perceive such investigative hearings does not lead to the conclusion that the juridical system is being coerced by the executive. Such interpretations merely point to a blind spot of law in its maintenance of investigative hearings. It simply means that the juridical system *could have* selected such communications to justify a different decision – for instance, that s. 83.28 investigative hearings are unconstitutional. In fact, it may do so in future operations. The liberty displays in the creative maintenance of anti-terrorism provisions clearly demonstrates the autonomy of law. Further, this maintenance does not obliterate the possibility that law is heavily influenced by other systems (such as politics, or science). Constructing law as a self-referential and autopoietic social system does not contradict such notions; in fact, it provides a rather robust analytic for illustrating law's arbitrary creativity. As the Luhmannian theoretical framework suggests, the continued maintenance of the investigative hearing scheme introduced by the *Anti-terrorism Act* is legitimate because it is legal. The juridical system deparadoxified itself through reference to particular scientific authority and a societal “consensus” about how to interpret judicial independence in the context of s. 83.28.

5.3 The Juridical Construction of “Danger” and “Terrorism”: Suresh v. Canada (Minister of Citizenship and Immigration)

As we have seen, *Khawaja* represented the first SCC decision involving an individual charged with offences under the *Anti-terror Act*. In *Application Under s. 83.28 of the Criminal Code*, we saw the first constitutional challenge of some procedural

aspects of post 2001 anti-terrorism legislation. However, as I have mentioned in previous chapters, the juridical system has long been able to deal with problems associated with terrorism. In the final section of this chapter, I will turn my focus to how, prior to 2001, the legal system was able to respond to terrorism through existing legal structures. Through an analysis of (some) elements of the 2002 *Suresh v. Canada* SCC decision, I hope to demonstrate that the juridical system was able to define “terrorism” in a way that fit within the legislative boundaries of existing legal structure. While I will only focus on how the juridical system observed “terrorism” prior to the enactment of the *Anti-terrorism Act*, I hope to comment on how law’s creative maintenance of new anti-terrorism legislation is puzzling.

This case represented the last SCC decision on the constitutionality of some elements of the former *Immigration Act* (which, as we know, was replaced by the *IRPA* following the events of September 11). The appellant, a Convention refugee from Sri Lanka, applied for immigration status in Canada and in 1995 the government rejected his application and ordered that he be deported on the grounds that he was a security risk – the Minister of Citizenship and Immigration declared him a danger to the security of Canada under s. 53(1)(B) of the *Immigration Act*. The appellant held that deportation to torture would deprive a refugee of the right to liberty, security, and perhaps life and as such is in violation of s. 7 of the *Charter*. Furthermore, the defense posited that the terms “danger to the security of Canada” and “terrorism” defined in the *Immigration Act* were unconstitutionally vague. For the purposes of this section, I will put aside the SCC decision on whether deportation to torture was in violation of the *Charter*. Rather, I will focus on how law defined “danger to the security of Canada” and “terrorism” prior to

2001 to highlight how the juridical system able to observe ‘terrorist activity’ within current legal structure.

In order to rule on the constitutionality of the terms “danger to the Security of Canada” and “terrorism”, the juridical system observed as a juridical operation the question of defining vague laws in the eyes of the legal system. The system has long observed vagueness as an important element to legal structures, notably since the 1992 *R. v. Nova Scotia Pharmaceutical Society* SCC decision, which it observed as fundamental to law’s terrorism.

“A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion...“a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate” (Suresh v. Canada, 2002, para. 81; *R. v. Nova Scotia Pharmaceutical Society*, 1992, para. 643).

The juridical system thus observed as a juridical operation the question of deciding how to interpret “danger to the security of Canada” in relation to conduct outlined in the *Immigration Act*. The system thus observed the Court of Appeal decision as an element to decide on this interpretation, stating “the phrase [danger to the security of Canada] was imprecise but reasoned that whether a person poses a danger to the security of Canada could be determined by “the individual’s degree of association or complicity with a terrorist organization” (Suresh v. Canada, 2002, para. 82). The system further observed the governments interpretation of the term, “the government similarly argues that...the

phrase “refer[s] to the possibility that someone’s presence is harmful to national security in terms of the inadmissible classes” listed in s. 19 and referred to in s.53” of the *Immigration Act* (Suresh v. Canada, 2002, para. 82). However, the SCC concluded “we do not interpret the phrase exactly as [the Court of Appeal] or the government suggests. We would not conflate s.19’s reference to membership in a terrorist movement with “danger to the security of Canada” (Suresh v. Canada, 2002, para. 83). While the political system may interpret “danger to the security of Canada” as anyone who is involved with a terrorist organization, the juridical system observed that ““danger to the security of Canada”, in our view, must mean something more than just “person described in s. 19” of the *Immigration Act* (Suresh v. Canada, 2002, para. 83). This is another example of the juridical system constructing its own environment through self-referential communication. The juridical system observed that the political definition of “danger to the security of Canada” was not founded in a legal form. In other words, the juridical system observed that the government’s determination of “danger to the security of Canada” was, in this case, based on the distinction person described in s.19 of the *Immigration Act*/person not described in s. 19. The system was then also able to observe this to be inadequate for law, resulting in the translation of the political determination of danger into a form useful for law. The juridical system was thus able to translate political elements into a legal form. For law, “danger to the security of Canada” vis-à-vis “terrorism” could not simply be interpreted as an individual referenced in s.19, but had to invoke extra-judicial consensus that the individual presented a danger to Canadian citizens.

But, as the system recognized the term ““danger to the security of Canada” is difficult to define” and that the determination of what constitutes such danger is “highly fact-based and political in a general sense” (Suresh v. Canada, 2002, para. 85). As such, the juridical system observed extra-judicial elements, notably deference to judicial review completed by the Minister of Citizenship and Immigration, as an element to determine such danger, stating “provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister’s decision” (Suresh v. Canada, 2002, para. 85). However, the juridical system observed that there was a concern over whether the Minister must present “direct evidence of a specific danger to the security of Canada” (Suresh v. Canada, 2002, para. 86; emphasis in original). Here, through hetero-reference to both scientific and political elements, namely international legal scholars Hathaway and Harvey (2001) and Grahl-Madsen (1997) and international conventions, the juridical system was able to conclude:

“Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada’s security...it may have once made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid” (Suresh v. Canada, 2004, para. 87).

Here the juridical system observed several extra-judicial elements, such as the global transport of financial assets, the trans-jurisdictional threat, precautionary logic associated

with terrorism, and international government cooperation to combat terrorism, as part of its definition of “danger to the security of Canada”:

“That to insist on direct proof of a specific threat to Canada as the test for “danger to the security of Canada” is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security” (Suresh v. Canada, 2002, para. 88).

The system further stated: “these considerations lead us to conclude that a person constitutes a “danger to the security of Canada” if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind that the security...is often dependent on the security of other nations” (Suresh v. Canada, 2002, para. 90). With this “fair, large, and liberal interpretation”, the juridical system could thus confidently conclude “we are satisfied that the term “danger to the security of Canada”, defined as here suggested, gives those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion” (Suresh v. Canada, 2002, para. 92). The juridical construction of danger to the security of Canada thus made reference to a ‘changing climate’ of international terrorism under the pre-2001 legislative framework. While previous legislation related to terrorism may be interpreted as being focused on specific risks to Canada, the juridical system was able to observe political, scientific, and other legal structures to interpret “danger to the security of Canada” in a way that included not only threats from within, but any threat which may damage the security of Canada from the

outside. The system thus made use of a further distinction – threatening/not threatening – to define danger in a way so to decide on the “danger” represented by terrorism. This double coding does not contradict law as the sole provider of juridically valid legal norms. In this case, the system was able to utilize the form threatening/not threatening to decide on the legality of activity as it pertains to the distinction legal/illegal. While the system observed extra-judicial elements as part of juridically valid norms about terrorism: juridical terrorism refers to activity that represents a threat that may damage the national security of Canada from within or from the outside. However, this formed only part of law’s terrorism prior to 2001.

The difficulties faced by the juridical system in defining the term “terrorism”, as I mentioned earlier, is not a new development. As the SCC observed in 2002: “one searches in vain for an authoritative definition of “terrorism”. The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally” (Suresh v. Canada, 2002, para. 94). As such, the juridical system observed as a juridical operation the question of interpreting the meaning of “terrorism” to be used in its operations. Selecting several extra-judicial communications, the juridical system was able to “set the proper boundaries of legal adjudication” for its interpretation of “terrorism” (Suresh v. Canada, 2002, para. 96). The juridical system thus observed the United Nations’ 1999 *International Convention for the Suppression of the Financing of Terrorism*, as a legal element, stating:

“It employs a functional definition in Article 2(1)(a), defining “terrorism” as “[a]n act which constitutes an offence within the scope of and defined in one of the treaties listed in the annex”. The annex lists nine treaties that are

commonly viewed as relating to terrorist acts...Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(b) defines “terrorism” as: Any...act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, but its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act” (Suresh v. Canada, 2002, para. 96).

To justify the adoption of these “functional” and “stipulative” definitions of “terrorism”, the juridical system refused to observe “the strong support from international law scholars and state representatives – support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence” as a legal element. Instead, observing “the essence of what the world understands by “terrorism”” vis-à-vis both specific acts of violence and “particular cases on the fringes of terrorist activity” (Suresh v. Canada, 2002, para. 98). Through such hetero-reference, the juridical system was able to conclude that the term “terrorism”, as outlined in currently legislative responses to the phenomenon, was not unconstitutionally vague – and thus an adequate definition to base further legal decisions. Such hetero-reference, as we have seen, does not abolish any notion of law’s autonomy in the war on terror. In Luhmann’s theoretical framework, any selection by a reference system – such as the legal system – inevitably moves through a process of translation, which can also be read as construction. Such autopoietic movement does not mean that the legal system depends on extra-juridical elements –

rather, the movement can be read as an external element made internal by the reference system. In this case law's definition of terrorism, although heavily influenced by extra-judicial elements, is constructed by law itself – not politics or science or any other system. Such influence, which may in other cases be interpreted as domination or dependence, can also be analyzed as inter-systemic relations; but relations between systems which remain autonomous in their operations.

While the autonomous maintenance of anti-terror law after 2001 was highlighted in previous sections of this chapter, this section focus on how the juridical system was able to deal with problems associated long before the enactment of new counter-terrorism legislation since then. The juridical constructions of “danger” and “terrorism” were based primarily on reference to extra-judicial “consensus” about the threat of terrorism to the social fabric of society. Law observed that defining “danger to the security of Canada” was controversial, but ascribed to the political system the task of determining whether there is a societal consensus of such a threat. In addition, the juridical system was able to justify the existence of its definition of “terrorism” through reference to a scientific authority that a “functional” definition of terrorism is preferred due to the “changing climate” and societal consensus about what terrorism entails.

6 The Autonomy of Law and Security Certificates

At the time of the 2007 Supreme Court of Canada (hereafter, SCC) decision on the constitutionality of the security certificate mechanism, the *Immigration and Refugee Protection Act, S.C., 2001, c. 27* (hereafter, IRPA)⁴³ allowed the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness to issue a certificate ordering the detainment and/or deportation of any non-citizen (including permanent resident) on reasonable grounds of security, violating human or international rights, serious criminality or organized criminality (s.77). The certificate and the detention were both subject to review by a Federal Court judge, a process which may have deprived the named individual of some of all of the information on which the certificate was issued or the detention ordered (s. 78). The judge did not, however, review the legitimacy of the grounds on which the certificate was signed, but merely determined whether it was ‘reasonably’ issued. Once the certificate was issued, a permanent resident could be detained, and the detention was to be reviewed within 48 hours; foreign nationals could not apply for a review until 120 days after the Federal judge determined the certificate to be reasonable (s. 82-84). The judge’s determination on the reasonableness of the certificate could not be appealed or judicially reviewed. In addition, if the judge found the certificate to be reasonable, it would become a removal order that could be immediately enforced.

As I highlighted in chapter two, some critical Canadian scholars have argued that the security certificate mechanism is best understood as a modern manifestation of the

⁴³ The IRPA replaced the repealed *Immigration Act, 1976* as the primary federal legislation regulating immigration matters. The IRPA came into effect in 2002.

state of exception where sovereign power has been victorious over the rule of law. The tension between two differentiated subsystems of society – law and politics – in the context of anti-terrorism has become a noteworthy debate within academic circles. Any analysis of which requires both a theory of internal differentiation and of the autonomy of law. To this end, I adopt Luhmann’s social systems theory as a theoretical framework to explore the relationship between law and other social systems in the context of anti-terrorism (see the preceding chapter for an outline of systems theory). First, I outline a case study which has been offered by some critical sociologists as an example of political victory over rule of law: the Canadian security certificate mechanism. Here I examine some elements of the 2007 SCC ruling on the constitutionality of security certificates. I then reflect, through interaction with Luhmann’s sociology, on the plurality of communications that collide with the autonomy of law in this paradigm. In particular, I focus on legal justifications for the ruling that security certificates, in their current form, are inconsistent with the Constitution. Finally, I argue how this SCC ruling can be read – contrary to many current debates – as a reinforcement of law’s autonomy. Legal communication over the status of security certificates offer evidence of both the threat to, and persistence of, the autonomy law in the war on terror.

6.1 The Canadian Security Certificate Mechanism: *Charkaoui v. Canada*

In February of 2007, the Supreme Court of Canada ruled on the constitutionality of procedures for determining the reasonableness of security certificates and for review of detention that had been used in one way or another since 1991. This put an end, at least temporarily, to the juridical ambiguities surrounding some of the legislative changes that occurred following the events of September 11th. In *Charkaoui v. Canada (Citizenship*

and Immigration), the court held that the procedure for the judicial approval of certificates under IRPA was inconsistent with sections 7, 9, and 10(c) of the *Canadian Charter of Rights and Freedoms* (hereafter, *Charter*) and thus left the security certificate mechanism “of no force or effect” (*Charkaoui v. Canada, 2007*). However, the Court held suspension of this ruling for a period of one year “in order to give Parliament time to amend the law” during which the existing security certificate process under IRPA would apply (*Charkaoui v. Canada, 2007*). Three cases were heard simultaneously by the Court involving two foreign nationals, Hassan Almrei and Mohamed Harkat, and one permanent resident, Adil Charkaoui.

6.1.1 The juridical construction of due process and unpredictable fundamental principles of justice

In this case, the defendants argued that the prohibition of the named individual from examining evidence used to issue the security certificate infringes on section 7 of the *Charter* which states: “everyone has the right to life, liberty and security in accordance with the principles of fundamental justice” (*Canadian Charter of Rights and Freedoms, 1982*). Specifically, the defense claimed that the security certificate mechanism under IRPA did not provide the individual with the right to be informed of, and respond to, the case against him or her because, in its current form, the government effectively decides what is disclosed to the named person. In addition, the defense maintained that the infringement of the right to liberty could not be saved by the constitution because it is not in accordance with at least one principle of fundamental justice, namely the *right to know and meet the case*. This element has long been translated by legal systems in the common law tradition. Emerging in association with due process and duty of fair process, the principle proposes that each individual has the

right to know and defend the case against him or her to confirm the legality of detention. Indeed, as the Court suggests, this principle “remains as fundamental to our modern conception of liberty as it was in the days of King John” (*Charkaoui v. Canada*, 2007, para. 28). The juridical system could thus concluded that an individual under a security certificate must “[n]ot only...be informed of the case to be met...[but] also given an opportunity to challenge the information of the Minister where issues as to its validity arise...[t]his is the minimum requirement to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the *Charter*” (*Suresh v. Canada*, 2002, para. 123-128). The system further concluded that:

“What is required by the duty of fairness – and therefore the principles of fundamental justice – is that the issue at hand be decided in the context of the statute involved and the rights affected...More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, “the closeness of the administrative process to the judicial process”; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself...This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness...It must necessarily be so in determining the

procedures demanded by the principles of fundamental justice” (Suresh v. Canada, 2002, para. 115).

The juridical system thus observes that inquiry into s.7 does not permit a “free standing inquiry...into whether a particular legislative measure ‘strikes the right balance’ between individual and societal interest in general” (R. v. Malmo-Levine, 2003, para. 96). Nor is “achieving the right balance...in itself an overarching principle of fundamental justice” (R. v. Malmo-Levine, 2003, para. 96). For the Court, “the question at the s. 7 stage is whether the principles of fundamental justice relevant to the case have been observed in substance, having regard to the context and the seriousness of the violation” (Charkaoui v. Canada, 2003, para. 22). To hold otherwise “would entirely collapse the s. 1 inquiry into s. 7” (R. v. Malmo-Levine, 2003, para. 96) and thus “relieve the state from its burden of justifying intrusive measures and require the *Charter* complainant to show that the measures are not justified” (Charkaoui v. Canada, 2007, para. 21).

“The procedures required to conform to the principles of fundamental justice must reflect the exigencies of the security context. Yet they cannot be permitted to erode the essence of s. 7. The principles of fundamental justice cannot be reduced to the point where they cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*. The protection may not be as complete as in a case where national security constraints do not operate. But to satisfy s. 7, meaningful and substantial protection there must be” (Charkaoui v. Canada, 2007, para. 27).

Here, the system observed as a juridical operation the question of deciding which ‘exigencies of the security of the security context’ are to be attributed in cases of national interest. The tension between responsibility of government to ensure security of its citizens and of “accountable constitutional governance” (Charkaoui v. Canada, 2007, para. 1) is thus observed by the juridical system *as a matter of law*.

“The overarching principle of fundamental justice that applies here is this: before the state can detain people for significant periods of time, it must accord them a fair and judicial process...It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law, which must involve a meaningful judicial process...[t]his basic principle has a number of facets. It comprises the right to a *hearing* it requires that hearing be *before an independent and impartial magistrate*. It demands a *decision by the magistrate on the facts and the law*. And it entails the *right to know the case put against one*, and the *right to answer that case*...for s. 7 to be satisfied, each of them must be met in substance” (Charkaoui v. Canada, 2007, para. 28-29).

The first task of the juridical system in deciding on this tension is to define due process and the exigencies which may, or may not, be accepted by law in the context of national security. Here the juridical system observed several legal communications, notably 1985, 1999, and 2006 decisions,⁴⁴ to maintain that although the scope of a required hearing may vary according to contextual factors, it must include “[a]n

⁴⁴ See *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and *Valente v. The Queen*, [1985] 2 S.C.R. 673, and *United States of America v. Ferras*, [2006] 2 SCC 711.

independent judicial phase and an impartial judge...it is not enough that the judge in fact be independent and impartial; fundamental justice requires that the judge also appear to be independent and impartial” (Charkaoui v. Canada, 2007, para. 32). In the context of security certificates, the IRPA scheme provides for the certificate to be reviewed by a “designated judge” which is a judge of the Federal Court of Canada. The juridical system thus observes as a juridical operation the question of whether the role assigned to such a “designated judge” leads to the perception, in fact or otherwise, that “independence and impartiality are compromised” (Charkaoui v. Canada, 2007, para. 33). Here, law observes three “related concerns” that arise with respect to independence and impartiality:

“First is the concern that the IRPA may be perceived to deprive the judge of his or her independent judicial role and co-opt the judge as an agent of the executive branch of government. Second is the concern that the designated judge functions as an investigative officer rather than a judge. Third is the concern that the judge, whose role includes compensating for the fact that the named person may not have access to material and may not be present at the hearing, will become associated with the person’s case” (Charkaoui v. Canada, 2007, para. 37).

To address the first concern, that the IRPA may deprive the designated judge of his or her independent judicial role, law self-referentially selects elements from its own past, notably from two 2004 decisions⁴⁵, to maintain that “judges working under the process have eschewed an overly deferential approach, insisting instead on a searching examination of the reasonableness of the certificate on the material placed before

⁴⁵ See *Jaballah v. Canada (Minister of Citizenship and Immigration)*, [2004] FC 299 and *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2004] FCA 421.

them...They are correct to do so, having regard to the language of the provision, the history of its adoption, and the role of the designated judge” (Charkaoui v. Canada, 2007, para. 38). The juridical system thus observed that “this language, as well as the accompanying factual, legal and administrative context, leads to the conclusion that the designated judge must review the certificate on a standard of reasonableness” (Charkaoui v. Canada, 2007, para. 39). The juridical system thus included not only the language of the provision of IRPA, but also its intent, in its construction of the role of the judge within the security certificate context. For instance, the juridical system interpreted statements made in the course of the adoption of IRPA in the form of deliberations of the *Standing Committee on Citizenship and Immigration*. The Court observed that the intent of the IRPA scheme was “that the designated judge would be to avoid treatment that is unfair, arbitrary, or in violation of due process” (Charkaoui v. Canada, 2007, para. 40). While there was no consensus that the designated judge acts independently and impartially – as evinced by the juridical system explicitly raising concern through the selection of scientific communication in the 2007 decision⁴⁶ – the juridical system nevertheless concluded that “a non-deferential role for the designated judge goes some distance toward alleviating the first concern, that the judge will be perceived to be in the camp of the government” (Charkaoui v. Canada, 2007, para. 42). These were not, of course, the only examples of scientific and political elements to influence law’s autopoiesis.

⁴⁶ The juridical system observed, as important to legal communication, a product of the scientific system (i.e., communication producing a claim to truth) in the form of a Federal Court judge’s expressed unease with the role assigned to designated judges under the IRPA (para. 36).

In the 2007 decision, the juridical system confidently stated, “the law is clear that the principles of fundamental justice are breached if a judge is reduced to an executive, investigative function” (Charkaoui v. Canada, 2007, para. 43). It further concluded “the mere fact that a judge is required to assist in an investigative activity does not deprive the judge of the requisite independence” (Charkaoui v. Canada, 2007, para. 43). In order to define the judiciary’s role in security certificate hearings under IRPA, the juridical system selected some of its own communications – here, the 2004 decision *Re Bagri*⁴⁷, where the Court considered whether a provision under the *Criminal Code* that provides for a judge to assist the state in gathering evidence in the context of investigating terrorist offences violated s. 7 of the *Charter* – to conclude,

“The provision violates neither s. 7 of the *Charter* nor the unwritten principle of judicial independence. It stressed that s. 83.28 [of the *Criminal Code*] gives judges broad discretion to vary the terms of the order made under it and to ensure that constitutional and common law values are respected. It also noted that judges routinely participate in investigations in the criminal context and that their role in these situations is to “act as a check against state excess”, and emphasized that in the context of investigative hearings the judge was not asked to question the individual or challenge the evidence, but merely to mediate and ensure the fairness of the proceedings. However, it warned that “once the legislation invokes the aid of the judiciary, we must remain vigilant to ensure that the integrity of its role is not compromised or diluted” (Charkaoui v. Canada, 2007, para 43).

⁴⁷ See Application under s. 83.28 of the Criminal Code (Re), 2004 SCC 42, [2004] 2 S.C.R. 248, “Re Bagri”.

Through the self-referential selection of some of its elements as legal structures, the system stated that the provisions covering security certificates under IRPA, like s. 83.28 of the *Criminal Code*, “preserve the essential elements of the judicial role” (Charkaoui v. Canada, 2007, para. 44). The system further concluded,

“These comments suggest that while the designated judge may be more involved in vetting and skeptically scrutinizing the evidence than would be the case in a normal judicial hearing, the judge is nevertheless performing the adjudicative function of evaluation, rather than the executive function of investigation. However, care must be taken to avoid allowing the investigative aspect of the process to overwhelm its adjudicative aspect” (Charkaoui v. Canada, 2007, para. 44).

The juridical system could thus confidently conclude “that the process established by the legislation at issue is not purely investigative; the judge’s task of determining whether the certificate is “reasonable” seems on its face closer to the adjudicative review of an executive act than to investigation” (Charkaoui v. Canada, 2004, para. 44). While law may be under constant threat of surrendering to executive functions, the provisions under IRPA are observed by the juridical system as legal so long as they meet what has been determined as juridically valid by law through self-reference to some of its legal elements (i.e., past legal decisions). As a result, the juridical system could then conclude that the IRPA process “is designed to preserve the independence of impartiality of the designated judge, as required by s.7” (Charkaoui v. Canada, 2007, para. 46).

However, the juridical system also distinguishes between ‘normal’ judicial hearings and those presented in the context of security certificates, inevitably leading to

questions of how law observes judicial hearings under IRPA. The juridical system has long observed that a judge must make a decision based on facts and the law revealed by the evidence. As such, in 2006⁴⁸ the SCC could confidently state “the essence of a judicial hearing has been the treatment of facts revealed by the evidence in consideration of the substantive rights of the parties as set down by law” (*United States of America v. Ferras*, 2006, para. 25). The juridical system observed,

“The IRPA process at issue seeks to meet this requirement by placing material before the judge for evaluation...most if not all of the material that the judge considers is produced by the government and can be vetted for reliability and sufficiency only by the judge. The normal standards used to ensure the reliability of evidence in court do not apply. The named person may be shown little or none of the material relied on by the ministers and the judge, and may thus not be in a position to know or challenge the case against him or her” (*Charkaoui v. Canada*, 2007, para. 49).

The juridical system thus observes as a juridical operation the question of whether IRPA provisions allows for a decision to be made based on the law. As such, the Court could maintain that “without knowledge of the information put against him or her, the named person may not be in a position to raise objections relating to the evidence, or to develop legal arguments based on the evidence... he or she may not be in a position to put forward a full legal argument” (*Charkaoui v. Canada*, 2007, para. 52). The task for the juridical system here is to decide on the distinction between ‘normal’ juridical hearings and those outlined in IRPA, and decide on whether or not IRPA aligns with the principles

⁴⁸ See *United States of America v. Ferras*, [2006] 2 SCC 15.

of fundamental justice, namely the ‘case to meet’ principle. As highlighted at the beginning of this chapter, the ‘case to meet’ principle requires that the affected person be informed of the case against him or her, and be given the ability to respond to that case. In the context of the security certificate scheme, the juridical system maintains, “the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual” (*Charkaoui v. Canada*, 2007, para. 58). In order to define what is legally meant by “exceptional circumstances” the juridical system selected legal communications, notably SCC decisions from 1992⁴⁹, 2002⁵⁰, and 2006⁵¹, to state “[h]earing from both sides of an issue is a principle to be departed from only in exceptional circumstances”, in the ordinary case, a judge would be “well equipped...to determine whether a record is subject to [solicitor-client] privilege” without the assistance of counsel on both sides” (*Charkaoui v. Canada*, 2007, para. 57). The system further concluded, “In *Chiarelli*, this Court found that the Security Intelligence Review Committee could, in investigating certificates under the former *Immigration Act*...refuse to disclose details of investigation techniques and police sources” (*Charkaoui v. Canada*, 2007, para. 58). In the 1992 *Chiarelli* decision, the juridical system observed that the context for elucidating principles of fundamental justice in cases of security “state’s interest in effectively conducting national security and criminal intelligence investigations and in protecting police sources” (*Chiarelli v. Canada*, 1992, para. 744). The juridical system had thus interpreted national security as a legal element since the repealed *Immigration Act*. This however was not the sole political element to influence

⁴⁹ *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711.

⁵⁰ *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCC 1, *Ruby v. Canada (Solicitor General)*, [2002] SCC 75, and *R. v. Rodgers*, [2006] SCC 15.

⁵¹ *Goodis v. Ontario (Ministry of Correctional Services)*, [2006] SCC 31.

law's autopoiesis. The juridical construction of national security has long been translated by the juridical system in cases relating to *ex parte* or *in camera* hearings. In 2002, Court observed,

“The mandatory *ex parte in camera* provision [of the repealed *Immigration Act*] is designed to avoid the perception by Canada's allies and intelligence sources that an inadvertent disclosure of information might occur, which would in turn jeopardize the level of access to information that foreign sources would be willing to provide. In her reasons, Simpson J. reviewed five affidavits filed by the respondent from CSIS, the RCMP, the Department of National Defence, and two from the Department of External Affairs. These affidavits emphasize that Canada is a net importer of information and the information received is necessary for the security and defence of Canada and its allies...if the mandatory provisions were relaxed, all predict that this would negatively affect the flow and quality of such information” (*Ruby v. Canada*, 2002, para. 44).

The system further concluded “these societal concerns formed part of the relevant context for determining the scope of the applicable principles of fundamental justice” (*Charkaoui v. Canada*, 2007, para. 58). The juridical system thus observed as a juridical operation the question of defining which societal concerns form part of the relevant context for determining the application of principles of fundamental justice. In order to decide how to apply some of the principles that are “fundamental” to our conception of justice in the context of terrorism, the system selected some of its own communications, notably the 1992 *Chiarelli* and 2002 *Ruby* decisions, to justify the decision that substitute

measures provided by Parliament in *ex parte in camera* hearings under the repealed *Immigration Act* satisfied the constitutional requirements of procedural fairness. The Court thus concluded “[i]n such circumstances, fairness is met through other procedural safeguards such as subsequent disclosure, judicial review and rights of appeal” (*Ruby v. Canada*, 2002, para. 40). The juridical system further observed its own past while stating “[w]here limited disclosure or *ex parte* hearings have been found to satisfy the principles of fundamental justice, the intrusion on liberty and security has typically been less serious than that affected by the IRPA” (*Charkaoui v. Canada*, 2007, para. 60). The juridical system thus observes, as a juridical operation, which procedural substitutes are acceptable in the context of national security.

“In the context of national security, non-disclosure, which may be extensive, coupled with grave intrusions on liberty imposed on a detainee, makes it difficult, if not impossible, to find substitute procedures that will satisfy s. 7. Fundamental justice requires substantial compliance with the venerated principle that a person whose liberty is in jeopardy must be given an opportunity to know the case to meet, and an opportunity to meet the case. Yet the imperative of the protection of society may preclude this. Information may be obtained from other countries or from informers on condition that it not be disclosed. Or it may simply be so critical that it cannot be disclosed without risking public security. This is a reality of our modern world. If s. 7 is to be satisfied, either the person must be given the necessary information, or substantial substitute for that information must be found. Neither is the case here” (*Charkaoui v. Canada*, 2007, para. 61).

The system further stated “the issue at the s. 7 stage...is not whether the government has struck the right balance between the need for security and individual liberties. The question at the s. 7 stage is whether the basic requirements of procedural justice have been met, either in the usual way or in an alternative fashion appropriate to the context” (Charkaoui v. Canada, 2007, para. 63). The juridical system could thus conclude,

“The fairness of the IRPA procedure rests entirely on the shoulders of the designated judge. Those shoulders cannot by themselves bear the heavy burden of assuring, in fact and appearance, that the decision on the reasonableness of the certificate is impartial, is based on a full view of the facts and the law, and reflects the named person’s knowledge of the case to meet. The judge, working under the constraints imposed by IRPA, simply cannot fill the vacuum left by the removal of the traditional guarantees of a fair hearing...the judge’s activity on behalf of the named person is confined to what is presented by the ministers. The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet. Here that principle has not merely been limited; it has been effectively gutted. How can one meet a case one does not know?” (Charkaoui v. Canada, 2007, para. 63-64).

This is perhaps where some critical scholars see anti-terrorism legislation as an example of “law against law”: that the designated judge no longer operates within the boundaries

of the juridical system. However, as I have noted, the result of selecting government policy as the medium for analysis is that juridical communication on the mechanism is left in a blind spot. The interpretation that anti-terrorism legislation is a testament to modern political will, which is not entirely contradicted by the construction of law as an autonomous, autopoietic system, may very well be obvious in the analysis of policy documents and debates. As I continue to highlight, in the analysis of the relationship between law and other social systems (most notably, politics), we are able to observe how the juridical system is able to reinvent and transform itself through contingent selections (observations) of extra-judicial elements. And in the creative maintenance of anti-terror law, such selections must be observed as product of the legal, rather than political, system.

The overall conclusion of the SCC regarding IRPA's security certificate provisions was that "the IRPA's procedure for determining whether a certificate is reasonable does not conform to the principles of fundamental justice as embodied in s. 7 of the *Charter*" (Charkaoui v. Canada, 2007, para. 65). In most cases, especially those "less intrusive situations", the intrusion on liberty and security is typically less than that affected by IRPA. Even in the context of threats to national security under the former *Immigration Act*, the law has observed that fairness is met through the substitution of other procedural safeguards. In this case, the juridical system observed that new legislation, the IRPA, attempts to encroach upon the legal system's boundaries. In most cases, *ex parte in camera* hearings would lead to less intense intrusion on liberty and security. However, in the context of threats to national security intrusions on liberty imposed on a detainee may have "grave" consequences. The juridical system thus observes that in the IRPA, the

government has made an attempt to meet the requirements of fundamental justice through one mechanism – the designated judge tasked with reviewing the certificate of inadmissibility and detention. An attempt which infringes on the liberty, despite the context of ensuring national security, of the named individual.

Prior to the *Charter*, this may have been settled here: the *Constitution Act, 1867*, grants Parliament the authority to use law to ensure “the Peace, Order, and good Government of Canada”. However since the *Charter*, the matter of limiting rights – including the guarantee of life, liberty, and security outlined in s. 7 – has become much more complicated. The *Charter* does not guarantee rights absolutely. The state is permitted to limit rights if it can establish that the limits are “reasonable and justifiable in the context of a free and democratic society”. If the security certificate mechanism outlined in IRPA infringes upon the rights guaranteed in s. 7 and fails the requirements of the fundamental principle of due process, the inquiry then shifts to whether the state can establish that the limits are demonstrably justifiable in a free and democratic society. In 1985,⁵² the SCC could thus confidently state “[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like” (Re B.C. Motor Vehicle Act, 1985, para. 85). In the context of terrorism, the juridical system notably observed as a juridical operation the question of deciding whether to defer to Parliament the task of determining if there is a social “consensus” that terrorism represents a threat to the peace, order, and good government of Canada. The Court could also maintain,

⁵² *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

“The rights protected by s. 7 – life, liberty, and security of the person – are basic to our conception of a free and democratic society, and hence are not easily overridden by competing social interests. It follows that violations of the principles of fundamental justice, specifically the right to a fair hearing, are difficult to justify under s. 1. Nevertheless, the task may not be impossible, particularly in extraordinary circumstances where concerns are grave and the challenges complex” (Charkaoui v. Canada, 2007, para. 66).

The first task of the juridical system is to decide on which “extraordinary circumstances” can be justified by s. 1. In order to define “extraordinary circumstances” the juridical system selected some of its own elements as legal structures, notably what is known as the *Oakes* test⁵³, to state that any violation “requires a pressing and substantial objective and proportional means” (Charkaoui v. Canada, 2007, para. 67). The juridical system further observed that proportionality requires: “(a) means rationally connected to the objective; (b) minimal impairment of rights; and (c) proportionality between the effects of the infringement and the importance of the objective” (Charkaoui v. Canada, 2007, para. 67). The SCC could then maintain that “the protection of Canada’s national security and related intelligence sources undoubtedly constitutes a pressing and substantial objective. Moreover, the IRPA’s provisions regarding the non-disclosure of evidence at certificate hearings are rationally connected to this objective” (Charkaoui v. Canada, 2007, para. 68). The juridical system thus observed as a juridical observation the question of deciding whether terrorism presents an “extraordinary circumstance” which would justify the “chilling consequences” (Charkaoui v. Canada, 2007, para. 25) on

⁵³ *R. v. Oakes*, [1986] 1 S.C.R. 103.

individual liberty associated with the security certificate mechanism. Here, in vague reference to extra-judicial “consensus” about “the protection of Canada’s national security and related intelligence sources” (Charkaoui v. Canada, 2007, para. 68), “interest of security”, and necessity “to detain persons deemed to pose a threat” (Charkaoui v. Canada, 2007, para. 69), the juridical system was able to confidently conclude that “terrorism” indeed represents an extraordinary circumstance:

“The realities that confront modern governments faced with the challenge of terrorism are stark. In the interest of security, it may be necessary to detain persons deemed to pose a threat. At the same time, security concerns may preclude disclosure of the evidence on which the detention is based. But these tensions are not new...Canada has already devised processes that go further in preserving s. 7 rights while protecting sensitive information; until recently, one of these solutions was applicable in the security certificate context” (Charkaoui v. Canada, 2007, para. 69).

The juridical system thus observed the “challenge of terrorism” as an important element to decide on the proportionality of the security certificate mechanism. The system further concluded: “whether there is risk of catastrophic acts of violence, it would be foolhardy to require a lengthy review process *before* a certificate could be issued” (Charkaoui v. Canada, 2007, para. 76). The system was thus able to decide on security certificates as they pertain to “terrorists” and “terrorism” through a vague reference to Parliaments determination that the individual represents a “risk of catastrophic violence” or a “concern to national security”. The juridical construction of terrorism thus refers to individuals who are perceived by the government as a “risk of catastrophic violence”,

regardless of their particular motivation. In short: juridical terrorism refers to whatever the political system determines to be terrorism, but this is rooted in law's own interpretation of that political determination. One may very well observe this as an example of the political system imposing its will on law. Constructing law as an autopoietic system does not contradict such observations. However, what we see in the juridical observation of political elements – for instance, its determination of terrorism – is in fact a translation of political elements by the juridical system. The juridical system could thus observe the political system's determination of terrorism as a legal element, but still ascribe the political system the task of judging whether there is a "risk" or societal "consensus" that there is a threat to national security.

In addition, the juridical system observed as a juridical operation the decision of whether the means Parliament has chosen – IRPA's security certificate mechanism – are "proportional" to the effects of infringement on individual liberty. However, according to the *Oakes* test, "proportionality" requires "proportionality between the effects of the infringement and the importance of the objective". This clearly demonstrates the self-referentiality of the juridical system: legal decisions must be juridically validated through previous legal decisions. In the case presented here, the juridical system notably was able to base its decision on legal elements from its own past. Any conclusion on the proportionality of the security certificate system is thus justified through reference to legal elements which form the foundation for law's ability to rule on proportionality.

To this end, the juridical system observed its own version of history on the tension between security concerns and detention: "in a number of legal contexts, Canadian government institutions have found ways to protect sensitive information while

treating individuals fairly” (Charkaoui v. Canada, 2007, para. 70). Here, the juridical system observed as a legal operation the question of whether the security certificate is proportional in the context of national security. The system was able to self-referentially select both political and scientific elements, notably the Security Intelligence Review Committee’s (hereafter, SIRC) formal adversarial process under the former *Immigration Act* and one study of the SIRC procedures⁵⁴, the juridical system stated:

“In the words of Professor Rankin, SIRC’s procedures represented “an attempt to preserve the best features of the adversarial process with its insistence on vigorous cross-examination, but not to run afoul of the requirements of national security. These procedures illustrate how special counsel can provide not only an effective substitute for informed participation, but can also help bolster actual informed participation by the affected person. Since the special counsel had a role in determining how much information would be included in the summary, disclosure was presumably more complete than would otherwise have been the case. Sensitive national security information was still protected, but the executive was required to justify the breadth of this protection” (Charkaoui v. Canada, 2007, para. 74).

The juridical system thus observed the proportionality between the effects of the infringement and importance of the objective under SIRC’s adversarial procedures as an example of “the Canadian legal system striking a better balance between the protection of

⁵⁴ See Rankin’s (1990) report on SIRC procedures under the *Immigration Act* entitled ‘The Security Intelligence Review Committee: Reconciling National Security with Procedural Fairness’.

sensitive information and the procedural rights of individuals” (Charkaoui v. Canada, 2007, para. 77). A level of proportionality that was more or less controversial in the scientific system.⁵⁵ For instance, there is no scientific consensus that the SIRC procedures under the former *Immigration Act* protected sensitive national security information but failed to protect the procedural rights of the individual (Roach & Trotter, 2005). The juridical construction of proportionality in the context of SIRC’s procedures comes directly from its interpretation of one professor’s commentaries on the formal adversarial processes developed by SIRC under the *Immigration Act*. The system also made reference to the UK’s ‘special advocate system’ employed by the Special Immigration Appeals Commission and a report from the European Court of Human Rights, to justify its decision on the current mechanism’s proportionality, concluding: “the[se] alternatives discussed demonstrate that the *IRPA* does not minimally impair the named person’s rights” (Charkaoui v. Canada, 2007, para. 85). The juridical system further referred to its own past to define the boundaries for juridically valid infringement of liberty in the context of terrorism. Here the system observed some legal communications, namely the 2005 *Malik* decision⁵⁶ outlining procedures in the Air India Trial, to conclude:

“The Arar Inquiry provides another example of the use of special counsel in Canada. The commission had to examine confidential information related to the investigation of terrorism plots while preserving Mr. Arar’s and the public’s interest in disclosure...[t]o help assess claims for confidentiality, the Commissioner was assisted by independent security-cleared legal counsel

⁵⁵ See Roach & Trotter (2005).

⁵⁶ *R. v. Malik*, [2005] B.C.J. No. 521 (QL), [2005] BCSC 350.

with a background in security and intelligence, whose role was to act as *amicus curiae* on confidential applications. The scheme's aim was to ensure that only information that was rightly subjected to national security confidentiality was kept from public view. There is no indication that these procedures increased the risk of disclosure of protected information" (Charkaoui v. Canada, 2007, para. 77).

The juridical system thus observed that the use of 'special counsel' went some distance in "striking a sensitive balance between the need for protection of confidential information and the rights of the individual" (Charkaoui v. Canada, 2007, para. 77). In doing so, the juridical system self-referentially selected another scientific element, most notably Kent Roach's critique of the Court of Appeal's conclusion in *Charkaoui (Re)*,⁵⁷ to maintain, "the use of special advocates has received widespread support in Canadian academic commentary. Professor Roach, for example, criticizes the Court of Appeal's conclusion in *Charkaoui (Re)*...*that such a measure is not constitutionally required*" (Charkaoui v. Canada, 2007, para. 81). A conclusion which professor Roach himself seems to depart from elsewhere (Roach and Trotter, 2005). Nonetheless, the juridical system could thus conclude,

"Under the IRPA, the government effectively decides what can be disclosed to the named person. Not only is the named person not shown the information and not permitted to participate in proceedings involving it, but no one but the judge may look at the information with a view to protecting the named person's interests. Why the drafters of the legislation did not provide for

⁵⁷ *Charkaoui (Re)*, [2004] FCA 421.

special counsel to objectively review the material with a view to protecting the named person's interest, as was formerly done for the review of security certificates by SIRC...has not been explained...I conclude that the IRPA's procedures for determining whether a certificate is reasonable and for detention review cannot be justified as minimal impairments of the individual's right to a judicial determination on the facts and the law and right to know and meet the case. Mechanisms developed in Canada and abroad illustrate that the government can protect the individual while keeping critical information confidential than it has done in the IRPA. The special counsel system may not be perfect from the named person's perspective, given that special counsel cannot reveal confidential material. But without security, it better protects the named person's s. 7 interests" (Charkaoui v. Canada, 2007, para. 89).

The overall conclusion that "the IRPA's procedure for the judicial confirmation of certificates and review of detention violates s. 7 of the charter and has not been shown to be justified under s.1 of the charter. I would declare the procedure to be inconsistent with the Charter, and hence of no force or effect" made clear that the juridical system observed the security certificate mechanism as an attempt by government to encroach upon boundaries of law (Charkaoui v. Canada, 2007, para. 139); an attempt that the juridical system observed to be a problem of proportionality between infringement of liberty and government objectives. The juridical construction of proportionality, at its core, inevitably leads to a paradox: proportionality is what the juridical system defines as proportional. The paradoxicality of this legal element is solved by the juridical

construction of extra-judicial elements – juridically selected scientific ‘consensus’ – about the “delicate balance” achieved by the former security certificate mechanism under the *Immigration Act*.

Another liberty taken by the juridical system was to observe extra-judicial elements as fundamental structures to the legal principle of due process. Although the law stated: “this basic principle [due process] has a number of facets...it entails the right to know the case put against one, and the right to answer that case”, and that this principle was “as fundamental to our modern conception of liberty as it was in the days of King John”, the juridical system observed that “the right to know the case to be met is not absolute” (*Charkaoui v. Canada*, 2007, para. 29; para. 28; para. 57). The system further stated, “the Court has repeatedly recognized that national security considerations can limit the extent of disclosure of information to the affected individual” (*Charkaoui v. Canada*, para. 58). This clearly illustrates how law’s autopoiesis is an act of construction. The paradox of this fundamental justice is solved by the juridical construction of extra-judicial “consensus” that national security concerns are to be included in our idea of fundamental justice. In other words, the fundamental principle of due process can be limited if it can be established that the limits are “demonstrably justifiable in a free and democratic society” (*Charkaoui v. Canada*, 2007, para. 66).

The juridical observation of extra-judicial elements as fundamental to the fundamental principles of justice can be observed as an indication of the autonomy of law in the context of security certificates. For example, the juridical construction of due process could have been different: law could have decided that the states cannot undermine the principle of due process, regardless of contextual factors. Fundamental

principles of justice are, by their very nature, juridical principles. They are constantly constructed by the juridical system through a plurality of contingent selections. The paradox of the juridical construction of fundamental justice is solved through reference to extra-judicial elements, such as scientific “consensus” that the current security certificate mechanism does not “minimally impair” individual liberty or that non-judicial observers agree that the mechanism must “strike the right balance” between the protection of sensitive information and the procedural rights of individuals.

As I maintained in chapter three, in Luhmann’s work, social systems ultimately find their unity in a paradox. The unity of law can be found in the difference legal/illegal, the deparadoxification of which is accomplished through reference to extra-legal elements which law constructs as external. Such hetero-reference would appear to deprive law of any self-referential basis. However Luhmann maintains that any observing system, including law, translates and transforms external elements in order to use them as internal elements. For instance, a particular law makes juridical decisions possible and those decisions maintain or transform that particular law. This is precisely what is meant by the paradoxical notion of “openness through closure” discussed in previous chapters. The openness of law, according to this framework, is said to be “cognitive”. The cognitive openness of law refers to the possibility that the legal system can modify legal structures from observations of its environment. Since a selection is always necessary, the autopoietic modification of legal structures can thus be observed as a construction, or creation.

It is through such hetero-reference that the juridical system is able to decide on the security certificate mechanism through the application of its basal code: legal/illegal.

Non-judicial observers may very well code the mechanism differently. For instance, the scientific system may suggest that security certificates are illegal, however that is a communication that seeks to produce a claim to truth; the scientific system can certainly apply the code legal/illegal, but without mobilizing the symbols or tools of juridical validity. The scientific system can very well observe that the mechanism *should* or *can* be deemed legal or illegal, however only juridically valid decisions can apply the code in fact. On the other hand, the political system may observe the mechanism as appropriate, and legal, in the face of protecting citizens and national interests. But any such observation does not, in itself, apply the basal code legal/illegal. As Tosini (2012) argues, within this framework, emergency provisions in the context of counter-terrorism has led to states' attempt to subordinate law's code of legal/illegal with the code "efficiency/inefficiency". He further concludes that such post-2001 counterterrorism policies "endanger the autonomy of law" (Tosini, 2012, p. 116). In this case, law may very well be endangered by other systems. Luhmann himself acknowledged that social systems are under constant threat of dedifferentiation. However, in the case of security certificates in Canada – which I would argue fit into Tosini's definition of "extraordinary executive powers" in the war on terror – law was able to maintain its autonomy through the legal construction of law's norms in relation to terrorism. Rather than locating them in political system, I have argued that legal norms about terrorism are actually founded and produced by the system of law. Finally, Tosini repeatedly quotes politicians and policy documents which fail to apply the code legal/illegal (especially in times of exception) as evidence that law's autonomy is in danger. However, he fails to acknowledge that these communications are not, in themselves, legal communications.

6.1.2 Discussion: Time, executive power, and the rule of law

As I discussed in chapter three, some critical Canadian scholars have argued that the security certificate mechanism is an example of sovereign power's victory over the rule of law. The authors maintain that security certificates are a modern manifestation of a *state of exception*, where law is dominated by political measures. In this context, scholars such as Larsen and Piché (2009) suggest that the mechanism functions as a “moment of legal exception for the assertion of sovereign power and legitimation” (p. 65). In this moment of exception, Bell (2009) contends, a “suspension of law-by-law, a form of sovereign power is enacted that subverts normal juridical procedures of argument and evidence” (p. 74). However, these analyses seem to underestimate the role of time in juridical operations. If law ultimately finds its unity in the difference legal/illegal, with one side always indicated in relation to the other, it becomes impossible to speak of juridical decisions in a form of ‘law against law’. For instance, if the legal system indicates that an activity is legal, it cannot at the same time indicate that the same activity is illegal. This is precisely why any analysis of law must include legal communication. By eschewing law in favor of other systems’ communications – as Larsen and Piché, Bell, and Tosini seemingly do – not only are the authors able to conclude that the political system continuously attempts to dominate the rule of law, but they fail to recognize that law itself shut down security certificates precisely because they were interpreted as attempts to circumvent or suspend the rule of law. The result is that these analyses inevitably suffer from a blind spot: interpreting law without the inclusion of legal communication on the issue. By including law in the analysis, we can observe how the juridical system maintains its autonomy while being influenced by external elements.

Policy documents, speeches, or counterterrorism measures do not necessarily form part of legal operations. It takes time for the juridical system to observe such extra-judicial elements as part of legal operations. The juridical system could thus state

“It was not suggested before this court that SIRC’s special counsel system had not functioned well in connection with the review of certificates under the *Immigration Act*, nor was any explanation given for why, under the new system for vetting certificates and reviewing detentions, a special counsel process had not been retained” (Charkaoui v. Canada, 2007, para. 76).

The juridical system’s observation that new legislation passed by the political system infringed upon individual liberty thus illuminates how political communications (i.e., policy, parliamentary debates, and so on) do not necessarily form part of legal structures in their basic form. Only when, as in this case, the juridical system observes such political elements as legal structures do they form part of legal operations. By neglecting to include legal communication in any analysis of the relationship between the rule of law and sovereign power, one fails to account for how the legal system itself observes and communicates about extra-judicial elements.

Critical scholars working in the area of state of exception suggest that the rule of law is endangered by the security certificate mechanism. That much is clear. However, precisely *how* this endangerment is grounded in law remains unclear. These scholars continue to argue that security certificates are a legal form that “suspend[s] rule of law”. But as explicitly stated by law “there is no constitutional right to an appeal...nor can such a right be said to flow from the rule of law in this context” (Charkaoui v. Canada, 2007, para. 136). The juridical system further maintained that “the rule of law does not

categorically prohibit automatic detention or detention on the basis of an executive decision” (Charkaoui v. Canada, 2007, para. 137). The juridical system was thus able to maintain many of the security certificate elements – arrest warrant issued by the executive, automatic detention, and unavailability of an appeal of the judge’s determination of the reasonableness of the certificate – while concluding other elements as unconstitutional. The juridical maintenance of the security certificate mechanism does therefore not “suspend rule of law”, nor does the juridical system observe security certificates in general to be unconstitutional. While the juridical system can state that it is unconstitutional to deprive the named individual of the right to know and meet the case, founding the legality in the translation of certain scientific elements and the observation that new legislation infringes on individual liberty, other elements of the security certificate mechanism can be juridically maintained, founding such legality in the translation of certain political elements, namely a societal “consensus” that the executive must be able to protect the security of its citizens and national interests.

In conclusion, security certificates prior to the 2007 SCC judgment may very well be observed as a testament to the power of executive measures, or the victory of sovereign power over the rule of law. However, as I have argued, the juridical systems conclusion to strike down the security certificate mechanism can also be read as an example of law reaffirming its autonomy. In Luhmann’s theoretical framework, we can indeed interpret the impact of political and scientific elements on law so long as they are framed as influence. Elements of the political system, or scientific system, or any other system for that matter do not *dominate* law in some linear way, as is commonly argued in critical academic circles, but rather influence the construction of law as a self-referential

and autopoietic system. As a result, observers may look to how law justifies its operations while referencing the non-judicial, external elements. Indeed, observers may be surprised by the creativity law demonstrates in justifying its own operations.

7 Conclusion: The Autonomy of Law in Canada's 'War on Terror'

In the analysis presented above, I focused on two central questions: first I addressed the question of law's autonomy in the context of Canada's anti-terrorism legislation, and second, I examined how law observes and communicates about 'terrorism' evinced by decisions of the Supreme Court of Canada. In chapter five, I brought attention to the juridical system's maintenance of specific post-2001 anti-terrorism legislation. In chapter six, I shifted my focus to law's autonomy vis-à-vis the security certificate mechanism. In both chapters I argued, in contrast to some critical Canadian scholars, that not only did the juridical system display creativity in its maintenance anti-terror law, but also that the juridical construction of legal norms about terrorism was the product of the legal, rather than political or economic, system. I presented a socio-legal analysis of some elements of Supreme Court of Canada decisions on the constitutionality of various provisions outlined in post-2001 anti-terrorism legislation. Here, the juridical system continuously made reference to the code legal/illegal rather than replacing it with extra-legal distinctions, thereby upholding its autonomy.

In legal theory, autonomy usually refers to the independence of legal decisions from extra-legal constraints. As Lempert (1987) suggests: "by an autonomous legal system I mean one which in the ideal case is independent on other sources of power and authority in social life" (p. 157). As is the case in many theories of legal autonomy, law is observed as "at best, a relative matter" and ultimately, "we may think of the relative autonomy of law as the degree to which the legal system looks to itself rather than to the

standards of some external social, political, or ethical system for guidance in the making or applying law” (Lempert, 1987, p. 158-159). A radically different perspective is presented in the work of Niklas Luhmann, who maintains that law can be conceptualized in a theory of legal autopoiesis. Systems theorist Gunther Teubner (2002) has noted that some legal scholars are only able to advocate for a ‘relative’ autonomy because they identify autonomy with the causal independence of the legal system:

“A clear distinction is made in legal autopoiesis between the mechanism responsible for the autonomisation of law (its self-reference) and those responsible for its heteronomisation (its other reference). The autonomy of law is concerned solely with operational closure and the way legal operations form a closed network in which units of communication self-reproduce. This does not involve causal, informational or environmental closure.” (p. 906)

The theory of legal autopoiesis, on the other hand, does not ignore the influence of ethical concerns, political interests, economic forms, or religious beliefs, which can sometimes enter the legal system. Nor does the framework call for an analysis of legal decision-making insulated from the legal system’s environment. Legal autopoiesis departs concretely from theories of law’s relativity through focusing on the differentiation of functional subsystems of society, with society conceptualized as systems of communication (Luhmann, 1995). For Luhmann, the emergence of differentiated subsystems of society is based on the development of different functions in which subsystems perform, each working independently – for instance, the function of politics is to produce collectively binding decisions, the economy is charged with managing scarcity, and law functions to stabilize normative expectations in the face of

counter-factual examples. In the case presented above, law notably constructed legal norms about the breadth of certain provisions under the *Anti-terrorism Act*. For instance, the system was able to justify its interpretation of overbreadth and gross disproportionality, once observed as distinct “constitutional standards”, as interconnected standards integral to fundamental principles of justice. The system was then able to observe extra-judicial scientific “authority” to decide that s. 83.18 of the *Criminal Code* (which was introduced as part of the *Anti-terrorism Act*) required a heightened requirement of mens rea and thus should not be considered overbroad – while at the same time also justifying the decision to ignore ruling on gross disproportionality, because it was juridically observed to be included in the standard of overbreadth.

While the system indeed observed certain scientific elements in its definition of overbreadth in the context of terrorism, it ignored other scholarly work that interpreted the provisions as overbroad, discriminatory, and in contradiction with the *Charter*. For instance, the system could have observed Roach’s conclusion that doctors or lawyers who assist those suspected of terrorism could be included within the reach of s. 83.18. Indeed, the system could have observed Bahdi’s (2003) interpretation that anti-terrorism legislation reaffirms inequalities against certain ethnic or racial groups. However, the system selected particular extra-judicial elements to justify its maintenance of legal norms pertaining to anti-terrorism law. Such selection, I have argued, can be read as a product of the legal system rather than of merely law’s submission to scientific truth-claims. As the Luhmannian framework suggests, selected external-elements (such as scientific discourses or political communications) inevitably move through a process of translation, of transformation, and of self-production by the system of law. With this in

mind, I have argued that inasmuch as the juridical system is *influenced* by such extra-judicial communications, it also remains an autonomously operating system capable of translating external elements as internal products of law.

Furthermore, I have argued that the deference paid by law to Parliament in cases of anti-terrorism does not abolish any notion of law's self-referentiality. As highlighted in chapter five, law was able to juridically maintain the continued application of s. 83.18 (introduced as part of the 2001 *Anti-terrorism Act*) through hetero-reference some political elements – most notably the government's determination of suspected terrorist activity. Here the law observed politics' definition of "terrorist activity" as part of legal operations while maintaining its own autonomy. This is evinced by the juridical system's deference to the political determination of terrorist activity. In other words, the legal system made reference to the political determination of 'terrorist activity' as forming part of the legal construction of norms about terrorism (i.e., politics' conclusion that "X" is terrorist activity), however law maintained its autonomy by constructing its own environment through its communication (i.e., that the conclusion justifiably remains a product of the political system). In other words, the juridical system observed that the political determination of terrorist activity is a political element which can be used by the juridical system to determine such conduct's legality. The system thus self-referentially and autopoietically constructs legal norms associated with terrorist activity. While it may be influenced by political communications, the legal system is able to remain autonomous in its operations.

That being said, functional specificity is not the only requirement for the structure of functional differentiation. According to Luhmann, each system must assume one

specific binary coding for its internal communication (Luhmann, 1997). The binary coding, which takes the form of a distinction applied to a system's operations, is only observable if all of a system's communications refer back to one side of the same distinction. For instance, law's binary coding is the distinction between legal/illegal and all communication refers to one side of this distinction. In the case of law's version of terrorism, law notably observed extra-judicial communications regarding the "danger to the security of Canada", the political determination of 'terrorist activity', the "purpose" of the legislation, national security concerns (chapter five), and the extraordinary circumstances involved in the terrorist threat (chapter six) to define terrorism in a way so to be included within law's binary code. Not only did law defer to the government's determination that certain activity posed a particular "danger to the security of Canada", it was also able to self-referentially define the juridical meaning of terrorism. In the *Khawaja* case, for example, I demonstrated how law was able to observe a broad range of non-violent and non-threatening activity within the juridical meaning of terrorism. In this case, the system notably selected some scientific and political elements to distinguish between terrorism/not terrorism. For example, the system observed certain political elements, such as the government's determination that activity poses a "danger" to Canada or scientific authority on the purpose of the legislation, to justify its decision that non-violent and potentially non-threatening conduct forms part of law's terrorism. I also suggested, through reference to the SCC decision in *Keegstra*, that the system's conclusion in this case was based on a rather contingent set of extra-judicial selections. For example, law could have selected from its own elements (i.e., *Keegstra*) to justify a decision that non-violent yet threatening acts are to be protected by freedom of

expression. However, the system chose to include even activity that is not violent and in some cases non-threatening deemed as a “danger” to Canada’s essential infrastructure as forming part of law’s terrorism.

According to this framework, continued reference to the binary coding of law is what leads to the operative closure of the systems, and as such plays an important role in the analysis of law’s autonomy. Legal communications made in reference to the code legal/illegal are what provide the basis for a systems’ autopoiesis. Defined as a network of structures which enable a recursive production of operations (from operations), and which such production enables the making of operations, the operative closure of law is only possible if the application of the distinction – in this case between legal/illegal – is actualized in the course of making decisions. As Luhmann puts it: “law emerges only if, and only in so far as, the need is communicated to distinguish between legal and illegal” (Luhmann, 1987, p. 346).

This however, does not mean that the binary code of the legal system – legal/illegal – is self-sufficient. Luhmann quite explicitly argues that “since the values legal and illegal are not in themselves criteria for decisions between legal and illegal, there must be further points of view that indicate whether or not and how the values of the code are to be allocated *rightly* or *wrongly*” (Luhmann, 2004, p. 192). Here, Luhmann evokes the concept of law’s programmes to which the application of the code is associated. The programmes of law, which Luhmann maintains are always *conditional* (Luhmann, 2004, p. 197-198), consist of all the pre-existing principles, procedures, rules, statutes, and rulings that are made valid by past decisions referring to the code legal/illegal. As Luhmann (2004) puts it, the form of conditional programming:

“Spells out the conditions on which it depends, whether something is legal or illegal. With these conditions it refers to past facts, which are stated in the present...Here it is crucial that the attribution of the values legal and illegal depends on what can be treated as past at the moment of the decision. In this respect law always operates as an ex-post-facto, tandem-arranged system...What the form of the conditional programme does is to prevent any future facts, not accounted for at the time of the decision, from being relevant to a decision concerning legal and illegal” (p. 197-198).

The form of conditional programming can thus be observed, from this perspective, as the system making use of the distinction legal/illegal based on specific limitations already stated to be valid by law’s conditional programs. To put it differently, any reference to the binary code must be tested for validity based on law’s conditional programmes. This is what Luhmann refers to when he speaks of the operative closure of the legal system, which is also understood as law’s autopoiesis, and only from this does the autonomy of law emerge. Any attempt to undermine or replace law’s binary code of legal/illegal is considered a threat to such autonomy. As Luhmann notes: “the law’s autonomy is in danger only when the code itself is in danger” (Luhmann, 1987, p. 347).

As I argued in chapter six, some critical Canadian scholars maintain that that the security certificate mechanism is an example of the political system’s victory over rule of law. Grounding their arguments largely in discussions of policy documents and political debates, the authors suggest that the security certificate opens a space for sovereign power to dominate the rule of law. However, as I have suggested, by eschewing law in favour of political communications, they are unable to acknowledge that the juridical

system was able to eliminate elements of the security certificate mechanism precisely because they were legally observed to be political attempts to circumvent the rule of law. In this way, law was able to self-referentially construct its own environment through its communications. What I mean by this is that the juridical system was able to justify its decision that the security certificate mechanism was in contravention to the legal application of its binary code (legal/illegal) through reference to the political system's attempt to enter the boundaries of law. In other words, the system was able to interpret the security certificate mechanism as political *attempt* to monopolize law's binary code of legal/illegal. As only law functions to legally maintain legal norms, the system was able to decide that the political system had overstepped the boundaries of law's communicative system.

In addition, in the context of anti-terrorism legislation law was notably able to reaffirm its boundaries through its deference to the political system's decisions about the level of risk associated with suspected terrorist activity, the "danger to the security of Canada", and the purpose and proportionality of anti-terrorism legislation. However, as I have suggested, such deference does not obliterate the boundaries of law. In fact, I believe this deference demonstrates law's reaffirmation of its autonomy. As I discussed at length in chapter five, the juridical observation of extra-judicial elements (for instance, political determination that conduct represents a danger to Canada) is in this case in reference to law's binary code of legal/illegal. The legal system may include political decisions about conduct representing a threat to sovereign power, or economic communications about the impact of terrorism on financial markets, however the system is able to defer any decision about the application of the category "danger" to the

political system, thereby including that determination as part of a legal decision based on the code legal/illegal. The systems deference to politics in this case represents law constructing its own boundaries through recursive communication.

Finally, Luhmann suggests that any social system ultimately finds its unity in a paradox – for instance, law’s paradox is provided by the difference legal/illegal. In order to solve a system’s paradox, Luhmann maintains, the system must attribute the motives of its operations to elements constructed as external. For instance, in order to modify its structures, the legal system must attribute its motives to extra-judicial elements. A particular law thus makes juridical decisions possible and those decisions in turn maintain or transform that particular law (Carrier, 2007). However, since a selection is necessary in each case, the elements selected are translated and thus self-produced by the system. This refers to the possibility that the juridical system’s structures can be *influenced* by observations from its environment. The legal system’s autopoietic observation of external elements can enable the system to modify its structures, but through a process of translation, the legal system has already made those elements *internal* to law; the autopoietic movement of which can be read as an act of juridical construction rather than juridical submission.

In taking this as my point of departure, I was able to analyze the impact of Canada’s anti-terrorism legislation to the autonomy of law. In contrast to a growing body of critical scholarship, the aim of the preceding pages was to advance the thesis that the juridical maintenance of anti-terror legislation can be observed as an example law’s autonomy. While I accept that the legal system is under constant threat of dedifferentiation – where other social systems attempt to dominate the rule of law – the

creativity law displays in maintaining anti-terror legislation assists us in constructing law as a differentiated, self-referential, and autopoietic system. As I have argued, the autonomy of law was made explicit in various post-2001 Supreme Court of Canada rulings on specific provisions and mechanisms under the *Anti-terrorism Act*, the *Immigration Refugee Protection Act*, the *Criminal Code of Canada*, and the *Immigration Act*.

However, as Carrier (2007) has noted, suggesting that law operates as an autonomous, autopoietic subsystem of society does not reject notions of law being *influenced* by other subsystems of society. While law may be observed as arbitrary in its application of anti-terrorism law, the system was able to justify its decision through reference to “fundamental” values of Canadian citizens. The liberties taken by the juridical system in deciding which values to uphold may indeed be arbitrary, but the system continuously referred to extra-judicial communications about the importance of national security to Canadian citizens, the utility of preventative logic, the risks associated with the ‘terrorist threat’, and the proportionality of legislative means and ends, as elements to justify the system’s decisions vis-à-vis the legality of anti-terrorism legislation. This hetero-reference, as I have argued, was not based on any code other than legal/illegal.

In chapter five, I drew attention to the juridical maintenance of specific anti-terror provisions outlined in the *Anti-terrorism Act*, the *Criminal Code of Canada*, and the *Immigration Act*. Here I argued that the creativity law displays in its maintenance of anti-terror law not only demonstrates the autopoietic movement of legal operations, but also shows the arbitrariness of legal decisions.

In chapter six, I claimed that the SCC's upholding of the security certificate mechanism under *IRPA* could be interpreted as display of law's autonomy. In contradiction to a growing body of literature contending that the mechanism is the example *par excellence* of sovereign victory over rule of law, I advanced the argument that although the political and scientific systems' (among others) communications influenced law's decision on the constitutionality of the mechanism, the juridical selection of extra-legal elements were continuously made in reference to the code legal/illegal. I further argued that the juridical system was able to reinvent principles of fundamental justice through the selection of these extra-judicial elements. The tautology of the juridical construction of 'fundamental' principles of justice was broken through reference to non-judicial "consensus" that national security concerns could justify the infringement on individual liberty. This clearly illustrates law's autonomy in the context of security certificates: fundamental principles of justice must be juridical principles and those can only be reinvented by the juridical system through its contingent selections. Consequently, the hetero-referential observation of extra-judicial elements to justify the reinvention of fundamental principles of justice is thus an act of juridical selection – since a selection (among a horizon of other possibilities) is always necessary, hetero-reference can also be read as an act of juridical *construction*. The hetero-referential elements are, as I have argued, transformed by the juridical system into legal elements. The autonomy of law, in the context of security certificates, is therefore not obliterated.

In each case, the juridical system certainly observed national security concerns based on the application of a code other than legal/illegal (for instance, the distinction efficiency/inefficiency) as legal elements. But the juridical selection of these elements

inevitably transformed them into elements that could be used to decide on the legality of anti-terrorism legislation in reference to the code legal/illegal (or more specifically, constitutional/unconstitutional). Such hetero-reference does not lead to the dedifferentiation of law because each element autopoietically moves through processes of translation, transformation, and self-production in which external elements are made internal by the legal system. In the case presented here, law notably observed the power of national security discourse, political rationalities of pre-emption, and scientific authority on the intended scope of the legislation, as important legal elements. Luhmann's theory does not reject the interpretation that extra-legal discursive formations have an effect on law so long as they are observed as influence and grounded in empirical research. His perspective provides a framework for studying intersystemic relations which refuses to accept law's submission to other discursive formations. It allows for the empirical exploration of extra-judicial *influence* on the autopoietic functioning of the legal system. In the cases presented above, the juridical system notably observed non-judicial consensus about the need for preventing terrorism, but ascribed to the political system the task of determining whether the use increased powers of surveillance, arrest, and investigation outlined in anti-terrorism provisions aligned with the objective of terrorism prevention.

Further, as the *Khawaja* decision shows, the juridical system was able to take liberties in its own operations. The juridical observation of free expression, for instance, could have been much different. The system could have concluded, as it did in *Keegstra*, that certain non-violent, expressive activity should be protected under free expression. The juridical maintenance of non-violent, expressive activity as 'terrorist activity' clearly

demonstrates the autonomy of law. The juridical system was able to justify an infringement on the fundamental freedom of expression through references to scientific authority about the purpose of the legislation and the defining characteristics of ‘terrorist activity’: the threat of ‘terrorism’ is by nature violent and threatening. The juridical system was thus able to decide that non-threatening, expressive acts of ‘terrorism’ were not protected by the *Charter*, while protecting threatening acts of expression in other cases. The system could thus state that it is illegal to engage in non-threatening, expressive activity because it is considered ‘terrorist activity’, founding such justifications in the translation of particular scientific and political elements about the scope of the legislation and the pressing need to prevent terrorism, observed as a fundamental value to Canadian citizens.

In conclusion, the juridical system’s maintenance of anti-terrorism legislation could very well be interpreted as evidence of the power of national security discourse, the increasing importance of foreign relations, or to the impact of risk management and preventative logic. I do not deny the influence of any of these discursive formations on law. What I do question, and this has been the central theme of this thesis, is whether Canada’s legislative response to the global ‘war on terror’ can be observed as an example of the erosion of law’s autonomy. In hopes of addressing this key question, I submitted Niklas Luhmann’s theory of autopoietic social systems to what has been taken as the ultimate victory of sovereign power over law: post-2001 anti-terror legislation. Constructing law as an autopoietic subsystem of society does not ignore the influential aspects of extra-legal communications. In fact, as I hope to have demonstrated, constructing law in this way allows for a rather robust analysis into the juridical

translations of political, scientific, or other system's communications and the political, or scientific translations of legal communications. Rather than reducing such inter-systemic relations to a linear, causal relationship, Luhmann's framework is concerned with how legal operations form a closed network in which its communications self-reproduce (Teubner, 2002). The question presented here was not about how law is the sole provider of legal information. Nor is the question of autonomy a matter of liberating law from information made up of political interests, scientific knowledge, moral values, or religious beliefs. The question I have tried to address is much more humble: in the case of Canada's anti-terrorism legislation, is law indeed an autonomous social system?

My central argument was that while law is always endangered by threats from the outside, in the context of anti-terrorism legislation, law was able to creatively maintain its own boundaries through contingent, and I also argue rather arbitrary, selections from its self-referentially produced environment. Law notably observed several key political, economic, and scientific communications as part in parcel to its conceptualization of terrorism; but those selections are founded in the legal system rather an example of law's defeat at the hands of political, scientific, or economic discourse. While, these discourses indeed have influence over the legal system, I argue that they in no way dominate legal decision making in the war on terror. As such, any critique of anti-terror law must be founded in a critique of law itself – not law interpreted as political will. The arbitrariness of the juridical system in the context of anti-terrorism legislation should not be confused with law's defeat at the hands of sovereign power. Nor should it be an example of the scientific system's control over legal decision-making. In Canada's 'war on terror', the legal system is able to transform *itself* to include terrorism as part of its operations. And

as a result, any injustice perceived in the context of Canadian anti-terrorism law is actually an injustice rooted in system responsible for ensuring justice in the first place: the system of law.

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