

UNDERSTANDING COURTS IN CONTEXT: On the Embeddedness and Interaction of Judicial Bodies in a Functionally Differentiated World Society

*Andreas Grimmel*¹

University of Hamburg

Abstract: Are the numerous judicial bodies that we tend to very generally subsume under “international courts” or “international adjudicative bodies” really like-units, or are they rather highly diverse institutions that call for a more careful, not only typological, but also theoretical differentiation? The aim of this article is to make a theoretically grounded contribution to the questions of (a) in what ways international judicial institutions are dependent on the functionally differentiated settings they are embedded in, and (b) in what ways they are influenced and altered by the organisational frameworks of their operation. The starting point of the inquiry will be a critical discussion of systems theory and rationalist approaches, as these approaches involve opposite positions with regards to the embeddedness and interaction of judicial bodies in a functionally differentiated world society: while the former entails an exclusive logic, the latter is essentially based on an inclusive model. The claim is that both models enable us to better understand rather ideal-type cases of how judicial institutions (inter)act in practice. It will be argued that the *modus operandi* of diverse courts, (arbitral) tribunals, and quasi-judicial institutions is typically subtler and more complex and can be most likely understood – due to their entanglement with other functional settings – as being transclusive or substitutive in nature. Both concepts will be introduced and applied here as parts of a contextualist approach towards understanding international judicial institutions.

Keywords: international organisations, contextualism, international courts, Niklas Luhmann, systems theory, rationalism

Introduction

One of the most influential ideas Niklas Luhmann framed within his theory of social systems was the existence of a world society,² i.e. a functionally differentiated global system that is constituted by the fact that every meaningful operation in the system has to take the form of communication.³ *“World society is the occurrence*

1 The author thanks Karin Fierke, Gunther Teubner, Armin von Bogdandy and the two anonymous ERS reviewers for their helpful comments and support.

2 Luhmann 1982, 1997.

3 In this focus on communication, Luhmann differs from other theorists of functional differentiation and world

of world in communication,”⁴ as Luhmann put it. In such a setting, entities like nation states or regions are fading points of reference. The reason for this is simply that communication is more and more arranged along *functional* (primarily political, economic, legal) lines and centred around transnational regimes that cope with certain issues (e.g. environmental, medical, technical, agricultural, security, labour) instead of being bound to national politico-legal systems. Such regimes are therefore characterised by their obligation to multiple expectations stemming from functional differentiation,⁵ while, at the same time, following specific codes and programs.⁶ These codes and programs originate in the function systems in which they are embedded, and, at the same time, delimit systems from each other within world society to such a degree that direct communication and exchange between them becomes impossible.

International organisations take an interesting position here: on the one hand, they can be portrayed as “meeting spaces” (“*Treffräume*”) for multiple function systems and their divergent rationalities;⁷ on the other, the institutions which they comprise normally have a primary functional “membership” in that they only provide one type of decision, such as political, economic, or legal decisions. A judicial body, for example, as part of the centre of the legal system, is dependent on a certain functionally differentiated framework of communication, which provides specific prerequisites for rational reasoning and action and that, at the same time, delimits it from political and economic forms of communication that might have their place within the same international organisation as well.

At this point a set of questions arise that have received relatively little attention in theoretical as well as empirical studies: In what ways do adjudicative institutions interact and intermingle with the rest of the organisation and the further rationalities it contains as a “meeting space”? Do the entanglements of such institutions with political and economic frameworks of action within international organisations entail the alteration of certain *modi operandi* of the judicial bodies, and to what extent? Are the numerous judicial and quasi-judicial bodies that we tend to very generally subsume under “international courts”⁸ or “international adjudicative bodies”⁹ truly like-units, or are they rather highly diverse institutions that call for a more careful differentiation – not only typological,¹⁰ but also theoretical? The objective of this article is a modest one in that it does not aim to give exhaustive answers to these questions. The intention is rather to shed light on the relevance of the contextual embeddedness and dependency of judicial institutions, and on how these can be mapped theoretically and in further empirical studies.

As a first step, I discuss two approaches that imply opposite models of how judicial bodies operate in their wider contexts: systems theory and rationalism. I

society such as David Mitrany (1966) or John W. Burton (1972); in the debate about the relevance of a communication centered perspective in International Relations theory, see also Albert and Mahler (2017).

4 Luhmann 2012: 87.

5 Cf. Fischer-Lescano and Teubner 2004: 1024.

6 Luhmann 2004: 173–210.

7 Luhmann 2000: 398.

8 A current study of Carrubba and Gabel (2015: 3), for example, refers to the vast number of 54 such judicial bodies within the framework of recent and current multilateral international regulatory regimes as “international courts”; see also Alter 2014: 70–72, Helfer and Voeten 2014, Kingsbury 2012.

9 Romano, Alter and Shany 2014: 6.

10 Romano 2011: 251–253, Keohane, Moravcsik and Slaughter 2000.