

Keynote

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Introducing the research approach of the FnG¹

A. How does modern society work?

1. Images of man and society between norm and reality

How does modern society work? This question is not trivial. Where does society exist? What is the central reference? The old national society, which 100 or 150 years ago was still the natural frame of reference: it has opened up and interlocked internationally. But the global society is complex.²

Another problem is that every description of social reality is a social phenomenon, a product of society. Where should the neutral position be from which it can be observed? Self-images are more difficult to obtain than images of objects that can be perceived from a distance. Every image of society becomes part of a network of preconceptions and interests – be they economic, political or ideological. Normative ideas of what the world should be like are one thing. Descriptive analyses of social reality, i.e. statements on how the world is and how something works, are something else. But both classes of statements, the normative and the descriptive, are inextricably linked. It is not possible to analyze the world society completely descriptively, sociologically or economically, without being guided by fundamental, paradigmatic images. Such preprints possess a decisionist or normative core. There are normative foundations of our thinking that secretly influence and subcutaneously guide every sober description, every data analysis. We measure social inequality.³ But

¹ The research approach is developed further in Udo Di Fabio, *Herrschaft und Gesellschaft (Rule and Society)*, Studienausgabe 2019.

² Ronnie D. Lipschutz, *Reconstructing World Politics: The Emergence of Global Civil Society*, *Journal of International Studies*, Vol. 21, 389-420; Peter Kivisto *Multiculturalism in a Global Society*, 2002; John Keane, *Global Civil Society?*, 2010; Niklas Luhmann, *The World Society as a Social System*, *International Journal of General Systems*, 1982 131-138.

³ Kathryn Neckerman, (Ed.), *Social Inequality*, 2004; Aage B. Sørensen, *The Structural Basis of Social Inequality*, *American Journal of Sociology* 101 (5) 1996, 1333-1365.

why do we think this is negative and why do we see a need for action? Why is the convergence of living conditions or growing conformity not a problem?

People need images. We all work with images of people or of society. Often these are political or moral models, beacons and order grids of the discussion. Every form of political rule is interested in such images. But even a dictator cannot produce or control self-images of a society at will. Since the beginning of the modern era, typical images of people and the world have developed that were tailored to the functional conditions of the new type of society. Normative models may be stubborn, but in the long run they must also be compatible with social reality. Otherwise either the models will fade or reality will be forced to adapt. In the Christian Middle Ages and in Islam there was a ban on interest. Unlike today in the phase of negative interest rates – although here too a ban has recently been demanded – a modern economy with its hunger for capital could not have developed had risky loans not been profitable. One can observe how the ban on interest was undermined or circumvented because the pressure of a dynamically developing monetary economy brought about this. But one can also find evidence that religiously motivated adherence to the ban on interest or other practices of religious ethics hinders economic development.⁴

In modern times, images of society have developed that are still influential today.

- - A society can design itself as a sum of self-determined persons. Each person pursues his or her own plans, but must perceive the other person at least as an object, but regularly also as a subject. Even with a strong methodical individualism, this requires a social order (such was the argument of political philosophy since Thomas Hobbes). In this view, the individual person knows best what is good for him or her. Everyone is responsible for their actions and for their free development as a person. Each individual with conscience and self-confidence is ultimately also the reference for every greater order. This is regarded as the **liberal view** of the world.
- Society can also be viewed from the perspective of any kind of collective and can be measured from there. History experienced the strong nation, the holy nation, or the state which in its absolute reason was superior to everything else. We know the reference of religious or cultural communities, the rule of a theocracy. It is always revolving around some

⁴ This is the repeatedly discussed thesis in Max Weber, *Die Protestantische Ethik und der Geist des Kapitalismus*, 3rd edition, reviewed. 2010; see also Thomas Ruster, *Der Kampf um das kanonische Zinsverbot in der frühen Neuzeit*, in: Richard Faber (ed.), *Katholizismus in Geschichte und Gegenwart*, 2005, pp. 97-108; Justinus C. Pech, *Bedeutung der Wirtschaftsethik für die marktorientierte Unternehmensführung*, 2008.

grown or constructed collective order whose preservation and self-assertion are crucial. This order, its harmony, its power, is then placed in the centre, its value highly priced. For in the **collectivist perspective** it is this order that makes the individual human being what it is, because he or she existentially or ideally depends on it. Old conservative or theocratic worldviews, autocratic regimes, but also democratically legitimized state or international technocracies draw their arguments from this collectivist pool.

- A society can also be understood as an essentially **economically determined** association, as a class society based on private property that submits to the anonymous laws of the market, of capital and of its economic utility. And this reference can be linked to a moral argument of inequality if this economic order exists only for the benefit of the rich private owners and to the detriment of the dispossessed. Marxism draws its arguments for accusations against the existing conditions from this idea and creates a utopian picture of classless society. Political collectivism, which stands behind the **critique of economic power relations**, is concealed by the distant goal of free association - which would actually be liberal society again only without private property. For the decisive collective, until the distant ideal state is reached, it is the oppressed and disenfranchised class in whose name one acts.
- Through the current concentrated perception of global warming, the old contrast between **mankind and nature** becomes topical again for the self-description and self-design of society. Nature can be understood as an inviolable order of creation, its preservation and care as a moral reference for human action. This is the ecological, **the "green" position** that tells of a society that has subdued the earth, destroyed it over and over again and endangered all natural foundations, for which reason it must finally be transformed into a nature-compatible society.

All these positions are politically shaped or exploited models that tell how a society actually (in fact) functions and how it should (normatively) function. Actual functioning is often a discussion led by economists, sociologists or political scientists. The normative questions are the responsibility of theories of justice. Such theories are linked to a politically or religiously founded morality or to the basic normative models of constitutional law. Constitutional law is sometimes – in the USA or Germany – understood as a theory of society in itself, when the values of fundamental rights or the rules of a democratic society are discussed. Of course, no constitution is a theory of society, but the rules of the constitution reflect a certain image of man and of society.

2. The self-referential play of systems and structural coupling through institutional patterns

The Research College for Normative Social Foundations in Bonn wants to build a bridge between the description of the functioning of society and the discussion of how a society should be constituted. The description of the functioning of modern society is based on modern social science findings, above all on the systems theory approach of German sociologist Niklas Luhmann.⁵

Society can be perceived and analyzed from different perspectives. Action theory, for example, starts with the intentions and actions of individuals who can be observed. This is the micro level of society. In systems theory, on the other hand, it is observed how the major functional systems such as economy, politics, law, science or religion "behave". These large social systems follow their own specific operational logic. They organize themselves according to their own laws. They are self-referential. Which relationships arise to each other, how are they interconnected or coupled: These are topics of a description on the macro level. The Research College assumes that there is a connection between these perspectives, that institutions enable rule-guided behavior adaptively between the will and the needs of the individual on the one hand and the functional requirements of large systems on the other.

Action/actor level → Institutions ← Functional social system

For this sociological approach, actors (people) are personal systems that find their decisive place in their own consciousness. Communication between a personal system and a functional system (e.g. the law) is only possible through institutions, i.e. rule systems and behavioral guidelines that have at least two sides. Institutions are accepted normative orders that are connected with a life practice. Institutions are necessary for the structural coupling between otherwise very independent functional systems of society, but also between functional systems and personal systems (individuals/personal consciousness).⁶

⁵ Niklas Luhmann, *Theory of Society*, Stanford 2012. The original was published in German as Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 1997.

⁶ If, for example, private autonomy assumes that people are legal subjects whose declarations of intent are decisive for bringing about legal consequences, then this is not only a topic of law, but it also establishes connections to economic operations that make the functioning of markets possible in the first place, especially in connection with the institution of private property. But

Such an institution, on a very abstract level in the relationship between social systems and personal systems (individual consciousness), is language, which forms with its grammar its own order and in its field of application its own practice, which makes communication both possible and limited, but which also structures thinking, i.e. individual consciousness.⁷ Lawyers are not linguists, which is why they are familiar with far more concrete structural couplings which are called institutions in law. Private autonomy or contractual freedom have something to do with human self-perception. At the same time, they are decisive focal points for the economy and for the law. Private autonomy and contractual freedom also make the political system connectable via the institution of citizenship. Marriage, too, is perhaps a somewhat faded fundamental institution⁸, which in the past has fulfilled much more clearly economic, cultural and political functional needs and which, with a certain semantics in bourgeois society, has been deeply anchored emotionally in people's everyday lives.

Legal institutions such as private autonomy or democracy are linked to a normative image of man (that of a self-determined subject). Anyone who makes a declaration of intent, such as the acceptance of an installment credit agreement offered, can regard him- or herself as sovereign and learn to bear consequences. For its part, the legal system operates with a dogmatism that considers it decisive what legal subjects have declared. Consistent statements about legal consequences are then derived from this. The awareness of one's own decision-making power and the legal consequence of a binding effect are not the same, but they are structurally coupled in the institute of private autonomy. The modern understanding of democracy follows this model and considers the majority's decision to vote not only for functional reasons (decisions have to be made some way), but normatively indispensable, because it is the starting point of all political legitimation: all state power emanates from the people.⁹

Institutions can be differently developed and function differently. They are often surprisingly resistant to processes of change, but they can of course change themselves, be replaced by something else or even be destroyed without

private autonomy must also be able to connect institutionally to people's mental states of consciousness, i.e. people must also see themselves as privately autonomous actors and connect the whole with a certain image of man. Otherwise, the necessary coupling functions will be lost.

⁷ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, 1997, S. 108 f.

⁸ Nicholas Bala, *The Debates about Same-Sex Marriage in Canada and the United States: Controversy over the Evolution of a Fundamental Social Institution*, *Brigham Young University Journal of Public Law* (2005-2006), 195 ff.

⁹ Art. 20 para. 2 sentence 1 of the Basic Law of the Federal Republic of Germany.

replacement, with considerable consequences which are not always immediately apparent. Coupling services for the political system of authority can be provided by institutional ideas of democracy, but also by the institution of the state as a rational body of authority, which does not necessarily have to be democratic or constitutional.

It is always characteristic of **fundamental institutions** that they ultimately make smooth interaction and cohesion of society possible. Western society, for example, can only function if private autonomy is anchored as an institution jointly with private property. An institution is always normatively defined as a social pattern of behavior, whether through moral concepts or legal or religious safeguards. But every institution also needs everyday practice; it must be accepted and practiced by people, possibly "believed" in in a transcendental, civil-religious sense.

Many people in Germany lose the view of private property as a prerequisite for self-determined life if their savings do not earn interest and the inflation rate slowly but steadily destroys their monetary property. They experience that as owners of real estate they become nominally rich through rising prices, but that their freedom of action does not increase as a result. Nobody gives up real estate ownership if they only receive book money in return which does not earn interest in traditional forms of investment. So far, Germans have not only traditionally liked to save money, they also like to be tenants. The state has accommodated them with a tenancy law that has considerably limited the ownership powers over living space (social tenancy law). Today, some even want to nationalize the housing industry so that rents in urban areas remain low. Another example is pensions, which have always been dependent on the amount of one's own contributions, qualified by the German Federal Constitutional Court as a property position.¹⁰ Today, the connection between this property position (entitlement) is increasingly being broken, because even without the equivalent of corresponding contributions, a basic pension is financed with tax revenues in the existing social security system. This in turn weakens the link between property positions and the standard of living. If we do not pay attention here, the connection between individual performance, savings and subsequent gain in freedom resulting from a self-created basis of existence will disappear from people's minds. The idea that the state is the source of prosperity and of a good life then takes the place of this institution of private law society. Sociologically, this only shifts the normative system from the individual to the collective focus, but with considerable, unpredictable consequences for the functioning and cohesion of modern Western society and for the practical foundation of democracy.

¹⁰ BVerfGE 64, 87 (97 f.); 100, 1 (44).

3. Constitutional law and interdisciplinary analysis of institutions

Constitutional law can be understood as a legal mirror of the fundamental normative matrix of Western societies, but also as a compass that points the way with fundamental institutional models. The aim of an interdisciplinary, better-informed and reflexive jurisprudence is to make a contribution to social enlightenment. Major social issues such as the digital transformation of the world, the hasty development of artificial intelligence, ecological transformation, new geopolitical power relations, erosion processes of democracy and statehood, changes in the creation of economic value and everyday social practice are no longer understood to an appropriate degree in science and society and are no longer described in such a way that strategic, well-considered decisions are possible. Today, more than a few decades ago, it remains unclear what a fair World Trade Organization should look like in the system of unilateral thinking. What will be the future of central bank policy? What are the normative requirements of fundamental rights and democratic values, and what are the functional and economic consequences of the current policies of large Western central banks? Does Western individualism with its idea of man need an institution such as cash? Is it right that the salvation of the world climate should no longer be based on individual ethics because there is not enough time? How much freedom of decision is to be left to artificial intelligence? Will it be possible in the future to grant AI its own legal subjectivity, or should such a thing be considered for higher animals as well? Is the introduction or strengthening of corporate criminal law compatible with the personality of our legal system? Is the introduction of an unconditional basic income institutionally meaningful or dangerous?

All these questions cannot be answered by law alone, nor by sociology or economics or social psychology on their own. Ultimately, we need a better ability to recognize institutions as fundamental, to discuss them and to critically analyze change processes affecting them. Only then can the danger be counteracted that Western societies, driven by their high efficiency, lose sight of their own institutional foundations and thus endanger themselves.