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Abstract

This article argues that, from the first emergence of sociology as a distinct discipline, the sociology of constitutions, as a body of critical responses to the facts/norms dichotomy at the core of Enlightenment constitutionalism, has been an important but rather submerged area of sociological inquiry. Currently, there are unmistakeable signs that constitutional sociology is being consolidated as a distinct sub-discipline of theoretical sociology as a whole. This is evident in particular in the body of sociological constitutionalism associated with post-Luhmannian systems analysis, which focuses especially on the constitutions of world society. However, the article argues that the plausible premises for a fully sociological approach to constitutions and their normative functions of legitimation have not yet been established, and it offers a normative re-reading of Luhmann's own theory as a foundation for a constitutional sociology.

Keywords

constitutional sociology, facts/norms relation, normativity, systems theory, world society

The enduring definitions of the legitimating structure of the modern state were first formally articulated in the longer period of Enlightenment. In particular, it was argued at this time that states are likely to obtain legitimacy if they ensure that those subject to their power are protected by, and recognized in, subjective rights, which are enshrined in a constitution. It is not possible here to examine all theories of constitutions and constitutional rights that appeared in the Enlightenment, as both the content and the principles supporting these theories differed greatly. As a broadly indicative sample, however, we can observe that Baron d'Holbach utilized an institutional-organic perspective to examine rights, which he construed as formally attributable to each and every person, as 'fundamental laws' binding state power and determining the limits and content of its application (1776: 20–25). From a deductive-positivist view, Immanuel Kant argued that rights should be seen as inalienable elements of human subjectivity, attached to persons *qua* persons (1976a [1797]: 569), and he claimed that, in order to be legitimate, laws of state need to be deduced from and fully consonant with these rights (1976b [1795]: 205).

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From a more concrete constitutionalist perspective, Tom Paine radicalized Locke's earlier doctrine of natural rights to argue that the legitimacy of civil power depends entirely on the fact that it institutes and secures those 'natural rights of man' that human beings cannot preserve or fulfil on their own (1985 [1791]: 69). Perhaps the most important perspective in this theoretical line, however, was the theory of rights set out by Abbé Sieyès. Sieyès claimed that the particular rights and particular laws of the states of the *ancien régime* needed to be transformed into general (or national) rights and general (or national) laws, and that any state sanctioning particular rights (that is, privileges) could not claim to be legitimate (1839 [1789]: 179–180).

These theories cover a range of political stances. For all their distinctions, however, they reflect certain general principles. First, it can be observed that these theories all approach the constitution, which they define as the guarantor of the state's legitimacy, as possessing an implicitly dualistic relation to the state: the constitution imposes external norms (usually expressed as rights) on political power, and it ensures that the factual exercise of power is controlled and limited by relatively formalized normative principles. Second, these theories all examine the constitution from the perspective of a facts/norms dichotomy: that is, they define the constitution as consolidating norms that are originally external to political power, and in each case the constitution is perceived as offering legitimacy to political power because of its ability to obligate power to normative constraints that are relatively indifferent to the factual formation, location and application of political power.

During the incipient formation of sociological methodology, proto-sociological theories turned with particular vehemence against the dichotomous facts/norms structure implicit in the constitutional analyses of the Enlightenment. Indeed, during the first emergence of social-theoretical inquiry it might well have appeared that the *sociology of constitutions*, responding critically to the doctrines of constitutional norms in the Enlightenment, was in the process of emerging as a discrete sub-discipline of sociology as a whole. The very first formative period of sociological inquiry was characterized by a reaction against the formal-normative legal principles of the constitutionalism of the French and German Enlightenment: the earliest sociological theories were shaped by constitutional questions, and they sought to interpret constitutions and their normative/legitimating functions, not as resulting from externally prescribed normative institutions, but as integral elements of the common life of different societies.[1] Central to this undertaking was the view that the facts/norms division proposed by the Enlightenment was chimerical, and that societies could be interpreted as containing a factual structure that, in and of itself, resulted in the production of legitimating constitutional norms. Later, many of the most important theorists in the founding era of sociology also accorded special importance to elucidating the role and status of constitutions in modern societies. A sociological approach to the constitution is implicit in Durkheim's early analysis of Rousseau and Montesquieu as proto-sociological theorists (Durkheim, 1953 [1892]). This is then refined in his wider argument that law becomes less repressive and the state less coercive or 'less absolute' as societies evolve towards a more refined degree of solidarity (1960 [1893]: 199). A sociological account of the constitution is equally prominent in the works of Weber, who saw constitutions as documents capable

of producing legitimacy for political systems by integrating social agents in intensely centrifugal societies by appealing to deep-lying and structurally embedded motivations.[2] At roughly the same time, sociological approaches to constitutions also migrated across the disciplinary boundary between sociology and constitutional law. The constitutional lawyers Léon Duguit and Carl Schmitt, in particular, reacted against both pure-positivist and neo-Kantian traditions of constitutional analysis by proposing methods for observing constitutions in the broader context of a society as a whole, and they both argued, albeit very diversely, that constitutions provide reserves of legitimacy for society by representing the distinctive inner ethical/political form of a particular socio-historical order.[3] Early sociological theory, in sum, was marked by the strong sense that, in order to account for the cohesive legitimating fabric of the politics of a particular society, it is necessary to explain how societal norms are refracted in constitutional texts. At the heart of early sociology was thus a socio-theoretical re-phrasing of the main normative constitutionalist enterprise of the Enlightenment, and it aimed, beyond a simple facts/norms dichotomy, to account for constitutions and constitutional norms as expressions of *society's own constitution*.

These early perspectives in sociological and constitutional analysis, however, did not ultimately consolidate constitutional sociology as a theoretically differentiated sub-discipline. Owing in part to the constitutional disasters of interwar Europe, after 1945 more formal concepts of natural right resumed dominance in constitutional theory (see Neumann, 1994: 158). Indeed, the mainstream of constitutional analysis after 1945 was marked by the sense that theory must necessarily place itself on the norm-oriented side of the facts/norms division, that more positivist or descriptive methodologies are incapable of accounting for the essential normative functions of constitutions and constitutional norms, and that legal order must be secured by overarching and societally disembedded norms (see Rüthers, 1988: 22–53). This does not mean that the early impetus towards constitutional sociology was completely abandoned in the latter part of the twentieth century. In Germany, for example, Helmut Schelsky used an institutional-sociological method, borrowed in part from Arnold Gehlen, to interpret constitutions as instruments used by states for their own functional alleviation (1965: 50). Later, Richard Münch argued that constitutions – or, in fact, *constitutional culture* (*Verfassungskultur*) – play a crucial integrative and legitimating role in the political systems of modern societies by establishing a 'connection between political decision making and socio-cultural discourses' (1984: 311). In the USA, Talcott Parsons also ascribed a distinct, if rather understated, function to the constitution. He examined the constitution as the formal center of the 'legitimation subsystem of a highly differentiated polity', forming a 'major link between political and legal organization' and so contributing in vital fashion to the 'integration structures of the society' (1969: 339). Despite the persistence of these theoretical elements, however, constitutional sociology has remained marginal in general sociological inquiry, and even in legal sociology more specifically.[4] In particular, the key questions of constitutional analysis, which came briefly into view in classical sociology – that is, the questions: *What is the legitimate legal form of political power? What social factors cause political power to assume this form?* – have, to date, not received a conclusively sociological or socially internalistic response.

The Re-emergence of Constitutional Sociology

Currently, there are strong signs that this submerged dimension of classical sociology is being re-invigorated and that the sociology of constitutions is once again under construction as a specialized sub-field of political-sociological investigation. Some of the most important recent research in law and sociology has endeavoured to examine constitutional laws in light of their sociological origins, to elucidate the social processes underlying the public-legal construction of political authority, and to observe the legitimating functions of constitutions against a wide, and causally nuanced, societal background. At one level, to be sure, many currently influential legal-sociological analyses retain a highly critical tone in addressing constitutions. Some, for instance, build on neo-Marxist legal theory to identify constitutions as mere instruments of domination and socio-economic elite hegemony (Hirschl, 2004: 43; Schneiderman, 2008: 4). Theorists in the post-Foucauldian lineage, similarly, analyse liberal constitutional institutions as elements of social control, serving the disciplined integration of people in a 'governmental economy' (Dean, 1999: 122; Rose, 1999: 17). Despite this, however, a more favourable sociological attitude to constitutions has also become theoretically prominent in recent years. This is exemplified, first, in the works of Kim Lane Scheppele (2004), who pursues a historical-ethnographical method in examining constitutions and the motives for their reception as legitimate through society. It is also visible in the research of Andrew Arato (2000), who seeks to clarify the social preconditions of successful democratic-constitutional transitions. And it is characteristic of the works of David Sciulli (1992: 78–80), who examines the procedural norms of professional organizations as quasi-constitutional constraints on political power. The works of Hauke Brunkhorst, further, contain what is probably the most broad-ranging historical-sociological account of the role of constitutions in modern socio-political formation. Brunkhorst argues that the legal form of the constitution helps societies to stabilize and legitimize their political systems because it articulates and reflects both the normative orientation of social agents and the evolutionary processes determining social structure (2002: 113–139).

The most concentrated body of recent constitutional-sociological work, however, has developed on the ground cleared by the systems-theoretical *oeuvre* of Niklas Luhmann. Luhmann's own general theory of society includes significant, although rather inchoate, elements of a sociology of constitutions. This is discussed below. However, in recent years these elements have been substantially revised and expanded by, among others, the legal sociologist Gunther Teubner, and, latterly, Andreas Fischer-Lescano.[5] Together, these theorists have contributed much to the re-integration of sociological principles in constitutional inquiry, and in many ways they propose the most refined paradigm for sociological analysis of contemporary problems of political legitimacy and constitutional normativity. The outlooks associated with this body of sociological analysis have been modified over time, and the different works of its different exponents naturally reflect salient distinctions. However, at the risk of excessive homogenization, these views might be seen to converge around four positions.

First, these outlooks expressly negate the state-centred model of constitutional order. They claim that adequate analysis of the constitutions of contemporary society must renounce the classical public-law concept of a constitution as a single document acting

to sanction and legitimize the power of a political system assuming a monopoly of the means of coercion within one society and situated, as a primary bearer of power, above society as a whole. On this account, therefore, the 'centering of the concept of the constitution around the state' is insufficiently attuned to current socio-legal realities, and it omits to reflect the highly complex and functionally differentiated constitutional contours of contemporary society (Teubner, 2007: 135).

Second, these outlooks argue that under the conditions of globalization – or, to use Luhmann's own term, 'world society' – the political-monopolistic structure of nation states and the cohesive internalism of national societies have become extremely fluid. This brings forth an intense fragmentation and an extreme pluralization of legal regimes: different functional arenas within the transnational world society are extricated from vertical or state-enforced jurisdiction, and, across societal boundaries, they assume a position of relative autonomy in the production of laws and legal norms. In world society, in consequence, legal norms, even those assuming effective constitutional force, are produced not by states, but by international function systems: that is, media, commerce, sport, science, trade, and so on (Teubner, 2006: 161–162).

As a result of this, third, these outlooks claim that there now exists a new, and deeply pluralistic, mode of constitutionality in world society (Fischer-Lescano and Teubner, 2006: 53), and that, in parallel to political constitutional norms, different functional sectors now operate as quasi-constitutionalized *micro-commonwealths*, capable of articulating norms that, for their own functions, assume effective constitutional force (Fischer-Lescano and Teubner, 2007: 118). Different spheres of social practice and functional exchange are transformed into 'auto-constitutional regimes' producing their own 'procedural norms on law-making, law-recognition and legal sanctions' (Fischer-Lescano and Teubner, 2004: 1015–1016). The constitutional laws of world society, in consequence, are fundamentally *heterarchical*. Each socio-functional sphere has, or is capable of having, its own constitution, and constitutions are constructed not through foundational normative design, but through a process in which the law interlocks with different spheres of exchange and provides diffuse norm-building resources to stabilize these exchanges. The checks that exist against over-concentrated or unregulated use of power thus evolve, not as static or formal norms, but as articulations of the multiple legal regimes existing within society.[6]

Fourth, these outlooks also outline new sociological principles for analysing global governance. They claim that for adequate interpretation of current governmental structures a highly pluralized perspective is required, and modern international governance must be approached as comprising multiple semi-political regimes and multiple normative and legal orders. On this basis, these theories conclude that there exists in the world society a *de facto*, although highly dispersed and heterarchical, *global constitution*, which, as such, sets the legal form for contemporary international politics. Crucial for understanding this constitution is the fact that it clearly differs from all classical models of the constitution as an order of public law. In fact, it is a constitution that necessarily overarches the traditional distinction between public law and private law, and it draws power simultaneously from regimes of public governance (that is, states, international courts, human-rights tribunals) and from regimes of private governance (that is, companies, professional associations, international banks). Moreover, as this constitution

cannot be traced back to any primary act or normative foundational demand, the norms that it comprises are produced, internalistically, within the law itself: they are formed by plural legal acts or 'communicative events' in the global legal system and in the institutions applying law (Fischer-Lescano, 2003: 752; Teubner, 1997: 13). The law thus assumes a certain reflexive independence of express political control, and legal institutions such as 'arbitration courts, mediation authorities, ethics commissions', and so on, make themselves available as iterable sources of new, quasi-constitutional norms (Teubner, 2007: 132). The law of the new global constitution, in short, emerges endlessly from a reflexive communication within and about the law, and it is supported by, and reflexively re-iterates, a dense mesh of 'values, principles and basic rights' and even new constructions of international 'customary law' (Fischer-Lescano, 2003: 735, 751). In this form, the endlessly evolving constitution of the world society articulates the most solid available basis for 'norm foundation' (Teubner, 1997: 755), and, despite its essential autonomy against fixed centres of political jurisdiction, it provides an objective body of normative reserves to construct and restrict exchanges in different functional spheres. These accounts of the global constitution are underpinned, in their entirety, by Teubner's deeply influential concept of legal *hybridity*. This concept implies that in the laterally interpenetrated reality of world society, law and power are not pure, controlled, or monistically circumscribed forms. The law operates at a high degree of reflexive autonomy and self-generative positivity, and, responding variably to socio-functional structures within an international civil society, it lends itself spontaneously to the creation of a large number of functionally hybrid modes of politicality and constitutionality throughout the social world (Ladeur, 2002: 24; Teubner, 2005). Owing to law's hybridity, in fact, the constitution of global society might most accurately be seen as an aggregate of *global civil constitutions*, all of which exist outside the classical domain of the state and regulate social exchanges in highly positive and auto-genetically reflexive fashion.

Underlying post-Luhmannian views of contemporary constitutionalism is an emphatically *sociological* challenge both to the conventional principles of constitutional law and to the conventional principles of international law. For these views, classical constitutional perspectives fall behind an adequate sociological level of inquiry: classical accounts of the constitution omit to observe the factual dispersal of legal and constitutional power in contemporary society, they fail to appreciate the heuristic insufficiency of the classical distinctions between public and private law and public and private power, and they derive the whole normative/legitimating force of constitutions from a sociologically reductive semantics of purposive agency and foundational normative consensus. It is not difficult to see why Luhmann's theory of society proved fertile ground for this sociological analysis of post-state constitutionality. Central to the different variants of this theory are, in addition to the principle of *world society*,[7] Luhmann's core concepts of *legal positivity*, *contingency*, *systemic autonomy*, and *structural coupling* (interpenetration between different social systems). Most significantly, however, these theories follow Luhmann in their construction of society or of the social *per se* (see Luhmann, 1967). These theories implicitly reflect Luhmann's view that, in order to be adequate to contemporary realities, theory must think in *resolutely sociological* categories, and to think in such categories, it must recognize that its objects have no single determinate cause or structure and are generated in a highly contingent communicative manner (see

Thornhill, 2006, 2007). These theories thus examine modern society as creating intensely precarious meanings, they observe social phenomena as shaped by deeply unpredictable and multi-causal processes, and, in particular, they argue that *the social* in itself is formed by intricately variable communications within and between different function systems, through which societies produce functionally specialized, dramatically evolving, and externally uncorrelated internal patterns of reference. Social phenomena, on this account, must be approached as a densely ramified mass of systemically communicated meaning: there is no overarching or systemically external reality which might authenticate the meaning of phenomena, and there is no body of external principles or stable norms against which phenomenal meaning might be measured. As a result of this, these views also derive from Luhmann the argument that the political system, in the form of a sovereign body overseeing and directing interactions throughout an entire society, is a highly simplifying construction, and that the Weberian assumption that a political system can arrogate to itself a monopoly of directive power over all exchanges in a particular social order deeply falsifies the functionally pluralistic form of modern society. Luhmann argued that the political system of a society is simply one communication system amongst a number of others: this system has no remote claim to primacy in or for a society, and it is fictitious (and even dangerous) to assume that a political system can centristically control exchanges or interactions throughout society as a whole (1981b: 23). The insistence on the 'de-centration of the political' in contemporary theories of the global constitution, therefore, marks a direct and crucial political extension of Luhmann's conceptual apparatus (Fischer-Lescano, 2007: 109). Indeed, like Luhmann, these theories also suggest that the ascription to the political system of a primary role in modern society is a result of a sociologically under-refined method, which views society as convergent around one group of dominant principles that form a universal directive environment or superstructure for all areas of society. For both Luhmann and his followers, a fully *sociological* view of society will necessary unsettle the state's primacy, and it will necessarily perceive the state as nothing more than one de-centred nexus of contingent communications amongst a number of others.

At the same time, however, it is of particular importance in these approaches to society's constitution that they also move in a distinctly normative direction. Indeed, at the core of these post-Luhmannian theories is a substantial normative revision of more conventional positions within systems-theoretical analysis. To be clear, it must be noted that these theories flatly reject the idea that we can define overarching or prepotent constitutional norms for the world society: they place themselves quite unequivocally against theories proposing a supra-contingent *norm of governance* to regulate global society and to legitimize inter-state law.[8] As discussed, these sociologies assert that legal norms remain, in the last instance, unfounded and highly contingent: the law of global civil constitutions can only elaborate its normative structure from a recursive 'auto-logical relation' within law's inner exchanges, and global constitutions are always produced, auto-communicatively, from the 'paradoxical requirement' for legal norms where volitional, deductive, or structural grounds for the production of norms cannot be substantiated (Teubner, 2007: 138). Despite this, nonetheless, post-Luhmannian sociologies of the global constitution also indicate that the sources of law in world society possess an essential element of normative reflexivity, and that, in two distinct ways, the

constitutions of global society provide vital reflexive/normative frameworks to solidify and organize the evolving functions of society. On one hand, they argue, law reacts reflexively to emergent realms of social practice, and it establishes parameters for the construction of functionally specialized civil constitutions: that is, it allows different functional realms – trade, arts, science, education, media, and so on – to organize themselves in a particularly apt and enduring legal apparatus (Fischer-Lescano, 2003: 721). The law thus provides a normative cement that preserves and reinforces social processes already existing in sub-sectors of world society (Teubner, 2007: 135). On the other hand, however, the law also produces a wider corpus of constitutional norms, and it articulates a broader 'structural coupling between world law and world politics'; it consequently presents the form of a multi-structural 'global constitution', which the political sub-system of world society cannot easily ignore or contravene in the application of its power (Fischer-Lescano, 2003: 721). Law, in short, creates both the normative constitutional form for functionally specific communications, and the normative constitutional form for world society in its entirety.

In this latter respect, centrally, post-Luhmannian constitutional theory also assigns a particular status to *rights* as elements of the normative/legitimating fabric of modern society. Evidently, central to this theory is the view that rights cannot be seen to shape the political system or other spheres of interaction as deductively stipulated principles, and it clearly revolves around the assertion that there is no one set of rights that legitimately define a society or its political apparatus: the rights regimes of a contemporary society are necessarily heterarchical. For Teubner, for instance, rights have no simple structural or normative cause, and they draw content solely from contingent acts of law's 'self-production' and 'self-control' (2007: 139). Despite this, however, this theory argues that rights have constitutive importance for the diverse constitutional exchanges of modern society, and both normative functions of the law – the stabilization of distinct sub-systems and the political stabilization of society as a whole – are equally likely to be determined by, and to draw content from, rights. The soft constitutionality of modern society thus endlessly internalizes rights, as they are articulated and prescribed in law's discourses and in the localities of law's formation (that is, tribunals, courts, councils) (Teubner, 2007: 139–140), and as a result of this the wider formation of global civil constitutions is always marked by a tendency towards the 'development of human rights with binding world-wide validity' (Teubner, 2007: 130). On this account, in consequence, the law acts reflexively to valorize rights and to order the communications of society's sub-systems around them, and it increasingly constructs a semi-formal rights-based constitution throughout all society. Fischer-Lescano in fact takes Teubner's socio-normative analysis of rights still further. He argues that the '*rule of law*, fundamental human rights, rights of states, group rights as highest values, *global remedies rules*' and other rights-based principles and procedures fuse in the contemporary world to form an 'autopoietic, politically sustained world law' (2005: 271, original emphasis). As a result of this, he sees modern society as witnessing the emergence of a diffuse global constitution at the coupling between global politics and global law, and he claims that this new law/politics coupling institutes effective 'global constitutional rights' throughout society (2005: 247).

This theoretical tendency concludes, therefore, that even the most pluralized and functionally specialized constitutions of world society assume the normative functions

originally imputed to classical constitutions: that is, they preserve substantive and procedural norms for diverse social practices, they consolidate a relation of 'reciprocal control' between organization systems and those agents integrated in these systems, and they even contribute to the 'global, national and sectoral reinforcement of strong public spheres' (Fischer-Lescano, 2005: 258). The idea of the global civil constitution, in short, is designed both to allow us, *sociologically*, to comprehend the multiple normativity of modern society, and to allow us, *normatively*, to recuperate at a global level the original liberal/republican ideal of the constitution as a legal apparatus establishing law as realm of human autonomy and even enabling the pluralistic yet rights-based 'participation of civil society' in legislation (Fischer-Lescano and Teubner, 2006: 168–169).

Hypercontingent Norms?

On these grounds, it can be concluded that the original inchoate attempt in classical sociology to examine constitutions both in a factual and in a normative dimension is now again at the centre of high-level theoretical debate. In fact, the contours for a recommencement of constitutional sociology, adjusted to the realities of global society, are clearly in place. These theories of the post-state constitution might be seen, at least in intention, as positions that at once resume and intensify the critique of the facts/norms dichotomy in the tradition of Enlightenment constitutionalism that was proposed by early sociology. In particular, these theories examine constitutional norms as socially formative, and they account for these norms as structurally indispensable elements of society. Yet at a different level they also seek to account for the constitutional normativity of modern society as arising from highly contingent and systemically internal factual communications, and so as lacking any external or even causally *self-identical* foundation in deductive principles or general patterns of agency. For this theory, in its intention at least, a norm cannot be disarticulated from the factual form of its communication, and a norm's status as norm depends entirely on its enunciation within a set of externally unfounded communications. The constitutional *norms* of society are thus always also the constitutional *facts* of society.

At the same time, however, it can also be observed that these theories are not fully persuasive in their reconstruction of societal norms, and they retain a suppressed aporetic dimension. Although they strain their theoretical resources to account sociologically for the normative elements of society's constitutionality, they struggle to explain, without theoretical hypostasis, the exact origins of the norms that give constitutional structure to society. Indeed, even where they account for legal norms and rights as produced by law's autologism, these theories do not conclusively arrive at a societally internal or fully sociological account of constitutional norms and legal rights. In the final instance, in fact, in those moments where these theories directly confront the question of law's founding normativity, they retreat from their account of law's deep and irreducible contingency, and they insinuate a quasi-foundational re-anchoring of law by suggesting that law might derive normative force from the generalized imperatives of a global *civil society*, which, although split into different function systems, nonetheless assumes the functions of a transnational public sphere. On this account, international civil society, although de-centred, horizontal, and functionally specialized, condenses a determinate aggregate

of normative human needs, and it remains a constant reference and relatively stable substructure for law's normative force.

Even in their post-Luhmannian attempt to construct normative objects as contingently produced and substantially unboundaried, therefore, the most advanced theories of contemporary constitutionalism persist in taking recourse to the vestigially metaphysical assumption that social communications mysteriously gravitate around and draw content from a bedrock of rationally or communicatively produced norms and rights. Indeed, these theories ultimately retract their theories of normative hypercontingency, and they move towards the conclusion that society forms a relatively constant environment for its (albeit highly heterarchical) legal and constitutional forms, and that these forms are remotely and indeterminately structured by normative resources inherent in this societal environment. For this reason, it might be concluded that contemporary sociological analyses of constitutional functions are still ambiguously positioned around a facts/norms dichotomy, and where they intend to reconstruct the factual sources of norms they ultimately posit relatively constant normative resources through society, and they diminish the contingency and internalism of the law and its norms, on which they otherwise insist. In other words, where they address the core questions of constitutional normativity, these theories cease, in the terms of their own conception, to think in pure sociological categories, and they cross the division between facts and norms to place themselves on the side of norms. They thus fail, in their own terms, to provide sociological evidence to explain exactly why societies need constitutions and the normative resources provided by constitutions.

Against this background, the analyses proposed below attempt to build upon the founding sociological demand for a construction of the conditions of public order that stands outside the simple facts/norms dichotomy. They aim to trace the preconditions for an interpretive method able to comprehend society's legal/normative structure in fully and resolutely sociological fashion. To this effect, however, they argue that Luhmann's own theory of society requires further reconstruction, and the key to a plausibly *sociological* sociology of constitutions might still be identified in the work of Luhmann himself.

Luhmann's Sociology of the Constitution

Particularly paradoxical in the normative aporia of post-Luhmannian constitutional thinking is the fact that the most salient contemporary outlooks are shaped by a critical reaction against for the dimensions of Luhmann's work focused on normative aspects of political structure. Indeed, they expressly develop their conceptual apparatus in order to adjust systems-theoretical methodology to the multivalent and structurally independent normativity of modern society, which, they argue, Luhmann's own theory cannot accurately interpret (Fischer-Lescano, 2003: 720). Despite this, however, it is at least arguable that normative-sociological attempts to move beyond Luhmann are usually miscarried, and the desire to observe constitutional norms *after* Luhmann is the root of the conceptual deficiencies of these attempts. Luhmann's own work in fact provides an account of societal contingency, norms and legal/constitutional form that avoids the pitfalls and the residual hypostasis that mark contemporary systems-theoretical analysis

of constitutions. His theory clearly provides a fully sociological paradigm for constitutional inquiry, and it contains an express theory of *society's norms*, through which pure-sociological observation is able to elucidate normative patterns of societal evolution and even to evaluate why societies explain and legitimize their functions in distinct and relatively stable normative structures. Above all, Luhmann's work offers a fully *internalistic* account of society's normative structure, and it specifically resists positing a uniform normative boundary, substance, or environment in society in order to examine the reliance of society on distinct normative facts and procedures. To a greater extent than his critical heirs, in other words, Luhmann's approach to constitutional norms thinks through and beyond the facts/norms dichotomy, and it aims to offer a sociology of the constitution that fully reflects the legitimating status of constitutional norms, yet also refuses to split the normative source of constitutions from their systemically internal and factual functions.

At one level, it may appear as a singularly perverse undertaking to turn to Luhmann as a corrective to theories demonstrating a lack of persuasive normative/legitimating evidence in their account of society's constitutional order. It is widely (although inaccurately) argued that Luhmann's sociology is normatively neutral or even marked by a 'normative tone-deafness' (Scheuerman, 2008).[9] Moreover, it is precisely in questions regarding the normative/constitutional preconditions of modern society that Luhmann's theory appears most prone to extreme relativity and normative reductivism.[10] In examining the normative foundations of society's use of power, for instance, Luhmann denied that there are any external norms that determine legitimacy in power's exercise, and he clearly intimated that power can be legitimately applied in a number of highly variable ways. Still more relativistically, he also argued that norms employed in both the political system and the legal system are only ever systemically internal communications, and the validity of norms cannot be assessed by any external criteria. Political power, he concluded above all, has no necessary precondition *ab extra* (1981a: 69): the legitimation of power is always a communicative act of 'self-legitimation' that occurs within the political system, and it 'excludes legitimation through an external system' (2000: 358–359).

Despite this, however, if we scratch beneath the surface of Luhmann's writings on power, law, and constitutions we can find a number of perspectives that contain quasi-normative resonances. Indeed, these perspectives incorporate a set of principles offering something close both to a general normative model of the constitution in the narrow political sense and to a model of society's constitutionality as a whole. This model can be used to provide a conclusively sociological description of the societal foundations of norms, and to illuminate the inner-societal or structural reasons why certain social exchanges tend to arrange themselves, constitutionally, in legal-normative fashion and why political systems tend to apply their power in a constitutional structure. Moreover, as discussed below, this model might also be seen to produce an alternative sociological paradigm for examining the distinctive constitutional regimes of contemporary world society.

The paragraphs below reconstruct the basic principles of Luhmann's sociology of the constitution, they underline its normative implications, and they accentuate its utility as a prism for an irreducibly sociological constitution of public-legal norms. Significant in this respect is the fact that Luhmann pursued his analysis of constitutions in two distinct ways. At one level, he observed the legitimating functions of a constitution as operating

in a purely self-reflexive or contingent dimension: that is, he analysed constitutions as externalized self-descriptions of political power, which allow a society to simplify and to gain plausibility for its required transmission of power. In this respect, accusations of normative indifference against Luhmann can be upheld. At a different level, however, he also scrutinized the legitimating functions of a constitution as operating in a more practical/structural dimension. In this regard, he indicated that constitutions sustaining political legitimacy have the quality that they provide norms that allow a political system to adapt *adequately* to its distinct societal environments, and to use its power in a manner that remains sensitive to the characteristically plural (multi-environmental) shape of a modern society. Such constitutions thus obtain (or might be seen to obtain) an element of supra-contingent validity, and they act as repositories of the *effectively adaptive* evolutionary intelligence of modern society and its political power. It is in this question of power's adaptive adequacy, then, that the normative aspects of Luhmann's constitutional sociology can be most clearly identified.

Constitutions as the Coupling of Law and Power

In the first instance, Luhmann argued that constitutions serve to secure political legitimacy because they help a society to describe and objectivize its structural couplings between law and power. That is to say, constitutions are legal arrangements formed at the intersection between the legal and the political systems of society, they allow the terms of articulation between these systems to be consolidated and simplified, and they enable both systems to borrow from each other descriptions of their functions through which they can respond to and positively organize their inner communications (Luhmann, 1991: 186). Through the advent of constitutions in society, law acquires the capacity to explain (and positivize) itself and its decisions as *politically enforced*, and power acquires the capacity to explain (and positivize) itself and its decisions as *legally determined* (1991: 202). A constitution thus contributes to the legitimacy of political power, because it allows power to describe itself as subject to legal sanction, and so to transmit itself through society as palpably justified and warranting compliance.

Constitutions and Political De-paradoxification

Luhmann also argued that constitutions are documents that facilitate the legitimization of power because they allow function systems applying power to obscure the contingency of their foundations, and to produce self-descriptions that obviate their eventual disruption by acutely demanding queries and external crises. For Luhmann, the idea of 'the state' does not refer to a factually existing social object: the state, in itself, is nothing more than a paradoxical 'formula for the self-description of society's political system', which, as such, permits the political system to differentiate and unify its communications, and so to explain, concentrate and regularize society's positively usable power (1984a: 102; 2000: 319–371). The idea of the state under a constitution or of a 'constitutional state', then, marks a greatly refined formula of political self-description, which allows the political system both further to articulate its functions as positively differentiated and plausible, and to intensify and perpetuate its autonomy and effective unity

(1984a: 107). The core constitutional principles of basic norms, natural rights, democratic consensus, popular will-formation, and national sovereignty are thus self-descriptive *paradoxes* or *hyperfictions*, which a political system endlessly generates and utilizes for itself, and the constitution acts as a simplified form through which the political system recursively integrates and re-integrates these paradoxically fictitious principles into its communications in order to obtain and reproduce reserves of plausibility (legitimacy) for itself and its power (1991: 184–185, 191).[11] In this regard, the constitution underlies the differentiated and plausible use of political power in a modern society, and the normative constructs obtained within a constitution have the specifically factual value that they allow the political system to positivize and constantly to reproduce, and so also reflexively to legitimize, its own internal foundations.

Constitutions and the Semantics of Inclusion

Luhmann expanded on these themes by arguing that constitutions help to obtain legitimacy for power because they, and especially the catalogues of rights that they contain, play a key inclusionary/integrative role in modern societies. In allowing the political system to reflect all addressees of its power as assigned certain subjective rights, as universally equal under law, and as possessing broadly analogous social features, constitutions originally acted to transform modern society from a society of local/patrimonial structures and stratified estates into a fully differentiated aggregate of persons. In so doing, they established law and politics as positive and inclusive media of exchange, which could be applied, at a high level of internal abstraction and generalization, to all agents in society with little regard for their structural particularity (Luhmann, 1973: 4). Under modern conditions of socio-functional differentiation, consequently, constitutions allow both the legal system and the political system regularly to stabilize the terms of their inclusion, and to integrate social agents in their communications in relatively straightforward, uncontested, and generally iterable fashion (see Verschraegen, 2002). In both these respects, constitutions have a vital simplificating and legitimating status for modern power and modern law.

Constitutions and the Aversion of De-differentiation

At a more manifestly functional level, Luhmann claimed, first, that constitutions help to generate legitimacy for political power because they act to reflect and preserve the *functional differentiation* of modern society in its entirety (1973: 6). In particular, he argued that constitutions respond to the differentiation of society by placing limits on society's power, and they obstruct any tendency within the political system towards an undifferentiated expansion into, or colonization of, other realms of social exchange. For instance, as a document that enshrines personal rights of property, contract, belief, and scientific inquiry, the constitution assists the political system in its self-differentiation from other social systems – that is, those systems that regulate questions of property and contract (the economy, and possibly law), belief (religion), and theoretical inquiry (science, and possibly education and the arts) – and in so doing it helps to uphold both the adequately distilled form of political power and the finely differentiated shape of modern society as a whole (Luhmann, 1965: 135). Constitutions and constitutional rights, in consequence,

are objective institutions that countervail the possible re-centration or *de-differentiation* of a pluralistically differentiated society, and that give externalized yet reflexive form to the internally constructed boundaries of society in its entirety.[12] The (semantic) idea in classical constitutional theory that the constitution and the rights that it contains limit state power has its real truth in the fact that the constitution offsets society's convergence around its political power: constitutions in fact serve to formalize acts of self-restriction, or the 'renunciations and indifferences', which enable a political system to avoid exceeding its functional reach and prevent a society collapsing into constructions of its form and direction that rely excessively on damagingly monistic or emphatic expressions of political power (Luhmann, 1965: 182–183).

Constitutions and Political Abstraction

Luhmann's second main functional argument about the constitution is that, as a semantic simplification of the law/power coupling, the constitution allows the political system to translate most of the social exigencies (both practical and reflexive) that are channelled towards it into communications that can be performed in the form of the law (1993: 424). At a practical level, a constitution offers a legal institution that filters out most social exchanges from the political system before they require regulation necessitating specific legitimization, and it establishes administrative resources and legal routines (including those characteristic of legislatures, councils, and parliaments) that can intercept social issues before they demand or become fully relevant or taxing for political power (1981c: 184). The constitution thus allows a society to avoid using its and power its legitimacy in an inflated, obdurately personalized, or even excessively *frequent* manner. It is for this reason that constitutions conventionally endorse the principle of the separation of powers in the state: this principle performs a 'filter function' between the reserves of political power stored in the executive and the administrative capacities of the political system, and it 'blocks' the unnecessary 'politicization' of the founding resources of the political system (1973: 10–11). Additionally, however, the coupling of law and power in the constitution also means that the political system acquires a facility that enables it to pass decisions through society in the apolitically routinized procedures and judicial formulae of the law. In fact, under the law/politics coupling provided by the constitution, the political system is able to utilize law, or to undergo *second-coding* through law, so that law acts as the primary medium for the generalized transmission of society's power. Through this process of *second-coding*, the ease with which power can be disseminated through society is dramatically increased and the amount of positively usable, transmissible, or 'effective' power in society is exponentially expanded (1984b: 40; 1988: 34; 1991: 201). In both these respects, the constitution clearly serves the differentiation and the abstraction of society's political system, and it contributes to the legitimacy of power as an adequately usable and positively extensible and replicable facility.

Constitutions and Political De-politicization

In these respects, Luhmann also argued – albeit rather more implicitly – that constitutions have the function that they perform general services of *de-politicization* for a society and

its political power. This happens in three ways. First, in marking out the peripheries of the political system through rights and thus limiting the political system against other social exchanges, constitutions effectively safeguard or *immunize* society against its hypertrophic immersion in political power, and they ensure (as far as possible) that not all exchanges in society have to be unremittingly held at a high level of politicization. In this respect, constitutions establish and secure realms of positive and apolitical liberty in sectors of society not constructed as internal to the state, and they allow exchanges in these sectors to be conducted without being subject to direct or burdensome re-integration in the political system. Second, in alleviating the state by referring most social exchanges to the law and in providing formalized procedures for the diffusion of political power through law, constitutions also act to deflate the politicality contained in the more volatile elements of the political system itself, and they reduce the political resonance and controversy attached to the political system's exchanges (1973: 12; 1993: 424). In this respect, constitutions augment the positive facility of power's application, and they diminish the potential for society to converge around emphatically politicized social contents. Third, in ensuring that the political system stores a convenient and plausible (normative) self-description of itself, constitutions release the political system from the need constantly to re-state or renegotiate its legitimacy, and they permit the political system to articulate from within itself an (almost subliminally implicit) formula to accompany, to positivize, and to de-controversialize its transmission of power (1991: 187). In each of these ways, constitutions help to render power legitimate: they transform power into a relatively unemphatic phenomenon, they restrict the politicization of contents that have limited requirement for political resolution, and they dampen the possible provocations attached to power's justification.

In all these functions, it can be seen that, for Luhmann, constitutions, constitutional norms, and constitutional rights play a vital role in creating the operative preconditions for the use of power in a modern society and for the stability of society as a whole. Indeed, constitutions have a particular and vital legitimating function for political power, and they articulate a form for power so that it can be applied in a fashion that is both structurally and functionally adjusted to and *likely to be perceived as legitimate* in the pluralistic fabric of a modern differentiated society. Luhmann thus intimated that in a differentiated society there is a probability that legitimate power will normatively reflect itself as constitutional power, and that the political system will evolve procedures for using power by mapping out its societal boundaries and by consolidating other realms of social practice through the ascription of *subjective rights* (that is, selective rights of personal autonomy) to those particular agents who are subject to power. For Luhmann, there can be no legitimacy in society's power without a full differentiation of the political system. Legitimacy is the adequately differentiated form of political power. And the constitution performs crucial services in preserving society's power in its differentiation and its legitimacy.

In these respects, above all, Luhmann's theory contains elements of a sociology of constitutions that articulates normative insights about society's constitutional form without taking recourse to any external value or uniform hypostasis to explain this form. In particular, Luhmann argues that there are irreducible sociological and, in fact, medially internalistic reasons why political power tends to arrange itself around constitutional

norms, and he outlines a specific paradigm for showing why, in modern society, political power, constitutional norms, and constitutional rights are intimately connected and why the reference to constitutional norms and rights is likely to be co-implicit in power's communications. For Luhmann, political power must remain responsive to rights-based constitutional norms because power, through its internal communications, produces rights and rights-based norms as *the integral form of its own societal articulation*. Power produces rights, first, both in order to sensibilize itself to, and also generally and uniformly to include, the objects and agents to which it is applied. Power produces rights, second, in order to displace from within itself those social functions that it cannot regulate and that are not ideally responsive to political centration or overt politicization. In this respect, Luhmann's work on constitutions culminates in the following conclusion: *constitutions, constitutional norms, and constitutional rights are the most probable form of a modern society's political power*. Constitutions, constitutional norms, and constitutional rights are not imposed on power by any externally integral environment or any external set of postulates. In Luhmann's work, the norms and rights required to support society's political exchanges are only ever *society's norms* and *society's rights*, and they have no source except in society's own inner-systemic exchanges: these norms and rights are integral elements of society's political power, without which, in a differentiated society, power could hardly be utilized. However, they are communicated from within power as its internal reflexive form, and, as such, they remain necessary or at least highly probable prerequisites for its societal transmission. Pure sociological analysis of modern socio-political formation thus allows us, using Luhmann's perspectives, to draw this normative conclusion.

It might on these grounds be observed that post-Luhmannian sociologies of the constitution have moved beyond Luhmann rather too abruptly, and that Luhmann's own theory contains solutions for some of the aporia, and especially the residual rights-foundationalism, that intrude in the theories seeking to correct his own mode of normative analysis.[13] It might even, paradoxically, be observed that the extreme systemic internalism of Luhmann's work provides the most adequate paradigm for a sociological reconstruction of constitutions and their normative functions. Luhmann's account of constitutions as *power's own form* remains a key socio-normative perspective in analysis of constitutions, norms, and legitimacy. In fact, it makes it possible to grasp constitutions as elements of *society's own constitution*.

Conclusion

It can be concluded that Luhmann's theory of society contains distinctively valuable premises for the current re-orientation of theory towards the sociology of constitutions and constitutional rights, and it has the benefit that it accounts for these normative institutions in a perspective that remains resolutely and internalistically *sociological*. On one hand, Luhmann seeks to explain the status of constitutions and constitutional rights by examining their crucial role as communicative elements in the positivization, differentiation, and de-politicization of society's power, and he observes these institutions from a perspective that admits no external normative or causal dimension. On the other hand,

though, his work can be plausibly interpreted in a pointedly normative light, and it can provide structural insights into the reasons why some constitutions and constitutional norms offer normative and legitimating benefits to political power. Moreover, his work can even, with some degree of generalizability, offer a sociological account of why some norms or rights are and some norms or rights are not likely to perform politically legitimating services, and so to generate stability and acceptance in society's manifold constitutions. If the early development of constitutional sociology in the classical period of sociological inquiry aimed to explain the correlation between constitutions, rights, norms, and political legitimacy and to offer a sociological (that is, a societally internal) answer to the (normative) question about the *legal form of legitimate power*, Luhmann's work contains the core theoretical utensils that allow us to bring this sociological endeavour to completion. In particular, and it offers a paradigm that finally allows theory to comprehend constitutions, norms, and rights without migrating across the theoretical segregation of facts and norms.

It might also be concluded that Luhmann's analysis of constitutions and constitutional norms provides a normative paradigm that is transferable across different societies and different stages of societal evolution. Although devised in the first instance as a means of explaining the reliance of single societies under single states on the legitimating power of constitutional norms, the theory of the constitution as political power's positive adaptive form also offers a model for comprehending the processes of norm generation and constitutional rights attribution in contemporary, more functionally interdependent (world) societies.[14] In particular, first, Luhmann's work indicates that the tendency for contemporary (world) societies both to evolve a plurality of legal regimes outside the traditional domain of statehood and to allow norms of soft constitutionality to be formed in different sub-systems should not be viewed as a fully new and normatively distinct constitutional process. On the contrary, the construction of modern society's deeply pluralistic legal landscape, and the emergence of the autonomous normative structures that shape this landscape, can be comprehended as aspects of a process that performs deeplying differentiating and alleviating functions for society's power, and that in consequence, like earlier dynamics of constitutional formation, helps to establish an adequately adapted and dispersed form for society's power. In this respect, further, Luhmann's theory might also be seen to imply that in the pluralistic landscape of world society, social agents require and are allocated a plurality of rights because the ascription of different rights to social agents helps a society to articulate differentiated limits for its use of power, to include social actors in and across functionally diverse settings, and to avoid falling into deleteriously simplifying experiences of power. Rights, in consequence, are neither autologically founded nor derived from a stable environment of human needs or freedoms. On the contrary, they are objective instruments that a society institutes in order inclusively to stabilize its power and legitimize its politicality, and the existence of a plurality of such rights is always likely to be a characteristic of power able effectively and inclusively to apply itself in a differentiated societal horizon. Moreover, Luhmann's theory provides a framework for interpreting the regimes for applying rights in contemporary (world) society, and it offers a perspective which perceives the proliferation of bodies supervising rights-regimes (for example, international courts, regional courts,

international trade tribunals, fora for professional self-regulation and enforcement of codes), not as a shift in the law towards a new condition of radical de-centration or autologism, but rather as a further element in the wider and ongoing articulation and organization of society's power. An outlook based in Luhmann's theory might in fact observe the fact that contemporary rights structures are sustained by a plurality of (private and public) judicial instances as the result of the formative and continuous dislocation of society's power from firm centres of agency. It might then conclude that this reflects the perpetual need for the de-politicization of society's power, which informs all constitutional formation. Indeed, this outlook might suggest that the fact that most rights are applied in tribunals and courts that only distantly borrow immediate political sanction to define and apply rights is a highly refined adaptive articulation of society's power, in which rights act as particularly potent instruments of societal differentiation, and in which rights acquire a distinctive function of political legitimization because of this.

As an end result of this article, thus, we might arrive at an interim position in the methodological and substantive labour of constructing a sociology of constitutions. In particular, we might say, tentatively, that the sociology of constitutions needs to accept as its own object the fact of *absolute normative contingency* in modern society, and it needs to reject all traces of socio-anthropological foundationalism in accounting for the structural importance of legal and political norms. Further, it needs to acknowledge the extreme interdependence of different realms of social exchange, and it needs to endorse the post-Luhmannian view of radical normative acentricity as an inevitable dimension of society in a condition of advanced differentiation. However, as it necessarily has to do with norms and structural principles of legitimate order, constitutional sociology cannot accept absolute relativism or indifference in its approach to society's political form, and it needs to find a perspective to observe constitutional structures as *sociologically necessary*. The success of a sociological approach to constitutionalism, thus, might depend on its borrowing from Luhmann the intuition that political and constitutional norms are internally generated self-descriptions of society's political power. That is to say, it might need to observe constitutional norms as self-reflexions of political power that adaptively and pre-emptively articulate the necessary (or at least *probable*) dimensions of power's positive evolution and transmission. It might then need to observe, further, that it is precisely because of this inner-systemic function of political self-reflexivity that constitutions assume a structurally vital position in modern society. The way forward for the sociology of constitutions, in other words, might be to view the entire objective and conceptual apparatus of constitutionalism (including rights, normative texts, and even constitutional courts) as a bundle of institutions produced from within political power itself – as the necessary yet self-generated preconditions of power's positive and differentiated autonomy. In adopting this perspective, theory might satisfy equally both demands addressed to the sociology of constitutions: it might offer both an account of the contingency and social internality of constitutional norms and an account of the legitimating salience and structurally indispensable status of constitutional laws. Other attempts at developing a sociology of constitutions routinely fall behind the strict methodological demands of sociology because they persistently observe constitutional instruments, residually, as externally imposed upon power.

Notes

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1. For commentary, see Bramson (1961: 13–16). Nisbet (1970: 7); and Strasser (1976: 27); The critique of formal rights and statically natural-legal constitutions can be seen, across highly divergent political stances, amongst all quasi-sociological or social-theoretical responses to the French Revolution. See in particular De Bonald (1847 [1802]: 72–3, 165); De Maistre (1847 [1796]: 81); and Savigny (1840: 311).
2. Weber concluded that mass-democracies consolidate legitimacy for their political systems by means of constitutions that at once secure formal-legal rules for the state bureaucracy and allow the emergence of powerful leaders, distinguished by demagogic or Caesaristic attributes (1988: 391). For details of Weber's involvement in the actual process of constitution writing, see Schulz (1963: 123–124).
3. See Duguit's early essay (1889: 502). On this account, the validity of law depends on the extent to which it accords with 'the social state'. In his later work, Duguit expanded Durkheimian concepts of solidarity to argue that a state becomes legitimate as it grants to each person the 'moral and material possibility of participating in social solidarity' (1921: 596). The sociological dimension in Schmitt's view of constitutional law is more generalized. It implies simply that legitimate law reflects its origin, not in formal norms, but in the concrete existing will of the people (1928: 121).
4. Note the absence of discussion of constitutions in Freeman (2004).
5. The works of Karl-Heinz Ladeur (Hamburg) and Inger-Johanne Sand (Oslo) also deserve mention here, although they fall outside the main frame of analysis in this paper.
6. This view is also expressed by Ladeur (2003: 18).
7. Luhmann was clearly a forerunner of the now widespread break with societal internalism (see Luhmann, 1971).
8. On this view, there can be no 'normative unity of law in an international setting' (Fischer-Lescano and Teubner, 2006: 24). It is clear that these theories eschew the global-governance claims of the cosmopolitan theorists and the secular universalism of the new international law theorists (see Franck, 1990: 192). For further critique of overarching political norms, see Marx (2003: 36–78). The theories considered here have some points in common with the theory of the 'disaggregated state'. But they naturally perceive this as excessively state-centred and also reject the ideal of a 'foundational norm of global governance' (Slaughter, 2004: 245).
9. For (badly overstated) analysis of the anti-normative orientation of Luhmann's work, see Brodocz (1999: 338). Though for Luhmann's own critique of normative political analysis, see Luhmann (1970: 159). For alternative reconstructions of Luhmann's work as containing a normative dimension, see Mascareño (2007); and Thornhill (2008a, 2008b).
10. Luhmann was prepared to recognize legitimacy only as the basic reference or the formula of contingency (*Kontingenzformel*) for the political system. For him, legitimacy is the 'form in which the political system accepts its own contingency' (1992: 11).
11. For very useful recent analysis of Luhmann's theory of the paradox, see Philippopoulos-Mihalopoulos (2010: 65–67).
12. For Luhmann, it is not possible to 'centre a functionally differentiated society on politics without destroying it' (1981b: 22–3). Luhmann wrote extensively about *de-differentiation*, and this concept contains the most important clues about his own political stance (King and Thornhill, 2003: 115).

13. There is no suggestion in this that the theorists who set out to render Luhmann's thought adequate to global society do not know about his sociological theory of rights and constitutional norms. Patently, Teubner echoes Luhmann by arguing that basic rights were originally formed in European societies as institutions that reacted to 'expansionist tendencies' in the political system (narrowly defined), and that thus acted to stabilize the 'integrity of other autonomous areas of society' (2008: 4–6). Moreover, he also argues, following Luhmann almost to the letter, that rights are devices that secure an 'institutionalized guarantee' for 'the self-limitation of politics' (2007: 127). However, Teubner also concludes that this aspect of Luhmann's theory is bound to a now superseded account of the relation between constitutions and singular states, and he rejects the possibility of expanding this theory to construct a normative foundation for post-Luhmannian reflection.
14. Post-Luhmannian constitutional sociology usually takes issue with the fact that Luhmann's own work (allegedly) remained focused on single states. In consequence, these theories indicate that Luhmann failed fully to reflect the new modes of statehood and constitutionality evolving at the intersection between states, in new patterns of interlocking statehood (that is, WTO, EU, UN), and at the boundaries between international function systems (see Fischer-Lescano, 2007: 100).

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