Sociology of Constitutions

A paradoxical perspective

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Contents

14 The constitution in the work of Niklas Luhmann

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To understand how Luhmann studied the constitution, a premise is necessary. The systems theory is actually based on the idea that modern society is a functionally differentiated system. This means that subsystems are distinguished on the basis of the functions they fulfil, and have a de facto monopoly of their specific functions. This also applies to the system of law as well as to the system of politics: they are distinct systems, with different functions, structures and codes. This is a statement that would probably still not meet with the orientation of several researchers today and that already raised many an eyebrow in the 1960s (see Luhmann 2005: 272). All we can do here is recall that the law's function, for the systems theory, is not to regulate behaviour, but to create, maintain and generalise expectations of behaviour established by norms or in some other way traceable to legal factors. The function of politics, on the other hand, is to exercise power to make collectively binding decisions, these days through democratically-organised state structures.

It is important to remember this position adopted by the systems theory, because the constitution is a text that has played a pivotal role in both politics and law and, as we shall see, Luhmann holds that the meaning it has acquired in the last two hundred years actually derives from its relationship with these two different subsystems.

With regard to Luhmann's research on the constitution, his later writings only include one essay devoted explicitly to the topic (1990, but this was preceded by another back in 1973). In addition, he discusses the constitution in the two main books he devoted to the law (*Das Recht der Gesellschaft*, 1993, translated into English as *Law and a Social System*, 2004) and to politics (*Die Politik der Gesellschaft*, 2000). He also mentions the topic occasionally in other essays and books (see the references at the end of this chapter). It may be worth bearing in mind that he only dedicates a handful of lines to the constitution in his first book devoted to the law (*Rechtssoziologie*, 1972, translated into English as *A Sociological Theory of Law*, 1985), while analyses of the issue can be found in some of his writings about political sociology.

The following paragraphs are concentrated on Luhmann's research into the constitution in the political sense and in the legal sense, and will conclude with the argument that was crucial to his analyses, i.e. that the constitution's primary function is to enable the relations between the two systems of politics and of the law. The key term here will be structural coupling.

From a political standpoint, Luhmann sees the constitution primarily as the modern solution to the classical problem of political theory, i.e. the legitimation of power. The problem cannot be solved because it is structurally based on a paradox: it is impossible to justify and legitimise a situation in which some exercise power over others, except by having recourse to semantic artifices, such as today's constitutional state and/or popular sovereignty (Luhmann 2000: 33).

That society's underlying structural problems, like those of all its subsystems, take the form of a paradox is typical of the systems theory. In the case of politics, the paradox is that the

legitimation sought can only come from the power itself: in other words, the legitimation in question is always self-legitimation (Luhmann 1981). But that is the very reason why the power has to find a way to 'externalise' its legitimation, thus concealing the paradox and making the difference between those who hold the power and those who are subject to it acceptable.

While the sovereign in the pre-modern tradition was legitimised by a divinity or by reference to natural law, modernity brought the political theory that initially put its trust in the doctrines of contract, in a much more complex and refined approach. In any case, the apex of the political system has always had blurred outlines, which in one way or another end up pointing at arbitrariness, so to something that cannot be justified.

Luhmann's arguments about the political constitution are inspired by the characteristics of the modern state, above all by the division of powers, which enables the judiciary to control and limit the political power, this latter being a factor that from the very beginning legitimised the need for the constitution. The development of modern politics led to its democratisation, which for Luhmann means primarily the legitimation of the opposition, so that the apex of the exercise of power is now split along the lines of government vis-à-vis opposition (Luhmann 1989). In parallel, the figure of the sovereign also changes: it is the people. Yet popular sovereignty is only another version of the underlying paradox, deriving from the idea of a people that governs itself, of a people that decides to be governed (Luhmann 2000: 141).

Many other aspects typical of constitutions are related to these political developments, including the relevance of intérests (mediated by political parties), the protection of minorities, the fundamental rights, to which Luhmann devotes some important works (Luhmann 1965, 1973). From a political standpoint, Luhmann holds that fundamental rights and the values in which they are condensed are a form of legitimation of the constitution, a sort of 'civil religion' (Luhmann 2000: 141). Nevertheless, constitutional values are politically important not as ideals to be approached as closely as possible, but because they enable politics to create a specific uncertainty of its own (Luhmann 2000: 177–80), being not always mutually compatible as for instance the two values of freedom and equality: the very fact that they clash is the reason why they could be the lasting benchmark of nineteenth-century ideologies.

Ultimately, Luhmann holds that the constitution and the transformation of the liberal state into a constitutional state enable the political system to set its own internal and external boundaries: internally by organising the control and the division of powers, and externally by means of fundamental rights. In both directions, politics outlines its own possibilities and becomes autonomous as a differentiated subsystem within modern society. The control of what is politically permissible is thus not entrusted to supreme organs, but to the law and to justice on the one hand and to public opinion on the other.

From a legal standpoint, Luhmann sees the constitution as the modern tool that enables the law to manage its autonomy in a functionally differentiated society. In this context autonomy means above all positivisation of the law.

Luhmann stresses this point repeatedly in several works, as he believes it to be the decisive turning point for achieving the complete differentiation of a system of law (Luhmann 1970; 1972: 190–205; 1988). The question is still being discussed, although there is no doubt that the traditional distinction drawn between *jus naturale* and *jus positum*, natural law and positive law, which dominated the classical tradition until the beginning of the modern era, loses out in significance with functional differentiation. Luhmann notes that modern law is entirely positive law, in the sense that it is the result of decisions and can be created, amended or abolished by means of decisions.

This evolutionary process in the law is clearly visible in the birth of the United States. After the revolution, when the newly independent colonies set about creating territorial states and

their new nation, one of the most important problems they had to face was how to bridge the normative gaps deriving from their independence. The need to reorganise their legal material on foundations that were certainly traditional, but that would make allowance for a thoroughly unprecedented situation, suggested that the entire normative apparatus could be reviewed, reconsidered and potentially adapted and changed. In short, there was nothing that could be considered to be immune to potential revision: everything could be rearranged and reorganised in whatever way was most suitable. The constitution was an ideal solution for this purpose, and the consequences were of the utmost relevance 'A Law repugnant to the Constitution is void', as Marshall stated in the *Marbury* v. *Madison* case in 1803 (about the birth of the American constitution, see Luhmann 1990).

Luhmann focuses his interest on the formal and structural aspects of the constitutional text. The systems theory, as already mentioned, attributes pivotal importance to the circularity of communication in all its forms, especially to paradoxes and to tautologies. The law is an exemplary case: if all law were to become positive, how could the problems of self-control, of self-limitation and of change based on internal criteria be managed?

Luhmann returns repeatedly to the double distinction that has characterised the law since the invention of the constitution: the code of *Recht/Unrecht*[1] is not alone, but is also joined by 'the additional coding constitutional/unconstitutional' (Luhmann 1993: 120; here as in the following quotations see the English translation). This gives us 'a second level, where everything is different from the normal level' (Luhmann 2005: 232). While the rule that normally applies in the law is 'new law breaks old law', in the case of the constitution, it is the opposite rule that applies and this leads to the need for rules governing collisions and to the question of limits on the changeability of constitutional norms. It is then also possible to end up in a situation where norms or decisions may comply with the law, but be in breach of the constitution: a 'very unusual thing' (Luhmann 2005: 232).

The problems whose nature is more or less one of logic do not end here. For example, the constitution must include itself in itself, establishing rules for its own amendment and criteria and forms for judging constitutionality; in addition, the constitution proclaims itself, stating that it draws its legitimacy from God or from the people, thus externalising its own circularity (Luhmann 1993: 406). Alternatively, to mention another example, constitutions sometimes establish norms that establish other norms that have not to be changed. But since this prohibition could be changed, the whole thing ends up with a recourse to infinity (Luhmann 1993: 126–7). The law is therefore entrusted to a political evaluation, thus avoiding the issue of the paradox ending up blocking the law. Luhmann's interest in the constitution from a legal standpoint springs from historical analyses that attempt to answer the question: why does modern law need a constitution and what is its function?

It is no coincidence that the only essay that Luhmann devoted explicitly to the constitution is entitled 'Verfassung als evolutionäre Errungenschaft' (1990, 'The Constitution as an Evolutionary Achievement'). The fact that Luhmann places the constitution within an evolutionary process enables him to disregard its inventors' intentions: in other words, the constitution is the result of a process that has manifested its potential in a way that goes well beyond those intentions. According to the meaning given to it by the systems theory, the expression 'evolutionary conquest' stands for a social form that not only has to be compatible with the context in which it comes about (in our case, that of law and politics), but must also be advantageous, enabling internal complexity to be increased in order to reduce external complexity, as Luhmann constantly formulated it in his writings (lastly in *The Theory of Society*, 1997: 505–16). In this sense, we can see that the constitution represents the structural coupling between law and politics.

The concept of structural coupling, revived by Humberto Maturana, becomes necessary to describe the relationships that systems succeed in establishing with their environment. If we start from the premise that systems are autopoietic, i.e. operationally closed, and if we therefore rule out the possibility that exchanges or input–output relationships take place between a system and its environment, then we need to understand how the environment becomes relevant for the system in terms of its possibilities of survival. And the answer is in fact structural coupling, i.e. very specific and extremely selective relationship between the system and particular sectors of its environment. On the one hand, the system must be able to remain indifferent to almost everything that happens in its environment, but on the other it must be open to being 'irritated', 'perturbed' and 'disturbed', albeit only to a very limited extent. Any communication, for example, is not sensitive to anything of what happens or exists outside social systems. Natural differences (temperature, radiation and waves of all kinds), including differences produced by individuals' bodies and minds, are inaccessible to communication (this is what the systems theory means by 'operational closure'). But at the same time communication has to be liable to irritation and in fact can only be irritated by those who take part in the communication through very specific forms of structural coupling, such as language.

Luhmann's thesis is that the constitution fulfils the function of structural coupling between the political system and the legal system, once modernity enables the two systems to achieve complete differentiation. In other conditions the relationships between law and politics did not require any such structuré: law recognised society's class order and the nobility prevailed in cases of legal conflicts, while any problems between the normative order and structures of dominion were regulated contractually (Luhmann 1993: 450). But this involved extensive integration between the two systems that limited their development.

With the invention of the constitutional state, strict limits were imposed on the possibilities of reciprocal influence between law and politics, excluding such classical forms and customs as for example the 'exploitation of legal positions in the economic system (wealth, legal control of politically important options) in order to achieve political power, or political terrorism or political corruption' (Luhmann 1993: 404). The two systems' dynamic actually increase as a result of this limitation, while the reciprocal influences are limited to the fact that 'positive law is the instrument of choice for political organisations and, at the same time, constitutional law is a legal instrument for the disciplining of politics' (Luhmann 1993: 404).

This generates an enormous potential for reciprocal irritability that translates into an equally high degree of structural variability. Consider the developments in modern politics, about which Luhmann argues that 'democracy is a consequence of the positivisation of law and of the ensuing possibilities of changing the law at any time' (Luhmann 1993: 404). The function of structural coupling is concealed by the symbolic emphasis attributed to constitutions, as though they were a unitary, superior form, while from a sociological point of view – and in particular from that of the systems theory – they are only a form 'that can be read two ways and can be tackled differently from two sides, without insoluble political conflicts continuously arising as a result' (2000: 392). Luhmann closes this argument saying that those who do not see this difference of perspective can only generate confusion (2000: 392). The meaning of the constitution from the point of view of systemic sociology is rather different from that usually attributed to it by law and politics and by the theories that these systems have developed. The interpretative framework is offered here in more abstract terms by the systems theory that enables the subsystems of modern society to be compared to one another, providing the structures necessary for solving specific problems, such as the issue of structural coupling between operationally closed systems. This permits the constitution to be compared with the other forms of structural coupling that came about with functional differentiation, such as the institution of property and

those of contract for regulating relations between law and the economy, of qualifications and degrees for regulating relations between the economy and education, of the central banks for regulating relations between politics and the economy and so on: a theoretical approach and a scientific methodology that are decidedly unusual in the panorama of a fragmented sociology.

Note

1 Luhmann defines the code of law in terms of the two poles *Recht/Unrecht*, which are usually translated into English as legal/illegal. It is worth noting that this translation does not render the full meaning of the two terms *Recht/Unrecht*, which are hard to translate into any other language. The problem is that the law is not limited to dealing with questions of legality or illegality: it is safe to assume that this distinction came along relatively late, as a consequence of elaborate – if not already written – legal codes. *Recht* and *Unrecht* are far more generic terms that refer to any case that calls for an intervention to solve a conflict. As a matter of fact, even today, not all conflicts that end up in court or that have some form of legal solution concern questions of legality/illegality. When he was speaking in English, Luhmann himself on many occasions used the words right/wrong.

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