NOTE ON THE PLACE OF CONSTITUTIONAL COURTS AND THE ROLE OF THE PROPORTIONALITY PRINCIPLE IN THE AUTOPOIETIC SOCIAL SYSTEMS OF CONTEMPORARY WORLD SOCIETY.

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The theory of autopoietic social systems develops a conceptual framework to be applied to the study of societies that attained a particular historical condition, to which belongs firstly, the democratic feature of political institutions and the capitalistic domain of economic values in those societies. Considering it as a system, we'll have also on this system a "core" (or "center") and a "periphery". "Central" would be the (participative) democratic and advanced capitalistic parts of the world society, while the others would remain "peripheral" until the accomplishment of their integration in the "economic world society" (*wirtschaftliche Weltgesellschaft*). This is not to be thought of in terms of countries, since the center and its periphery would be physically everywhere, as long as its characteristics are shown. But if we follow the indications of Luhmann in his final masterwork from 1997, when he asserts that protests always come from the periphery against the center, by pretending to be out of society, then we come to the conclusion that as the “society of society” autopoietically unfolds itself so the distance between desires and its satisfaction tends to vanishes, something that Kojève´s (1976) lectures on Hegel´s “Phenomenology of spirit” would support, as there we find the (Herderian) idea of “geistige Tierreich“ (see Forster, 2009).

So we are now to face the question of the risks that such a development might bring about, as Luhmann (1997: 782) make us aware referring to Dieter Grimm´s book on the future of Constitutions. At stake is the maintenance of the autopoiesis in the global system, if we consider the legal system as Luhmann (1993) once proposed, that is to say, as a kind of immunity system in society, with the task to vaccinate it against the diseases of conflicts through the legal depiction of such conflicts as prescriptions to be followed by courts conceived as immune against politics.

The process of globalization leads us to figure the whole world as a society, the "world society" (*Weltgesellschaft* - see Luhmann, 1971). In the world society in which we live in, with its hyper complexity and multicentrality, as it is described by autopoietical systems social theory, this is a proposal to do research through the point of view of the present state of differentiation of systems in such a society. One of those systems is the legal one, which is at the same time separated and articulated with the others, so that mutual irritations are absorbed through the so called “structural coupling” (Maturana & Varela, 1973) between the center and periphery of one another, in order to maintain their stability and simultaneously growth in their environment, autonomously. Legal systems and political systems are connected through a particular media of operative closeness called the legal constitution of the State. From Constitutional Supreme Courts we expect to ultimately define what is to be seeing as constitutionally grounded. These courts become then co-responsible with the operation of the binary code of both systems, that is to say, the lawful or non-lawful code in the case of legal system and the government or opposition in the case of political system (Luhmann, 1993, 1995, 2000a, 2004). This is due to the centrality of the definitions about constitutionality of legal norms both to legal and political systems. As a result, we might consider a tendency of those units do migrate from the juridical do the political system.

This throws a new light on the well-known Luhmannian thesis on the legitimacy of law through procedures (Luhmann: 1969), as far as their outcomes must meet one of the possible contents of the principles and norms, to be conform with basic values such as rationality, democratic participation, pluralism, economic efficiency, that are already pursued in the making of the procedures.

Here must be mentioned with emphasis the Frankfurtian legal philosopher R. Wiethölter (1989), according to whom in post-industrial society we find the most distinctive feature of law in its "proceduralization" (*Prozeduralisierung*). This means that M. Weber's (1978) thesis about law in modern society being essentially formal, with the prevalence of general and abstract norms - in contrast with the more substantive type of law in pre-modern societies - is no longer adequate to the description of law in today's postmodern society, since its major problem is not the protection of individual liberty against arbitrary action of the State, but the enforcement of collective interest by the State and social agencies. In attaining those collective interests there are also public and individual interests to be respected, what is very hard - if not impossible - to be thoroughly done by general and abstract statutes in advance. There must be a case-by-case, contextualized consideration, so that, as Rawls (1972: 83, 84) would say, the best we can do is to assure fair procedures, in order to achieve decisions that are shaped to equate all conflicting interests and/or values. This occurs mainly through the "balancing" (German: *Abwägung*) of these interests and/or values according to a "principle of proportionality" (German: *Grundsatz der Verhältnismäßigkeit*), as Ladeur (1983) pointed out, in his postmodern approach to legal theory. We may find this as a good example of Hofstadter's (2007) "strange loop", since such a principle, that has constitutional nature, is located in the highest level of legal hierarchy and would be applied to decide concrete conflicts and legal problems bringing harmony to multiple possibilities of lawful solutions to them, in

a way that is not previously ruled. This means that such a principle is valid not only due to its constitutional status, but also because it validates the solution offered to rule a specific case. It accomplishes an oscillator function (Spencer Brown, 1993) that is needed to switch back and forth from hetero-reference to self-reference, which is vital to the system's autopoiesis (Maturana & Varela, 1973). Here the relevant distinction, instead of those of true/false or fair/unfair, would rather be something like flip/flop, as Luhmann (2000b) once pointed out. The closest that the "contingency formula of justice" as a code of higher order (that is to say the unity of the difference in the "metacode" fair/unfair and also in an "Überbegriff", as we would say in German, but not an *Über*program that is internal to law, as it seems to be for Derrida in his book on Marx – see Derrida, 1994b) can get to the legal system without properly getting into it seems to be through such a principle, which is also responsible for the introduction of an exception in the system, that pushes it downward dangerously close to the negation of law by violence and arbitrariness. Those circumstances makes it tempting to conceive proportionality as the best candidate do be located at the legendary place of the Kelsenian "Grundnorm", specially if it is taken in account his last version of it (Kelsen, 1991), as a fictional norm (German: "eine fingierte Norm") in the Vaihingerian sense (see Vaihinger, 1935), by means of what the illusion of (knowing) justice and satisfaction of fundamental rights as the illusion that is necessary to the operational closure to/with the environment to be easily elicited as the cognitive openness to the future is maintained.

In this context the judicature turns out to be of central importance to the efficiency of legal order in present societies with a democratic political organization. Legislation no longer furnishes the required guidelines to a satisfactory judicial treatment of issues, such as those that we have to cope with in the hyper complex postmodern society, brought into light after the body of statutes was enacted. And this means also an emphasis on the

importance of the procedural laws that regulate the judicial exercise of power. Such a concept of "proceduralization" (Wiethölter, 1989) is congenial to Luhmann's (1969) thesis of "legitimacy through procedure" and might very well be understood as a "call to judicial responsibility" (Drucilla Cornell, 1992a).

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