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The under-complexity of social rights

Luís Heleno Terrinha

Abstract: In this essay it is aimed to critically observe the societal structure of social rights and the inner-societal processes that shape them. The concern is with the systemic and operative consequences that social rights unleash, support or promote regarding the political and the legal system. For this purpose, and following the main premises of the sociology of Niklas Luhmann, echo is given to an interpretation of rights as a language power, concluding that social rights induce the expansion and growth of both the political and legal autopoietic operativities. In face of the fact that social rights know no inbuilt device to restrict or limit those expansionary tendencies, their under-complexity is ascertained based on the negative disruptions that may come thereof for the political system, the legal system and the functional differentiated society as a whole.

Keywords: Legal theory; Sociology ; Autopoiesis; Social rights ; Welfare state

Resumo: Neste estudo, pretende-se observar criticamente a estrutura societal dos direitos sociais e os processos intra-sociais que os cunham. A nossa atenção dirige-se para as consequências sistémico-operativas que os direitos sociais provocam, suportam ou promovem no que toca aos sistemas político e jurídico. Para este propósito, e seguindo as premissas fundamentais da sociologia de Niklas Luhmann, damos eco a uma interpretação dos direitos como linguagem do poder, concluindo que os direitos sociais induzem a expansão e o crescimento das operatividades autopoieticas política e jurídica. Em face do facto de que os direitos sociais não dispõem de qualquer mecanismo interno que restrinja ou limite as tendências expansivas, declaramos a sua sub-complexidade baseada nas disrupções negativas que podem daí resultar para o sistema político, o sistema jurídico e a sociedade funcionalmente diferenciada como um todo.

Palavras-chave: Teoria do direito; Sociologia; Autopoiese Direitos sociais; Estado social

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This paper seeks to *observe* social rights from a theoretical perspective. That has a twofold impact.

Firstly, it implies that the author proceeds with a sociologically and philosophically (for some perhaps ideologically) committed mode of enquire:¹ the author is not theorizing or reflecting out of a vacuum, but instead through intentionally chosen perspectives, world-views and scientific methods. Such a conduct does not hamper the results of the research, nor the quality of the opinions expressed. The analytical value of the findings remains, essential is that the premises and the ground assumptions shared are clearly stated. In this work, the predominant influencing world-view is the theory of autopoietic social systems as developed by German author Niklas Luhmann (both a legal scholar and a sociologist), which, as unintended consequence, tends to put us on the right or conservative side of the political spectrum.²

Secondly, a theoretical stand implies that the author feels himself free to make a *radical* critique of social rights. This type of approach is the most suitable to confront social rights with deep fundamental questions regarding their own “*right*” to existence, their validity claim or their societal meaning. A substantial reflection on social rights, especially one that derives from a sociologically informed practice of legal theory, must take into consideration their particular societal embeddedness, their underlying societal structure, their positive societal functions as well as their negative societal impact or externalities – this is the only way to truly *understand* them. This sort of (theoretically induced) detachment provides for some fruitful distance from the object under scrutiny and will, in ultimate analysis, be fertile to generate a productive scepticism regarding not only the – sometimes praised and metaphysically presented – origins of social rights but also their virtuosities (or absence of them) in contemporary societies.

The itinerary of this article is quite simple to follow: first, a relatively short presentation of the basics of luhmannian autopoietic social theory is provided, considering that some readers might not possess sufficient knowledge of it (our main concern is the explanation of core concepts that shape the argument along the text); second, leaning on important research and findings advanced by Professor Chris Thornhill, echo is given to an interpretation of *rights* (in general) as devices or mechanisms of (political) power, that is, rights as an instrument subservient to the ends, language and communication of the political system; third, departing from that conception, both classical types of rights are put in theoretical opposition

1 - In general, SOMEK, Alexander, *Rechtliches Wissen*, Suhrkamp: Frankfurt am Main, 2006.

2 - See KING, Michael / THORNHILL, Chris, *Niklas Luhmann's Theory of Politics and Law*, Hampshire: Palgrave Macmillan, 2003, pp. 98-101.

– liberal or negative rights and social or positive rights –, something that will allow to highlight the positive societal function of negative rights (not only for the political system, but for society in general as a functionally differentiated society) and the disruptive societal effects that accompany social rights. The conclusion will consist in the assessment of the structural (unavoidable) under-complexity of social rights.

1. THEORETICAL FRAMEWORK: AUTOPOIETIC SOCIAL SYSTEMS THEORY (NIKLAS LUHMANN)

It is usually granted that Niklas Luhmann has offered one of the most important, insightful, useful and advanced contributions to the domain of sociology and to the understanding of the evolutionary processes that culminated in what is called the modern society. Above all, his theory of society helps understand with a considerable degree of precision and refinement the processes and linkages that shape this complex world of ours. Even though sometimes accused of using hermetic language, something which is not to be denied, it must also be conceded that the prize to be claimed after digging and immersing in his (vast) work is actually well worth the ride: one acquires a sophisticated instrument that enhances our analytical capabilities to make sense of very diverse phenomena. The richness of Luhmann's theory is confirmed by the fact that it can be of help in almost any issue or domain within the so-called social sciences, something that is obviously reinforced by his abstract analysis, by the type of conceptualization in which he engages in and by the semantics that he uses.

This paper is obviously not the adequate place to present Luhmann's theory in detail. We will be mainly concerned with explaining some of his core concepts, especially those that will tend to be employed or presupposed along this article. The aim is just to make the further thought on the topic (the under-complexity of social rights) more intelligible, by clearly stating the premises from which we depart and the concepts that underpin our theoretical construction.

Luhmann develops a theory of society that, liberated from certain "*obstacles épistémologiques*",³ appears as post-metaphysical and post-ontological⁴.

3 - See LUHMANN, Niklas, *Die Gesellschaft der Gesellschaft*, Frankfurt am Main: Suhrkamp, 1997, p. 24, and LUHMANN, Niklas, "Soziologische Aufklärung", in Niklas Luhmann, *Soziologische Aufklärung 1 – Aufsätze zur Theorie sozialer Systeme*, 8.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 83-115.

4 - LUHMANN, Niklas, *Soziale Systeme – Grundriß einer allgemeinen Theorie*, Frankfurt am Main:

The human being or person is not at the centre of sociological inquiry and not even at the centre of society itself.⁵ Instead, another element is found to be the radical and irreducible *social* element: communication.⁶ Society is constituted by communication and is made up of communicative operations.⁷ In this sense, and bluntly put, the human being or person is *outside* society⁸ (which, tells us Luhmann, is a much better place⁹), for the defining element of the human being is not communication but conscience.¹⁰ Therefore, Luhmann's theory of society is a theory of communication and of communicative processes *in(side)* society.

This associates with the fact that Luhmann, leaning on decisive theoretical contributions made before him (namely by Talcott Parsons and other differentialist and systems thinkers¹¹), assumes the existence, in society, of *systems*.¹² His focus is, naturally, on *social* systems, that is, systems that process meaning through the reproduction of communication.¹³

With the preceding information it is easier to grasp the essentials of Luhmann's

Suhrkamp, 1987, pp. 143-147, and KING / THORNHILL, *Niklas Luhmann's Theory of Politics and Law*, pp. 146-148.

5 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 31.

6 - See LUHMANN, Niklas, "Was ist Kommunikation?", in Niklas Luhmann, *Soziologische Aufklärung 6 – Die Soziologie und der Mensch*, 3.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, pp. 109-120.

7 - LUHMANN, *Die Gesellschaft der Gesellschaft*, pp. 71-73, e LUHMANN, Niklas, "Intersubjektivität oder Kommunikation: Unterschiedliche Ausgangspunkte soziologischer Theoriebildung", in Niklas Luhmann, *Soziologische Aufklärung 6 – Die Soziologie und der Mensch*, 3.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, pp. 162-179.

8 - LUHMANN, *Soziale Systeme*, p. 288, and LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 30.

9 - LUHMANN, Niklas, "Die Tücke des Subjekts und die Frage nach den Menschen", in Niklas Luhmann, *Soziologische Aufklärung 6 – Die Soziologie und der Mensch*, 3.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, p. 159.

10 - LUHMANN, *Soziale Systeme*, p. 355, and LUHMANN, Niklas, "Die Autopoiesis des Bewußtseins", in Niklas Luhmann, *Soziologische Aufklärung 6 – Die Soziologie und der Mensch*, 3.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, pp. 55-108.

11 - For an overview, see. Read also PARSONS, Talcott, *The System of Modern Societies*, New Jersey: Prentice-Hall, Inc., 1971.

12 - LUHMANN, *Soziale Systeme*, p. 30.

13 - LUHMANN, *Soziale Systeme*, p. 18, LUHMANN, Niklas, "Vorbemerkungen zu einer Theorie sozialer Systeme", in Niklas Luhmann, *Soziologische Aufklärung 3 – Soziales System, Gesellschaft, Organisation*, 5.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 13-28, and LUHMANN, Niklas, "Soziologie als Theorie sozialer Systeme", in Niklas Luhmann, *Soziologische Aufklärung 1 – Aufsätze zur Theorie sozialer Systeme*, 8.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 143-172.

theoretical and sociological work.

First, within Society (the most comprehensive and encompassing system, the system outside of which there is no communication, the system in which all communicative operations are executed) we assist to a multiplication of systems. Luhmann identifies what he terms a process of *systemic differentiation*: the formation and autonomization (differentiation) of (sub-)social systems that are part of / are in society and that execute society (communication).¹⁴

Second, at the present evolutionary stage such a systemic differentiation translates into a functional differentiation of society: the partial social systems (as opposed to the total or non-partial system of Society) differentiate themselves through the generation of a systemic-relative (exclusive) binary code (that works as a mechanism of attribution of an original general communication to a determined social system) and according to specific social problems, questions or realms.¹⁵ This systemic differentiation intends to manage and reduce complexity within society (complexity is understood as the existence of more possibilities than those that can be actualized¹⁶) and each system exhibits a specialization and an universal competence for a delimited and delineated social function, for which they assume sole responsibility.¹⁷ The binary code mediates the transmutation of a societal general communication into a communication that pertains to the operations of a given system (precisely the one that uses the code in question) and, simultaneously, concurs to enable the identification of what is part of the system and what is not, which communications are of a system and which are not: in sum, it enables the demarcation of the borders of the system (a distinction between the inside of the system and the outside of the system as what does not belong to the system).¹⁸ These binary codes are binary precisely because they consist in two alternative and opposing values (one positive and one negative, but without any moral connotations). In this sense, codes are a dual form that present a disjunctive

14 - LUHMANN, *Die Gesellschaft der Gesellschaft*, pp. 78 ff., and LUHMANN, Niklas, "Gesellschaft", in Niklas Luhmann, *Soziologische Aufklärung 1 – Aufsätze zur Theorie sozialer Systeme*, 8.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 173-193.

15 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 131.

16 - See LUHMANN, Niklas, "Komplexität", in Niklas Luhmann, *Soziologische Aufklärung 2 – Aufsätze zur Theorie der Gesellschaft*, 6.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 255-276.

17 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 747.

18 - LUHMANN, Niklas, "«Distinctions directrices». Über Codierung von Semantiken und Systeme", in Niklas Luhmann, *Soziologische Aufklärung 4 – Beiträge zur funktionalen Differenzierung der Gesellschaft*, 4.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 13-32.

structure (“either... or...”).¹⁹

Third, and this is his most obvious originality (when compared to previous general systems theory and even to Talcott Parsons), Luhmann adapts the findings of Chilean biologists Humberto Maturana and Francisco Varela²⁰ and conceives social systems as *autopoietic*. This is an unprecedented conceptualization full of theoretical and sociological impact. Autopoietic social systems are *operatively closed* systems, meaning that they self-reproduce themselves: their operativity proceeds in a circular and recursive fashion, implying that each new operation *refers* or connects to a previous operation also executed by the system (*self-reference*).²¹ This ability for self-reproduction – in which each and every new element produced by the system relates with and to former elements also produced by the system always in a self-referential circle – differentiates the system regarding its outside, called the *environment*:²² this environment is constituted by the other systems (meaning that for a given system the others are its intra-societal environment²³). The system refers to itself, to its previous operations, and not to the environment. Between both there are no direct relations: no system can steer or control directly, causally or purposefully another system (to which represents its environment), mainly because the system possesses its internal complexity (non-triviality), rules and criteria of relevance.²⁴ It is for this fact that the in autopoietic systems functionally differentiated society is said to have *no centre*.²⁵ All the partial and differentiated systems are in horizontal parity – none possesses a total and totalizing view of society, none of the systemic-relative perspectives can be

19 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 360.

20 - See MATURANA, Humberto R. / VARELA, Francisco J., *The Tree of Knowledge. The Biological Roots of Human Understanding*, Edição revista, Boston: Shambhala, 1992, MATURANA, Humberto R. / VARELA, Francisco J., “Autopoiesis: The Organization of the Living”, in Humberto R. Maturana / Francisco J. Varela, *Autopoiesis and Cognition. The Realization of the Living*, Dordrecht: D. Reidel Publishing Company, 1980, pp. 63-138, MATURANA, Humberto R., “La organización de lo viviente: una teoría de la organización de lo vivo”, in Humberto R. Maturana, *¿La realidad: objetiva o construida?*, Vol. II (Fundamentos biológicos del conocimiento), 2.ª edição, Barcelona: Anthropos Editorial (em co-edición com a Universidad Iberoamericana, Mexico, D.F., e com o Instituto Tecnológico y de Estudios Superiores de Occidente, Guadalajara, Mexico), 2009, pp. 226-252.

21 - LUHMANN, *Soziale Systeme*, p. 25, and LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 65.

22 - LUHMANN, *Soziale Systeme*, p. 22, and LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 67.

23 - An outer-societal environment is one where no communication takes place. Human beings are, first, for Society and, then, for the sub-systems of society in this outer-societal environment. See LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 604.

24 - LUHMANN, *Soziale Systeme*, p. 25.

25 - LUHMANN, *Soziale Systeme*, p. 14, and LUHMANN, *Die Gesellschaft der Gesellschaft*, pp. 802-803.

considered to represent the whole, and none of the systems is in a hierarchical position to command others.²⁶ Certain traditional views on the political or legal systems as classical *loci* of supra-systemic authority to rule over other systems and control their operations have to be totally abandoned.²⁷

However, systems are *cognitively* open – they do not “live”, operate or reproduce themselves in autarchy.²⁸ They are sensitive to receive information, energy or other *cognitive* irritations or perturbations from the environment, any of which will subsequently be processed by the internal operative network of the system.²⁹ In this matter, one concept comes forward: structural coupling.³⁰ Institutes of structural coupling between systems provide for the channelling of information and perturbations from one another, stabilize in time intersystemic relations of cognitive nature and may be considered a decisive root of systemic evolution in a autopoietically differentiated society – a cognitively irritated or perturbed system will tend to re-adapt or re-structure its operations to accommodate the impulses coming from the environment, even though it is impossible to precisely predict how that is going to happen or how is going to turn out.³¹

Taking all into consideration, we can see that the analytical or theoretical image that Luhmann offers us, according to the ideas of social and functional differentiation and according to the autopoietic (closed, recursive, circular, self-referential) nature of social systems, is one in which a large enclosing horizon (Society) is populated with smaller or functionally specified social systems, that are autonomous and operatively closed to their environment, even though some type of cognitive (inter)connection might occur.

This is, then, our theoretical framework in a nutshell.

For the purposes of this paper, two particular autopoietic social systems assume prominence: the legal system and the political system. Notwithstanding their autopoietic, operatively closed or self-referential nature, it is imperative to acknowledge that both maintain important connections or structural couplings³²

26 - LUHMANN, *Soziale Systeme*, pp. 629-630.

27 - LUHMANN, Niklas, *Die Politik der Gesellschaft*, Frankfurt am Main: Suhrkamp, 2002, p. 110, e WILLKE, Helmut, “Die Steuerungsfunktion des Staates aus systemtheoretischer Sicht”, in Dieter Grimm (Org.), *Staatsaufgaben*, Frankfurt am Main: Suhrkamp, 1996, pp. 685-711.

28 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 68.

29 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 790.

30 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 119.

31 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 118.

32 - Something to which we will later return.

(traditionally: Constitution, *Rechtsstaat*, legislation or positivization of law³³). Anyway, it is essential that those intersystemic relations are not taken to demonstrate an absence of two independent and autonomous systems (an arguably wrong perspective). From a systemic point a view, and to maximize analytical gains, one has to be able to recognize (and accept) that it is two differentiated and autopoietic systems we are dealing with.

To close this section we will just say descriptively the following about both systems:

- a) the legal system uses the binary code *legal/illegal (recht/unrecht)*³⁴ and is specialized in the social function of contrafactually stabilizing *normative expectations*, reintegrating them when necessary;³⁵ normative expectations are those expectations that, unlike cognitive expectations, are assured and protected against their frustration (they are resistant to learning from the fact of their unfulfillment);³⁶ for many of the current normative expectations it is important to underline that the normative quality is due to a selection and institutionalization as such by the legal system and not due to some essentialist or metaphysical nature of the expectation itself;³⁷
- b) the political system differentiates itself through the symbolic medium of power and its binary code, in its purest (non-democratic) form, corresponds to the values *subject to power/not subject to power*;³⁸ the political system functionally assumes the competence of adopting binding collective decisions;³⁹ it is usually considered that the political system is of relevance

33 - LUHMANN, Niklas, *Das Recht der Gesellschaft*, Frankfurt am Main: Suhrkamp, 1993, p. 60.

34 - LUHMANN, *Das Recht*, pp. 414 ff.

35 - LUHMANN, Niklas, "Die Funktion des Rechts: Erwartungssicherung oder Verhaltenssteuerung?", in Niklas Luhmann, *Die Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt am Main: Suhrkamp, 1999, pp. 73-91, e LUHMANN, *Das Recht*, p. 61.

36 - LUHMANN, *Rechtssoziologie*, pp. 42-43.

37 - An exception may be open for a restricted number of normative expectations that have gained that nature and consolidated that quality in evolutionary fashion, so that the legal system hasn't done more than to recognize and integrating them. See LUHMANN, Niklas, "The Unity of the Legal System", in Gunther Teubner (Ed.), *Autopoietic Law – A New Approach to Law and Society*, Berlin: Walter de Gruyter, 1988, p. 27, LUHMANN, Niklas, "Positivität des Rechts als Voraussetzung einer modernen Gesellschaft", in Niklas Luhmann, *Die Ausdifferenzierung des Rechts – Beiträge zur Rechtssoziologie und Rechtstheorie*, Frankfurt am Main: Suhrkamp, 1999, pp. 116-123, LUHMANN, Niklas, *Rechtssoziologie*, 4.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, pp. 140-141, and LUHMANN, Niklas, "Normen in soziologischer Perspektive", in Niklas Luhmann, *Die Moral der Gesellschaft*, 3.^a edição, Frankfurt am Main: Suhrkamp, 2012, p. 54-55.

38 - LUHMANN, *Die Politik*, p. 88.

39 - LUHMANN, *Die Politik*, p. 84.

in those matters that transcend the borders of any given system and gain wider societal resonance, therefore requiring a functional apparatus that addresses and minimizes them (that is the case with problems that seem to affect Society in its entirety or a plurality of systems; menaces to the functional differentiation of society are included).⁴⁰

2. RIGHTS AS A LANGUAGE OF POWER

The topic of rights transports us directly into the arena of relations between the political and the legal system. It is our conviction, therefore, that a structural understanding of rights is only obtained once one sees that interconnection or how rights crystallize an intersection between both systems. After all, and notwithstanding further explanations, rights seem to be, from a certain structural point of view, a power or politically induced legalisation or juridification of a given expectation or claim (expectation or claim that before such integration in the operative network of the legal system was evidently no “right” but simply a societal general expectation or claim).

CHRIS THORNHILL has offered the legal academic community one of the most interesting and important contributions regarding the qualitative transformation of power and the political system (including its relation to the legal system). Through historical reconstruction – or, in his own words, through a method of *historical-functional sociology*⁴¹ – THORNHILL examined deeply, from an overarching systems-theory perspective, the paths of the evolving differentiation of power and of the political from past to present times. His analysis is groundbreaking for a number of reasons, but we would highlight not only the insight that he provides us regarding state formation, but also the alternative views he presents (some radically different from classical or more established doctrines) on fundamental concepts as legitimacy, rights, constitutions, or the relation between power and law.

In this paper we will overlook his more historical account and attend to the main analytical and theoretical findings.

Power is normally understood as an ability to impose a certain will or action

40 - For a similar description see THORNHILL, Chris, “Public Law and the Emergence of the Political”, in Cormac Mac Amhlaigh / Claudio Michelon / Neil Walker (Ed.), *After Public Law*, Oxford: Oxford University Press, 2013, p. 26.

41 - See THORNHILL, Chris, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge: Cambridge University Press, 2011, p. 15.

against opposing wills or actions.⁴² Those that possess and use power overcome any resistance that a contradictory will might or could have expressed. However, the differentiation of such a mechanism (in systems-theoretical terms power is a “symbolically generalized medium”⁴³), which ultimately results in a specific political system, requires several steps and occurred on an evolutionary basis throughout centuries.

The differentiation of power depended on processes of its generalization and abstraction. Those phenomena were crucial to the formation of a differentiated political system and, consequently, for the emergence of statehood. Generalization and abstraction in this context meant, historically, that power was able to detach from private instances and ultimately rely on des-subjectivized political (public) institutions.⁴⁴ From the pre-medieval times of its fragmentation, dispersal and connection to private individuals, power evolved to become an abstract or generalized “social medium”, a facility of easier reproduction, circulation, transmission and societal diffusion. The main repositories of this abstracted and generalized power came to be what we call states.⁴⁵

This differentiation of power goes hand in hand with the differentiation of a political system. The latter, using power as a medium, was able to better circumscribe and delineate its borders and generate a distinct and specific politic realm, responsible for the fulfilment of an exclusive social function.⁴⁶ The mentioned processes of abstraction and generalization made it possible to establish a circular and recursive network of communications that, with the underlying systemic-relative codes and mediums, are now identified as indistinguishably political.

In the process of power differentiation – meaning its increased generalized and abstracted transmission and circulation in society and its evenly, reproducible and replicatable use in variable settings – certain instruments came to be of decisive importance. It is at this point that one productive relationship between power and law – between the political system and the legal system – is to be noticed. In fact,

42 - LUHMANN, *Die Politik*, p. 21.

43 - See LUHMANN, *Die Politik*, p. 36, and LUHMANN, Niklas, “Einführende Bemerkungen zu einer Theorie symbolisch generalisierter Kommunikationsmedien”, in Niklas Luhmann, *Soziologische Aufklärung 2 – Aufsätze zur Theorie der Gesellschaft*, 6.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 212-240.

44 - THORNHILL, *A Sociology of Constitutions*, p. 159.

45 - THORNHILL, *A Sociology of Constitutions*, p. 19 and 158 ff.

46 - See PIRES, Edmundo Balsemão, *A Individuação da Sociedade Moderna – Investigações Semânticas sobre a Diferenciação da Sociedade Moderna*, Coimbra: Imprensa da Universidade de Coimbra, 2011, pp. 514-518.

no other system seemed to serve better the ends of power as the legal system, for it revealed itself as one of the most effective ways to assure and guarantee the smooth circulation and transmission of power.⁴⁷

The process in question can be qualified and systems-theoretically described as one of *second-codification of power in legal form*.⁴⁸ This means that power, to guarantee its wider circulation and reinforced success, converts strategically and intentionally to the legal form, using it instrumentally as a device to its own purposes and as a mechanism of its own expansion.⁴⁹ In this reading, therefore, not only power *precedes* law, but also law is subordinate to power (even when it appears otherwise) and acts as underpinning power.⁵⁰

Formal and positive law provided power, as THORNHILL writes, “a normative construct that allowed for their growing autonomy, and a functional instrument that enabled them to reduce their own residual privatisation and to transplant power positively across widening and increasingly de-feudalized (less and less privatistic) societies”.⁵¹

The legal system or the law helped power, for instance, to generate an uniform account of its addressees, which means, of those subject to power.⁵² The category of “legal personality” or “legal subjectivity” (even of “citizen”) performed such a function in an excellent way: it was abstract and generalized enough for power not to deal with and not to consider the particularism of the subjects in question.⁵³ Further, it enabled power to manage – to strategically manage – the *inclusion* in power: through positive legal forms it was easy to incorporate – include – subjects, questions, problems or realms in the sphere of power and the political,

47 - See THORNHILL, *A Sociology of Constitutions*, p. 18, THORNHILL, “Public Law...”, p. 28, and WILLKE, Helmut, *Heterotopia. Studien zur Krisis der Ordnung moderner Gesellschaften*, Frankfurt am Main: Suhrkamp, 2003, p. 77.

48 - About the concept, see NOBLES, Richard / SCHIFF, David, *Observing Law through Systems Theory*, Oxford: Hart Publishing, 2013, pp. 210-212.

49 - WILLKE, *Heterotopia*, p. 134, KING / THORNHILL, *Niklas Luhmann's Theory of Politics and Law*, pp. 179, ASHENDEN, Samantha, “The Problem of Power in Luhmann's Systems Theory”, in Michael King / Chris Thornhill (Ed.), *Luhmann on Law and Politics. Critical Appraisals and Applications*, Oxford: Hart Publishing, 2006, pp. 134-135.

50 - ASHENDEN, “The Problem of Power...”, p. 142.

51 - See THORNHILL, *A Sociology of Constitutions*, p. 59.

52 - See THORNHILL, *A Sociology of Constitutions*, p. 59.

53 - THORNHILL, *A Sociology of Constitutions*, pp. 59-61. Read also BROEKMAN, Jan M., “Legal Subjectivity as a Precondition for the Intertwinement of Law and the Welfare State”, in Gunther Teubner (Ed.), *Dilemmas of Law in the Welfare State*, Berlin: Walter de Gruyter, 1988, pp. 76-108.

or, instead, to just exclude them as non-political.⁵⁴ This inclusionary and correlated exclusionary capacity or ability is crucial for power and the political system since it underpins their differentiation and systemic self-reference. In fact, it is through inclusion and exclusion that the political system defines, varies, expands or restricts its borders, so that a balanced and smart management of such processes of inclusion and exclusion are essential to guarantee a continuous and uneventful reproduction of the political systemic operations or communications.⁵⁵ Just as a boundless or disproportionate inclusion will tend, very probably, to induce an overburdening on the side of the political (eventually affecting disruptively its autopoietic operations), a parallel inordinate exclusion will restrict so gravely the scope of the political realm that it will, as well, affect its differentiation and societal position up to the point of generating its disappearance.⁵⁶

Legal procedures perform similar functions. Besides facilitating inclusion and subjection to power – in which they excel: current trends that point to increased citizen participation in multiple types of procedure serve the ends of power as they neutralize future resistance and generate acceptance and social recognition of power determinations and decisions –, legal procedures promote the iteration and reproduction of power across time and space, for they are easily replicated in different contexts.⁵⁷

The legal system ensures, as well, a consistent articulation of legitimacy and legitimation for the political system and for the use of power.

Indeed, normative legitimacy theories evolved functionally due to the need of providing power with societal foundations and with a self-authorizing narrative that eased the reproduction and the exercise of power in society.⁵⁸ Legitimacy theories, and the legal norms and principles that came to express them, are not genetically attached to motives or reasons regarding the limitation of power, but to the need of reinforcing it.⁵⁹ Without such theories and without the normative and social ground that they provide to explain and justify power in a convincing

54 - THORNHILL, *A Sociology of Constitutions*, p. 59.

55 - CLAM, Jean, “What Is Modern Power?“, in Michael King / Chris Thornhill (Ed.), *Luhmann on Law and Politics. Critical Appraisals and Applications*, Oxford: Hart Publishing, 2006, pp. 145-162.

56 - BORA, Alfons, “»Wer gehört dazu?«. Überlegungen zur Theorie der Inklusion“, in Kai-Uwe Hellmann / Rainer Schmalz-Bruns (Hrsg.), *Theorie der Politik. Niklas Luhmanns politische Soziologie*, Frankfurt am Main: Suhrkamp, 2002, pp. 60-84.

57 - See THORNHILL, *A Sociology of Constitutions*, p. 59.

58 - THORNHILL, Chris, “Political Legitimacy: A Theoretical Approach Between Facts and Norms“, *Constellations* 18 (2011), pp.145-146.

59 - ASHENDEN, “The Problem of Power...“, p. 142.

and societally usable way, the political system would see the reproduction of its operations hampered, for they would be constantly subject to contest. Power turns, then, to the legal norms as positive justification for its use: the reference to an enabling, legitimating and authorizing legal rule dismisses power from further explanations.⁶⁰ To invoke the legal norms is sufficient and necessary to convince the addressees or those subject to power of the legitimacy of the authority issuing the command. The transmission of power is simplified and its effectiveness revived. Legality accomplishes legitimacy.⁶¹

Constitutions also deepen the differentiation and the increase of power in society.⁶² Constitutions cannot be conceptualized as external generated documents or as an external (legitimizing) precondition imposed upon power. If one wants to adequately grasp their societal and normative nature, they have to be seen as the result of inner-societal forces and processes in which the political system and power participate.⁶³ Due to this, Constitutions end up reinforcing the abstraction, generalization and inclusivity of power, simultaneously underpinning its systemic reflexivity or differentiation.⁶⁴ Using it as a resource and as an internal support, the political system becomes enabled, once more, by referring to the Constitution, to locate a stable ground that provides, in a consistent and non-contested way, a justification for the use of power.⁶⁵ Consequently, Constitutions pave the way for the multiplication of power and facilitate its transmission throughout society (something that runs against common interpretations of it working as a power restricting device).⁶⁶ Important to acknowledge is precisely this inner-political origin and nature of the Constitution: its legal form and the embodiment of legitimating principles are resources for the political system and for power to unburden from further justification.⁶⁷ Power will, therefore, gladly submit to constitutional determinations in order to assure its own effectiveness and reproduction.

60 - THORNHILL, "Political Legitimacy...", pp. 145-146.

61 - THORNHILL, Chris, "Towards a historical sociology of constitutional legitimacy", *Theory and Society* 37 (2008), p. 172.

62 - THORNHILL, Chris, "Niklas Luhmann and the sociology of the constitution", *JSC* 10 (2010), p. 326.

63 - THORNHILL, *A Sociology of Constitutions*, p. 372, and PRANDINI, Riccardo, "The Morphogenesis of Constitutionalism", in Petra Dobner / Martin Loughlin (Ed.), *The Twilight of Constitutionalism?*, Oxford: Oxford University Press, 2010, pp. 309-326.

64 - THORNHILL, "Towards a historical sociology...", p. 174, e THORNHILL, *A Sociology of Constitutions*, pp. 200-205.

65 - THORNHILL, *A Sociology of Constitutions*, p. 372.

66 - LOUGHLIN, Martin, "In Defence of *Staatslehre*", *Der Staat* 48 (2009), p. 14.

67 - THORNHILL, *A Sociology of Constitutions*, pp. 373-374.

We now turn finally to rights. Rights appear as crucial devices of power differentiation, power inclusivity, power legitimation and power self-reflection.⁶⁸ Through the attribution of rights to *rights' holders* both power and the political system find a way of easily and strategically managing power or political inclusivity.⁶⁹ In fact, rights allow for an integration of actors within the political sphere or, on the opposite side, for their exclusion.⁷⁰ In this sense, rights signalize self-produced criteria of relevance for power and the political: the recognition of a right equates with an inclusion in the political communication, bringing certain persons, themes and problems to the centre of it; whereas a (political) decision for a non-recognition of rights enables power and the political to put outside of the political sphere that same category of persons or issues, thus making them politically non-thematizable or, in other words, making it appear as political irrelevant.⁷¹ However, when one has a right one is observed in the network of political and legal operations and participates in it.

This means that rights act – and this is important to stress – as elementary devices and mechanisms of border management for power and the political, revealing themselves as regulators of inclusionary or exclusionary trends. In particular, the inclusionary aptitude allows power and the political to integrate private actors in its apparatus, in terms defined by power and under close political supervision.⁷² Power delineates the contours of rights and so intervenes directly in what it permits to become politically relevant or not. This performance enhances power's abstraction and generalization.⁷³

Further, rights turn the processing of the complexity of the environment easier for power and the political: not only do rights' holders become subject to power,⁷⁴ they channel as well to the political system irritations and perturbations that initiate its variation and foster its structural or systemic adaptation,⁷⁵ always in a power and

68 - THORNHILL, *A Sociology of Constitutions*, p. 167.

69 - THORNHILL, "Towards a historical sociology...", p. 174.

70 - THORNHILL, *A Sociology of Constitutions*, p. 153.

71 - THORNHILL, "Towards a historical sociology...", p. 175.

72 - THORNHILL, *A Sociology of Constitutions*, p. 193.

73 - THORNHILL, "Towards a historical sociology...", p. 175.

74 - THORNHILL, *A Sociology of Constitutions*, p. 67, BORA, "»Wer gehört dazu?«...", pp. 72 ff., and BROEKMAN, "Legal Subjectivity...", pp. 76 ff.

75 - About the paradoxical form of the category of subjective rights and its contribution to the reflection of the system, please read MENKE, Christoph, "Subjektive Rechte: Zur Paradoxie der Form", in Gunther Teubner (Hrsg.), *Nach Jacques Derrida und Niklas Luhmann: Zur (Un-)Möglichkeit einer Gesellschaftstheorie der Gerechtigkeit*, Stuttgart: Lucius & Lucius, 2008, pp. 81-108.

political controlled fashion and always from within.⁷⁶

It adds that rights play a significant a role in what amounts to the legitimation of power. The rights' narrative is so strong and consistent that by referring to rights both power and the political system present themselves with an instrument that, side by side with the Constitution, constitutes itself as one additional stable and consistent ground that justifies not only the use of power, but also its active spreading throughout society.⁷⁷ Rights excel in multiplying power and making it reproducible: their attribution tends either to extend power to new realms or, when it seems to restrict the political sphere and the domain of power's influence, it still unburdens power and the political from certain issues or from certain social areas which, in any case, helps power's operativity in assuring its own effectiveness and reproduction.⁷⁸ Without the reference to a Constitution and to a power's respect for rights it would be hard(er) to apply and transmit power across society.⁷⁹ Rights represent, therefore, important stocks and foundations of self-legitimation for power and the political system.⁸⁰

Let us look, for instance, to the case of representative constitutions, recognizing a right to participation in the formation of the so-called "political will", among other connected rights that came to being (freedom of expression, etc....). In reality, the representative constitution and the model of political participation centred around periodical voting were cornerstones in the abstraction and generalization of political power in society: through it, political power was detached from the concrete manifestation of a specific popular, national or general will; untied from such need, Constitutions and rights appeared as important reserves and repositories of power and power's legitimation: no longer the reference to an actual people's will was necessary, instead the reference to the legitimating force and to the authority conferred by Constitutions and rights to the political system and institutions was enough for it to present its authority as a justified one, diminishing contestation and eventual resistance.⁸¹ In this sense, the political participation (legally formalized into rights) that appears as a condition of legitimate use of public power actually

76 - THORNHILL, "Political Legitimacy...", p. 152, and THORNHILL, *A Sociology of Constitutions*, p. 166.

77 - THORNHILL, *A Sociology of Constitutions*, p. 167.

78 - THORNHILL, Chris, "The autonomy of the political. A socio-theoretical response", *PSC 35* (2009), pp. 705-735, THORNHILL, "Towards a historical sociology...", p. 176-179, and CLAM, "What is Modern Power...", p. 152.

79 - THORNHILL, *A Sociology of Constitutions*, p. 374.

80 - THORNHILL, *A Sociology of Constitutions*, pp. 156-157, THORNHILL, "Political Legitimacy...", p. 151, and THORNHILL, "Towards a historical sociology...", p. 196.

81 - THORNHILL, *A Sociology of Constitutions*, pp. 74-76.

derived from inner-societal forces shaped by power and the political system to ensure and assure its own reproduction and circulation in Society.⁸²

Bearing all in mind, when we speak of “rights as a language of power” we are conveying this fundamental idea that power “submits” or converts into the legal form – power engages in a legal second-codification – so as to underpin its differentiation and reflexivity, to facilitate its societal diffusion and to benefit from the advantages that the legal form offers. We are in presence of power-serving devices, without which the political autopoiesis would find many more obstacles to its self-reproduction.⁸³ In this sense, rights are subservient to political power and functionally connected to its transmission and application,⁸⁴ or as THORNHILL puts it: “far from acting as external normative limits on power, rights became parts of the state’s internal functional, public-legal apparatus”.⁸⁵

3. THE COMPLEXITY OF NEGATIVE RIGHTS AND THE UNDER-COMPLEXITY OF POSITIVE SOCIAL RIGHTS

We opted in this section to theoretically oppose both classical types of rights: negative rights and positive (social) rights. The purpose is to evaluate their “complexity”.

The expression “complexity” of rights brings us to the centre of the societal embeddedness of rights, their inner-structure and their societal functions (in view of the political system). “Complexity” is used here in the sense of rights’ adequacy and ability to sustain, promote and support processes of systemic differentiation and reproduction.⁸⁶ In this sense, rights’ complexity varies according to the effects

82 - THORNHILL, *A Sociology of Constitutions*, p. 193.

83 - THORNHILL, Chris, “The Future of the State”, in Poul F. Kjaer / Gunther Teubner / Alberto Febbrajo (Ed.), *The Financial Crisis in Constitutional Perspective – The Dark Side of Functional Differentiation*, Oxford: Hart Publishing, 2011, pp. 365-366, THORNHILL, *A Sociology of Constitutions*, pp. 153-157, and THORNHILL, “Political Legitimacy...”, p. 151.

84 - THORNHILL, *A Sociology of Constitutions*, p. 219, is very clear about the above mentioned aspect of rights when he declares: “The abstracted production and transmission of positive political power could only be accomplished by states founded in rights-based national sovereignty: indeed, the increase in rights in society brought a directly correlated increase in power. Absolutism thus found both its apogee and its nemesis in early constitutional democracy”.

85 - THORNHILL, *A Sociology of Constitutions*, p. 153.

86 - Somewhat similarly, see MENKE, “Subjektive Rechte...”, pp. 92-95, and Karl-Heinz LADEUR, “Das subjektive Recht und der Wunsch nach Gerechtigkeit als sein Parasit”, in Gunther Teubner (Hrsg.), *Nach Jacques Derrida und Niklas Luhmann: Zur (Un-)Möglichkeit einer Gesellschaftstheorie*

they produce or induce in the operativity of systems. A more complex type of rights not only safeguards the functional differentiation of society, but protects as well the reflexivity and autopoiesis of the political system, helping it regulating its relation to the environment in a way that maintains protected and stable the reproduction of political communication. A less complex type of rights, on the other hand, ends up causing the opposite: it reveals a structural inability to protect the autopoietic reproduction of the system, flooding it with too much environmental complexity, burdening its operativity with irrational demands (in this context, irrational means demands that are not in line with the systems' rationality or function in a differentiated society) and, due to this over-inclusion, affecting potentially disruptively not only the operative closure of the system but also the functional differentiation of society. In sum, rights' *complexity* works as a measure of qualitatively evaluating how rights contribute positively to a consistent, integrated and societally harmonic way of political self-reproduction (while the absence of complexity or under-complexity would imply political disruption and societal externalities).⁸⁷

3.1. The complexity of negative rights

When we refer to “negative rights” we have in mind rights that protect/defend individuals or, in a systems-theoretical reformulation, differentiated communicative realms from state interference.⁸⁸ The concept indicates, therefore, a complex of actions that are not licit for the state (political system) to undertake, as well as a number of issues or spheres that shall not be politicized (dogmatical discursivity employs the conceptual demarcation of State and Society to illustrate that there are tasks and responsibilities that should be assumed by society).

Classical negative freedom rights perform, accordingly, an important exclusionary function: they allow power and the political system to withdraw certain problems

der Gerechtigkeit, Stuttgart: Lucius & Lucius, 2008, pp. 109-124.

87 - See a different – albeit not contrary – use of the expression “under-complexity” by KJAER, Poul. F., “The Under-Complexity of Democracy”, in Graf-Peter Calliess / Andreas Fischer-Lescano / Dan Wielsch / Peer Zumbansen (Hrsg.), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin: de Gruyter, 2009, pp. 531-542, applying it to democracy. The idea he is trying to convey with the concept is that “we are witnessing [...] an evolutionary development in which the attempt to channel communication-flows into democratic procedures has become increasingly marginalised because such procedures are not complex or flexible enough to handle the massive increases in social complexity which characterise the late-modern society”.

88 - LADEUR, Karl-Heinz, *Negative Freiheitsrechte und gesellschaftliche Selbstorganisation: zur Erzeugung von Sozialkapital durch gesellschaftliche Institutionen*, Tübingen: Mohr Siebeck, 2000, p. 6.

from political communication and consider them, for the matter, as non-political⁸⁹. In that sense, the political systems regulates its borders and it manages to unburden its own autopoiesis by excluding individuals or spheres from its operations. The benefits of this unburdening can be quite significant: by structuring its relations with the environment in this exclusionary way, the political system ceases to perceive certain matters as political and leaves them for other differentiated communicative networks. Through the non-intervention or non-interference, power creates its own absence from matters where it could very probably find resistance to its application and where its transmission and societal diffusion could be in jeopardy for a number of reasons.

As we have already mentioned, negative rights are especially in line with the fundamental rights' conceptualization of NIKLAS LUHMANN. In fact, when we centre the function of fundamental rights around the maintenance and protection of the integrity of differentiated communicative systems – meaning, in ultimate analysis, the protection of the functional differentiation of society as a whole (which equates with the protection of modern society as we know it) – then these negative rights are those that excel in preventing a *politicization* of society. They induce a self-restriction of the borders of the political system and avoid an expansion potentially affecting the differentiation of other realms. Negative rights are the ones whose societal function is to assure that the autopoiesis of other systems remains undisturbed and undisrupted.⁹⁰

To this interpretation of negative rights we could add the one from KARL-HEINZ LADEUR. By guaranteeing the reproduction of other social realms without political intervention, it is inherent to negative rights a societally productive and epistemologically valuable function: distributed and fragmented societal knowledge can, through them, circulate, be (re)produced and exchanged in society, allowing for intersystemic communication and for the generation of positive externalities to society as a whole. The image here is that of a network society, where individuals and organizations engage in knowledge production and transmission without being contaminated and affected by public/political interference disrupting the privately managed circulation, the interaction between actors and the spontaneous generation of more knowledge. Further, the underlying private epistemology that gives cohesiveness to society remains politically untouched. For this reason, this

89 - About the self-restriction of the political through negative rights, see LADEUR, *Negative Freiheitsrechte*, p. 99, and THORNHILL, *A Sociology of Constitutions*, p. 191.

90 - See, especially, LUHMANN, Niklas, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie*, 5.^a edição, Berlin: Duncker & Humblot, 2009, pp. 12 ff. Read also TEUBNER, Gunther, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung*, Frankfurt am Main: Suhrkamp, 2012, pp. 215-219.

societal epistemology, generated in evolutionary fashion, continues to be able to reproduce itself without the dangers that a politicization of its rationality could pose.⁹¹ Our conclusion is that negative rights are complex enough for the differentiated political system and for the functionally differentiated society. Their internal complexity derives mainly from they acting as watchguards of the intersystemic stability of society. By alleviating the political system from certain issues or by inducing a self-restriction of the political, negative rights not only maintain the political autopoietic network in levels that are compatible or harmonic with the autopoiesis of other systems, but they also diminish the societal pressure over the political system: first, because they present the view of the political system that certain claims are non-political (in this sense, they insulate the political and circumvent the expansion of power); second, because they articulate the justification of such non-interference and disavow the need for an intensified legitimation required by an hypothetical interference.⁹² In sum, negative rights underpin both political reflexivity and other systems' reflexivity.

3.2. The under-complexity of positive social rights

The inner-societal forces that underlie social rights can only be apprehended once one acknowledges that social rights seem to result of the interconnection of two main elements: a *democratic* political system and the openness of that democratic political system to convert certain societal expectations into political-legal rights. The fact that democracy is at the basis of social rights is confirmed by the fact that social rights and the so-called Welfare State have become, at least in the developed West, the fundamental pillars of state, political and power (democratic) legitimacy in the 20th century.⁹³ This poses, obviously, its own dangers. The processes that give origin to social rights can be described in the following way: through the adoption of democracy as a political form, the political system becomes significantly more permeable to the irritations coming from the environment (in fact, democracy can be understood as a way or a form through which the political increases its adaptability to the complexity of the environment);⁹⁴ some of those

91 - LADEUR, *Negative Freiheitsrechte*, pp. 56 ff.

92 - LADEUR, *Negative Freiheitsrechte*, pp. 93-106.

93 - CASTELLS, Manuel, *The Power of Identity*, 2.^a edição, Sussex: Wiley-Blackwell, 2010, p. 314.

94 - KING / THORNHILL, *Niklas Luhmann's Theory of Politics and Law*, p. 88, CZERWICK, Edwin, *Systemtheorie der Demokratie – Begriffe und Strukturen im Werk Luhmanns*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2008, p. 21, and WIMMER, Hannes, "Demokratie als Resultat politischer

irritations are expectations and claims that sectors of society address to the political system, convinced, in some way, that the political is able to give effect to those expectations and claims; the political system, amidst such societal perturbation, ends up translating the expectations or claims into the legal form. In this context, expectations or claims pertaining to social justice or material equality take the lead, fostering countless redistributive or social policies by the government.

The first thing we should preoccupy ourselves with concerns the tendency to try transforming the political system into an “all-problems-solving-system” of society. It is true that, traditionally, the political system has fostered a self-description of itself that seems to feed the illusion that it is able to hierarchically steer, control or command society.⁹⁵

This is particularly one of the points where systems-theory is more useful and where a normative theory of the political that reaps systems-theory teachings can have more impact.⁹⁶

When we envision society as functionally differentiated in autopoietic social systems we are precisely recognizing that no hierarchical or vertical relations between autopoietic systems can exist.⁹⁷ This is a finding that contextualizes the political system of today and that explains some of its current problems, because the political system continues to diffuse that illusion that it represents the centre of society. However, the constant failures of the political system especially when it tries to intervene in other systems (namely the economic system) has demonstrated how unsuitable he is to command society and to solve problems that do not pertain to the political but to another sphere. The economic and financial crisis initiated more visibly around 2007 was one of the more recent proves of the total unknowledgeability of the political to tackle the financial and economic issues (besides that, it should not be forgotten as well that the political system had an important hand in the origins or causes that led us into a crisis).⁹⁸

Evolution”, in Kai-Uwe Hellmann / Rainer Schmalz-Bruns (Hrsg.), *Theorie der Politik. Niklas Luhmanns politische Soziologie*, Frankfurt am Main: Suhrkamp, 2002, pp. 223-260.

95 - LANGE, Stefan, “Die politische Utopie der Gesellschaftsteuerung”, in Kai-Uwe Hellmann / Rainer Schmalz-Bruns (Hrsg.), *Theorie der Politik. Niklas Luhmanns politische Soziologie*, Frankfurt am Main: Suhrkamp, 2002, pp. 171-193.

96 - WILLKE, Helmut, “The Tragedy of the State. Prolegomena to a Theory of the State in Polycentric Society”, *ARSP LXXII* (1986), pp. 455-467.

97 - LUHMANN, *Die Politik*, p. 138.

98 - See WENGER, David R., “Der ohnmächtige Staat. Zwischen Selbstbehauptungsstrategien und Steuerungsillusionen. Bemerkungen anlässlich der Finanzkrise”, *Ancilla Iuris* (2009), pp. 1-24, PATERSON, John, “Functional Differentiation, Financial Instruments and Regulatory Challenges”, in Alberto Febbrajo / Gorm Harste (Ed.), *Law and Intersystemic Communication: Understanding*

This is the ground that justifies the theoretical and practical error of what we call the Welfare State, because such a description is based on premises that must be admitted as false in the modern and differentiated society, precisely the one that declares that power and the political can indeed, in causal and linear fashion, produce effects that depend on another's system autopoietic operativity.⁹⁹ For instance, when it is affirmed that social rights are dependent upon factual possibility,¹⁰⁰ it is that impotence of the political to steer other systems that is being acknowledged.

Taking this into consideration and bearing in mind previous opinions, we are now in a position to consider and sustain that, from a structural and inner-societal point of view, social rights work as mechanisms of the political system's expansion and, accordingly, as devices of over-politicization of society.

When the political system and its own medium of power are confronted with certain societal expectations or claims and when the intent is to induce the juridicization of the expectation and claim,¹⁰¹ thus transforming it into a right, what is essentially achieved is an expansion of the borders of the political system and an increase in the spheres and realms subject to power. Social rights are not liberating, they are intentional mechanisms subservient to power so as to extend, in a legitimate and self-authorizing way, political and power operativity to previous politically and power unoccupied issues, themes or subjects.¹⁰²

Structural Coupling, Surrey: Ashgate, 2013, pp. 155-178, WINDBICHLER, Christine, "Kapitalmärkte als Vorsorgeinstrument: «Risikobegrenzung» durch Rechtsnormen?", in Herfried Münkler / Matthias Bohlender / Sabine Meurer (Hrsg.), *Handeln unter Risiko. Gestaltungsansätze zwischen Wagnis und Vorsorge*, Bielefeld: transcript Verlag, 2010, pp. 199-220, GOODHART, Charles, "The Boundary Problem in Financial Regulation", *National Institute Economic Review* 206 (2008), pp. 48-55, and MASCAREÑO, Aldo, "The Ethics of Financial Crisis", in Poul F. Kjaer / Gunther Teubner / Alberto Febbrajo (Ed.), *The Financial Crisis in Constitutional Perspective – The Dark Side of Funtional Differentiation*, Oxford: Hart Publishing, 2011, pp. 333-353.

99 - With more detail, please read TERRINHA, Luís Heleno, "A auto-crise da Constituição. Breves reflexões liberalmente inspiradas sobre o princípio da socialidade e o princípio democrático", *Direito & Política* 6 (2014), pp. 70-87, and KERSTING, Wolfgang, "Sicherheit, Freiheit, Gerechtigkeit – zur Verantwortlichkeit des Staates in der neueren Staatszielsdiskussion", in Ludger Heidbrink / Alfred Hirsch (Hrsg.), *Staat ohne Verantwortung? – Zum Wandel der Aufgaben von Staat und Politik*, Frankfurt am Main: Campus Verlag, 2007, pp. 87-118.

100 - CANOTILHO, JJ. Gomes, *Direito Constitucional e Teoria da Constituição*, 7.^a edição, Coimbra: Coimbra Editora, 2003, pp. 480-481.

101 - Not forgetting that the overarching "legal culture" may support and encourage that same process of juridicization. Please read FRIEDMAN, Lawrence M., "Legal Culture and the Welfare State", in Gunther Teubner (Ed.), *Dilemmas of Law in the Welfare State*, Berlin: Walter de Gruyter, 1988, pp. 13-27.

102 - Something acknowledged by THORNHILL, *A Sociology of Constitutions*, pp. 276, 280-282, 292-293.

In this sense, social rights, which are normally anchored in the Constitution (thereby benefitting from that ground and corresponding normative legitimacy theories), provide, as no other, for a multiplication and reinforced circulation of power in society.

That is particularly obvious regarding the relations between the political system and the economic system: social rights and the ideology of the Welfare State were the anchors – the normative and legitimating anchors – to underpin increased regulation of the economy, increased intervention on private activities and increased interference on a number of once considered private issues.¹⁰³ The societal impact expressed itself not only through intervention in the economy and corresponding inefficiencies (trying politically to accomplish the politically unreachable¹⁰⁴), but also in the legal system, since a wave of juridicization of society – an inflation of legal norms – was the most obvious consequence of the social aspirations of the State.¹⁰⁵

It adds that social rights and the Welfare State by letting come into force the ideology of interests', values' and goods' balancing, practically eliminated the respect for the evolutionary generated social epistemology of society.¹⁰⁶ That means, particularly, that everything became subject to a weighing judgement, eradicating the absolute respect for values and normative expectations of the liberal society.¹⁰⁷ Private property is one of the noblest examples, subjected today, in the States we inhabit, to public intervention and legalized expropriation, especially through taxation.¹⁰⁸ We could also refer, on a more politically incorrect tone, to the number of social public policies of very doubtful effectiveness, many of which not only are dependent on factors unmanageable for power – namely, the motivation of the inner disposition of people and the achievement of results that depend of voluntary behaviours –, but also produce grave negative consequences

103 - See, in general, HAYEK, F. A., *Law, Legislation and Liberty – A new statement of the liberal principles of justice and political economy*, London: Routledge, 1982.

104 - A home for all, eradication of poverty, end of non-discrimination, fair wages, elimination of unemployment... These are all problems that the political system communicates society that it will solve even though it has no means and no capacity for it.

105 - TEUBNER, Gunther, "Verrechtlichung – Begriffe, Merkmale, Grenzen, Auswege", in Zacher / Simitis / Kübler / Teubner (Org.), *Verrechtlichung von Wirtschaft, Arbeit und sozialer Solidarität*, Baden-Baden: Nomos, 1984, pp. 289-344.

106 - LADEUR, *Negative Freiheitsrechte*, pp. 95-99.

107 - See LADEUR, Karl-Heinz, "«Abwägung» – ein neues Rechtsparadigma?", *ARSP* LXIX (1983), pp. 463-483.

108 - See EPSTEIN, Richard A., *Design for Liberty: Private Property, Public Administration, and the Rule of Law*, Massachusetts: Harvard University Press, 2011.

on the epistemology of society, by rewarding dependence on public expenditure and subventions.¹⁰⁹

It happens, though, that the above-mentioned process or phenomenon does not occur without consequences for the political system itself and for the functionally differentiated society as a whole.

Social rights and the Welfare State know no *a priori* limitation to the political operative expansion that they induce and reinforce.¹¹⁰ In fact, as LUHMANN quite rightly puts it, the Welfare State attributes no relevance whatsoever to its own failure.¹¹¹ Instead it comprehends the objective failure of social measures as additional motive or reason to continue to expand, reproduce and multiply itself. It is for this reason that the only way out of this vicious circle envisioned by Luhmann is the cut of energy and resources that the Welfare State uses to maintain and reproduce itself, namely *financing*. Only the absence of more financial resources seems to break the otherwise unstoppable reproductive cycle of the Welfare State.¹¹²

It is precisely that expansive cycle and that operative widening tendency that brings us to an important problem recently formulated by GUNTHER TEUBNER. Autopoietic systems, in order to assure their maintenance as a system, need continuous and uninterrupted reproduction. An operation needs to give cause and connect to another operation, and so on. The stopping of the autopoietic recursiveness with mean that the system would cease to exist. From this simple fact regarding autopoietic operativity, TEUBNER infers that in each autopoietic system there is an inbuilt tendency to growth and expansion, or more precisely, a tendency to over-growth and over-expansion.¹¹³

From our point of view, social rights, by not conducing to self-limitation and self-restriction by the political system, form part of mechanisms that underpin such a disproportionate growth.¹¹⁴ By not providing for exclusion out the political realms

109 - LADEUR, *Negative Freiheitsrechte*, pp. 106-111.

110 - CZERWICK, *Systemtheorie der Demokratie*, p. 154.

111 - LUHMANN, Niklas, *Politische Theorie im Wohlfahrtsstaat*, München: Olzog, 2011 (1981), p. 90, e LANGE, "Die politische Utopie der Gesellschaftsteuerung...", pp. 187-188.

112 - LUHMANN, Niklas, "Staat und Politik. Zur Semantik der Selbbsbeschreibung politischer Systeme", in Niklas Luhmann, *Soziologische Aufklärung 4 – Beiträge zur funktionalen Differenzierung der Gesellschaft*, 4.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, p. 100.

113 - See TEUBNER, Gunther, "A Constitutional Moment? The logics of «Hitting the Bottom»", in Poul F. Kjaer / Gunther Teubner / Alberto Febbrajo (Ed.), *The Financial Crisis in Constitutional Perspective – The Dark Side of Functional Differentiation*, Oxford: Hart Publishing, 2011, pp. 3-42.

114 - Something also acknowledged by Pedro MACHETE, *Estado de Direito Democrático e Administração Paritária*, Coimbra: Almedina, 2007, p. 411: "Sucede que tal afinidade e interação

but instead by flooding the political system with unbearable inclusiveness, social rights induce the expansion of the political borders, taking power and the political to ever far reaching spheres.¹¹⁵

However, such a logic does not come without consequences. On the one hand, and because such over-expansion means that the system is incorporating too much environmental complexity, the political system will eventually be faced with the incapability to operatively process all that data and information that it is letting in its autopoietic network (through mechanisms such as social rights). Therefore, this political network will eventually become disruptively affected.¹¹⁶ On the other hand, modern society as a functionally differentiated society will also suffer: the other differentiated and autonomous systems will sooner or later be hampered by negative externalities incoming from the political system. Trends of politicization are accompanied by disturbance in the intersystemic balance of a differentiated society, because the over-growth of political operativity will eventually clash with the autopoiesis of other systems and their self-reproduction.¹¹⁷ In this circumstances, we are dealing with a menace to the structural architecture and present evolutionary stage of modern society.

As it is well known, the process of over-expansion of the political system has begun decades ago and its crisis is here today for everyone to see. Some of the main problems, such as unbalanced state finances and enormous public debt, are connected to the model of social state that western countries have been pursuing. The operative disruptions have started and I am not sure if it is so a “new era” we are entering in or if we are simply facing the imperative of abandoning certain illusions about modernity and social evolution, namely the idea of continuous progress, of welfare for all and of a political centre of society. It is said sometimes that we are today lacking a description, a theory or an explanation of the times we are living. Perhaps we are unwilling to face the changes or perhaps we are too attached to prior beliefs we resist to abandon. The dream of striving for an ideal world has been torn apart with the regressions that the wake of the financial and public debt crisis imposed.

entre democracia e Estado social é causa de um aumento das tarefas do Estado sob a pressão da sociedade, sem que aquela integre quaisquer instrumentos de contenção. Rapidamente o conteúdo das incumbências do Estado social passa da superação de situações de necessidade e da prevenção de riscos sociais especiais – os seus fins originais – para a defesa e a consequente assunção de riscos normais e, bem assim, a garantia de um nível de vida estável e, se possível, crescente”.

115 - CZERWICK, *Systemtheorie der Demokratie*, p. 153.

116 - CZERWICK, *Systemtheorie der Demokratie*, p. 153.

117 - ELLUL, Jacques, “Politicization and Political Solutions”, in Kenneth S. Templeton, Jr. (Ed.), *The Politicization of Society*, Indianapolis: Liberty Fund, Inc., 1979, pp. 209-247.

TEUBNER argues that the tendency to over-expansion results in a systemic logic of “hitting the bottom”: the system goes as far as it can until it starts to experience disruptive effects on itself. The sense of self-destruction induces a counter-reaction of self-regeneration, something that has to translate in self-restriction and self-limitation.¹¹⁸

Reflection, as the capacity of systems to thematize themselves in a functionally differentiated society (thereby recognizing the autonomy of the other systems that constitute its environment and respecting their autopoiesis),¹¹⁹ becomes an important tool where the objective is to assure intersystemic harmony and the integrity of each differentiated system. It is for this reason that most systemic authors pursue a line of investigation that accentuates the improvement of such reflection capacities in all systems, so that they can think of themselves in an environment and prevent the production of negative externalities.¹²⁰

For instance, a limit on public spending or public debt on the constitution (*Schuldenbremse* in German terminology) – a discussion quite actual in the Portuguese context – reveals itself as a mechanism of reflection and limitation of the political, more rigorously: a self-induced self-restriction of the political system. This is not the place to discuss this issue, but a theoretically grounded understanding of such a constitutional rule can have significant impact in the articulation of certain constitutional principles. A few months ago, a Portuguese legal magazine asked whether a limiting rule was “compatible” with the welfare state.¹²¹ We must disagree with the way the question is formulated. Once one sees the limiting rule in its societal embeddedness and acknowledges its societal function, then it is the welfare state that has to prove to be compatible with such a rule, and not otherwise. From a constitutional point of view we would say that this position of ours indicates the limiting rule as a *meta-constitutional imperative*. The constitutional positivization does not hamper such a quality because the limiting rule relates to a primarily societal constitutionalization, regarding the legal support of

118 - TEUBNER, “A Constitutional Moment?..”, pp. 10 ff.

119 - LUHMANN, *Die Gesellschaft der Gesellschaft*, p. 757, e LUHMANN, Niklas, “Selbst-Thematisierung des Gesellschaftssystems: Über die Kategorie der Reflexion aus der Sicht der Systemtheorie”, in Niklas Luhmann, *Soziologische Aufklärung 2 – Aufsätze zur Theorie der Gesellschaft*, 6.^a edição, Wiesbaden: VS Verlag für Sozialwissenschaften, 2009, pp. 89-127.

120 - TEUBNER, Gunther, *Recht als autopoietisches System*, Frankfurt am Main: Suhrkamp, 1989, p. 87, and WILLKE, Helmut, *Systemtheorie I: Grundlagen*, 7.^a edição, Stuttgart: Lucius & Lucius, 2006, p. 100.

121 - See the articles of the Portuguese *Revista Direito e Política* 3 (2013), edited by PAULO OTERO and published by Diário de Bordo Editores.

the reflexivity and differentiation of the systems.¹²²

4. FINAL REMARKS

It is now time to conclude. When we assert the under-complexity of social rights what is highlighted is the following:

- 1) that social rights are subservient to the ends of power and to its dissemination across society, allowing for power to penetrate previously untouched social spheres or realms;
- 2) that social rights channel too much environmental complexity into the political system, inducing an over-expansion of its operativity;¹²³
- 3) that social rights contain no inbuilt device to balance, maintain in bearable levels or restrict that surplus of operativity;¹²⁴
- 4) that the social rights' induced growth of the political system unleashes disruption on the political operativity and on the autopoiesis of other differentiated systems;¹²⁵
- 5) that in ultimate analysis a menace to the functional differentiation of society can be generated.

From a systems-theory point of view, the only exit out of the dilemma consists in investing in strategies of self-limitation and self-restriction, meaning improved reflection of the political system as an autopoietic system among autopoietic systems in society.¹²⁶

Normative theories of legitimacy should, for the purpose, refocus their attention from supporting power's expansion to emphasizing the need of maintaining power's reproduction or circulation within bearable borders or limits.¹²⁷ Particular emphasis should be placed on creating, improving and reinforcing legal mechanisms of control and avoidance of the negative externalities of social rights,

122 - LUHMANN, *Das Recht*, p. 481, and TEUBNER, *Verfassungsfragmente*, pp. 120-139.

123 - CZERWICK, *Systemtheorie der Demokratie*, p. 153: "Der Wohlfahrtsstaat ist so gesehen ein Ergebnis von politischen Problemlösungen, mit denen sich das politische System ständig selbst überfordert".

124 - CZERWICK, *Systemtheorie der Demokratie*, p. 154.

125 - See THORNHILL, *A Sociology of Constitutions*, pp. 293-295, mentioning a "crisis of inclusion" as a consequence of the increase of "programmatic rights".

126 - TEUBNER, *Recht als autopoietisches System*, p. 87, and WILLKE, *Systemtheorie I*, p. 100.

127 - See, as an example of that effort, LADEUR, Karl-Heinz, "Risiko Sozialstaat. Expansion des Sozialstaats ohne verfassungsrechtliche Schranken", *Der Staat* 46 (2007), pp. 61-88.

thereby counteracting certain expansionary intents of the political. The legal system and the legal actors must assume somehow a task of defining barriers to the unrestricted implementation of social policies.

We tend, in fact, to advocate for the end of the current theoretical legitimation of the Welfare State and social rights. Devaluating their constitutional dignity is a possible path, but it appears as too formal. Instead, narratives and discursivities need to change in society and inside the political system. In a certain sense we could say that we face a cultural issue. Besides concrete measures (the *Schuldenbremse* is one instrument for the limitation of the political system's growth), one has to abandon the illusion of the State as a hierarchical *locus* of society's steering. Only after that will the claims and expectation addressed to the State begin to decrease or change in nature. The political must also embrace another self-description of itself, namely one that puts tone on its own limitations and on its inability to control societal processes outside its sphere. This does not equate with the end of the State. We are not denying that there are possibilities of the political system influencing societal processes. But it is just an influencing: there is never guarantee of success nor is it possible a certain prediction of the consequences that political measures might have on other social realms. Required is political humbleness, emphasizing the *Ohnmacht* of political power in so many and varied situations. Regulatory instruments must also be adequate to the regulatory circumstances and autopoietic context, but I will leave that for another paper.