

The Issue of the Constitution in Luhmann's Card Index System. Reading the Traces

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1. Introduction

Niklas Luhmann, as already mentioned in the former chapter, started discussing the issue of the constitution at a very early stage in his academic career: his first established publication in this field was his 1965 work, *Fundamental Rights as an Institution*, in which he already discussed from a standpoint of societal theory, referring to political sociology in the subtitle, but which also addressed jurists. This was followed in 1973 by his comprehensive approach to the *Political Constitution in the Context of the Social System*, which focused on the question of the constitution's function for the political system, but also still addressed an audience interested in legal theory. Following the autopoietic turnaround in the underlying system theory in the eighties, the question about the constitution was raised once again in this changed theoretical framework, especially in his historically argued 1989 essay *The Constitution as an Evolutionary Achievement* and notably in his 1993 monograph on the functional system *Law as a Social System*. It is therefore possible to speak of an ongoing, though maybe not exactly continuous, interest in the topic of the constitution on the part of the sociologist Luhmann. This article starts out against a background and on the basis of a preliminary inspection of Luhmann's card index system to ask what traces of the constitutional issue can be found in the unique collection of jottings pieced together by Luhmann from the fifties onwards and which eventually totalled nearly 90,000 notes by the middle of the nineties.

2. Luhmann's Card Index System

In Niklas Luhmann's description of the theory project he pursued purposefully and applied universally for over 35 years, his card index system constitutes a factor that cannot be ignored (viz. Luhmann 1981; 1987): without the specific method of the notes he already started jotting down even before he started out on his actual academic career, the better to provide the results of his excessive and broadly interdisciplinary reading with a systematic organisation, as Luhmann tells us himself, the great number and thematic diversity of his publications would have been inconceivable. By organising his research in this way, he tapped into a system of knowledge management that had developed to keep pace with the rapidly increasing number of publications available using a quite specific storage and retrieval system to perfect the possibilities of systematic knowledge generating offered by the card index system (cf. Krajewski 2002).

The card index system in Luhmann's academic estate comprises two largely separated collections: (a) an early collection dating to the period 1951-1962, based primarily on his readings in the areas of administrative and political sciences, organisational theory and philosophy and consisting of some 24,000 notes and (b) a later collection dating to the period 1963-1996, featuring a clear sociological slant and consisting of some 66,000 notes. As a rule, Luhmann did not put excerpts directly into

his file system, but was far more likely to take notes while reading, then use them in a second stage to generate comments, which he then oriented in particular to relate to the other notes already contained in the system. He assumed that it would only be possible to decide at a later stage how meaningful a note would be, by seeing how it related to other notes.

Luhmann himself described his filing system on the one hand as a “tool for thinking” that provided the groundwork that enabled him to think in a structured, link-oriented “manner that works differences in”: this brought all the “ideas” and “chances of (his) reading” into his collection, leaving the decision about how to link it all up internally to a later stage (ZK II: 9/8g, 9/8a2, 9/8i)¹. On the other hand, he said that his filing system was a “second memory” that constituted not so much a simple archive of knowledge as a partner in a process of communication, so that he himself was surprised by the information furnished by the system (Luhmann 1981, 225). The reason why the difference of his system of storage and use could be productive was because the collection’s internal structure enabled some quite different combinations of several notes to be compiled in response to individual questions, making it largely independent of the original intention when the note was first drawn up.

Talking about his filing system, Luhmann (1981, 224f.) based his approach on the unusual structure of the note collection, which he maintained explained his unusual productivity. In a section devoted to the card index system itself², he describes the collection as “a cybernetic system” in the shape of a “combination of order and disorder, of coagulating and unpredictable combinations achieved by accessing it at random” (ZK II: 9/8). The precondition for this was that he had to accept the need to do without any predetermined order. But even though the note collection has no systematic structure, it nevertheless contains an accumulation of many notes about certain terms and individual issues. Correspondingly, there is a first level of order and sections that is thoroughly differentiated by topics. In the earlier of the two collections, this structure still bears clear signs of the (individual) processing of previously determined (and external) areas of knowledge, which are listed and processed in 108 sections. The core issues in this case are found in the area of legal and political sciences, of the science of administration and of organisational theory, but there are also sections on questions concerned with epistemology, as well as some individual sociological issues. The second and later collection was organised from the very beginning with a focus on identified issues and betrays a genuinely sociological grasp. Here there are only eleven main topics, while their respective sections contain several thousand cards each: 1 organisational theory, 2 functionalism, 3 decision theory, 4 officialdom, 5 formal/informal order, 6 sovereignty/state, 7 individual terms/problems, 8 economics, 9 random notes, 10 archaic societies, 11 high cultures. It is easy to see that this is neither a mere list, nor a structural order with a preconceived system. Instead, this structure is very clearly the product of Luhmann’s reading and research interests, as recorded in the course of time. This applies both to the first level of ordering and to the additional subsections that follow on them, which are at least loosely related to the original issue. Within these thematic blocks, each card is then the subject of a specific ordering

¹ In this article, references to the notes in the filing system are identified with the numbers given to them by Luhmann himself, “ZK I” or “ZK II”, as the two collections are have substantially separate numbering and independent of one another.

² This may have been drafted in connection with the 1981 article mentioned above.

principle that does not lead the respective first thematic stipulation to an obligatory monothematic succession, but often introduces it to a cascade of issues that take it further and further away from the point where the considerations started. As a result, the functionalism section, for example, contains not only thoughts about the concept of function, but also about that of system, the relationship between systems and the world, social theory and stratification, among other things.

This structure derives from the underlying idea behind Luhmann's card index system, that a card only needs to relate to the previous one and does not necessarily need to take a preconceived superior thematic structure into account. This corresponds to a specific way of generating notes, in which Luhmann followed up on secondary thoughts that triggered his interest, jotting down additional notes about a thought that had already occurred to him on a card that he would then place here in the filing system, so that he would retain a sequence of cards that led further and further away from the original issue or enabled the card index system to grow 'inwardly'. But placing individual cards in the collection was not the only product generated by Luhmann's reading interests in the course of time. The collection itself is also the consequence of the frequent difficulty he encountered when he tried to classify a question unequivocally under one and only one (superior) issue. Luhmann solved this problem by treating it as an opportunity: by adopting the principle that each the entry only has to relate to the previous entry, he adhered to the computer technology principle, already known in the fifties, of "multiple storage", so that notes about one issue can be found in quite different places in the card index system.

There is a constitutive relationship between the storage technique thus sketched and the special numbering system used for the notes. The principle behind it all derives necessarily from the decision to do without an explicit thematic order, which then leads to the question of how to retrieve a certain card once it has been filed. The solution is in each card's fixed location and a corresponding numbering system, which at the same time tackles the question of how to insert the new card into the existing index without causing havoc with the original numbering system. This idea was put into practice with a very simple expedient: in each of the major sections listed above, Luhmann first always applied a simple numerical sequence that reflected the moment when each entry was made. The section number comes before the actual sequential number, so 1/1 is followed by 1/2, 1/3 and so on. Cards that were then generated later on and pursue a single issue that is jotted down on card 1/1 are then identified by a corresponding numerical sequence of their own, so that card 1/1a is inserted between card 1/1 and card 1/2. The next card after that may return to a single issue with 1b or pursue the previous sequence further with 1/1a1: this latter card is inserted between card 1/1a and card 1/1b and so on. This procedure means that the space between two thematically related cards that were originally generated one directly next to another, so could also be found one directly next to the other, may end up being occupied by hundreds of cards generated later, whose numerical sequence can have combinations of up to 13 numerals and letters. This card index therefore features a thoroughly idiosyncratic 3D structure, which Luhmann described in his explanation of his filing system as an "internal branching capacity" (1981, 224).

A further need arises from the storage system sketched out above, and especially its principle of multiple storage: all the cards in the collection that are related to one another thematically or conceptually must also refer to one another, by means of a

reciprocal notation of their respective card numbers. For this reason, individual references at the beginning of a thematic subsection are often accompanied by an introductory card with collective references, which develop systematically on the thematically related fields in the card system. Luhmann himself called this reference system network a “spider-shaped system” (1987, 143). Test samples enable us to assume that there are about 20,000 references in the earlier collection and about 30,000 in the later one.

Lastly, in order to ensure that this network of references would always remain accessible, Luhmann drew up a list of keywords with about 4,000 entries. This list of keywords was the vital tool for using the index, as it was the only way in which notes about a given topic could be retrieved with certainty. Unlike a corresponding index in a book, this list of keywords lays no claim to achieving a complete compilation of the locations in the collection that tackle each concept. Instead, Luhmann generally only made of a record of at most three places in his system where the concept in question could be found. The underlying idea was that he could then use the internal system of cross-references to find the other relevant places very quickly.

In summary, we can say that not only was Luhmann’s original approach to reading and note-taking crucial for his collection to function, but also the relationships between the notes that were created on the one hand by his special method of storage and on the other by his method of (selective) reference. The difference between the structure of the issues put down (more or less at random) in the course of time and the structure of references generated with every subsequent new entry thus became sometimes more available when the collection was consulted at a later date than had been intended with the original note. The collection’s structural organisation ensures that any access to a conceptually pertinent place in the collection that is managed via the list of keywords does not restrict the search to that single location, quite the contrary: profiting from the specific approach adopted for inserting the cards and the structure of references, it opens the gates to a web of notes, so that the combination of the search question addressed to the list of keywords and the principle of placing the cards and the reference system systematically brings (theoretically or conceptually controlled) chance into play. With his principle of multiple storage and a method of references reminiscent of today’s hyperlinks – and despite using an analogue storage system, Luhmann was already simulating a modern computer-aided databank system as early as the 1960s, to which he then resorted with increasing frequency for the purpose of generating his manuscripts, once he had achieved a critical mass of notes at the beginning of the seventies. This by no means indicates that the relationship between the card index and Luhmann’s publications was in any way one-sided, far from it: the basic assumption should be one of reciprocity, in which on the one hand the texts were initiated by consulting the card index and by asking it specific questions, so as generate a combination of a variety of findings from different places, while on the other hand the thoughts thus generated also found their way back into the card index in their own right (see Schmidt 2012, 10f). Similarly, not (only) was verified knowledge entrusted to the collection’s function as a tool for thinking, but a process of theory generation was also recorded, including potential mistakes and red herrings, which were revised by later entries, but not eliminated, as once a card had found its way into the index, it stayed there.

After this introduction, it is now time to ask what traces the constitutional issue left in the card index and whether the system's functionality as described above is confirmed for this topic.

3. The Constitution in the Card Index System

The fact that Luhmann focused intensively on law as a subject matter throughout his entire academic career can of course be traced back to the circumstance that, as a jurist who first took an interest in constitutional law, he also had a special affinity for this field later in his career, as a sociologist. To this extent it comes as no surprise that his card index system contains a large number of notes about the law. To be sure, it should be noted from the start that this only applies to a limited extent for the issue of special interest to us here now: that of the constitution.

3.1 Card Index I: the Concept of Constitutional Law

From 1956 to 1962, Luhmann worked as an advisor in the Lower Saxony Ministry of Culture, although at the same time he was already pursuing advanced academic interests, with a special focus firstly on constitutional law and administrative studies, which already at this time led not only to extensive reading, but also to his first more comprehensive manuscripts. Thus does his estate include not only the manuscript of a practically complete, but never submitted, dissertation about *The Organisation of Government Advisory Bodies*, dated 1955, in which he discusses the question of submitting advisory relations to a process of normation under (organisational) law, but also further, albeit incomplete, manuscripts about political science and about a theory of the contemporary state dated to the late fifties.

This primary perspective of political and administrative sciences, on which Luhmann was only to expand by taking an increasing and decided interest in organisational studies from the beginning of the sixties,³ already becomes clear in the structure he gave to the collection, which, compared to the second card index, still shows the signs of the (individual) processing of previously largely determined and relatively compartmentalised areas of knowledge: in particular in the earlier part of the collection, the majority of these still reflect a juridical approach.⁴ Yet the fact that Luhmann's relationship to sociology is still rather distant here is not clear from the thematic priorities. Rather, the collection contains repeated formulations that demonstrate the jurist's lingering mistrust of what, from his point of view, was the conceptually less disciplined discussion about sociology. In a similar vein, the few references to the constitution are primarily expressed from an internal legal viewpoint. They can be found in the section on the constitution, section 27, which comes between section 26, "Power", and section 28 on "The Nature of Organisation". When it comes, though, the topic's explicit treatment is certainly very clear: on no more than 13 cards (making this

³ It was also at this time that Luhmann spent a sabbatical at the Harvard University School of Government, where he first came into contact with Talcott Parsons: this led to Luhmann to apply himself more vigorously to sociology.

⁴ Such as the issues of the state, equality, planning, the right of veto, power, the constitution, emergency, government and the majority principle. Subsequently, the topics (among others the division of labour, hierarchy, roles and integration) then enable a gradual orientation towards organisational studies – and thus also as a consequence to sociology – to be detected.

one of the shortest sections in the collection), Luhmann approaches the topic from a decidedly constitutional angle.

Already the literature that Luhmann noted at the beginning of the section derives practically exclusively from the juridical discussion (of political and administrative science and public law): in the notes that followed, he had evidently taken his cue in particular from Hermann Heller's 1934 political science. In addition to a majority of legal literature, he also took note of several works of legal history and just one sociological text, Helmut Schelsky's 1949 essay *On the Stability of Institutions, Especially Constitutions*. However there are no traces in the notes that follow of any reading of this text, which focuses primarily on discussing from a standpoint of cultural anthropology and institutions theory.

A short definition provides the introduction: the concept of the constitution is not "phenomenologically traceable sociological circumstance", but a legal concept generated with certain historical and political intentions, whose meaning resides in "being a self-made, supreme basic law that can be shaped, reshaped and amended to suit its purpose". That is why its typical form is the written constitution, whose ultimate legitimation is the "free will of the people" (ZK I: 27,1). The constitution is treated – in a still very old-European vein of legal theory – as an attempt on the part of "Western man [...] to take possession of the state": it is part of the "essence of the state [...] to be available and that means that it has a constitution". In the process, Luhmann observes that "this is not all explained by the sociological situation of the emerging citizenry that seeks its system of government" (27,2). As a consequence of the basic order guaranteed by the constitution becoming available, there is the rise of a need for the constitution to be safeguarded against amendments. This leads to a.) the problem of how to protect the constitution and b.) the question of putting barriers in the way of amending or altering the constitution (27,2). However both of these points are only followed by a few references to the literature but no further discussion of contents.

For modern constitutional thinking, as Luhmann then continues, it is of decisive significance to the constitution not only that it is a manufactured fact, but also that it is homogeneous, meaning that it has 1.) an external homogeneity, since it is set out in a single written document, and 2.) an internal, material homogeneity, since it is the result of a closed, systematic plan (27, 4). In this vein, it is not the material content of the codification in itself that is characteristic of a modern constitution, so much as how it is systemised and rationalised. It is a necessary precondition for this that the state has a monopoly of law-making. In this context, Luhmann issues a demand (but takes it no further) for a theory of constitutional law-making to tackle the issue of a pre-constitutional subject, since the loss of belief in the divine establishment of the overall political order is of underlying significance for the modern constitution.

In conclusion, a short reference to Hans Freyer's 1925 work *Der Staat (The State)*, although it is not quoted in the original, only as a secondary source) then accompanies a short comment on the paradoxical material content that the constitution is a "system of axioms that stands unproven and unprovable at the beginning, but for its part lends their truth in the system to all true sentences" (27,6). This perception of the constitution's unjustifiable self-justification was later to be crucial to Luhmann's later understanding in the eighties, although nothing more is added to it in the earlier collection, as the section is simply discontinued here.

In the late fifties and early sixties, then, Luhmann took note of this issue, primarily in the framework of the established constitutional viewpoint, but no more than that: compared to other issues found in the first card index, this one is treated as marginal and no interpretation of his own is yet recognisable, to say nothing of a sociological one. Then there is the fact that there are absolutely no references to be found in this section that would lead to networking with other fields in the card index. In addition to this section, the only other reference in the list of keywords is one at point 10 “Organisation as Imagination and Reality”, where there is just a note mentioning that the written constitution can be construed as a bridge between ideological state doctrine and reality. Since an examination of other, potentially more pertinent sections, such as on the Concept of State (ZK I: 9), on the Relationship between Organisation (State) and the Law (12) and on Politics and Law (14,6) has also turned up no additional findings, the first card index displays extensive ignorance of the constitutional issue, despite its focus on legal science.

3.2 Card Index II: A Social Theory Appreciation of the Constitution

This tends to change in the second (sociological) card index collection, which Luhmann started at the beginning of the sixties. Nevertheless, it must be said that the number of notes relative to constitutions that Luhmann generated in this collection, now with a primary focus on considerations of social theory, is comparably negligible here, too.

This applies in particular in the light of the fact that this collection contains an extensive block denominated 3414 “Legal Order”, with some 2,500 cards, following the areas of “Ideology”, “Authority” and “Rules” in section 3 on “Decision Theory”. In this block, a large number of more comprehensive sub-topics can be identified, which cover Luhmann’s known concepts of the sociology of law and legal theory and follow one another more or less non-systematically, corresponding to the principle of information storage sketched out above: the function of the law, the concept of justice, the question of the generalisation of expected behaviour, the relationship between the sociology of law and legal theory, the positivisation of the law, basic rights, legal decision theory (conditional programming, legal doctrine, subjective rights), the differentiation of the legal system, the limits of enforceability of the law, justice/injustice, the legal system as a closed self-referential system. The names of these sub-topics already hint at Luhmann’s various related publications. Although the block contains both earlier and later entries, there is a clearly identifiable focus datable to the seventies.

3.2.1 The Constitution as a Legal Institution

The legal section of the card index contains decidedly scanty notes about the constitution:

(1) There is nothing substantial among the approximately 200 cards that make up the sub-topic 3414/6 “The Positivisation of the Law”, except a few short comments about the possibility that positive law may stipulate the irreversibility of the law under the heading of “constitutional amendments” (ZK II: 3414/6c6): here Luhmann makes a concrete reference to the relevant articles of several European countries’ constitutions and then emphasises that the problem was originally not so much one of the possibility as far more of the impossibility of amending the constitution, because it is enacted as a positive law and is supposed to apply as such (3414/6c6a).

(2) The most extensive notes can be found in the approximately 100 cards that make up the section 3414/10 “Basic Rights”. However just as in Luhmann’s 1965 book on Basic Rights, whose preparation probably furnished the context for the majority of these notes, this section contains hardly any systematic considerations about the concept of the constitution itself. Again, just as in the book, which starts by mentioning only the difference between segments of constitutions that deal with basic rights and with organisation, as well as the question of their rationale in natural law, while focusing no particular attention on the concept of the constitution itself⁵, against the background of the thesis of the (latent) function of preserving a differentiated social order, the section ventures immediately (ZK II: 34141/10a) into a discussion of a variety of basic rights: rights of freedom, rights of franchise, rights of property, rights of association, freedom of opinion, freedom of conscience, equality and freedom of religion. These are then followed by just two very short general comments about the constitution:

(a) Basic rights have the function not only of preserving a differentiated social order as a whole, but also of organising how the state reaches its decisions, since they organise their environment in such a way as to enable a political system to be differentiated. When basic rights are anchored in the constitution, this enables the state’s decision-making system to concentrate on a specific function (3414/10f).

(b) At the same time, in the interests of encountering a differentiated social order in the form of basic rights, technology relieves the constitution of over-high interdependences: as a result, legal questions are differentiated by sector, even when a majority of basic rights may be affected “in isolated cases” (3414/10f2).

(3) Finally, section 3414/13 “Law and Power” contains an even more marginal observation: instead of assuming that the law is the code of political power, Luhmann finds it more sensible to ask what it means when the code of a medium – in this case political power – is placed contingently following on social development. According to his reading, only the law can be considered for controlling the contingency of the code of political power. This obliges on the one hand constitutions to be juridified and on the other the law to be positivised (3414/13f1).

In the last notes mentioned, it is striking that Luhmann here already abandoned the perspective originally focused on the law and adopted the dual perspective of law and politics that was to be a constituent factor of his later approach (see below).

Looking through the remaining notes about the law in the second collection in search of further supposedly pertinent places – for example in the sections on natural law (3414/3b), on the legal order and hierarchy (3414/9), on the sources of the law (3414/12) and on the differentiation of the law (3414/14), including its sub-topic on the legal system and political system (3414/14k10), on the law as a self-substituting order (3414/32), on the applicability of the law (3414/38b) or on the basic principles of the law (3414/48) – there are no entries of any kind that refer to the constitution.

⁵ This can be explained by the fact that this feeds directly into the constitutional discussion – so the concept of the constitution is ultimately consolidated – from whose interpretation of basic rights Luhmann then dissociates himself, however, with his functional questioning. The social theory grounding for the concept of the constitution that is still largely missing here then followed in the 1973 essay mentioned above.

Consulting the list of keywords, it soon becomes clear that Luhmann did not place the issue of the constitution in the block of notes about the law in the second card index, but in two places with notes about politics, in the sections 35 “The Organisation of Decisions” and 7/54 “The Welfare State”. This thematic classification under politics can be explained by looking at the history of his works and is ultimately already applied in his book on basic rights, whose notes Luhmann nevertheless had still filed under the law (see above): the notes mentioned were probably first generated in the context of his 1973 essay on the constitution, which targeted an audience of legal theorists, although it focused on the function for politics; the second section is related to his 1981 book on the theory of the welfare state.

3.2.2 The Constitution between Politics and the Law

Starting from the filing number 35/5g5, there are some 40 cards that tackle this issue in the sub-topic 35/5 “Administration as a System of Decision-making”, which can be found among the 700 cards that make up the large section 35 “The Organisation of Decisions”, most of them dating to the seventies, the rest to the eighties. In this case, the focus or system reference is primarily on politics, something that is not necessarily surprising, in the light of the sequence in this section about decision-making, before then changing over from a political to a legal perspective, although without making any great fuss about it.⁶ As a general rule, these notes tend to be fundamental and sometimes programmatic in character, i.e. they seldom go into detail and are scarcely co-ordinated in terms of theory, which indicates that they were jotted down over a considerable period of time.⁷ Similarly, it is possible to identify several different approaches to determining functions and some only loosely related structural descriptions:

3.2.2.1 Limiting and Increasing Political Power

This starts by defining the modern state as a decision-making organisation that, unlike the *res publica*, is no longer perceived as a continuation of an inherited order, but is legitimised rationally by a political formula made to measure especially for the purpose. Establishing that the decision is binding in nature and so legitimising it is the task of the constitution (ZK II: 35/5ga), while it is essential for a modern understanding of the constitution that there can only be *one* constitutional law (35/5g5a13), as this is the only way that the connection to the social function of politics is guaranteed after the unifying concept of civil society, i.e. of an ethically and politically constituted society, has dissolved (35/5ga1). In this connection we find a first, still very general definition of the concept: “The constitution can be described as those structures in a system that are institutionalised *multifunctionally* and so cannot be separated from the point of view of a specific function. Any change in them makes it necessary to stabilise the entire system all over again and is correspondingly difficult” (35/5ga1). To be sure, Luhmann later added a question mark to this passage and noted only a little later that, in addition to this aspect of multifunctionality, which does not exclude enough, it was also

⁶ It is worth recalling the fact mentioned above that a card’s location in the index was ultimately determined by the principle of how it would relate to the previous card, not by how it would relate to the overall topic.

⁷ Further indicators in favour of this theory are the changing handwriting and the different types of paper used for the cards.

necessary to consider the question of especially focal or essential connections that are placated by constitutions. With this in mind, he continued by noting two proposals:

(a) Constitutions are written for the purpose of limiting political power. This thesis is offered in the context of cybernetic thinking, typical of the perspectives of the seventies, about how an increase in power becomes possible as a result of a decrease in power (35/5g5a3): while the old European model set out to draw distinctions between the rulers and the ruled, the modern model of power construes the constitution as a structure that enables power to increase as a result of restricting, so there is a need to draw distinctions between an internal limitation of political power in the form of checks and balances in the organisational part of the constitution and an external limitation achieved by natural laws, underlying values or basic rights (35/5g5a2-3). Luhmann thus considers the constitutional model's most important function to be to ensure that the limitations of power do not detract from the power itself. As the barriers to the power are not restricted to its ability to enforce, it is only possible to set conditions to relationships of power if they can then in turn become the object of politics (35/5g5a4). This is no longer just a question of applying the law to the state, but of the state regulating the conditions governing the guarantee of the law. Similarly, constitutionalism uses the constitution as a central tool of transformation (35/5g5a7), without there being any scope for still talking about using political means to achieve an intentional change of society: instead, we should assume that social development displays the form of evolution (35/5g5a10).

(b) For Luhmann, constitutions' second function is to reformulate the conditions of social compatibility for the political subsystem (35/5g5d), against the background of the general assumption that the constitution governs the relations between the system and its environment (35/5g5b). this function is linked to the observation that the planes of interaction, organisation and society that constitute society are pulling away from one another with increasing centrifugal force.⁸ These social preconditions can no longer be taken for granted in a sovereign state, nor are they moralised any more, i.e. transferred from the model of interaction to the life of the state, but have to be reformulated.

3.2.2.2 The Constitution as the Deparadoxisation of the Law

Alongside these notes, which are typical of Luhmann's approach to the dual perspective of politics and law, are others that concern themselves with the constitution's idiosyncrasies as a self-referential law to govern the law, prompting questions of law's self-imposed asymmetry and also including some historical observations.

The thesis that the constitution is construed as an installation in the system of a description of the system explains the high share of concepts of difference in constitutional semantics, both from a system-environment perspective (basic rights) and through an internal differentiation (the separation of powers) (ZK II: 35/5g5a9).

It is in this area that we find comments on the constitution's paradoxes. For example, that the problem was already diagnosed in the seventeenth century that no law can establish its own immutability, since it actually cannot exclude the possibility that the

⁸ The thesis of an increasing difference between the planes of interaction, organisation and society is developed further at note ZK II: 21/3d27f.

very clause that establishes immutability will itself be amended one day (35/5g5a11); similarly, the order of succession was still a crucial component of the pre-revolutionary understanding of the constitution (35/5g5a11g). Since more recent constitutional thinking no longer relies on a cosmologically inspired hierarchy of laws, it is confronted with the realisation that positive law requires immutability and hierarchies to be established (35/5g5a12).

Similarly, the need for constitutions is ascribed to positive law's idiosyncrasy of being circular in composition and having a tautological description (35/5g5k+k1-3): constitutions serve the purpose of breaking this circle by establishing hierarchies in the sources of the law and so concealing the fact that the law itself is the sole source of the law. Only in the legal system itself can and must a constitution be treated as a natural exigency. This brings Luhmann to a concept of the constitution that is based on a strictly functional definition with regard to a problem that first arose in history from the differentiation of the legal system in the course of the differentiation of society. This leads to a series of research questions, which Luhmann noted down here, although without following them up in his card index: (a) he believed it was no coincidence that that the constitutional movement coincided with the demise of the case for natural law; (b) according to his approach, constitutional problems in developing countries can be attributed to the fact that no premises had been created there for the problem that the constitutions set out to solve, i.e. the self-referentially closed nature of the various social subsystems arrived at by means of differentiation, so that the observable semantic borrowings from Europe could promise little in the way of success;⁹ (c) the 'beauty spots' that can be discerned in all constitutions in the form of unsuppressible self-references called Luhmann's attention to the fact that all methods used to erase tautologies must proceed impurely, e.g. by anchoring corresponding plausibilities in the canon of basic values,¹⁰ by delegating to organisation in the process of the separation of powers,¹¹ by a specifically juridical perception of the constitution as a natural exigency and by borrowing from logical analyses that demonstrate that it is impossible to achieve a logical conclusion¹² or by accepting a limited extent of self-reference at a higher level.¹³ It is notable here that none of the points mentioned results in a reference to other sections in the card index that might be pertinent in this respect: in each case, the only reference is outside the card index to other literature.

3.2.2.3 The Constitutional State and the Welfare State

The second more extensive heading mentioned in the list of keywords, to which reference is also made in the section just described, is also located in the area of political theory. Of the approximately 150 cards that make up the section 7/54 on the "Welfare State", 20 come under the sub-topic 7/54b of "The Welfare State/Constitutional State".

⁹ This topic was discussed by Marcelo Neves in his dissertation *Constitution and the Positivity of the Law in Peripheral Modern Societies*, whose manuscript is also mentioned here by Luhmann.

¹⁰ Without Luhmann referring here to the relevant sections in his card index.

¹¹ Luhmann mentions Hermann Heller by name, but without naming the relevant location in his system in card index ZK I.

¹² Luhmann here merely makes fleeting mention of "Gödel and successors".

¹³ This card contains a literature reference to Lars Löfgren, but without any subsequent reference to sections relevant to self-reference (ZK II: 21/3d26g98) or to paradox (21/3d26g70m).

In the context of the thesis of politics overstressing itself that we know from his 1981 book *Political Theory in the Welfare State*, Luhmann starts by using the feedback concept to compare the welfare state and the constitutional state (ZK II: 7/54b1-9). The welfare state relies on the principles of a positive feedback: any deviation from the condition as given is favoured, after which information is sought. The theories of the constitutional state, on the other hand, aim primarily to counter the abuse of power and are therefore formulated in terms of a negative feedback: they aim at acquiring information that indicates deviations from the morally and legally required condition, so that mechanisms can be introduced to recuperate the status quo. In a constitutional state with this kind of conception, Luhmann focuses primarily on two viewpoints, but without going into any greater detail: 1) sovereignty, in the sense that it is impossible to enforce a binding decision to solve every conflict, and 2) precautionary measures against the abuse of power.

Luhmann then considers the constitutional state's historical development into the (constitutionally based) welfare state as an example of how social evolution takes place on the plane of functional systems (7/54b5): although the constitutional state was stabilised by the law and so by a negative feedback, so could wait for conflicts, it introduced an evolutionary non-identical reproduction that can then be perceived to be the welfare state. Admittedly, the reference found here to a corresponding location in the more extensive section of the card index that deals with evolution (ZK II: 54/14kg) leads largely into the wilderness: there is only a short note commenting that when evolution is described in this case as non-identical reproduction, it means that all political decisions always contain a reference to the structure, especially to the state constitution, and that processes of variation and selection could come about here (54/14kgC1).¹⁴

Finally, in one note that was inserted at a very late stage and stands isolated in the section, Luhmann points out that the relationship between the constitutional state and the welfare state can be understood as the transformation of the basic paradox of a system's identity and its description of itself (ZK II: 7/54b10 f): in the constitutional state, there is a difference between the body of constitutional norms and the problem of the re-entry of the difference between the state and society in that state. In the welfare state, there is a comparable difference between superficial structures and deeper structures: the surface structure is described as a phenomenon of escalation (more social activities and commitments, more impact on society, more financial burdens, more juridification, more bureaucracy etc.). As a result, it is programmed into the crisis of the state, as no escalation is in fact possible. The basic paradox is then in the consequence that the political system is thus occupied with more and more problems that it actually created for itself, so needs new forms of re-entry rationality. In this respect, Luhmann mentions the social diagnostic suspicion that the welfare state therefore has "the more contemporary problems", so that the constitutional state loses out on thematic relevance and is not tackled (ZK II: 7/54b4).

Any search in the remaining political sections of the second card index for any additional notes comes up with thoroughly negative results: in the place actually reserved for this in the card index, section 533/15 on "Politics", where the majority of

¹⁴ Luhmann then developed this point further in the nineties, when he wrote his monograph on politics as a functional system (2000, 422f).

the approximately 800 cards decidedly dedicated to political theory are collected as a sub-heading of the section 533 on “Peer Groups, Problems of Consensus and Consensus Formalisations”, most of which date to the seventies and eighties, there is no observations of any kind. And that despite the fact that Luhmann discusses the “Relationship to Other Subsystems” there in a separate section 533/15t, in the process quoting economics, science, religion, the educational system and the family and tackling them under individual, sometimes quite extensive sub-headings. In vain does one search for notes on the law, however. In this respect, there is nothing more than a reference in an introductory overview of the various different constellations of systems to publications on basic rights – here, too, then, to material outside the collection, but not to the relevant section described above – as well as to the location 3414/14k10 already mentioned above, with a glimpse at the constitution, although it is not exactly pertinent.

Likewise, there are no findings in the older, primary notes contained in the section 353 on “Power and Influence” dating back to the sixties and seventies, on which Luhmann presumably drew when preparing his 1975 book on power. The same also applies for the fourth place in the system with a decided affinity to politics, which is located in the block 6 “Sovereignty and the State”, drawn up in the seventies and eighties and comprising approximately 150 cards, although an introductory mention is made here of the legal side of the sovereignty paradox in the form of freedom and obligation (ZK II: 6/1,3 f) and of the reflexivity of applicable law (6/1e). However there are no references that develop any further on the theme of the role played by the constitution in this process of the differentiation of the political system, which Luhmann describes from a historical perspective, save one short note that the theory of the constitutional state¹⁵ as a theory of reflection provides an answer to the question of whether all conflicts can be solved politically and discusses the nature of the non-arbitrary use of political force (6/11)¹⁶. The same also applies in the case of the extensive section on the concept of the state (6/3).

To make a provisional appraisal, it has to be said that also the second card index only tackles the issue of the constitution rather marginally: most of the notes in the pertinent sections are no more than rapid sketches, while the presence of argumentatively more comprehensive considerations arrayed in sequence is rather sparse. The cohesion of the theses mentioned is mostly poor, just as the notes are evidently altogether a documentary record of a rather long period of time and a correspondingly unsystematic search process, in which nothing seems to have been attached purposefully to any particular location in the card index system. Instead, the majority of Luhmann’s actual theoretical and conceptual work took place outside the card index, with a first focus especially in his 1965 book on basic rights, whose main emphasis is nevertheless still on the controversy with political science and legal theory. Also in the case of his 1975 essay on *Political Constitutions in the Context of the System of Society*, which spelled out the general thesis that the constitution plays a regulatory role for the political system’s relationship with its environment and which goes much further than the available notes, Luhmann seems to have made practically no use of his card index or at the most used his notes as no more than sources of keywords. Lastly, something similar applies to his 1981 publication about the welfare state. Since the notes in the collection

¹⁵ A reference is also made to this location from the section 7/54 mentioned above.

¹⁶ The reference found here to the location 533/15z/e on “Political Theory” goes no further here.

are rather rudimentary in character, it is also impossible to use the formulation that was so popular with Luhmann with reference to his publications, i.e. that the card index even exceeded his output of learned texts. On the contrary, only a few of the discussions crucial to these publications found their way into the card index, so that in this particular case not only is the linkage between the card index and the book at best a loose one, but in addition it can be stated that Luhmann mostly refrained from transferring the considerations he had developed in the process of developing his manuscript into the card index, unlike what he often did when producing other manuscripts, since he intended to develop their themes further.

A quest for the reasons for this finding leads in particular to two reciprocally related causes. On the one hand, the constitution probably achieves such scanty consideration in the card index because the issue was both an early and a late developer in Luhmann: he had already tackled the issue comprehensively at a very early stage with his 1965 book on basic rights and his 1973 essay on the constitution, without having been able to fall back on any substantial numbers of existing notes in his card index at that stage. Correspondingly, all we find in the card index are the outlines he had prepared in the framework of the practical preparatory work for these publications, whereas the majority of the work he put into developing the arguments for this purpose took place outside the card index, directly during the preparation of the manuscripts. On the other hand, despite his enduring interest in the law, much of Luhmann's attention was evidently drawn to other fields by the work he started doing on his other publications in the mid-seventies, so that there were at first very few concrete opportunities for any further notes.¹⁷ In addition, as already mentioned before, the comparatively few outlines are scattered across several different places in the card index. This feature of how the card index is composed on the basis of the principle of multiple storage reflects the circumstance that Luhmann went against the grain of the constitutional presumption of a fusion between politics and the law, proceeding from an operative difference between the two and so from a dual perspective also of the constitution. Nevertheless, in the sketches dating to the seventies, this dual perspective leads to notes that are mostly unconnected to their neighbours, some of them adopting the political standpoint, others the legal or constitutional perspective.¹⁸ Paradoxically, it was only when he transposed the general theory of social systems onto the model of operational closure that the possibility of a new theoretical conception was revealed, one that was capable of taking both perspectives into consideration at the same time. Yet this late development was based primarily on the essentials, so that its development in terms of material records on the issue of the constitution could not really draw on the card index.

3.2.2.4 The Constitution as A Structural Bond between Politics and Law

After a certain period of respite, the problem of the theoretically conclusive treatment of inter-system phenomena concomitant with the concept of autopoiesis (Luhmann 1982) led Luhmann at the end of the eighties to introduce the general theoretical concept of structural coupling, which enables the reciprocal irritation in

¹⁷ In this respect, it is worth mentioning that Luhmann's book on basic rights was edited repeatedly without amendment once every decade, which can be read as evidence that the author felt that the publication had not been superseded.

¹⁸ In his book on basic rights, on the other hand, Luhmann construes the benchmark issue to which basic rights react as regarding society as a whole: the conservation of a functionally differentiated society.

closed systems to be modelled.¹⁹ In the context of this development, he then also achieved a theoretical reformulation of the concept of the constitution, which is construed as a structure in the social subsystems of law and politics that operate not only separately from one another, yet refer reciprocally to each other, but in addition as a mechanism that at the same time ensures a close correlation between the two functional areas.

The relationship implicit in this between politics and the law was first subjected to preliminary development at the end of the eighties in the corresponding concept of the state based on the rule of law, which in its turn was derived from a reading of the state as the political system describing itself. The development of this theory is recorded in parts of the approximately 80 cards about the state based on the rule of law that date back to the seventies and eighties and can be found in the second collection under 35/5j6, in the same main section 35 “The Organisation of Decisions” as the subsection on the constitution, although there is no direct reference to this section, despite a corresponding note to that effect²⁰. The concept of the state based on the rule of law hinging on the reciprocal relationship between the law and politics that was adopted by Luhmann from the very beginning (1971), and espoused against the political science that held sway in the sixties and seventies, eventually blossomed into the thesis that the state based on the rule of law itself constitutes the borderline between the law and politics, where both sides only ever see their own potential, just as in a mirror. This concept then manifested itself again in the essay published in 1988, *The Two Sides of the State Based on the Rule of Law*: this essay’s development either drew on some of the notes contained in the section mentioned above or was the occasion for others to be added.

The corresponding constitutional concept reacts to the diagnosed need for the completely separated system to be connected, as Luhmann notes in his essay *The Constitution as an Evolutionary Achievement* (1990, 180; 193). The thesis of the constitution achieving the structural coupling between politics and the law was eventually lexicalised in Luhmann’s monograph on the legal system (1993, 440ff), although in the card index the constitution is merely noted as a candidate for this theoretical figure: as already mentioned previously, the sub-heading on differentiation from the legal system contains a small sequence of cards on the legal system and politics (ZK II: 3414/14k10 ff) which, while it does refer to the above-mentioned section 35/5j6 on the state based on the rule of law, does not refer to the constitution, but merely makes a brief statement to the effect that the relationship between the law and politics can be formulated anew on this basis. The corresponding place in the system for the theoretical concept of structural coupling can be found in the larger block about the concept of function (ZK II: 21/8v). Arranged at the end of the eighties, the 35 cards that make up this subsection are not particularly comprehensive, nevertheless they

¹⁹ The concept of structural coupling was first introduced in a 1989 manuscript about the relationship between the law and the economy, which was then reflected in the relevant section in Luhmann’s monograph on the functional system of the law (1993, 452ff).

²⁰ “The state based on the rule of law is the notion that the political system determines its essence as a ‘state’ in accordance with the constitution, i.e. in a nutshell, the law is established and determined by the law. The state is defined in its particular form by the constitution, i.e. by a law. This is underscored emphatically as the victory of the law over the power, so over politics; and, thus, of reason over arbitrariness. All power must therefore take the form of competences.” (ZK II: 35/5j6i)

include not only primarily conceptual and terminological clarifications, but also evidence of their application. Along with others, the constitution is mentioned twice as this kind of mechanism of structural coupling (21/8v2 & v12): as in other cases specific to functional systems, however, this thesis is merely hinted at in the card index, while the actual developments on the theme are reserved for the author's corresponding publications.

With reference to the works he published in the field of the law from the mid-eighties onwards, it has to be said that Luhmann evidently decided to do largely without providing his card index with a documentary record of the latest theoretical developments. The reason why this is worth mentioning is because he continued to generate more extensive notes for other topics right up to the nineties, among others for his 1991 book on risks (ZK II: 21/3d18c60o9 ff) and the 1995 volume on art (ZK II: 32/3g13k ff and 11/13 ff). Yet this does not apply to the topic of the law in general, nor in particular to Luhmann's 1993 monograph on the legal system. So it follows that the conceptual stipulations that were only first developed in this framework were no longer worked systematically into the card index. Similarly, the essay about the constitution published in 1990, with its wealth of material content, also has no immediately discernible corresponding section in the card index.²¹ Luhmann appears to have found it much easier to develop his text conventionally in the case of law than in other cases, where he first had to work on the topic's material content himself,²² with the result that this, too, led to no further new entries. Correspondingly, the card index also only contains relatively few notes that were first generated in the framework of the preparation for the monograph *Law, Justice, Society*.²³ Section 3414/18, which is supposedly pertinent, since it bears the same title, comprises precisely one card, although this on card dates not from the end of the eighties, but from the beginning of the seventies, reacting to the evidence of a crisis in the law – in the sense of a crisis in legal consciousness – and containing a reference to the approximately 150 cards that make up another, older block, 3414/14 on “Law in a Differentiated Social Order”, that first of all links to Durkheim and his theory of using the law to integrate a differentiated social order, then adds observations about contemporary legal development and the differentiation of the law, yet contains only selectively newly-inserted cards (as in the case of section 3414/6 on the positivisation of the law). Meanwhile, the section 3414/38 on “Law as a Self-Referential Closed System” was drawn up in the framework of Luhmann's later socio-legal thinking. Admittedly, it contains only about 40 cards, but they include his well-known observations about the concept of law's operational closure, validity, codification and the jurisprudence of interests, which he had developed and extended on in essays published in the journal *Rechtstheorie* in the eighties and while preparing the ground for the 1993 monograph on the Legal System, although none of this generated any feedback worth mentioning in the card index. The fact that the section that covers the concept of validity contains a reference of content

²¹ Unlike the short, rather sketched 1988 essay *The Two Sides of the State Based on the Rule of Law*.

²² The legal scholar's ‘insider perspective’ leads correspondingly to clearly higher expectations of reception from sociologists, which can easily be discerned in the relevant 1972 publication (of particular note alongside the book on basic rights is the manuscript on contingency and law that has since been published (2013)), which was produced in parallel to and as an extension of his *A Sociological Theory of Law* (1972).

²³ Which incidentally also devotes comparatively little space to the issue of the constitution (see in particular 1993, 470ff).

(to 3414/38b1) “elaborated in *Law, Justice, Society* (Ms 89)” indicates that the card index was no longer Luhmann’s primary dialogue partner at this stage, just as, vice-versa, it had not yet been at the earlier time when he drew up his book on basic rights.

4. Conclusion

To summarise, it must therefore be stated that the card index was no particularly original dialogue partner for Luhmann when it came to his work in the area of the constitution. Since Luhmann’s interest in the topic of the constitution was first reflected in early corresponding publications, as time went on this led to very few follow-up entries in the card index, so that it is possible to observe a phenomenon, with regard to these notes, that Luhmann described in his own appraisal of the card index as a process of trickling and of patchy growth (1981, 225): although the sections with notes about the law and politics grew continuously in the seventies and eighties, the process was neither even nor applied across the entire scope of the theme. Similarly, Luhmann’s late development of his newer, decidedly bifocal understanding of the constitution could not link up to any already existing larger body of notes. As it was probably predictable for Luhmann at the end of the eighties that these were likely to be his last publications about the law, so that in that sense there was no longer any need for the collection to be tailored to keep up what was in practice an intrinsically future-oriented attitude, he was gradually converted to producing his texts more conventionally when his card index still featured no corresponding contents, as a result of which he also did without any feedback into it.²⁴

The small number of cards about the issue of the constitution is closely related – and this is far more important for the functionality of the card index – to the small rate of references in the available notes. Within the card index, they contradict what ought to be the very *raison d’être* of their networking principle by being relatively isolated: the few references that are made are also overwhelmingly circular, so that original new perspectives are seldom found in the card index. And the few references that do venture outside the theme’s traditional grounds end up referring to discussions that are then taken no further in the card index, such as on the evolution of politics and the law as cases where a general theory of evolution is applied. Correspondingly, no internal network of references could be set in motion with regard to the issue of the constitution and the card index could also not act as a generator of surprise links, in accordance with the general principle sketched out by Luhmann. This makes it clear that there are not only opportunities intrinsic to the principle of reference, but also risks, as Luhmann pointed out himself: “Every note is just an element that only achieves quality from the network of references and cross-references in the system. A note that is not linked in to this network gets lost in the card index: the card index forgets it. Its rediscovery is a matter of chance and also of the fortuitous circumstance that it will be rediscovered at a moment when the occurrence happens to mean something” (1981, 225).

²⁴ Luhmann also tells us that this was the procedure he used increasingly during a late phase of the theory in an interview he gave in 1997: “I now have an alternative [to the card index], what you might call half-finished book manuscripts, which are stored in boxes under my desk (...). When I now discover anything interesting about ‘sovereignty’, I can put it directly into the manuscript, where ‘state’ and ‘sovereignty’ are dealt with.” (Hagen/Luhmann 2004, 107) What he does not say is that was accompanied by a fundamental change in his way of producing theories and texts.

It would be exaggerated to argue that the notes about the constitution were forgotten in the card index, but no critical mass of observations, of the kind that could have triggered a process of new combinations of notes, ever came about, with the result that the card index was unable to act as a productive second memory for the issue of constitutionalism. In the case of the newer definition of the constitution, this led to the situation that Luhmann's theoretical work no longer took place in the card index, but only in his publications themselves, as can easily be discerned, for example, by comparing how the two monographs on the law and on politics (published in 1993 and 2000 respectively, but developed in close succession) handled the issue of the state and the constitution: they both illustrate his theory as work in progress, a state of affairs that in other fields tended to be recorded in the card index itself. In this respect, the card index was certainly not Luhmann's favourite tool of thought for the issue of the constitution: at best, it could be a source of keywords.

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