DOI: http://dx.doi.org/10.5771/9783845247892

Constitutional courts as autopoietic organisations

Ralf Rogowski

Der Beitrag beschreibt Verfassungsgerichte als selbstreferentiell operierende autopoietische Systeme. Er definiert sie mit Hilfe neuerer Sozialsystemtheorie als autopoietische Organisationen, die in der Lage sind, genügend kognitive Komplexität zu generieren, um sich selbst zu regulieren. Dies wird in drei Bereichen demonstriert: Autonomie in der Fallselektion und im Management des Geschäftsanfalls; Rekursivität in der Entscheidungsfindung; und folgenorientierte Rechtsdogmatik, die reflexiv mit Erkenntnissen über die Wirkungen von Verfassungsgerichten umgeht. Im abschließenden Teil wird die Rolle von Verfassungsgerichten als Akteure im strukturellen Kopplungsbereich von Recht und Politik analysiert.

The chapter proposes to conceptualise constitutional courts as self-referentially operating, autopoietic systems. From a perspective of social systems theory, constitutional courts are autopoietic organisations that are capable of generating sufficient cognitive complexity to regulate themselves. This is demonstrated in relation to three aspects of constitutional court practice: autonomy in docket control, recursive decision-making and the development of consequentialist legal doctrine that makes reflexive use of information concerning the court's own impact. In the final section, the chapter assesses the role of autopoietic constitutional courts operating in the zone of structural coupling between the legal and the political system.

I. Introduction

This chapter develops hypotheses for a new understanding of constitutional courts from a modern systems theory perspective. It argues that constitutional courts are autopoietic social systems guided by an underlying concern for autonomy and self-reproduction. Modern constitutional courts are autopoietic organisations that constitute themselves in reflexive processes resulting from operative complexities developed in these courts. The core operation is the recursive decision-making process that constitutes constitutional courts. By developing sufficient operative complexity constitutional courts become capable of using their self-created standards and principles as well as information about their impacts for the purposes of decision-making.

In conceptualising constitutional courts in this way, the chapter makes creative use of autopoietic organisation theory as developed by Niklas Luhmann (Luhmann 2000). This theory views organisations as communication systems that

are capable of reproducing themselves through their own decision-making. Analysing constitutional courts as autopoietic organisation systems deviates from traditional socio-legal theories in certain crucial aspects. Whereas older systems theoretical organisation theories operate with input-output models that presuppose direct links between the environment and internal organisational processes, autopoietic organisation theories privilege, in contrast, internal processes and assume only indirect links between environment and internal processes. These internal processes are intricately related to autopoietic decision-making in which decisions derive from previous decisions and serve as a source for future decision-making. With regard to these constitutive communication processes, aspects of self-restraint, precedence and autonomy acquire a new functional meaning.

Self-referential organisations such as societal function systems operate with a system-specific code. Control over the application of the code guarantees autonomy. Prominent examples of binary codes are 'government/opposition' in the political system and 'legal/illegal' in the legal system. In relation to a constitutional court, the relevant code may be identified as 'constitutionally relevant/irrelevant' (Gawron and Rogowski 2007: Ch. 6).

II. Autopoietic adjudication in constitutional courts

In light of these systems theoretical assumptions, three aspects are of particular relevance in assessing constitutional courts as autopoietic organisations. These aspects are:

- caseload management,
- recursive decision-making, and
- consequentialist legal argumentation (external referencing) as an element of self-referential judicial decision-making.

The chapter refers to judicial practices in two constitutional courts, the German Federal Constitutional Court and the U.S. Supreme Court, to discuss these three dimensions. In the following sections these examples are used to demonstrate basic assumptions about constitutional courts as autopoietic organisations. However, the claim advanced here is that the aspects analysed in this chapter hold true not just for the two courts under examination but for the adjudication of developed constitutional courts in general.

DOI: http://dx.doi.org/10.5771/9783845247892

1. Caseload management

Constitutional courts like the German Federal Constitutional Court and the U.S. Supreme Court[1] are dependent on, and thus limited by, their case input. Although both courts allow citizens to approach them directly, in form of a writ of certiorari and a constitutional complaint, they deal with only a few cases handled in the judicial system of their countries. 'The U.S. Supreme Court only hears a fraction of one percent of all cases brought to federal and state courts' (Baum 2013: 11). This applies also to the Federal Constitutional Court, notwithstanding the fact that this court, unlike the U.S. Supreme Court, is specifically intended to be an expert court for constitutional conflicts and thus expressing the higher degree of differentiation and of 'specializing the courts' (Baum 2011) within the German judicial system.

The tasks, functions and responsibilities of constitutional courts differ according to the type of party – private individuals, institutions of the political system or other courts – that invokes them. The Federal Constitutional Court functions *de facto*, although not *de jure*, as both a court of final appeal and as arbiter in political disputes (Gawron and Rogowski 2007: Ch. 4). Requests by lower courts for preliminary rulings on the constitutionality of norms (Article 100 of the Basic Law) and constitutional complaints brought by individuals to challenge judicial decisions integrate the Federal Constitutional Court into the judicial system. On the other hand, the abstract norm control cases, institutional disputes between state organs, and other procedures for resolving political conflicts establish the Federal Constitutional Court as an arbiter in the political arena. Although public opinion tends to notice the court almost exclusively in relation to political conflict resolution, the bulk of the daily business of the court is related, in fact, to less grandiose matters addressed in constitutional complaints.

In order to enable autopoiesis, constitutional courts have to become independent of fluctuations in their caseload and control their docket (Fontana 2011). Both courts under comparison have a high degree of autonomy in this respect. The U.S. Supreme Court has entire control over its caseload. It can refuse petitions and claims using its own criteria of admittance.

The German Federal Constitutional Court operates with a procedural filter system that prevents cases that can be handled by specialised courts from admission to the constitutional court (Heun 2002). Although, in theory, the Federal Constitutional Court has to decide each case that is brought to it, in practice, it has developed a wide discretion to refuse to hear cases. There are certain cases

1 For a discussion why the US Supreme Court must be regarded not simply as the highest court in the system of US federal courts but as a constitutional court comparable to constitutional courts in other countries see Rogowski and Gawron 2002.

related to disputes between specific, constitutionally recognised state bodies that the court has to decide properly, but these only amount to a few cases per year. In the vast majority of cases, constitutional complaints brought by individuals, the Federal Constitutional Court has achieved autonomy in its decision to refuse to hear the case largely through measures of its own, subsequently endorsed by statute. Refusals of complaints are now the result of summary decisions made by chambers consisting of only three judges.[2]

If we look at judicial statistics we see the enormous filter effect of these chambers. According to the official statistics of the Federal Constitutional Court, the total number of cases that reached the court between 1951 and end of 2011 was 195,018. Of these 185,172 were constitutional complaints. This amounted to 96.5 per cent of the total caseload. Over 97 per cent of the constitutional complaints were refused a hearing, which amounts to a grant rate of less than 3 per cent.

We find similar figures for the U.S. Supreme Court, in particular in relation to writs of certiorari. The U.S. Supreme Court denies the vast majority of these petitions. Empirical research reports that the grant rate of the overall docket is below 1 per cent (Thompson and Wachtell 2009). In 2010, for example, the court received almost 8,000 petitions and granted certiorari and full consideration to only 90 of those petitions (Baum 2013: 86).

From a systems theoretical perspective, a number of aspects can be highlighted in relation to caseload management at constitutional courts. The court uses a code of constitutionally relevant/irrelevant in disposing of the vast majority of cases. It has either by law − as in the United States − or in practice − as in Germany − immense discretion in disposing of cases. This discretion can be used for agenda setting (Grossman and Epp 2002) or to fish for cases in constitutional areas where the constitutional court thinks that its legal doctrine needs to be developed through constitutional interpretation. There are, of course, also the usual organisational reasons. Constitutional courts are simply incapable of handling enormous numbers of constitutional complaints in full hearings. By disposing of the bulk of constitutional complaints in summarily fashion, they relieve themselves of the tasks of listening to evidence produced in hearings, deliberation in plena with all judges present and producing lengthy decisions involving extended legal reasoning.

The donkey work in handling (and disposing of) petitions or constitutional complaints is carried out by the law clerks or legal assistants working for the judges at the constitutional court. At the Federal Constitutional Court the legal

2 On the history and practice of handling constitutional complaints at the Federal Constitutional Court see Blankenburg 2002.

DOI: http://dx.doi.org/10.5771/9783845247892

assistants are, in general, trained judges for whom a stint at the constitutional court means improving their chances of advancement in their judicial careers (Wieland 2002: 200). In the United States, they are young recruits from leading law schools, 'who matriculate at top law schools, secure prestigious clerkships with prominent judges and justices, and embark on careers of power and reward' (Ward and Weiden 2006: 55).

The criteria for selecting judicially experienced legal assistants at the Federal Constitutional Court reveal system reasons linked to autopoietic requirements of sustaining contingency and increasing variety at the court. In contrast, the stronger politicisation of the U.S. Supreme Court is reflected in the fact that ideology seems to be an important selection criterion: 'Perhaps our most important finding is the general ideological congruence between justices and clerks' (Ward and Weiden 2006: 107). However, this factor is also important in relation to the practice of decision-making at the Supreme Court.

Furthermore, the provision of judges by other courts to support decision-making at the Federal Constitutional Court is a strong mechanism of structural coupling between the Federal Constitutional Court and the remainder of the German judicial system. In contrast, being a law clerk at the U.S. Supreme Court helps in gaining a reputation that is useful for a career in a leading Washington or New York law firm. Through their law clerks the Supreme Court justices establish personal links with the legal profession in general.

In summary, disposal practices reveal that autopoietic constitutional courts require considerable discretion in order to achieve a skilful filtering of constitutionally relevant cases. From research on the U.S. Supreme Court, it is known that the exercise of such autonomy, i.e. active use of internal filtering mechanisms, leads to uneven effects on parties preparing for litigation and mobilising the law (Provine 1980: especially Ch.4). However, as social subsystems, constitutional courts have to balance these effects against their own concerns for the autonomy of the system in the interest of self-reproduction.

2. Recursive decision-making

In considering constitutional courts as autopoietic systems, the central aspect is the nature of their decision-making practices. They are self-referential and at their core recursive operations referring to previous decisions as a basis for present and future decision-making. Self-referential decision-making enables constitutional courts to become self-reproductive or autopoietic as an organisation.

We find evidence of autopoietic decision-making in the legal doctrine of the Federal Constitutional Court and the U.S. Supreme Court which increasingly consists of principles established through their own decision-making. The open

character of constitutional norms leaves space for interpretation and the constitutional courts are offered wide discretion in establishing legal argumentative figures. These self-produced argumentative figures, norms and principles do not only constitute 'leading opinions' or *obiter dicta* for further implementation by other legal actors or courts (Tushnet 2006; Gawron and Rogowski 2007: Ch. 6) but have binding effects as precedent or as normative points of reference for future decisions and discussions at the constitutional court itself. Thus, the autonomy of constitutional courts is ultimately constituted by this self-referential decision-making.

Like other judicial decisions, constitutional court decisions are characterised by a dual structure. The decision addresses the parties to the case in a specific way and, at the same time, establishes the position of the court on the policy and legal doctrinal issues (Baum 2013: Ch. 4). There may be certain evidence that oral argument, for example, has an influence on policy choices made by justices of the U.S. Supreme Court (Johnson 2004). However, as regards autonomy in decision-making and the autopoiesis of the constitutional court as a legal subsystem, the ability of the constitutional court to retain control over its decisions through legal doctrine becomes crucial. The function of legal doctrine and legal argumentation is not only to archive judicial opinions but to preserve them in such a form that they can become opportunities for self-reference (Luhmann 1995 and 2004: Ch. 8).

Self-reference should not be understood as a deterministic process. It means simply that the system as such requires the possibility to refer to its previous decision-making both in current and future decision-making. Self-reference can be described as the search for stability in a turbulent environment. The possibility for self-reference is constitutive of a court's autonomy in decision-making.

Autopoietic systems are operationally closed but cognitively open. The notion of operational closure means that the system itself decides, according to its own criteria, whether a particular communication falls within its purview (Luhmann 2004: Ch. 2). As long as this operational closure is guaranteed the system can be cognitively open and can act on any issue proposed. Operational closure and cognitive openness ensure the system's self-reproduction. An autopoietic system relies solely on internally produced elements for its reproduction. In an autopoietic system, self-reference is no longer an arbitrary reference to the history of the system but creates the basis for its reproduction.

Operational closure and cognitive openness can be observed in the operations of constitutional courts. Operational closure is the basic mechanism used in case selection. If the reasons for the refusal to hear a case are disclosed (and this is not always the case), they usually refer to the court's previously established line of reasoning. The Federal Constitutional Court, for example, is quite explicit in rejecting cases on the ground that the issue has already been decided by the court

DOI: http://dx.doi.org/10.5771/9783845247892

and thus no further need exists for constitutional clarification. The criterion used in case selection is, in general, the question whether the doctrinal basis of constitutional court decision-making can be improved by hearing the case. For the constitutional court as a system the request to resolve the actual dispute, which generated the case, remains secondary to its autopoietic concern.

Even in situations of direct involvement in conflicts that originate in the political system, constitutional courts are ultimately guided by their autopoietic needs. This can be seen when constitutional courts arbitrate between state institutions in a situation which requires them to engage in some form of balancing of interests. However, the ability to arbitrate in highly controversial political cases presupposes autonomy and independence from the interests of the conflicting parties. Thus, the court cannot limit itself simply to noting the expectations of the parties and proposing what might just be acceptable to both of them. The court has to ensure that arbitration is an integral part of judicial decision-making. For the sake of consistency, the constitutional court must insist on the uniformity of its decision-making and, thus, reconcile its function as arbitrator with its function as an independent judiciary. Thus, also in arbitration cases the recursive style of decision-making prevails over conspicuous interest balancing. Were it act otherwise, the constitutional court would abdicate control over its autopoiesis. In this manner, the constitutional court maintains its status, its position and its functions with respect to future arbitrations.

From an autopoietic perspective, the general principles which are commonly used to characterise the cautious tendencies in the decision-making of constitutional courts acquire new meaning. Autopoietic theory explains both the ‘political question’ and ‘judicial self-restraint’ doctrines as self-protective mechanisms and not as impositions by the political system to limit the power of the constitutional court to engage in judicial policy making. These mechanisms were invented by constitutional courts in order to maintain control over their involvement in hazardous cases.

3. Consequentialist decision-making and implementation

Constitutional courts operate within society. According to modern social systems theory of society not only organisations such as constitutional courts but also most other advanced social systems operate on an autopoietic basis and, on that basis, develop complex relations with other social systems. Direct steering of one system by another is virtually impossible and regulation is only successful to the extent that it is accompanied by self-regulation. Thus, constitutional courts are only successful in having their decisions implemented if the regulated social system responds with self-regulation.

Because the addressees of decisions and the implementation agents acting on behalf of constitutional courts form particularly diffuse groups, constitutional courts are required to develop differentiated steering mechanisms in order to exercise control over implementation processes. In previous research on the impact of the Federal Constitutional Court (Gawron and Rogowski 2007, in particular Ch. 2) five implementation arenas were distinguished: (1) the legislature; (2) other courts; (3) public administrations; (4) associations, political parties and other collective interests; and (5) private actors, companies and citizens. The Federal Constitutional Court has developed several procedural instruments with which it can flexibly influence and react to divergent implementation conditions in each arena. For example, in relation to the legislature, the Federal Constitutional Court has invented so-called judicial orders (*Gesetzgebungsaufträge*), which are designed to exercise pressure and steer the legislature and to guarantee proper implementation of Federal Constitutional Court decisions by the German legislature. However, a closer look at judicial orders reveals that they were only effective because there were successful responses in self-regulatory processes within the German political system which led to a rationalisation of legislative procedures. The outcome of this structural coupling of regulatory processes was the juridification and bureaucratisation of legislative drafting (see Gawron and Rogowski 2007: Ch. 5).

From an implementation research perspective, judicial self-restraint can be explained as the anticipation of implementation difficulties by the courts. Judicial policy making, like other regulatory efforts, may indeed encounter Gunther Teubner's regulatory trilemma (Teubner 1984): the attempted regulation is either ineffective, i.e. the regulated system does not respond to the regulatory effort, or the autonomy of the regulated system is destroyed as a result of legalisation or juridification, or, vice versa, the autonomy of the regulating system, i.e., the legal system, respectively the judicial system, is destroyed due to politicisation or capture.[3] In order to avoid the problems identified by the trilemma, the regulating system has to become reflexive and find indirect ways of influencing the regulated system that are compatible with its mechanisms of self-regulation and do not undermine the autonomy of the regulated system.

The fact that constitutional court decisions take account of problems of implementation seems to lead to the paradoxical result that the autonomy of the addressees of decisions and implementing agents and not the autonomy of the courts is the decisive factor both in case management and judicial decision-making. However, this paradox is more apparent than real because feedback effects do not constrain the autopoiesis of constitutional courts as long as the

3 On the regulatory trilemma see Teubner 1984.

DOI: http://dx.doi.org/10.5771/9783845247892

courts can exercise control in deciding which feedback effects lead to adaptation and reversal of decision-making. Furthermore, advanced constitutional courts are capable of developing a type of legal doctrine that addresses legal and social consequences of its own decision-making. Such consequentialist legal doctrine operates with reflexive law that requires both an understanding of judicial limits and the conditions of social environments in which the courts operate (Teubner 1995).

Luhmann has warned against too much confidence in reflexive law and consequentialist legal doctrine (Luhmann 1974 and 1992). Courts in his orthodox autopoietic view are not capable of reflecting on or engaging with their consumers without encountering paradoxes. Courts are dependent on externalising problems that their decision-making may create. There are clear limits, in his view, to the extent to which courts can engage in reflexive law making. And these limits result from their autopoietic needs.

However, constitutional courts are usually aware of the dangers of overstretching consequentialist argumentation. They tend to concentrate on a limited range of legal issues in order to maintain internal consistency. In doing so, they strengthen their self-referential decision-making. At the same time, consequentialist decision-making is recognised as a response outside the court and contributes to the establishment of more or less stable patterns of contact with other social subsystems which allow influence to be exerted cautiously. This system of relations is characterised by mutual recognition of the needs of self-reproduction of both the constitutional court and other social systems. This mutual recognition constitutes the condition for constitutional court decisions to achieve acceptance and trigger compliance.

III. Constitutional courts and structural coupling

The virtue of the autopoietic perspective is its radical inward turn in analysing constitutional courts. It focuses the analysis of constitutional adjudication on internal organisational processes and replaces the idea of constitutions as frames for political processes with a functional view emphasising the different perspectives on constitutions in the different function systems. From this viewpoint, consequentialist decision-making is an internal reconstruction within the legal system of external events in other social systems for the purpose of self-reproduction.

However, in Luhmann's theory of society there is a further way of analysing constitutional adjudication and this is related to the capacity of constitutions to link social systems. Luhmann has proposed that constitutions should be viewed as mechanisms of structural coupling between the legal and the political system.

Constitutional courts operate in a zone which generates irritations between these two function systems of society that have internal consequences for both. Thus, constitutional courts are neither simply courts interacting with other courts in the judicial system nor merely political organisations competing with other political institutions.

Implications of this location for constitutional courts as autopoietic organisations will be discussed in the second part below. As an introduction to this societal assessment of constitutional adjudication, Luhmann's approach may be contrasted with alternative systems theory accounts of judicial adjudication. A critique of the limits of traditional systems theory provides the background for an assessment of Luhmann's theory of the structural coupling of law and politics as the specific zone in which constitutional courts operate.

1. Is the constitution a system?

Adrian Vermeule's *The System of the Constitution* may be taken as an example of a non-autopoietic systems theory account. Like many traditional approaches in systems theory it operates with a low-key definition of a system as something that has 'emergent properties that differ from the properties of its components' (Vermeule 2011: 3). If at all, this definition of systems is derived from complexity theory (Webb 2012) and the theoretical tradition Vermeule is really interested in is not social systems theory as developed in social science[4] but law and economics. The model for constitutional decision-making Vermeule has in mind is a version of rational choice theory based on the theorem of the 'invisible hand' that, according to Adam Smith, regulates the market.

What this approach to constitutional adjudication tries to explain is why judges on a constitutional court, or indeed any other collegial court, decide in a way that reflects 'the court as a whole' and not their personal biases. It portrays judging as a 'collective enterprise' that generates system effects. Vermeule demonstrates what system effects in constitutional adjudication mean with reference to the example of 'principled consequentialism', a concern in judging with 'long-run results for the legal system' (Vermeule 2011: 136). This corroborates to a certain extent the view of autopoietic organisation theory that self-referential decision-making is constitutive for constitutional courts.

4 In fact Vermeule is quite dismissive of social systems theory. He does not engage with Luhmann and it is doubtful that he has studied him in detail because Luhmann's theory is for him 'difficult to cash out in analytically precise or pragmatically relevant fashion' (Vermeule 2011: 181, footnote 3).

DOI: http://dx.doi.org/10.5771/9783845247892

Despite claiming to be sociological, Vermeule's law and economics and rational choice bias leads to questionable methodological assumptions about constitutional courts. In his approach constitutional courts are collective actors that can be studied by looking at intended or unintended consequences of individual behaviour. His analysis crucially lacks a foundation in comparative and historical accounts of constitutional courts which would allow him an assessment of the differences in the meaning of the constitution in the legal and political system and how this is constitutive for the operation of constitutional courts.

Furthermore, talking of the constitution as a system is, at best, misleading. For social systems theory, law and politics are systems and not the constitution. The two examples invoked by Vermeule, namely checks and balances between the legislature, the executive and the judiciary (separation of powers) and selection of judges (Vermeule 2011: Chs. 2 and 4) describe constitutional rules adopted in the political system. Their impact on constitutional adjudication depends on the capacity of constitutional courts to operate as autopoietic organisations. And vice versa constitutional interpretation has an impact on politics to the degree that judicial pronouncements have a binding effect on political processes. In any event, constitutional interpretation as practised by the U.S. Supreme Court develops 'systemic effects' because it serves as a substitute for constitutional amendments, which are difficult to achieve through politics in the United States (Tushnet 2006).

2. Constitutional adjudication and structural coupling

Luhmann's theory of structural coupling provides an alternative conceptualisation of constitutional adjudication and the constitution. In Luhmann's theoretical account of modern society the role of constitutional courts differs in the function systems of law and politics. Luhmann's theory of structural coupling operates with a number of clear analytical distinctions that are crucial for this analysis.

First, law and politics have to be understood as separate function systems that are each guided by self-reference and a concern for self-reproduction. They operate with separate codes and create environments for each other. The constitution has a different meaning in the political system in comparison to the legal system (Luhmann 1990: 184-201 and Nobles and Schiff 2013: 191-3). For the legal system constitutions and in particular constitutionally guaranteed fundamental rights are important means to support the development of autonomous social spheres in society and protect them from political interference (Luhmann 1965 and King and Thornhill 2003: 116-7).

Second, constitutions are mechanisms of structural coupling that bind the two independent function systems of law and politics. They are the product of evolu-

tionary processes in which the two systems develop their own understandings and practices in dealing with constitutions. They were invented as mechanisms of structural coupling in the eighteenth century precisely because of the complete differentiation of law and politics that generates the need to find new ways of linking the two function systems (Luhmann 1990: 179 f. and Thornhill 2011). 'A constitution is the paradox that brings together law and politics precisely by keeping them separate (namely, by allowing both law and politics to restrict the influence on each other)' (Philippopoulos-Mihalopoulos 2009: 143).

Third, as organisations, constitutional courts are at the same time independent and linked in special ways to the legal and the political system. In his sociology of organisation, Luhmann compares the independence of constitutional courts with that of central banks (Luhmann 2000: 398 ff.). Central banks like constitutional courts are in the paradoxical situation of being linked to and independent of the political system. Problems that derive from linkage in the form of structural coupling have to be translated internally in the decision-making of these organisations. Both develop reflexive ways of recognising the needs of the political system by developing their own non-democratic policies. Furthermore they develop ways of dealing with their own competences ('auto-competence') by deciding on the extent of their competences in internal organisational decision-making processes.

There are of course external pressures on constitutional courts that result from their specific location in the zone of structural coupling between law and politics. The U.S. Supreme Court has endured many attempts at external control by politics launched through direct regulatory interventions in the form of bills or statutes. There have been continuous efforts by Congress to restrain the court with 'court-curbing bills'. Tom Clark has identified almost 900 of such bills that were introduced between 1877 and 2008, whereby the largest number, amounting to a third of all bills, aimed at the composition of the court (Clark 2011: 37, Table 2-1). In the majority of cases these were efforts by conservative politicians who were dissatisfied with the independence of the court. But this analysis should not overlook the fact that in *Marbury* v *Madison* the U.S. Supreme Court decided that it has the power to declare legislation unconstitutional and annul it, which is the prime example for Luhmann of 'auto-competence' of a constitutional court (Luhmann 1990: 399).

Luhmann was particularly concerned with internal developments in constitutional adjudication resulting from new forms of structural coupling of law and politics. These are related to policy areas in which each system 'takes a detour via the inclusion of the environment in the system' (Luhmann 2004: 412). The problem he had in mind is related to the efforts involved in controlling an ever-expanding welfare state and the ensuing legal problems. He detected a 'structural

DOI: http://dx.doi.org/10.5771/9783845247892

drift' in constitutional adjudication resulting in the dissolution of firm legal doctrine (Luhmann 2000: 398 ff.).

In modern society constitutional courts also have to realise that the basis for their jurisdiction, the public law notion of a national constitution, is under challenge. These challenges are twofold. They derive from global processes of constitutionalisation related to emerging orders in international and supranational law, including the global expansion of judicial power and an increasing judicialisation of international politics (Tate and Vallinder 1995) and from processes of societal constitutionalisation (Teubner 2012). In order to cope with these processes, constitutional courts have to engage not only in consequentialist deliberations but open up and engage in comparative and international deliberations that include interaction with their counterparts in other countries as well as with other judicial or quasi-judicial bodies. Autopoietic constitutional courts have no choice but to become reflexive in realising their involvement in the 'global community of courts' (Slaughter 2003), and assess their role and impact on these processes.

Bibliography

Baum, Lawrence (2011) Specializing the Courts, Chicago/London.

Baum, Lawrence (2013) The Supreme Court, 11th edition, Los Angeles and London.

Blankenburg, Erhard (2002) 'Mobilization of the Federal Constitutional Court', in: Rogowski, Ralf/Gawron, Thomas (eds.) Constitutional Courts in Comparison. The U.S. Supreme Court and the German Federal Constitutional Court, New York/Oxford: 157−72.

Clark, Tom S. (2011) The Limits of Judicial Independence, New York.

Fontana, David (2011) 'Docket Control and the success of constitutional courts', in: Ginsburg, Tom and Dixon, Rosalind (eds.), Comparative Constitutional Law, Cheltenham: 624−41.

Gawron, Thomas/Rogowski, Ralf (2007) Die Wirkung des Bundesverfassungsgerichts. Rechtssoziologische Analysen, Baden-Baden.

Grossman, Joel B./Epp, Charles R. (2002) 'Agenda Formation on the Policy Actice U.S. Supreme Court', in: Rogowski Ralf/ Gawron, Thomas (eds.) Constitutional Courts in Comparison. The U.S. Supreme Court and the German Federal Constitutional Court, New York/Oxford: 103−56.

Heun, Werner (2002) 'Access to the German Federal Constitutional Court', in Rogowski, Ralf/ Gawron, Thomas (eds.) Constitutional Courts in Comparison. The U.S. Supreme Court and the German Federal Constitutional Court, New York/Oxford: 125−56.

Johnson, Timothy R. (2004) Oral Arguments and Decision Making on the United States Supreme Court, Albany.

King, Michael/Thornhill, Chris (2003) Niklas Luhmann's Theory of Politics and Law, Basingstoke/New York.

Luhmann, Niklas (1965) Grundrechte als Institution. Ein Beitrag zur politischen Soziologie, Berlin.

Luhmann, Niklas (1974) Rechtssystem und Rechtsdogmatik, Stuttgart.

Luhmann, Niklas (1990) ‘Verfassung als evolutionäre Errungenschaft’, in: Rechtshistorisches Journal, Vol. 9: 176−220.

Luhmann, Niklas (1992) ‘Some Problems with Reflexive Law’, in: Teubner, Gunther/Febbrajo, Alberto (eds.), State, Law and Economy as Autopoietic Systems. Regulation and autonomy in a new perspective, Milano: 389−415.

Luhmann, Niklas (1995) ‘Legal Argumentation: An Analysis of its Form’, Modern Law Review, Vol. 58 (3): 285−98.

Luhmann, Niklas (2000) Organisation und Entscheidung, Opladen.

Luhmann, Niklas (2004) Law as a Social System, Oxford.

Nobles, Richard/ Schiff, David (2013) Observing Law Through Systems Theory, Oxford/Portland.

Philippopoulos-Mihalopoulos, Andreas (2009) Niklas Luhmann: Law, Justice, Society, Abingdon.

Provine, Doris M. (1980) Case Selection in the United States Supreme Court, Chicago/London.

Rogowski, Ralf/ Gawron, Thomas (2002) ‘Constitutional Litigation as Dispute Processing: Comparing the U.S. Supreme Court and the German Federal Constitutional Court’, in Rogowski, Ralf/ Gawron, Thomas (eds.), Constitutional Courts in Comparison. The U.S. Supreme Court and the German Federal Constitutional Court, New York/Oxford: 1−21.

Slaughter, Anne-Marie (2003), ‘A global community of courts’, Harvard International Law Journal, Vol. 44 (1): 191−219.

Tate, C. Neal/ Vallinder, Torbjorn (1995) ‘The Global Expansion of Judicial Power: The Judicialization of Politics’, in: Tate, C. Neal/ Vallinder, Torbjorn (eds.), The Global Expansion of Judicial Power, New York: 1−12.

Teubner, Gunther (1984) ‘Das regulatorische Trilemma. Zur Diskussion um postinterventionistische Rechtsmodelle’, Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno, Vol. 13: 109−49.

Teubner, Gunther (ed.) (1995) Entscheidungsfolgen als Rechtsgründe. Folgenorientiertes Argumentieren in rechtsvergleichender Sicht, Baden-Baden.

Teubner, Gunther (2012) Constitutional Fragments: Societal Constitutionalism and Globalization, Oxford.

Thompson, David C./ Wachtell, Melanie (2009) ‘An Empirical Analysis of Supreme Court Certiorari Petition Procedures’, George Mason University Law Review, Vol. 16: 237−302.

Thornhill, Chris (2011) A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective, Cambridge.

Tushnet, Mark (2006) ‘The United States: Eclecticism in the Service of Pragmatism’, in: Goldsworthy, Jeffrey (ed.), Interpreting constitutions. A comparative study, New York: 7−54.

Vermeule, Adrian (2011) The System of the Constitution, New York.

Ward, Artemus/ Weiden David L. (2006) Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court, New York/London.

Webb, Thomas E. (2012) Book Review of Adrain Vermeule, The System of the Constitution, The Modern Law Review, Vol. 75(6): 1182−8.

Wieland, Joachim (2002) ‘The Role of Legal Assistants at the German Federal Constitutional Court’, in: Rogowski, Ralf/ Gawron, Thomas (eds.) Constitutional Courts in Comparison. The U.S. Supreme Court and the German Federal Constitutional Court, New York/Oxford: 197−207.

DOI: http://dx.doi.org/10.5771/9783845247892