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The legislator's strategic toolkit. The systemic construction of the New World Order

Edited by Natalia Brasil Dib and Sara Petroccia

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Gli strumenti strategico-sistemici per la modellizzazione delle politiche e la legiferazione

Les outils stratégiques et systémiques pour la modélisation des politiques et le processus législatif

The Strategic Systemic Toolkit for Policy Modelling and Lawmaking

*Natalia Brasil Dib, Emilia Ferone, Sara Petroccia**

Riassunto

Il presente saggio vuole rispondere alla seguente domanda: cos'è una Costituzione? Sappiamo che essa costituisce la legge più importante di uno Stato, nella sua accezione tradizionalmente fornita dal comune senso politico del sistema legale nazionale. Tuttavia, gli stati nazionali hanno inteso le costituzioni in senso verticale (Pitasi) sia esso dall'alto che dal basso (Grundnorm). Ad un primo sguardo, nella migliore tradizione, sembra essere verticale, essa costituisce la cima, il punto più alto, non la base. Tuttavia, oggi questo potrebbe costituire un problema dato che si sono verificati in tutto il mondo slittamenti normativi in termini di globalizzazione del diritto e orizzontalizzazione delle costituzioni. Pertanto, in questo lavoro ne analizzeremo alcuni.

Résumé

Ce texte se consacre à la question suivante : qu'est-ce qu'une Constitution ? Nous savons que c'est la loi la plus importante, dans l'acception traditionnelle et politique commune du système légal national. Toutefois, que l'on parte du bas ou du haut (Grundnorm), les États Nationaux conçoivent les constitutions verticalement (Pitasi). Au premier abord, l'apparence est que ce qui est vertical est le haut, dans la meilleure tradition, et non le bas. Ce pourrait être un problème de nos jours car des changements ont eu lieu, en termes de mondialisation et d'horizontalisation des constitutions sur la planète, et nous allons dès à présent en analyser quelques cas.

Abstract

This paper is focused on the question what is a Constitution? We know it is the most important law of a traditionally meant by political common sense national legal system of course. Nevertheless, from the top or from the bottom (Grundnorm), National states meant constitutions vertically (Pitasi). It seems at first glance to be vertical in the best tradition, is the top, not the bottom. Nevertheless it might be a problem nowadays because some changes happened in terms of law globalization and horizontalization of constitutions on the planet and, here, we are going to analyze some of them.

Key words: constitution; strategic systemic toolkit; policy modelling; lawmaking.

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1. Law as a social system.

This paper focuses on the three fundamental sciences of law and their application in the global societies: general theory of law, focused on validity, philosophy of law, focused on justice and sociology of law, focused on efficacy or efficiency. We started introducing some key concepts of the systemic way of thinking the social system, where every system has a set we can call the code and the program. (Pitasi: 2017a). A code is a kind of door opening and door closing. The program, in turn, is the entire building, more in details, according to Luhmann's semantics (Luhmann, 1995), the code of the legal system is a recht/unrecht - consistent/not

consistent with the law and the program is the valid law, so we are going to introduce an important aspect to make sense of our systems of how systems works in Luhmann's theory (Luhmann, 1990, 2012, 2013). In Luhmann's theory there are not things like subsystems. One of the key points of Luhmann's theory is that there are systems and every system has a specific code and program. Therefore, the challenge is that they are not integrated just like it was in Parsons' Theory (Parsons, 1951), the LIGA pattern: latency, integration, goal setting, and adaptation. Each of them in Parsons's System was a function, a subsystem of the general system. We can represent LIGA in this way:

L	I
G	A

For Parsons we can shape an economical subsystem or pattern variable, which is an adaptation function. However, to be precise, in Parsons also the medical biological subsystem plays the adaptation functions, so we have two systems in the same quadrant. On the other side, integration function is played by the subsystem of law in Parsons. Latency is the function played by the cultural subsystem at large including education, culture, traditions, religion, family, which is all in one according to Parsons's concept of system under the agency for educating people all around the world. It finds them turning into norms, legal norms. It was Parsons greatest illusion that the latency system could be the present position of the integration system. The fourth and final subsystemic function is a goal setting, which is played by politics in Parsons and some way we can find the subsystems in Parsons and one of the most important paradigm shift in this system's theory was

that Parsons thought that the system as a whole composed from different parts/subsystems/pattern variables. Therefore, that some way the parts composed the unity of everything. The whole and there was a very consistent coherent system made of some parts and the sum of the parts should be turned into consistency, or coherency of the system. It means that Parson' system was coherent and thus not complex. The standard values of the society was and is a core concept, which draws a distinction between Parsons' and Luhmann's theory.

For Parsons' theory, a system exists according to latency. Latency creates what we could define as a kind of cultural integration, not a legal integration: the family, the church, the media, the group of peers, it is common sense of course. The key concept, which is the big difference between Luhmann and Parsons, is that according to Parsons culture, in the broadest meaning of the word of

culture, is the glue, the fundamental pillar of a system of a social system. Culture integrates the system. According to Luhmann (1993) culture does not exist systemically, but the more the Constitution is focus on culture, the more we have social conflicts. The more the Constitution is shaped by complexity the less we will have conflicts in Society or system. Parsons's system theory is and was very important for social sciences, but nobody would consider Parson's theory as a complex system theory. Complexity will enter later on in the debate. Parsons seldom used the word culture, but mostly used latency. In practice, the matter is culture because latency is the sum of all values we learn at church in our family, at school and our groups of peers while playing. Luhmann said this legion of a system is wrong because of a very simple reason. For example, first of all he takes for granted the way we are grown-up and our family, the way we are grown up at church, grown up at school, and among our peers with our peers, he is exactly, exactly the same value pattern. So there are no contradictions between the model we receive and our family and at school, but if we already have our mother who is politically left wing and our father who is right wing, the idea of integrated culture is gone.

For Parsons, systems are systems or rather subsystems are subsystems. Basically, integration and cooperation among the systems are taken for granted among the subsystem. Taking for granted as the presupposition of the existence of the system. If the subsystems do not work together or integrate, the system implodes. The general system implodes, it's not by chance that probably Parsons most important book publish and 1951 in the US was titled "The Social System" while the 1995 Luhmann book which shapes the pillars of his theory is titled

"Social Systems" and the difference between these titles there is a universe, it's just not that it sounded better. Social systems means that there are many and each system has its own code and program. What does it mean subsystems are part of the general system? For Luhmann, systems are differentiated: law, politics, religion, economics, science, education, and so on and each system is some way blind and deaf with the others. By chance, we will analyze what Luhmann calls a "structural coupling" and how each system has its own life: its own selection criteria and its own perspective. In addition, there is no way for example that politics can use (a metaphor) the glasses of law (Luhmann: 2004). Law could never be used as the glasses of science, the glasses means the code of the program.

Therefore, some way they can try to cooperate, sometimes they can try to couple. Nevertheless, on the other side, they are very different systems and they will never be able to put on the other system's shoes. How did we get to here? Law, as we told, has a code, is recht/unrecht. The program is the value below. Politics has a different code: government/opposition. The program is the reproduction of a political power, power in brief, nothing else. Just power. If a society is democratic or not, it is not a problem of the political system. So the political system is a system that generates power. The legal system produces value of laws. In the very old-fashioned version, there are politics, people meet, discuss, debate about political ideas, or proposals, and then they gradually turn into law and it is also the reason why, for example, Luhmann is very skeptical about social and political movements as a tool for social change. What happens in practice is that social movements in public spaces, complaining, manifesting, are

“environment” and noise, not system and meaningful communication. They just make noise, and according to the legal system, politics is noise, nothing else, there is no creation of legally valid meaning through politics.

Complex System Theory and most of the system theories about complexity are relatively recent. We can start thinking about System's theory in the 1940s, after the end of the Second World War. If we speak about strong System's Theory, means starting talking about the changes in science and technology after the Second World War. The link between Law & Society is much older than systems theory. However, one System Theory can change the perspective of the past. According to Luhmann (1993), culture does not exist systemically. When he said that was all the system for example, law, economics, and politics, which are just some of them. They in some way exploded, so they separated. More or less 1980, there was about 4,000 years of law and society linked, before this great explosion. Probably, many categories, we use, that we still use in everyday life, which depend on old theories, which common sense now considers science. That was science many years ago too.

When Luhmann speaks about there is no culture, there is no latency, there is no religion, that does not mean there is no religion in the world, but there is no religion making the system homogenous. Now let's go back to the matter of possible adjacent (Kaufmann, 2000) and the matter that leads to a great misunderstanding that reality exists. The police, crime, politics, political parties, buildings, cars, trains, bikes, are all things that do not exist in nature; they are constructions: law is exactly a construction. The point is, does it work or not? There is no real existence of laws and in the same time, the impact of law is extremely concrete and

real. It means that when we start talking about lawmaking, the most elementary way to make laws, and an ineffective way, was to turn socially shared values of a certain community into laws. Our social habits, our traditions are, we get the values and turn them into laws. Normally, it is the beginning of all wars. Because the more we focus on values, the more we focus on "us" and "them" and the border between our side and the other side becomes neater and neater. There is no foundation to date in law. Very often people do not work this way, because they still think like Parsons that law is the near translation to legal shapes of the social values. The more complexity increases, the more it is no longer true. When we want to design a law, and we think that we are shaping a kind of 18th camel, we have to consider some design principles. A principle is something different from a value. A value is something moral and principles are required just to design, for example, the law (Pitasi: 2014). There are some principles that are very useful for lawmaking, for designing and constructing laws, which we will deal with. The first one is the Malthus trap. He was a priest in a church and he began to write letters to other priests, saying when poor people come to our church for food, especially their children, let them starve. He shaped what is called the Malthus principle. It is a mathematical relationship between demographic increase and the food production. The food production rate should be higher and faster than the demographic rate. As he died before the industrial revolution, he could not know the changes that the revolution could provide. The point was that Malthus was right and wrong, at the same time. Malthus was wrong, because the prophecy of the trap did not happen. However, he was right because his mathematical relationship between demography and food was

right. Nevertheless, he was wrong because it was not a two variables relationship. It was three variable relationship, he could not see yet. The third variable was technology. We cannot consider laws of development, so legal shapes to empower and enforce development if we do not consider the three variable relationships among population/demography, food, and technology. In a law, we cannot be too much idealistic. We can make a general purpose, but if we write things, which are promises we cannot keep, it is worse. Because, it is a certain point that we get between law and politics increases. Moreover, politics starts to ignore law. Then corruption starts to become social practice.

The second one is Pareto's principle, the mathematical application and political vision, a concentration model, not a distribution model. What Pareto demonstrated was that concentration works, distribution does not. (Pitasi: 2003, 2008). Therefore, for short, concentration is technically speaking a kind of vicious cycle as a vicious loop. At a certain point, we may need redistribution. However, redistribution is a secondary function in the process. In the beginning, the concentration is what allows it to generate resources, also considering the principles of the composed interest in investment. The more we distribute, the more we destroy the composed interest. When we design a law, for example, and it is a kind of law economic principle, and we start setting distribution first, we are not making a moral mistake or a technical mistake. However, what was increasing? The more we increase wealth, the more our standards grow. There is a mathematical point, which connects growth, development, and distribution. If we distribute too early, we destroy capital. If we distribute too late, we have people killing each other. It is a more mathematical matter than a moral

matter. The deepest criticism, independent from corruption, was that he began distributing when the cycle was fueling.

2. Constructing and designing systems.

Scholars of different disciplines affirm that we are already in the third world war. The third world war is not based on traditional weapons. It is not based on an army with uniforms, is based on currencies. Currency wars are probably less violence from an external view, but in terms of social/political impact, they are extremely violent and powerful. These currently wars have always existed, there is nothing new. However, since the fall of the Berlin Wall, they began the most standard battlefield to discuss and decide any kind of political social matter. According to some authors, we are going to work out four possible scenarios.

The first scenario is the Multiple Reserve Currency Mode. The multiple reserve currency mode is what we experienced through the decades up to now. Many scholars are skeptical about that.

A second possible scenario is Chaos. It would be one of the worst, which would mean for everyone. We would also understand how small our planet is. Because there would be no part of the planet not impacted by this.

The third scenario is a more reductive scenario. Is the return of the Golden Rule Standard. In practice, it is just like playing monopoly.

The fourth scenario, which is the one we are the most supportive, but not in just being a fan of it, it the so-called Special Drawing Rights, SDR and it is a much more recent one. The SDR is mostly there to solve the currency wars by setting the maximum and the minimum monetary expansion. Which, turns into a paradox, because eventually, it will not disappear, but get to a higher level. Which is one of

the worst political fights. People, as public opinion, are complaining that sovereignty is disappearing from the Union (Pitasi: 2018b). Environmental noise produced i. e. they think that Germans, Spanish, French and if we think of the nationalist scale, we are wrong because our sensation that our state is losing sovereignty. On the other side, it is not disappearing, but moving to a higher rank. Because as a EU member, we/they are European, and it is a simple thing that most politicians in Europe do not understand. They do not understand the evolution of European sovereignty from the nation/state rank to the global rank. And it is probably something taken for granted.

In 1999, we still had the old currency inside the common area of the Union. However, in three years we had no national currencies. In three years was possible to use both, during a crazy time. In practice, the national currencies disappeared and it was very consistent with what Triffin wrote already in the 1960s. Triffin was a Belgian economist. However, afterwards, he became the first consultant and manager for the World Bank. Then, he invented the ECU which was the first European currency. It was an attempt to invent an official European currency. Because the ECU was a mutual currency adopted by banks. However, there was no store that would accept a payment in ECU. It was a little strange currency for us. This experiment failed and then the Euro was invented. What was the trick? It was to demonstrate what is now called Triffin's Dilemma (1960), which was not named by Triffin: the unlinear relationship between monetary expansion and sovereignty. The more monetary expansion, the lower number of currency and institutional actors turning into bigger and bigger global players. If there is one currency on the planet, this kind of war would be over. It would not

be just the dollar or euro, but it would be something completely new. It would be the average of everything. If the dollar or euro became the currency, it would be a case of financial imperialism. What was the matter of Triffin? In practice, he states that since the 1960s, our plan there were no countries, which might afford to be independent. They may have an independent government, of course, but he defends that no country could self-sustain. Nowhere has enough resources by itself, in practice, there is no country that can be independent. It may be sovereign, but that does not mean that we have resources. Since then, it began to become a clear that we were in the age of interdependence and convergence.

Many parts of the world, the prophecy of Triffin is taken for granted. Most recent studies spoke about four different possible scenarios, but probably SDR is considered the most likely, it is a kind of mathematical relationship, not just a political opinion. Every time we write a law, Triffin's dilemma could be just around the corner. Of course, to write and draft a law, it is not enough. We also have to let this law be accepted. Sometimes the debate if it is at the higher level, among the top politicians, top policymakers, and the general population is not much involved. Other times there may be a more popular mastermind behind it. Imagine a scenario demonstrating where we have to shape a law. This law interferes for some traditions, so we have stakeholders against we, and we can lose our law. Law is one of the possible kinds of our social innovation. Therefore, we have to deal with that problem of social innovation. How would we word our proposal to turn into law in order to be accepted? The speed of the cycle depends on the cycle itself divided the Roger's cycle by Williamson costs (Pitasi: 2014)

The slower the something, the slower the cycle. If know the debate about the ideal proposal for a job, and the matter of flexibility at work.

In add there is an institutional mobility/modeling. It could be split between historical modeling, sociological institutional modeling and economical institutional modeling. Nevertheless, institutional modeling is still considered a kind of the social economical political development of the country, and so institutions are the kind of solidification, shaping of a kind of historical process. It is not necessarily spontaneous, because we have more influential factors impacting this kind of process, but still institutionalism sees the state as a kind of historical and evolution of the social connections of behaviors.

There are many organizations, which are still featured this way, and this is not what are not usually called international. Any kind of international treaty is an example. In the past, also some international societies, the society for nations for example. The problem in this case is that we have a kind of bad balance between function and sovereignty. For example, CECA was a *neofunctional* construction, but it was inspired by international agreements among France, Germany and so on. The current EU is turning/switching into a *supernational* model. That is why the UK has no negotiation power, this power belongs to the international agreements, not to the *supernational* agreements. It is *supernational* because it is one step further in the downgrade of the sovereign states. International and Institutional models depend on social mobilization. Politicians take masses into the squares and for better or for worse. Social mobilization is a typical feature of these models. The other three *neofunctionalism* constructivism, federalism, and *supernational* model are focused on

social learning. Of course, it can has social learning in the other two and some slight social mobilization in these three. Social mobilization is much stronger in international and institutional process models and social learning is stronger in the other three. The difference is that with social learning.

Social learning focuses on emotions. These are typical patterns of social mobilization. They focus on the emotional life of people, basically on fear. They are very effective tools for strong political fight. Nevertheless, usually, they are not super effective for lawmaking. Social learning instead is not so effective in political terms that involve masses and manifestations, but it is rather effective for lawmaking. The more citizens are skilled and competent, the more they can be early adopters of the law. The more emotional, the weaker they are. The emotional impact on masses is what social science has known well. The scope of the action is to discharge energy, but not to create a new law or something, just discharging. That is why most people, most the specialists in policymaking say of course social mobilization is a tool, one of the strategies we can use to control masses. Actually, from this point of view, we have a more democratic society, if we want a more democratic society, then social learning is a better investment than social mobility. Social learning is often named participant democracy - everyone is free to say anything about it, regardless about how much know about it. Even those who know nothing, are able to tell their opinions.

3. Citizenship and development.

Citizenship and development is a complex and complicated matter. Between the term complex and complicated, there is a big gap. Complex scenarios are always to be preferred to complicated scenarios

(Pitasi: 2018a). This does not mean they are better mathematically or morally, but mathematically more effective. How do we measure development?

The problem is that more rights and democracy are something what we cannot decide about it. Many theorists are founded on assumptions about that. So, if we go to the heart of the theorem, we get to the core of human rights.

The problem is not to be for or against human rights. The paradox of human rights is that it was not the intention of the lawmakers of the UN declaration. Today, human rights is not becoming a chance to increase complexity, but a source of more complications. The good lawmaker who wants to have open marriage rights would never write specific articles for each type of couple, but maintain it more complex by saying it is based solely on a couple. Very simple to guarantee social human rights about marriage and we do not make things complicated. If we write the rights in a complicated way, in practice we destroy the function of law (Pitasi: 2013).

To be effective in more human rights, the paradox is the word more, the more we have, the less we have in reality. Imagine democracy, human rights, and GDP, each one has a binary code with a variety of scenarios. If we start, we prefer the scenario that we have democracy up, human rights up, and GDP down, which is one of the scenarios. In other scenario, we could have low democracy, low human rights, but a lot of money. Why would we prefer one scenario to the other? There are many combinations and ways they are linked and we try to explain how citizenship evolves. The first function is cosmopolitanism, the second is science intensity, the third is entrepreneurship, and fourth is social relations capacity.

What we might consider is how to turn this concept into indexes, as example Cosmopolitanism is from the combination and the cultural tradition. Cultural tradition means they are very rigid sequences for better or worse. The combinations mean these sequences are very soft and flexible. The more complicated, the less variety is able to manage and the less complexity is able to manage. The more loose citizenship is, the other way. The concept is the more we put rigid standards on traditions, the more selective, the more complicated it all becomes. The same is for science intensity. More educated people about science, the more able to demonstrate the increase in education corresponds to an increase in job, profession, wealth, and income. Giving more opportunities. The growth of cosmopolitanism, is the same too. It is one step about the expansion of citizenship. The citizens are able to apply what they know through science intensity, so the patents and intellectual property matters grow (Pitasi: 2015).

The third one is what we call entrepreneurial index. A lobby influenced a new law to check the validity of the train ticket for a certain amount of time and needed proof on a certain time and date. Moreover, in the internet ticket, it already were assigned a leaving and arriving time. However, they wanted to make these machines available in every station because the producer of the machine was one company that made an agreement with the Italian government. The matter of those machines were an agreement between the state and the company.

What Hypercitizenship (Pitasi: 2012) is, which is the expansion of citizenship on a global scale is something we can measure with the improvement or decrease of these four dimensions. We can have them all zeros, all ones, or just in the middle for these.

The more hyper we have the higher the sovereignty, which means higher the speed of this one. In this sense, we have no development without *leverage*. It is not enough to say that development is an increase of *leverage*, but it is an essential part.

The paradox of human rights is that sometimes the *leverage*, sometimes they don't. The more human rights leverage, the more positive theory, and probably the most effective link between development and citizenship (Pitasi: 2017a, 2017b, 2017c).

4. World order policy modelling and lawmaking.

The power of the theory, like complexity theory, is that we have a theoretical framework, which we can use almost about every topic, with principles and not values. Sometimes we speak about socialist societies for example. Sometimes we speak about federal societies or organizations. Sometimes we speak about communistic. What we usually consider is that they are a kind of random result of blind evolution, in history.

What we seldom consider is that of course we cannot plan anything 100% in life, especially in social sciences. On the other side, the planning side, is important, the planning side. The Marshal plan after WWII was an example, the people like Stalin were pros at these things. Yugoslavia was in some way shaped, a melting pot of all people of different groups, and so, Yugoslavia became the Western front of the Eastern world.

However, the more the world became complex, the more the turbulence in economy and military situations became apparent, the more that scholars they need a type of "engineering toolkit" to redesign the planet, or part of the planet, every time there is a problem. Law people, which is more interesting

for we, are among this legal, political, and social scientists and should learn a toolkit to design and redesign the planet, an exaggeration, but we understand. The EU came out of two big world wars with a lot of people dying and destruction. In 1951 the signature of CECA took place, CECA in which some European countries decided to share the energy resources - any kind of energy. If steel, energy, and carbon are together, they no longer belong to each country. Then it is more difficult to go back to war.

If we do not have each country having its own energy, then everyone controls the energy of everyone. The EU is artificial. It is not historical. Nowadays we are discussing to let Turkey or Morocco to enter the EU, but these do not correspond historically to Europe. If we think in terms of exchanges we could have Brazil and Canada entering the EU, because the EU would not just represent Europe. It is not designed to solve some problems. So, the word here is design. Yes, there are some politics and economics and they are called emergent phenomenon, but on the other side, do not have the illusion that the emergence is enough to shape the scenarios. Most of the scenarios are shaped by designers, lawmakers, who work in this way - *neofunctionalism*, constructivist, pragmatists, and systemic. In the tradition of the common law, mostly an American tradition, for example a judge is also a lawmaker, not the highest rank, but also a lawmaker. In the Roman civil tradition the judge is essentially a lawmaker. Therefore, in the first case, a judge can change the law with their decision. In the second case, a judge more or less demonstrates what a law decider has decided above. When we speak about civil law, commercial law, bankrupt law, we are just talking about operational law. When we are talking about

theory and philosophy of law, we are talking about the sciences of law. The sciences of law could appear as irrelevant for law operators because in their everyday professional life, they do not impact very much at the first glance. Nevertheless, they do affect, because operators are not lawmakers but operators deal with the design of the lawmakers. A model like we talk about is *neofunctionalism* and means that we are focused on functions and not on values. We are focused when we design a system on the key function and key principles in our system and we will have a great increase of variety.

Functionalism means the focus is on the function, it is not a view of who is better or worse, the problem is to have evolution of society, which decreases the risk of self-implosion. Constructivist means that it is something we design. As we remind the 18th camel, we are the problem setter and problem solver and in the sense that choosing the highest solution to fly high from a wider perspective and be able to turn around the little obstacles.

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