

# EVOLUTIONARY FORMS OF LAW AND SOCIAL SYSTEMS

Pasquale Luigi DI VIGGIANO\*

**ABSTRACT:** *Modern law is a social system, functionally differentiated as a result of a social evolution, which is embedded in its processes of variation, selection and stabilization, and generated through mechanisms enabled by law itself. Modern positive law, therefore, is based on a decision, and has value by virtue of a decision (that is contingent and changeable). The acquisitions of the social systems theory of Luhmann describe how the stabilization of normative expectations, that is to say the stabilization of uncertainty, establishes the mechanism of production of modern law.*

**KEYWORDS:** *Expectations, Evolution of the Law, Luhmann, Social Systems, Sociology of Law, Social Theory.*

**JEL CLASSIFICATION:** *K00, K10.*

## 1. INTRODUCTION

In the current sociological reflection, sociology of law assumes a notable relevance while different threads of sociological thinking assign a prominent role to this discipline<sup>1</sup>.

During the sixties, the same Parsons stated that, in his opinion, the entire sociology originated from sociology of law<sup>2</sup>. This statement can be understood in different ways: it could mean that the reflection about society finds its centrality in the reflection about law; or it could mean that law is the social system that keeps up the structure of society, in whatever way it's conceived; or, again, it could mean that in society the law system has the function of order, whose analysis, for the peculiarity that it characterizes, can constitute a relevant indicator for the observation of the entire system of action.

---

\* PhD in Scienze Giuridiche. Part of Centro di Studi sul Rischio (CSR) and of the scientific Council of the Laboratory of e-Government (LEG) - Università del Salento, Lecce, ITALY.

<sup>1</sup> The tendency of moving the current history of law near juridical sociology (sociology of law) produces positions also distant among them and, nevertheless, in the opinion of who writes doesn't write from teleological shadings of history. See Mario Losano (by), *Storia contemporanea del diritto e sociologia giuridica*, Franco Angeli, Milano, 1997.

<sup>2</sup> See also Raffaele De Giorgi, *L'azione come artefatto storico-evolutivo*, in *Temi di filosofia del diritto*, Pensa Multimedia, Lecce, 2006, p. 109: "Sociology was born as sociology of law. An idea of Parsons that we consider sharable. An idea that finds an easy empirical verification if the character of society's descriptions that sociology has offered from the middle of the XIX century up to now is observed and if the problem to which these descriptions should find an answer are considered".

In the paper<sup>3</sup> we are presenting here, we will try to explore the extent of Parsons' statement and at the same time, in contradiction with this, we'll try to void it proving that the specific sense, in which it can be understood, makes it invalid.

Our research deals with the field of acquisitions, and how this concept changed by the analysis of the juridical system in the theory of social systems of Niklas Luhmann. This analysis disconcerts the categories of classical juridical thought starting from its genetic presuppositions, describing bluntly, unlike the old-European tradition, structure and functions of the current positive law.

The fundamental premise of modern juridical sciences is: law is the rule-making structure of action, law is secure orientation on the base of which behaviour can be decided. Law is order, prohibition, permission. In this sense law is essentially a norm, a norm of acting. In one of the three deontic modalities law addresses recipients<sup>4</sup>. In an essay of many years ago an Italian philosopher of law, important member of the classical tradition of juridical sciences, Norberto Bobbio, stated that law doesn't give advices, but basically expresses or denies orders in one of the deontic modalities<sup>5</sup>.

Based on this presupposition, juridical sciences have been debating for a long time, at times in vain, about the nature of command<sup>6</sup>. And before that, at the beginning of modern age, there has been a general discussion on the nature of the subject who actually formulates the command. In every case law is referring to subjects and regulates their behaviour.

Either it is referring to decision-making subjects, as Scandinavian realism<sup>7</sup> sustains, or it is abstractly referring to impersonal subjects, or it is referring to the last addressee of the precept<sup>8</sup>, the juridical rule always complies with will and determines this will in a direct and indirect way.

This presupposition has caused a lot of problems to classical and modern juridical thought. They are both theoretical and practical. Innumerable have been the attempts that theorists of law<sup>9</sup>, or even philosophers of law<sup>10</sup> have been making to find a solution,

Juridical fictions were produced like the will of the legislator, the idea of the validity of law, the foundation of the juridical norm on nature, the common good, the interests of the community, the notion of imputation of law<sup>11</sup> and others.

<sup>3</sup>The present contribution summarizes the first part of a more extensive work, result of the research activity conducted in range of PhD research course in Scienze Giuridiche of the Department of Studi giuridici of Università del Salento, Italy.

<sup>4</sup>So the theory of law from Bentham onwards up to Kelsen and the Scandinavian legal realism.

<sup>5</sup>See Norberto Bobbio, *Comandi e consigli*, Riv. Trim. "Dir. Proc. Civ.", 1961, XV, pp. 369-390; Norberto Bobbio, *Teoria generale del diritto*, Ed. G. Giappichelli, Torino, 1993; Amedeo Gustavo Conte, *Saggio sulla completezza degli ordinamenti giuridici*, Giappichelli, Torino, 1962.

<sup>6</sup>See Nicholas Rescher, *The Logic of Commands*, Routledge & Kegan, London, 1964.

<sup>7</sup>See Alf Ross, *On Law and justice*, Stevens, London 1958. Alf Ross is considered the greatest representative of Scandinavian realism which basis is the conceiving of law as a collective psychic phenomena while norms are seen as social beliefs that, so far important as influential, are always only the result of imagination, even though rationally justified. The particular contribution of Ross to the general theory of law comes probably from having been a student of Hans Kelsen and from being therefore particularly alert to the modern theory of language's analysis but, unlike Kelsen, denies that norm propositions (Norm Sätze) are affirmations.

<sup>8</sup>So the normativism of August Thon, *Rechtsnorm und Subjektives Recht. Untersuchungen zur Allgemeine Rechtslehre*, Weimar, 1878.

<sup>9</sup>See Herbert Lionel Adolphus Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961.

<sup>10</sup>See Hans Kelsen, *Reine Rechtslehre*, Mohr, Tübingen, 2008.

<sup>11</sup>See Raffaele De Giorgi, *Azione e imputazione. Semantica e critica di un principio nel diritto penale*, Milella, Lecce, 1984.

Max Weber, though, despite his education according to the German juridical sciences tradition, stained already the juridical idea of validity<sup>12</sup>. He connected the idea of validity to the idea of belief and stabilisation of organizations, juridical organization included, with the factual behaviour of the addressees of norms. Fundamentally, he originated the fundament of validity out of factual attitudes or behaviour. Yet, the categorical construction of Weber's sociology still connected norm to action, action to sense and therefore to will.

Weber, though, had gained new principles to the sociological reflection that could have been very productive if sociological reflection would have freed itself from the presupposition of natural law, according to which law produces order in society because it produces order among actions and it achieves this goal by orientating will and, therefore, by orientating the consequent behaviour. This analysis characterizes, despite some differences, the evolution of sociological thought on law from the middle of last century up to now. The contribution that empirical sociology has given to the analysis of law appears to be a contribution of knowledge of law effectiveness.

Even in the diversity of concretely applied methods, sociology of law has always been proceeding based on the indemonstrable and tautological presupposition according to which, given a normative system, it's possible to evaluate the level of effectiveness by assessing the behaviour of the subjects that constitute their addressees<sup>13</sup>.

Actually it's not possible to determine any certain connection between factual behaviour and the normative system as it's not possible to determine the level of motivation that this system produces relative to effective behaviours. Motives refer to motives that refer to motives<sup>14</sup>.

The limits of sociological law analysis reproduce the limits of the classical juridical categories. They reproduce, in particular, the instability of the presupposition according to which the juridical norm addresses the will of subjects in the practice of acting. But those limits assail also the general idea of normativity and of its function of order in the structure of society. One often finds reflections about the relation between law and society as if law could be outside of society, previous to it or inside it.

The systems theory of Niklas Luhmann opens totally different perspectives. Once set to zero the subjectivist and voluntaristic presupposition of juridical thought, after having described its collocation in the philosophical tradition of old-Europe, the analysis of the systems theory describes the function of law as a structure of generalized expectations in a congruent way. At this level of advanced abstraction, it describes the ways in which the very selectiveness of the juridical structure is being practised and asserted in social communication.

This perspective allows the systemic analysis to describe the forms of the differentiation of law in the general evolution of society and to observe law without having to use the very fictions of juridical science<sup>15</sup>.

<sup>12</sup> Max Weber, *Wirtschaft und Gesellschaft*, Mohr, Tübingen, 1920, pp. 28 ss..

<sup>13</sup> See for all, Renato Treves, *Sociologia del diritto*, Einaudi, Torino, 1996.

<sup>14</sup> So Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, Mohr, Tübingen, 1922.

<sup>15</sup> See Niklas Luhmann, *Ausdifferenzierung des Rechts - Beiträge zur Rechtssoziologie und Rechtstheorie*, Suhrkamp, Frankfurt am Main, 1999.

At this point we suggest to indicate briefly the acquisitions of the theory of systems and the analytical possibilities made available by it. These explain the revolutionary function of the process of positivization of law in modern society; they describe the mechanism of reduction of social complexity that characterizes the system of law and draw attention to the analysis of expectations that structures juridical orientation.

Through this analysis it becomes clear that what has been stabilized as law, are expectations and expectations of expectations. The paradox of positivity consists in this: it is the normativization of both the stability of the system of expectations and their variability through the stabilization of the variability of law<sup>16</sup>. In other words, the function of law doesn't consist in the fact that juridical normativity constitutes a stable and secure orientation for action, but it consists in the fact that it is a contingent normativity which can be continuously different.

Though it may seem paradoxical, law produces only insecurity: the function of order to be achieved through law is given by the very stabilization of this insecurity. To describe some evolutionary processes put into effects in law we will follow the instances of the systems theory of Niklas Luhmann and the latest acquisitions delineated by the researchers of the "Centro di Studi sul Rischio" (Study Centre of Risk) of the University of Salento<sup>17</sup>.

## 2. SEMANTICS OF EVOLUTION<sup>18</sup>

In the 19<sup>th</sup> century the concept of evolution had constituted the formula to overcome the static utilitarianism of Bentham or of J. Mills, through which the passage from the simple conjectural history of enlightenment towards a representation of a strictly naturalistic history became possible.

Today we consider the principle of evolution as a conceptual instrument able to shatter the so much criticized barriers of the structural-functionalist systems theory<sup>19</sup> and capable of reaching a higher complexity in the scientific exhibition of the system of society through the acquisition of the dimension of time.

This process of renewal of the evolution principle could have a significant meaning to juridical science and could create the possibility to orientate sociology of law again towards a universal theory of society since it can again be referred to law, intended as a structure of the society system.

<sup>16</sup> See Raffaele De Giorgi, *Scienza del diritto e legittimazione*, De Donato, Bari, 1979; Luigi Pannarale, *Il diritto e le aspettative*, Edizioni Scientifiche Italiane, Napoli, 1988.

<sup>17</sup> The Centro di Studi sul Rischio (Study Centre of Risk) was founded at Università del Salento in 1990 on a project elaborated by Prof. Niklas Luhmann of Universität di Bielefeld (R.F.T.) and by Prof. Raffaele De Giorgi of Università del Salento, who is the current director. The Centre's aim is the analysis and the study of risk in complex societies. It offers the observation and description through theoretic and empiric analysis, the ways according to which the factual acting can be conditional to decisions that produce bonds for the future since they were adopted in uncertain conditions.

<sup>18</sup> "Society is the result of evolution". For a sociological treatment of "Evoluzione" from the point of view of the theory of social systems, see Niklas Luhmann, Raffaele De Giorgi, *Teoria della società*, Franco Angeli, Milano, 1992, pp. 169-246; Claudio Baraldi, Giancarlo Corsi, Elena Esposito, voce *Evoluzione*, in *Luhmann in glossario*, Franco Angeli, Milano, 2002., pp. 112-117.

<sup>19</sup> This is the theory of Parsons. For a critical study of Parsons' work, with particular reference to his juridical contents, see Alberto Marinelli, *Struttura dell'ordine e funzione del diritto*, Franco Angeli, Milano, 1988.

Previously the classical sociology of law, from Marx to Weber, was linked to the typical concept of evolution of the 19<sup>th</sup> century which, collapsing, has dragged along the same sociology of law, that ever since is vegetating partly as sociological jurisprudence, partly as sociology of law without law. It is limited in its researches to fields that have to do with law, but that don't constitute law<sup>20</sup>.

In the new sociological theory of evolution some trends of thought have been clarified so it is obvious that we will not propose a sort of return to Spencer, and we will not suggest that the parallelism with the biological development is not sufficient, or that social evolution doesn't necessarily proceed in a mono-linear and continuous way, or, again, that regressions would be possible, or even presumable, for single societies. The real transformation doesn't consist in a correction of old methods, but is explained through singular acquisitions of guide-ideas of argumentation.

In modern thought on evolution, in fact, the fundamental idea of natural causation (causality) which was both condition of positive scientificity of theory and driving force of evolution, and which Spencer presented as a process whose results create a constellation of causes for the additional development in organic as well as in social systems, has been overthrown. Practically "... the causality can only be thought in relation to systems and is made possible and guided through the structure of systems and not through causal laws, in the sense of cause-effect correlations provided by the character of abstraction and necessity<sup>21</sup>.

It will be clear that, in this way, the relation between the structure of the system and evolution has become central, since it are the structures of the system that guide the evolution (as do the processes of learning), establishing at the same time a clear parallelism between evolution theory and learning theory.

The analysis of transformation processes, as indicated above, makes space for new possibilities to study the existing relation between law and the evolution of society, a relation that, for its specific features, can be considered symbiotic, problematic and unconvincing in its development. Today, the idea that evolution is only conceived as an increase of complexity seems to be inadequate to explain this same evolution, because the mechanism producing complexity appears to be far more complicated.

The possibility of evolution is based upon the difference between the complexity of the system and the complexity of the environment and the social systems, in transforming themselves, can therefore produce the possibility to increase their possibilities. Social systems can respond to this transformation by increasing their inner complexity, they are able to adapt themselves to the environment through growing indifference and isolation, but not necessarily.

To this perspective of exogenous evolution has to be added the corresponding perspective of endogenous evolution, and also this evolution is understandable through the theory of social systems. Therefore, the evolution of a system depends on the complexity of the environment, but also on its own complexity, that is its own inner differentiation.

<sup>20</sup> See Renato Treves, *Sociologia del diritto*, cit., for international references, as well as historical and cultural cross-references; See also Alberto Febbrajo, *Sociologia del diritto. Concetti e problemi*, Il Mulino, Bologna, 2009.

<sup>21</sup> Niklas Luhmann, *Ausdifferenzierung des Rechts*, cit., p. 37.

It is the satisfaction of three different functions within the system that makes the evolution possible, that is:

1. the production of a new kind of possibility inside the system, for the rest unchanged (VARIATION);
2. the selection of the usable possibilities and the exclusion of the unusable ones (SELECTION);
3. the stabilization of the possibilities usable within the structure of the system (STABILIZATION)<sup>22</sup>.

In order that the variation, the selection and the stabilization will be actualized inside the system, it is necessary to be in presence of a system that is interested, relatively to some of its distinguishable parts, in its motivations, in the information and in “the direct decisive casualness” of the environment, in order to acquire the capacity of producing important effects on small causes, while activating a process of reinforcement inside the effect<sup>23</sup>.

At this point we can underline that evolution is not a casual process immanent to the system, produced by a natural necessity or by a determining cause. It depends rather, in its measure, extent and universal time, on the degree in which the three functions of variation, selection and stabilization can be distinguished on a structural and on a procedural level, so that for an evolution theory it would be sufficient to locate the degree of presence of these three functions, on a structural and procedural level, in the various types of social systems.

All these mechanisms are observable and through observation it’s possible to notice a certain parallelism both in the evolution of organic systems (which functions are satisfied by 1) mutation, 2) surviving in “the struggle for existence”, 3) reproductive isolation) and in the evolution of psychic systems. Here ends our historical and conceptual excursus through the principle of evolution in general, since our intention is to study the issue in deep, only in relation to a particular structure of the social system: law.

### 3. VARIATION, SELECTION, STABILIZATION

It should be so that our hypothesis on evolution, applied to the social system of law, leads to the consideration that the mechanisms related to variety, selection and stabilization will have to be present in different forms, and in different phases of the evolution of law, and that, at the same time, law evolution sustains itself on the base of their separation and interdependence.

The development of law is connoted by fundamental motivations of extra-juridical character which are the expression of the size, the complexity and, especially, the functional differentiation of the single systems of the society, differentiation that stimulates the different normative projections, specified in an abstract way, through which transformations are produced emerging from the general development of society and assume the form of new problems for the law.

<sup>22</sup> Ivi, p. 40.

<sup>23</sup> See Walter Buckley, *Sociology and Modern Systems Theory*, Englewood Cliffs, N.Y., 1967, p. 47.

For what concerns the production of variety, we see how some significative processes for the understanding of the production of the very variety and its succeeding, become a selective process that stabilizes settlements of senses.

Typical for these evolutionary functions is the aspect that in a first moment it seems to be inappropriate and dysfunctional in decisive structures, but that, compared to the evolution, it can be functional. Normativity can be considered as the model of a behavioural expectation through which is indicated which of the expectations has to be maintained even in case of letdown. In that case, it is possible to intend these norms as stabilized expectations in a counterfactual way, resistant to letdowns and as such initially not ordered, neither in a natural, or in a systematic, or in a logical way. A quite elevated variety of normative individual and contrasting projections can manifest itself with an increase of reciprocal letdowns and juridical controversies. It will appear therefore as an irritation for the subjects concerned and as an extra load of work for the roles that deal with it. But this produces the possibility to choose while operating with decision-making instruments. At the same time an increase of possibilities occurs in relation to which law applies more abstract articulations or more efficient integrations.

Therefore, juridical conflicts produce the potential for a further evolution of law in dependence of the fact and provided that other evolution mechanisms function in a suitable way to the level of complexity, freed from an axiomatic law of continuous progress.

Also the way how to select<sup>24</sup> what law should be, changes with social development. The first archaic societies were characterized by a mechanism that generally assumed the character of struggle. Through these empiric processes they performed the selection of what actually law means to society, generally fit to individual or tribal assertiveness<sup>25</sup>.

The increasing complexity of society and the ever more accentuated differentiation and enhancement of merely normative perspectives require the preparation of more suitable and efficient selective mechanisms, subtracted from the momentary distribution of power, in order to maintain the level of achieved development. In ways that can be totally different in particular, systems of specific interaction are produced, the so-called procedures, with the particular task to provide binding functions.

The specific character of these procedures makes them time-limited social systems, and not only processes able to have a proper inner selective service. Through them the internal experience is mediated and evaluated according to pre-existing criteria, an experience about law which is instantaneous and disappointing to the parties concerned. Law itself, equipped with new chances of abstraction, becomes then a decision-making premise that acts as a norm for the procedure.

The stabilizing mechanism of law is, somehow, the consequence of the institutionalization of a clear-cut separation between varying factors and selectiveness of control; the form of law, therefore, is conserved and remains accessible as a sense, elaborated by processes of settlement.

Law becomes a decision-making programme applicable and controllable according to abstract criteria of validity. This transformation grows gradually through its procedural

<sup>24</sup> In this case we mean for selection the choice of surplus uncorrelated expectations which must be valid as law. See Niklas Luhmann, *Rechtssoziologie*, Westdeutscher Verlag, Köln-Opladen, 1983.

<sup>25</sup> See Bronislaw Malinowski, *Crime and Custom in Savage Society*, in Malinowski *Collected Works*, vol. III, Routledge, London, 2009.

activities. From representation of acquired power after conflict, law becomes a system of more or less systemized decisions, from which selections and a new kind of expectations can derive. The distinction between valid and not valid prescriptions substitutes the old distinction between allowed or good behaviour and between forbidden or bad behaviour.

Once set law in these terms, this leads to the renunciation of the use of physical power, of forms of self-representation of expectations and of their affirmation, to the withdrawal of dogmatic figures and of everything linked to the old conception of law because its validity is questioned and denied.

Without going further we can already state that “the production process of normative expectations acquires a higher variety and that it therefore gains the possibility, according to the situation and need, to imagine norms ever more unlikely”<sup>26</sup>.

The hinge of the product that we know as the juridical culture consists in a system of interaction set up by the procedure; its potential, supported by the complexity and the level of innovation depends on its own capacity of procedures. The dogmatic theory is a direct consequence of an already given conceptuality, compared to decisions.

#### 4. FROM EXPECTATIONS TO LAW

The sociology of law developed by N. Luhmann breaches the prevalent juridical and sociological conceptuality, opens new perspectives of reflections and creates unexplored research fields. We would like to draw the attention on the following: Luhmann crashes the “myth” of social facts by demonstrating that, what is meant by factuality, is a social reality placed on a high level of abstraction. Behaviour is only an obvious and final result of processes of selection and accusation<sup>27</sup>, enabled by social systems whose structures, in turn, are the result of the procedurally elaboration of the attributions of senses.

The classical sociology of law expressed its concern about norms and their efficacy. It interpreted law as a series of normative rules to control behaviour. Norms addressed to subjects control action. But in this way, sociology doesn’t succeed to explain the specificity of modern law and neither the difference between the various normative systems, on functional level. Sociology, therefore, considers to be facts what are social constructs, while taking as given what instead has to be explained. Sociology of law which uses the proper conceptuality of the social systems theory, perturbs basically the recruits that were stable starting points for classic sociology.

The construction provided by the philosophy of Luhmann allows not only to explain the functional capacity of modern law compared to other differentiated normative systems of modern society, but allows also to explain the same conceptual behaviour of sociology in the framework of semantics and of the reflective mechanisms that every social system develops to observe and describe oneself.

Acting doesn’t constitute, as Weber<sup>28</sup> thought, the fundamental object of sociology. It’s too concrete, and can be in contradiction with the required motivations used to justify it, lastly it can be coherently incoherent.

<sup>26</sup> Niklas Luhmann, *Ausdifferenzierung des Rechts*, cit..

<sup>27</sup> See Raffaele De Giorgi, *Azione e imputazione. Semantica e critica di un principio nel diritto penale*, cit..

<sup>28</sup> See Max Weber, *Wirtschaft und Gesellschaft*, cit..

On the other side, also rules which should orientate behaviour, can be changed. It's indeed this possibility that characterizes the rules of modern positive law. Neither can be made worth any appeal to values: every norm can be justified by virtue of a value and, as H. Kelsen<sup>29</sup> sustained, between values doesn't exist hierarchy.

So, if the concreteness of acting can't be neither controlled or conducted by the law, if social order can't be constituted by normative systems, and then, if in modern society between law and justice cannot exist a correlation, which was supposed to exist on a not yet advanced level of law differentiation, it's necessary to identify the functional specificity of law on a higher level of abstraction than the non-concrete-acting and their orientability.

Law is for Luhmann a social system in which the congruent generalization of normative expectations of behaviour is realized. The congruence<sup>30</sup> ensures the functionality of law on a social, temporal and material level. Generalization immunizes law against the risk of continuous problematization. Structured as a conditional programme, law guarantees only that a decision will be made: it is not clear which one.

The possibility of law legalizes the possibility of the transformation of the rules, it stabilizes, therefore, the capacity of learning by the system. The rule, instead, is meant to be unavailable to the learning.

The validity of the juridical norm, set by the act of decision that produces law, is temporalized, it depends therefore on the fact that no new decision interferes.

The "sociality" of law is not the result of an alleged relation between law and society, as if law could be collocated outside or inside society. The sociality of law is the result of the inevitability of the specific function of law in social communication.

For the theory of social systems, such a specificity consists in: that law uses normativity and cognition while referring to itself and stabilizing, in this way, both availability to learn and the unavailability to accept the different.

The great acquisition of modern law consists exactly in this reciprocal reference of normativity and cognition. Herein consists also its specific function of order. Regardless of contents (any event can be object of law), regardless of presumed forms of subjectivity (any aspect of subjectivity can be processed by law), regardless of values (any value can be stabilized in an opportunistic way to legitimize positive law): law is particularly sensitive to processes that constitute its structure. We are talking about processes which law produces and reproduces inside itself. Law reacts to the events of the world stabilizing its structure, which is producing law.

Scrambled by politics<sup>31</sup> law reacts producing law; in front of the shed tears for the redundancy of law, the juridical system reacts producing law.

It can be evident, at this point, that the specific function of modern law can only be explained if the specificity of the structure of the juridical systems is taken in consideration and if one proceeds simultaneously to the elimination of ambiguities, that were sedimented in this structure by what is called by Luhmann the old-European thought. Order and disorder are incomparable between each other.

---

<sup>29</sup> See Hans Kelsen, *Reine Rechtslehre*, cit..

<sup>30</sup> See Niklas Luhmann, *Rechtssoziologie*, cit..

<sup>31</sup> See Niklas Luhmann, *Politische Planung*, Westdeutscher Verlag, Köln-Opladen, 1994.

The order of society<sup>32</sup> isn't the order of action, but the order that constitutes the virtue of self-constitution of the possibility of social communication. In this way we can say that law realizes a structure of order<sup>33</sup>.

Using the concept of expectations Luhmann collocates the analysis of the function of law on a higher level of order compared to the level on which this function was collocated by the classical sociological thought. The system of expectations offers endless combinatorial possibilities and therefore outlines endless horizons of order, functionally equal among each other<sup>34</sup>.

We can't linger here on the most recent acquisitions performed by the theory of social systems in relation to law. The sociological analysis of law by Luhmann, under the influence of cybernetics of second order, has acquired new levels of complexity and higher analytic and descriptive possibilities. Here we tried to rebuild the first level of observation and of sociological description of the juridical system elaborated by Luhmann and by some experts of his theory of society, up to the middle of the last decade.

We had to present a complex conceptuality in a most synthetic way, a conceptuality that, as it crushes, and at the same time explains the old-European tradition, has to be, in turn, crushed and explained. The thought of Luhmann is particularly complex<sup>35</sup> wherefore it is not possible to present some aspects of it without proceeding to arbitrary reductions of its complexity. Justifying our path, we can say that we orientated the selection of our practiced conceptuality, bearing in mind the objectives we did put ahead: describing the evolution and the functional specificity of modern law. This specificity is given by the paradoxical and reciprocal references of cognition and normativity.

The epochal turning point, that the developments of technology, of modern science, of medicine, of political organization have brought to the modern society, raises new and complex problems to the law. In front of this complexity one resorts to moral. But moral itself is discredited in this way: moral, therefore, as it is not able to resolve problems inside itself, it cannot resolve problems within the juridical system.

The analysis of the social systems theory in reference to law proves that only law can resolve its own problems inside itself. An acquisition, that takes shape and contains the horizon of the present of contemporary society. What first was called moral, justice, liberty and what was necessary to enable immoral social practices, often unfair, for sure unavailable for liberty, has been surpassed in the contemporary society by forms of functional specification of social systems. Only within these forms action in contemporary society is possible, because only inside of these social communication is achievable.

<sup>32</sup> See Niklas Luhmann, *Wie ist Soziale Ordnung möglich?* in *Gesellschaftsstruktur und Semantik*, Suhrkamp, Frankfurt am Main, vol.II, 1981, pp. 195-285.

<sup>33</sup> See Alberto Marinelli, *Struttura dell'ordine e funzione del diritto*, cit.; for law as a technique of social order see Hans Kelsen, *Reine Rechtslehre*, cit. The classical political theory, from Hobbes onwards, considered law as a structure of order. Completely different was the point of view of C. Schmitt, (See Carl Schmitt, *Le categorie del politico*, Il Mulino, Bologna, 1972) which considered law as a norm, that is like a structure stabilizing the situation of normality.

<sup>34</sup> See Niklas Luhmann, *Soziologie als Theorie sozialer Systems*, in *Soziologische Aufklärung 1*, Westdeutscher Verlag, Köln-Opladen, 1970.

<sup>35</sup> The bibliography about Luhmann's thought is nearly wiped out, but for the knowledge of the theory of society and of concepts constituting it the reading of Luhmann's work for every original comparison is referred to. See, in particular, Niklas Luhmann, Raffaele De Giorgi, *Teoria della societf*, cit.

It's highly improbable that society is what it is and it's also highly improbable that there exists an order inside of it. Assuming this improbability explains the ways in which it gets transformed in possibility. It is the paradox of the contemporary society and through this paradox it's possible to build forms of complex and universal observation.

#### REFERENCES

- Alberto Febbrajo, *Sociologia del diritto. Concetti e problemi*, Il Mulino, Bologna, 2009
- Alberto Marinelli, *Struttura dell'ordine e funzione del diritto*, Franco Angeli, Milano, 1988
- Alf Ross, *On Law and justice*, Stevens, London 1958
- Amedeo Gustavo Conte, *Saggio sulla completezza degli ordinamenti giuridici*, Giappichelli, Torino, 1962
- August Thon, *Rechtsnorm und Subjektives Recht. Untersuchungen zur Allgemeine Rechtslehre*, Weimar, 1878
- Bronislaw Malinowski, *Crime and Custom in Savage Society*, in *Malinowski Collected Works*, vol. III, Routledge, London, 2009
- Carl Schmitt, *Le categorie del politico*, Il Mulino, Bologna, 1972 (edizione italiana)
- Claudio Baraldi, Giancarlo Corsi, Elena Esposito, *Luhmann in glossario*, Franco Angeli, Milano, 2002
- Hans Kelsen, *Reine Rechtslehre*, J.C.B. Mohr, Tübingen, 2008.
- Herbert Lionel Adolphus Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961
- Luigi Pannarale, *Il diritto e le aspettative*, Edizioni Scientifiche Italiane, Napoli, 1988
- Mario Losano (a cura di), *Storia contemporanea del diritto e sociologia giuridica*, Franco Angeli, Milano, 1997
- Max Weber, *Gesammelte Aufsätze zur Wissenschaftslehre*, Mohr, Tübingen 1922
- Max Weber, *Wirtschaft und Gesellschaft*, Mohr, Tübingen, 1920
- Nicholas Rescher, *The Logic of Commands*, Routledge & Kegan, London, 1964
- Niklas Luhmann, *Wie ist Soziale Ordnung möglich?* in *Gesellschaftsstruktur und Semantik*, Suhrkamp, Frankfurt am Main, vol. II, 1981, pp. 195-285
- Niklas Luhmann, *Soziologische Aufklärung 1*, Westdeutscher Verlag, Köln-Opladen, 1970
- Niklas Luhmann, *Ausdifferenzierung des Rechts - Beiträge zur Rechtssoziologie und Rechtstheorie*, Suhrkamp, Frankfurt am Main, 1999.
- Niklas Luhmann, Raffaele De Giorgi, *Teoria della società*, Franco Angeli, Milano, 1992
- Niklas Luhmann, *Rechtssoziologie*, Westdeutscher Verlag, Köln-Opladen, 1983
- Niklas Luhmann, *Politische Planung*, Westdeutscher Verlag, Köln-Opladen, 1994
- Norberto Bobbio, *Comandi e consigli*, Riv. Trim. "Dir. Proc. Civ.", 1961, XV, pp. 369-390
- Norberto Bobbio, *Teoria generale del diritto*, Ed. G. Giappichelli, Torino, 1993
- Raffaele De Giorgi, *Azione e imputazione. Semantica e critica di un principio nel diritto penale*, Milella, Lecce, 1984
- Raffaele De Giorgi, *Scienza del diritto e legittimazione*, De Donato, Bari, 1979
- Raffaele De Giorgi, *Temi di filosofia del diritto*, Pensa Multimedia, Lecce, 2006
- Renato Treves, *Sociologia del diritto*, Einaudi, Torino, 1996
- Walter Buckley, *Sociology and Modern Systems Theory*, Englewood Cliffs, N.Y., 1967.