

SLSA Annual Conference 2011

Theme: Systems, Complexity and Autopoiesis: Critical Perspectives and Applications

Convenor: Tom Webb

Panel 1

Dr Cedric Gilson (University of Westminster)

Dr Stephen Riley (Sheffield Hallam University)

Dr Annika Newnham (University of Portsmouth)

Panel 2

Prof David Schiff, and Prof Richard Nobles (Queen Mary College, London)

Dr Jen Hendry (University of Leeds)

Mr Tom Webb (Lancaster University)

Panel 3

Mr Carlos Herrera-Martin (University College London)

Mr Neil Lyons (Stetson University College of Law, Florida, USA)

Prof. Andreas Philippopoulos-Mihalopoulos (University of Westminster)

Panel 1

Chair: Tom Webb

'Illuminating the legal dilemmas of assisted dying. The clarity afforded by orthodox systems theory', Dr Cedric C. Gilson, Visiting Fellow, School of Law, University of Westminster

In English law, the Suicide Act 1961 prohibits rendering assistance in dying to a person, even at their behest. Societal debate and petitions to law reveal agitation for legal change, sometimes championed by medical ethics. Law resists pressure to amend the legislation, save for procedural clarifications. Viewed through orthodox Luhmannian systems theory, decriminalizing assistance in dying would involve transposing a social action from one side of the lawful/unlawful form to the other, which is to expect a great deal. The problem amplifies the very conditions of legal autopoiesis. How could transformations be effected in the way law communicates about assisted dying for the previously unlawful to be regarded lawful, without sacrificing its core values? Morals and ethics promulgate ideas pervasively

over assisted dying but what is their conceptual home? Does systems theory assign them a place or must they remain forever ethereal? Depending on the answer, what rôle would they have in the discourse and what prescriptive authority? Medicalization of assisted dying accords clinical medicine a rôle in end-of-life decisions but on what basis can it undertake this responsibility, as seen via systems perspectives? What nexus exists between the epistemological underpinning of medicine, its curative function and as an arbiter of desirable social action? And how is this 'society' that agitates for change identified? Functional differentiation creates a social order of constituent systems. So, which of them now can speak to law about assisted dying? And is law not also part of this social order, so must involve itself in its own reflections? The abstraction of systems theory illuminates issues germane to the central problem with brilliant clarity and permits their exploration without external contagion. It is offered methodologically as an *excursus* in orthodox systems theory that also disabuses some misconceptions about rôles and responsibilities in the central problem of assisted dying.

'Human Dignity and the Problem of Transcendence', Dr Stephen Riley, Senior Lecturer in Law, Sheffield Hallam University

This paper considers the extent to which human dignity, and its relationship with transcendence, is explicable within Luhmann's systems theory. Human dignity functions variously as a substantive right, a heuristic, a peremptory norm, and a *grundnorm*. Together, these functions serve to designate the individual - embodied and inviolable - as the ultimate determinant of change within law. Moreover, these functions invoke the transcendent: human dignity as *justice*, a reified *humanity*, and the *a-temporal* conditions of legality. While such appeals are unexceptional within normative legal discourse each depends in the context of human dignity on interplay between the embodied individual and a democratised idea of sovereignty. This interplay eludes analysis in terms of the temporal progress of human self-government, but is explicable in terms of law's privileging certain conceptions of human self-consciousness. In other words, when we afford importance to human dignity we commit ourselves to a view of law not solely as the management of change, but as a negotiation between the transcendent and immanent in human self-perception.

'Autopoietic theory and the current (mis)use of shared residence orders', Dr Annika Newnham, Lecturer in Law, University of Portsmouth

Shared residence, where children alternate between two separated parents' homes, is known to be demanding for all involved, but particularly for the children. Under Section 1 of the Children Act 1989, a court choosing a residence arrangement must have the child's best interests as its paramount consideration. It has, therefore, previously been thought that shared residence should remain limited to a small number of committed families. Instead, it is increasingly used in high conflict cases litigated under S.8 of the Children Act

1989. This paper uses autopoietic theory to explain why the case law has developed this way, and why this new strategy is unlikely to be successful.

An order, which was rejected as *prima facie* wrong prior to the 1989 Act, and was then for a long time held to require exceptional circumstances, is now made almost as a matter of routine, not only where it reflects the practical realities but also in circumstances that would more comfortably be labelled contact, in order to teach parents to cooperate.

This new understanding of shared residence has no support in the legislation or in empirical research. Instead, it has originated purely within law's circular chains of communication, as the result of a selective reinterpretation of knowledge from the child welfare sciences and a need to respond to pressure from the political subsystem; separated fatherhood has become a problem, which is perceived to require a legal solution.

This paper traces the interaction between the three autopoietic subsystems of law, child welfare science and politics, examines the influence that systems' internal perceptions of power have on these relationships and argues that since parents, too, use the processes of re-entry and redundancy to reinterpret or reject the legal subsystem's messages this use of the law is more likely to harm than to benefit children.

Panel 2

Chair: Andreas Philippopoulos-Mihalopoulos

'Legal pluralism and systems theory: a dialogue with Brian Tamanaha' Prof. Richard Nobles and Prof. David Schiff, Professors of Law, Queen Mary College, University of London,

In his work on legal pluralism and socio-legal studies, most notably his book 'A General Jurisprudence of Law and Society', Brian Tamanaha has questioned the usefulness of autopoietic theory. In this paper, we offer a reply to his criticisms and, in turn, question the usefulness of his own non-foundational approach to socio-legal studies and legal pluralism.

A Lack of Harmony? Comparative Law in light of Europeanisation – Some Internal Tensions, Dr Jen Hendry, Lecturer in Law, University of Leeds

Since the inception of the European project, comparative law has been inching from its arguable position on the periphery of the debate to a position far closer to the centre. The 'umbrella term' comparative law has, as a result, come under increased scrutiny as to both what its disciplinary identity is and what a comparative method involves. Contemporary comparative law (and legal studies) thus finds itself caught in a perpetual oscillation between characterisation as either a discipline or a method; indeed, these attempts to self-characterise appear to occupy much of its proponents' time.

At a time when superficial formalist studies of (specific features of) Member States' legal systems are falling out of vogue, and the ongoing processes of Europeanisation in the

European Union are serving to blur the lines between these legal systems to the (increased) detriment of a functionalist approach, this article takes the approach that both of these avenues of study are now of questionable utility. These are, of course, not new observations; nevertheless, this article will draw on the insights of systems theory to argue that the mere identification of sameness or alterity within the borders of the EU contributes little if these observations and discoveries cannot be *operationalised*, and that it is to *this* locus that the internal debate should shift.

Complexity and Autopoietic Theory – What Relation? A Public Law Perspective, Mr. Tom Webb, PhD Researcher, Lancaster University Law School

This paper contends that autopoiesis and complexity bear many familial resemblances, and as such one might be well-used to inform ideas in the other. These familial resemblances stem from connected origins in the natural sciences, their status as systems theories, and the overlap in technical terminology (even though the meanings of such terminology will vary). Of course, a familial resemblance does not mean that complexity and autopoiesis are the same, there are a number of ideological and structural differences between the two systems theories, and these will be drawn out in the discussion.

This paper, having made clear the general differences (ideologically and structurally) between autopoiesis and complexity seeks to outline the similarities and differences between complexity and autopoiesis through a discussion of Teubner's understanding of societal constitutionalism juxtaposed against key concepts of complexity.

Panel 3

Chair: Tom Webb

'The Mexican *Kelo*: the "Pascual Boing" Case', Carlos Herrera-Martin, PhD Researcher, University College London

In this paper I analyse a case where the Government of Mexico City decided to expropriate the area where the most important workers' cooperative in Mexico had its plant. This cooperative produces soft drinks and they had an ongoing conflict with the owner of the land where the plant was located. The cooperative tried to buy the land but the owner refused to sell at any price. In this case, when the factory looked set to be closed, the government decided that keeping this plant functioning was in the public interest and they decided to proceed with the acquisition of the land using their expropriation powers on the February 14 2003. The owner was granted judicial review

In this case the Supreme Court had to decide whether or not the decision made by the lower court in which it declared unconstitutional the law that allowed expropriation to benefit specific companies that were in risk of going bankrupt, was correct. The Supreme Court reversed the lower court's decision and ruled that the law was constitutional but that

the decision by the Mexico City government was invalid because it had not proven that there was a public interest in this specific case. I plan to use Luhmann's approach to systems theory to explore how the legal system transforms social and political issues in order to process them and transform them into legal categories. My paper will concentrate in looking at the process by which communications from other subsystems are transformed into legal communications.

***"I've overseen the assimilation of countless millions. You were no different."* Autopoiesis: Evolution, Assimilation, and Causation of Normative Closure', Mr. Neil T Lyons, J.D. Candidate, Stetson University College of Law, Florida, USA**

What causes a legal system to become operationally and normatively closed achieving an autopoietic phase? I attempt to answer this question using a three phase approach: Phase I represents the change from status to contract; phase II represents the emergence and development of administrative regulatory agencies; and phase III represents the absorbing and assimilation of Individual Identity Recognition Categories (IRCs) into the legal system's existing communication structure. Each phase illustrates a legal system's evolutionary development. Throughout phases I and II, the system develops its own internal logic while at the same time creates and utilizes evolutionary mechanisms of filtration and stabilization.

Phase I is the beginning of meaning differentiation. That is, the differentiation of meaning between a legal system's communications and society's communications. Phase II continues meaning differentiation while expanding the communication producing structure. Administrative Regulatory Agencies are created from already existing legal processes and communications. New communications created by agencies must derive meaning from existing legal communications. Because the agencies become more specialized in the creation of their communications, they become the medium for communication between the legal system and other sub-systems. In Phase II, the legal system achieves operational closure as it develops and utilizes sophisticated evolutionary mechanisms.

In phase III, the legal system begins absorbing and assimilating more societal communications known as IRC's. IRC's are societal constructs which are given meaning by societal communications. IRC's include societal descriptions about a person from their sex or gender, race, ethnicity, occupation, marital status, sexual orientation or preference, etc. Problems arise as more become assimilated into the legal system's communications. Since the legal system has already developed its own internal logic that it is unwilling to sacrifice, the legal system completely differentiates the meanings of IRC's according to its own criteria. Thus, the system achieves normative closure.

A running theme throughout my paper is the arch-antagonist from *Star Trek—The Borg*. I use *The Borg* to draw the analogy between the legal system's own evolution and assimilation.

'Critical Autopoiesis', Prof. Andreas Philippopoulos-Mihalopoulos, Professor of Law & Theory, School of Law, University of Westminster

The recent increase in attempts at reading Niklas Luhmann's autopoietic systems theory from different perspectives demonstrates the capacity of the theory to come into productive dialogue with theoretical strands that at least prima facie would be considered incompatible. My attempt is to offer an autopoietic reading that will push autopoietic limits and bring forth the theory's relevance to contemporary society. Hence, what I have come to call Critical Autopoiesis is the autopoietic practice that is at home with deconstruction, gender studies, geography, radical ethics, postecologism, deleuzian jurisprudence, radical politics, or indeed radical autopoiesis itself –namely, a reading of the theory that reach the limits of self-referentiality and establish a critical space within the theory from which observations about the theory's identity, topology and future can be produced. In my exposition of Critical Autopoiesis I will be touching upon issues such as the connection of law to justice, dedifferentiation and hybrid normativity, global legal centre and periphery, legal rights and identity politics.