The ‘Truth’ About Autopoiesis

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Like the economy and the royal family, autopoiesis has been receiving some bad publicity recently in Britain. What are we to make of a theory which apparently sees the legal system as firmly closed to all external influences and which refuses even to accept the obvious fact that ‘people make decisions’? Surely our sympathies must be with the critic who dismisses this unpronounceable theory as a lawyers’ attempt ‘to aggrandize the legal discourse by writing of law in half-apologetic and half-admiring tones’? Or is what we have here not so much a social theory but a recognition of law’s ‘need to defend and perpetuate its traditional hegemony by defining itself as closed’ – a new and virulent form of legal positivism perhaps?

Let me from the start declare an interest. Having myself presented an account of one version of the theory and applied its principles to decisions concerning children’s welfare, I am anxious to scotch some of the rumours and distortions surrounding autopoiesis before they take on the status of unassailable myths. Furthermore, there is a risk that some of the misapprehensions that have been flying around are likely to deter students from taking the effort required to give the theory any serious attention. This, I believe, would be a pity, as, in spite of its controversial nature, autopoiesis does offer new and valuable insights into the operation of the legal system and its relationships with other social systems.

THE MEANING OF AUTOPOIESIS

It may be more accurate to describe autopoiesis as a theoretical paradigm rather than a unified theory. Like Marxist or psychoanalytic theory, it comes in several forms, but all have the same basic features. Its principal exponent within sociology is the German theorist, Niklas Luhmann, and it is for the most part his version of the theory which I shall be describing in this article.

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Autopoiesis is, then, a theoretical approach to the operations of social systems and their relationships with each other and with the general social environment. Several of its critics tend to see it as synonymous with autonomy which leads them to point out the absurdity of the claim that the legal system is totally free of political and economic influences. Exponents of the theory do not clarify matters, however, by their randomly interchangeable use of the terms 'self-referential', 'self-productive', and 'autopoietic'.

In order to make sense of autopoiesis, one needs to trace its origins to developments in social systems theory. Apart from those areas of social science, which, sustained by their procedural uniqueness, continued to regard social systems as consisting of administrative structures and/or interconnected units of decision-making, the main thrust of systems theory thinking in the last twenty years has been in the direction of ever-more open systems. Systems have been increasingly seen as adapting to their environment, their actions and decisions being influenced, even determined by that environment. Indeed, for one systems theorist, the openness of social systems is an essential pre-requisite for equilibrium in society. Since, according to views such as these, no clear demarcation lines existed between systems, other than those flexible and arbitrary boundaries erected to meet the demands of any particular situation, it was possible to think in terms of a hierarchy of power between systems and of one system, such as economy, exercising control over the total output of another system. Systems were, therefore, seen as open to the direct influence of other systems as well as to the general social environment.

This open-system approach gave the impression that social systems were engaged in collecting, organizing, and operating upon 'facts' from the environment. Environmental 'facts' were seen as representing the raw material on which the system relied to fulfil its production requirements. Even if, under the influence of constructivist models of society, it was admitted that the bases and prejudices of those individuals who operated the system might affect interpretations of social facts and the actions and decisions that emerged from these interpretations, these distortions could be detected and identified by reference to an objective social reality.

From 1982 Niklas Luhmann, who previously had been developing his ideas along Parsonian functionalist lines, no longer saw systems primarily as input-output models but gave more and more attention to their internal operations of self-production (that is, autopoiesis). In doing so he drew upon the work of the Chilean biologists, Maturana and Varela who first developed the idea of biological systems as units which repeatedly reproduced their elements from their own elements and in doing so became independent of their environment. Luhmann distinguished social autopoiesis from its biological origins by identifying communication as the basic element of social systems and by defining social systems, not as groups of people, (Maturana's 'coupled human beings') but as systems of meaning. Although the principles of the theory are identical, or at least very similar, to those of biological autopoiesis, the type of elements and structures to which the theory...
relates are, therefore, very different. Instead of cells, organisms, the nervous system, the cardio-muscular, the digestive system, and so on, what we now have are communications as a synthesis of information, utterance, and understanding (including non-verbal communications, such as signs, gestures, and acts). "This synthesis is produced by the network of communication, not by some inherent power of consciousness, or by the inherent quality of the information." It is essentially anti-structuralist, for, as Luhmann argues, 'communication is not produced by language. Structuralists have never been able to show how a structure can produce an event.' For autopoiesis, 'it is the network of events which reproduces itself, and structures are required for the reproduction of events by events." Social systems, as networks of communication, produce their own meaning. In Luhmann's version of the theory they do not, as many other theorists have proposed, perform operations of interpretation and selectivity upon 'facts' gleaned from the social environment. Rather, they construct that environment and perform their operations upon the environment that they themselves have constructed. A defining criterion of an autopoietic social system is that it should contain and constitutes 'a representation of society within society'. Different social systems are distinguished from one another by the meaning each gives to relationships and events in the social world.

If social systems are systems of meaning, people 'exist' within systems only according to the meaning that each system assigns to them (Teubner's 'semantic artefacts'). But, contrary to the impression given by some critical commentators, individuals are given an existence independent of their representation within social systems: they are themselves autopoietic systems, in both the biological and psychic sense. As psychic systems their internal communications (whether conscious or unconscious) construct meanings both from their social environment and their internal physiological environment. These psychic systems, it has to be emphasized, are separate and distinct from social systems. Once an individual expresses her or his thoughts to another, the communications enters the social domain.

According to Luhmann, since systems use different coding and different procedures for validating reality and thus constructing the external environment, they cannot communicate directly with one another in the sense that they cannot transmit meaning directly. In that sense they are closed. However, in order to maintain their existence social and psychic systems need to reproduce within themselves their version of the external social environment. This external environment may also include other social systems. As Habermas, in explaining Luhmann's theory, writes, 'all systems are environments for one another, mutually amplifying the environmental complexity each has to master.'

We have already seen how individuals also become constructed as semantic artefacts within a system's communications. The full implications of this paradoxical form of communication which has the appearance of non-communication between systems which relate to other systems by reconstructing those systems within its own reality constructions and the way
in which systems become coupled to and interfere with one another will be explained with specific reference to the legal system in the next section.

A NEW PARADIGM?

A major problem in coming to grips with autopoietic theory is that what it offers is as close as one can come in the social sciences to a clean break with European and American social theoretical traditions. I write this with a certain amount of hesitation, for it is certainly true that important elements of autopoiesis can be traced to previous theorists, such as Marx, Durkheim, Parsons, Weber, and Berger and Luckmann. A further difficulty is that two of the chief protagonists of the theory, Niklas Luhmann and Günther Teubner, themselves changed paradigms in the mid-1980s. If one looks at their earlier works, therefore, one finds Luhmann developing Parsons' functionalism within the general framework of systems theory, while Teubner tended to draw his inspiration from Habermas, Selznick, Weber, and Luhmann in his theoretical writings on reflexive law.

The origins of autopoiesis within the biological sciences has, not surprisingly, given rise to much critical comment. For some social scientists any theory which draws upon biological models smacks of social Darwinism, and for that reason alone must be suspect. Such sweeping criticisms tend to be made by people who have decided to dismiss the theory out-of-hand.

More sophisticated criticisms have come from those biologists who were responsible for conceiving and developing the original notion of autopoiesis and who caution against the application to social systems of a theory designed to explain organic life. Varela, for example, sees the term 'production' in autopoietic theory as referring rigidly and exclusively to such single natural phenomena as living cells. A number of social scientists have endorsed this view. Yet it is valid only in so far as social theorists attempt a direct translation from biology to sociology, replacing cells with individuals or groups of people organized in the pursuit of common objectives. Luhmann avoids the sin of social biologism in the way I have already described, that is by defining social systems, not as bio-systems or 'coupled human beings', but as systems of meaning-production.

However, the Italian philosopher Danilo Zolo, in a forceful criticism of social autopoiesis, protests vehemently against this uprooting of autopoietic theory from life science and its replanting in social science, while admitting Luhmann's 'great inventive freedom' and 'inexhaustible ability of conceptual sophistication'. The biological theory, he claims, was based on experimental observations validated by statistical evidence, while social autopoiesis has no basis in empirical observation or evidence. Furthermore, he accuses Luhmann of developing autopoiesis 'with total independence from any theoretical tradition'. His only goal, he adds, 'seems to be the construction of a super-theory' based on free interpretation of other theories (p. 83ff). From his erudite philosophical position Zolo might well be right, but one would
need to add that no social scientific theory has ever been founded on a firm base of unambiguous empirical evidence (although Marx may have made this claim for his theory), nor could they ever be so, given the major interpretive element of such theories. The test for autopoiesis should not be how well or badly it meets Zolo’s (or anyone else’s) criteria governing the ways that theories in the social sciences ought to be developed, but whether the theory provides a convincing way of understanding some of the complexities of modern societies and the relationships of people to these societies.

THE MEANING OF LAW

This vision of a world of systems which are continually confronting one another has important implications for law. In most democratic societies law had come to be seen as ‘the great regulator’, capable of exerting considerable influence over social behaviour principally through its seeming ability to alter cost-benefit outcomes for those individual actors involved in administering and managing the systems. At the same time, law has been seen as a powerful medium for achieving political and economic objectives. This has led critical legal scholars to propose that by ‘deconstructing’ laws, peering behind and burrowing beneath the surface of legal discourse it was possible to reveal the hidden political agendas that these regulatory laws concealed.31

There have proved to be a number of problems, however, with the Utopian vision of law as an effective regulator of social behaviour. Not least of these was the growing evidence of law’s failure to fulfil the high hopes that had been expected of it. Attempts to regulate social systems through law often seemed to work effectively for a short time and then would produce consequences which were unanticipated by legislators and would-be reformers.32 Critical scholars also found that their deconstructive analyses did not provide them, as they once believed they would, with a model which would allow them to trace a trail of causality between political forces and law. Instead, the relationship between the two systems was far more complex than they had originally expected.33 Legal decisions were not determined by politics in any simple, direct way.

More general criticisms have also been directed at the effects of law’s seemingly benign role as ‘the great regulator’. Habermas complains of the ‘juridification of the life world . . . the tendency towards an increase in written law’ which includes ‘the legal regulation of hitherto informally regulated social systems . . . colonizing cultural reproduction, social integration and socialization’ and ‘destroying traditional patterns of social life’.34 Others refer to law as the medium through which culture and ethics are appropriated to the service of power,35 while Nelken sees law as ‘the great concealer, hiding the fact of violence at the basis of the social order’ 36

Yet, it would be wrong, however, to see the emergence of autopoietic theory in narrow terms as a response to law’s failures, inadequacies, and transgressions – a noble attempt to put law in its place. Luhmann’s intentions
were far more ambitious. They were to provide a total theory in the European tradition of grand theories, which extended to the whole of society and to all social systems. Nevertheless, it is certain true that most of the written work on autopoiesis to be translated into English has concerned the legal system. It is perhaps not surprising, therefore, that one English commentator has characterized autopoiesis as a misguided attempt by lawyers to impose their closed systems approach to the world upon the open systems view favoured by social science. This observation is based on the misconception that something called the 'legal discourse' somehow programmes lawyers and legal theorists into accepting a vision of the legal system as closed. Although it is true that Kelsen's positivism may see law as a closed system with law justifiable only by law, there is no compelling reason for lawyers, more than anyone else, to see law and all social systems as closed. As I have shown, a strong argument could be made for the opposite point of view, seeing lawyers as more likely to favour a vision of the legal system as open, both in its tendency to be used as the a vehicle for political and economic strategies and for its own internal operations to be subject directly to political and economic forces. Equally, many social scientists, as has been noted, have themselves adopted a closed systems approach.

Yet this view of the legal discourse, however misconceived it may be, arises from an understandable confusion as to the meaning of law generally in social systems theories and specifically in autopoietic theories. It is perhaps tempting, particularly for British commentators, to see law as consisting of that arcane kingdom where the judges hold sway and police, solicitors, and barristers hang on their every word. It is easy to understand how this popular image of law as 'a closed world' could give rise to the notion that lawyers think of law as a 'closed system'. Yet, when social and legal theorists write of law or the legal system they are referring usually to a different concept. Law here means that network of rules and decisions emerging from statutes and courts as well as the activities of legal personnel (judges, police, and so on) in interpreting and enforcing these rules and decisions. Law in this broader sense is seen as 'a means of governance through the application of sanctions', as 'commands backed by force' as Weber's 'probability of coercion to bring about conformity'.

If we move on to autopoietic theory we find yet another definition of law and the legal system, where the threat of force or sanctions no longer represents its defining feature. Here social systems consist, as we have seen, of individuals or organized units, but of communications. In the legal system social events derive their meaning through the law's unique binary code of lawful/unlawful, legal/illegal. An event in the social environment cannot be interpreted simultaneously as lawful and unlawful or as falling both within and outside the scope of the law. These categories are mutually exclusive, even if a legal act may subsequently be declared illegal or vice versa.

Any act or utterance that codes social acts according to this binary code of lawful/unlawful may be regarded as part of the legal system, no matter where it was made and no matter who made it. The legal system in this sense is not
confined, therefore, to the activities of formal legal institutions. The teaching and interpretation of legal norms in law schools and departments is therefore seen as law, as is the creation of new laws and regulations by legislators and government departments. Social workers who investigate cases of child abuse with a view to possible court action are then treated as part of the legal system, so are surgeons who refuse to perform a potentially life-saving operation on a child, because the parents refuse their consent. All these are examples of the social world being coded as lawful or unlawful and the communication of statements based on such a coding.

Conversely, not all communications made by lawyers, judges, police officers, and so on, whether in court or during the course of investigations and pre-trial processes, are legal communications. When a judge, for example, confers with lawyers in court on the possibility of costs being saved by a negotiated settlement, she or he may well do so without any reference to the respective claims to legality of the competing parties. The communication should, therefore, be seen as economic rather than legal. It will only become part of the legal system if the judge makes an open or veiled suggestion that one or other of the parties would be likely to lose the case if no compromise solution was forthcoming. In a similar vein, when courts in the United States of America appoint administrators to take over the running of a state prison which had been operating racially discriminatory policies, they were engaging in political or administrative rather than legal communications.46

The final twist in this complex tale is that one communication may exist and have meaning in more than one system. The meaning for each system may, however, be very different. Take, for example, the controversy over the meaning of consent in rape cases. Not only may the utterances of the woman have a very different meaning for the psyche systems of the man and woman involved, but the law will impose its own meaning on these communications. Similarly, in the settlement of the arrangements for children on divorce the term agreement may have a very different meaning for conciliators and the parents than for the lawyers and judges involved.47

LEGAL AUTOPOIESIS

According to Teubner, the key to understanding law's autonomy lies in the 'three-tiered relation of self-observation, self-constitution and self-reproduction':

As soon as legal communications on the fundamental distinction between legal and illegal began to be differentiated from general social communication, they inevitably become self-referential and are forced to consider themselves in terms of legal categories.48

Teubner's account of law's autopoiesis differs from Luhmann, who does not accept any notion of partial autopoiesis. Law either reproduces itself or it does not, and in modern societies it does. For Teubner on the other hand autonomy and autopoiesis are best understood as a matter of degree.49 One

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should be able to identify the degree of autopoiesis in a legal system by examining the extent to which that system manages to 'constitute its own components, action, norm, process, identity – into self-referential cycles'.

When these cycles link together to form a hypercycle of self-referential systems, the legal system can be said to be totally closed or autopoietic. An essential component for an autopoietic legal system is then its capacity for self-organization, for devising itself the rules which govern its own operations – Hart’s ‘secondary rules’, that is, the rules which determine whether its own decisions are legal or illegal, rules governing the making of rules. To the question ‘How do we know that a social event is lawful or unlawful?’ the answer is ‘because the law says so’. And to the question, ‘How do we know that the law’s decision is lawful or unlawful?’ the answer must be again, ‘because the law says so’. So we enter the hypercycle of circularity which Teubner describes and which identifies autopoietic systems.

Legal communications occur whenever people express themselves in terms of lawful/unlawful, legal/illegal, and whenever their communicative acts are directed towards claim-making and claim-defending. Yet law, obviously, deals in communications about rules and their application to events in the social world. It does not and cannot create, receive, or produce non-legal communications on, for example, a country’s economic policy, medical treatment, moral values, or family life. However, it does produce parallel legal communications on all these issues, and through this production they are transformed into legal statements.

In its conflict management and norm-producing roles, therefore, the legal system confronts events arising in many different areas of social activity. In this sense it is cognitively open. Yet, as Luhmann puts it, ‘It cannot communicate with the environment, but must necessarily communicate about the environment.’ Once events in the external environment enter the domain of legal communications they are inevitably transformed or reconstructed by law in ways which allow for their conversion into events recognizable as legal communications, which allow for the creation or confirmation of rules to govern such events. As soon as this relationship has been established between law and events in other systems, the way is open for the relationship to continue and for future events in the social world of a similar nature automatically to give rise to shadowing within the legal system. In the language of autopoietic theory, a perturbation in the social environment which enters the meaning system of law creates a structural coupling at the point of perturbation between law and any other systems, both social and psychic, involved in generating the perturbation. From this moment, developments within non-legal systems are coupled to parallel but independent developments in the legal system.

Take the relatively simple example of a road accident. One can conceive of the first time that a collision between two cars became the cause of a legal action. The physical event of the collision became a perturbation in the legal world as soon as those affected by the accident communicated in terms of legal responsibility and fault. At the same time the accident represented a
perturbation in the social system of economic relations in the psychic systems of the individuals involved and, if they suffered injury, in their biological systems. Once constructed as an event in the legal world of meaning, road traffic accidents and the perturbations that they create within non-legal systems became structurally coupled to law, giving rise to the development of a sub-system of legal concepts which reflected the diversity of the perturbations associated with this kind of incident.

SPECIFIC FEATURES OF AUTOPOIETIC THEORIES

1. Law as a closed system

Although I have touched upon this vexed issue of law’s closure earlier in this article, it is so central to the concept of autopoietic law that it needs to be tackled in further detail. As we have seen, autopoietic theories maintain that modern law is cognitively open, but normatively closed. Some critics have seen the idea of law’s closure as raising the hoary spectres of judicial formalism and positive law, of law as an autonomous system where its decision-makers operate completely free of any external pressures, and where the study of law’s internal logic will tell one all one needs to know about the legal system. However, these criticisms have tended to take law out of its context in Luhmann’s new world view and interpreted ‘legal autopoiesis’ as being identical with ‘legal autonomy’. According to Lempert, for example, what Luhmann is asking us to accept is the odd proposition that ‘a legal system which, in the ideal case, is independent of other sources of power and authority in social life’, that is:

- uncontrolled by the political branches of government... free from the influences of those branches that respond to and embody power relations in society (p 157)

James goes even further when he insists that the legal system cannot be closed, because ‘law by its very nature is a social institution and the environment in which it exists is a social environment’. He then goes on to describe how law is:

linked structurally to other key social institutions such as Parliament, so that the nature, shape and content of law are determined by necessity by its parameters, both social and institutional

For James, then, law can have no autonomous operation, but is ‘moulded by its [social] environment’, although this leaves unanswered important questions as to what these forces are and how exactly they mould law.

The first point that needs to be made is that law in autopoietic theory refers, as we have seen, to a system of meaning and not to formal institutional structures. The boundaries of law are determined neither by the walls of the courtroom nor by the reach of its long arm, but by the application to the external environment of the code, lawful/unlawful. Law exists only as legal communications. Secondly, the theory does not deny the possible influence of other social systems – political, economic, religious, and so on – upon the
content of legal communications, but does refute suggestions that these systems are able to determine legal communications in any direct way or in a way that is possible to predict. It rejects, therefore, both legal realism's naive faith in socio-psychological factors as the determinants of legal decisions and also the political determinacy that was claimed by some critical legal scholars.61

Law is seen as a communicative system which produces norms of conduct both for its own operations and for society at large. As such it is closed in the sense that it cannot produce anything but law and also in that its operations are impervious to direct communications from other social systems. This does not mean that legislation or the decisions of judges are free of any influence from political or economic factors. What autopoietic theory is proposing is rather that the legal system is normatively closed but cognitively open. It is, as Teubner enigmatically tells us, 'open in a closed sort of way'.62

The normative communications of other systems cannot simply be reproduced by law as legal communication. They first have to be reconstructed as law if they are to become accepted as law, and this reconstruction process may well give rise to unforeseen distortions and reductions to the meaning of the original communications as they were formulated in the political or economic systems. James's example of the actions of a certain Mrs. Gillick which he states 'played an important role in clarifying and reframing the concept of parental responsibility, which was to be central to [the Children Act's] philosophy',63 does not raise any problems for the autopoietic notion of closure. Despite James's assertion to the contrary, the Children Act did not propound a philosophical position on the relationship between parents and their children; it reformulated or reconstructed philosophical or political principles concerning children's rights in such legal terms as the child's right to be consulted in decisions concerning her or his welfare. Similarly the Gillick case in the House of Lords had previously provided its own legal test of a child's competence to determine whether her or his decision as to medical treatment should be respected. Once reconstructed within law, philosophical, moral, or religious statements become part of the meaning system of law, subject to its reproductive procedures and prevailing realities. The way in which the Court of Appeal in Re R (A Minor)64 subsequently interpreted and modified the Gillick competence test serves as an example of this process. Autopoetic theorists, therefore, would have no argument with James over the possibility of law being motivated by external events. What they would question, however, is his suggestion that legislative acts (or court decisions) can have a philosophy. They may be inspired by philosophical principles, but in reality they produce law and nothing else.

In a similar way the individual biases and prejudices of judges, magistrates, and legislators also have to be reconstructed as law if they are to make the transition from the psychic to the social. This does not mean that these external systems have no influence upon law, but rather that the nature and extent of this influence will be determined largely by law's internal operations.
2. Social autopoiesis and psychic autopoiesis

Luhmann states quite clearly that autopoiesis 'precludes humanism'. His reason is that there is within the social world 'no autopoietic unity of all the autopoietic systems that comprise the human being'. Yet this, he adds, is not to deny that we are all human, but to reject the idea of people's humanity as the starting-point for any scientific analysis of modern society. Whatever may be the effect of autopoietic theory upon our conception of people and their place in the social cosmos, Luhmann's intention was to provide an alternative to what he sees as the outdated and increasingly irrelevant late nineteenth-century ways of explaining the relationship of human beings to society by splitting consciousness into a personal identity and a social identity (for example, Freud's ego and super-ego). What autopoiesis rejects, therefore, is the kind of analysis that starts from the premise 'it's all down to people', but, far from destroying the individual, Luhmann wishes to 'reformulate the individual consciousness in a system theoretical way'. As the result of this reformulation, individuals are reconstructed or interpreted as epistemic subjects within different social meaning systems and also, simultaneously, as psychic systems. It is as psychic systems that individuals give coherence to and make sense of differentiated meaning systems of the social world. Of course, this is far from the modernist tradition of the individual as the prime mover in the social universe. Rather, it sees people on the one hand as constructs of all social meaning systems whose 'human' utterances (whether acts and words) are instrumental in allowing systems to define, observe, and reproduce themselves. Yet, each individual is, on the other hand, a psychic system, reconstructing as psychic (rather than social) communications through thought or internal representations within their own psychic autopoietic hypercycles of meaning those social systems which she or he confronts in the external world. Moreover, individuals, as psychic systems, are uniquely able to reconstruct these different social systems in a way that allows them to operate simultaneously within two or more social meaning systems.

If we take the example of law's development and reproduction as a social system, this operates quite independently of individual psychic systems. Legal norms may have become psychic phenomena to the extent that they are internalized and serve to determine people's expectations as they move into and within the legal system of meaning. As psychic systems, however, individuals or groups of individuals cannot produce legal norms. The law's reality, therefore, is not the reality of individual lawyers, but it is through the perturbations in the social environment created by lawyers and others (as psychic systems) that many structural couplings are developed between the legal system and other social systems. One may go so far as to claim that law's social operations in its management of social conflicts, and the surplus value that it gains in terms of its own increased capacity for norm production, are
dependent upon the integrative and cohesive operations of individuals as psychic systems.

An appreciation of this important role that individuals as psychic systems play in autopoiesis undermines most allegations of its destructive and anti-human properties — that it creates a society peopled by reconstructed humanoids instead of individuals with human feelings and a sense of justice. Many of these criticisms have been couched in florid and dramatic terms. Thus, according to one commentator, ‘like the neutron bomb, autopoiesis extinguishes the subject and leaves inanimate objects as they are.’

Zenon Bankowski is another critic claiming these allegedly dehumanizing effects of the theory. His complaint is not merely that the concentration on systems removes the individual from centre-stage, but that it effectively negates those human qualities that are essential to a fair and humane system of justice, relieving decision-makers of any personal responsibility for their actions. A third critic, in his attempt to defend the human being against the dehumanizing powers of autopoiesis, goes so far as to deny the existence of institutional pressures in legal decision-making. There are no ‘lawyers’, he writes, ‘but only people who are employed as lawyers... It is people not the constructs who are making the decisions’ (emphasis in original).

There appear to be two strands to this allegation that autopoiesis destroys or degrades the individual and her or his essential humanity. The first states that by concentrating on the operation of systems we risk creating or reverting to dehumanizing forms of regulation and control, where people become mere ciphers, the disposable dots in Harry Lime’s nefarious profit-making enterprises. Yet it should be clear by now to readers of this article that the idea that systems theory in general or autopoiesis in particular somehow goes hand-in-hand with standardization and regimentation by totalitarian governments is misconceived. Moreover, as Sean Smith argues that for critics of autopoiesis to rush to embrace the banner of ‘individuality’ seems somewhat strange at a time when we are still reeling from the impact of Michel Foucault’s revelations of the huge increase in surveillance and oppression that was brought about by individual-centred social policies.

The second strand to the anti-systems argument states that to remove the individual as the prime mover in the social world from the central position in social analysis and to reject even the fact of individuality as an essential conceptual element in social theory are such absurd propositions that any theoretical paradigm which includes these propositions does not deserve to be taken seriously. The strong feelings that autopoiesis arouses may be understandable, but, as I have demonstrated, they are hardly justified in the light of what the theory is actually saying.

3. *Autopoiesis, injustice, and social policy*

Autopoietic theory cannot answer the sort of questions posed by lawyers or liberal-reformist researchers who wish to know what factors in legal administration and decision-making cause injustice and inefficiency in
individual cases and how to remedy these defects through statutory or administrative reforms. Indeed, to expect autopoiesis to explain individual legal decisions is like asking evolutionary theory to account for the death of a pet dog. Just as Darwin's theory encompasses but does not explain the life cycles of individual creatures, so autopoiesis encompasses but does not explain why a judge reached a certain decision in a particular case. Both, however, do explain evolution, the one of biological systems and the other of social systems.

Just as it does not offer explanations for individual legal decisions, so the theory is of little use to those who wish to predict the outcome of court cases or legislative debates. However, in a more general way, it may, through identifying the major trends in the development of law in different areas, be able to offer some sobering thoughts on the capacity of law to regulate the behaviour of other systems. For those who would reform the legal system, it is able to provide an account of the way that the system operates which is a considerable advance on the simple input-output models of previous critical and socio-legal theories. The breadth of its concept of law allows it to identify emerging forms of legal phenomena outside the formal legal system and to make predictions about their impact on other social systems.71

The theory may also prove helpful in describing the way in which law develops in different areas of the social environment. It may also help to trace the relationship that evolves between law and other social systems and to identify the forms that this relationship takes. Teubner,76 Jessop,77 and Baecker,78 for instance, have analyzed regulatory activities in politics, administration, and commerce, while Ladeur has written on legal logic and rationality99 and Suchwee has analyzed modern science as an autopoietic system.80 My own work with Christine Pips81 has, I hope, offered new insights into the relationship between the legal and child welfare systems. Moreover, several of the research students working with Gunther Teubner at the European University Institute, Florence, have applied or are in the process of applying autopoietic theory to a wide range of issues involving legal regulation of social and commercial life. Autopoiesis forces researchers to concentrate simultaneously on three areas: the internal operations of different systems, the interfaces between these systems, and the different social worlds of meaning that each constructs. It may therefore operate as a liberating force, not only from the narrow legal paradigm of 'black-letter law' which accepts as unproblematic the social reality constructed by law but also from some of the constraints and misdirections arising from law-in-context and socio-legal paradigms. The former tends to concentrate attention almost entirely on the ways in which the problems of the social world (as constructed by social scientists) are regulated by law, while the latter evaluates law's operations according to external criteria derived from social scientific expectations.

4. Autopoietic theory and power

Some critics of autopoiesis reject the theory on the ground that it lacks any
concept of power and therefore cannot claim to be taken seriously. Added to this is the reproach to the effect that those who find the theory useful are guilty of conservatism in taking the side of the status quo against any attempts to use the law to create a fairer and more just society.

One problem with this type of criticism is that it often comes from people who recognize power relations as existing only when individuals or groups of individuals use their superior physical, political, or economic strength to oppress others, of a different class, race, gender, or age to themselves. This type of analysis follows Marxist theories in the way that its notion of power’s operation is restricted to its direct imposition in the sense of Lukes’s one- or two-dimensions and takes no account of its more indirect imposition. Add to that the challenge that autopoiesis presents in its insistence on concentrating attention at the level of social systems of meaning rather than individuals or groups, and it is not difficult to see why those who see themselves as critical and radical are quick to attach labels of conservatism or positivism to the theory.

However, autopoiesis does deal with power in at least three different ways. To begin with, Luhmann sees power generally as constituting a medium, along with money, love, and truth, which produces the motivation to accept a proposition. Within formal organizations it may be combined with the binary code lawful/unlawful to provide the threat of negative sanctions, through the imposition of legitimate power. Once formal organizations resort to violence, according to Luhmann, they have effectively destroyed the medium or mechanism of power. The most effective use of power, therefore, consists of the threat of negative sanctions which are rarely, if ever, exercised.

Secondly, the relationship between social meaning systems is not necessarily one of equality. Although it is theoretically possible for each social system to reconstruct every other system according to its own procedures and to attribute its own meaning to that system, those systems which are widely accepted as defining meanings for the whole of society are in a much more powerful position than others. The interference between systems that perturbations produce and the consequent coupling of their structures is rarely a relationship of equality. In this sense, therefore, it is possible to speak of ‘the enslavement’ of the knowledge of one meaning system by another. In post-industrial Western societies the most prevalent systems are arguably economics, politics, science, and law. Of course, while the knowledge of these prevalent systems may reconstruct others, less prevalent, ‘enslavement’ here does not mean total domination. It is always possible for the less prevalent systems to insist on their own self-constructions and indeed to reconstruct successful meaning systems according to their particular procedures and reality versions. The problem these weaker systems face, however, is to convince society, the world of social communications, to accept their versions of reality in preference to those of the more prevalent systems.

A third aspect of power within autopoietic theory is concerned with how different systems reconstruct the social environment in ways which allow the system to reproduce itself. The way in which law constructs people as semantic artefacts of the legal system comes close to the idea of ‘fictional legal persons’
identified by McKinnon and other feminist writers. To say that the language of formal law tends to reflect existing power relationships in the social environment is perhaps so obvious that it hardly needs stating, but what autopoietic theory adds to this ‘truth’ is the prediction that the law’s constructions of the social environment will change only in so far as such changes will enhance the interests of the formal legal system for its own reproduction. It is unrealistic, therefore, to expect the law to construct a social world which flies in the face of power relationships which are recognized and accepted by economic, political, and scientific meaning systems, for to do so would be to reduce its own influence and capacity for reproduction.

This is very different from claiming that the law never changes or never changes in the direction desired by would-be reformers. One needs to draw a distinction between the letter of the law and the social environment constructed by law. Changes in the letter of the law which appear to favour certain social groups may also reinforce a particular image of members of that group. This paradox has long been recognized by feminist scholars in their analyses of the law’s protective role towards women’s interests, but the scope of law’s reality constructs extends not just to women but to all individuals and groups who make their appearance on the stage of formal legal reality. It is these reality-constructions, rather than the letter of the law, which tend to be so impervious to extra-legal influences. In modern pluralist societies where social realities tend to be fiercely contested, it is hardly surprising that the formal legal system, with its vested interest in maintaining its own credibility and reproductive capabilities, should be so resistant to the rapid acceptance of new versions of reality. Given the complexity of the issues and ephemeral nature of the social forces at work, it should also not be surprising that changes in law’s reality constructions should be so difficult to predict from studies of the legal system at work or of measurable features of the social environment. Indeed, as we have seen, autopoietic theories deny the possibility of any but the most general predictions.

Finally, in its application to situations of political and economic imbalance autopoietic theory may go some way to explaining the paradox of the rule of law, identified by some Marxist writers. This sees the ruling class as apparently turning its back on its own interests by giving rights and interests to the least powerful social groups. The usual explanation for this paradoxical phenomenon is that of law as the confidence trickster, giving the impression that it is placing a powerful weapon in the hands of the powerless, while all the time retaining ‘real power’ in the hands of the ruling class. Autopoietic theory would agree with E. P. Thompson that this analysis does not adequately explain the apparent independence of formal legality from political and economic interests. Only when one accepts some notion of modern law’s closure and self-reference with the possibility of reproducing its own elements, free of external forces, do such paradoxes disappear.
CONCLUDING PARABLE

Autopoiesis has proved an exasperating concept for legal and socio-legal scholars, for, like all new paradigms, it fails abysmally to answer the questions that occupy their thoughts and writings and which make academic life within normal scholarship interesting and rewarding. All autopoiesis does is to tell them that the questions that they are asking are not the only ones. 'Ah no', they reply, 'If you want us to take you seriously you must prove to us that you can answer our questions. You must tell us whether laws are just or unjust and how we can make them more just. You must show that your hypotheses can be disproved. You must explain to us all about power and how it is exercised to perpetuate state hegemony. You must tell us how to predict the effects of legislation and how to know in advance how the court will decide a case.'

'But why these questions?' asks autopoiesis.

'Because they are the only valid questions for legal scholars', they reply.

'But how do you know that they're the right questions?'

'We know.'

'But how do you know that you know?'

'Because we know.'

'Ahah!' says autopoiesis with a wry smile.

NOTES AND REFERENCES

3 Id
4 James, op cit., n. 1, p 282.
9 W Buckley, 'Society as a Complex Adaptive System' in Modern Systems Research for the Behavioural Sciences, ed. W. Buckley (1968)

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17 Id.
20 Although, according to Teubner, they will not necessarily become part of an institutionalized social system, but may exist as diffuse communication within the general social environment (Teubner (1991) personal communication).
23 T. Parsons, *The Social System* (1952); T. Parsons, *The Structure of Social Action* (1937)
24 P. Berger and T. Luckmann, op cit., n 31
32 See, for example, R. Morley and A. Mulckade, ‘Hype or Hope? The importation of pre-arrest policies and batterer’s programmes from North America to Britain as key measures for preventing violence against women in the home’ (1992) 6 *Int J of Law and the Family* 255–88
33 Duncan Kennedy, a talk given in June 1992 at the European University Institute, critically reviewed his earlier attempts at political determinacy.
38 H. Kelsen, General Theory of Law and the State (1945)
39 The view of law as an open system was certainly taken by Lawrence Friedman in his book *The Legal System: A Social Science Perspective* (1975).
40 Op cit., n 1
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45. This does not mean that there has to be a clear separation and a clear law for every legal case, but that each of the issues that requires determination by the court must be decided one way or the other.
46. The initial decision that the prison authorities had been guilty of racial discrimination would, of course, have been a legal communication.
47. See King and Paper, op. cit., n. 5, ch. 5.
54. Although there is nothing to stop individual judges and lawyers communicating on these subjects, there is no communication is put, however, part of the legal system.
56. This reconstruction process will not necessarily involve a direct translation of social events into law through lawful/unlawful coding. Often transitional concepts, such as rights, duties, obligations, and so on, are necessary. These concepts have meaning (though not the same meaning) both in the legal and non-legal conceptual worlds. See King, 'Children's Rights and the Magic of Law' (forthcoming).
57. For Luhmann law was open in archaic or primitive societies where no clear boundaries existed between law and other social institutions, while for Teubner, even in modern societies the issue of law's 'closure' is a matter of degree and an all-or-nothing phenomenon.
59. R. Lempert, op. cit., n. 6, p. 15.
61. See earlier discussion.
62. This is how Teubner described autopoiesis at a conference in Florence, as reported in P. Kenemy, 'Talking about Autopoiesis – Order from Noce?' in Teubner, op. cit., n. 6, pp. 389–68.
67. See Bradeney, op. cit., n. 2.
68. Teubner, op. cit., n. 48, p. 45.
69. Id.
71. Z. Bankowska, 'How Does It Feel to Be Alone? The Person in the Sight of Autopoiesis' *Ratio Juris* (1993). Nevertheless, it is still possible to conceive of a communicative meaning system which does not depend upon human intervention. If all humanity had indeed been eliminated by neutron bombs, there is no reason why computers should not continue to communicate with one another and for those communications to have meaning, at least until the electricity ran out!
Bankowsky, op. cit., n. 71. James (op cit., n. 1, pp 279ff) makes much of the power of welfare officers to influence court decisions on the issue of the child's best interests. Yet we should remind ourselves that it is only relatively recently that decisions about children's welfare have been considered as properly belonging to law. Moreover, despite the obvious influence of welfare officers, it is always open to judges to impose the lawful/unlawful coding in response to the recommendations in the welfare officer's report.

88 See, for example, C. Smart, 'Women of Legal Discourse' (1992) Social and Legal Studies 29
90 T Kuhn, The Structure of Scientific Revolutions (1962)