

Critical Socio-Legal Engagements with Systems Thinking: Theory and Context

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Beyond the autopoietic enclaves in university law schools, one hears that autopoietic, or systems theory (we shall be using this interchangeably) and the discourse surrounding it, is highly abstracted, and in consequence, has little to say on society, law, or socio-legal studies. This is thought to be the case in relation to both Luhmann's comprehensive mapping of the field, and in the subsequent exploration of that field by legal academics and other social scientists. As a result of this, outside of the community of autopoietic theorists, systems theory is not generally thought of as being something that is regularly applied to the operative contexts of particular legal or social systems.

This special issue is an attempt to change that perception and show the relevance of autopoiesis as applied in various sociolegal fields. The origin of the papers in this issue can be traced to the discussions at the *Systems* stream of the Socio-Legal Studies Association Annual Conference (SLSA). The papers are drawn from several different meetings of the Conference, and from the work presented and discussed there. As systems theorists will already be aware, and as it became clear from the first time that the *Systems* stream convened at the SLSA, the usual characterisation of autopoiesis as abstract and lacking direct application to context, mischaracterises the diversity of discourse which draws on autopoiesis as an analytical framework, and the uses to which that material has been put. The articles in this issue showcase the many contexts in which autopoiesis can be applied to offer novel and productively critical perspectives on legal questions.

In the first article of this issue, Rachel Herron addresses systems theory to the power to stop and search under s.44 of the Terrorism Act 2000. Herron argues that autopoiesis can be used to understand the limited effects of the safeguards envisaged by the drafters of the Act, as well as the lack of anticipated operational restraint and intelligence-led judgment on the part of police officers that legislators had expected. This analysis is developed through the conceptualisation of the legal system alongside that of the policing system – which is to be differentiated from the political system on the basis of the particular functions of the policing sub-system. It is argued that, although s.44

has been repealed, the reasons for the racial-effect of the powers remains misunderstood by legislators, and so seems likely to reoccur if the observations of autopoiesis are not considered.

In their article, Jennifer Hendry and Colin King examine a different aspect of law enforcement, the use of civil powers to seize property which, in the view of law enforcement officers, represent the proceeds of crime. The powers under the Proceeds of Crime Act 2002 Part V allow for non-conviction based asset forfeiture; the recovery of assets through a procedure premised on a civil, rather than criminal standard of proof. Drawing on systems theory, the authors explain that the powers can be seen as a consequence of the perceived failure of criminal law to tackle the problem of organised crime, particularly the financial incentives connected with such activity, and raise concerns over whether non-conviction based asset forfeiture represents a legitimate process in view of the reduction in procedural protections offered by the civil standard of proof.

Shifting away from law enforcement and towards family law, Sarah Sargent draws on both critical race theory and systems theory to examine transracial adoption. Reflecting on the reforms made to s.1(5) of the Adoption and Children Act 2002 by the The Children and Families Act 2014, Sargent argues that the effort to make the adoption placement system 'race-neutral', and the concurrent belief that this will reduce the number of ethnic minority children in care, while laudable, will not be successful. Through an examination of the legal, political, and child welfare systems, Sargent argues that the causes of the significant numbers of ethnic minority children in care are lost in the communications recreated within systems about systems. It is suggested that it is only through the combination of systems theory and critical race theory that a clearer understanding of the way the systems operate can be gleaned.

Annika Newnham's contribution concerns the diffusion of power in the framework for dealing with post-divorce family life as it relates to shared parenting. Using systems theory, Newnham demonstrates that, although shared parenting may have moved up the political agenda, most recently demonstrated in the reforms brought about through the Children and Families Act 2014,

the efforts to realise a functioning and effective framework have tended to be unsuccessful due to the imperfect recreation of the framework within the structurally coupled systems. The failure of reforms is compounded by the power relation perceptions which they reinforce, to the detriment of parents who view themselves as powerless, and to the advantage of those willing to exploit the legal framework against the (likely) intentions of legislators.

Moving from power to vulnerability, Andreas Philippopoulos-Mihalopoulos and Thomas Webb address an underlying concern with autopoiesis, that relating to how social exclusion is understood by the theory. Drawing on Luhmann's experience and reflections on the *favelas* of Brazil and of Neves critique of it, the authors argue that the exclusion witnessed there can also occur in the West to the profound detriment of functionally differentiated society. This exclusion is more than the necessity of exclusion in every inclusive society. Rather, it is a hyper-exclusion from society as a whole. Drawing on feminist theory, the authors include a notion of corporeality in autopoiesis, with its inevitable material vulnerability. Neither corporeality nor vulnerability have been traditionally conceptualised by autopoiesis, but their inclusion in relation to exclusion opens up avenues of novel theoretical and applied understanding of the marginalised.

In their examination of social discontent as manifested through civil disobedience, Richard Nobles and David Schiff explore the tension created between the legal and political systems, experienced through their structural coupling, of politically permitted, but legally incomprehensible disobedience to law under certain conditions. They argue that, while civil disobedience has traditionally been accommodated by society, the increasing juridification of discretionary powers surrounding protest risks undermine this. However, the unsettling of the legal and political systems' coupling encapsulated in the paradox that one can disobey the law through protest does not undermine the system; rather, in the authors' view, provides a means for the evolution of each system.

The concluding article of this issue is by Jiří Přibáň who examines the concept of popular sovereignty. Rather than treating sovereignty as a universal concept, Přibáň develops the idea of sovereignty as a

semantic construct of each function system, thereby disclosing sovereignty as a concept which cannot be fully articulated within either law or politics. This renders sovereignty into a contingent concept (within each system) which, while it can be used to 'steer' communication, raises only further questions about constitutional discourse which Přibáň skilfully analyses.

In closing we must thank the SLSA for providing an outlet for systems discourse which can otherwise be difficult to find, and to all those who have attended and contributed to the discussions at the *Systems* stream, and in so doing have helped to develop the thinking contained in these papers. We are also grateful to the Editors of the *International Journal of Law in Context* for agreeing to host this special issue, and for the support they and the staff at the journal have given during the process. We also wish to record our thanks to the authors for their patience in the assembling of this issue, and for their thoughtful engagement with the comments of the reviewers and ourselves. Lastly, we also wish to express our gratitude to the anonymous peer reviewers for their detailed and thoroughly helpful responses to the articles.

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