

AUTOPOIESIS AND SOCIAL SYSTEMS

Autopoiesis is a theory of social systems which is based on biological theories of the cell: it models social systems as though they were cells which are closed off from other systems and which only ingest or excrete substances by complex means. So, social systems receive inputs and generate outputs in ways which must be studied closely. Inputs and outputs are in the form of communications; social systems inter-act by means of a complex process of coupling and decoupling. The systems theories which are generated by theorists like Luhmann were in conflict with the communicative theories of Habermas.

This material was written originally in 1994 and has only been lightly edited since then – I will return to it from scratch some time in the future. My focus at the time was on the feasibility of applying autopoietic / systems theory to law, and my barely concealed hostility to the autopoietic marginalisation of individual human beings to the, frankly flakey, movement of “communications”. This idea is also discussed in “Autonomy” in this part of the site.

Communication, social systems and law

There is a commonality between community and communication: their common stem “commune” is a particularly apposite term in the context of a society going through great upheaval. There is societal, institutional and existential angst at this time. Change is moving too fast for our social mores to accommodate it. Therefore, “law” becomes essential to operate as the forum in which critical disputes or the provision of legal advice on personal strategies (commercial, personal, whatever) can be satisfied. It is by reference to “the law” and polity that this “commune” can operate.

Communication and law

On the understanding of the justice system that is being developed here, law is the means by which the polity transmits its decisions to the broader world. On some analyses, this operates by means of handing the reins from politicians to lawyers in the administration of justice. There are three key issues tied up in the debate about communication and social systems. At an ideological level, this issue centres on the debate between Habermas and Luhmann. The correlation of this debate with Giddens’s theory of structuration is picked up below. The issues relate, first, to the nature of law as a means of communication as considered by Habermas; second, the social role of law as a means by which citizens in democratic societies communicate both between one another and

with social institutions about the development of their inter-action; and, third, the role of social systems in effective social communication.

Systems theory holds that society is too hyper-complex for communicative action to work. Systems theory should not be the *correct* analysis - systems theory cannot conceive adequately of the individual nor of communications outwith systems (e.g.: tribunals, or arbitration, not courts - the privatisation of law in this context does not, perhaps, constitute a system). Habermas is right to put communication at the centre. There must be structures within which individuals, groups and society more broadly can reach towards answers in a changing world. Our newly complex politics requires these communicative capabilities to function effectively.

The social role of law as communicative action

We have got law the wrong way round. It is not something to be worshipped, in the way that pure positivists require obedience to all law. Rather, it is a *tool* with which our collective lifeworld should be developed.¹ There is a colonisation of the lifeworld by law. Law subsumes human transactions, actions and reactions. It offers an analysis of those human activities and then carried through the means of controlling them. The language of law operates as a means of conceptualising human behaviour. That things are said and analysed in a particular, renders those things into truth. In this way the justice system operates as a means of communication. [The term “justice system” is one I have used in books like *Towards a Just Society* to refer to the whole of the system of law and of dispute resolution (including tribunals, arbitration, conciliation services, etc.) not just positivist, court-based law.]

To enter into this discussion requires that the individual be able to access the justice system in the first place. The barrier to this appears to be the analysis of the justice system as a closed social system which is able to control that debate. In this theory of autopoietic social systems, the individual does not appear to occupy a place within this schemata. While there is a narrow difference in political terms between Habermas and systems theorists like Luhmann, the impact of their difference in analysis will be all-important for the individual.

Autopoiesis and law

The underpinnings of autopoiesis as a conception of law is best summarised in Teubner’s words:

“... ‘the autopoiesis of consciousness’ is a radical attempt to reformulate the individual’s consciousness and his capacity for self-reflection in a systems-theoretical way. The objection that systems theory marginalises the human

¹ Outhwaite 86/87.

individual for society, that it treats individuals as ‘blind agents’, as dolls, without which the game could not go on, is without foundation.²”

Where the view based on individual autonomy is weak is in the understanding of the way in which the moral decisions of the individual are translated into a social construct. The autopoietic view has the strength that it sees the role of the social institution as conducting these discussions as part of a self-reflexive process. The two attitudes both contain elements which make claims to the identification of the nature of social systems and claims to have located the ideal form of system. One of the fears held about systems theory³ is that it is a systemic game which does not require human beings to be anything other than mere counters on the board on which the game is played. In political terms, the competing claims are efficient communicative action on the one hand and a fear that dehumanised systems will ignore the requirements of real people on the other.

This is the tension in the claim that individuals cannot communicate but that is only the system, or communications (to use Luhmann’s phrasing), which can communicate. And yet, surely the victory of language is one of the few anthropological victories of life on this sordid little planet. To take the control and possibility of communication by language away from the agents and put it in the hands of the process (either the communication itself or the “system”) runs against the grain of the received, ordinary values of much of the audience. It certainly seems to be a tragic loss for the human agents involved. And yet as Teubner puts the autopoietic argument:

“... the human subject which is consigned to the social environment involves society to a considerable extent. On the one hand, the social constructs of “persons” are absolutely essential for society to be able to constitute actions from communications by means of self-observation.”

The participation of the individual is as part of the observing brief set out by the autopoiesists. The tension here is that if communications can communicate, what is to prevent them from observing at the same time? If individuals cannot communicate, how can they observe? And if they do observe, how can they communicate those observations except by other communications which in turn must be watched? At what point does the hypercycle simply implode under the weight of this logical self-penetration and inter-penetration?

The solution is in the separation of the individual from the social in this context.⁴ The fusing of individual and social, the anecdotal with the observed, the microcosmic with the macrocosmic, makes understanding either more complicated. The central claim for autopoiesis must be in its attempt to separate the two elements and consider each independently of the other.

² Gunther Teubner: *The Law as an Autopoietic System*

³ see for example Giddens

⁴ For the necessary linkage between individual and social in other contexts, however, see the file on [phenomenology](#) on this site.

“[Autopoiesis] breaks up the unity of the individual and society, and makes us view human thought and social communication as autonomous processes which reproduce themselves according to a logic of their own.”

The political issue with “processes which reproduce themselves according to a logic of their own” is that that is reminiscent of any definition of power which is outside the control of ordinary citizens. The fundamental question is whether a system developing its own rules is preferable to a society which enables individuals to select their own lifechoices while exercising autonomous control over social institutions. Arguing against the uninformed power conflict is the assertion that the role of the legal system is outside the aggregate influence of the lawyers’ consciousnesses. The analysis of John Griffith, for example, is not enough to understand the legal system.⁵ Rather, as Teubner has it, law is the product of an emergent reality, the inner dynamics of legal communications.

This removal of the locus of consideration of legal norms to the system avoids the consideration of their relationship to individuals. The effect of legal norms, their impact and their power is on individuals at their end. It is the individual that is locked up. It is the individual which loses access to children. It is the individual who loses a house. The reason for legal norms being applied is because of the behaviour of individuals creating the need for a legal norm. The effect of legal norms being applied is their effect on the lives of human beings. Talking then of the systemic legal norm is to look at that part of the process which occurs between the behaviour of and the impact on the individual. It returns us to the question of how communication is effected in a way that differs from Ingram’s analysis of liberal-democratic rights creation.

AUTOPOIESIS AND AUTONOMY

*Note, there is a separate discussion of autonomy elsewhere on this site.
There is some overlap between the two discussions.*

Dividing between autonomy and autopoiesis

There are two seemingly contradictory currents in modern social theory. The first argues for autonomy as the central element in the place of the individual at the centre of the organisation of social structures. The second argues for an analysis of social relations built around the communicating social system. Teubner makes the claim for the autopoietic systemic point of view that “*Autopoiesis breathes new life into the individual.*” This view appears counter-intuitive to the “autonomous individual” view.

The former view I shall refer to as the “autonomic view”, considered in relation to autonomy on this site, and the latter the “autopoietic view”.

⁵ John Griffith: *The Politics of the Judiciary*

The absence of an understanding of the individual in autopoietic theory

Example: in legal autopoiesis, is the individual sidelined?

With reference to legal autopoiesis as discussed by Teubner, one intuitive reaction of the autonomic view to autopoiesis is that it strips the individual out of the communicative system. What lives on apparently is the system without the need for the subject. This prompts Teubner's initial question:-

“But where is the individual in all this? Does the legal hypercycle not mean that law is dehumanising?”

The theme of reason resurfaces in this context. How is reason to be exercised in a situation where there is only the internal dynamic of the system to move forward. In Frankenburg's words: “*No subject, no reason*”? Is Frankenburg right in claiming that the hypercycle is “as post-modern as the neutron bomb which eliminates the subject while leaving everything else as it was”?

Teubner is confident of the claims of autopoiesis: the victory of autopoiesis is in reinstating the autonomy of the individual. What is central is the use that Teubner is making of the term “autonomy” and the use of that term that is made by the autonomic view.

What is interesting in looking at Teubner's truncated analysis of the place of the individual within the autopoietic legal system is his use of the term “autonomous”. For the autonomic view, autonomy aims to be something which puts the individual before the system. It does not make the brave assertion that the individual is relegated to a position which is exterior to the possibility of the communication that is propounded within the system.

What are the roots of autopoiesis and of autonomy: liberal or late capitalist?

The autonomic viewpoint, and the extent to which I shall refer to systems of modern thought that place this at the centre of liberal-democratic (and possibly democratic-socialist thought) is that there is suspicion of the system. One issue to which I shall return at the end of this analysis is the question as to the genesis of autopoiesis. Does autopoiesis arise from the observation of post-capitalist systems? Alternatively does it grow out of the thought of the New Right in the 1970's when the capitalist system was venerated and located as the vanguard for the regeneration of nations states and national economies. Much of the reaction of the autonomic view (for example Giddens's response to Parsons) is based upon these underlying normative claims about the role of the *individual* within the *social*.

This normative stress on the socialist models of social theory has led to the automatic suspicion of system-based models. The weakness of this position is the regular failure

that is made when socialist principles are applied to public administration and to the control of many private sector organisations.⁶ The claims of the systems models need to be reconsidered in the light of the post-monetarist consensus that has begun to grow in the 1990's.

The importance of the systems models are in locating a possible answer to the problem of examining social institutions and public administration. In the case of the legal system, there are two strands of thought: the first fails to see any world beyond the legal system; the second sees only the world beyond the legal and does not look at the importance of the internal workings of the system. The former position is one of legal fetishism. The pronouncements of judges are given pre-eminent importance. Law is considered only as a web of lawyers' expositions. The position of those "coming to law" as lawyers, litigants, or societies generally, are not considered as needing particular attention. In the latter view, the sociological environment in which the legal system operates is placed ahead of the manner in which the system takes legal problems and deals with them.

Systems theory has latent within it the possibility of driving an important middle course between these two diametrically opposed approaches. This is the importance of autopoietic thought generally: the work that can be one on looking between the subject-centred concerns of democratic-socialism and the social-engineering of technocrats.

As Teubner states the autopoietic position with reference to law:-

“[Autopoiesis] breaks up the unity of the individual and society, and makes us view human thought and social communication as autonomous processes which reproduce themselves according to a logic of their own.”

It is not clear how the discussion on “autonomy” developed by Attracta Ingram, David Held and Anthony Giddens meshes with Teubner's use of the term. The first task is to understand the Ingram and Held position before looking at the use which Teubner would make of it.

[insert David Held discussion]

The common ground between both the autopoietic view and the autonomic view is that they are both convinced of the need for the processes of the individual to be separated from those of society more generally. The difference is in the inter-action between individual and society and the way in which the processes of one should affect the behaviour of the other.

⁶ Not a failure I seek to applaud but a failure, in the case of European state socialism for example, which one must acknowledge in the loss of individual liberty and so forth. See the book *Past Imperfect* for example on the myopia of much of the French left to the effects of Stalinism in the twentieth century.

ACOMPARISON OF THE AUTOPOIETIC VIEW AND THE AUTONOMIC VIEW

A note on references: this document was originally a set of notes and as such the footnoting is incomplete – my apologies to the authors. Once an author is mentioned and referenced the first time, it can be assumed that the following quotes, until attributed to someone else, follow on from the first referenced quotation.

THE AUTOPOIETIC VIEW

In Teubner's words:

“‘the autopoiesis of consciousness’ is a radical attempt to reformulate the individual's consciousness and his capacity for self-reflection in a systems-theoretical way. The objection that systems theory marginalises the human individual for society, that it treats individuals as “blind agents”, as dolls, without which the game could not go on”, is without foundation.⁷”

Where the autonomic view is weak is in the understanding of the way in which the moral decisions of the individual are translated into a social construct. The autopoietic view has the strength that it sees the role of the social institution as conducting these discussions as part of a self-reflexive process.

The two attitudes both contain elements which make claims to the identification of the nature of social system and claims to have located the ideal form of system.

One of the fears held about systems theory⁸ is that it is a systemic game which does require the people for anything more than counters on the board on which the game is played. In political terms, the competing claims are efficient communicative action on the one hand and a fear that dehumanised systems will ignore the requirements of real people on the other.

This is the tension in the claim that individuals cannot communicate but that is only the system, or communications (to use Luhmann's phrasing), which can communicate. The victory of language is one of the few anthropological victories of life on this sordid little planet. To take the control and possibility of communication by language away from the agents and put it in the hands of the process (either the communication itself or the “system”) runs against the grain of the received, ordinary values of much of the audience.

As Teubner puts the autopoietic argument:

“...the human subject which is consigned to the social environment involves society to a considerable extent. On the one hand, the social constructs of

⁷ Gunther Teubner: *The Law as an Autopoietic System*

⁸ see for example Giddens

“persons” are absolutely essential for society to be able to constitute actions from communications by means of self-observation.”

The participation of the individual is as part of the observing brief set out by the autopoiesists. The tension here is that if communications can communicate, what is to prevent them from observing at the same time? If individuals cannot communicate, how can they observe? And if they do observe, how can they communicate those observations except by other communications which in turn must be watched? At what point does the hypercycle simply implode under the weight of this logical self-penetration?

Teubner continues:-

“On the other hand, the social system is disturbed by turbulent psychic systems by means of operative and structural coupling.”

The reference to coupling here is vague. Does it refer to coupling between communication and individual or between the individual and the social? The latter is to place the cart firmly before the horse. The question is how the links are to be formed between the individual and that which sits outside the individual, and not whether the two become tethered through this processus. Therefore, the former returns us to the self-contradictory position of the way in which the individual and the communication are to inter-act if one is capable of acting in a way that the other is not.

The solution is in the separation of the individual from the social. The fusing of individual and social, the anecdotal with the observed, the microcosmic with the macrocosmic, makes understanding either more complicated. The central claim for autopoiesis must be in its attempt to separate the two elements and consider each independently of the other.

“[Autopoiesis] breaks up the unity of the individual and society, and makes us view human thought and social communication as autonomous processes which reproduce themselves according to a logic of their own.”

The political issue with “processes which reproduce themselves according to a logic of their own” is that that is reminiscent of any definition of power which is outside the control of ordinary citizens. The fundamental question is whether a system developing its own rules is preferable to a society which enables individuals to select their own lifechoices while exercising autonomous control over social institutions.

For the autopoiesist there are three routes:

“These processes are linked in three ways: through social observation, interpenetration and co-evolution.”

The modes of autopoiesis begin to sound like political slogans that surround communitarianism. The important point to take away from autopoiesis is that, like

monetarist economic theory, it was not supposed to be taken to its logical conclusion. It is a grand theory, in the European tradition, which highlights social theory but does not anticipate being held up to a scrutiny which does not appreciate its irony.

Autopoiesis does have important comment to make about the claims of deconstruction. The political role of the deconstructive impulse, has been the destabilisation of the grand ideas of 19th century and early 20th century politics. It has become difficult to make normative claims of any sort in this environment. Politically it becomes necessary to make these normative claims. To understand how to do this, distinguishing between competing individual and social claims becomes important. The lesson to take from autopoiesis is the distinction between system and individual.

As Teubner has it:-

“Despite premature reports to the contrary, the autonomous reflecting subject is still with us. It has certainly not been deconstructed, merely decentred. In its unique position it is threatened by communicating social systems, law among them, which have at their disposal independent (communicative) mechanisms for understanding the world and for self-reflection. Herein lies one of the most important innovations of systems theory, one which makes it so relevant, particularly for law. Law is not identical with the sum of lawyers’ consciousnesses. Rather it is the product of an emergent reality, the inner dynamics of legal communications.”

To pick these elements apart, we can begin to probe Teubner’s understanding of the interaction between the system and the individual.

“Despite premature reports to the contrary, the autonomous reflecting subject is still with us. It has certainly not been deconstructed, merely decentred.

The surprise is to find the subject here. It would have been easier to have deconstructed the subject and to have carried the body away behind an arras to lie with Polonius. The difficulty is in seeing how the subject is supposed to inter-act with the system. Luhmann takes from the individual the responsibility for communication and replaces it with the possibility of observation. The individual has been moved away from the centre of decision-forming: “decentred”.

In its unique position it is threatened by communicating social systems, law among them, which have at their disposal independent (communicative) mechanisms for understanding the world and for self-reflection.

Luhmann does not grant the individual the ability to communicate: Teubner locates the communicative possibility in a pre-systemic state that has now left the individual. IN Teubner’s analysis there is a feeling that the resources of the legal system are mightier than those of the individual and this is why the individual cannot be heard. Is it then a political battle? Is it simply an issue of power or is there something peculiar to those

areas of social theory which have established systemic possibility which relocate the form of communication? If so, when did law acquire this capacity?

Herein lies one of the most important innovations of systems theory, one which makes it so relevant, particularly for law. Law is not identical with the sum of lawyers' consciousnesses.

Arguing against the uninformed power conflict is the assertion that the role of the legal system is outside the aggregate influence of the lawyers' consciousnesses. The analysis of John Griffith, for example, is not enough to understand the legal system.⁹

Rather it is the product of an emergent reality, the inner dynamics of legal communications."

For the legal system, we must look beyond simply the lawyers. The logic of autopoiesis is that we must also look beyond the subject of legal relations per se. Our focus must be on the "emergent reality" and the means by which the system communicates and permits communication.

"Legal norms are not psychic phenomena. Nor are they socio-psychological phenomena in the sense that they represent an aggregation of individual preferences or a consensus of actors. They are autonomous social phenomena, the reality of which resides in the mere fact that they are communicated.

But in what context are they "autonomous"? We have seen the rights-based approach to autonomy as an individualist mantra. The real question is in the formation of the "autonomous social phenomena". There is no explanation of the way in which they are formulated in a way that differs from a social collection of asserted choices.

Teubner maintains that legal norms exist solely in their communication. They are not simply created in the psychic level. But what does that mean? Does that mean that legal norms are not deliberately created by a political process either? There must be the intervention of mind or a combination of minds at some point in this drift of meta-practice. The rules and conventions of a process might emerge without deliberate, coherent planning.

This removal of the locus of consideration of legal norms to the system avoids the consideration of their relationship to individuals. The effect of legal norms, their impact and their power is on individuals at their end. It is the individual that is locked up. It is the individual which loses access to children. It is the individual who loses a house. The reason for legal norms being applied is because of the behaviour of individuals creating the need for a legal norm. The effect of legal norms being applied is their effect on the lives of human beings.

⁹ John Griffith: *The Politics of the Judiciary*

Talking then of the systemic legal norm is to look at that part of the process which occurs between the behaviour of and the impact on the individual. It returns us to the question of how communication is effected in a way that differs from Ingram's analysis of liberal-democratic rights creation.

Much of the following discussion is presented more fully in autonomy elsewhere on this site.

THE AUTONOMIC VIEW

In looking at the autonomic view, it is necessary to isolate its genesis and also to understand where it perceives of the dividing line between individual and social decision-making. One of the clearest analyses of this position is in Attracta Ingrams's *A Political Theory of Rights*, which looks at the understanding of what constitutes a "human right", what their moral claims are, and how they should be conceived of politically. Her initial position is that the classical view of individual rights sees them as goods which are "owned" in some way by individuals on the basis that they are human.

She prefers to see rights as being created and protected through the filter of subjective political and moral belief which in turn undermines any claim to their objective existence as inalienable rights. The concentration on "autonomy" is considered to be the better understanding of the conception of rights, based on a Kantian position about the value of the human being which is involved in a social contractual inter-action. She then develops her position to take a stand related to Habermas's "social conversation" of developing consensus about rights.

The foundations of her position deserve some analysis to understand the qualities that are imputed to the individual in this area.

"[The reigning conception of rights] demystifies rights by showing them as logically tied to certain normative descriptions of ourselves. In the Lockian world what we must do to discover rights is to recapitulate the conception of persons as self-owners."

Rights are embedded in normative theories about the world. They do not grow out of objectively existing criteria.

The 1990's obsession with human rights does not command universal assent. Macintyre, for example, derides belief in rights as at "one with belief in witches and in unicorns". Etzioni interestingly calls for a "moratorium on rights" while the focus is trained instead on "responsibility".

The Etzioni / communitarian line of the 1990's echoes perhaps a more traditional socialist message of the individual as a moral agent. Rather than being centred solely on personal gain and the role of personal achievement for self-selected, the individual in Ingram and Held's analyses, is necessarily involved in and concerned by the social ramifications of their choices. As Ingrams has it:-

"Apparent ontological disputes turn out to be misleading ways of canvassing the merits and demerits of different conceptions of persons...conceptions that favour certain traits such as separateness and independence may be regarded by some

people as less revealing of human nature or less attractive morally, than ones which identify traits such as sociability and connectedness.”

The consideration of the person, in this analysis, must take account of the public aspect to the individual. Essentially, this position is the foundation of Rawls’s and much of liberal democracy’s consideration of the individual. The sole level of majority consensus in democratic societies is that there is some point at which the choices exercised by the individual inter-act with the social.

[Even in the thought that led to the 1980’s concentration on the individual and Margaret Thatcher’s infamous pronouncement “there is no such thing as society”, served only to underline the way in which the individual and the social were linked. The thought of Popper and Hayek served only to redraw the contract between the social and the familial (more accurately than the individual) rather than rip it up altogether. [expand]]

The criticism that can be levelled against the liberal democratic analysis is the reliance on rationality in the individual agent. [Rorty] What is not accounted for is selfishness or bare-faced irrationality. In the selection of moral questions, there is much scope for the selection of purportedly “irrational” (or perhaps more accurately “non-mainstream”) moral choices. Ingram again:

“But these rights claims cannot be treated as subject to assertion or denial independently of the theoretical context in which they are embedded. So we should see scepticism about individual rights as a misleading way of disputing theories that give rights as a misleading priority to individual over communal interests.”

There is fundamental disagreement about the individual and profound misunderstanding about the capacity of the individual in many important contexts. Ingram:

“...the notion that rights are given in a conception of ourselves such as self-ownership illuminates disagreements about the context of rights.”

That individuals are thought of differently highlights the basic differences in many political and philosophical systems. These differences frequently remain undiscussed because they are not recognised in the majority of cases. The concomitant result is the uncertainty of the place of the individual within these systems and the crisis of human identity that results. To talk of the individual rather than the social, or to talk of the concrete-individual rather than the theoretical-social is to adopt a political stance (explicitly or otherwise) because that focus exposes the driving direction of the theory. This is true even of the “grand theories” like autopoiesis. To put the individual at the end of the queue of objects of consideration is to say that the importance of the individual is secondary to that of the social-theoretical.

Autopoiesis must become explicit in its consideration of the place of the individual within the communicative system. This is the essential difference between Teubner and Luhmann. Luhmann is stated in his position on the role of mind in the discussion. Teubner prefers what is in fact a sloganeering approach to the individual. The position stated in *The Law as an Autopoietic System* is determinedly brief. The failure to consider terms such as “autonomous” within the drift of the discussion of system, illustrates the tension that exists in this field.

“Thus the scheme of rights we endorse is inevitably connected with our judgements about the importance of certain liberties to our philosophically favoured conception of the person.”

The failure to state a position at all appears to be an endorsement of a position.

“...an alternative conception must make good its own claim to adequacy by tying itself more firmly to the interests that rights are to protect.”

The issue for autopoiesis is how it conceives of legal rights and rights more generally. Ingrams’s position is clear to this extent: there is no possibility of creating rights without passing those rights through a moral and political filter that is shaped by the creator’s normative convictions. In Ingrams words “the first task in working through a contractarian approach is to fix the appropriate conception of the person” and so:

“...our thinking about rights takes place against certain background beliefs that are not in question within the liberal democratic perspective: (1) that citizens are to be treated as equals from the point of view of politics; (2) that certain liberties, such as the liberty to practice a religion, are of fundamental importance; (3) that disagreement about the fundamentals of human existence is to be tolerated (even regarded as a good thing) rather than stamped out by force.”

The autopoietic view must be clear about the roots of its view of legal rights and the movement of the legal system. The disagreement between that and the autonomic view is that the autonomic view gives rights pre-eminence in its conception of the subject.

The liberal-democratic view is therefore centred on the requirement of moral pluralism. If individuals are to have autonomy, they must be free to make their own lifechoices. “The thought is that treating a person as an end is respecting her distinctive capacity to set and pursue her own aims and projects.” This freedom depends upon the ability to for individuals to hold different opinions as to the good life. Herein lies the essential difficulty: how to marry the idea of moral pluralism with social, or group, action.

“Now in the context of moral pluralism the good a person identifies and pursues is not a good shared by all. So equal respect for persons cannot flow from the thought that others are due the respect we claim for ourselves because they are like us in sharing our judgements of what makes life worthwhile. Instead, equal respect must come from the thought that what matters is that people develop and exercise their capacities to form and implement their own plans and projects. This is the thought of people as capable of autonomous life and of autonomy itself as so deeply valuable an ideal that we shape our politics to secure it.”

The autonomic viewpoint throws its concentration on the individual as the fons origio of its conception of social structures. In the autonomic view:-

“The ideal of autonomy flows from the thought that individuals have a moral personality that enables them to discern good and evil for themselves.”

The autonomic position can be stated more explicitly:

“Autonomy is conceived of as a second-order capacity of persons to reflect critically upon their first-order preferences, desires, wishes and so forth and the capacity to accept or attempt to change these in light of higher-order preferences and values.”¹⁰

In another statement of the autonomy principle:

¹⁰ Gerald Dworkin: *The Theory and Practice of Autonomy*, 20. The question is then whether this capacity is taken away in the construction or the analysis of an autopoietic legal system: if so, would it matter?

“...a person may be regarded as a human life lived according to a plan.”¹¹

How does this autonomy to plan arise if the space between the individual and the system is taken away from the individual? Can the plan be created in the absence of knowledge of the society in the context of which the choices will be exercised? The autopoietic theory does not address the importance of the exercise of choice. Choices are selected within the system. Is this a central distinction or does the project of the autonomic view in fact require the generation of systemic choice?

In the rightist, libertarian position Robert Nozick formulates a similar position with reference to the autonomous subject as

“a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself and hence not merely the plaything of immediate stimuli, a being that limits its own behaviour in accordance with some principles or picture it has of what an appropriate life is for itself and others.”¹²

The issue for the autopoietic position is then whether taking this decision-making into the system enhances these possibilities for autonomous action by placing them within an achievable context.

In Raz’s conception of “significant autonomy”, the concept requires the ability to “adopt personal projects, develop relationships, and accept commitment to causes through which their personal integrity and sense of dignity and self-respect are made concrete.”¹³

To return to Attracta Ingram:

“Autonomy is not prejudiced because we discover ourselves already loaded with projects and aims when we start to reflect. The crucial point is that we regard these commitments as open to question...”

Does the autopoietic system re-frame these questions?

The Ingram structure of autonomy focuses more explicitly on a Kantian position. Its basic elements are that autonomy defines freedom negatively as belonging to rational will “being able to work independently of determination by alien causes.” From here springs the more useful positive concept of freedom where individuals choose self-imposed laws. “What else then can freedom of the will be but autonomy - that is, the property which will has of being a law unto itself”¹⁴. The primacy of the system and the availability of communication replaces self-determining will where the power to communicate and choose is abstracted to the system.

The problem with Teubner’s conception of the individual is that this central relationship is obfuscated.

“Kant’s view is that the law we make is no mere subjective standard for assessing actions but one that we can will to be universal...So if we follow the Kantian line here, we need to think of making moral laws that are intersubjectively valid because they express an agreement in moral judgements that is the terminus of many independent deliberations and judgements. How the many independent

¹¹ John Rawls: *Theory of Justice*, 408

¹² Robert Nozick: *Anarchy, State and Utopia*, 49

¹³ Raz: *The Morality of Freedom*,

¹⁴ Kant: *The Groundwork Metaphysic of Morals*

deliberators are to arrive at one and the same moral conclusion is the key problem here and the one that post-Kantian contract theory addresses.”¹⁵

The restraint that might be offered by a freely communicating system are that the choice is taken away from communication between individuals and located in choices selected and elected by the autopoietic communication. As Rawls has it: “acting autonomously is acting from principles that we would consent to as free and equal rational beings.”

The autopoietic view, naively stated, suggests that the individual is served by an autopoietic transfer of inputs from the outside world to the system and the communicative outputs of that system. The individual’s position is protected and enhanced by this osmotic discourse. The purist autonomic position would suggest that this removes the power from the individual. However, the social implications of the individual maintaining control over moral and political choices are that there could never be meaningful consensus. Ingram, for example, moves explicitly towards the position held by Habermas that the difficulties of resolving these disputes can only be solved through an ongoing discourse which is aiming for the “ideal speech situation”.

The result is an uncomfortable compromise of the basic assertion that it is the individual who makes the choices: the individual has to choose a la carte instead.

“Choice is represented by the role given to consent. The idea of independent validity is captured in the thought of principles that any free and equal rational being would endorse.”¹⁶

Is autonomy to be tied up in the idea of choice in a way that is necessarily linked to consent? Logically, consenting does not pre-suppose the exercise of choice. The two may be linked in some circumstances but consenting to a state of affairs cannot be equivalent to the exercise of free choice. To consent to something, in a social context, requires choice from a menu rather than choice from all the possibilities which the individual can conceive of. The issue of how free any individual is to choose in any event, is a question of politics. However, this does not remove the underlying question. What is the relationship between choice and consent to a list of choices? Autonomy, in its ordinary use would indicate a general freedom to choose. Closing down the options to an menu of consent necessarily implies compromise.

Any political programme must provide a menu at some point: even if it is simply a selection between frameworks in which comparatively free choice is to be exercised. In Ingrams’s analysis then, the exercise of autonomy necessarily involves the potential for the compromise of entirely free choice.

In this way Kant moves towards the social contract position, where individuals are held to be morally autonomous but are also held to have consented to an agreed collection of moral (and other) choices.

“Our own will, provided it were to act only under the condition of being able to make universal law by means of its maxims - this ideal will which can be ours is the proper object of reverence; and the dignity of man consists precisely in his capacity to make universal law, although only on condition of being himself also subject to the law he makes.”

In Ingrams’s words:

¹⁵ Attracta Ingram: *Political Theory of Rights*,

¹⁶ Attracta Ingram: *ibid*

“The ideal of autonomy that I have been putting together is the vision of people determining, to some extent, their own lives in the light of principles they would endorse as free and equal persons.” [my underlining]

The underlined supposes a conditionality in these rights. The questions at this point become more complex. There must be an adequate range of options from which to pick. There is a requirement of rationality in all these models. What does it mean to be rational: what guarantees are there in Rawls’s original position that rational rather than risk-taking choices would be made?

In contrast, what does the system offer in terms of rationality and free choice? The assertion of the autonomic models are that the choices have to be made, or analysed as being explicitly by persons. The autopoietic position contains the possibility that the questions are not met and answered but rather that solutions are presented through the operation of the system.

In Ingrams’s own position, there is the possibility that solutions to problems arise not from those in whose benefit the problem is resolved but rather from within the operation of a system that administers their rights:

“Laws that prohibit the abuse and maltreatment of slaves are not founded on claims made by slaves on their own behalf, but on claims originating either from slaveholders, or from the general interests of society (which does not include the interest of slaves).”

The history of the US constitution is one in which the “inalienable rights of man” have been asserted for three centuries while the rights of former slaves have been asserted for only three decades. Here is both the fear and the salvation: the salvation is the idea that within the system there is the ability to set the slave free; the fear is that the slave may sit in chains for a long time before the system reacts.

In the autonomic view, “[individuals] are politically free as members of a polity that is internally self-governing.”¹⁷ The issue is how the polity is internally self-governing. Citizens must regard themselves as able to give justice to each other. “Citizens are politically free with respect to justice in that their civic status is regarded as independent of which conception they hold, which religious affiliation, if any, which political convictions, and so on¹⁸.” But how do these citizens communicate? Is the communication systemic or inter-personal?

And yet Ingrams persists:-

“The point is that respect for autonomy is not consistent with governments deciding moral issues on behalf of citizens...political participation, just institutions, and independence of state paternalism are valuable to individuals not merely as a means to autonomy, but as an intrinsic part of what autonomy is.”

Does this resistance to paternalism extend to the closed system? If so, what other system do we use to determine society’s moral choices? Does this make systemic choices immoral too? Where has the conception of “consent” above gone to?

¹⁷ Attracta Ingram: *ibid*

¹⁸ Attracta Ingram: *ibid*

“If we are to deal with the fundamental problems of justice in our political culture we have to find some point of contact with each other on the basis of which we can agree common principles of right.¹⁹”

Can this be achieved in the context of system too?

¹⁹ Attracta Ingram: *ibid*

Notes from reading:
“Is Law an Autopoietic System?” by Anthony Beck

We should place autopoiesis in the context of theories which use a metaphor: biology. Compare this with Derrida’s thoughts on metaphor and deconstruction. See Teubner: “How the Law Thinks: Towards a Constructivist Epistemology of Law”; 23 Law and Society Review (1989) 727-57.

“...the concept becomes an unacknowledged metaphor presented within propositions which claim literal truth...”

“The reason for adopting phoney concepts may be some political or other rhetorical appeal of the transfer.”

“The further aim of the label “phoney”, however, is to identify an ulterior purpose of such concepts which is to sell the theory giving a political slant, or some other unexpected and startling feature to law, and to do so by offering some special attraction to the use of metaphor.”

“Law is by this means unmasked or superficially shown to possess some hidden quality.”

‘... law is superficially rendered comprehensible in an apparently new and acceptable way, when the true cost is a new obscurity or incoherence.’

S. Rose, *The Chemistry of Life*: “It became clear that one, perhaps the major, function of the living cell was the constant re-creation of itself from within.”

“‘Autopoiesis’ as an idea derives historically from ‘homeostasis’, the term which describes natural states which are kept stable by complex systems of information and control (ie: in-built cybernetic systems).”

“Autopoiesis goes a step further. It refers to the stability of constituent parts, of structure, maintained by self re-creation.”

Humberto Maturana; *Erkennen, Die Organisation und Verkörperung von Wirklichkeit*: “Autopoietic organisation is defined as a unit through a network of constituents which (1) have a recursive effect on the network of the production of constituents which also produces these constituents and (2) which realize the network of production as a unit in the same space in which the constituents are located.”

“A system is essentially some defined unit, bounded from its environment, which is internally patterned by input, process and output, combined with elements which collect and interpret information and exercise control on the basis of that information....In the 1950’s Talcott Parsons developed a general theory of the social system (T. Parsons *The*

Social System) and more recently Luhmann has developed a systems theory of society (*Social Systems*).”

“Teubner’s legal theory is not compact...instead of physical entities and their interactions, the material which constitutes Teubner’s system is meaning and understanding. The autopoietic legal system is a system of communications.”

“In the language of ‘post-modern’ thought, social sub-systems constitute their own realities. Far from communications being made by people, people are constructed by discourses as ‘semantic artefacts’”.

“Courts, judges, lawyers, laws, parties and penalties, appear in the system only as linguistic entities, only within the communications which are the stuff of the system.”

cf continental systems and common law systems

“...what is systematic and closed is by implications of determination not indeterminate.”

Teubner adopts from Foucault an account of discourse as an “anonymous, impersonal, intention-free choice of linguistic events” which constructs reality for the age; and from Luhmann, the fragmentation of society into different self-referring discourses. He concludes that “The law autonomously processes information, creates worlds of meaning, sets goals and purposes reality constructions and defines normative expectations - and all this quite apart from the world construction is lawyers’ minds.”

“In the first place the system of communication is a generated system. This means that some physical entities have to utter or write the words which carry the freight of meaning....Teubner is committed to giving autonomy to this world of meanings he is attempting to isolate and identify.”

“...the observation of the system does not give Teubner any worries. This is because the interpretation of the discourse so far as this takes place in a way which it is significant for system, is done by the system itself - words interpreting words.”

“Quite distinctly, individuals have their own world of communications outside the current public social sub-systems. This is the realm of private inner life, individual, uncommunicated and uncommunicable, and in its own terms self-referring, which is called ‘psychi autopoiesis’.”

Self-constituting

“A simple example of this in the English system is found in the rules of precedent: they are uttered by the discourse of the courts themselves.”

“As in Hart’s *Concept of Law*, in order to discover the specific nature of any legal system you have to examine its behaviour, but only that.”

“The idea of being self-constituting does not involve the notion of validity of anything as law but physical creation or creation by indication of what enjoys membership of the class of legal discourse. It is the discourse of the law which creates what is part of the discourse of the law. Creation is obviously dependent upon validation but is analytically distinguishable.”

Self-referring

“Statutory material, Teubner claims, as did some in the American realist tradition and others, means only what the judges say it does.”

Self -Describing

“This distinction is achieved by allotting the power and authority to utter proper or official descriptions to some discourse but not to any other.”

“Communication in its familiar use implies the presence of a sender and a receiver as well as a message. All three elements are generally assumed to subsist contemporaneously. Legal texts are better thought of a part of an archive, extended in time...But the answer cannot be to regard the accumulation of legal texts which judges refer to as communications.”

“At one point Teubner himself refers to legal culture (p.61) but his theory is incapable of recognising this: the past has no weight upon the present unless the present so chooses.”

“Semiotically a legal text carries many messages.”

“Teubner is weak on the hermeneutics of texts which undermines the apparent certainty and stability of communications within “discourse” and therefore of the notion of discourse. If Teubner relies upon the multiplicity of messages involved in legal utterances as separate communications all part of law, then he is in difficulty in establishing law as a closed system of communications existing as an autonomous dimension.”

“As well as ignoring the variety of receivers, Teubner’s theory excludes the senders.”

“The absence of subjects from the ‘generated’ communication system of law leads to commentators under autopoietic theory’s influence to say the “law thinks” and that it “has a life of its own”.

Teubner: “Social discourses are the new epistemic subjects that compete with the consciousness of the individual.”

“...[autopoiesis] obscures the voluntaristic and social elements which motivate the production of the texts and which establish them as law.”

Early Teubner was prepared to accept that the “social environment” had an effect on law (*Juridification of the Social Sphere*). M. King [in “*The Truth about Autopoiesis*”, 20 *Journal of Law and Society*, 221 (1993)] claims that a paradigm shift has occurred for both Luhmann and Teubner in the 1980’s in this respect. As Teubner knows holds: “It is the authentic consensus of the communicative community and not the consciousness of the autonomous individual that determines truth.”

The Social Context

“1. Habermas has pointed out that the lifeworld of general social ideas and values infiltrates all social sub-systems: *Theory of Communicative Action*, Volume 2.”

“Even in modern organic society, as Durkheim insisted (*The Division of Labour in Society*), there is a residual shared social consciousness. It cannot be detached from legal phenomena.”

“2. Few can read the law reports without becoming aware that judges decide cases with an eye to the consequences.”

“3. ...the normative power of a text depends upon the way living people regard that text.”