

SLSA 2012, SYSTEMS STREAM

Convenor: Thomas E Webb, University of Lancaster

PARTICIPANTS

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Dr Sarah Sargent,

Mr Thomas Webb,

Prof Gary Wickham,

PANELS

Panel 1

- Dr Julien Broquet
- Prof Jiří Přibáň
- Mr Thomas Webb

Panel 2

- Dr Oles Andrichuk
- Prof Richard Nobles
- Prof Gary Wickham

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- Prof Reza Banakar
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- Miss Rachel C. Herron

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- Dr Annika Newnham
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- Dr Sarah Sargent

Panel 1

Dr Julien Broquet, Université de Picardie Jules Verne, CRIISEA

'Structural couplings and evolution. The ongoing definition of the European economic constitution'

In the field of European Studies, Modern Systems Theory has known a vivifying debate on the europeanization of autonomous social systems, and on what one could call the europeanization of structural couplings¹. Constitution as Luhmann's typical example of structural coupling has been at the core of theoretical reflections on the nature and future of Europe as a specific form of inter-systemic co-evolution². This occurred in parallel to more

1 See Albert, M. (2002) 'Governance and democracy in European systems: on systems theory and European integration'. *Review of International Studies*, Vol. 28, No. 02, pp. 293-309.

2 E.g. Kjaer, P.F. (2010) 'Constitutionalizing Governing and Governance in Europe'. *Comparative Sociology*, Vol. 9, No. 1, pp. 86-119.

general reflections on the very nature of constitutions and on the evolution of such forms of couplings, under the label of 'societal constitutionalism'³.

Following this line of reasoning, the current proposal aims at questioning the nature of inter-systemic relations and of structural coupling, by focusing on the emergence and structuration of such relations. In order to do so, we propose to deal with the recent evolutions in the European economic constitution. This reflection will lead us to discuss Teubner's recent systemic account on economic constitutions⁴, and to defend the claim that such couplings are best described and analyzed as tripartite forms of intersystemic relations. We will advance that in the course of the definition of a specific economic constitution for Europe, one can not oversee the *polycontexturality* of modern society, and the importance of numerous functional and organizational systems.

Professor Jiří Přibáň, Professor of Law, Cardiff University

'Sovereignty and Post-Sovereignty Studies: A systems theoretical critique'

The paper focuses on the proliferation of the sovereignty discourse and the normative expectations of some major and typical theories of sovereign and post-sovereign politics and law. It analyses sovereignty's semantic value for modern politics and law. Drawing on the autopoietic social systems theory, the final part considers sovereignty as part of the self-referential semantics of both the legal and political system. The author argues that the concept of sovereignty cannot be discarded as useless if politicians, lawyers, constitutional judges and the general public continue using it in their social communication. However, it cannot be understood as a fiction signifying the total unity of society ultimately governed and controlled by one power centre and its laws. This fiction needs to be replaced by a theory in which the concept of sovereignty is self-limiting and self-referring to the globalized systems of politics and law.

3 E.g. Teubner, G. and Fischer-Lescano, A. (2004) 'Regime-collisions: the vain search for legal unity in the fragmentation of global law'. *Michigan Journal of International Law*, Vol. 25, No. 4, 2004, pp. 999-1046.

4 Teubner, G. (2011) 'A Constitutional Moment? The Logics of 'Hitting the bottom''. In Kjaer, P.F., Teubner, G. and Febbrajo, A. (eds.) *The Financial Crisis in Constitutional Perspective. The dark Side of Functional Differentiation* (Portland: Hart Publishing).

Mr Thomas E. Webb, PhD Candidate, Lancaster University

'Contingency, Contestability, and Constitutionalism'

In this paper I use complexity theory, a systems theory, to critique three models of constitutionalism (as offered by Allan, Loughlin, and Walker). I specifically draw on two features of complexity theory thinking's critical approach which are contingency and contestability. These features relate to complexity theory's perception of reality as comprising many competing and incomplete accounts of reality in the form of models of understanding (models for making sense of the world, such as theories). The idea of contingency relates to how we must be careful about the claims we make about the validity of our knowledge. Contestability suggests that, in recognising the limits to our understanding brought about by contingency, we should be open to dialogue and engagement with rival theories through the agnostics of the network.

The paper shows both the incompleteness of each model of constitutionalism, as well as its validity, suggesting that public lawyers should be more open to inter-theory dialogue in order to improve their own models through discourse with rivals.

Panel 2

Dr Oles Andrichuk, Post-Doctoral Research Fellow, ESRC Centre for Competition Policy, University of East Anglia

'Exclusive Legal Positivism and Legal Autopoiesis: Towards a Theory of Dialectical Positivism'

This paper puts forward a theory of dialectical positivism. The dialectical part of the theory is developed along the lines of social systems theory – legal autopoiesis. Its positivist part is based on the premises of exclusive legal positivism. My objective is to justify the main premises of exclusive legal positivism using autopoiesis as a method. More specifically, the paper addresses the following problems: the definition of the law as a system of social norms and its interaction with other social systems (among others, morality, economics and politics); a critical assessment of non-positivist theories of law and inclusive legal positivism; the application of dialectical positivism to the issues of legal interpretation and argumentation

in hard cases. Its main epistemological argument is based on the notion of ideal law, which is dialectically connected to material law. Unlike in non-positivist theories, the ideal dimension of law that is endorsed in this paper is not considered as law's moral incarnation. The paper explains why every norm (be it legal, moral or of any other nature) always has an ideal dimension, which shifts the notion of ideality from norm's content to that of its structure.

Professor Richard Nobles, Professor of Law, Queen Mary University of London

'How Law Constructs Time'

Einstein made it clear why we need to orientate ourselves towards time: 'The only reason for time is so that everything doesn't happen at once.' But, such orientation does not mean that only one understanding of time operates within society. This paper will discuss some of the roles played by time within the legal system, how law travels through time, and the mode of time's construction within law, namely law's observations on its own temporality.

Professor Gary Wickham, Professor of Sociology, Murdoch University

'Hobbes, Sovereignty, and the Rule of Law'

Hobbes's account of sovereignty, which draws on his Epicurean anthropology and his Epicurean political philosophy, sets out the steps whereby the rule of a strong authority, the sovereign, can discipline the wills of subjects by properly balancing their passions in order to achieve a lasting civil peace. As Schmitt and many other commentators have noted, Hobbes's sovereignty is therefore based on the capacity to make a decision, it does not entail norms. This paper, drawing on a some recent work by Martin Krygier, explores the possibility that the only coherent understanding of rule of law consistent with Hobbes's notion of sovereignty is one in which law is part of a system of rule in which politics can be restrained by law but ultimately trumps law.

Panel 3

Professor Reza Banakar, Professor of Socio-Legal Studies, University of Westminster
'Law, Community and Justice'

This paper explores the ability of socio-legal research to capture the normativity of law and produce a theory of justice. It begins by examining some of the debates on the relationship between law and justice against the methodological constraints of socio-legal research, according to which social scientific studies of law should apply themselves to the factual properties of the relationship between law and society. It then moves on to argue that the sphere of socio-legal research is not, and cannot, be limited to an examination of the factual characteristics of law, legal behaviour and legal institutions. Although law and justice may be divorced from one another conceptually, they remain inseparable constitutive elements of the mundane reality of the law under modernity. Justice is, arguably, not only a virtue attributed to social practices and institutions of modern law and polity, but also a moral value capable of enhancing social integration. The paper ends by asking if the notion of justice as a socially integrating force under modernity is still valid under late modernity, when the significance of the “social” as the imperative property of law and governance is undermined by society’s “liquidity” and cultural hybridity and when communities become morally fragmented and increasingly transient.

Professor Alberto Febbrajo, Professor of Law, University of Macerata
'The Anthropological Roots of Social Systems Theory'

The purpose of this contribution is the discussion of the thesis that the application of an autopoietic approach to the analysis of social systems requires not only the use of sophisticated conceptual tools but also their constant control through a combination of critical and reflexive attitudes which are not only normatively but also cognitively defined. These tools have to be in particular reconsidered in order to discover the anthropological roots of the different models of system rationality; the relativity of the distinction between closure and openness of the system; the flexibility of the borders of the system; the inevitable inter-systemic connections which are presupposed by the flow of communication filtered by various instruments of structural couplings; the changing content of the identity of social systems and the evolution of their programmes and structures.

Besides an internal autopoiesis we can thus speak of an external one, based on instruments of structural couplings which, for the legal system, are mainly constitution, democracy and the market.

Miss Rachel Clare Herron, Solicitor of the Senior Courts of England and Wales and PhD Candidate, Durham University

'A Social Systems Explanation for the Racial Effect of the Section 44 Counter-terror Stop and Search Powers'

In 2010, the European Court of Human Rights endorsed long-standing claims of the potentially discriminatory effect of the suspicion-less stop and search powers within s.44 Terrorism Act 2000.⁵ Following on from this decision, and the subsequent suspension and repeal of the powers, this paper proposes a social systems explanation for the race-based effect of the statutory provisions, focusing on the existence of several communicative barriers, apparent between the law-making and policing subsystems. One effect of each subsystem's understanding of the expectations of the other, regarding the nature and use of the statutory powers, was the deployment of the powers by the police in a way that diminished the effectiveness of the safeguards on which the legislature premised the enactment of the powers. These communicative barriers suggest that the lack of external constraints on police operational behaviour risks being understood by the policing subsystem as freeing them from any such strictures. In the case of s.44 such inter-subsystem misunderstandings may have contributed to their racially disproportionate deployment and consequent role in alienating minority communities from police counter-terrorism efforts.

Panel 4

Dr Annika Newnham, Senior Lecturer in Law, University of Portsmouth

'Accommodating Power within the Autopoietic Theory Framework'

This paper is more an invitation to discussion than a presentation of a definitive account. It explores ways to explain power within the framework of autopoietic theory and is borne

⁵ *Gillan and Quinton v The United Kingdom* 4158/05 [2010] ECHR 28 (12 January 2010).

initially out of mine and others' analyses of family law interactions between legal personnel, policy-makers, other professionals and parents. The description of society as a heterarchy of closed subsystems (with power as a medium confined predominantly to politics) can feel difficult to reconcile with the observation that law's structural coupling with politics and its association with state exercise of force continue to shape understandings of the legal system as powerful, aid law's enslavement of other subsystems, and limit individuals' choices in a way that perhaps entrenches the perception of law's power into something akin to a self-fulfilling prophecy. At the same time, power in our functionally differentiated society, with its recent proliferation of communication, appears more diffuse, diverse, even obfuscated, and usually difficult to plot into one-way relationships. Although it is not claimed that one universal explanation or meta-narrative of power can be found, it is suggested that a consideration of perceptions of power and their impact on communicative choices can be important.

Miss Christine Ocran, Lecturer in Law, University of East London

'The trokosi practice in Ghana: A form of law?'

This paper evaluates the *trokosi* system, a traditional custom which evolved in the 17th century and is practised by the Ewes, an ethnic group of people in the Volta Region of Ghana. *Trokosi* involves women and girl-children, some as young as four, being given away to serve fetish priests at shrines as pacification for crimes committed by a member of their family. In some cases the priests "marry" all the women and girls and have sexual relations with them soon after maturity. *Trokosi* became more visible in the 1990s when an abolitionist movement began leading efforts to eradicate the practice. In 1998, the Ghanaian government enacted a law abolishing the practice of "customary servitude", aimed at dealing with *trokosi*.

The aim of the paper is to explore some of the multi-dimensional socio-legal issues raised by the *trokosi* practice. In particular, it considers the dichotomy between the perceptions of those internal and those external to the custom. For outsiders, the practice is considered a "harmful" traditional practice. It provokes arguments of serious denial of women and children's rights including sexual exploitation, slavery, gender violence and discrimination. For insiders, the paper seeks to expose *trokosi* as an intricate cultural and religious practice, as well as a form of social control and criminal justice system. Emphasis is placed on *trokosi's* operation as a legal system and the contention made that it is used by those within the practising community

in their everyday lives to ensure justice and retribution for crimes committed within their society. In this context, the paper questions whether *trokosi* can adequately be considered a form of “soft law” and seeks to establish its place within the hierarchy of Ghana’s legal pluralistic society. It concludes that *trokosi* is an effective form of law, which has real meaning in the lives of its practitioners.

Dr Sarah Sargent, Lecturer in Law, University of Buckingham

‘Systems Theory and Critical Race Theory: Research Strategies for Transracial Adoption’

This paper explores the combined use of autopoiesis theory and critical race theory in an examination of transracial adoption policy in the United States and England. It is based on a recently published article in the *Denning Law Journal*.⁶ Transracial adoption is a complex topic that touches on many issues and many systems. A greater understanding of the dynamics of policy positions and changes in both countries is achieved through the combined use of these theories as a platform for examination. Critical race theory is widely used in American legal research, but has only begun to be applied in the UK.

The paper will look at the research strategy of using these theories together. Firstly, it will discuss why these two theories were chosen, rather than using one or the other in a singular application. It will then examine the advantages and challenges of using a combined theoretical approach-- where the two theories complement each other, and what limitations as well as advantages there might be in using a combined rather than single theory approach.

⁶ Sarah Sargent, ‘Trapped in Legal Discourse: Transracial Adoption in the United States and England’ (2011) 23 *The Denning Law Journal* 131.