Celso Fernandes Campilongo, Lucas Fucci Amato and Marco Antonio Loschiavo Leme de Barros (eds.), *Luhmann and Socio-Legal Research. An Empirical Agenda for Social Systems Theory*, Routledge, London 2022, pp. 280, € 49.99, ISBN 9780367637323

Roberta del Pezzo
Università degli Studi di Padova
École des Hautes Études en Sciences Sociales

Luhmann and Socio-Legal Research. An Empirical Agenda for Social Systems Theory, edited by C. Fernandes Campilongo, L. Fucci Amato and M.A. Loschiavo Leme de Barros represents a rather unique attempt in the field of social systems' theory to carefully engineer the theoretical framework providing empirical instruments for the further study of the self-reproduction of autopoietic systems. The book is structured in three sections, preceded by an introduction ("An empirical agenda for social systems theory?", pp. 1-6). The first one covers the theoretical bases for systemic empirical studies with contributions from R. De Giorgi ("The sociological investigation of law in systems theory", pp. 9-22), L.K. Sosoe ("Is there a need for a critical systems theory?" (pp. 23-32)) and J. Paterson and G. Teubner ("Changing maps: Empirical legal autopoiesis", pp. 24-33, originally published in 1998). De Giorgi delimitates the area for discussion by assessing the issues of existing socio-legal theories resting on a fixedly unquestioned distinction between law and society and seeking to establish a causal relation for the determination of legal validity from non-legal social processes. Sosoe fathoms, instead, the possibility for empirical observation through a critical social systems theory, provided the difficulty for existing empirical research tools to address the matter of complexity in the autopoietic recursivity of systemic self-organisation. Paterson and Teubner had already attempted at defining a methodology capable of empirically analysing the interfering fields of action of different self-referring

communications. Considering the process of legal regulation, they specifically discussed the possibility of analysing each subsystem's internally built information by establishing a cognitive map (first introduced by Axelrod) of the concepts built, 'synchronised' and rearranged by each system in response to irritations in each subsystem's environment by other subsystems in the process of legal regulation. Substituting autopoietic 'self-regulation' to the concept of a 'regulatory' process, it subverts the traditional modelling of social regulation. Traditionally, planning, in theory, is achieved by establishing a predicted set of consequences, where a political goal determines first legislative acts that in turn determine legal norms, and following the steps of implementation, eventually generates social effects in a horizontal causal chain for determining and implementing stage-to-stage effectiveness. Instead, the methodology envisions multiple vertical chains of recursions in each system, from the political to the regulated area, where each system performs a self-referring difference-minimisation process between the actual situation and the desired one. The hope that one day "the interference of recursive meaning processes can be modelled in computer simulations and then confronted with real-world processes" (p. 59) largely echoes L. K. Sosoe's statement that perhaps "We do not yet have empirical studies which are good enough to be useful for systems theory" (p. 30). The framing of the methodology and the fascination with the theoretical potential of cognitive mapping to frame regulatory processes as autopoietic self-regulation in each system bridges the first and the second part of the volume.

"Analysing law through systemic approaches: The economic and regulatory interface" (pp. 69-138) engages extensively with a methodological and applicative analysis of the interface between the legal, regulatory and economic system. B. Lange ("Regulation without interests? An introduction to Luhmannian empirical mapping of system-environment relationships", pp. 71-95) furthers Teubner and Paterson's initial proposal of a methodology derived from cognitive mapping for legal regulation. Building on such premises, Lange seeks to build an empirical mapping tool, using a qualitative empirical methodology, through a grounded-theory approach, in order to highlight and compare the links, reinforcements and variations in the conceptual network established in each

system's actualised communications. She analyses specifically environmental regulation in the relation between social and natural systems. In doing so, regulation and regulated actors become situated in the interaction of 'mediated' interests defined according to their different systemic references.

C. Besio and M. Seckelmann ("Free floating or free riding? Recursive norm-building in the German energy transition using the example of the approval of e-scooters in German cities", pp. 96-109) seek to model, making use of an exemplary case-study, the recursive communication process between regulated actors and the legislative step of regulation by taking account of the role played by organisational decisional processes.

Apart from them, several contributions seek to advance institutionally and organisationally-based analyses to locate and 'ground' the punctual 'synchronisation' of the legal system with the economic and the political enabled by the 'enclosed' re-specification of environmental irritations through the internal decisional processes of organizations. Given that each system has a specific code, programmes and symbolic medium (for example, money for the economic system and law for the legal), organisations and institutions perform a second-order selection that specifies the general function of the subsystem within which they operate. By processing through decision-making programs, they stabilise multiple systemic references and thus serve as situated 'filters' for mediated structural coupling between otherwise operationally closed social systems. Lucas Fucci Amato ("Law and economy without 'law and economics'? From new institutional economics to social systems theory", pp. 110-138), through a critical comparison of assumptions drawn from both neo-institutional economics and systems theory, challenges the former conceptualisation of law in terms of an external constraint on rational behaviour, and analyses instead the conditioning relations between autopoietic legal and economic systems referring to 'system-bridging' institutions as 'media of coupling'.

In the third part ("Analysing law through systemic approaches: The political interface", pp. 139-262), M. A. Loschiavo Leme de Barros ("Observing Courts: An organisational sociology for socio-legal research", pp. 141-165) again develops the role of organisations in systems theory, this time in referring to courts and their judicial 'location' in the functional field of various systems. M. Hanna's contributions

("Casting off from the rock of uncertainty: Observations on the empirical application of Luhmann's sociological theory and a case study on the concept of normative expectations", pp. 166-187) echoes the first chapters of the volume's attempts at providing a methodological articulation of how empirical data can inform (and be directed at) the reconstruction of the problem-solution structures through which law responds to contingency. C. Fernandes Campilongo ("Integration and Disintegration: Protest, Social Movements and Legal Interpretation", pp. 188-222) studies the social movements and protests distinguishing between integration-disintegration movements and functioning as irritations for the legal systems triggering the evolution of the legal system by the means of 'responsive' legal interpretation. In the next contribution, the case-study of Brexit is used by J. Paterson ("Politics, Law and Legitimacy: Re-Constructing Brexit from a Systems Theory Perspective", pp. 223-246) to denounce the non-interchangeability of political and legal expectations of legitimacy, addressing the specific failure of mechanism of structural couplings in such case. The volume comes to a close with an interview featuring Chris Thornhill on the historical sociology of constitutions and democracy and its relations with Luhmann's systems theory (pp. 247-262), and which finally addresses the need to broaden the field for an empirical agenda to "world society".

From the beginning, the question mark following the introduction's title ("An empirical agenda for social systems theory?"), and visibly hinting at the potentially dubious feasibility of the theoretical attempt, is of extremely reasonable employ for all those who are familiar with Luhmann's epistemological lexicon. The general *second-order observation* of society pursued by Luhmann's social systems theory' radical constructivism describes the way in which systems draw the distinctions enabling the circularity of their autopoietic operations by including itself, as theory (a system's self-description), in the set of autological self-references of the scientific system. Despite engaging throughout his career in rather problematic ways with the potential employment of empirical data, Luhmann does not endorse a supposed hiatus between the 'theoretical' or 'abstract' and the 'empirical'. Within social systems theory, both are equally self-referential operations within the scientific system, as there is eventually no

difference in degree of self-reference in both. The envisioned 'objective' spatio-temporal topology for the dissemination of empirical data refers specifically to the internal selective structure underlying a scientific operation.

As such, the autological self-reference of a system's reflexivity, according to which Luhmann critiques the tradition of the subject-object distinction, also implies the impossibility of the (empirical) falsification of the theory. His theory of social systems articulates various degrees of *observation* by primarily building not on the general meaning of human observation, but on that of 'operationalising a distinction' between the observed item/process and the rest. The process of developing distinctions as such (drawing from Spencer Brown's logic of the 'two-sided' nature of the form as for indication/distinction) is at the core of the differentiation of each functional social system.

Self-organisation, understood as the production of order from complexity, derives from the functional differentiation through which a system continually reconstitutes itself as distinct from its environment. This ongoing distinction is performed by the system's self-observation – its reflexive operation of perceiving itself as other than what surrounds it. Each function system maintains its operational closure through a binary code that structures its communications (for instance, *legal/illegal* for the legal system, *having/not having money/property*, or *payment-non payment* for the economic system, *government-opposition* for the political system, *true/untrue* for the scientific system, etc), thereby reproducing the difference between system and environment in the form if a guiding distinction. The system's variability resides at the level of its structure, which conditions and enables the recursive unfolding of operations. Structural selections are performed through the selection of the structure itself, following a temporally distributed chain of references that builds on 'events' as elements and re-enacts previously selected choices to actualise further selections. A 'law' of linear causality in such processes cannot be established as universally viable in face of selections enabled, instead, by the multiplicity of functional equivalents, and on a chronological distribution of elements which is not dependent on a spatio-temporal objective model for the classification of prior-after and cause-effect. The soft empiricism advocated by Hanna re-operationalises causal

relations as methodological 'hypotheses', capable of orienting and understanding selective dynamics over time. Socio-legal empirical analyses could then overturn the claim for predictability of normative expectations inferred from empirical regularities in an standard input-ouput model.

Furthermore, the coded distinction generates a visible paradox of *re-entry* when it is internally processed by the system and reflexively applied to itself. A viable example pinpoints to the scientific system, which observes itself according to the true/untrue distinction, when it subjects to a truth-check the same distinction true-untrue: that is to say, whenever there is a scientific operation in which the truth of scientific operations is questioned.

As far as the legal system is concerned, this occurs insofar as what is legal and what is illegal must be determined 'legally', by a set of procedures that can be identified as 'legal'. In doing so, the system ultimately rests the validity of the distinction legal-illegal on the legality of a procedure which in turns necessitates a viable (and acceptable) difference between what's legal and what is not to exist. Thus, demystifying the core of the paradoxical 'metabolism' of the legal system reveals that the entirety of its operations is self-referential and dynamically self-operative. 'Immunisation' from the paradox is enacted by legal dogmatics with discussions on the validity of law similarly credible enough to render the circularity of it opaque to the system. Forms of unbalancing and asymmetry further a 'hypertrophic' development in theory of one side of the distinction to 'smooth' the functioning and the definition of law: we are much more interested, despite formally both sides of the binary opposition are logically weighed equally, in defining what is legal and simply deducing subtractively what's illegal. The discourse on the 'normativity' of legal norms in theory eventually boils down to the fact that "the legal proposition 'ought' is a protective shell of a semantic nature which the rule covers to hide from itself the fact, the pure factuality, that it has no right to be right" (p. 15), and that "what jurists call 'validity' is nothing more than a symbol that moves in the legal system and has the function of fixing in the system's temporality what can be different from what it is: a form that unites the difference between actuality and potentiality" (p. 15). Consequently, the standpoint made by the authors, is that second-order observation in the construction of a legal-

sociological theory (that is, *observing the observer,* observing how a system makes its own distinctions) which pretends to 'fix' as two distinct objects law and society ultimately falls prey to the paradox of its own distinction, claiming to stand outside the legal system while operating within it.

The autological premises of the theory led it to be summarised once with "autopoiesis is a religion or a drug" (*Autopoietic Law: A New Approach to Law and Society*, 1988, p. 354). Instead, the volume brings a refreshing opening of new perspectives of research which in turn stem not from a general theory framed as such, but address the matters of situating and locating re-specifications of organisations in furthering the expansion or the contraction of functional systems in a global context. It further showcases how contemporary theories of regulation envision a process which instead gains better explanatory instruments once it is devoid of the pretended uniformity of an action exerted on a selected object in order to achieve an objective. Instead, effects are differentiated, and minimisation attempts are processed according to various scenarios that entail in turn different reactions and forms of uncertainty 'absorption' by systems. Interferential programs for different minimisation in legal norms influence 'transaction costs' in economic organisations, triggering re-orientation in the economic system, whereas, instead, legal inflation devalues the legal medium when an 'abuse' of legal reference occurs following an 'uncontrolled' juridification of the global market, as the legal system is overextended beyond its functional boundaries to guarantee the generalisation of normative expectations. Formal and informal economies face a 'cost' of formalisation in neo-institutional economics: the 'price' of such process is reflected with reference to the structure of the legal system. According to Luhmann, the economic system produces a specifically selective internal memory of the payments constituting its elemental structure: only successful payments are remembered by the system, and unsuccessful exchanges are forgotten. The price paid is the only price that matters: economic self-regulation cannot be explained as the direct effect of a regulation directed at prices if not as the capacity of the political system to produce an irritation in the economic system's environment so that the communication actualised responds to a restriction in the circulation of its

money medium and other simultaneously possible undesired communications are collapsed.

Institutions, through internal self-defining production of statutes and similarly administrative 'orthopaedics' to engineer decisional programs, 'expand' the legal system by addressing such procedures internally and becoming 'sources of law'. The limits and the latent inflationary risk for the legal system become evident when new types of law 'accelerate' inter-organisational connections of institutions that mostly operate within the global economic system. In such matter, it would perhaps be of interest for further empirical research to take into account, from the organisational point of view, the effects on processes in the economic system (and of accumulation) of the difference between economic surplus value and what Teubner had elsewhere called the 'juridical surplus value'. The book delivers what it promises, and it was no small promise: by moving between theoretical stances and applied methodologies, it demonstrates that Luhmann's systems theory, far from being an abstract and self-referential formalism, offers concrete analytical tools for socio-legal research.

Bibliography

Gunther Teubner (ed.), *Autopoietic Law: A New Approach to Law and Society*, Walter de Gruyter, New York 1988