

# Moving to the Other Side of Luhmann’s Binary Distinction: Perspectives for Legal Change over Assisted Dying

Cedric C. Gilson\*

**Abstract:** An intransigent problem for English law inheres in the desire of some to assist another who wishes to die as an act of benevolence. This is prohibited by law, so creating an impasse. Conceptual correspondence between this and the strictures of Luhmannian systems theory is apparent, making it possible to examine the stalemate by this means. The foundational paradox that mandates to law the unique prerogative of distinguishing lawfulness from unlawfulness is reproduced in the seeming immutability of present ruling on assisted dying. Yet elements of society esteem altruistic assistance to voluntary dying and their objections to current legal prohibition often are based on extra-legal contemplations. The paradox, though, is posited here as essential and indissoluble. So the ways in which law functions in the presence of the paradox in relation to protagonism for assisted dying becomes a central concern. However, attempts to unfold the paradox by understanding the relation of law to fact, the roles of law’s conditional programmes and structural coupling, while informative and bearing on decision-making, hardly change the status quo. Such examination proves mundane, merely schematic and already is familiar, although an empirical example of a change in the operation of the law raises questions of whether it was correctly legal and might not have unfolded the paradox too far. The study then looks for new dynamism within the systems-theoretical hypothesis and is reinvigorated by incorporating important precepts of modern, progressive societies—justice, liberty, democracy—and discovering how these can be regarded in relation to legal paradox. Also, they are coincidental with some of society’s extra-legal bases of objection to the prevention of assisted dying. Importantly, these precepts do not constitute functional systems of their own but are transcendent, permeating as they do many aspects of the social world. Systems theory then can accommodate them through the phenomenon of re-entry of the extra-legal from the environment of law into one side of the lawful/unlawful distinction. This expands the horizon of understanding of law while it keeps firm grip on its normativity and without hazarding the integrity of the paradox. Teubner enthuses about the possibilities that re-entry can afford and his instruction is examined in relation to new substantive issues introduced by the present study. In turn and appositely, this approach amplifies the ‘political opportunity structures’ of Griffiths, et al, hitherto inadequately explained, but which are believed here to indicate the contemporary social tenets of autonomy, freedom and inclusion. Thus, a new theoretical coherence has been uncovered through which not only can law contextualize the protestations of society over assisted dying in relation to its own domain but also can contemplate the opportunities it creates for considering the conditions of possibility of legal change.

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## Part I. Introduction

In the English jurisdiction, the Suicide Act 1961<sup>1</sup> decriminalized suicide but an offence was created under s 2(1) of assisting or encouraging another person in its performance.<sup>2</sup> To laypersons, characterizing assistance to commit an act at itself is not an offence as criminally liable is anomalous.<sup>3</sup> The aim of s 2(1), though, is to prevent malevolent intentions towards susceptible persons by assisting or encouraging them to self-kill. This legislation remained uncontroversial for several decades, was virtually unchallenged and few offences were brought to law (see Mullock 2009: 290). More recently, western society has come to doubt the appropriateness of prohibiting assisted death through two prominent developments. The first is the ability of modern medical treatment to extend life long past its point of natural demise that might incur pain, suffering and human degradation. Second is the emergence of the individual as a legal entity having the liberty of self-determination. A conflict thus has arisen between the duty of law to prevent harm to the vulnerable who might be coerced into requesting assistance to die<sup>4</sup> and the voluntary wishes of a competent person concerning their own dying through rights-based principles and arguments.<sup>5</sup>

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\* Cedric C. Gilson PhD LLM MSc PGDip is Visiting Fellow in Law in the Department of Advanced Legal Studies at The School of Law, University of Westminster, London, UK. His postdoctoral studies embrace dilemmas for law in assisted dying; expert evidence, especially that of science, in legal decision-making; medical negligence; and risk, regulation and governance. He is leader of the LLM Dispute Prevention and Resolution Module 'Regulating Risk Environments'. As Cedric Charles Gilson, he is author of 'The Law-Science Chasm. Bridging Law's Disaffection with Science as Evidence' (Pro Quo Books, 2012).

<sup>1</sup> Suicide Act 1961 c. 60

<sup>2</sup> s 2 Suicide Act 1961 amended by s 59 Coroners and Justice Act 2009, see Ministry of Justice Circular 2010/3

<sup>3</sup> The act of suicide itself was rendered no longer unlawful by the 1961 Act.

<sup>4</sup> This concerns vulnerable persons, namely those drawn into consenting to assisted dying without full understanding of meaning or consequence, feel obliged to submit and that they are a burden or who are influenced by medication

<sup>5</sup> Conflicting views over assisted dying are discussed in Jackson and Keown (2012)

## **Conflict-prone trends in English modern political culture**

Events in the media have revealed a growing public sympathy for assisted dying, certainly for the terminally ill. In the House of Lords Select Committee on Assisted Dying for the Terminally Ill Bill First Report (2005: 218) it was deduced from one public survey that, as regards basic public attitudes to assisted suicide and euthanasia, "it is evident that there is a great deal of sympathy, at least for the concept of euthanasia, and it seems likely that the level of sympathy has grown in recent years."<sup>6</sup> From other reports consulted the Committee also concluded that, "the apparent trend towards the belief that euthanasia should be legalised in certain circumstances is part and parcel of a broad process of secularisation in western society—and, as such, seems set to grow" and that "neither of the 'principled' approaches of those for or against legalising euthanasia—liberty of the individual/duty of the state to preserve life—adequately represents the more pragmatic approach taken by most individuals when asked to view the issue on a case-by-case basis (ibid: 219)."

## **Characterizing the Central Problem**

At the heart of this dilemma, then, lies the fundamental but general question of how the once unlawful could be rendered lawful and the means by which law could achieve this shift without submitting to random pressures and abandoning its core values. It is essential to learn the transformations that would be undergone by law if it should commit a volte-face over such important issues and the means by which it could achieve it. Intuitively though, it is recognized that law can be changed and indeed has been on frequent past occasions.

Legal history provides evidence of change that belongs to the account of the evolution of law. Some of it represents milestones in legal accommodation of what sometimes must amount to societal preferences. As examples, in the English jurisdiction, homosexual acts were decriminalised if conducted by consenting male adults in private ('legalized consent');<sup>7</sup> medical termination of pregnancy (abortion) became available on grounds of maternal and foetal health<sup>8</sup> and, according to recent prosecution guidance, accompanying a person to another jurisdiction for assisted suicide will not necessarily incur legal liability if motivated by compassion (Crown Prosecution Service 2010).

## **The current position on assisted dying in English law**

While s 2(1) Suicide Act 1961 forbids absolutely encouragement or assistance in suicide, a quandary for English law has been created because it is possible to travel to another jurisdiction where assistance is offered to those in categories of health or circumstance judged appropriate.<sup>9</sup> Law in England and Wales has been ambivalent recently over prosecution decisions where assistance could be said to have been rendered through the act of helping a person wishing to die to travel abroad for the

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<sup>6</sup> This statement and others like it were issued with substantial caveats regarding the method of public survey and the real understanding of those questioned of the issues attached to assisted suicide.

<sup>7</sup> Sexual offences Act 1967 c. 60

<sup>8</sup> Abortion Act 1967 c. 89

<sup>9</sup> The act is not unlawful under regulated practice for nationals in The Netherlands, Belgium and Switzerland and residents of Washington and Oregon states in the USA. Only in Switzerland is assisted suicide available for non-nationals.

purpose. Due to insistent pressure from society, government in England and Wales might soon be faced with making a determination over the lawfulness of assisted suicide. While public opinion in favour of assisted dying is likely to be founded (knowingly or unknowingly) on vague Habermasian notions of democratic will-formation,<sup>10</sup> various expressions of self-determination and human rights, law would need to differentiate between responding to these libertarian principles and its duty to protect the vulnerable from harm.

The possibility that public insistence eventually could compel law to render assisted dying lawful under certain conditions would be a momentous step for both law and society in this country. Careful examination of consequences would be crucial to such a decision. Taking another life is prohibited as a fundamental tenet of English law and this includes euthanasia, even when administered as 'mercy killing' and at the request of the sufferer (the 'suicidee').<sup>11</sup> Assisted dying administered in the form of physician-assisted suicide (PAS)<sup>12</sup> is unlawful under s 2(1) Suicide Act 1961, but represents putatively a means of evading criminal liability for the physician because the patient concerned would self-administer a lethal substance, albeit that the prescription would be authorized by a practitioner in full knowledge of its intended use.<sup>13</sup> Current agitation in society is for legal approval of this mode of killing as a merciful act towards the suffering terminally ill.<sup>14</sup> This would entail repeal of s 2(1) of the Act so that assistance in committing an already lawful act no longer would be regarded unlawful. If passed into law, this measure would represent for the first time in England and Wales legal approval of complicity in killing. For those with deeply held contrary beliefs<sup>15</sup> this would represent a substantial violation of the sanctity of human life.

For scholars unfamiliar with legal developments in the English jurisdiction over assisted dying, a brief synopsis might be helpful.<sup>16</sup> As already indicated, the Suicide Act 1961 decriminalised the act of suicide or self-murder, or an attempt at the same but retained a section prohibiting the assisting or encouraging of another person to commit the act (s 2(1)). The maintenance on the statute book of the offence of assisting or encouraging suicide serves several functions. Firstly, it indicates that society values human life. Second, it indicates that the taking of human life is normally to be regarded prima facie as a wrong. Third, it is (now) an expression of the UK's obligation under Article 2 of the European Convention on Human Rights (ECHR) to take positive steps to safeguard human life. Fourth, it recognises that people contemplating suicide often will be psychologically vulnerable and require specific pro-

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<sup>10</sup> See, for example, Habermas (1996)

<sup>11</sup> This term was coined by the author during a personal communication with Professor Alan Norrie (21.03.2012), who said the common practice was to refer to the person wishing suicide as the 'victim'.

<sup>12</sup> Physician-assisted suicide is a form of indirect voluntary euthanasia. Direct voluntary and involuntary euthanasia are outside the scope of present discussion.

<sup>13</sup> Note that, at the Dignitas Clinic in Switzerland, lethal preparations are not drawn up by physicians.

<sup>14</sup> Whereas many doctors would be inclined to participate in assisting a death for the terminally ill, many would not favour the measure for those not terminally ill. For an up-to-date literature review of studies, see McCormack, et al (2012)

<sup>15</sup> Not necessarily only those with religious beliefs but also those with personal conviction.

<sup>16</sup> For a comprehensive and up-to-date synopsis of legal developments in English law over assisted suicide, see Brazier and Cave (2011), Chapter 19.

tection against pressures from within themselves and from outside (Foster 2010, §3.8).<sup>17</sup> Current resistance to legal change commonly is interpreted in England and Wales as the need to protect the vulnerable.<sup>18</sup> Assistance with a suicide can be as broadly perceived as including assistance to travel for the purpose of assisted dying.<sup>19</sup>

### **Modus of Examination**

The strong polarization of opinions over the legalization of assisted suicide creates an intricate social problem. Divergent arguments sometimes are suffused with polemic and emotive sentiment. However, the reasoned arguments of both protagonists and antagonists of assisted dying sometimes can appear equally valid, so resolution of the stalemate through dialectic is improbable. Engaging with dramatic exchanges either draws the observer into choosing a 'side' to take or results in immersion that disables study. Law, too, has found little means of determining a basis for change and currently is challenged both by representative bodies of opinion and the petitions of those seeking to resolve pressing end-of-life dilemmas. But resolution might not lie in adjudication of contrary views, irrespective of feasibility, in which case a more principled approach might be advisable. This would indicate deep legal analysis that might be rewarding ultimately but require huge attention. Methodologically, it would be more informative and less legally intricate to pursue inquiry detached from the mêlée of contention and not to attempt resolution through analysis. Instead, it would be desirable to harness a perspective abstracted from the minutiae of everyday occurrences so as to explore the conditions of possibility of legal change. Systems theory according to Luhmann facilitates such a modus of observing. It describes the communications of law and society, which can be problematized in contexts of constructed misunderstanding. The elegance of its prescriptions, its separation of issues and the rigour of its canons make it *sine qua non* for the present study. Systems theory frames the problem for law on assisted dying exactly but its utilization must be such that the coincidence of the apparent situation and the 'fit' of the theory produces more than mere 'heuristic fruitfulness' or 'schematic' approaches to problem-solving.

### **The Paradoxical Justification of the Legal System**

The fact that law justifies itself as the sole arbiter of lawfulness frustrates inquiry into the possibility of legal change because, definitively, this can be instigated only by law itself and with reference to its own normativity. It conjures an impression of a system impervious to change. Any inquiry into the possibility of change therefore must contend with the paradoxical justification and this idea will be developed as the driving force of the present study.

## **Part II. Unfolding the Paradoxical Justification of the Legal System**

As legal fiat, no abrogation from the strict provisions of s 2(1) Suicide Act 1961 is permitted and this unequivocal nature replicates the paradoxical justification of law

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<sup>17</sup> The principles of the ECHR are reproduced in the English Human Rights Act 1998, including the Right to Life (Article 2) and the Right to Respect for Family and Private Life (Article 8).

<sup>18</sup> For comment, see, for instance, Hennessey (2011)

<sup>19</sup> Note that the DPP's Policy indicating the likelihood of a prosecution (Crown Prosecution Service 2010) are not reliant on the jurisdiction in which a suicide takes place or from whence the assistance is rendered.

in operation. Absent external influence, law would endorse the unlawfulness of assistance in suicide inexorably and self-referentially, unless it were to perceive its own reason for change. Intuitively though, it is realized that law must and does evolve and that encounters between law and society present empirical evidence that society asks law to change. Scholars of systems theory prioritize unfolding the paradox to evade this intellectual as well as empirical cul-de-sac without sacrificing theoretical consistency.

### **Cognitive Openness**

In its communications about assistance in self-killing, law says it is unlawful and self-referral to its normative values not only produces closure but also the perpetual conclusion that killing is unlawful. Left there, there would be unproductive stasis. However, contemporary social pressure currently insists there are occasions when a certain form of killing should be considered 'un-unlawful'. In that regard, law would wish to maintain its normative stance but its closure might be mitigated by facts arising from its environment (Luhmann 1992: 19). While initially beguiling, it would be delusional to imagine that, through this proposition, law would be opened to any or all (extra-legal) external matters that could inflict change. Cognitive openness is the 'flipside' of normative closure and the source of yet another paradox. Gains in operational closure and autonomy of the system connote corresponding gains in its openness towards social facts, political demands, social science theories and human needs (Teubner 1987: 2), a statement replete with implications for the present study. Cognitive openness is not the diametric opposite of autopoietic closure nor a denial of it but a means of ensuring the conditions for the decisions lawful/unlawful are provided (Luhmann 1987: 20). For present purposes, this concerns legal regard for facts attaching to end-of-life issues (the conditions for these decisions) and ruling them lawful or unlawful but only ever to facts reconstructed via legal understanding (Luhmann 1992: 1429, 1432). This is typified by the use of scientific evidence in court where reconstruction of facts can be construed as assigning liability to actions. Where legal implications of external facts can be drawn, law can learn from them and the possibility of change becomes real. However, in spite of Luhmann's enthusiasm over closure/openness synergy, the problems for law surrounding assisted dying revolve around whether its contentions can be reconstructed according to legal norms. Sometimes they are unintelligible. In the past, with regard to drafting the Suicide Act itself, few facts could have been considered owing to its strict proscription, but more recent challenges have obliged law to consider non-legal issues, such as the fact of compassion.<sup>20</sup>

### **Structural Coupling**

Underlying structural coupling is the important theme that a system like law does not operate in isolation from society but within it and on its behalf. Although law functions self-sufficiently, society comprises multiple systems that require law's help. Sometimes, law needs to draw on the knowledge of other systems, such as when the evidence of science is needed for legal conclusions, and at times other systems need law for legitimation of their operations. Structural coupling should not be construed as a way of sharing values between systems for the exigency of tasks that must be performed jointly but as a highly selective connection between system and

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<sup>20</sup> See DPP's Guidance and Purdy case.

environment (Luhmann 1992: 1432). Structural coupling relies upon the familiar notion of cognitive openness resting on operative closure but re-examines and extends the theory. The more systems theory stresses the operative closure of systems, the greater the need to establish how the relations between system and environment are shaped (Luhmann 2004: 381). Structural coupling is the presupposition (or presumption) by a system that certain features of its environment occur on an on-going basis and relies on them structurally so that, for example, law accepts the rôle of money in economics (ibid: 382). Therefore, a continuing relationship exists but is built on mutual recognition of structures by each system. The norms of systems in the environment are never delivered to the legal system by structural coupling. They provide only irritation (ibid: 385).

### **Structural coupling: the environment, society and societal preferences.**

While reducing complexity in its description of society, systems theory also can be responsible for losing its representation as an organic whole. For present purposes, 'society' corresponds to a diffuse but omnipresent organism beleaguering law to change. The means of conscious choice of the kind of society that society prefers must be suggested, which is not realized by summing the normative standards of its contributory systems.

Society 'at large' needs to regulate the operations of its systems. For instance, the economy cannot decide by itself which modes of production it will employ; societal standards will define certain boundaries (Amstutz 2009: 362). With regard to art, irrespective of its own internal reference, society continues to participate in the aesthetic canons of its tastes (ibid). These types of societal preferences are generalizable to all of society's constituent systems. With regard to assisted dying too, society can state its preferences.

Unsurprisingly, and consistently with Luhmann's thesis, the thread that unifies society is communication. Not only is communication the domain in which differentiation of the legal system becomes possible but also it is the structural coupling of social communication that reproduces society (Luhmann 1992: 1424, 1433 – 34). Luhmann also conceives law as an inextricable part of a network of law and society (ibid: 1425).

Direct exposure of law to pressure from its environment means that it is vulnerable to all possible pressures with the potential to deform it, by ignoring or bypassing it, making the system declare legality illegal or vice versa (Luhmann 2004, 385). Without structural coupling in the relations of the functioning systems of society, Luhmann states that law simply is corrupt in the modern sense (ibid). But structural coupling makes it possible simultaneously to reduce the influence of the environment on a system by excluding unsuitable references and increase it by its recognition of other structures (ibid: 382, 385).

### **Law's Conditional Programmes**

Unfolding legal paradox also can be expedited by considering when the code lawful/unlawful is correctly applied (Luhmann 2004: 19). Law's conditional programmes rely on 'if a –then b' consequences of fact and legal response (Luhmann 1987: 24) so that, if the fact is that assisting in a suicide was performed, then the response under

present statute would be that it was unlawful. Programmes therefore define what is correctly lawful and correctly unlawful (Luhmann 1986: 171f). It lies at the heart of this study that present popular contention suggests that prosecutions arising from committing this act should not be considered unlawful.

It should not be expected that law's conditional programmes could remain invariant with time. Conditional programmes can change or the individual coding may be revisited and the coding altered (Luhmann, 2004: 19). Its conditional programmes allow law to act as an open system, that is, socially relevant. '...[W]hen observing coding, and articulating programmes that account for it, law can utilize values communicated within any of society's sub-systems,<sup>21</sup>...or within general societal communication.'<sup>22</sup> (ibid). The combination of code and programme makes the legal system 'an open-ended, on-going concern structurally requiring itself to decide how to allocate its positive or negative values' (Philippopoulos-Mihalopoulos (2007: 17). The majority of legal norms are conceived of as programmes aimed at the normative treatment of information from outside and depend on the counterfactual relationship of fact and normative consequence. (Luhmann, 1986: 116ff).

'Only in the structural form of its code is the system invariant and unchangeable<sup>23</sup> but always available to be adapted and transformed (Luhmann 2004: 195).<sup>24</sup> Only on the level of its programmes can it [law] allow changes without fearing the risk of loss of identity, including a decision not to change anything' (ibid). Philippopoulos-Mihalopoulos (2007, 17) puts this elegantly. He characterizes the binary code as the bastion of the system's autopoiesis that safeguards the distinction between system and environment that offers at the same time the flexibility of fluctuation between lawful and unlawful. Significantly for this study, communication between the two values of the code is postulated via the supposition that there is no obstacle to a concept being resemilogized over time as lawful that previously had been considered unlawful (ibid).

'Always available to be adapted and transformed' with respect to codes and their suggested resemilogization signifies the codes are 'leaky' or porous under certain conditions. Reassurance that this migration need not be a random occurrence is given by the ability of programmes to moderate this migration or even to prevent it. A legal system can be programmed so as to render itself deliberately dependent on the evolution of outside circumstances; a change in the programme itself under pressure from the environment is likewise possible, 'as long as the system does not in this search for optimum adaptation lose control over its transformations'<sup>25</sup> (Ost 1987, 75). That is an essential caveat.

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<sup>21</sup> Luhmann regards society as an entire social system comprising discrete systems or sub-systems, of which law is one. 'Systems or 'subsystems' are terms that tend to be used interchangeably.

<sup>22</sup> Teubner uses this term, which will be explained in detail later.

<sup>23</sup> Meaning that law cannot communicate about events on the basis of anything other than lawful/unlawful.

<sup>24</sup> Emphasis added

<sup>25</sup> Emphasis added.



Luhmann recognizes that systems are related to each other in the general functioning of society. Conservatively, he advises that, concerning law's uptake of information from other social systems, interchange can only take place on the basis of a selection process determined by each system's criteria (1987, 19 – 23). At this stage of the explanation, normative closure/cognitive openness and programming now can be seen as co-dependent. Law makes itself dependent on facts and can change its programmes when the pressure of facts so determine (ibid). But every operation in law and every juristic programming of information uses normative and cognitive orientations simultaneously (Luhmann 1987, 20). The norm quality serves the autopoiesis of the system and its self-continuation in relation to the environment. The cognitive quality serves the coordination of this process within the system's environment (ibid, 20).<sup>26</sup> Law's conditional programmes then become a purely cognitive matter in terms of the 'if-then' structure if specific legal conditions are fulfilled. Then certain legal decisions will be reached (Luhmann 1972/1985: 174; 1987: 24).

### **Reaffirming the paradox and the fruitfulness of legal autopoiesis**

While scholastic efforts concentrate on alleviating the strictures of legal paradox, an ineluctable consequence of Luhmannian systems theory, nevertheless it is productive to study how it works to the advantage of the self-regulation of law and its autologous capacity for change. Deflem (2008: 478), a percipient commentator on Luhmann, characterizes Luhmann's theory as a unique perspective that denies the relevance of extra-legal contexts conditioning the operations of law. Luhmann (1987: 20 – 21; 1989: 144) posits cognitive openness but depicts non-legal pressures as 'mere irritations' that always need translation into the code lawful/unlawful to be considered part of law. In this regard, Luhmann contends that the production and evolution of law cannot be attributed to extra-legal influences.

Deflem (2008: 476), regards Luhmann's theory as suggesting that legal change can occur because of changes within the legal system itself: 'law can regulate its own regulation and thereby also regulate, legally, alterations to the law' (Luhmann 1989: 141). This autopoietic approach to autopoiesis also is evocative of legal paradox. The production of certain legal norms, then, as well as the extent and manner to which they change or are amenable to change, are conditioned by the legal system itself (ibid).

Law's autopoietic closure concomitant with its cognitive openness draws on the distinction between law and its environment. Social pressure for legal change signifies that law must attend to matters in its environment but their relationship is not a simple one of stimulus and effect. Luhmann (2004: 258) comments that changes in the law, that is, adjustment to changing conditions, do not mean that the environment can determine the legal system. That would imply anarchy.<sup>27</sup> Rather, he says, 'the legal system notices defects only in its own devices and fixes them with its own

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<sup>26</sup> Luhmann provides a useful working example of the simultaneous process of normative closure/cognitive openness. In economics, payments serve the exclusive process of making other payments possible, that is, they serve the autopoiesis of the system. But precisely this closure is also the basis of the wide-ranging openness of the system, because every payment requires a motive, which is related ultimately to the satisfaction of a demand (Luhmann 1987, 20, n. 17)

<sup>27</sup> Teubner (1987, 220), also comments that a self-referential system must be subject to autopoietic regulation, otherwise its own continual maintenance and reproduction would be dependent on the environment and consequently on chance, rather than on the necessities of recursively organised systematic operations

means' (ibid). Again evocative of autopoiesis, there is also engendered a sense of a medium to effect legal change that comes from recognition of legislation as a form of innovation to remedy defects. Correction of a deficiency depends on whether a change in the law is called for (ibid). In the present work, the central question revolves around whether a change in the law is essential but is first that of whether law considers a defect exists. As instances, law noticed its own defect in its proscription of homosexual behaviour and perceived the need to decriminalize abortion where maternal and foetal health would be threatened by a continuing pregnancy.

Luhmann prescribes that, in its functional involvement with programming and keeping the normative expectations of law stable, the code represents invariability and the programmes positivity and changeability. He postulates that both code and programme are the concern of legal institutions (2004, 195), thus allocating them a potentially mediative rôle. Deflem (2008, 478) comments that Luhmann's theory of law is centred around its positivity, accompanied by certainty that legal decisions will be consequent upon broken rules. So, Luhmann prioritizes the response to rule violations or law's counterfactual reaffirmation of norms, which he reveals as embedded in [the mediative faculties of] court procedures and the rôle of judges and lawyers (Luhmann 2004, 252).<sup>28</sup> The disparity of the autopoietic 'strait-jacket' and vehicles for legal change finally is resolved through Luhmann's explicit application of autopoiesis to all levels of law, concurrently with his statement that 'the cognitive nature of law's conditioning is also true and precisely in relation to legislation and judicial decision' (Luhmann 1972/1985: 285).

### **An empirical object: Purdy v Director of Public Prosecutions**

For readers outside the English jurisdiction it might be helpful to provide a brief summary of a recent appeal case in the House of Lords bearing on issues here. It concerned the need of the appellant for clarification over the liability to prosecution in English law of a person accompanying another to a jurisdiction where assistance in dying is not unlawful. In the case known as 'Purdy',<sup>29</sup> Ms Debbie Purdy had multiple sclerosis with increasing physical disability and could foresee a time when she would be incapable of taking her own life, should that be her wish. Upon reaching that stage, she would want her husband to accompany her to Switzerland, where assisted dying was a facility offered by the organization Dignitas. Under s 2(1) Suicide Act 1961, the action of her husband could be construed as assisting another to take their own life.<sup>30, 31, 32</sup> The eventuality could not have been imagined in drafting the 1961 legislation. From the record, it appeared there had been very few prosecu-

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<sup>28</sup> It is worth noting that Luhmann (2004, 252) differentiates legal proceedings as serving only to clarify the law, not to change it. He deems new rules found in proceedings examples only of 'punctuated structural change'. This statement requires literal interpretation, as applying to changes in the rules of proceedings, not changes in law produced via cases.

<sup>29</sup> R (on the application of Purdy) (Appellant) v Director of Public Prosecutions (Respondent) [2009] UKHL 45 on appeal from [2009] EWCA Civ 92

<sup>30</sup> 'Purdy' per Phillips, LJ at 1.

<sup>31</sup> *ibid*, per Hope, LJ at 18

<sup>32</sup> *ibid*, per Hope LJ at 27

tions following such action,<sup>33, 34</sup> discretion over which was held by the Director of Public Prosecutions (DPP). Ms Purdy sought to determine whether her right to private life under Article 8 of the European Convention on Human Rights (ECHR) would be extinguished by the proscription of s 2(4) Suicide Act 1961,<sup>35</sup> asserting that she was entitled to information that would enable her to take a decision affecting her private life.<sup>36</sup> At [31], Lord Hope said, “The applicant in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life [...]” and at [39], “I [...] hold that the right to respect for private life in article 8(1) is engaged in this case”. Because of uncertainty over whether prosecutions were likely to be directed for an offence under s 2(1) of the statute,<sup>37</sup> the appeal judges ordered that the DPP should publish specific policy that sets out what he would generally regard as aggravating and mitigating factors when deciding whether to sanction a prosecution.<sup>38, 39</sup> The crucial question would be whether prosecutions should be brought in the public interest, for which prosecutors would require criteria.<sup>40, 41, 42, 43, 44</sup> These were duly produced by the DPP in a Crown Prosecution Service policy document (CPS 2010).<sup>45</sup>

Full analysis of the prosecution criteria is not possible here but the DPP distinguished, *inter alia*, compassionate and ‘malevolent’<sup>46</sup> motivations for assisting a person in a suicide, provided the act was inspired totally by compassion<sup>47</sup> and not for gain.<sup>48, 49</sup> Though all cases would be investigated by the police (CPS 2010)<sup>50</sup> a prose-

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<sup>33</sup> *ibid*, per Phillips, LJ at 14

<sup>34</sup> *ibid*, per Hope, LJ (re: Professor Michael Hirst) at 19

<sup>35</sup> [F1] ‘no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions’.

<sup>36</sup> ‘Purdy’, per Hope, LJ at 30

<sup>37</sup> *ibid*, per Hope, LJ At 16

<sup>38</sup> *ibid*, per Neuberger, LJ at 101

<sup>39</sup> *ibid*, per Hope, LJ at 56

<sup>40</sup> *ibid*, per Hope, LJ at 28

<sup>41</sup> *ibid*, per Hope, LJ at 31

<sup>42</sup> *ibid*, per Hope, LJ at 44

<sup>43</sup> *ibid*, per Hope, LJ at 47

<sup>44</sup> *ibid*, per Hope, LJ at 55

<sup>45</sup> Available at [http://www.cps.gov.uk/publications/prosecution/assisted\\_suicide\\_policy.html](http://www.cps.gov.uk/publications/prosecution/assisted_suicide_policy.html)

<sup>46</sup> If ‘benevolent’ is substituted for ‘compassionate’ then the antonym is ‘malevolent’.

<sup>47</sup> *ibid*, §§ 45 (1) – (6); §§ 46 – 48

<sup>48</sup> *ibid*, §§ 43 (1) – (16); § 44

<sup>49</sup> Suicide Act 1961 also amended by adding Section 2A to it via Section 59(4) of the Coroners and Justice Act 2009 (noted in Ministry of Justice Circular 2010/03). Available at <http://www.justice.gov.uk/publications/docs/circular-03-2010-assisting-encouraging-suicide.pdf>

<sup>50</sup> CPS 2010 §§ 9 – 10

cution would be less likely in cases where the act was motivated by compassion, as to proceed would not be in the public interest.

### **The (operational) effect of Purdy and the DPP's Policy: legal paradox unfolded too far?**

Legal commentators in abundance have analysed the controversial implications of the DPP's guidance on prosecutorial policy and it would be uneconomic to reproduce them all here. Among the most thought-provoking, though, are the opinions of Nobles and Schiff (2010) that ask whether the judgment in Purdy and the prosecutorial guidelines represent a change in the law, a situation in which it may be unlawful to enforce the law, or even generate a legal right of disobedience to law. Keown (2009) believes post Purdy guidance threatens public safety and undermines justice. Cleary (2010) concludes that acknowledgment of personal autonomy in decision-making over one's own death might make 'death-on-demand' routine in the United Kingdom. Rapke (2009)<sup>51</sup> considers that the reasoning in the House of Lords judgment was guided by when the community is entitled to know the factors likely to be considered by a prosecuting agency when determining whether or not it is in the public interest to prosecute (ibid: 12); that the judgment was not based on human rights legislation (ibid: 13); that doctors administering palliative care also might benefit from offence-specific guidelines (ibid: 16) and that prosecuting agencies increasingly will be required to provide guidance to the public that enables individuals to regulate their lives (ibid: 17). Murdoch (2011: 5) asserted that the DPP's Policy did not improve the inaccessibility of the law and the inconsistency of the offence and the practice. She advised the Attorney General *inter alia*<sup>52</sup> to repeal s 2(1) Suicide Act 1961, substituting a new offence of 'Maliciously Encouraging and/or Assisting in a Suicide' (ibid: 4) but says that the law relating to assisted suicide is better suited to a regime of discretion than one of statutory construction (ibid: 6). On the question of motivation for assisting in a suicide, Biggs (2011: 86) feels that non-reliance on the health status of the contender fails to clarify the basis for the assistor's compassion. Regarding the exclusion of healthcare professionals from assistance in dying, Biggs feels this out of step with public preferences and the approach taken in jurisdictions where assisted dying has been legalised (ibid: 88). The Policy offers neither immunity from prosecution nor does it decriminalize assisted suicide (ibid: 89). Greasley (2010: 324) suggests that the hitherto unofficial policy of non-prosecution was the correct—indeed, the only viable—answer to assistance in suicide and that the House of Lords decision to order clarification was wrong-headed. Further, she asserts that the pre-Purdy approach of wilful blindness<sup>53</sup> was the best method of navigating the tricky moral territory of assisted suicide in cases like Purdy (ibid: 326). Insofar as the recent House of Lords decision has ruptured this status quo, it is the harbinger of an even thornier ethical arrangement (ibid).

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<sup>51</sup> Jeremy Rapke, QC, is the Director of Public Prosecutions in the State of Victoria, Australia.

<sup>52</sup> This was the winning entry to the Kalisher Essay Competition 2011 for barristers in pupillage to advise the Attorney General on the pros and cons of permitting assisted suicide, and in the event that such a scheme should find approval, on the options of a penalty regime for non-compliance with its regulation. Part of the essay reviewed the decision in Purdy and the DPP's Policy.

<sup>53</sup> Emphasis added

Through the decision in Purdy and with regard to its effect through law's conditional programmes, evidence of a compassionate act as motivation for assisting in a suicide moved its consequence from the unlawful to the lawful side of the code in this very specific instance.<sup>54, 55, 56</sup> The DPP's Policy has altered perception of an act that previously would have been considered correctly unlawful (contravening s 1(2) Suicide Act 1961), namely that liability would have been attached. The corollary prospect now is that prosecution brought in a case of compassionate assistance would be 'incorrectly lawful';<sup>57, 58</sup> some commentators indeed are uncertain whether the Policy is based on correct lawfulness (Nobles and Schiff 2010). Although it was asserted by Luhmann that codes are available for change and can be revisited (2004: 227), this might not have been what he imagined.

Settled law through both cases and statute sometimes can aid resolution of end-of-life issues such as those involving therapeutic decisions<sup>59</sup> and the provisions of the Mental Capacity Act 2005 involving voluntary refusal of treatment.<sup>60</sup> So law is not insensitive to the predicament of the dying but reaches its conclusions processually and by reference to its internal values. However, through Purdy, perhaps law could be accused of disingenuousness in hiding behind law in another jurisdiction over questions of assisting suicidees and failing to produce its own conclusions. Sometimes it seems that unfolding the paradox too far provokes law into dubious decisions. At other times, law proceeds normatively and produces incremental responses to problems that clarify specific issues. Sometimes law protects its paradox but remains cognitive; occasionally the paradox can be unfolded too far. Idiosyncratic responses can make law seem incoherent.

### **Paradoxical justification defended**

If societal conflicts about the legalization of assisted dying in the English jurisdiction uncover the paradoxical justification of the legal system, new differences the legal system might develop to cope with this threat becomes a question. This is the inverse of how society can persuade law to rethink its position.

A principle justification for the law on assisted dying is protecting the vulnerable. Law's paradoxical prescription of (il)legality thus is apparent and usually is considered immutable. The permanent structural coupling of law and politics predisposes that legal change must be instigated by Parliament but which first must be per-

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<sup>54</sup> A question hangs over the introduction of 'motivation' as a legal concept as distinct from 'intention'. Greasley (2010) questions both its meaning and effect in prosecutions for assisting a suicide.

<sup>55</sup> If the law were to be changed, could 'motivation' be incorporated as a defence? It is a matter replete with legal implications.

<sup>56</sup> That a suicidee was rendered assistance (an act) might well be fact and belong to evidence; motivation might not be representable as fact but could be construed as the reason for the act. It is questionable as evidence but a decision to prosecute rests on it.

<sup>57</sup> Concomitantly, evidence of malicious motivation for assisting a suicidee mandates a 'correctly lawful' prosecution.

<sup>58</sup> While remembering that the DPP's Policy advises on the operation of the law (Policy for Prosecutors) and not directly on the law itself.

<sup>59</sup> For instance, those concerning the futility of treatment: see Brazier and Cave (2011), p. 550ff

<sup>60</sup> Mental Capacity Act 2005 c.9, s 24.

suaded. An extensive chronology reveals failed attempts.<sup>61</sup> Even the elucidation afforded by the decision in Purdy has not actually unseated the paradox. And, quite frankly, can the paradox ever be dislodged? Notable past changes in the law took account of fresh legal perspectives on older issues, so change in the law on homosexual behaviour was founded on consent and privacy and on abortion on maternal and foetal health. Changes like that did not upset the paradox, so perhaps it is the wrong question to ask. Germane to the present inquiry is how law understands its environment sufficiently to reflect on its own normativity in relation to irritations. In the instance of homosexuality, it could be construed that law 'fixed itself', having detected something was wrong (see Luhmann 2004: 258, *supra*); over abortion, law responded to expert advice.<sup>62</sup> In neither instance was the paradox threatened; it was only that which law considered legal or illegal that changed.

### **Time-out—unfolding the legal paradox: progress or stagnation?**

Legal paradox, like autopoiesis, seems a counterintuitive part of systems theory the way Luhmann has it, that is, as not meshing with experience of the empirical object. Attempts at unfolding the paradox involve scrutiny of law's communication with its environment. Relaxation of the conceptual 'strait-jacket' is afforded by cognitive openness, structural coupling and law's conditional programmes. Such perspectives are not invalid but can be over-interpreted. Thus, the schematic stratagem of this inquiry has become mundane—is exhausted without concluding. No more dynamism exists within inter-system operations; perhaps Luhmann's formula provides only a 'roadmap' for such operations. Eventually, it becomes apparent that attempts to unfold legal paradox concern only the way in which law reaches its decisions. Something is absent from the narrative so far and a means of reinvigorating it must be sought.

Abandoning the schematic form of inquiry would mean discarding systems theory, which would signify either its failure as a modus of study or of the inquirer's endeavours. And seeking enlightenment by different means would represent methodological inconsistency. Also, absorption by the finer points of legal and ethical argument over issues would risk immersing the study in the kind of complexity from which it might not emerge—besides, that kind of inquiry has been pursued comprehensively elsewhere. Over-engagement in empirical study, though materially relevant, would distract similarly. Nonetheless, there would be utility in pursuing the inquiry schematically if directed towards fresh perspectives within which reasoning over end-of-life issues in society are perceived, and they would need to be framed within a systems-theoretical concept. Then the study could be re-energized. The meaningful perspectives that warrant attention, then, are those of a general socio-political movement in the western world since the industrial revolution. They concern justice, liberty and democracy—modern society's 'core idealisms of modernity'. Within these can be isolated themes such as the strength of public opinion, the individual, human rights, autonomy and others that currently are valued. Luhmannian systems theory is not silent on them. The central problem of the study can be explored through their

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<sup>61</sup> Again, see Brazier Cave (2011). Chapter 19.

<sup>62</sup> Principally to abolish illegal practice, that abortion should become a therapeutic decision and the matter would be medicalized. See Keown (1988)

imaginings and abstracted (or schematic) study then can continue, situating polemic and acknowledging the empirical object. The present study must attempt to show there are opportunities for exploration, spaces for contemplation and more adequately complex explanations of how law can relate to its environment. The conditions under which the law on assisted dying can move from one side of Luhmann's distinction lawful/unlawful to the other then can be re-examined. Before that, one empirically observed phenomenon must be reconciled within a systems-theoretical approach so that the remainder of the inquiry can proceed smoothly.

### **Whither 'social chatter', polemic, public opinion?**

Pronouncements in ethics and from campaigning groups that extoll individual choice over dying and the right not to suffer sustain much public opinion in favour of legalizing assisted dying,<sup>63</sup> albeit there is also substantial opposition.<sup>64</sup> Perception of the need for legal change is represented by a mélange of public and media opinion, as well as some academic studies,<sup>65</sup> complemented by what amounts almost to a crusade by bioethicists, some of whom suggest that their prescriptions provide the wherewithal for appropriate decisions where they think law unequal to the task.<sup>66</sup> One problem for the present study is how to categorize multiple and sometimes diffuse social movements that lack epistemological 'hooks' and are represented by 'social chatter'.

In functionally differentiated society it is not clear where public opinion should be anchored. Undeniably, it is tangible. Although seeming at first not to be identifiable according to systems, yet it must be accounted for. Any inquiry into the influence of public opinion on law, policy, government and so on, first must position it within societal activity and identify the mechanisms by which its influence can be felt. Luhmann grounds his systems-theoretical approach to the answer in human rights discourse (Verschraegen 2002). While this would seem to signify engagement with politics initially, Luhmann provides a sociological description of the issues (ibid: 259).<sup>67</sup> Functionally differentiated society no longer recognizes individuals or groups that used to exist in hierarchical social structures, protected by a network of social bonds (ibid: 266). So, no longer are types or strata of people differentiated but types of communication (ibid). However, a person's assertions cannot be allocated to the communications of science, law, politics or economics singly. While living outside the function system, a person is entitled to access in the form of subjective rights and claims to participate in them, such as in economics, politics, law, education, religion and others (ibid: 267). With physical integrity and freedom of movement proclaimed as the basic rights of communicative self-presentation, the individual is bestowed identity as 'person' and can participate in communication and social intercourse (ibid: 275).

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<sup>63</sup> For instance, Dignity in Dying at <http://www.dignityindying.org.uk/>

<sup>64</sup> For instance, Care not Killing at <http://www.carenotkilling.org.uk/>

<sup>65</sup> For a synopsis of theorists who argue from protagonist standpoints and those arguing from the antithetical position, consult Battin (2005), pp. 17 – 46

<sup>66</sup> This is very much a position adopted by Doyal and Doyal (2001); Doyal (2006)

<sup>67</sup> Reference is to an untranslated primary source.

This form of social inclusion through access to any or all functional systems produces a 'heterogeneous, even hybrid affair' (ibid: 266), which offers no surprise. It reproduces the situation of 'social chatter', polemic and public opinion but with the difference that the rights of persons so to engage have been affirmed here by Luhmann. They do so, not bearing the identity of groups as social, but as communicative entities. This elucidation foretells that the communications known as public opinion and the like should be associated with functionally differentiated systems; indeed, people can locate their views severally in law, politics, science, and so on. Not all of them will be experts, though. However, Luhmann's sociological perspective shows that, if ever the law over assisted dying were to change, it might not have to be as the result of random, disorganized societal pressure but more as a normatively configured response to communications that are entitled to be made and heard. Teubner (1989: 745) recognizes a duality of communications, saying about law that, regardless of its proclivity for closure and self-reproduction, unavoidably, legal communication is social communication, so that a communicative event in law always is represented by two discourses—the specialized institutionalized discourse of law and diffuse and general societal communication. So it is not necessary to disassociate 'social chatter' from a systems-theoretical approach; indeed, Luhmann's sociological perspective validates it.

### **Part III. Re-envisioning law's paradoxical justification; re-representing distinctions; re-creating the space for legal change**

#### **Re-entry as a new form of rationality**

Autopoietic systems observe by constant self-reference and their (differentiated) operations simply are reproduced in response to events. As the process of system differentiation repeats the process of system formation within itself, systems become increasingly reflexive (Schwanitz 1995: 143). While systems remain operatively closed, they are cognizant of systems in their environment but only through their own constructions of reality. As the autopoiesis of systems advances, both the complexity of its internal organization (as internal differentiation) and its differentiation from the other subsystems increase (González-Díaz 2004: 19).<sup>68</sup>

The conventional appreciation of epistemology relies on how the subject knows the object but Luhmann's characterization of re-entry asserts that the difference between the subject and the object should be replaced by the difference between the system and the environment (Schwanitz 1995: 161). This is achieved by re-entry of the system/environment distinction into one side of the system's distinction (Luhmann 1997: 71; Teubner 2002: 205; 2009: 11). As soon as self-referentially constructed knowledge encounters a self-referential object (that is, another social system) a new kind of reality emerges, a reality that is neither attributable to cognition nor to the object of cognition. Thus, the concept of self-referentiality replaces any ultimate [epistemological] foundation (Schwanitz 1995: 141). An increase in complexity of a system enlarges its capacity to contend with challenging issues in modernity. An inadequately complex system might fail to respond appropriately. Law, for example, could be accused of failing to respond adequately to the situation caused by advances in medicine that actually prolong suffering through the ability to keep

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<sup>68</sup> This has been liberally adapted from Schwanitz's description of the complexity of science but must be universal to all autopoietic social systems.



patients alive. So, knowledge is no longer defined as reaching out into the field of reality; rather it is redefined as an effort undertaken by a system (for example, politics or law) to transform environmental restrictions into preconditions for an increase of internal complexity (ibid: 162).

Teubner (2002: 205) suggests that re-entry might be one of the new more complex representations of the world that is sought in resolving some of law's paradoxes. '... [B]y the internal reconstruction of external demands stemming from society, people and nature within the law' (Teubner 2009: 11 – 12). 'The law transcends itself by 'enacting' its ecologies—society, people, nature and developing adequate legal concepts' (ibid: 17).

With re-entry, the original distinction has changed to become the representation of the distinction within one of its poles (ibid). The internal/external distinction therefore has been 'internalized' so that a system can make self-referential use of the distinction between self-reference and hetero-reference (Luhmann 1997: 71). Under the conditions of re-entry, a difference is created between the environment of a system explained from the standpoint of the observer and the environment as defined by the system itself (Luhmann 2006: 50). The environment is constructed by the system in the only way it can by making use of its own structure and its internal operation (González-Díaz: 2010: 19). The system then can be depicted as one that oscillates between self-reference and external reference in reflexive contemplations (ibid) or in a temporal bi-stability of the system (Luhmann 1997: 71).

### **The response of the system to irritations from the environment**

A constant theme of the study has been the influence of external social forces on law and in systems theory these are regarded as irritations. Observing re-entry of a distinction into an indicated side of a form entails revision of the way in which irritations are perceived by systems. This interpretation presages more possibilities for the conditions of legal change than the now seemingly artless closure/openness relation of system and events. In maintaining the unity of the distinction system/environment via the phenomenon of re-entry, the system constantly must modify itself in its relation to its environment. It does this by alternating self-reference (being a closed system) continually with re-entry (openly interacting with the greater environment of which it is a part) (González-Díaz 2010: 19). At every new irritation, the system has to re-enter the distinction between system and environment into itself, which takes the form of a structural change of the system (ibid: 17). The only component of a system that can change is its structure (Luhmann 1993: 771).<sup>69</sup>

Although irritations perceived by the system trigger reactions or structural adjustments by the system, such reactions are entirely dependent on the system's organization and never on [the nature of] the stimulus coming from outside (González-Díaz 2010: 18). The 'system/environment', 'internal/external' (or 'inside/outside') distinction for a system must be maintained and this can only be through the successful and continued re-entry of the operation into the system (ibid: 19). Constant self-reference, re-entry, and increasingly complex organization eventually allow a system

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<sup>69</sup> There are various understandings of 'structure': Schwanitz (1995: 147) asserts that '...[O]nly such structures develop that are able to link passing and coming events'; '...[A]ctual components and their relations...' Mingers (2002: 293); '...[E]lements, processes, boundaries...' , Elder-Vass (2007: 419)

to operate a distinction between events (as irritations) that the system experiences, some of which it interprets as proceeding from within its own organization, that is, from its inside, and others as coming from its outside (ibid: 19). When the distinction between the system and its environment is copied in the system, it then allows for bistability of the system, for referential oscillation between observations, respectively indicating external and internal states and events (Luhmann 1997: 71).

Thus assured, re-entry provides law a fresh means of understanding its environment and itself newly in relation to it. When the self/other distinction is re-entered into the form, previous autopoietic system boundaries evaporate because their previous 'distinctiveness' is subordinated to other meanings that are then drawn by the operation. Concurrently, possibilities are created whence aspects of social life not accorded the characteristics of legal or social autopoiesis in 'standard' theory can acquire identity and meaning. Included can be the civil aspirations of freedoms, rights and expectations because, hitherto, they have had no precise locus. They have tended to be universal, socially. So now the principal concepts of justice, liberty and democracy can be explored in this new light and it is anticipated that it will be productive.

## **Justice**

The common view of justice is associated with 'fairness' in social, political or legal treatment of individuals or groups. It connotes a general societal sensation of measures meted out according to deserts or 'doing right' by those concerned, so it might have the form fairness/unfairness. For a principle of such apparent importance to society, a universal meaning for it is elusive. 'Searching for one pancontexture where principles of a just society can be formulated is in vain' (Teubner 2009: 6). There are views of justice but no prescription for injustice (ibid: 2) and justice cannot be litigated (ibid). At first blush, this suggests that recourse to justice as a concept with mediative potential over problems of assisted dying could prove fruitless. Even with its own but imprecise visualizations of justice though, modern society holds it as one of its foundational values. In the current setting, many protagonists of assisted dying attach their notions of justice to 'doing right' by those who suffer and wish to die; the failure of others with the ability to act on such a wish representing injustice. So, inquiry into perspectives through which legal change could be visualized must include justice, for which not only is better understanding of it required but also an examination of its relationship to law. Does it define law? Does it regulate law? Does law produce it?

To ensure proper direction of the inquiry it is necessary to restrict exploration because there are also the possibilities of moral, political and economic justice, perceived as partial rationalities and partial normativities in the social context. (ibid: 6). Legal sociology that develops a concept of justice specific to law as a partial rationality and partial normativity would be called juridical justice (ibid, 7).

In systems theory, justice is not considered a discrete function system. Unlike morals, it has not become 'unhooked' from law (in Luhmannian perspective) through disaggregation from religion. In both Luhmannian and Derridean perspectives, justice has an existence outside or 'beyond' law (Philippopoulos-Mihalopoulos 2004: 175) but its criteria of materialization lie within law—a negative, paradoxical connection (ibid). Justice is not understood by the legal system because its selections cannot be made according to the legal/illegal (lawful/unlawful) code and attaching jus-

tice as a third element of law's distinction is not possible (Luhmann 2004: 22). The idea of justice as fairness therefore cannot be contemplated by law (Philippopoulos-Mihalopoulos 2004: 176).<sup>70</sup> Unmistakably though, justice/injustice has social manifestation, less ghostlike than morals, and is recognizable as two sides of a form. Initially, there seem to be grounds for more than suspicion that the (abstract) notion of justice can be reified.

Because of the temporal element in indicating a distinction, law and justice cannot be prioritized at the same time. This is described as an interruption of the continuity of law and justice (ibid: 175). So law and justice, commonly considered as interdependent, are increasingly becoming separated through this narrative. The notion that justice is externalized from law and all other social systems seems counterintuitive. Does justice therefore require rehabilitation in order to affirm its social standing?

Systems theory finds a plausible location for justice by considering law's conditional programmes. These set the conditions under which law makes its selections as correctly lawful or correctly unlawful<sup>71</sup> and helps to unfold the principal paradox of law. However, Luhmann (2004: 22) affirms that justice is not a conditional programme itself. Instead, Luhmann perceives justice as a 'supra-programme' of the legal system as a programme of (all) programmes on the level of the programmes of the system that guides legal decisions from the outside. Justice therefore emerges as a criterion that applies to law's code lawful/unlawful and determines its selection (Philippopoulos-Mihalopoulos 2004, 176).<sup>72</sup> This explanation looks convenient but is glib. Beneath it lurks a suggestion that the crisis between law and justice freely can be ascribed to a supra-programme for resolution. Certainly, this cannot be the end of the matter.

Juridical justice is concerned only with treating like cases alike and unlike cases differently. The connection between law and justice is thus avowed to be contingent. Contingency attaches to whether like cases are decided<sup>73</sup> to be alike or non-alike, attainment of justice therefore being probabilistic (ibid).<sup>74</sup> As law's contingency formula, justice emerges as a necessary scheme for the search for reasons or values, which become legally valid only in the form of programmes (Teubner 2009: 9). Luhmann's definition of justice then can be given as adequate complexity of decision-making (ibid). The genealogy of justice has hereby been partly reconstructed in a particularly Luhmannian way (ibid: 2) and an ascription of its functioning in conjunction with law suggested.

The previous explanation is entirely in relation to the span of juridical justice, which therefore introduces limitation. Impliedly, it concerns only instances that are litigated, even though there is a reflexive sense in which law contemplates its own decision-making. The literature also acknowledges the previous account to be only

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<sup>70</sup> Secondary source: English translation unavailable.

<sup>71</sup> Emphasis added

<sup>72</sup> Secondary source of untranslated text.

<sup>73</sup> Emphasis added

<sup>74</sup> Contingency assumes that outcomes always can be different.

partial (ibid: 7). But law is irritated constantly by external social pressures agitating for change (ibid). The inquiry is imbued with new energy by considering that, 'justice redirects law's attention to the problematic questions of its adequacy to the outside world' (ibid: 10)—a theme that society would recognize. 'Justice, as [law's] contingency formula, is perceived not as justice immanent to law but one that transcends law' (ibid) but, as Teubner says, for this transcendence to be real, how does justice escape the [paradoxical] gravitational pull of law's self-referential closure?

Supposing also that law wishes to observe its own operations and their effects in relation to its environment (Luhmann 2004: 105 – 106). This would be commensurate with law interested in assessing whether its operations are 'just'. The problem then would become that of forms of 'internalization' of the distinction<sup>75</sup> between law and the environment through law itself (ibid). A systems-theoretical approach introduces the concept of re-entry of the system/environment distinction as legal/non-legal (or legal/extra-legal) into legal operations (Teubner 2009: 11).<sup>76</sup> The re-entrance of the distinction into what has been distinguished and the virtual space which the system opens up creates new possibilities for self-observation through this operation (Luhmann 2004: 105 – 106). It imparts to law the characteristics of an observing system operating at the level of second-order observation that can distinguish between self-reference and hetero-reference (ibid). By virtue of this, legal argumentation thus gains the capacity for distinguishing norms from facts, internal legal acts from external social acts, legal concepts from social interests and between internal reality constructs and those of social processes (Teubner 2009: 11). Law thus relates to the external world through this new internal distinction that creates the possibility of imagining justice (ibid: 11 – 12). The virtual space so created allows the legal reconstruction<sup>77</sup> of external demands from society, people and nature (ibid). Implied is the whole range of serious communication about law wherever it happens in society, including citizens' protest against law (ibid: 15). Thus, means of legitimating legal change as a result of societal demands become apparent and for which a systems-theoretical approach provides. The dynamics of law-society relationships are expanded and re-entry suggests a greater impression of social connectedness for law than obtains with the mundane autopoietic closure/cognitive openness claim. In the current quest, it represents advancement from the situation of law constructing its own reality from systems in its environment, which is of no direct utility, to the possibility of fashioning legal constructions of right-to-die agitations and petitions. In this new responsiveness, law creates 'enacted environments' (ibid: 11) and, by virtue of the self-reference/hetero-reference distinction, justice seeks 'ecological adequacy' in the response of law to its environment (ibid: 11). Nothing in the idea of re-entry suggests that the 'filtering' capacity of law to communications from its environment is diminished; re-entry of the environment into law persists as the internal reconstruction of external demands (ibid: 11 – 12). Lest this discovery be over-interpreted, it is crucial to mention that the existence of a conduit by which law can recognize the concept of justice as conveyed by its environment does not guarantee that law will change in relation to assisted dying; after all, law would need to over-

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<sup>75</sup> Emphasis added.

<sup>76</sup> Teubner cautions that non-legal or extra-legal does not mean illegal but the distinction between law and matters arising from the environment of law.

<sup>77</sup> Emphasis added

turn the fundamental dictum that to take a life is unlawful and substitute circumstances in which it could be considered otherwise.

The foregoing describes conditions under which perceptions of justice could be operationalized in conjunction with law but, as has come to be expected from this inquiry, it is only a partial solution. It does not determine newly that law will become more just or that justice will produce better decision-making, only that (using modern parlance) it has appeared on law's radar as an element of societal contemplation. And we still need to discover through systems theory whether justice can assume the mantle of substance or must remain some kind of aspirational ideal.

Resuming the narrative, the criteria for ecological justice—in society, people, nature—are found not in law but in the enactment of these ecologies (ibid: 17). But law then bears responsibility for [its own] criteria of justice (ibid). It cannot, for instance, look to democracy or morality for guidance (ibid). The literature in this field does not elaborate on law's 'criteria of justice', so an entire vision of the concept still is elusive.

Perhaps the concept of justice can be understood partly through the opportunities for, and occurrences of, injustice. Even in the foundational paradox of law deciding for itself the lawfulness of law, the opportunity for injustice emerges (ibid: 19) and, in juridical justice, the unequal treatment of cases that are equal is a constant source of injustice (ibid: 7). The discourse of justice is one that responds to law's failure (ibid: 14), so it appears that law's response (in Luhmannian regard), is to the presence of the absence of justice as a force for change. Justice is then not a standard of 'impeccable ideality' but a process of transformation of injustice into law (ibid: 20).<sup>78</sup>

## **Liberty**

Within this broad category lie many of the principles on which protagonists of assisted dying rely. Often, they are understood in modern society through assertion of fundamental freedoms and human rights. In the present context, included would be the right to choose how to live (and possibly die), which connotes autonomy. In political guise, liberty is associated with government, the state, constitutions and law. The ordinary person's view of rights is of enshrinement in treaties, legislation, constitutions, supra-national and international conventions, so the two sides of a form might be (in Hayekian fashion) freedom/coercion.<sup>79</sup> Claims under these provisions usually have to be litigated and so, in the current context, the right of a proposed action over assisted dying cannot be assumed. Ethics contends rights based on its own adopted principles, often expressed in terms similar in spirit to those of conventions but which are not justiciable. Even in the exceptional incident of Purdy, the see-saw public argument of right-to-die versus principled objection so far has not proved resolvable by recourse to rights.

It was established earlier that 'social chatter' is 'legitimized' by acknowledgement of the need for self-presentation of individuals and groups in society by regarding them as communicative entities. In the present narrative, politically characterized public

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<sup>78</sup> Secondary source from untranslated German text.

<sup>79</sup> See, for instance, Hayek (2006: 80 – 89 )

opinion concerning rights now moves into the sociological, which marks Luhmann's way of regarding the communications of individuals or groups as social institutions with specific functions (Verschraegen 2002: 103). Luhmann is seen as a progressive theorist who acknowledges an increase in social autonomy and plurality as an essential characteristic of modern society (Thornhill 2006a: 76). Although this perception is unsurprising, Luhmann is committed to finding for his sociological theory a condition in which it can provide positive terms for its internal consistency (ibid). This he situates in accounting for the function of rationality, so that his argument concerning that which triggers social change, improvement or 'progress' is linked to the rationality of systems of society—in what he calls his 'sociological enlightenment' (ibid: 77 – 78).

With fundamental freedoms and human rights entrenched in constitutions, conventions, charters and the like, and largely upheld by legal machinery, a perception of liberty is created that depends on the relationship of law, power and the individual,<sup>80</sup> sometimes under conditions of tension. However, a sociologically-orientated perspective proposes a society more and differently differentiated than one whose systems concern the juristic and political aspects of liberty, such as law and power, to include those of other social systems (Verschraegen 2002: 273). Encompassed are the different communicative spheres and social dimensions of personal development, such as freedom of speech, conscience, religion and association that guarantee the capacity to develop a social identity (ibid: 274). Fundamental freedoms and rights instead are needed to protect the conditions of possibility<sup>81</sup> of individual self-presentation (ibid: 274) and for this individual to participate in communication and social intercourse.

Luhmann's sociological approach has afforded an increase in understanding, in which inhere two important aspects. Firstly, Luhmann's re-characterization of the individual as a communicative entity locates that person in law's environment as a kind of 'transcending, communicating self-system'. Second, the enriched systems-theoretical approach that includes communicative spheres permits recognition and consideration of the utterances of individuals without law having to conceive them as expressions within politics, economics, science or similar. The law-society dynamic already has been increased but one more problem remains

Liberty begets an aura of transcendency, although the present study systems theory fixes it initially within political and legal frameworks. But Luhmann considers constitutional and human rights are pre-legal as a social institution and are actually institutionalized expectations underlying the legal system (ibid: 263). Systems theory, though, provides no abode for transcendent liberty, with all its plural associations. But liberty can be re-enacted as one of Teubner's ecologies of law, which affords it a new 'conceptual locus'—a new cogency—expressed through communicative spheres and the communicating person. As before, this does not necessarily signal that a change in the law on assisted dying can be effected, only that the conditions of possibility might be created through this new window. Nonetheless, broad reflection on

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<sup>80</sup> The 'Triad'(Verschraegen 2009: 273)

<sup>81</sup> Emphasis added

our social condition is made possible through these new perspectives, by which we can consider the kind of society in which we live and look for less painful conditions (ibid: 281). This would seem to augur well for considering legal change.

### **Democracy and societal preferences**

Luhmann's view of functionally differentiated society is that it tends to be democratic and that social differentiation (sic)<sup>82</sup> creates broad-ranging societal conditions of liberty, pluralism and autonomy (Thornhill 2006a: 89). A political system is legitimated through the contingency of its decision-making if it responds to the plural and differentiated reality of democratic societies (ibid). Societies, so characterized, are likely to resist 'unquestionable or dogmatically orthodox justifications for the exercise of power, and to maintain optional liberties for all social agents' (ibid: 90). This denotes political legitimacy validated as democratic legitimacy, which places the public, as the addressees of law via public opinion, in the position of registering objections through elections or even formalised or semi-formalised protests (ibid).<sup>83</sup> Thus the theory allows structures and conduits for public objection to law, which, coincidentally, is also a fundamental characteristic of liberty.

While politics in Luhmann's theory is distinguished by the code government/opposition, (Luhmann 1990: 48) in reality this articulates the conditions for the operation of democracy. On its face, this schematic conception is more a description of electoral processes and the operation of government. The distinction govern/governed constitutes a better code for the relationship between institutions with legislative authority and those who must comply.<sup>84</sup> The relationship is asymmetric in that it is the governed who seek to influence authority but who lack equivalent power (Andersen 2001). While elections provide opportunities for influencing policy, it signifies indirect democracy that operates through representation, where the elected representative makes choices on behalf of constituents. Participatory democracy, though, is a form of direct democracy. In some American states, this is institutionalized through referenda and initiatives.<sup>85</sup> In the first of these, critical policy issues can be subject to binding vote; in the second, the populace can insist on the consideration of laws. Without such institutional vehicles or constitutions, as obtains in the United Kingdom, perhaps activism, public opinion and submission of petitions to government are gaining effect in an informally emerging participatory democracy.<sup>86</sup> So, direct democracy can reduce the asymmetry of power between the governing and the governed.

A little pessimistically, Luhmann cautions against the degeneration of politics into so-called 'peoples democracies' (1990: 49). Absent regulation of participatory democ-

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<sup>82</sup> Social differentiation examines the economic, political, and normatively defined relations that underlie the construction of social categories. Embedded in inequalities of power, status, wealth, and prestige, social differentiation affects life chances of individuals as well as the allocation of resources and opportunities. See, for example, Juteau (2003).

<sup>83</sup> The two other constituents of a so-called triadically-differentiated political system are politics as the source of symbolic legitimacy, and administration as transmitting decisions via the medium of law.

<sup>84</sup> At first, this might seem reminiscent of a repressive system but the ability of the people to mitigate the power of government becomes a key issue in the relationship.

<sup>85</sup> As applies in the USA and was apparent in the ballot decision concerning the Death with Dignity Act in the state of Oregon. See, for instance, Cohen-Almagor and Hartman (2001)

<sup>86</sup> Perhaps this is a form of democracy emerging by default through the increasing exercise of liberty

racy, this can be imagined.<sup>87</sup> Therefore it could be questioned whether the political distinction of government/opposition will survive in the long term as an adequate description of democracy or as one that operates in the way society would prefer. More than that, opinion over assisted dying can be apolitical and therefore inhabit either side of the distinction. Then, inasmuch as views over assisted dying can transcend politics and participatory democracy tends to dissolve familiar political distinctions, for the purposes of present study it would be helpful to regard the concept of democracy as systems-transcendent. This is not mere convenience, because democracy, too, is manifested in different social systems, such as in how decisions are reached in economics, the conduct of scientific research and in the operations of many organizations. By virtue of re-entry, then, the perspectives of democratic politics as external reference to law can be considered in relation to law's normativity. Indubitably, participation by people in democratic affairs can be visualized as one of Teubner's ecologies for enactment by law. In addition, the inclusion of self-reference in the oscillatory switch caused by re-entry will dampen any tendency towards de-differentiation of law. Movements both for and against assisted dying as sincere conviction could be accommodated equally by re-entry of (participatory) politics from law's environment into the lawful side of the lawful/unlawful divide. This accomplished, the question of the means by which the unlawfulness of assisted dying might move to the lawful side of Luhmann's distinction, or indeed not, can be contemplated.

Before leaving these topics, it should be noted that re-entry neutralizes neither law nor legal paradox through the freedoms and rights of justice, liberty and democracy. These cannot be considered limitless or there would be societal disorder. Oscillatory self- and other-reference prevents elaborate social claims from assuming ascendancy over law, while law can continue to have better understanding of their perspectives.

### **The empirical object, re-entry and the jurisprudence of interests**

Re-entry of the distinction legal/extra-legal into legal operations means that, through the second-order observation so created, law can see how it operationalizes the distinction between self-reference and external reference (Luhmann 2004: 106). This function can be witnessed in the jurisprudence of concepts and interests, whereby law practices self-reference with regard to formal argumentation and external reference with respect to substantive argumentation (Luhmann 2004: 346). Formal argumentation makes reference to concepts and substantive argumentation to interests. Interests can be those submitted to court by petitioners for assistance in dying, the purpose of the jurisprudence being to allow reasoned decisions, especially where there is conflict (*ibid*). If distinction between legally preferred interests and legally disallowed interests is made, disallowed interests can be stored in the legal system's memory so that they can be tested against any new facts that emerge to tell whether those interests can continue to be disallowed (*ibid*). Recent guidance by the Director of Public Prosecutions suggests that interests previously disallowed, for example, by assisting a suicidee in contravention of s 1(2) Suicide Act 1961, might no longer be disallowed if compassionately motivated. Furthermore, the jurisprudence of interests can reserve for itself re-evaluation of new constellations not taken into

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<sup>87</sup> A comprehensive description of Luhmann's understanding of modern politics is provided in Thornhill (2006b)



account when legislators drew up statute representing a decision for or against interests (ibid: 349). For instance, progress in medical technology and modern attitudes towards suffering and personal autonomy could not have been imagined in earlier legislation about suicide. Nor could the present-day interests of compassion, dignity and a good death have been contemplated. If compassion can become an allowed interest, then so too could dignity, a good death and choosing the time to die.

#### **Part IV. Conclusion**

Uncovering the paradoxical justification of the legal system in the English jurisdiction at first pass relies on examining the cognitive ability of law. However, cognitive openness to facts does not unfold the paradox sufficiently for present purposes—indeed law's present inability to respond to the facts and circumstances of assisted dying is the very problem. Cognition afforded via structural coupling contributes little more knowledge because facts have to be legally reconstructed, although law has progressed in that direction by adjudication of petitions according to legal doctrine. In turn, this propelled legislation allowing for individual influence over their therapeutic decisions. Nonetheless, the quantum leap required to legalize assisted dying has not been made and cognition alone can do no more than add perspectives to the debate. Law's conditional programmes, though, can determine whether law is correctly or incorrectly lawful. At first, programmes appeared to represent a regulatory mechanism that would prevent unlawful law, so that any measure to surmount s 2(1) Suicide Act 1961 could be tested using the 'if-then' criteria. Recent developments in prosecutorial advice have shown that this relationship can break down. So the schematic approach to study at the level of cognition produced only circumstantial information concerning law's dilemma, though a principle could be seen faulting a decision in one critical empirical instance.<sup>88</sup> The study then was reinvigorated, albeit still schematically, by choosing more socially relevant perspectives to inform the problem and by employing enhanced systems theory to unfold further the paradoxical justification of the legal system.

Ultimately, a decision to change the law on assisted dying in the English jurisdiction must be political in that new primary legislation would be required to revoke s 1(2) Suicide Act 1961. Most probable will be statute that decriminalizes assisting a suicidee and substitution by a form of regulation, as obtains in some other jurisdictions. Passing new law of this degree of sensitivity, though, might be above party politics. Despite several Bills presented to Parliament over the last decade,<sup>89</sup> no firm movement towards decriminalizing assistance in dying has been evident and even the recent recommendations of the Commission on Assisted Dying (DEMOS: 2011) in favour of legal change have found no favour at Westminster. Change, therefore, appears to be one of political appetite, for which presently there is none.<sup>90</sup> Neverthe-

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<sup>88</sup> Reminding us that, after Purdy, Prosecutorial Policy could herald 'unlawful law'.

<sup>89</sup> For a chronology and discussion of legislative attempts to decriminalize assisted dying (albeit in relation to religion), see Warnock (2010)

<sup>90</sup> Issues of assisted dying were debated in the House of Commons on 27<sup>th</sup> March 2012, with the following conclusion, 'That this House welcomes the Director of Public Prosecution's Policy to Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, published in February 2010, and encourages further development of specialist palliative care and hospice provision.' (Hansard 542 (2012) columns 1363 – 1440, 27.03.2012.)

less, the number, nature and direction of challenges is increasing.<sup>91,92</sup> Also, a risk has been recognized that legal resolution of disputes sometimes produces anomalies for law that could usurp the role of Parliament by changing law sans debate and the passing of statute.

As comment on the potential for legal change driven by political and societal developments, Griffiths, et al (208: 525 – 531) propose that 'political opportunity structures' inspired by a 'post-materialistic value orientations' are likely to be responsible in the future. These are not amplified in the description, though, and the identification of England as one among those European countries likely to entertain legal change is not explained. Jotterand (2008: 110) finds critical analysis of the part of the book containing this assertion superficial. However, it is reasonable to surmise that Griffiths, et al are referring to post-materialistic values similar to those suggested by Inglehardt of giving people more say in political decisions, protecting the right of free speech and so on (see, for instance, Bealey 1999: 298; 117; 264). But study of the 'core idealisms of modernity' in society justice, liberty and democracy here meshes with Griffiths' 'post-materialistic value orientations' in that (presumably) the same values are espoused. Perhaps their characterization here is clearer.

Re-entry has been relied on here as a promising means of surpassing the autopoietic boundary of law to allow improvements in its contemplation of external communications and operations. The following quotation from Teubner (contextualized in the globalization of law) has exactly the way of it:

'This is re-entry: a chain of distinctions reformulates its difference to the outside world in the language of its own distinctions (national rules on international collisions). It cannot connect itself to other chains of distinctions except by re-entry, by a reconstruction of these other chains in its own terms. The main effect of this re-entry: If, for an outside observer there was incommensurability of different sorts of distinctions, after the re-entry, there is comparability and compatibility.' (Teubner 1996: 909).

These words describe new situations in which law's appreciation of systems in its environment is no longer so impeded by its closure. The casual reader might imagine this requires circumspection.<sup>93</sup> Implied is that re-entry opens the whole of the extra-legal environment to law's consideration according to its own distinction. In re-entry, no system is prioritized when law looks around for help from its environment, which now can be understood as a plural external world of concurrent perspectives. Even more usefully, re-entry conceals the principal legal paradox to allow systems-transcendent perspectives to be acknowledged, so that broad and diffuse notions of freedom, rights and action can have meaning within an otherwise rigorously bounded systems concept. While justice is construed as systems-transcendent and

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<sup>91</sup> Tony Nicklinson was given permission at judicial review to seek declaratory relief under three headings, the first of which is that it would not be unlawful, on the grounds of necessity, for a doctor to terminate or assist the termination of his life. *Nicklinson v Ministry of Justice* [2012] EWHC 304 (QB) at 5 (I – 3) per Charles, J. (12.03.2012). (Permission to seek declaratory relief subsequently refused: *Q on the appn of Nicklinson v MOJ* [2012] EWHC 2381 (Admin)). The other claims are made in reference to the Human Rights Act 1998, that is, within the English jurisdiction and not (yet) to the ECHR.

<sup>92</sup> <http://www.dailymail.co.uk/news/article-2080927/Cameron-faces-new-pressure-end-ban-assisted-suicide.html>

<sup>93</sup> Teubner's elucidation of systems theory often seems more accessible and optimistic than that of Luhmann. It is not that they differ in strict terms, so much as the fact that Teubner sees more opportunities in the expression of the theory, so that theoretical and empirical interpretations are brought closer together.

re-entry prevails over legal paradox, liberty, with its foothold in politics, law and society but no unique locus of existence,<sup>94</sup> also can be considered systems-unbound. In free societies, politics and democracy are conceptually transposable; however, direct democracy is restricted to representation with its operations firmly located. Post-materialist society, though, aspires to participatory forms, with multiple loci of operations. Again, there is justification for regarding democracy as systems-transcendent because its principles are enjoyed by organizations, representatives, groups and individuals. And it was affirmed prior to examination of re-entry that public opinion is understood with respect to individuals as communicative self-presentation and to groups as communicative spheres.

Lest it be imagined that re-entry lays law bare to extra-legal influences, and sometimes it can appear that defeating the paradox is a single-minded ambition of scholars, let it be said that the paradox itself is impervious to change.<sup>95</sup> Unfolding it simply allows law glimpses into different spheres that can inform its decision whether to move the previously unlawful to the lawful. Simplistic though it might sound, it is all that is required.

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<sup>94</sup> Except for juridical justice.

<sup>95</sup> Emphasis added

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