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**IN A WORLD OF ITS OWN:
HOW OPERATIVE CLOSURE LIMITS THE LAW'S
ABILITY TO PROTECT CHILDREN FROM
MALTREATMENT**

A thesis
submitted in partial fulfilment
of the requirements for the degree
of
Master of Laws
at
The University of Waikato
by
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The University of Waikato
2008

ABSTRACT

New Zealand's figures for child maltreatment are consistently amongst the highest in the OECD. The purpose of this thesis is to understand what the legal system can do to protect children in New Zealand from maltreatment and why legal responses to child maltreatment often appear to be ineffectual or of limited effect.

This thesis uses the theories of Luhman and Teubner to argue that the law's ability to protect children from maltreatment is limited because the legal system creates and responds to its own abstract world. This process arises from the functional requirements of the law and its operation as an autopoietic system of power that produces its own abstract knowledge about the world. The legal system's function within New Zealand society is to stabilise behavioural expectations and maintain society's coherence and it does so by reducing the complexity of subjective human existence into binary alternatives. However, this process of reducing complexity limits the way in which the law produces its knowledge about the world and controls how power is distributed within the law's abstract world to such an extent that the legal system is closed from the world of subjective experience. This closure from the world outside the legal system limits the law's ability to regulate and reform that outside world and protect the children who live within it. By identifying these limits, this thesis will contribute to an understanding of the limits of the law's ability to protect children from maltreatment and thereby improve the effectiveness of New Zealand society's attempts to protect its children.

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Chapter 1 Introduction

As a parent of young children, I read with particular dismay reports showing New Zealand's figures for child maltreatment to be consistently amongst the highest in the OECD.¹ As a lawyer, I question what the law can do to protect children in New Zealand from such maltreatment and I wonder why legal responses to child maltreatment often appear to be ineffectual or, at least, of limited effect. These questions were the catalyst for this thesis.

In this thesis I will argue that the legal system is limited in its ability to protect children from maltreatment because it creates and responds to its own world, rather than the world as experienced by children and adults. As a result, although the legal system can impose consequences for the breach of its normative standards, it is ineffective in proactively changing behaviour and reforming society. By examining these issues, I hope that this thesis will contribute to a deeper understanding of how the law operates and the limitations of the legal system as a tool of social reform.

In chapter two I will establish the theoretical basis for my argument that the law creates its own world. I will examine the systems theories of Luhman and Teubner, both of whom begin with the proposition that the legal system's function within modern society is to stabilise behavioural expectations, and that it does so by reducing the complexity of subjective human experience into abstract binary alternatives. They argue that these reductive processes limit the way in which the law produces its knowledge about the world to such an extent that the law creates its own abstract world, a world closed from the subjective experiences of those subject to it. Furthermore, because the law responds to problems such as child maltreatment on the basis of this limited and abstract vision of the world, it

¹ UNICEF Innocenti Research Centre, "Child Poverty in Perspective: An Overview of Child Well-being in Rich Countries, Innocenti Report Card 7, 2007" viewed at <http://www.unicef-ird.org/cgi_bin/unicef/download_insert.sql?ProductID=494> (3 July 2008), 16.

is unable to reform society by communicating its normative requirements in any meaningful, proactive way. I will conclude this chapter by acknowledging that Luhman's and Teubner's claims that the legal system is operationally closed from society is criticised by other theorists, particularly by Jurgen Habermas.

In chapter three I will review Habermas' alternative theory for describing the relationship between law and society. Habermas argues that knowledge is created through a process he describes as 'communicative action'. For Habermas, communicative action is the foundation of modern democracy and the law's legitimacy. Habermas therefore argues that the knowledge the law produces is the result of communicative action, not the result of the law's operative closure. Consequently, he argues that the law *is* able to regulate society because it is not an operationally closed system but, through its genesis in the participatory processes of modern democracy, exists in a symbiotic relationship with society.

In chapters two and three I will therefore present two alternative theories for describing the relationship between law and society. The first will claim that the law produces its own world to meet its own functional requirements and is consequently unable to regulate the outside world. In contrast, the second theory will claim that the law and society have a symbiotic relationship through democratic processes of communicative action and that the law is able to regulate society. The subsequent chapters will investigate two particular operations of the legal system to determine which of these two theoretical approaches offers the most explanatory power for describing how the law operates in practice. I will investigate how the law produces knowledge about children and how the law redistributes power by recognising rights. These investigations are significant because the law can only protect children from maltreatment if it is able to regulate society.

In chapter four I will focus on how the law produces its knowledge about children by using conceptions of childhood. I will argue that Luhman's and

Teubner's theories explain the way in which the law uses conceptions of childhood to construct children as objects that meet the legal system's functional requirements. I will also argue that Habermas' theory fails to incorporate Foucault's insight that "power produces knowledge."² I will argue that the law is engaged in an exercise of power when it produces its own world using conceptions of childhood. Furthermore, the knowledge it produces generally serves the needs of the legal system itself, not the needs of children. I will argue that this result is predicted by Luhman's and Teubner's theories as they accept the exclusion of children from the law's knowledge creation process. However, because Habermas' theory is based on participation, it fails to account for the law's production of knowledge about human beings, such as children, who do not participate in the knowledge creation processes of communicative action. I will conclude this chapter by arguing that the law attempts to empower children by granting them legal rights.

In chapter five I will examine the role of rights within the legal system. I will argue that granting rights to children is an attempt to redistribute power to them in order to empower them to participate in the production of knowledge about their lives. Rights advocates attempt to use the law to redistribute power to children because the legal system promises to exercise power on the behalf of rights-holders. However, I will argue that the effectiveness of legal rights as a mechanism for redistributing power is entirely dependent on the law's ability to communicate and enforce this transfer of power outside the world of the law. In chapter five I will argue that granting rights to children can fail to achieve this transfer of power because of the legal system's operative closure as described by Luhman and Teubner.

After examining a variety of theoretical arguments in the first five chapters, I will examine two areas of the law in practice. In chapter six I will examine how the law is *created*, by examining the recent amendment to s 59 of the Crimes Act 1961. I will argue that the process of law reform

² Foucault, M *Discipline and Punish: The Birth of the Prison* (trans) Sheridan, A (1995) 27.

evident from the s 59 amendment process supports Luhman's and Teubner's claims that the law operates as a closed system. I will also show that Habermas' theory offers a useful critique of how law reform processes operate within the political system. In chapter seven I will examine how the law is applied by examining some recent cases of child maltreatment. I will argue that these cases also confirm Luhman's and Teubner's claims that the law operates as a closed system.

I will conclude this thesis by arguing that the cases, reports and law reform processes examined in chapters six and seven support Luhman's and Teubner's claims that the law creates its own world, is closed within that world and is consequently limited in its ability to respond to the needs of children in the outside world. I will also argue that Habermas' theory is more of an ideal than a description of actual practice. These factors limit the law's ability to protect children and I will therefore argue that New Zealand society can improve its attempts to protect children by recognising the limits of legal intervention and focusing on the causes of child maltreatment. Finally, on the basis of Habermas' insights, I will also argue that it is important for law reform processes designed to protect children to actively engage with the general community in order to improve the law's perceived validity.

A common theme throughout this thesis is the role of power in shaping both the law and society. This theme is founded on Derrida's claim that differences between individuals in society are fundamentally differences in social power.³ Society and the law generally treat children differently from adults and this difference reflects, in part, a difference in the ability of children to exercise social power. At the risk of generalising, adults have power (even if not absolute) whereas children have little or no power over their lives. Children are unable to exercise many of the freedoms that adults take for granted. In many ways, children are powerless. In contrast, the law is a system founded on the exercise of power. In this

³ Derrida, J "The Force of Law: The 'Mystical Foundation of Authority'" in Cornell, D Rosenfeld, M and Carlson, D G (eds) *Deconstruction and the Possibility of Justice* (1992) 7.

thesis I will argue that many of the limitations the law faces when responding to child maltreatment are the result of using a system of power such as the law to respond to the needs of the powerless.⁴

Joseph Goldstein comments that:

There is attributed to the law a magical power, a capacity to do what is far beyond its means. While the law may claim to establish relationships, it can, in fact, do little more than acknowledge them and give them recognition. It may be able to destroy human relationships, but it cannot compel them to develop.⁵

The law has no magical power to prevent maltreatment; it is limited in its ability to respond to the needs of children and to reform society. I hope that, by identifying these limits, this thesis will contribute to developing an understanding of what the law is capable of and to the development of a more effective and holistic approach to protecting children in New Zealand from maltreatment.

⁴ Children are not the only powerless members of our society. The limitations identified in this thesis could also apply to the law's response to the needs of other members of our society who have little or no power.

⁵ Goldstein J. S. "Finding the Least Detrimental Alternative" *Psychoanalytic Study of the Child* 628, at 736 (1972) quoted in Rodham, H "Children Under the Law" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 36.

Chapter 2 The Law is a Closed System

2.1 Introduction

In this chapter I will argue that the law operates as a system that is closed from other systems in society. This argument has significant implications when considering what the law can do to protect children from maltreatment. If the law operates as a closed system then it has, at best, a limited ability to protect children. If this argument is correct, it may explain why law reforms have often failed to change or improve the position of children within our society.⁶

My argument that the law operates as an autonomous system is based on the systems theories of Niklas Luhman and Gunther Teubner. I will therefore examine their theories in some detail in this chapter.

2.2 What are systems theories?

Since the 1960s, theorists within both the physical and social sciences have argued that organisations, both physical and social, are often ‘more than the sum of their parts’.⁷ These theorists argue that the facts of organisation impart

to the aggregate characteristics that are not only *different* from, but often *not found in* the components alone; and the ‘sum of the parts’ must be taken to mean, not their numerical addition, but their unorganised aggregation.⁸

The fact that organised systems are different from their constituent parts, is significant as it implies that the current state of any system can not be

⁶ Rodham, H “Children Under the Law” in Freeman, M (ed) *Children’s Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 33.

⁷ Buckley, W *Sociology and Modern Systems Theory* (1967) 42.

⁸ *Ibid.*

determined by simple deduction from its initial condition.⁹ Systems theories deal with the problems of causation within complex organisations by refusing to focus on linear chains of causation but on interrelationships between complex elements within the system.¹⁰ Systems themselves are thereby given ontological significance beyond their constituent parts and are treated as entities in themselves that consist of well-ordered elements that tend to maintain their organisational boundaries.¹¹ Boundaries are therefore particularly significant to systems theories as systems maintain their organisational coherence by defining their boundaries and what information or behaviour is acceptable within those boundaries.¹²

2.3 Does the law operate as a social system?

Niklas Luhman and Gunther Teubner have developed and applied theories regarding the nature of systems generally to describe the operations of the law. They argue that the law is a system and that its function is to integrate society by stabilising congruent expectations. To achieve this function, the legal system reduces complexity to manageable proportions so that its normative communications will be acceptable to society.¹³ The legal system's functional requirement to reduce complexity is therefore a fundamental element of Luhman's and Teubner's theories. They argue that this functional requirement leads to operative closure because, to reduce complexity, the legal system must re-interpret knowledge from outside the legal system to meet its own 'truth' criteria.¹⁴

Luhman and Teubner begin with the proposition that although truth may exist, it is not directly accessible.¹⁵ However, concepts of truth are required for the law to function. Consequently, Luhman and Teubner argue, the law as a system develops its own formal procedures to

⁹ Ibid, 39.

¹⁰ Ibid, 80.

¹¹ Flecha, R Gomez, J and Puigvert, L *Contemporary Sociological Theory* (2001) 8.

¹² Giles-Sam, J *Wife Battering: A Systems Theory Approach* (1983) 9.

¹³ King, M and Piper, C *How the Law Thinks About Children* (1995) 29 and 32.

¹⁴ Ibid, 34.

¹⁵ Ibid, 22.

determine the concepts of truth that are relevant for its own functional requirements.¹⁶

This understanding of truth, and the importance of formal procedures and functional requirements for the identification of legally valid 'truth', is fundamental to Luhman's and Teubner's theories. Within their theories, the legal system establishes its boundaries through formal procedures and thereby maintains its organisational coherence. This understanding of truth also combines with a reification of the legal system to produce a purely objective understanding of the nature of law and its interaction with individual human beings and society in general. Luhman and Teubner argue that the law does not develop its concepts of truth and meaning from the subjective perspectives of participants within the legal system. Rather, they argue that the legal system gives its own meaning to the behaviour of human actors. The law therefore relegates individual human beings to a role as "the structural interface between social and psychic systems."¹⁷

In contrast to positive law theorists who define 'the law' by reference to specific structural rules (H. L. A. Hart's rule of recognition for example¹⁸), Luhman argues that 'the law' needs to be defined by reference to its operations and how those operations distinguish between the legal system and its environment.¹⁹ Luhman "assumes" that these operations "always have to be the operations of the legal system itself"²⁰ and this forms the basis of his argument that the legal system is operatively closed. Luhman's theory is therefore an attempt (which he acknowledges is "structurally complex"²¹) to develop a theory able to clearly distinguish law from its environment and it does so by positing that the law uses its own processes for determining 'truth'.

¹⁶ Ibid, 22.

¹⁷ Flecha, Gomez, and Puigvert, supra n 11 at 27.

¹⁸ Hart, H.L.A. *The Concept of Law* (1994) 56.

¹⁹ Luhman, N *Law as a Social System* (trans) Zeigert, K (2004), 78.

²⁰ Ibid, 78.

²¹ Ibid, 70.

The idea that discourses such as the law develop their own formal procedures for determining the truthfulness of any statement leads to the reification of systems themselves. Teubner, for example, argues that:

[S]ocial organisations and institutions think, and ... this thinking is different to, and independent of, the thinking of its individual members.²²

Teubner argues that this 'thinking' proceeds on a self-referential basis; that is, systems develop processes to determine the validity of truth claims within the system but the validity of these processes is determined by referring to processes within the system itself.²³ The effect of this self-referential process is that legal rules take on a 'life of their own' and no longer operate as a legal means to social ends, but as ends in themselves.²⁴

Teubner argues that, although legal rules may initially represent underlying social values, over time they develop, through self-referential processes of production and maintenance, to exclude references to the social environment altogether.²⁵ This process is evident in New Zealand through the system of precedent that is an integral part of our common law system. The self-referential nature of the system of precedent serves to entrench the perspectives of those in positions of power, traditionally white, middle-class men.²⁶ The self-referential nature of the legal system itself allows this perspective to become synonymous with normative standards such as the normative standard of the 'reasonable man'.²⁷

The self-referential nature of systems creates particularly difficult theoretical problems for the legal system. Both Luhman and Teubner

²² King and Piper, *supra* n 13 at 23.

²³ *Ibid*, 25.

²⁴ Teubner, G *Law as an Autopoietic System* (1993) 40.

²⁵ *Ibid*.

²⁶ Davies, M *Asking the Law Question* (1994) 148.

²⁷ A concept developed in cases such as *Hall v. Brooklands Auto-Racing Club* (1933) 1 KB 205 with its reference to the "man on the Clapham omnibus" to set an 'objective' standard of foreseeability in cases of negligence. See also Davies, *supra* n 26 at 148.

argue that the legal system's function within modern society is to resolve the conflicts that arise as a consequence of divergent expectations.²⁸ To do so, the law reduces the complexity of human life by employing the fundamental normative distinction between what is legal and what is not.²⁹ However, as noted by Teubner:

As soon as the simple distinction between legal and illegal is applied in any context whatsoever, self-reference poses a threat to the law. If the distinction between legal and illegal is applied ... with claims to universality, then at some stage it will be applied to itself.³⁰

This reveals a fundamental paradox that lies at the heart of the legal system: the law itself determines its own legality. Luhman and Teubner attempt to explain this paradox by arguing that the law operates as a social system. This enables them to apply the concept of autopoiesis developed by Maturana and Varela in the context of the biological systems.³¹ Teubner claims that the concept of autopoiesis avoids the taboo against circularity that creates logical difficulties for the conception of law as a fundamentally self-referential system.³² Rather than regarding the circularity of law as a fault, autopoiesis regards circularity as a "productive and heuristically valuable practice".³³

2.4 What is autopoiesis?

Maturana and Varela initially defined an autopoietic system (or, in their case, an autopoietic biological 'machine') as:

[A] network of processes of production ... of components which: (i) through their interactions and transformations continuously regenerate

²⁸ Teubner, *supra* n 24 at 38. King and Piper, *supra* n 13 at 29.

²⁹ Davies, M *Delimiting the Law: 'Postmodernism' and the Politics of Law* (1996) 6.

³⁰ Teubner, *supra* n 24 at 4.

³¹ Flecha, Gomez, and Puigvert, *supra* n 11 at 27.

³² As noted by Teubner, another way to address the paradox of self-reference is by radical critique and deconstruction. (Teubner, *supra* n 11 at 8.) Derrida, for example, took this approach by identifying contradictions in the law; *infra* at 25. Other theorists such as H.L.A Hart, with his 'rule of recognition' have established theories based on self-reference that have been critiqued as 'logical contradictions'; see Davies, *supra* n 29 at 27.

³³ Teubner, *supra* n 24 at 9.

and realize the network of processes (relations) that produced them; and (ii) constitute it (the machine) as a concrete unity in space in which they (the components) exist by specifying the topological domain of its realization as such a network.³⁴

Applying this concept to the social sciences is a challenge.³⁵ Luhman began his application by arguing that the fundamental component of the legal system is not the human actors involved (judges, lawyers, clients etc) but the communications between such actors.³⁶ Luhman (and, subsequently, Teubner) therefore conceptualised the legal system primarily as a system of meaning generated through communication.³⁷ This system of meaning operates autopoietically because:

[T]he law produces by itself all the distinctions and concepts which it uses, and ... the unity of law is nothing but the fact of this self-production, this 'autopoiesis'.³⁸

It is clear from Maturana and Varela's definition that autopoiesis is more than simple self-reference as an autopoietic system not only refers to itself but is actively involved in its own regeneration and transformation. Teubner argues that autopoiesis involves self-reference, self-description, self-reflection, self-organisation, self-regulation and self-production.³⁹ Understanding the distinctions and relationships between these concepts is the key to understanding the Luhman's and Teubner's theories of autopoiesis.

Self-reference is the general concept underlying systems theories. It refers to systems consisting of rules that refer to other rules within the same system for their validity.⁴⁰ However, Luhman notes that such

³⁴ Maturana, Varela, *Autopoiesis and cognition: the realization of the living* (1980) 78.

³⁵ Teubner, *supra* n 24 at 27.

³⁶ Luhman, *supra* n 19 at 74.

³⁷ *Ibid*, 29.

³⁸ *Ibid*, 70.

³⁹ Teubner, *supra* n 24 at 16. As noted by Habermas, this emphasis on the self creates "a narcissistically self-enclosed" system. Habermas, *J Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 462.

⁴⁰ Teubner, *supra* n 24 at 18.

'reference' inevitably implies external reference as well; that is, a self-referential system will designate itself "in contrast to its environment" through an act of self-observation.⁴¹ This difference between external and internal reference is a reflection of the distinction between facts and norms that is a key element of the legal system within Luhman's theory.⁴²

Self-observation refers to a system's capacity to influence its own operations. Within the legal system, Teubner describes legal doctrine as an example of self-observation.⁴³ However, self-observations do not in themselves *produce* valid law but simply *describe* legal operations and their structures.⁴⁴ A legal system moves beyond mere self-observation and engages in self-organisation when it uses what H.L.A Hart referred to as 'secondary rules' to produce 'primary rules'.⁴⁵ This process of self-organisation ultimately develops into self-regulation allowing the legal system to not only produce new 'primary' rules but also to alter its own structure in accordance with its own systemic criteria.⁴⁶

The most complex concept within the definition of autopoiesis is the concept of self-production. Teubner notes that the term does not imply "that all causes are located within the system",⁴⁷ as a self-producing legal system is strongly influenced by external factors including social, political and economic events.⁴⁸ What distinguishes a self-producing system from other social systems is the fact that a self-producing system "reproduces itself by extracting and constituting, as it were, new elements from the flow of events, which it then uses by linking them up selectively."⁴⁹ Teubner describes the legal system as a 'second-order' autopoietic system that

⁴¹ Luhman, supra n 19 at 86.

⁴² Ibid, 113.

⁴³ Teubner, supra n 24 at 19.

⁴⁴ Ibid.

⁴⁵ A reference to H. L. A. Hart's categories described in *The Concept of Law* (1994) 79, Teubner, supra n 24 at 20.

⁴⁶ Teubner, supra n 24 at 20.

⁴⁷ Ibid, 21.

⁴⁸ Ibid.

⁴⁹ Ibid.

developed from society, which he considers to be the 'first-order' social system, through a historical process of self-production.⁵⁰

Autopoiesis consists of a particular combination of these processes. It involves the self-production of all components within a system, self-maintenance of this self-production through self-productive cycles, and self-regulation of the entire process.⁵¹ Teubner argues that modern legal systems exhibit these features as "legal communications generate themselves through the network of legal expectations, and are regulated by legal dogmatics and legal process."⁵² The effect of this autopoietic process is that the legal system generates norms autonomously from other social systems⁵³ and maintains its own stability through these internal autopoietic processes.⁵⁴ Although elements may be extracted from other systems, the legal system maintains its autonomy from those systems by strictly controlling the extraction process for its own purposes.

The role of human beings in these processes is one of the more controversial aspects of Luhman's and Teubner's systems theories. An obvious critique of their theories is that symbolic systems such as legal systems cannot generate themselves, as symbols require human interpretation.⁵⁵ Teubner's response is that it is not only legal acts that are involved in self-productive processes; all of the legal system's components, including its structures, processes, boundaries, identities, functions and performances, are also involved in the processes of self-production.⁵⁶ Consequently, Teubner argues, human beings have a double role as they "function as semantic constructs of the legal system and as independent autopoietic (psychic) systems in the environment of

⁵⁰ Ibid, 25.

⁵¹ Ibid, 24.

⁵² Ibid, 42.

⁵³ Ibid, 41.

⁵⁴ Ibid, 15.

⁵⁵ Ibid, 2

⁵⁶ Ibid, 26.

law”.⁵⁷ Teubner’s theory therefore views human beings as semantically constructed objects or, to use Luhman’s term, “semantic artefacts.”⁵⁸

2.5 What are ‘semantic artefacts’?

One critique of Luhman’s and Teubner’s arguments concerning the law’s inability to communicate directly with other social systems, is that the law and other social systems all share a common medium: the human beings who exist within and across the different systems that make up society as a whole. However, Luhman argues that the legal system, due to the effects of autopoiesis, does not deal with ‘flesh-and-blood people’ but with ‘semantic artefacts’ constructed by the legal system itself.⁵⁹

Consequently, the law is unable to respond to, and communicate with, the subjective experiences of human beings who engage with the legal system and can only engage with the ‘semantic artefacts’ constructed by the legal system itself. Although the law constructs all human beings as semantic artefacts, this thesis will focus on how the law constructs children in this objectifying way.

When constructing children as semantic artefacts to which it can apply its norms, the law generates binary alternatives that define what falls within and what falls outside particular semantic categories. These alternatives include whether particular conduct is defined as legal or illegal or whether a particular human being is defined as an adult or a child. The generation of binary alternatives is a functional requirement of the legal system as it allows the law to reduce human complexity into a form that allows the law to exercise its decision making power and reflects the legal system’s foundation on the dichotomy between legal and illegal.⁶⁰

Western thought often relies on establishing binary alternatives.⁶¹

Margaret Davies criticises this habit within legal processes on the basis

⁵⁷ Ibid.

⁵⁸ King and Piper, *supra* n 13 at 27.

⁵⁹ Ibid.

⁶⁰ Derrida *supra* n 3 at 7.

⁶¹ Davies, *supra* n 29 at 15.

that it “mediates oppression by defining and legitimising the categories of sameness and deviancy.”⁶² This critique can be applied to Luhman’s and Teubner’s systems theories. Both Luhman and Teubner argue that the legal system operates on the basis of the foundational dichotomy between legal and illegal. However, they do not question this foundation and consequently fail to consider the impact of power differentials within society and any oppression arising from the legal categorisation process is thereby masked. The law in Western society has traditionally operated by reference to adult, white, male Europeans as the subjects of the legal system⁶³ and consequently it has been the needs and interests of this group of subjects that have provided the norms with which other human beings have been compared. Theorists such as Derrida have challenged these traditional norms and have called for a reconsideration of “the boundaries that institute the human subject” within the legal system.⁶⁴

The law’s need to construct ‘semantic artefacts’ operates throughout the legal system. It operates not only in the formal setting of a Court proceeding, but begins when individuals begin interacting with the legal system. As noted by Sarat and Felstine:

Clients often seek to expand the conversational agenda to encompass a broader picture of their lives, experiences and needs. In so doing, they contest the ideology of separate spheres that lawyers seek to maintain. Lawyers, on the other hand, passively resist such expansion.⁶⁵

Lawyers resist such expansion because they need to construct their clients as semantic artefacts to which the legal system can respond by employing the limited binary alternatives available within legal discourse. These binary alternatives do not necessarily reflect wider social realities, or even the views of legal professionals operating the system. Rather, as

⁶² Ibid, 15.

⁶³ Derrida, supra n 3 at 21 and Davies, supra n 26 at 134.

⁶⁴ Derrida, supra n 3 at 18.

⁶⁵ Henaghan, M “Children and lawyers acting for children in legal proceedings – What does a child’s right to be heard in legal proceedings really mean?” in *Papers Presented at the Fourth World Conference on Family Law and Children’s Rights* [2005] 1 at 8.

Teubner argues, legal reality, including its understanding of human beings, is constructed through the specific limitations of legal communication.⁶⁶

Constructing human beings as semantic artefacts therefore prevents the law from interacting directly with individual human beings. By mediating its interactions with human subjects through semantic constructions, the law engages with those semantic constructions rather than with human beings directly. This is the basis of Luhman's and Teubner's argument that the law cannot function as an institution for solving social problems. They claim that the law's inability to resolve social problems does not arise from

the obvious reasons that judges may be class-bound, gender-bound and race-bound in their interpretation of these problems, but because the law, having developed its own 'rationality' in order to decide social conflicts, then goes on to abstract highly selective models of the world thereby neglecting many politically, economically and socially relevant elements.⁶⁷

Luhman and Teubner describe the law's process of abstracting a selective model of the world as operative closure.

2.6 What is operative closure?

If the legal system operates autopoietically, legal communications become differentiated from general social communications and the meaning that the legal system gives to such communications will have no direct relationship to the meanings such communications may have in other social discourses. In short, meaning within the legal system becomes 'closed' to the outside world.⁶⁸ Constructing human beings as semantic artefacts is but one example of this closure. Autopoietic theory 'radicalises' this closure by claiming that it prevents closed systems such as the law from intervening in other systems such as society.⁶⁹

⁶⁶ Teubner, supra n 24 at 44.

⁶⁷ Teubner, G quoted in King, and Piper, supra n 13 at 38.

⁶⁸ Teubner, supra n 24 at 11 and Luhman, supra n 19 at 80.

⁶⁹ Teubner, supra n 24 at 74.

Luhman accepts that this 'operative closure' is counterintuitive, particularly for systems that appear to be closely related such as the legal and political systems.⁷⁰ However, Luhman argues that closure is not isolation⁷¹ and that:

[S]ystems theory has long since accepted that openness (dependence of the system on its environment) on the basis of matter or energy does not conflict with the thesis of informational or semantic closure.⁷²

Luhman therefore argues that, although the legal system can be materially related to its environment (through the provision of funding for example), the way in which the legal system understands, explains and structures itself in response to its environment is internally generated by the system itself. Luhman and Teubner argue that it is this closure of understanding that prevents the law from dealing directly with 'the outside world' and reforming society.⁷³

Systems theories originally encouraged political strategies of reform by describing systems as means of direct social intervention analogous to other forms of social intervention such as money, power and technology.⁷⁴ Teubner argues that autopoietic theory, with its concept of closed systems, began to be applied to the legal system when theorists came to the view that social intervention by the legal system had "unexpected" results.⁷⁵ Although Teubner does not offer any examples of these "unexpected results", he claims that autopoietic theory explains such results by establishing that intervention is not actually possible given systemic closure and that what are perceived to be the results of intervention are, in fact, coincidences.⁷⁶

⁷⁰ Luhman, *supra* n 19 at 357.

⁷¹ *Ibid.*, 80.

⁷² *Ibid.*, 80.

⁷³ King, and Piper, *supra* n 13 at 27.

⁷⁴ Teubner, *supra* n 24 at 14.

⁷⁵ *Ibid.*

⁷⁶ The results of operative closure are considered in detail in chapters four to seven; *infra* at 16 - 19.

The operative closure of the legal system operates in two ways. First, once the legal system has become autonomous, it cannot directly *receive* communications from other social systems. Secondly, a closed legal system cannot directly influence or *send* communications to other 'outside' systems.

Luhman and Teubner argue that communications received by a closed legal system can only influence the legal system indirectly through a process of reconstruction whereby the legal system 'translates' the external communication into a legally valid form.⁷⁷ This 'translation' involves more than merely translating general social communications into legal jargon; the process involves a radical reconstruction of social events as legal events occurring within the legal system.⁷⁸ In the process, disputes are reconstructed from conflicts occurring in the social sphere to autonomous legal conflicts within the legal system.⁷⁹

One example of the legal system's inability to receive communications directly from other discursive systems without translation is that complex research results from the social sciences concerning the welfare of children are simplified and converted into legally valid normative principles.⁸⁰ This process of translation is required to simplify complex research into a format capable of defining a particular event as either legal or illegal; facts need to be translated into norms. Consequently, the legal system can be slow to react to advances in knowledge from other fields of enquiry. This is confirmed by recent research which shows that new social science research is regularly omitted from Court ordered psychological assessments and is seldom referred to by legal counsel or in legal judgments.⁸¹ Furthermore, when scientific research is presented in a legal

⁷⁷ King and Piper, *supra* n 13 at 29.

⁷⁸ Teubner, *supra* n 24 at 58.

⁷⁹ *Ibid.*

⁸⁰ King and Piper, *supra* n 13 at 51.

⁸¹ Mahon, A "Children's Views and Best Interests – A Legal Perspective" in New Zealand Law Society *Papers Presented at the Child Development Seminar* (2003) 1 at 22. Further research is required to determine whether this result reflects autopoietic systemic closure or is simply the result of practical matters such as resource constraints. However, such research is beyond the scope of this thesis.

setting, it can lose its “essential elements of scientific quality” as a consequence of the translation processes involved.⁸²

The distinction between facts and norms leads to the second effect of operative closure; the law cannot directly regulate with the world ‘outside’ the legal system itself because it is unable to communicate with it.⁸³ The law can only reconstruct the outside world in forms that are acceptable as legal communications within the legal system itself and this restricts the law’s ability to act as a tool of social regulation.⁸⁴

2.7 Can the law regulate society?

Luhman and Teubner therefore raise significant doubts about the legal system’s ability to regulate society. They claim that because of the legal system’s operative closure and the way in which it constructs highly abstract models of the world, the legal system is limited in its ability to send or receive communications to other social systems and is consequently unable to regulate society. Although their theories initially appear somewhat counterintuitive, it cannot be denied that the law is not universally complied with. At best, it therefore appears that the law’s ability to regulate society is limited in some way and Luhman’s and Teubner’s theories offer a coherent and thorough explanation for the failure of legal regulation. However, their theories are not the only theories that attempt to explain this phenomenon.

Teubner identifies a number of ways in which other theorists have explained or responded to the common failure of legal regulation to secure universal conformity to legal norms. He describes one response, the generation of more legal norms to forbid disobedience, as ‘the lawyer’s response’.⁸⁵ In contrast, the sociological response is to apply models of

⁸² Luhman, supra n 19 at 116.

⁸³ King, M and Thornhill, C (eds) *Luhman on Law and Politics: Critical Appraisals and Applications* (2006) 13.

⁸⁴ Ibid.

⁸⁵ Teubner, supra n 24 at 72.

efficacy to propose more severe sanctions for non-compliance.⁸⁶ Another response is to view non-conformity as a regulatory failure resulting from a lack of appropriate power that can only be overcome by strengthening the power sources of regulatory agencies.⁸⁷ Yet another approach is to identify mismatches of regulatory responses to particular social structures (such as the misuse of command and control norms to deal with issues of economic utility).⁸⁸

An examination of these alternative approaches is beyond the scope of this thesis. However, for the purposes of this thesis, it must be noted that Teubner argues that these alternative approaches are attempts to overcome systemic autonomy, rather than valid descriptions of how the legal system operates.⁸⁹ Luhman and Teubner discard all of these alternative approaches and Luhman argues that the autonomy of the law as a closed autopoietic system is inescapable and cannot be overcome. If this is correct, the law cannot regulate society. However, Teubner offers some hope for legal regulation by claiming that legal intervention in other social systems is possible, if only indirectly.⁹⁰ Teubner argues that the legal system can indirectly affect other social systems through processes of reciprocal observation and interference.⁹¹

Teubner's theory of interference through reciprocal observation is dependent upon a particular and somewhat counterintuitive definition of observation. Teubner points to a price freeze as an event which is generally considered to be a direct legal intervention by the legal system in society but, within Teubner's theory, is an example of an "act of observation".⁹² According to Teubner, what actually occurs when a price freeze is introduced is that the legal system imagines that the economic system functions in a particular way and then, on the basis of that imaginative construction, it uses a price control to observe its own

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Ibid, 77.

⁹¹ Ibid.

⁹² Ibid.

operations.⁹³ The observation involves the introduction of a legally relevant binary distinction that the legal system uses on the basis of its verification procedures to determine the existence of legally relevant facts.⁹⁴

Teubner argues that observation processes generate opportunities for different social systems to interfere with each other. Such interference can occur when different social systems ‘observe’ the same communicative event.⁹⁵ This interference arises because all social systems are ultimately systems of ‘meaning’; they are all based on communication to generate ‘meaning’ and general social communication forms the basis for the specialised communications used within each autonomous system.⁹⁶ This does not mean, however, that information is communicated directly between the different systems. Information is generated anew within each system. The key point is that this information is generated simultaneously within each system *in relation to the same observed event*, even though it is observed from a different systemic perspective.⁹⁷ Independent systems within society can therefore indirectly influence other systems by creating interference through events that those other systems are also observing and responding to. Consequently, Teubner argues that the law’s attempts to regulate society need to move beyond traditional cause and effect processes “towards a logic of perturbation.”⁹⁸

Although Teubner argues for the possibility of ‘interference’, he accepts that the legal system faces significant restrictions in its ability to ‘interfere’ with other systems. One such restriction is the problem of maintaining a source of motivation through the interference process. Teubner argues that legal communications can only reliably motivate other legal communications; their capacity to motivate general social communication

⁹³ Ibid.

⁹⁴ Ibid, 78.

⁹⁵ Ibid, 84.

⁹⁶ Ibid.

⁹⁷ Ibid, 87.

⁹⁸ Ibid, 35.

is limited because they can only communicate indirectly.⁹⁹ Consequently when the legal system interferes in other social systems, the motivating force attaching to the relevant communication within the legal system is lost, or at least reduced, through the process of interference. The source of motivation therefore needs to be reinforced within the new system through other means of communication. Teubner claims that this motivation may be reinforced by moral pressure or claims to normative validity but will predominantly be developed through the power of enforced sanctions.¹⁰⁰

Habermas has criticised Teubner's arguments for the possibility of 'interference' between systems on the basis that it is inconsistent with the conceptual framework of autopoietic theory. He notes that:

On the one hand, legal discourse is supposed to be trapped in its self-reproduction, constructing only its own internal image of the external world; on the other hand, it is supposed to use "general social communication" so that it can "influence" general social constructions of reality, and in this way influence those of other discursive worlds as well. It is difficult to reconcile these two statements.¹⁰¹

Teubner attempts to overcome this criticism by distinguishing between social systems that use the same elements (thoughts and communications) from systems that use different elements (such as a psychic system and a social system).¹⁰² However, it is not clear how this distinction can overcome operative closure or allow for interference. On that basis, Luhman's theory of autopoiesis rejects the possibility of interference between systems altogether.

In summary, although Luhman argues that the autopoietically closed nature of the legal system prevents it from exercising any degree of

⁹⁹ Ibid, 91.

¹⁰⁰ Ibid.

¹⁰¹ Habermas, J *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) 53.

¹⁰² Teubner, supra n 24 at 88.

regulatory control over other social systems, Teubner argues that some indirect regulation is possible. According to Teubner, indirect regulation can occur through the 'general shared communications' of the legal system and other social systems that allow the legal system to 'interfere' with other systems. Interference is possible where different systems 'observe' the same event; by influencing the observed event, systems can indirectly interfere with the observations of other systems thereby influencing those systems' internal mechanisms. However, Teubner emphasises that the possibility for legal regulation to occur through interference is limited and that the fundamentally closed nature of autopoietic systems, including the law, is impossible to break down.¹⁰³

2.8 Why does the law operate as a closed system?

In this section, I will argue that the law operates as a closed system because of the requirements of power that proscribe law's functional requirements. To do so I will apply Derrida's theories of law and justice, which identify and analyse the logico-formal paradoxes of the legal system's discursive practices.¹⁰⁴

Luhman's and Teubner's theories attempt to describe the operations of the legal system and how those operations result in closure of the system. They do not consider in detail the reasons why the legal system operates in a closed way. Their theories are primarily descriptive. However, the role of social power in shaping social systems such as the law becomes apparent by considering Derrida's theories of law and justice.¹⁰⁵

Derrida's approach to justice and law differs from the traditional 'positivist' approach (including the approach of theorists such as Luhman and Teubner) as it questions the foundations of the social or linguistic constructs that form part of the legal system. Positivist approaches

¹⁰³ Ibid, 97.

¹⁰⁴ Derrida, supra n 3 at 21.

¹⁰⁵ Ibid, 3 - 67.

'naturalise' and mask the underlying power dynamics that shape the legal system by failing to question the role of power.¹⁰⁶

As previously considered, Luhman and Teubner argue that the law operates as a closed system through the process of autopoiesis and they do not examine whether law has any source of validity beyond itself. By restricting their theories to describing the operations of the law and excluding any consideration of issues of morality or justice, issues of validity lose their importance.

In contrast, Derrida focuses on the source of law's validity and argues that the law validates its existence through the use of force.¹⁰⁷ For Derrida, 'force' refers to power differentials within society. In fact, it is differences in power which create differences in society; for Derrida, 'difference' means 'difference of force.'¹⁰⁸ Power is therefore related to the law through the concept of enforceability. According to Derrida, the concept of enforceability is "essentially implied in the very concept of justice as law."¹⁰⁹ Consequently, force (which Derrida also describes as 'power' or 'violence'¹¹⁰) has a complex internal relationship with law; law is not simply a tool used by those with power but is inextricably linked to the validity of the law.¹¹¹

As previously noted,¹¹² Teubner recognised that the basic legal/illegal dichotomy underlying the legal system is a fundamental paradox. Luhman's and Teubner's systems theories are attempts to address this paradox by adapting theories of autopoiesis from the biological sciences. In contrast, Derrida acknowledges the paradox and argues that it is inescapable as the founding authority for the law cannot be law but the violence "without ground" that establishes the legal system.¹¹³ For Derrida,

¹⁰⁶ Davies, n 29 at 20.

¹⁰⁷ Derrida, supra n 3 at 5.

¹⁰⁸ Ibid, 7.

¹⁰⁹ Ibid, 5.

¹¹⁰ Ibid, 7.

¹¹¹ Ibid.

¹¹² Supra at 10.

¹¹³ Derrida, supra n 3 at 14.

any legal system is “neither legal nor illegal in the founding moment”.¹¹⁴ Consequently, the existence of any legal system does not depend on the system itself, even through a process of autopoietic self-production as Luhman and Teubner argue, but ultimately rests on an expression of force that is neither legal nor illegal. Derrida refers to this as the “mystical foundation” of law’s authority.¹¹⁵ Given these internal relationships between force, enforceability and law, Derrida argues that the law can be critiqued to uncover the “economic and political interests of the dominant forces of society.”¹¹⁶

In addition to identifying the “mystical foundation” of law’s authority, Derrida identifies three logical contradictions that are a fundamental and inescapable part of the legal system. The first is the contradiction between the need for freedom in decision-making and the simultaneous need for decisions to be predictable applications of known rules. In other words, for decisions to be just, they must be both regulated and unregulated.¹¹⁷ The second is the need to recognise particularity and the corresponding need for general equity.¹¹⁸ The third contradiction Derrida identified is that ultimately, given the limitations of human understanding and the fact that decisions are always made on the basis of incomplete knowledge, all decisions are “a madness” in the sense that they are a reflection of both rational *and* irrational processes.¹¹⁹

Derrida claims that all of these contradictions operate within Western legal systems and that their existence, and their inevitability, justifies his argument that the law’s authority ultimately rests on violence and force. The existence of these contradictions prevents the legal system from claiming that its decisions and authority are founded on logic and reason.

¹¹⁴ Ibid.

¹¹⁵ Ibid, 12. In referring to ‘mystical authority’, Derrida referred to a quote from Pascal: “Custom is the sole basis for equity, for the simple reason that it is received; it is the mystical foundation of its authority. Whoever traces it to its source annihilates it.”

¹¹⁶ Ibid, 13.

¹¹⁷ Ibid, 23.

¹¹⁸ Ibid, 24.

¹¹⁹ Ibid, 26.

Derrida's exploration of the relationship between law and force is significant when considering the law's ability to protect children from maltreatment. If, as Derrida argues, the validity of law is ultimately based on an expression of force, either through systemic power, physical force or any other form of socially recognised, and thereby privileged, difference, those within society who have no or little power to enforce their interests are at a significant systemic disadvantage. This disadvantage is entrenched given the operative closure of the legal system. The functional requirements of the legal system that lead to operative closure through autopoiesis, are requirements with a "mystical foundation" in social power. Those without power are thereby excluded from the operations of power within the system.

Clearly, children within New Zealand society have little or no power themselves; they are dependent upon those with power to take action on their behalf.¹²⁰ Although the law can promise to protect children, its ability to do so is limited given the legal system's operative closure based on functional requirements that serve the interests of power. To recognise this issue, laws relating to children need to be carefully analysed and deconstructed to determine whether they reflect the needs and wishes of children themselves or, in fact, the needs and wishes of other groups within society who have the power to enforce their own interests.

2.9 Summary

Luhman and Teubner argue that the law creates its own abstract world of meaning and is consequently closed and distinct from what many people think of as the 'real world'. This operative closure arises from systemic processes of knowledge and meaning creation. The legal system produces knowledge that meets its own functional requirements. These requirements include a requirement for the law to reduce the chaotic complexity of subjective human reality to binary alternatives, such as the stark dichotomy between legal and illegal. This reduction results in the

¹²⁰ The process for amending s 59 of the Crimes Act 1961 illustrates this point and will be considered in more detail in chapter six; *infra* at 97 - 119.

law responding to its own created world, an abstracted, simplified world populated with semantic artefacts, rather than the subjectively experienced worlds of those subject to the law's operations. By constructing its own world in this way, the law engages in an exercise of power by constructing differences between adults and children.¹²¹

If Luhman and Teubner are correct, their theories may offer an explanation for some of the difficulties the law faces in protecting children from maltreatment. In chapters four to seven I will therefore examine how the law operates in more detail to determine whether Luhman's and Teubner's theories offer an accurate description of the law in practice. However, Luhman's and Teubner's claim that the world of the law is operationally closed from society is controversial and criticised by other theorists, particularly by Jurgen Habermas. Before examining how the law operates, I will therefore examine Habermas' alternative theory for explaining the relationship between law and society.

¹²¹ As claimed by Derrida, differences between individuals in society are fundamentally differences in social power; supra n 4.

Chapter 3 Habermas: Law and Society

3.1 Introduction

In this chapter I will examine Habermas' response to Luhman's and Teubner's theories. As examined in chapter two, Luhman and Teubner claim that the law is a closed, autopoietic system and is consequently unable to communicate with, influence or regulate, other social systems. In contrast, Habermas uses his theory of communicative action to critique Luhman's and Teubner's claims and argue that the law is, in fact, able to influence and ultimately regulate society. For Habermas, the law's ability to regulate society is dependent upon those subject to the law perceiving the law to be valid. As indicated in chapter two, Derrida found the source of validity in an original exercise of force.¹²² In contrast, Habermas locates the source of legal validity in social processes of deliberative democracy.

Habermas' theory is useful when considering the law's response to child maltreatment as he argues that the law *is* able to play a role in regulating society. Habermas therefore provides a theoretical basis for critiquing Luhman's and Teubner's pessimism and examining some of the prerequisites for effective regulation.

Habermas agrees with Luhman and Teubner that the law's role in modern Western society is to play a part in maintaining social integration by stabilising divergent behavioural expectations.¹²³ However, he argues that the law achieves this by generating mutual understanding between communicatively acting subjects who accept particular validity claims.¹²⁴ Social values, norms and systemic factors such as economic markets and the administrative use of power also play a role in integrating society.¹²⁵ However, Habermas argues, the law's ability to play its part in maintaining

¹²² Supra at 24.

¹²³ Habermas, supra n 101 at 449.

¹²⁴ Ibid, 83.

¹²⁵ Ibid, 39.

social integration has become increasingly difficult within modern, differentiated societies. Understanding Habermas' concept of modern society is therefore an important step in understanding his legal theory.

3.2 How does Habermas describe modern society?

For Habermas, modern Western societies are complex and face increasing social differentiation: that is, the role of individuals within modern society is no longer explicitly determined by birth, class or other external, fixed characteristics.¹²⁶ Within modern Western societies, individuals may have many different functionally specified tasks, social roles and interest positions.¹²⁷

Concomitant with increasing social differentiation has been an increasing pluralisation of what Habermas refers to as subjective 'lifeworlds'.¹²⁸ 'Lifeworld' is a sociological term referring to shared subjective conceptions of reality bound to the medium of ordinary language and reflecting cultural traditions, social expectations and individual competencies.¹²⁹ A significant result of this lifeworld pluralisation has been a corresponding reduction in shared metaphysical beliefs. Habermas argues that, because of increasing social differentiation and lifeworld pluralisation, legal theory within modern Western society needs to allow for and incorporate a wide range of subjective perceptions of reality.

Habermas' attempt to incorporate subjective perceptions into his theory of the law is in stark contrast to Luhman's and Teubner's approach to subjectivity. Both Luhman and Teubner focus on an objective and abstract description of law and society. They ignore the perspectives of participants within systems. In contrast, Habermas attempts to balance both the normative, objective aspects of law and the perspectives of participants. Habermas refers to this relationship between the normative

¹²⁶ Ibid, 25.

¹²⁷ Ibid, 25.

¹²⁸ Ibid, 22.

¹²⁹ White, S. K. *The Recent Work of Jurgen Habermas: Reason, Justice & Modernity* (1988) 99.

and subjective aspects of law as a tension between “facticity and validity” and this description emphasises the importance, for Habermas, of the concept of legal validity.¹³⁰

3.3 What is the source of the law’s validity?

Habermas argues that in pre-modern Western societies, that is, in undifferentiated societies with few available lifeworlds, the law established its validity on the metaphysical grounds of higher-ranking and widely accepted moral law such as the God-given authority of the King or the Church.¹³¹ However, given the pluralisation of modern societies and their subjective ‘lifeworlds’, such appeals to metaphysical grounds of authority are no longer universally accepted by those subject to the law.¹³² As a result, modern law has had to find alternative sources of validity.¹³³

Habermas argues that the challenge for the law within modern Western societies is locating a source of validity outside the metaphysical grounds of shared religious belief or universal lifeworlds. Luhman and Teubner avoid addressing this challenge by focusing exclusively on an objective analysis of the source of legal legitimacy within the legal system itself. By closing the legal system off from the subjective perceptions of its subjects, Luhman and Teubner avoid considering subjective perceptions of the law’s validity. In contrast, the internal, subjective perception of validity for legal subjects is an important issue for Habermas. He argues that rational discourse and democratic processes are the source of this subjectively perceived validity within modern, post-metaphysical societies.

Habermas argues that the law needs to maintain validity (both objective and subjective) if it is to achieve its social function of maintaining social integration. If the law is not perceived by its subjects to be valid, other factors such as intimidation, force, custom or mere habit are required to

¹³⁰ Habermas, supra n 101 at 8.

¹³¹ Ibid, 448.

¹³² Rehg, W *Translator’s Introduction* in Habermas, J *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996) xix.

¹³³ Habermas, supra n 101 at 448.

ensure compliance with the law's normative requirements.¹³⁴ Whereas Derrida argues that 'force' or 'violence' is the ultimate and "mystical" source of law's validity,¹³⁵ Habermas argues that force only operates in the absence of subjectively perceived validity arising from discursively generated understanding.

To explain the significance of this discursively generated understanding, Habermas distinguishes between legal subjects taking *strategic* and *performative* approaches to complying with the law. Legal subjects take a *strategic* approach when they comply with the law on the basis of their calculation of the consequences of non-compliance but take a *performative* approach when they comply because they view the norm established by the law as valid.¹³⁶

For Derrida, all legal compliance is ultimately strategic. For Luhman and Teubner, the subjective perceptions of legal subjects is an issue outside their conceptual framework and therefore irrelevant. However, for Habermas, understanding the distinction between performative and strategic compliance provides useful insights into the operation of modern, Western legal systems. He argues that although strategic compliance may be acceptable on occasion, the validity of the legal system, and ultimately its ability to perform its socially integrative function, is dependent upon achieving and maintaining performative compliance. It is therefore clear that, for Habermas, the discursive process of reaching 'understanding' is an important part of the law's operation within modern Western societies. Habermas argues that this 'understanding' arises from what he describes as 'communicative action'¹³⁷.

¹³⁴ Ibid, 30.

¹³⁵ Supra at 24.

¹³⁶ Habermas, supra n 101 at 448.

¹³⁷ Ibid, 8.

3.4 What is 'communicative action'?

Habermas criticises modern philosophical theories that discard the concept of reason as a universal concept and he attempts to resurrect it by locating reason within interpersonal communication.¹³⁸ For Habermas, 'communicative action' is the process that produces rational knowledge about the world.¹³⁹ This rational knowledge then forms the basis of law's validity.

Habermas claims that 'communicative action' occurs when competent speakers raise universal validity claims and then participate in processes of debate about those claims.¹⁴⁰ During such debates, proponents of truth claims need to defend their claims with reasons¹⁴¹ and when truth claims obtain the rationally motivated agreement of the interpretation community as a whole, the claims can be considered rationally valid.¹⁴² This process transports the concepts of reason and truth from an abstract realm into a linguistic medium.¹⁴³ Consequently, reason and truth lose any relationship with idealised contents in a Platonic sense and become grounded in the shared understandings of social groups.¹⁴⁴ The potential for 'shared understanding' is therefore an important element of Habermas' theory.

Developing a 'shared understanding' requires communicative actors within a community to commit themselves to pragmatic presuppositions,¹⁴⁵ including the assumption that members of the community can understand the meaning of grammatical expressions in identical ways.¹⁴⁶ This is a controversial assumption. Derrida, for example, argues that the belief that all members of a linguistic community share the same idiom is an ideal

¹³⁸ White, *supra* n 129 at 1.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Habermas, *supra* n 101 at 14.

¹⁴² *Ibid.*

¹⁴³ *Ibid.*, 3.

¹⁴⁴ *Ibid.*, 9.

¹⁴⁵ *Ibid.*, 8.

¹⁴⁶ *Ibid.*, 11.

that is “never possible”¹⁴⁷ Although Habermas does not specifically acknowledge this issue, his approach is designed to develop a “pragmatic explanation of the idea of truth”¹⁴⁸ rather than identify universal ideals.

Habermas’ theory of ‘communicative action’ therefore establishes a general theory of the pragmatic development of truth or validity claims within modern societies through reasoned communication. By applying this general theory to the law, Habermas argues that the rule of law is conceptually related to the practice of deliberative democracy.¹⁴⁹ In fact, for Habermas, the democratic process bears “the entire burden” of legitimising legal norms.¹⁵⁰

3.5 Why is democracy important?

Habermas centres his account of legal legitimacy on the principle that:

Only those norms are valid to which all affected persons could agree as participants in rational discourses.¹⁵¹

This principle, which Habermas refers to as the ‘discourse principle’, explains the importance of democratic processes within Habermas’ social theory; democratic processes allow people subject to the law to participate in its creation. Habermas argues that the subjective perception that the law is the creation of rational processes and therefore rational is the basis of the law’s validity.

Habermas argues that democratic processes bear the burden of generating validity because, without religious or metaphysical grounds for validity, the law can only perform its function of integrating and regulating society if those subject to the law are able to consider themselves to be

¹⁴⁷ Derrida, supra n 3 at 18. Many scholars in the Critical Legal Studies movement make a similar point; see Davies, supra n 26 at 145 - 148 for a useful summary of these arguments.

¹⁴⁸ Habermas, supra n 101 at 15.

¹⁴⁹ Rehg, W supra n 132 at xxiv.

¹⁵⁰ Habermas, supra n 101 at 450.

¹⁵¹ Ibid, 107.

the “rational authors” of the law they are subject to and that the law is therefore valid.¹⁵² Democratic processes are therefore designed to ensure that those subject to the law are given an opportunity to contribute to the law-making process through communicative action. Habermas argues that, within modern society, it is this principle of democratic participation that “confers legitimating force on the legislative process”.¹⁵³

The principle of democratic participation creates a distinction between those who are able to participate in the democratic processes of law’s creation and those who are not. This ability to participate, within modern Western societies, is generally dependent on legal rights. Habermas argues that the legitimacy of the legal process is therefore dependent upon protecting the rights of those subject to the law to participate in the processes of law’s creation.¹⁵⁴ This point has significant implications for children, who are often given little or no rights to participate in democratic processes.

Habermas’ approach to human rights differs from the approaches of traditional liberal legal theorists such as Locke for whom legal rights were a necessary protection against the power of the state.¹⁵⁵ Modern rights theorists such as Dworkin have adopted a similar approach, arguing that rights distinguish law from “ordered brutality” and therefore operate as a restraint on state power.¹⁵⁶ As Habermas notes, under such theories, concepts of human rights and state power are in competition.¹⁵⁷ Habermas argues that this approach fails to take into account the “constitutive connection between law and politics”,¹⁵⁸ that is, the fact that the rights of individuals and the validity of public democratic processes are each dependent upon the other.¹⁵⁹

¹⁵² Ibid, 33.

¹⁵³ Ibid, 121.

¹⁵⁴ Ibid, 451.

¹⁵⁵ Russell, B *A History of Western Philosophy* (1946) 572.

¹⁵⁶ Dworkin, R *Taking Rights Seriously* (1977) 205.

¹⁵⁷ Habermas, supra n 101 at 454.

¹⁵⁸ Ibid, 457.

¹⁵⁹ Ibid, 454.

3.6 Summary

Luhman and Teubner offer a pessimistic vision of the law's ability to regulate society. In this chapter I have examined the theories of Habermas, a prominent critic of Luhman and Teubner, in an effort to discount their theories.

Habermas argues that knowledge is created through a process he describes as 'communicative action', not through the autopoietic, closed processes Luhman and Teubner propose. He argues that the law uses communicative action to create rational knowledge about the world and establish its validity and that this requires the active participation of those subject to the law. Consequently, Habermas argues that the law is not operationally closed but created through the participatory processes of modern democracy. Law and society therefore have a symbiotic relationship and the law *is* able to regulate society (just as society is able to regulate the law).

A key distinction between Habermas and Luhman and Teubner is the difference in the way they describe the law's knowledge creation processes. Habermas locates the source of knowledge in the participatory processes of communicative action whereas Luhman and Teubner argue that knowledge is produced by the legal system itself, to meet its own functional requirements. This is an important distinction when considering what the law can do to protect children from maltreatment because the law's response to children will inevitably be a consequence of its knowledge about children. In chapter four I will therefore focus on how the law produces its knowledge about children.

In chapter four I will argue that Luhman's and Teubner's theory explains the way in which the law produces knowledge about children. I will also argue that Habermas' theory does not describe the law's knowledge production process with the same clarity, primarily because it fails to

incorporate Foucault's insight that "power produces knowledge."¹⁶⁰ I will argue that the law is engaged in an exercise of power when it produces its knowledge about children and, as a result, the knowledge it produces generally serves the needs of the legal system itself not the needs of children. I will argue that this result is predicted by Luhman's and Teubner's theories as they accept the exclusion of children from the law's knowledge creation process. Conversely, because Habermas' theory of knowledge creation is so dependent upon the ability to participate in producing knowledge through democratic processes, it fails to describe the way in which the law produces knowledge about children given that they cannot participate in those processes directly.

¹⁶⁰ Foucault, *supra* n 2 at 27.

Chapter 4 Producing Knowledge

4.1 Introduction

In this chapter I will argue that the law uses its creative power to produce knowledge about children. However, the law's functional requirements limit the law's exercise of creative power so that the knowledge it produces differs from the world experienced by children. The law produces its knowledge about children in a number of ways but, given space limitations, this chapter will focus on how the law uses conceptions of childhood to produce its knowledge about children.¹⁶¹ I will argue that Luhman's and Teubner's theories explain how the law uses these conceptions to construct children as objects that meet the legal system's functional requirements. I will also argue that Habermas' theory of communicative action does not have the same explanatory power as he does not account for the role of power in producing knowledge.

4.2 How does power produce knowledge?

The law has traditionally operated on the basis of the 'correspondence' model of language and assumed that language accurately corresponds with a discernible, absolute reality.¹⁶² As a result, the law has assumed that the interpretation of the law and the finding of facts are processes involving the discovery of absolute truths.¹⁶³ This meant that when the law was required to respond to the needs of children, the law distinguished children from adults simply on the basis of their obvious physical limitations.¹⁶⁴ The law did not take account of the way in which children were described as the law considered that those descriptions

¹⁶¹ Other processes of creation that are worthy of further investigation include, but are not limited to, the role of evidence rules, the influence of patriarchal power systems and beliefs in the power of reason and the possibility of objectivity.

¹⁶² Davies, *supra* n 29 at 45.

¹⁶³ *Ibid*, 46.

¹⁶⁴ Archard, D *Children: Rights and Childhood* (2nd ed, 2004) 26.

corresponded with absolute objective reality.¹⁶⁵ However, recent philosophical developments have challenged the ‘correspondence model’ of language and its use within the legal system.

Following the ‘linguistic turn’ in philosophy and social theory many social theorists now argue that what is generally accepted as ‘reality’ does not correspond to one absolute reality but is actually a representation constructed through social discourse.¹⁶⁶ Language can therefore be used as a tool by those with power to achieve particular individual or social goals, a possibility described by sociologists as the ‘action orientation’ model of language.¹⁶⁷ Power therefore produces knowledge because the meaning of language is dependent upon context and the intentions of the speaker.¹⁶⁸ Recognising the role of power in producing knowledge about children leads to a re-evaluation of the ways in which children and childhood have been understood by society and the law.

When the law is called upon to respond to the needs of a child, it engages in a process of constructing a linguistic representation of that child. This construction arises through the use of discursive techniques of description and definition. Using Luhman’s terminology, the law constructs the child as a ‘semantic artifact’ to which the legal system can respond.¹⁶⁹ To do so, the law employs conceptions of childhood, many of which have a long history within Western society.

In this chapter I will examine some of the major conceptions of childhood that have developed in Western society and the ways in which the law uses these conceptions to produce knowledge about children and construct children as objects that meet the legal system’s functional requirements.¹⁷⁰

¹⁶⁵ James, A and Prout, A “A New Paradigm for the Sociology of Childhood: Provenance, Promise and Problems” in James, A and Prout, A (eds) *Constructing and Reconstructing Childhood* (1997) 10.

¹⁶⁶ Gergen, M and Gergen J *Social Construction: A Reader* (2003) 2.

¹⁶⁷ Tuffin, K *Understanding Critical Social Psychology* (2005) 83.

¹⁶⁸ Wittgenstein, L “Knowledge as a Language Game” in Gergen, M and Gergen J *Social Construction: A Reader* (2003), 18 – 19.

¹⁶⁹ Teubner, supra n 24 at 33.

¹⁷⁰ In this chapter, I will focus on the conceptions of childhood that have developed in Western society as it is these conceptions that have been employed by the Western legal

By exercising its power to produce its knowledge about children to meet its own functional requirements, the law separates its knowledge from the subjective realities of children themselves and this limits the law's ability to meet their needs. This process is driven by the law's functional requirement to divide reality into binary alternatives amenable to resolution through the legal system. A fundamental binary, when considering the law's response to children, is the binary distinction between adults and children. This distinction is established and supported by conceptions of childhood.

4.3 How do conceptions of childhood divide society?

Any conception of childhood must begin with the idea that children are, in some way, different to adults. Aries, for example, defined the concept of childhood as:

[A]n awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult.¹⁷¹

A focus on the distinction between children and adults can operate to the detriment of children by encouraging a focus on what it is that children lack in comparison to the socially constructed ideals of adulthood.¹⁷² However, accepting that children are different from adults does not inevitably lead to a view that children are in some way inferior to adults. Many modern writers have acknowledged differences between adults and children while affirming that children are autonomous individuals entitled to rights.¹⁷³ The difficulty lies in appropriately balancing respect for children as unique human beings while simultaneously acknowledging and allowing for their vulnerability and limited knowledge, experience and conceptual skill.

system, including New Zealand's legal system, when exercising power over children. Conceptions of childhood also exist in other cultures.

¹⁷¹ Aries, P *Centuries of Childhood: A Social History of Family Life* (trans) Baldick, R (1962) 128.

¹⁷² Archard, supra n 164 at 12.

¹⁷³ Freeman, M *Children's Rights: A Comparative Perspective* (1996) 1.

The idea that children should be distinguished from adults forms the basis of many legal instruments relating to the status and rights of children, including the United Nations Convention on the Rights of the Child (“UNCRC”).¹⁷⁴ As noted in the UNCRC’s preamble:

The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.¹⁷⁵

Conceptions of childhood give meaning to and thereby offer justifications for the binary distinction between adults and children.

4.4 Have conceptions of childhood always existed?

Phillip Aries was one of the first historians to examine the ways in which conceptions of childhood have developed over time. He claimed that no conception of childhood existed during the Middle Ages. In this section I will examine Aries’ claims and argue that conceptions of childhood did exist during the Middle Ages and that it appears that conceptions of childhood have always existed, even if they have changed over time.

Aries developed his theories by interpreting a variety of historical documents dating from the Middle Ages through to the late nineteenth century. His sources included diaries, autobiographies and art works from the relevant periods and his goal was to examine the historical development of the concept of childhood. In summary, Aries argued that:

In medieval society the idea of childhood did not exist; this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children; it corresponds to an awareness of the particular nature of childhood, that particular

¹⁷⁴ 1989, entered into force 2 September 1990, 1577 UNTS 3.

¹⁷⁵ Ibid.

nature which distinguishes the child from the adult, even the young adult. In medieval society this awareness was lacking.¹⁷⁶

Although Aries claimed that the idea of childhood did not exist in medieval society, he acknowledged that medieval texts often described the different “ages” of human life (from childhood, through pueritia and adolescence to youth, senectitude and old age).¹⁷⁷ However, he argued that children were not treated differently to adults during the fifteenth and sixteenth centuries. To support this argument, Aries referred to paintings from the period that showed children mingling with adults in everyday life. This intermingling, Aries claimed, was evidence that there was no social distinction between the worlds of adulthood and childhood during this period.¹⁷⁸ Aries also noted that although children were often portrayed in medieval art as part of a scene, they were not portrayed alone in portraits, a fact that he interpreted as evidence that childhood was considered an “unimportant phase of which there was no need to keep any record.”¹⁷⁹

Aries argued that, during the Middle Ages, childhood was considered an “unimportant phase” because of the high infant mortality rates experienced throughout Western Europe throughout the period.¹⁸⁰ The child mortality rate in England between 1500 and 1800, for example, varied between 30% and 50%.¹⁸¹ Aries concluded that adults avoided emotional attachment to children given the high likelihood that they would not survive beyond childhood.¹⁸² Consequently, Aries argued, adults placed little value on the lives of children and no conceptions were developed to understand them.¹⁸³

¹⁷⁶ Aries, supra n 171 at 128.

¹⁷⁷ Ibid, 21.

¹⁷⁸ Ibid, 37.

¹⁷⁹ Ibid, 38.

¹⁸⁰ Ibid, 38. Stone makes a similar argument, see Stone, L *The Family, Sex and Marriage in England 1500 – 1800* (1979) 407.

¹⁸¹ Stone, supra n 180 at 407.

¹⁸² Aries, supra n 171 at 38. Stone makes a similar argument, see Stone, supra n 180 at 407, as does May, see May, H *The Discovery of Early Childhood* (1997) 31.

¹⁸³ Aries, supra n 171 at 38.

There are significant difficulties with Aries' claims and his theories have been criticised by a number of theorists since they were published in 1962. Many historians have argued that, at most, Aries has shown that conceptions of childhood during the Middle Ages differed from modern conceptions, not that the Middle Ages had no conceptions of childhood at all.¹⁸⁴

Pollock uses evolutionary theory to critique the substance of Aries' claims. She argues that it would have been difficult for a society to operate successfully if little value was placed on the lives of children and that children treated as valueless would probably have developed into psychologically unhealthy and antisocial adults.¹⁸⁵ There is no evidence that this occurred.¹⁸⁶

Other historians have claimed that the available evidence suggests that adults during the Middle Ages did, in fact, respect and value their children, despite the high child mortality rates.¹⁸⁷ They have noted that studies of modern societies with high child mortality rates have failed to show any link between the survival chances of young children and how children are valued by their parents and other adults in society.¹⁸⁸ Aries' assumed link between high infant mortality rates and a lack of concern for children therefore appears to be unsupportable.

It therefore appears that there is little evidence to suggest that the conception that children are different from adults is a recent historical development. Although Aries argued that the "discovery" of childhood only began in the thirteenth century, other historians argue that adults in the Middle Ages *did* appreciate that children were different to adults and that they had an appreciation of the nature of those differences. They claim that it was accepted, even during the Middle Ages, that children pass

¹⁸⁴ See, for example Archard, *supra* n 164 and Pollock, L *Forgotten Children: Parent-Child Relations from 1500 to 1900* (1983).

¹⁸⁵ Pollock, *supra* n 184 at 33.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*, 49.

through certain recognisable developmental stages, that they play and require discipline, education and protection.¹⁸⁹

Despite the limitations of Aries' theories, they have had a profound impact on the study of social history and the way in which modern Western society understands childhood. His challenge to orthodoxy has combined with subsequent social constructionist theories¹⁹⁰ to deconstruct and describe a variety of conceptions of childhood used within the law to construct linguistic representations of children and childhood. Although childhood has always been a physical given, concepts regarding the significance of childhood have been variously interpreted in different times and different places.¹⁹¹ Exploring these concepts is important for an examination of the law's response to child maltreatment.

In the remainder of this chapter I will examine conceptions constructing children as:

1. The objects of parental rights and responsibilities;
2. In need of physical punishment;
3. Either innocent or corrupt; and
4. Rationally incompetent.¹⁹²

The purpose of this chapter is to provide some historical context for these four conceptions of childhood and provide some examples of how the law continues to use these conceptions today. Although these conceptions are employed across society, not only in the legal system, I will argue that the law uses these conceptions in its own way to meet its own functional

¹⁸⁹ Ibid, 268.

¹⁹⁰ Social constructionist theories argue that "childhood is socially constructed rather than being static, universal or immutable"; Smith, A and Taylor, N "The Sociocultural Context of Childhood: Balancing Dependency and Agency" in Smith, A Taylor, N and Gollop, M (eds) *Children's Voices: Research, Policy and Practice* (2000) 12.

¹⁹¹ Dixon, S "The 'Other' Romans and Their Family Values" in Dixon, S (ed) *Childhood, Class and Kin in the Roman World* (2001) 1.

¹⁹² It is purely arbitrary to limit this chapter's examination to these four conceptual developments within Western society. Useful insights could be gained by examining the influence of other conceptions and other cultural developments, particularly the influence of Maori and Pacific Island conceptions on New Zealand law. However, limitations of space preclude such a wide-ranging examination.

requirements. In doing so the law creates its own vision of children, what Luhman would describe as 'semantic artefacts' and then responds to those artefacts, rather than to the subjectively perceived needs of children themselves. The first conception I will examine is the conception that children are the objects of adult rights and responsibilities.

4.5 Conception 1: Children are the objects of adult rights and responsibilities.

Conceptualising children as the objects of adult rights and responsibilities confirms the power of adults over children. Such conceptions are often justified by paternalistic claims that adults 'know what is best' for children (particularly 'their own' children). The claims of paternalism have a long history and, within Western society, can be traced back at least as far as the patriarchal power systems of Roman society. To understand the role of paternalism within modern society it is therefore useful to examine the historical development of patriarchy and paternalism.

The Roman concept of *paterfamilias* provides a clear example of the power of patriarchy and the concepts it embodies have continued to influence the structure of family relationships in Western society since Roman times.¹⁹³ The *paterfamilias* concept confirmed the absolute authority of the male head of the Roman household over his wife and children, who were considered to be objects of property rights, rather than human beings with rights of their own. The authority of the *paterfamilias* originally extended to a 'right of life and death' over his children, although it appears that this right was certainly diluted by the sixth century.¹⁹⁴ Although this dilution removed any legal right for a *paterfamilias* to kill his

¹⁹³ This is not to say that paternalism and patriarchy originated in Roman culture. The concepts appear to have played a part in structuring societies well before Roman times. There is evidence of such concepts in Neolithic times when the growth of agriculture led to the commodification of women and children: Lerner, G *The Creation of Patriarchy* (1986) 212.

¹⁹⁴ Corbier, M "Child Exposure and Abandonment" in Dixon, S (ed) *Childhood, Class and Kin in the Roman World* (2001) 59.

children, he retained a significant degree of power over them (and over others subject to his control, including his wife and slaves).

During the period when the paterfamilias had a right to kill children, the right was generally exercised through the practice of 'exposure' of infants and appears to have reflected a belief that infants were not regarded as having attained full human status until accepted into the family by the paterfamilias.¹⁹⁵ This confirms again the extent to which the nature of childhood is culturally constructed through conceptions, in this case, conceptions regarding the commencement of human life.¹⁹⁶

During the Middle Ages, patriarchal power consolidated its position within European societies by adjusting family structures from the predominantly open family structures of earlier periods to a more restricted nuclear family structure based on the paterfamilias model of Roman society.¹⁹⁷ Aries argues that this development of the concept of the nuclear family as a unit, distinct, separate and private from the outside world, was more significant than the modern development of individualism. Whereas medieval society was a rigid, polymorphous whole, Aries argues that the subsequent conceptual construction of the nuclear family led to a disintegration of European medieval society into discrete families or "little societies".¹⁹⁸ This development reinforced private life at the expense of community values¹⁹⁹ and located the responsibility for children within the private realm of the nuclear family. Following the paterfamilias tradition of Roman society, the law recognised men as the 'heads' of such nuclear families.

These adjustments in the structure of society continued the concentration of social power in the hands of men with profound implications for both women and children. Arguably, given the nature of patriarchal structures that had existed since Roman times at least, these 'adjustments' simply reflected long-standing patriarchal power structures. However, it is also

¹⁹⁵ Ibid, 71.

¹⁹⁶ These conceptions continue to be fiercely debated in modern society in debates concerning the morality of abortion. All that has changed is the boundary point under debate.

¹⁹⁷ Stone, supra n 181 at 146.

¹⁹⁸ Aries, supra n 171 at 414.

¹⁹⁹ Ibid, 406.

clear that the long-standing patriarchal power systems combined with developing social customs, laws, state propaganda, moral theology and family tradition throughout the Middle Ages to generate specific expectations and values governing family relationships.²⁰⁰ In particular, these factors confirmed that children should respect and obey the authority of their fathers.²⁰¹

It was not until the late seventeenth and early eighteenth centuries that children began to gain some freedom from the authority of their fathers.²⁰² This developing freedom arose simultaneously with the identification of children as a special interest group within society with their own institutions (schools in particular) and moral codes (reflected in the growing exclusion of children from discussions of both sex and death).²⁰³ Stone points to a wide range of evidence supporting this claim including the development of children's books and games (for entertainment rather than educational purposes), a growth in family portraits, fading acts of deference and changes in modes of address, all of which occurred during the eighteenth century.²⁰⁴ However, although children may have gained some freedom during the seventeenth and eighteenth centuries, they continued to be conceptualised primarily as the property of their fathers²⁰⁵ and therefore subject to their fathers' control.²⁰⁶

The conception that children were the objects of patriarchal property rights had particularly profound implications for illegitimate children throughout these historical periods. Illegitimate children were sometimes abandoned by their parents and, as they did not possess any separate rights of their own, they were often dealt with harshly by society.²⁰⁷ Furthermore, by conceptualising children as the objects of parental (particularly patriarchal)

²⁰⁰ Stone, supra n 181 at 146.

²⁰¹ Ibid.

²⁰² Ibid, 149.

²⁰³ Ibid, 149. See also infra at 61 for Aries' comments regarding Henri IV's childhood.

²⁰⁴ Ibid, 407.

²⁰⁵ ter Haar. C "A Fight to the Death? The Needs, Rights and Welfare of the Child in Need of Life-Saving Medical Treatment" in Breen, C *Children's Needs, Rights and Welfare: Developing Strategies for the 'Whole Child' in the 21st Century* (2004) 17.

²⁰⁶ Wald, S. "Children's Rights: A Framework for Analysis" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 114.

²⁰⁷ May, supra n 182 at 26.

rights and responsibilities, illegitimate children could become the objects of punishment for the 'sins' of their parents.

Although homes for abandoned illegitimate children began to be established during the eighteenth century²⁰⁸ some religious authorities criticised such institutions for encouraging immorality and illegitimacy, thereby punishing illegitimate children for the 'sins' of their parents.²⁰⁹ Consequently, such homes faced a constant struggle for funding. Although adoption offered some hope for illegitimate children by providing an opportunity for them to become subject to the rights and responsibilities of adopting adults, it was generally only older children who were adopted. The practice of adopting infants did not develop until the twentieth century.²¹⁰ Without adoption, abandoned illegitimate children were literally at the mercy of a society often focused on maintaining general social morality rather than protecting individual children.

The treatment of illegitimate children by Western society throughout and following the Middle Ages has been used to argue that childhood was not considered to be of any inherent value until the twentieth century when children began to be valued as individuals, distinct from the social value of their parents.²¹¹ However, this is a significant argument to base on the treatment of illegitimate children given that rates of illegitimacy prior to the twentieth century were not significant (for example, only 1% of births in New Zealand during 1896 were illegitimate)²¹² and can be explained on grounds other than a lack of concern for children (the effects of poverty or religious belief for example). Furthermore, although the mortality rate for illegitimate children may have been significantly higher than the rate for legitimate children (twice as high as late as 1922)²¹³ this may also be attributable to poverty, rather than a lack of (at least maternal) concern for the lives of illegitimate children, particularly given the patriarchal structure of society which excluded the mothers of illegitimate children from the

²⁰⁸ The first such facility being the London Foundling Hospital established in 1741; *ibid*, 26.

²⁰⁹ *Ibid*, 27.

²¹⁰ *Ibid*.

²¹¹ *Ibid*.

²¹² *Ibid*, 37.

²¹³ *Ibid*, 45.

wealth of society. It should also be noted that illegitimacy was only considered to be a problem within European society. Within Maori society, the care of illegitimate children carried no social stigma and 'illegitimate' children were considered to be a valuable part of the whanau.²¹⁴

The European concern with legitimacy constructed children as objects and the status of legitimacy was significant for the property rights that were protected by such status. Legitimacy concerns therefore established and re-affirmed a conceptual link between children as objects and as a form of property, a link explicit under the paterfamilias concepts of Roman society.

One consequence of conceptualising children as property objects was the resulting utilitarian focus on the contributions that children could make to society. This utilitarian focus reinforced society's structural division between adults and children. Adults could be considered to have immediate value as contributors to the well being of society. In contrast, children, as 'not-yet-adults',²¹⁵ were conceptualised as investments with future potential requiring safeguarding. This conception of childhood, accepted by many traditional theorists,²¹⁶ has been criticised by modern commentators who argue that although children may be different from adults they need to be recognised as distinctive and special in their own right, with unique characteristics, needs and interests and inherent value as members of today's society, not simply as objects of patriarchal property rights.²¹⁷

The conception that children are the objects of patriarchal rights and responsibilities continues to play a part in modern society. However, it has been tempered by the influence of feminism and the growing impact of socialist thought and activism in mainstream politics.²¹⁸ The feminist

²¹⁴ Ibid, 47.

²¹⁵ Tapp, P and Henaghan, M "Family Law: Conceptions of Childhood and Children's Voices – the Implications of Article 12 of the United Nations Convention on the Rights of the Child" in Smith, A Taylor, N and Gollop, M (eds) *Children's Voices: Research, Policy and Practice* (2000) 96.

²¹⁶ Archard, supra n 164 at 12.

²¹⁷ Rayner, M *The King of Children* (2003) 4 NZFLJ 137.

²¹⁸ May, supra n 182 at 131.

movement has succeeded to a significant extent in moving the rights and responsibilities for children from the father to both parents. Socialist thought has also had an impact by gradually shifting some rights and responsibilities for children from the private realm of the nuclear family to the state.²¹⁹ Children are now conceptualised as objects of parental responsibility and as objects of state responsibility, although how such responsibilities are to be shared remains a matter of considerable debate. However, although some patriarchal power has been removed, power over the lives of children is still held by adults. Children continue to be conceptualised as the objects of the rights and responsibilities of adults, what has changed is the identity of the adults who hold those rights and responsibilities.

The law in New Zealand continues to use the conception that children are the objects of parental rights and responsibilities when constructing its response to the needs of children. Legislative provisions often refer quite explicitly to parental and family rights and responsibilities. The Children, Young Persons and Their Families Act 1989, for example, provides that one of the objects of the Act is to assist parents, families, whanau, hapu, iwi and family groups to discharge their responsibilities to their children.²²⁰ Similarly, the Care of Children Act 2004 provides that a child's parents and guardians should have the "primary responsibility" for that child's care, development and upbringing.²²¹ These legislative provisions both conceptualise children as objects of adult responsibilities.

As noted by the High Court in *P v K*,²²² the conception that children are objects of the rights of adults, particularly parents, was reflected in the language of the Guardianship Act 1968 in its references to "custody" and "access" and in the explicit reference in section 2 of that Act to "the right to possession ... of the child."²²³ Although the references to "custody" and "access" have been replaced in the Care of Children Act 2004 (which

²¹⁹ Ibid.

²²⁰ Section 4(b).

²²¹ Section 5(a).

²²² (2003) NZFLR 489; (2002) FRNZ 677.

²²³ *P v K* (2002) FRNZ 677, 700.

replaced the Guardianship Act 1968) with references to “residence” and “contact” it is not clear that this semantic change avoids conceptualising children as objects subject to private adult rights.²²⁴

Even if the Care of Children Act 2004 continues to conceptualise children as the objects of adult rights and responsibilities, it does move away from prioritising the rights of parents over the rights of their children. Boshier J, in *BDD v IBG*,²²⁵ noted that:

The [Care of Children] Act has an unmistakeable shift towards greater rights and input from children. If that is so there is a corresponding diminishing in rights of parents ...²²⁶

However, despite attempts to diminish the power of parents over the lives over their children, the conception that children are primarily the objects of private, family rights and responsibilities continues to play a significant role in constructing the law’s response to the needs of children through legislation. This was evident during the recent debates regarding the repeal of s 59 of the Crimes Act 1961 with many opponents to the proposed law change basing their arguments on appeals to parental rights over their children.²²⁷ I will consider this issue in more detail in chapter six.

The conception that children are the objects of private adult rights and responsibilities not only influences the development of statutory provisions but also plays a part in the interpretation and application of the law and in constructing the beliefs of legal decision makers. By conceptualising children as objects of the rights and responsibilities of adults, the law is able to reduce complexity by establishing a presumption that children should continue to have contact with or remain in contact with their

²²⁴ Mahon, A “Children’s Views and Best Interests – A Legal Perspective” in New Zealand Law Society *Papers Presented at the Child Development Seminar* (2003) 7.

²²⁵ [2007] NZFLR 1.

²²⁶ Ibid, para [42].

²²⁷ See, for example, Mallett, G “A moral justification for smacking” *Hamilton This Week* 10 May 2007, 5, which stated that: “This article is a moral justification for securing into our law the right of parents to use smacking (i.e. reasonable force) as a means of discipline and/or correction.”

families. This conception therefore serves the law's functional requirement of stabilising behavioural expectations and also serves to entrench the power of parents over the lives of 'their' children.

A recent study of the conceptions of childhood held by New Zealand Family Court judges found that most of the judges surveyed believe that children need to maintain contact with both parents.²²⁸ This belief is specifically referred to in cases such as *C v D*²²⁹ where Boshier J held that "recognition that contact with both parents is by and large important for reasons of familial and psycho-social development is reflected in countless cases."²³⁰ *M v M (Child Access)*²³¹ effectively established this conception as a legal presumption. This presumption was established despite the fact that research justifying the importance of continuing contact with a non-custodial parent has been described as "ambivalent".²³² The fact that the presumption has been established, despite this ambivalent research, indicates that the law has used the conception that children are the objects of parental rights to meet its own functional requirements, not in order to meet the best interests of children. By employing this presumption, the law is able to stabilise behavioural expectations by reducing the complex worlds of children's lives to level amenable to legal resolution. This is evident in the way in which the presumption emphasises the importance of the biological tie.

The relevance of biological ties was an important issue in *Re I T A*,²³³ a case involving care and protection proceedings for an 8-month-old baby. Medical specialists with 30 years' experience of child abuse advised that the baby faced a risk of death or further severe injury if he was returned to his family without appropriate state intervention. Despite this expert opinion the social worker, together with a public health nurse and a Maori community health worker supported returning the child to his parents once

²²⁸ Henaghan, *supra* n 65 at 15.

²²⁹ [1991] 8 FRNZ 338.

²³⁰ *Ibid.*

²³¹ [1973] 2 All ER 81.

²³² Tapp, and Henaghan, *supra* n 215 at 100.

²³³ [1997] NZFLR 385.

the parents had partially completed a programme arranged by the Maori community health worker. Judge Green expressed serious concern about the social worker's apparent inability to grasp and act upon the medical specialist's advice and took the view that the social worker was focused on leaving the child with his parents in order to preserve the biological family group rather than on the need to ensure that the child was safe.

Similar issues arose in *Re P*,²³⁴ a case involving a guardianship application by a foster mother attempting to prevent the return of a three-year-old child to her birth mother. The child was removed from the birth mother's care shortly after birth given safety concerns due to the birth mother's depression and young age (19). By the time the birth mother applied for guardianship she had undertaken a number of parenting courses, all with the intention of recovering guardianship and custody of her child.

The psychotherapist who gave evidence for the birth mother argued that the birth mother's parenting was "good enough"²³⁵ and that, given this assessment *and the legislative framework*, the legal system was obliged to plan for the child's return to her biological mother.²³⁶ He specifically referred to the legal requirements of the Children, Young Persons and Their Families Act 1989 and the UNCRC to support his arguments.²³⁷ By specifically referring to the legislative framework, the psychotherapist was able to translate his communications regarding the child into a legal valid form.

In contrast, the Court appointed psychologist argued that the best interests of the child required a focus on continuity of relationships, certainty of quality care, predictability, behavioural expectations and routines.²³⁸ On that basis, she argued that the existing care arrangements should

²³⁴ (2000) 20 FRNZ 19.

²³⁵ Ibid, 34. The Court accepted that the term "good enough parenting" was a technical term but the case report does not include any definition of the term.

²³⁶ Ibid.

²³⁷ Ibid, 35.

²³⁸ Ibid, 30.

continue and that this would be in the child's best interests. She did not refer to the legislative regime at all.

The Court was therefore required to absorb and translate into the legal system two conflicting communications from social science experts. The Court ultimately accepted the recommendation of the psychotherapist that the child should be returned to the birth mother. In reaching this decision the Court emphasized the importance of the biological tie established by the legislative framework, although acknowledging that the primary consideration must be the best interests of the child. The Court referred specifically to the dictum of Tipping J in *B (CA204/97) v DSW*²³⁹ that:

Ordinarily the interests and welfare of children are best served by their being in the custody of their biological parents, or at least one of them; that is to do no more than state the obvious and to recognize the fundamental role of the biological family in our society.²⁴⁰

Once the importance of the biological tie was thus established the Court was led to focus on the efforts of the mother. The Court found that:

The birth mother has had the goal of having the child returned to her firmly in her sights for a considerable period of time and has done everything which she could reasonably be expected to have done to prepare herself adequately for the return of the child.²⁴¹

The decision in *Re P* is significant for a number of reasons. Firstly, it is significant to note the extent to which legal norms structured the communications of at least one of the social scientists called to give evidence at the hearing. The Court appointed psychologist focused on the child's best interests without reference to the legal framework. In contrast, the birth mother's expert successfully translated his communications into a form acceptable to the legal system through a process of self-reference; his communications became valid legal communications because they

²³⁹ 16 FRNZ 522.

²⁴⁰ Ibid, 525-526.

²⁴¹ Supra n 234 at 38.

included reference to other legal communications such as the provisions of the relevant legislation and international law.

The cases of *Re I T A* and *Re P* both illustrate how the law continues to be structured by the conception that children are the objects of adult responsibilities and that, because the biological tie is so important, those adult responsibilities and rights reside in parents. By employing these conceptions, the law is able to reduce the complex worlds of children's lives to a more manageable level. This is also evident in the way in which these conceptions contribute to the way in which the law constructs and interprets the views of children.

By conceptualising children as the objects of parental or biological family rights and responsibilities and presuming that contact should be maintained the law is able to discount the subjective experiences of children. This is not only a failure to give children the respect they deserve as human beings but reduces the law's ability to understand and thereby fully meet the needs of children in the context of their own lives. This was evident in *H v F*,²⁴² a case involving an application by parents for custody of their children and the removal of the children from their grandparents.

The parents in *H v F* had previously left their two children in the care of the grandparents and they sought the return of the children through the legal system. The case was particularly challenging because the children, during their time with their grandparents, had accepted their grandparents' religious beliefs and did not want to return to the custody of their apostate parents.

Justice Fraser noted that the parents "ought to have acted at once to get the children back",²⁴³ clearly constructing the case as an adult conflict over property objects. This construction of the dispute as a conflict analogous with a property dispute enabled the Court to employ concepts of parental

²⁴² (1993) 10 FRNZ 486.

²⁴³ *Ibid*, 497.

rights to resolve the dispute. By conceptualizing the children as the objects of parental rights, the Court was able to focus on the rights of the parents, as the children's legal guardians, to determine the religion of 'their' children. The Court held that it was "both the right and the responsibility of the [parents] to care for, guide, and direct their own children."²⁴⁴ The Court found that the parents could only exercise their right to determine the children's religion if the children were returned to their custody. By focusing on the rights of the parents, the children were treated as objects and the legal issue became determining the appropriate location of rights of control. By locating this control within adults, the views of the children could also be discounted, as their views were not legally relevant to the issue of control rights.²⁴⁵

Although adults have traditionally used conceptions of parental rights and responsibilities to enforce their own power over children, as occurred in *H v F*, the conception can also be used against parents unwilling to accept parental responsibilities. This occurred in *PN v BN [Parenting Orders]*,²⁴⁶ where the Court used arguments of parental rights and responsibilities to force a reluctant father to spend more time with his children.

As examined in this section, the conception that children are the objects of parental rights and responsibilities has a long history. The law can use this conception to produce its knowledge about the world in a way that meets its own functional requirements. This conception allows the law to reduce the complexity of family relationships into binary alternatives amenable to resolution through legal processes; conceptualising custody disputes as property disputes about the appropriate location of control rights is but one example of this reductive tendency.

This conception is therefore closely related to and employed by existing power structures within society, particularly paternalistic power structures

²⁴⁴ Ibid, 496.

²⁴⁵ This case and the way the children's views were expressed is also considered infra at 73.

²⁴⁶ [2007] NZFLR 320.

that emphasise parental power over the lives of children. As this power is often exercised physically through the use of physical discipline in the next conception I will examine the conception that children can be subject to the use of power through physical discipline.

4.6 Conception 2: Children need to be physically disciplined.

The conception that children are the objects of parental rights is related to the conception that children can be physically disciplined. As previously noted, the authority of the paterfamilias within Roman society originally extended to a 'right of life and death' over children.²⁴⁷ Parental rights over children have also been conceptualised to include a right to exercise physical discipline, even if the absolute power available to a paterfamilias is no longer accepted.

Many historians who write about the history of childhood argue that children have always been physically disciplined at home and that more humane methods of discipline did not develop until the middle of the eighteenth century.²⁴⁸ However, although it may be true that parents have always used discipline as a means of controlling their children, Pollock claims that it is not clear that physical violence was a predominant power tactic until the mid-eighteenth century.²⁴⁹ On the basis of her review of primary sources from 1500 to 1900 in Western Europe, Pollock argues that parents throughout this period employed various methods of disciplining children, including physical discipline, withdrawal of privileges, lectures, shame and remonstrations.²⁵⁰ She also argues that there is nothing to indicate a direct link between particular types of discipline and particular time periods or even beliefs.²⁵¹ The types of discipline employed appear to have varied according to the particular nature of the

²⁴⁷ Supra at 44.

²⁴⁸ Pollock, supra n 184 at 116.

²⁴⁹ Ibid, 199.

²⁵⁰ Ibid.

²⁵¹ Ibid.

parents and children involved.²⁵² She refers as examples to the journals of three parents from the seventeenth century, all of whom expressed a belief in the concept of Original Sin,²⁵³ but none of whom record administering physical punishment.²⁵⁴ One of the journals, in fact, specifically spoke out against such treatment.²⁵⁵

Although the evidence presented by historians such as Pollock may be an accurate reflection of the approach taken by some parents, the evidence appears clear that physical punishment was the predominant method of discipline used in educational institutions, including universities, during the Middle Ages.²⁵⁶ There is also evidence that during the early Middle Ages, adults were often fiercely determined to “break the will” of children and enforce absolute obedience to adult authority through the use of physical discipline.²⁵⁷ However, the use of physical discipline to enforce obedience was not restricted to children during this period.

Up until the 18th century at least, Western societies relied upon corporal punishment, often involving significant torture, to discipline and control both adults and children.²⁵⁸ Criminals and political and religious agitators, amongst others, often faced particularly gruesome physical discipline, torture and, in some cases, death as a consequence of their behaviour.²⁵⁹ The physical body was the object of punishment when discipline was required for both adults and children.

The focus on the physical body as the object of disciplinary punishment began to diminish during the nineteenth century and there has consequently been a reduction in the severity of the physical discipline of

²⁵² Ibid.

²⁵³ See *infra* at 62 for a more detailed examination of the concept of Original Sin and its implications for conceptions of childhood.

²⁵⁴ Pollock, *supra* n 184 at 199.

²⁵⁵ Ibid.

²⁵⁶ Stone, *supra* n 181 at 116.

²⁵⁷ Ibid.

²⁵⁸ Many states, including Western states (most notably the United States of America) continue to use capital punishment in some cases but the use of torture and other forms of physical punishment has declined since the 18th Century, at least at a public level in Western societies.

²⁵⁹ See Foucault, *supra* n 2 at 3 - 5 for a description of one such punishment.

adults over the last 200 years.²⁶⁰ Foucault argues that this does not reflect a reduction in the intensity of discipline itself. Rather, he argues that the adult body now serves not as an object of punishment but simply as an intermediary with the object of punishment being the soul, that is, the “heart, the thoughts, the will, the inclinations” of the punished.²⁶¹ The punishment involved has moved from physical punishment to deprivations of liberty and personal and property rights.²⁶² However, these conceptual changes in the punishment of adults have not necessarily been reflected in the approaches taken by adults to the discipline of children and the physical discipline of children continues to play a part in many Western societies.

Within New Zealand society, the physical discipline of children has been widely accepted as an essential child-raising tool for parents and caregivers since the colonisation process began.²⁶³ During the late nineteenth and early twentieth centuries, the physical discipline of children was practiced by parents and caregivers and by Government agencies. Even the Courts promoted physical punishment, sentencing boys to be whipped by the police or their fathers or stepfathers.²⁶⁴ Physical discipline was often considered to be a necessary accompaniment of education. In 1902, for example, 8-year-old Dorothy Drake was beaten by her mother and sisters for failing to repeat a lesson of verse. She subsequently died of her injuries. Dorothy’s mother was charged with her murder and at her trial she argued that the beating was simply legal, reasonable punishment.²⁶⁵

It is therefore apparent that parental rights over children have often been defined to include a right for parents to exercise physical punishment. Attempts by the state to regulate this parental power have consequently

²⁶⁰ Ibid, 16.

²⁶¹ Ibid.

²⁶² Ibid, 11.

²⁶³ Maclean, S “Child Cruelty or Reasonable Punishment? A Case Study of the Operation of the Law and the Courts 1883 – 1903” *New Zealand Journal of History*, (2006) 40, 1 at 7.

²⁶⁴ Ibid.

²⁶⁵ *R v Drake* (1902) 22 NZLR 478.

focused on protecting the rights of parents against the power of the state. This has been a feature of the legal response to child maltreatment for over 100 years. In 1885, for example, Alexander Fleming was charged in the Dunedin Supreme Court with causing grievous bodily harm to his son. The jury found that the father's 'punishment' (tying his son to a bed and beating him with a cart whip) was 'reasonable' chastisement and he was acquitted. During the trial, his defence counsel specifically argued to the jury that:

If they found the accused guilty of this offence, any one of them who was a father, if he gave his child anything like a smart whipping, would be liable to have a policeman force his way into the house, examine the child, get up a howl against the parent, and make him, as the prisoner had been during the past few weeks, an outcast of society.²⁶⁶

Many adults in New Zealand society continue to argue that physical discipline is a legitimate tool of correction for wayward children and an important parental right that should not be compromised by the state.²⁶⁷ One reason for this may be that, until relatively recently, children have had few, if any, rights. As the punishment of adults has moved towards a focus on the deprivation of liberty, the punishment of children has not been able to follow this course to the same extent. This is ultimately a reflection of the differing power relations that exist between adults and the state and between adults and children. The relationship between adults and the state in Western democracies has increasingly been governed and constrained by rights recognised by the state. With the increasing number of adult rights, the options for the state to discipline adults by removing rights have increased. In contrast, the power relationships between children and adults are often more complex and are not founded on, or even predominantly formed by, the recognition of rights. At most, what are often considered rights by adults for themselves, are considered to be

²⁶⁶ Otago Daily Times, 10 April 1895, p 4 quoted in Maclean, supra n 263 at 16. It is interesting to note the similarity between this argument and many of the arguments raised during the recent Parliamentary debates concerning the repeal of the old s 59 examined infra at 109 – 110.

²⁶⁷ See, for example Mallett, G supra n 227.

privileges for children. Consequently, adult power over children's lives can continue to be exercised in a physical form. The law is able to support this use of power by conceptualising children as objects of parental rights and defining these parental rights to include the power to exercise physical discipline.

In this section I have examined the conception that parental rights over children include a right to use physical discipline. The law can use this conception to entrench the power of adults, particularly parents, over the lives of their children. It also affects the way that the law produces its knowledge about the world by providing a normative framework for defining the use of adult force against children as discipline. In chapter 6 I will examine the role that this conception played in the reform of s 59 of the Crimes Act 1961 and in chapter 7 I will examine how the law can use this conception to construct children as objects and thereby avoid any engagement with their subjective experience of parental force. Before doing so, I will argue in the next section that the conception that children need to be physically disciplined has often been justified by using conceptions of the innocence or corruption of children.

4.7 Conception 3: Children are either innocent or corrupt.

In this section I will briefly examine the historical development of concepts of childhood's inherent innocence or corruption. I will then show how the law continues to employ these conceptions today when producing its knowledge about children.

Aries argued that the influence of Christianity following the Middle Ages led to the acceptance of a belief in childhood innocence,²⁶⁸ with a concomitant belief in the spiritual weakness of children.²⁶⁹ These conceptions constructed children as vulnerable to corruption and consequently in need of protection from the corrupting influence of the

²⁶⁸ Aries, *supra* n 171 at 110.

²⁶⁹ *Ibid*, 113.

adult world. As this conception developed after the Middle Ages, Western society tried to strengthen childhood innocence through education and thereby develop character and the ability to reason.²⁷⁰ This education included an increasing focus on the discipline of children, particularly strict physical discipline, in order to preserve and protect their innocence from corruption.²⁷¹

The perceived need to protect children from the corruptions of the adult world also had implications for the topics considered appropriate to discuss with children. To support his argument that a belief in childhood innocence developed after the Middle Ages, Aries made extensive use of the diaries of Henri IV's physician, who recorded the life of young Louis XII. Aries argued that many of the events described in these diaries, particularly discussions of sexual matters with the young Louis XII, would not be acceptable in modern society given contemporary standards of morality.²⁷² Given the apparent lack of the discretion considered appropriate by modern standards, Aries argued that until the seventeenth century adults believed that children were either unaware of or indifferent to sexual matters and that there was consequently no belief in childhood 'innocence'.²⁷³

The conception of 'innocence' that developed during this period perceived innocence to be a reflection of divinity; a state of freedom from the worldly corruptions of sin. By doing so, conceptions of innocence established a binary distinction between innocent children and the sinful adult world. This distinction has been reflected in long-running philosophical debates regarding the nature of humanity, with philosophers such as Rousseau and Locke arguing that humanity is naturally innocent but corrupted by society²⁷⁴ and Hobbes and much of Christian tradition (from St Augustine

²⁷⁰ Ibid, 119.

²⁷¹ Ibid, 115.

²⁷² Ibid, 100 and see for example the comments in *Child, Youth and Family Services v Television New Zealand Ltd* [2006] NZAR 328 at para [26] *infra* at 66.

²⁷³ Aries, *supra* n 171 at 106.

²⁷⁴ Russell, *supra* n 155 at 714.

onwards in particular) arguing that humans are naturally sinful brutes, often as a consequence of Original Sin.²⁷⁵

According to the Christian doctrine of Original Sin, children (as with all humanity) are considered to be inherently sinful and justly subject to divine judgement and punishment. The growth of Calvinist theology during the Middle Ages reinforced these beliefs.²⁷⁶ Aries and subsequent historians have argued that the Christian doctrine of Original Sin was particularly influential in increasing the formality of adult/child relations from the 16th to the 18th centuries.²⁷⁷ Stone, for example, claims that child/adult relations during this period were characterised by “psychological coolness and physical severity.”²⁷⁸

Physical severity was also justified by conceptualising children as innocent but vulnerable to corruption. The following reference, taken from a 1532 petition to close a brothel in Basel, exemplifies this conceptualisation:

This house is nothing but a cause of corruption for youth ... Allowances may be made for childhood, which is not yet contaminated by sin; but the rod should always be within sight and close at hand. Above all, youth should not be forgiven for anything; on the contrary, the more it is inclined to pleasure, the more it must be held in check by punishments and discouraged from the sin of luxury.²⁷⁹

Adults could therefore employ both conceptions of Original Sin and conceptions of childhood innocence to justify the temporal (rather than divine) judgement and punishment of children by arguing that only harsh treatment would ‘cure’ children of their inherent or potential sinfulness.²⁸⁰

²⁷⁵ Ibid, 572.

²⁷⁶ Stone, supra n 181 at 255.

²⁷⁷ Pollock, supra n 184 at 26.

²⁷⁸ Stone, supra n 181 at 126.

²⁷⁹ Levi, G and Schmitt, J (eds) *A History of Young People: Ancient and Medieval Rights of Passage* (trans) Naish, C (1997) 244 - 245.

²⁸⁰ Pollock, supra n 184 at 26. See also Stone, supra n 181 at 255.

However, care needs to be taken when making assumptions about the type of treatment children received from adults on the basis of the beliefs those adults expressed. It cannot, for example, be assumed that parents with a belief in Original Sin and the potential sinfulness of their children treated their children harshly as a consequence of that belief. Pollock notes that although Puritan parents were particularly focused on the consequences of Original Sin (as indicated by numerous journal entries by Puritan parents²⁸¹), they

were genuinely concerned for their children – they may have been polluted beings; but they were also ‘Lambs in the Fold’ and deeply loved.²⁸²

It is difficult to determine how this ‘deep love’ was practically expressed by Puritan parents. Stone claims that:

Puritans in particular were profoundly concerned about their children, loved them, cherished them, prayed over them and subjected them to endless moral pressure. At the same time they feared and even hated them as agents of sin within the household, and therefore beat them mercilessly.²⁸³

It must also be noted that the belief in Original Sin was not universal, even if it was a significant part of religious orthodoxy in Western Europe throughout the Middle Ages. In 1628, John Earle expressed the view that children were born ignorant of sin,²⁸⁴ a view popularised by Locke’s theory, published in 1690, that the mind is a *tabula rasa*.²⁸⁵ Nor was the belief in Original Sin new to the Middle Ages as the concept was developed primarily by Augustine of Hippo in the fifth century A.D.²⁸⁶ It is therefore not clear that any increase in the formality or brutality of

²⁸¹ Pollock, supra n 184 at 102.

²⁸² Ibid, 53.

²⁸³ Stone, supra n 181 at 125.

²⁸⁴ Ibid, 255.

²⁸⁵ May, supra n 182 at 4.

²⁸⁶ Dowley, T (ed.) *A History of Christianity* (1990) 207.

adult/child relations during the Middle Ages can be attributed to a belief in Original Sin.

It therefore appears that conceptions of childhood's innocence and childhood's corruption have developed simultaneously in Western society and have existed since, at least, the Middle Ages. The law has made and continues to make use of both conceptions when responding to the needs of children.

Conceptions of childhood corruption have been employed within New Zealand's legal system since its inception. During the late nineteenth century, for example, adults charged with offences against children under New Zealand's child protection legislation²⁸⁷ frequently based their defences on allegations of dishonesty and behavioural difficulties with the child victims.²⁸⁸ For example, one stepmother charged with ill-treating her stepdaughter in a manner calculated to injure her health, argued that her stepdaughter was "idle, untruthful, dishonest and disobedient".²⁸⁹ Such accusations constructed the child victim as corrupt, allied the accused with the forces of justice represented by the legal system and provided a powerful justification for physical chastisement (as Courts themselves regularly whipped children for crimes of dishonesty).²⁹⁰

The law in New Zealand continues to use conceptions of childhood's corruption when responding to the needs of children, even though the secularisation of society has removed many of the conception's religious foundations in Original Sin. In *K v K (No. 1)*²⁹¹ for example, a young boy was described as "hedonistic and immature" after expressing a desire to live with his father rather than his mother. Conceptualising the child as 'hedonistic' and therefore corrupt allowed the Court to disregard the child's wishes and 'protect' the child from further corruption through the exercise of legal power.

²⁸⁷ Principally, the Children's Protection Act 1890.

²⁸⁸ Maclean, *supra* n 263 at 13.

²⁸⁹ *Ibid.*

²⁹⁰ *Ibid.*

²⁹¹ [1988] 5 NZFLR 257.

Conceptions of corruption can also be employed within the modern legal system to discount the views of children when those views are considered to be manipulative.²⁹² This approach was evident in *Wishnowsky v Wishnowsky*²⁹³ where the Court appointed psychologist reported that the 8 year old child involved in the case had developed “a pattern of behaviour ... to achieve or manipulate a situation to obtain what she wants ...”²⁹⁴ A similar approach was evident in *S v K [Parenting orders]*²⁹⁵ where the child’s view that he “would be happy not to see his mother at all”²⁹⁶ was re-interpreted by the Court. O’Dwyer J considered that the child was attached to his mother and that his expressions to the contrary were part of his “battle” to achieve the result he desired, being a move to live with his father.²⁹⁷

By conceptualising the children in these cases as corrupt (evidenced by their hedonism or exercise of manipulation) the law exercised its power to produce knowledge about the children involved in a way that allowed the Courts to discount the views the children expressed. If different conceptions had been used, different knowledge would have been produced. If, for example, the children had been conceptualised as innocent, their behaviour could have been interpreted quite differently as merely their exercise of a freedom to choose their own destiny.

Concepts of childhood innocence have also played a role in New Zealand law since its inception. During the nineteenth century, for example, conceptualising children as innocent led to legislation such as the Neglected and Criminal Children Act 1867. This Act enabled the master of an industrial school to assume the guardianship of a neglected child when the child’s parents were considered to be immoral or antisocial and

²⁹² Manipulation can also be conceptualised as a result of ‘parental alienation syndrome’. See the discussion of that syndrome *infra* at 72.

²⁹³ [1993] NZFLR 455.

²⁹⁴ *Ibid*, 456.

²⁹⁵ [2006] NZFLR 613.

²⁹⁶ *Ibid*, para [16].

²⁹⁷ *Ibid*, para [23].

therefore unfit to exercise any parental rights.²⁹⁸ Conceptions of childhood innocence were also reflected in the Children's Protection Act 1890, which allowed the police to remove children without warrant in cases of neglect, abandonment, mistreatment or exposure.²⁹⁹ The provisions of this Act were broad enough to allow the police to remove children from situations not only of abuse but also of destitution³⁰⁰ or which were otherwise considered unsuitable in the vague context of the home being morally 'bad'.³⁰¹ By conceptualising children as innocent, the law was therefore able to justify its use of power to protect them from the corrupting influence of immoral, dissolute or even destitute parents.

Modern law continues to employ conceptions of childhood innocence. Many modern strategies of child protection are:

[U]nderpinned by theories of pollution; [that] adult society undermines childhood innocence and that children therefore must be segregated from the harsh realities of the adult world.³⁰²

Conceptions of childhood innocence not only underpin entire strategies of child protection but the law also uses such conceptions to enforce a distinction between adults and children on a much more quotidian level. This was evident in *Child, Youth and Family Services v Television New Zealand Ltd*,³⁰³ a case involving the development of a care and protection plan under the Children, Young Persons and Their Families Act 1989. The plan included a specific requirement that the child "not be subjected to conversations about adult issues...".³⁰⁴ As noted by Aries, conceptions of childhood innocence have often led to a concern about appropriate topics

²⁹⁸ Section 13 defined children to be neglected if they begged or lived in a brothel or if one of them lived with an adult who was a thief, vagrant or drunkard.

²⁹⁹ Defined as boys under 14 years of age and girls under 16 years of age (ss 3 and 5).

³⁰⁰ For example, it was an offence under the Act to cause a child to beg (s5(a)).

³⁰¹ May, *supra* n 182 at 37.

³⁰² Boyden, J "Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood" in James, A and Prout, A (eds) *Constructing and Reconstructing Childhood* (1997) 191.

³⁰³ [2006] NZAR 328 at para [26].

³⁰⁴ *Ibid* at para [26].

of discussion.³⁰⁵ Such concepts define the content of ambiguous terms such as “adult issues.”

In summary, the law uses conceptions of childhood innocence and corruption to segregate children from the world of adults. By doing so the law reduces the complexity of the world as experienced by children into binary alternatives and reinforces adult power over children’s lives. A similar process occurs with the conception that adults are rationally competent whereas children are rationally incompetent.

4.8 Conception 4: Children are rationally incompetent.

As previously noted, conceptions of childhood define the nature of the distinction between children and adults.³⁰⁶ Since concepts of rational thought began to predominate within Western society during the sixteenth century, a clear conceptual distinction has developed between adults and children based on the perceived capacity for rational thought. In this section I will examine this conception and provide some examples of how the law continues to use it to produce its knowledge about children.

The reification of rational thought arguably originates with ancient Greek philosophers such as Socrates, Plato and Aristotle.³⁰⁷ However, it was not until the work of Descartes began to penetrate Western society that the modern focus on reason took hold.³⁰⁸ The resulting emphasis on rational thought influenced the development of conceptions of childhood that associated children with “irrationalism or pre-logicism”³⁰⁹ by the late Middle Ages. Rational competence began to be considered one of the attributes of mature adulthood, although only for adult males, and consequently,

³⁰⁵ Supra at 61.

³⁰⁶ Supra at 39.

³⁰⁷ See Magee, B *The Story of Philosophy* (1998) 20 – 38 for an overview of their philosophies.

³⁰⁸ Saul, J R *Voltaire’s Bastards: The Dictatorship of Reason in the West* (1993) 48

³⁰⁹ Aries, supra n 171 at 119.

children, as ‘not-yet-adults’³¹⁰, were conceptualised as rationally incompetent and immature.³¹¹

Arguably, the conception that children are rationally incompetent merely reflects the physical realities of childhood development. Research regarding the intellectual, social and moral development of children shows that children younger than 10 to 12 years of age generally “lack the cognitive abilities and judgemental skills necessary to make decisions about major events.”³¹² This lack is a developmental issue rather than a reflection of inexperience as research has shown that younger children are *generally* unable to think abstractly and have a limited sense of future time.³¹³ However, to meet its functional requirement to reduce complexity, the law uses this social science research of to establish *universal* norms of competence that assume adult competence and the incompetence of all human beings younger than a specified age.³¹⁴ Consequently, when children and young people seek to be recognised as competent, they bear the burden of establishing their rational competence and to do so they encounter the power of the law to produce its own knowledge about their lives.

The law has the power to define such terms as “reason” and “rationally competent”. As the cases I will examine in this section show, the law establishes different definitions of “rationally competent” for adults and children. As noted by David Archard, in order to be considered rationally competent by the legal system children must display a level of competence that some adults lack in general and very many lack on occasion.³¹⁵ Furthermore, the conception that children are rationally incompetent also contributes to a conception that because of their incompetence children are particularly vulnerable to manipulation.

³¹⁰ Tapp and Henaghan, *supra* n 215 at 96.

³¹¹ James and Prout, *supra* n 165 at 11.

³¹² Wald, *supra* n 206 at 132.

³¹³ *Ibid.*

³¹⁴ *Infra* n 368.

³¹⁵ Archard, *supra* n 164 at 67.

One way in which the law uses the conception that children are incompetent is by requiring children to prove their competence as a prerequisite for giving them rights to participate in legal processes. For children, competence itself is not the gateway to power over their own lives; being defined to be competent by the law is. This was evident in *Clarke v Carson*,³¹⁶ where Elias J held that “the position at which it was right to take into account the views of children was the time when they are able to reason.”³¹⁷ This decision conceptualised the children as inherently irrational, by virtue of their status as children and consequently their ability to participate could only arise when the Court considered that they exhibited the ‘adult’ characteristic of rational thought. Using the perceived capacity to reason as a prerequisite for obtaining power not only applies to limited rights of participation, such as those referred to in *Clarke v Carson*, but also applies to rights of autonomy and freedom of action.

The leading case in the area of the autonomy of children is the English case *Gillick v West Norfolk and Wisbech Area Health Authority* (“*Gillick*”).³¹⁸ In *Gillick* the Court was prepared to grant the applicant child rights of autonomy but required the grant of autonomy to be conditional on the child exhibiting sufficient rational competence.³¹⁹ As noted above, the law has the power to define the content of such terms as “reason” and “rationally competent”³²⁰ and this was evident in the approach taken by the Court in *Gillick*, which established a test for rational competence based on “understanding”.³²¹

Gillick established a stringent approach to defining the rational capacity of children by insisting that children must have “sufficient understanding and intelligence to enable [them] to fully understand what is proposed” before they can be considered rational enough to make decisions regarding their

³¹⁶ [1995] NZFLR 626.

³¹⁷ Ibid.

³¹⁸ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

³¹⁹ Such decisions only need to be made for children and young people younger than the statutory age boundaries at which point competence is assumed to exist.

³²⁰ Archard, supra n 164 at 66

³²¹ Ibid, 66.

own lives. This “understanding” includes an understanding of the “moral and family” questions involved in a decision.³²²

The law in New Zealand has adopted the *Gillick* definition of rational competence for children. In *PJKR v DAR [Guardianship]*³²³ for example, the Court held that s 6 of the Care of Children Act:

does not require a Judge to give effect to [the wishes of children], particularly if the child is of an age where he or she is immature and has no *real understanding of the longer term consequences* of the wishes expressed [emphasis added].³²⁴

Elias J took a similar approach in *Clarke v Carson*³²⁵ by assessing whether the children shared the Court’s assessment of the longer term consequences of the available options. When considering the views of the children, Elias J tried to determine their ability to assess the “potential prize for them in re-establishing their relationship” with their father.³²⁶ Elias J considered that the children did not give adequate weight to this “prize” in forming their views and on that basis the children and their mother were ordered to return to the United States, against the “vehement”³²⁷ wishes of the children.

All three of these cases required the children involved to have a “real understanding of the longer term consequences” of their decisions before they could be considered rationally competent. This requirement establishes a significant test for children to pass if they want to be defined as rationally competent and thereby obtain some degree of legally recognised autonomy over their own lives. However, it is not the only threshold they must overcome if they want be perceived as rationally competent.

³²² Ibid.

³²³ [2006] NZFLR 946.

³²⁴ Archard, supra n 164 at 67. See also *Child, Youth and Family Services v Television New Zealand Limited* [2006] NZAR 328 at para [37] which required a similar level of understanding for a ten year old to consent to a television interview.

³²⁵ Supra n 316 at 632

³²⁶ Ibid.

³²⁷ Ibid, 631.

In addition to an understanding of longer-term consequences, the law also defines rational competence to include an element of selfishness or self-interest. In *T v Child, Youth and Family Services*³²⁸ for example, an application by parents for one of their children to be returned to them from Child, Youth and Family Services' care was declined, despite the child's clearly expressed desire to return to the care of her parents. Judge Clarkson observed that she did not consider the child's wishes to be "putting her own needs first".³²⁹ Consequently the child's decision was considered to be evidence of her rational incompetence. The Court then employed this conception of the child to justify withholding from her the power to decide or influence who would care for her. Rational competence, it appears, therefore includes an element of selfishness or self-interest.

Selfishness and self-interest are both dependent on the existence of a sense of self. As a result, for children to establish that they are rationally competent, they must also establish that they conceptualise themselves as individuals separate from their families. This was evident in *White v Northumberland*,³³⁰ where the Family Court relied on the evidence of a Court appointed psychologist when assessing the child's maturity. The psychologist held the view that the child was not mature enough to make decisions for himself, as he did not have a "clear separate sense of his own identity."³³¹ Assessments of the child's competence were clearly linked to the child's sense of individuality and independence.

By defining the concept of rational competence to include an element of independence, the conception that children are rationally incompetent incorporates the related conception that are vulnerable to manipulation by the adults in their lives. Conceptions of the vulnerability of children to such

³²⁸ Unreported, FC, Gisborne, FCG1SO 16/196/96, 25/5/01, Judge Clarkson referred to in Mahon, A "Children's Views and Best Interests – A Legal Perspective" in New Zealand Law Society *Papers Presented at the Child Development Seminar* (2003) 1 at 11.

³²⁹ Ibid.

³³⁰ [2006] NZFLR 1105.

³³¹ Ibid, para [35].

manipulation may have played a part in the development of parental alienation syndrome. This syndrome was developed to explain the hostility some children exhibit towards a non-residential parent during custody disputes. It classified this hostility as a mental disorder brought about in a child by the malign, or at least misguided, manipulation and control of a residential parent. In *L v S*³³² for example, the Court appointed psychiatrist argued that the child's express wish to remain with her father was not an expression of her "true feelings" as she was suffering from parental alienation syndrome. The law was therefore able to use parental alienation syndrome to define the child as rationally incompetent. However, there are significant doubts about the validity of parental alienation syndrome.

Sturge and Glaser note that parental alienation syndrome does not exist as a generally recognised psychological condition and is empirically and theoretically unsound.³³³ They point out that there are a number of reasons why a custodial parent may take a position of implacable hostility towards a non-custodial parent, many of which may be fully justified (a fear of violence or post-traumatic symptoms for example).³³⁴ Similar justifications exist for children who express hostility towards one parent and the existence of such reasonable justifications needs to be acknowledged and respected. A full review of parental alienation syndrome is beyond the scope of this thesis. For present purposes, it is sufficient to note that the legal system's use of the syndrome is arguably a result of the law employing conceptions of childhood's incompetence and consequent vulnerability to manipulation to meet its own functional requirements. By accepting the syndrome, the law acquires a normative basis for reducing the complexity of family relationships. The law can therefore use the conception that children are rationally incompetent and consequently vulnerable to manipulation to discount the views children express and entrench adult power over their lives.

³³² [1997] NZFLR 481.

³³³ Sturge, C and Glaser, D "Contact and Domestic Violence – The Experts' Court Report" [2000] Fam Law 615, 622.

³³⁴ *Ibid*, 623.

The law can also use conceptions of incompetence and vulnerability to manipulation without invoking parental alienation syndrome. In *H v F*³³⁵ for example, the Court employed these conceptions to disregard the children's views. As previously noted, the parents in *H v F* had previously left their two children in the care of their religious grandparents and the children did not want to return to the custody of their apostate parents.³³⁶ Although the Court considered the children's religious beliefs to be honestly held and not the result of fear or coercion,³³⁷ it also held that their views were "an expected result in the circumstances in which they have been brought up and have been living ...".³³⁸ This focus on the inevitability of the children's beliefs allowed the Court to discount those beliefs.³³⁹ This focus conceptualized the children as incompetent, vulnerable and passive victims of external influence and manipulation rather than as competent agents in the construction of their own realities. *C v F*³⁴⁰ provides an instructive contrast to this approach.

The case of *C v F*³⁴¹ involved a custody application for a child who, because of his religious belief, clearly expressed a view that he did not want his apostate mother to receive staying access rights. Both *H v F* and *C v F* therefore required the legal system to interpret the views of religious children. In *C v F* Inglis J held that:

The question whether it was wise to allow [the child] to form those beliefs is less important than the present fact that he has them and that they regulate his attitude and behaviour.³⁴²

³³⁵ Supra n 242 at 486.

³³⁶ Supra, refer to first page considering *H v F*

³³⁷ Supra n 242 at 494.

³³⁸ Ibid.

³³⁹ Henaghan, M "New Zealand and The United Nations Convention on the Rights of the Child: A Lack of Balance" in Freeman, M (ed) *Children's Rights: A Comparative Perspective* (1996) 173.

³⁴⁰ (1992) 9 FRNZ 439.

³⁴¹ Ibid.

³⁴² Ibid, 441.

This approach clearly respected the autonomy of the child as rational and competent within his social and family context. By refusing to conceptualise the child as incompetent, vulnerable and passive, the law was able to allow the child to exercise some power over his own life.

All of the cases I have examined in this chapter, with the exception of *C v F*, illustrate that in assessing the rational competence of children the law applies higher standards of competence than it applies to adults. For children to be considered rationally competent they need to exhibit an understanding of long-term consequences that is not required of competent adults. Under contract law, for example, adults are considered to be competent to contract if they understand the nature of the contractual act itself, not necessarily the long-term consequences of the contract.³⁴³ Furthermore, although children live within family contexts, to be considered rationally competent they must exhibit some independence and even selfishness.

Conceptualising children as a group to be irrational and vulnerable to manipulation limits the law's ability to employ images of children as competent, rational agents in the construction of their own lives.³⁴⁴ However, the law continues to employ the conception that children are irrational. This is useful for the law because it establishes a clear binary distinction between adults and children that simplifies decision-making processes. By using the conception, the law is therefore engaged in a process of producing knowledge about children in order to meet its own functional requirements. This knowledge may approximate reality, but is different from it, and as a result separates the operations of the law from the outside world.

³⁴³ Archard, *supra* n 164 at 66.

³⁴⁴ Ross, N "Agency, Article 12 and Models for Legal Representation of Children in Australia" in *Papers Presented at the Fourth World Conference on Family Law and Children's Rights* [2005] at 15.

4.9 Conclusions

Conceptions of childhood over the last 200 years have constructed a stark dichotomy between adults and children. Adults have been conceptualised as “mature, rational, competent, social and autonomous.”³⁴⁵ In contrast, children have been variously conceptualised as innocent, corrupt, objects of the rights and responsibilities of others, irrational, incompetent and vulnerable. These conceptions were traditionally considered to be merely a statement of the universal and unchanging nature of adults and children. However, these conceptions are, to a significant extent, socially constructed, context dependent and changeable. They do not simply reflect the unchanging nature of adults and children, but serve to reinforce adult power over children and actively construct what it means to be a child in Western society.

The law uses conceptions of childhood to establish norms that allow the law to meet its functional requirement of reducing complexity to a level amenable to the legal system’s decision-making processes. By doing so the law produces its own knowledge about the world and this knowledge excludes from consideration the unique and particular needs of individual children. The world constructed by the law therefore differs from the world as subjectively experienced by children themselves, as predicted by the theories of Luhman and Teubner examined in chapter two. This is autopoietic, operative closure in action and prevents the law from adequately responding to children’s needs.

The use of conceptions of childhood can also operate actively to accord privileges to those who best exhibit or represent the norms established by such conceptions.³⁴⁶ The legal system’s operative closure therefore maintains existing power structures within society³⁴⁷ and this is exacerbated for children because of their general powerlessness. Habermas argues that rights give rights-holders power by enabling them

³⁴⁵ James and Prout, *supra* n 165 at 13.

³⁴⁶ Davies, *supra* n 29 at 42.

³⁴⁷ *Ibid*, 42.

to participate in the production of knowledge and this argument lies behind an increasing focus on recognising the rights of children. To overcome the problems arising from operative closure and improve the law's ability to respond adequately to the needs of children, many advocates for children have focused on distributing power to children by granting them legal rights. In the next chapter I will therefore examine the role of rights within the legal system and whether granting children rights is able to overcome the legal system's operative closure and improve the law's ability to respond to child maltreatment.

Chapter 5 Children's Rights

5.1 Introduction

In this chapter I will argue that granting rights to children is an attempt to redistribute power to them and enable them to participate in the production of knowledge about their lives. The legal system promises to exercise power on the behalf of rights-holders and granting rights to children is therefore an attempt to use the law to redistribute power to them. However, the effectiveness of legal rights as a mechanism for redistributing power is entirely dependent on the law's ability to communicate and enforce this transfer of power outside the world of the law.

In this chapter I will argue that granting rights to children can fail to transfer power to children because of the legal system's operative closure, as described by Luhman and Teubner. I will also note that because Habermas' critique of operative closure is dependent upon rights of participation, rights not generally given to children, granting rights to children does not generally empower children or overcome operative closure. I will begin this chapter by examining rights theories in general and the theoretical development of rights as a legal tool to redistribute power to children.

5.2 What are rights?

Defining a 'right' is inherently difficult. The difficulties of defining the content of rights in general and children's rights in particular, emphasise that the phrase "children's rights" is, as noted by Hilary Rodham, "a slogan in search of a definition."³⁴⁸ In part, these difficulties arise because advocating for children's legal rights raises significant and difficult issues regarding family autonomy, state responsibility and the independence of

³⁴⁸ Rodham, supra n 6 at 29.

children.³⁴⁹ The difficulty of defining legal rights also allows room for the language of rights to be subverted and employed to

mask the ugly realities behind the law, realities such as greed, pursuit of self-interest, abuse of power, and oppression; ... society's power wielders can manipulate the meaning of 'rights' in any way they wish because that concept is vague and indeterminate.³⁵⁰

Ultimately, attempting to define 'rights' involves an attempt to answer fundamental questions regarding the significance of human life itself. Are all human beings equal? Is each human life inherently 'special' and 'unique' and thereby entitled to exercise certain claims against the rest of society? Are simple utilitarian considerations sufficient to form the basis of social policy and legal decisions? Definitions of rights are dependent on how these questions are answered. To understand human rights it is therefore necessary to examine the various arguments that have been used to justify the creation of rights.

Historically, rights claims have been justified on the basis of religious belief and developed by inductive processes from premises accepted by faith by a significant part of Western society.³⁵¹ However, given the pluralisation of modern societies, appeals to metaphysical grounds of authority are no longer universally accepted.³⁵² Consequently, arguments for rights in modern Western societies have had to find alternative sources of validity³⁵³ and this is one of the primary philosophical difficulties for modern rights discourses.³⁵⁴ This issue is particularly significant for attempts to establish international human rights instruments, such as the

³⁴⁹ Ibid, 29.

³⁵⁰ Wardle, L.D. "The Use and Abuse of Rights Rhetoric: The Constitutional Rights of Children" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 351.

³⁵¹ See, for example, the unanimous Declaration of the Thirteen United States of America (1776) (commonly referred to as the United States Declaration of Independence) which states "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

³⁵² Rehg, supra n 132 at xix.

³⁵³ Habermas, supra n 101 at 448.

³⁵⁴ Freeman, M *Human Rights: An Interdisciplinary Approach* (2002) 10.

UNCRC, which must lay claim to universality and eschew reliance on particular religious or cultural norms.³⁵⁵

One consequence of the loss of universally accepted norms is the criticism of claims that rights are universally applicable. Without a universally accepted theoretical justification for rights, many theorists argue that rights are dependent on social and cultural contexts.³⁵⁶ This conditional approach to rights is supported by the arguments of philosophers such as David Hume, who argued that absolute rights are unfeasible on the basis of his scepticism of absolutes derived through rational processes.³⁵⁷ If absolute rights are not philosophically possible, individual communities have the freedom and the responsibility of not only defining the rights they will recognise but also specifying which rights they will consider to be the most significant.³⁵⁸ Bandman, for example, argues that communities must generate their own rights to meet their own particular social needs and that when that community's resources are limited, rights talk "loses its point" for that community and the rights can be revoked.³⁵⁹ Modern communities therefore need to develop their own justifications for acknowledging legal rights.

In broad terms, there are two modern rights theories that attempt to provide a reasoned justification for legal rights without reference to the absolutes of natural law or religious belief. The first argues that having a legal right is a legal recognition of a particular individual's *choice* as being pre-eminent over the will of others in relation to particular decisions (often referred to as the "choice" or "will" theory of rights).³⁶⁰ The second approach argues that legal rights recognise and protect the *interests* of individuals by imposing normative constraints on other individuals within

³⁵⁵ Ibid.

³⁵⁶ See, for example, Bandman, B "Do Children Have Any Natural Rights? A Look at Rights and Claims in Legal, Moral and Educational Discourse" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 65.

³⁵⁷ Hume, D "The Sceptic" in Aiken, H. D. (ed) *Hume's Moral and Political Philosophy* (1948) 339. See also Russell, supra n 155 at 698.

³⁵⁸ Bandman, supra n 356 at 65.

³⁵⁹ Ibid, 64.

³⁶⁰ MacCormick, N "Children's Rights: A Test-Case for Theories of Right" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 71.

society (often referred to as the “interest” theory of rights).³⁶¹ These theories offer quite different and ultimately competing justifications for rights discourses and I will therefore examine each of these theories in turn.³⁶²

5.3 Rights protect the freedom to choose

5.3.1 Choice-based rights

The first approach to justifying legal rights is that rights can be justified on rational grounds because they protect and enable the freedom of individuals to act as they choose within reasonable limits. These theories are often based on Kant’s claim that “freedom is the one sole and original right that belongs to every human being by virtue of his humanity.”³⁶³ The focus on freedom of choice is particularly significant for children and has led some commentators to advocate for fewer protections for and the even the removal of adult control over children on the basis that children, like adults, should be free to make their own choices.³⁶⁴

This approach is evident in the introduction to John Holt’s *Escape from Childhood* where he proposed that:

the rights, privileges, duties, responsibilities of adult citizens be made *available* to any young person, of whatever age, who wants to make use of them. These would include, among others:

1. The right to equal treatment at the hands of the law – i.e., the right, in any situation, to be treated no worse than an adult would be.
2. The right to vote, and take full part in political affairs.
- ...
4. The right to work, for money.

³⁶¹ Ibid, 71.

³⁶² Lucy, W. N. R. “Controversy About Children’s Rights” in Freeman, M (ed) *Children’s Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 84.

³⁶³ Bandman, supra n 356 at 58.

³⁶⁴ Wald, supra n 206 at 128.

- ...
8. The right to travel, to live away from home, to choose or make one's own home.
- ...
10. The right to make and enter into, on a basis of mutual consent, quasi-familial relationships outside one's own immediate family – i.e., the right to seek and choose guardians other than one's own parents and to be legally dependant on them.
 11. The right to do, in general, what any adult may legally do.³⁶⁵

This approach therefore seeks to secure for children the same freedoms of choice enjoyed by adults. However, as noted by Martha Minow, granting independence to any member of society is not simply a rational decision based on scientific measures of competence; rather the grant of independence is a political or moral choice made by those in positions of power.³⁶⁶ Consequently, power structures within society, particularly systems emphasising parental control over children (and supported by the conceptions of childhood described in chapter 4), play a significant role in restricting and preventing the implementation of proposals such as Holt's within the legal system. However, although the extreme views of theorists such as John Holt are seldom put forward today, similar choice-based rights arguments have had an impact on legislative and judicial activity in recent years³⁶⁷ by encouraging an increasing focus on the appropriate age boundaries for 'protection' rights to apply.

5.3.2 Age restrictions

The legal system operates on the basis of a number of age restrictions that establish arbitrary boundaries between adulthood and childhood. For most purposes, the law deems children to be adults when they reach 18

³⁶⁵ Holt, J *Escape from Childhood: The Needs and Rights of Children* (1974), 15-16. I have not included the entire list, in the interests of brevity, and the selections are arbitrary and intended to illustrate the radical nature of John Holt's proposals.

³⁶⁶ Minow, M "Rights for the Next Generation: A Feminist Approach to Children's Rights" in Freeman, M (ed) *Children's Rights: Volume 2 (The International Library of Essays on Rights)* (2004) 7.

³⁶⁷ Wald, supra n 206 at 123.

years of age.³⁶⁸ However, the process of moving from the legal status of childhood to adulthood is marked by inconsistencies and contradictions.³⁶⁹ The existence of a variety of arbitrary legal age boundaries is an example of the extent to which conceptions of childhood are socially constructed: those in positions of power determine who is a child and what rights are available at different ages of development and for different purposes.³⁷⁰ Choice-based rights theories challenge this use of power and encourage an examination of age boundaries.

The more extreme choice-based theories such as Holt's argue for the removal of arbitrary age boundaries altogether, on the grounds that they restrict the rights of children to make their own choices. However, re-evaluations of arbitrary age boundaries often focus on changes to arbitrary boundaries, rather than on removing such boundaries altogether. In 1999, for example the legal age for purchasing alcohol in New Zealand was reduced from 20 to 18 following a re-evaluation of the appropriate age boundary.³⁷¹ The freedom to choose to purchase alcohol was withheld from those younger than 18 years of age; one arbitrary boundary was replaced with another. Although choice-based rights theories may not have succeeded in removing age boundaries such as the age for purchasing alcohol, they have succeeded in encouraging a re-evaluation of many of these boundaries.

Choice-based rights theories have led to an increasing focus on appropriate age boundaries because they actively question the appropriate extent of parental control over the lives of children. This is particularly evident in the areas of youth pregnancy and contraception.³⁷² Approaches to these issues can take a variety of forms: parental control can be removed entirely from a fixed age; children can be given decision

³⁶⁸ Although the Age of Majority Act 1970 provides that the age of majority is 20, in fact, for most legal purposes, human beings are given full legal rights at 18; see, for example, the Children, Young Persons and Their Families Act 1989, the Residential Tenancies Act 1986 and the Minors Contracts Act 1969.

³⁶⁹ Minow, *supra* n 366 at 4.

³⁷⁰ Freeman, M "Taking Children's Rights More Seriously" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 175.

³⁷¹ Pursuant to section 2(2) of the Sale of Liquor Amendment Act 1999.

³⁷² Wald, *supra* n 206 at 129.

making powers subject to parental veto rights;³⁷³ or parental control can be made subject to the individual capacity and maturity of particular children.³⁷⁴ When the issue of parental control is considered within the legal system, the result often depends upon a determination of the particular child's rational capacity. The law therefore uses conceptions of rational competence, as considered in detail in chapter four, to determine whether children have a right to be free from parental control. This consideration is not required once a child reaches the relevant statutory age boundaries at which point they automatically receive the right to exercise the same freedoms as adults.

5.3.3 Participation rights

Choice-based rights theories have also influenced the development of other rights, particularly rights of participation. The right for children to participate in decision-making about their lives is a particularly significant right and has developed from an emphasis on valuing the choices children make. However, rights of participation for children are not generally absolute rights. Article 12 of the UNCRC for example, one of the foundations for children's legal rights of participation, does not give children rights of self-determination but only a right to "try to motivate or to persuade the adult to choose as the child herself would choose if allowed to."³⁷⁵ This limited participation right can be exercised to express preferences or to express a particular perspective³⁷⁶ and is limited to participation in private decision-making rather than in the public decision making processes of democracy.

On a practical level, research indicates that participation in decision-making has psychological benefits for children even when their participation is not determinative of the outcome and that, in any event,

³⁷³ That is, the decision of the child is only legally effective with parental consent. The requirement for a child of 16 or 17 years of age to obtain parental consent to marriage provides an example.

³⁷⁴ *Gillick* supra n 318.

³⁷⁵ Archard, supra n 164 at 66.

³⁷⁶ Henaghan, supra n 339 at 175.

children often do not want decision-making power.³⁷⁷ On a theoretical level, even limited participation rights are significant because they recognise children as “full human beings, with integrity and personality and with the ability to participate fully in the production of knowledge about their lives.”³⁷⁸ Participation rights seek to transfer to children some of the law’s creative power to produce knowledge and thus ensure that the legal system evaluates children as individual human beings.³⁷⁹ Participation rights are therefore an attempt to overcome the legal system’s operative closure when producing knowledge about children.

Because participation rights play a significant role in the production of knowledge, they are a significant element of Habermas’ critique of operative closure. As previously noted, Habermas argues that the legitimacy of the legal process is dependent upon protecting the rights of those subject to the law to participate in the processes of law’s creation.³⁸⁰ Rehg argues that women’s struggle for equality illustrates Habermas argument because, by valuing participation rights, women recognised that:

[T]he legitimate regulation of [gender equality] requires that women themselves take part in public discussions that determine which gender differences are relevant to definitions of equality.³⁸¹

However, as noted above, when participation rights are given to children, they are generally only given in a limited form. Children are not generally given rights to take part in public discussions that determine which age differences are relevant to definitions of equality between adults and children. Consequently, Habermas’ theory of communicative action does not address the interests of children or the operative closure of the legal system in its responses to children.

³⁷⁷ Caldwell, J “Judicial interviews of children: some legal background” (2007) 5 NZFLJ 215 at 2.

³⁷⁸ Henaghan, *supra* n 65 at 25.

³⁷⁹ Rodham, *supra* n 6 at 43.

³⁸⁰ *Supra* at 33 – 34.

³⁸¹ Rehg, *supra* n 132 at xxxiii.

5.3.4 Some problems with choice-based rights

Choice-based rights advocates argue that children should have the same rights as adults to exercise free choice. However, concomitant with freedom of choice is the freedom to waive the exercise of a power to choose. This ability to waive a right creates difficulties for using choice-based rights theories to justify rights for children. Children are often not given any choice in relation to the exercise of their rights and the exercise of their rights is often considered to be compulsory and not susceptible to waiver.³⁸² Some of these difficulties can be overcome by recognising that some rights (the right to live, for example) are not capable of waiver, even for adults, but this argument simply moves the argument to another level of analysis. If some rights can be waived and others cannot, which rights fall within which category? Choice-based rights theories therefore fail to describe how children's rights generally operate in practice. Further difficulties with a choice-based rights approach to children's rights can arise given the relationship between rights and duties.

Within the choice-based rights paradigm, the freedom to choose³⁸³ is inevitably linked to duties; when an individual has freedom to exercise a particular choice, other individuals have the duty to respect, or at least not to interfere with the exercise of that choice. Consequently, rights become equivalent to legal powers to enforce or waive duties.³⁸⁴ This relationship between rights and duties can have consequences that may not be in the best interests of children.³⁸⁵ As an example, calls to give children greater rights have been matched by calls to make children more 'responsible' for their criminal behaviour.³⁸⁶

Defining rights as a power to exercise individual choices also raises significance issues of enforceability. Bandman, for example, argues that

³⁸² Rodham, *supra* n 6 at 34.

³⁸³ The right to be 'free to choose' has been given economic as well as legal significance by economists such as Milton and Rose Friedman, see *Free to Choose* (1979).

³⁸⁴ MacCormick, *supra* n 360 at 73.

³⁸⁵ Freeman, *supra* n 370 at 173.

³⁸⁶ Wald, *supra* n 206 at 127.

the ability for a rights holder to claim their rights is important because, without such an ability, "... one could not cash in on one's rights ..."³⁸⁷

This view is grounded in the theories of J. S. Mill who argued that:

The rights and interests of every or any person are only secure from being disregarded when the person interested is himself (sic) able and habitually disposed to stand up for them.³⁸⁸

The need to be able to "cash in" on or "stand up for" rights is particularly significant for children as they are often unable to claim rights for themselves. If rights are designed to empower individuals to make their own choices, they can become meaningless for those who do not have any power to exercise their rights. Choice theorists attempt to overcome this difficulty when applying rights to children by arguing that choices are made on behalf of children by the adults in their lives (generally parents) or, in some circumstances, by the state.³⁸⁹ However, even if this view is correct, children's rights remain unsecured and meaningless until some legal institution or competent adult recognises those rights and accepts responsibility for enforcing them.³⁹⁰

5.3.5 Summary

In summary, choice-based rights theorists argue that children should be given the freedom to make their own choices independently of parental and state control and that rights are required to give children the power they need to exercise this freedom. These arguments have led to an increasing recognition of the importance of increasing the legal independence and autonomy given to children as they develop. Although significant difficulties are involved with assessing maturity and the appropriate level of autonomy children should be given as they develop, children are increasingly given limited rights to participate in decisions affecting their lives in recognition of their right, generally considered to be

³⁸⁷ Bandman, *supra* n 356 at 59.

³⁸⁸ Mill, J. S. quoted in Bandman, *supra* n 356 at 67.

³⁸⁹ MacCormick, *supra* n 360 at 73.

³⁹⁰ Rodham, *supra* n 6 at 43.

a developing right, to personal freedom. By giving children such rights, the law attempts to redistribute some social power from the adults who previously had complete control over the lives of children, to children themselves. However, there are a number of conceptual difficulties with choice-based rights theories, particularly in relation to the limited power of children to enforce any rights granted to them. Advocates of rights theories based on children's interests claim that they avoid these difficulties.

5.4 Rights protect interests

5.4.1 Interests

The second approach to justifying rights for children argues that some individual 'interests' should be protected by the imposition of normative constraints on the actions of other people³⁹¹ and that legal rights provide this normative constraint. Whereas choice-based approaches are designed to *empower* children to exercise free choice, interest based theories are designed to *protect* children by exercising power on their behalf. By focusing on protecting children, interest-based theories entrench the distinction between adulthood and childhood and the power of adults over the lives of children.

Interest-based rights theories are founded on the belief that the interests of children are different from the interests of adults and consequently those interests cannot be satisfied by granting to children the same rights granted to adults, even if such rights are strictly enforced.³⁹² This approach therefore argues that there are morally relevant differences between adults and children that justify protectionist measures, even when those measures constrain the autonomy of children.³⁹³ These protectionist measures are justified using conceptions of childhood, such

³⁹¹ MacCormick, *supra* n 360 at 71.

³⁹² Rodham, *supra* n 6 at 35.

³⁹³ Purdy, L. M. "Why Children Shouldn't Have Equal Rights" in Freeman, M (ed) *Children's Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 329.

as those examined in chapter four,³⁹⁴ to support claims that the interests of children differ from those of adults.

The conception that children are the objects of adult rights and responsibilities³⁹⁵ can be used within a rights discourse to argue that children's special interests need to be protected by granting children a wider range of rights than those given to adults. Such arguments have been used to advocate for children's rights to receive protection from abuse, neglect or exploitation and rights to adequate food, shelter and healthcare.³⁹⁶ However, although granting such wide-ranging rights is possible, giving such rights real efficacy is a real challenge given practical resource limitations. The UNCRC, for example, recognises rights for children that extend beyond civil and political rights to cover social, economic, cultural and humanitarian rights³⁹⁷ even though it is not necessarily able to enforce these normative standards.³⁹⁸ Such rights are dependent upon the existence of individuals and entities capable of accepting duties to fulfil such rights.³⁹⁹

It is important to recognise that the interests involved in these arguments are the interests of individuals, not necessarily the interests of society or the wider community. The interests of the wider community can be used as a justification for granting rights to children by arguing that it is in the community's interest to give rights to children in order to avoid the social problems that can arise from childhood neglect. However, this utilitarian approach is dangerous as it can also be used to remove rights from those who are perceived to offer little benefit to society. Rights advocates such as MacCormick therefore argue that children are morally entitled to rights

³⁹⁴ See the examination of these issues in chapter four supra at 37 - 76 and Freeman, supra n 370 at 173.

³⁹⁵ See, for example, article 6 of the UNCRC which recognises a right to "enjoy economic, social, cultural and political development".

³⁹⁶ Wald, supra n 206 at 118.

³⁹⁷ McGoldrick, D "The United Nations Convention on the Rights of the Child" in Freeman, M (ed) *Children's Rights: Volume 21 (The International Library of Essays on Rights)* (2004) at 79.

³⁹⁸ Wald, supra n 206 at 119.

³⁹⁹ Similar difficulties arise when such rights are given to adults. However, these difficulties alone should not preclude recognising such rights, for the reasons noted supra at 95.

given their inherent value as human beings and the interests they hold as individuals.⁴⁰⁰ Defining the content of the concept of ‘interest’ is therefore particularly important.

The term ‘interests’ covers a wide variety of conceptions and can, for example, include autonomy interests (an interest in choosing freely), developmental interests (an interest in having the same rights as other members of society to self-development) and basic interests to health and protection from neglect and violence.⁴⁰¹ These different interests can be mutually exclusive. For example, granting an individual a right that recognises their interest in personal autonomy may conflict with their developmental interests if they exercise their autonomy in a way that restricts their developmental interests (either present, future or both)⁴⁰² or the autonomy rights of others. A significant problem for interest-based rights theories is therefore the difficulty of defining those interests that are worthy of legal protection.

Most interest-based rights advocates accept that legal rights should not protect all personal interests.⁴⁰³ Attempts to identify those interests that should be protected by legal rights have sometimes incorporated the arguments regarding the significance of liberty and autonomy that form the basis of choice-based approaches to rights.⁴⁰⁴ J. S. Mill, for example, argued that because each adult is the best positioned to choose what is in their own best interests they should have rights to personal autonomy in order to protect those interests.⁴⁰⁵ However, interest-based approaches to rights can also proceed on the basis, specifically expressed in *Brown v Argyll*,⁴⁰⁶ that human beings are frequently not the “best arbiters of their own best interests.”⁴⁰⁷ This issue is even more complex for children’s interests than it is for adults. Children are often conceptualised as

⁴⁰⁰ MacCormick, supra n 360 at 76.

⁴⁰¹ Eekelaar, J “The Emergence of Children’s Rights” in Freeman, M (ed) *Children’s Rights: Volume 1 (The International Library of Essays on Rights)* (2004) 201.

⁴⁰² Ibid, 207.

⁴⁰³ Freeman, supra n 370 at 181.

⁴⁰⁴ Supra at 80.

⁴⁰⁵ Archard, supra n 164 at 117.

⁴⁰⁶ [2006] NZFLR 705.

⁴⁰⁷ Ibid, para. [49].

rationality incompetent⁴⁰⁸ and, as a result, adults are often empowered to make decisions on their behalf to protect their interests.

5.4.2 Power

The empowerment of adults as decision makers is particularly significant within the legal system. The law often recognises that children have interests and that legal processes must operate in their 'best interests'.⁴⁰⁹ However, because the law generally conceptualises children as rationally incompetent, their best interests are generally assessed by adults, not by children themselves.⁴¹⁰ Consequently, interest-based rights do not transfer decision-making power to children but entrench and justify adult power over their lives.

The entrenchment of adult power through interest-based rights for children contrasts with rights justified on the grounds of recognizing a right to freedom of choice. Choice-based rights are founded on a conception of children as agents, actively engaged in producing knowledge about their own lives. These two conflicting approaches to the development of rights can therefore create conflicts between the legal interests of children, as assessed by adults, and the freedoms of children. Consequently, rights that are justified on the grounds that the interests of children need protection do not assert that children should have more autonomy or freedom than adults nor do they seek to change the status of children as subject to adult power.⁴¹¹ Rather, such claims advocate for greater state intervention in the control of children thereby allowing the substitution of one adult decision maker (an inadequate parent for example) with another adult (generally a state representative).

⁴⁰⁸ Supra at 67 – 74.

⁴⁰⁹ See for example s 4 of the Care of Children Act 2004, where a child's welfare is described as the "paramount consideration" and article 3.1 of the UNCRC where it is described as a "primary consideration".

⁴¹⁰ Ross, supra n 344 at 1.

⁴¹¹ Wald, supra n 206 at 121.

The transfer of power over the lives of children from the private to the public realm advocated by interest-based rights theories raises a number of significant practical issues.⁴¹² One such issue is determining who should be given such power if it is removed from parents. If the decision-making power is not given to children themselves the other options are the wider family, community or the state. In general, modern approaches have not questioned whether public intervention is appropriate but have focused on how to ensure that such intervention is effective.⁴¹³

The effectiveness of public intervention is often limited because of the practical difficulties of transferring parental power. Wald argues that the transfer of parental power can be practically unrealistic,

unless we are prepared to place an outside monitor in every home to eliminate the authority parents have stemming from their greater strength and economic power.⁴¹⁴

Adult power is therefore an inherent part of interest-based rights for children. Such rights operate to entrench adult power rather than empower children. This has significant implications when considering Habermas' response to operative closure given his theoretical dependence on participation rights that empower participation in democratic processes. When children's rights are founded on interest-based theories that confirm adult power, children are excluded from, or at least not empowered to participate in, democratic processes of knowledge creation. As a consequence, interest-based rights do not empower children to overcome the legal system's operative closure.

5.4.3 Summary

Interest-based rights theories use conceptions of childhood to produce particular knowledge about the nature of children and their interests.

⁴¹² Minow, *supra* n 366 at 9.

⁴¹³ King and Piper, *supra* n 13 at 3.

⁴¹⁴ Wald, *supra* n 206 at 130.

These conceptions distinguish children from adults and are used to justify claims that children have unique interests that need to be protected by adults with power over their lives. Interest-based rights theories therefore use rights as a mechanism to entrench private adult power over the lives of children on the assumption that adults will use this power in the 'best interests' of children. The law can also use such theories to justify the transfer of private power over children to public institutions, although there are difficulties with exercising and enforcing such power transfers. However, in either case, children themselves are excluded from exercising power over their lives and this includes excluding children from knowledge creation processes. In this way, interest-based rights theories can contribute to the legal system's operative closure. Habermas' theory of communicative action does not overcome this operative closure.

Choice-based and interest-based rights theories share foundations in moral arguments presented as uncontestable assertions. In the following section, I will examine these moral arguments.

5.5 Morality as the foundation for rights.

MacCormick, a prominent interest-based rights theorist, bases his argument for rights on

a simple and barely contestable assertion: at least from birth, every child has a right to be nurtured, cared for, and, if possible, loved, until such time as he or she is capable of caring for himself or herself.⁴¹⁵

The moral basis of this "barely contestable assertion" is the argument that respecting the inherent dignity of every individual and the corresponding need to respect individual interests is a fundamental moral principle.⁴¹⁶ Dworkin also argues that there is a close association between rights and the moral values of human dignity and respect⁴¹⁷ and this approach is

⁴¹⁵ MacCormick, *supra* n 360 at 71.

⁴¹⁶ *Ibid*, 77.

⁴¹⁷ Dworkin, *supra* n 156 at 273.

accepted by a number of other rights theorists as a sufficient basis for granting rights to children.⁴¹⁸

The argument that children are entitled to rights on moral grounds on the basis of their interests is summarised by MacCormick as follows:

each and every child is a being whose needs and capacities command our respect, so that denial to any child of the wherewithal to meet his or her needs and to develop his or her capacities would be wrong in itself (at least in so far as it is physically possible to provide the wherewithal), and would be wrong regardless of the ulterior disadvantages or advantages to anyone else – so to argue, would be to put a case which is intelligible as a justification for the opinion that children have such rights.⁴¹⁹

This foundation on morality moves concepts of rights, including rights for children, into the realm of “essentially contested concepts”⁴²⁰ and, consequently, the search for conceptual consensus regarding the theoretical justification of rights may well be futile. This does not mean however, that the discussion should not be undertaken, as there is inherent value in discussing the issues involved,⁴²¹ simply that resolution of the debate may be impossible. However, the impossibility of defining the conceptual basis for rights, contributes to a number of difficulties when rights are applied.

5.6 Some problems with rights.

Particular problems arise when rights discourses are applied to children as children acquire legal rights in a way that is generally discontinuous and abrupt.⁴²² Chronological dividing lines are often used to define individuals as children, young people or adults with different rights being legally

⁴¹⁸ Bandman, for example, argues that “Rights enable us to stand with dignity”: Bandman, supra n 355 at 59 and Freeman accepts “the moral argument for the recognition of children’s rights”, Freeman, supra n 369 at 172. See also MacCormick, supra n 359 at 75.

⁴¹⁹ MacCormick, supra n 360 at 76.

⁴²⁰ Ibid, 77 and Lucy, supra n 362 at 84.

⁴²¹ See Habermas’ arguments for the importance of participatory democracy; supra at 33.

⁴²² Archard, supra n 164 at 12.

recognised at each stage.⁴²³ The right to vote, for example, confers a certain status instantaneously at a legally defined age. In contrast, the maturing process is gradual and varies widely between individuals. Consequently, the legal system's need for rights-bearers acquiring rights abruptly fails to reflect the reality of life for many children and young people. As David Archard notes:

A young person just below the age of majority is less like an infant and more like an adult. Yet its legal status remains that of the former.⁴²⁴

Further difficulties arise as a result of the individualist focus of legal rights. Within traditional, Western liberal ideology, the creation of legal rights is justified by a belief in the significance of individuals.⁴²⁵ Choice-based rights theories emphasise individual choice whereas interest-based theories emphasise individual interests, but both focus on individuals as rights-holders.

A focus on individual rights-holders is a functional requirement of Western legal systems as it allows the law to simplify and reduce complex relations within families and societies to a more manageable level. However, by producing its knowledge about the world in this reductionist way, the law produces a vision of the world that ignores the impact of wider social, economic, political and cultural conditions in the shaping of social phenomena.⁴²⁶ The law then responds to this simplified, abstract world by using rights to transfer power within that world. The individualist focus of rights therefore contributes to the operative closure of the legal system by avoiding engagement with wider, contextual issues.

By avoiding engagement with wider contextual issues, legal rights construct social conflicts as contests between individuals⁴²⁷ and this allows the legal system to adopt its familiar processes of establishing

⁴²³ Rodham, *supra* n 6 at 34.

⁴²⁴ Archard, *supra* n 164 at 12.

⁴²⁵ Davies, *supra* n 26 at 158.

⁴²⁶ Boyden, *supra* n 302 at 197.

⁴²⁷ King and Piper *supra* n 13 at 78.

binary alternatives and then using legal procedures to decide between those binaries.⁴²⁸ By constructing intra-family difficulties as contests between individual rights bearers, the law can operate to construct barriers between family members, restrict genuine communication and interaction⁴²⁹ and fail to address the contextual preconditions to successful relationships.⁴³⁰ The individualist focus of rights therefore overlooks alternative constructions of reality that recognise the inter-dependence that characterises most, if not all, human relationships and the importance of relational values such as love and compassion.⁴³¹

Some critics of rights focus on the need to develop and encourage relational values rather than focusing on the narrow conceptions of individual rights, particularly when considering rights for children. However, recognising the fundamental importance of relational values in children's lives does not preclude the pragmatic recognition that this ideal does not reflect the realities of life for some children. The rights of individuals can play a part in establishing minimum standards for the benefit of all children, not just those who are fortunate to develop in loving and supportive relational environments.⁴³² Recognising rights for individuals does not preclude the exercise of the other morally significant values based on inter-dependence.⁴³³ Relying on idealised visions of familial or community love and support without providing a legal minimum level of protection for vulnerable members of society as individuals is arguably a misguided and perilous form of optimism.⁴³⁴

The most significant difficulty with legal rights is that they are legal operations caught within the legal system. As Freeman notes:

It is easy to take the words for the act and assume that with the enactment of rights-bestowing provisions the conditions of children's lives

⁴²⁸ Ibid.

⁴²⁹ Davies, *supra* n 26 at 160.

⁴³⁰ Minow, *supra* n 366 at 25.

⁴³¹ Archard, *supra* n 164 at 112.

⁴³² Ibid, 123.

⁴³³ Freeman, *supra* n 370 at 174.

⁴³⁴ Archard, *supra* n 164 at 123.

has changed. The importance of legislation as a symbol cannot be underestimated, but the recognition of children's rights requires implementation in practice.⁴³⁵

This observation emphasises that the effectiveness of legal rights as a mechanism for redistributing power is entirely dependent on the law's ability to implement this transfer of power outside the closed world of the law. However, its power to do this is limited because of the limitations inherent in the legal system itself. Rights are designed to transfer legal power to children but the legal system uses rights to produce its own world to respond to, a world distinct from the subjective worlds of those subject to it. The law uses rights to reduce complexity through a focus on individuals and to exercise power over children. Even when rights are established to empower children, as with participation rights, the law uses its power to define concepts such as competence and maturity to restrict any intended transfer of power. All of these factors limit the law's ability to use rights to regulate the world outside the legal system. These limitations are particularly evident in the way in which rights are used to advocate for law reform and I will examine this point in the next chapter.

⁴³⁵ Freeman, *supra* n 370 at 173.

Chapter 6 Creating the Law

6.1 Introduction

In this chapter I will examine how the law is created, by examining the recent amendment to s 59 of the Crimes Act 1961 (“the Crimes Act”). I will argue that the process of law reform evident from the s 59 amendment process supports Luhman’s and Teubner’s claims that the law operates as a closed system. I will also show that Habermas’ theory offers a useful critique of how law reform processes operate within the political system. I will not attempt to explicate or assess the content of the new amended section, but will simply aim to illustrate how the operative closure of the legal system affected the processes involved with amending the law. I will also show how the old s 59 and the reform debate both employed many of the conceptions of childhood examined in chapter four and rights arguments discussed in chapter five. I will argue that the ways in which the legal system employed normative conceptions and abstract rights contributed to the legal system’s operative closure throughout the law reform process.

As previously noted, the operative closure of the legal system arises, in part, because of the legal system’s functional requirement to reduce human complexity into binary alternatives amenable to being defined as either legal or illegal.⁴³⁶ One of the law’s primary responses to child maltreatment is to apply this legal/illegal distinction to the treatment of children by adults. In this way, the law produces knowledge about the world by exercising its power to define boundaries for the legally acceptable treatment of children. In New Zealand, this occurs most clearly under the Crimes Act, which codifies definitions of criminal behaviour.

⁴³⁶ Supra at 14.

6.2 Defining the boundaries of acceptable behaviour.

Under the Crimes Act, the physical and sexual abuse of children is generally treated in the same way as the physical and sexual abuse of adults and is defined to be illegal. Crimes such as wounding with intent (s 188) or common assault (s 196) are committed regardless of whether the victim is an adult or a child. However, in addition to the general criminal offences where the identity of the victim is irrelevant, the Crimes Act also contains a number of offences specifically aimed at protecting children from maltreatment. Section 194, for example, creates a specific offence for adults who assault children under 14 years of age.⁴³⁷ However, in addition to creating child specific crimes, the Crimes Act also provides for a child specific defence in s 59.⁴³⁸

Whenever it is alleged that a crime has been committed against a child, whether it is a 'general' crime, such as wounding with intent, or a child specific crime, such as adult assaults child, an accused is able to raise a defence under s 59 of the Crimes Act if they are the parent of the child, or an adult acting 'in the place of the parent'.⁴³⁹ Prior to 21 June 2007, s 59 allowed parents to use force against their children provided that such force was reasonable and for the purposes of correction. Following considerable public and political debate, s 59 was amended to restrict the defence and, in particular, to prevent the use of force for the purposes of correction. The processes involved with the amendment illustrate many of the limitations of the legal system identified as part of this thesis.

⁴³⁷ Significantly, s 194 includes two subsections; the first creates an offence for adults who assault children under 14 years of age and the second creates an offence for males (of any age) who assault females (of any age). Grouping these two offences together implies that there are similarities in the nature of adult/child and male/female relationships that justify the creation of an offence that applies to both relationships.

⁴³⁸ Although the recent amendment has significantly limited the scope of the defence, it has not removed the section altogether and a limited defence therefore remains in place.

⁴³⁹ For a discussion of the definition of 'parent' see *infra* at 99. Throughout the rest of this chapter, unless otherwise indicated by the context, references to 'parent' under the old s 59 includes reference to any adult acting in the place of a parent.

6.3 Section 59 prior to 21 June 2007

Before 21 June 2007, s 59(1) of the Crimes Act (“the old s 59”) provided that:

Every parent of a child and ... every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.⁴⁴⁰

The key elements to this section are the concepts of “parent”, “child”, “justified”, “force”, “correction” and “reasonable”. In this section I will deconstruct each of these elements to show how they contributed to the law’s operative closure and the entrenchment of existing power structures governing the lives of children.

6.3.1 “Parent”

The defence created by the old s 59 was available to parents *and* to those who were acting “in the place of the parent”. In *R v Murphy*⁴⁴¹ for example, the Court held that a babysitter was entitled to use the s 59 defence. However, the old subsection 59(3) specifically provided that teachers were not acting ‘in the place of the parent’ and that they were therefore bound by s 139A of the Education Act 1989 that prohibits the use of corporal punishment in educational institutions. This use of a self-referential process excluded teachers from using the old s 59 as a defence if they used force against a child (unless they were the child’s parent).

Restricting the protection offered by the old s 59 defence to parents indicates that the law considered the role of a parent to be unique in some

⁴⁴⁰ This section simply confirmed the position that existed at common law before the criminal law began to be codified, a position supported by conceptions of children that had existed in Western society for centuries. A similar defence was included in the Act’s predecessors to the Crimes Act; see section 68 of the Criminal Code 1893 and section 85 of the Crimes Act 1908.

⁴⁴¹ (1996) 108 CCC (3d) 414 (BCCA) cited in Ahdar, R and Allan, J “Taking Smacking Seriously: The Case for Retaining the Legality of Parental Smacking in New Zealand” (2001) 1 NZ Law Review 1, 10.

way. This uniqueness appeared to rest solely on parental status. If two adults used the same force against the same child for the same purposes of correction and only one of those adults was a parent of the child, only the parent was able to defend themselves on the basis of the old s 59. This distinction, based purely on parental status, indicates that the old s 59 was concerned with the protection or maintenance of parental power, rather than with the impact of the use of force on the child concerned.

The law has defended the appropriateness of maintaining parental power by using the conception that children are the objects of parental rights and that this is in the best interests of children. This argument incorporates elements of long standing conceptions regarding children⁴⁴² and of more recent interest-based rights theories.⁴⁴³ Both of these arguments were evident in *B(R) v Children's Aid Society of Metropolitan Toronto*, a Canadian case considering the Canadian equivalent to the old s 59, where the Court found that:

The common law has always, in the absence of demonstrated neglect or unsuitability, *presumed that parents should make all significant choices affecting their children*, and has afforded them a general liberty to do as they choose. This liberty interest is not a parental right tantamount to a right of property in children ... This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children.⁴⁴⁴

Reflecting these arguments, the old s 59 established a boundary between the public and private responsibility for children and left decisions regarding 'reasonable' physical discipline to parents, rather than to the

⁴⁴² Particularly the conceptions that children are the objects of parental rights and responsibilities, supra at 44 - 55 and that children need to be physically punished, supra at 56 - 59.

⁴⁴³ For a discussion of these theories see supra at 87 - 91.

⁴⁴⁴ [1995] 1 SCR 315, 372.

state. The section therefore operated to reinforce the legal system's operative closure and entrench parental power by excluding the jurisdiction of the courts over parent/child relationships and providing a justification for their exercise of power.

6.3.2. "Child"

Although some specific offences under the Crimes Act contain age restrictions,⁴⁴⁵ the defence provided by the old s 59, did not define the term "child".⁴⁴⁶ Nor does the Crimes Act contain any general definition of the term. Consequently, when considering the application of the old s 59, the legal system was required to define whether the victim was a "child", before considering the potential application of s 59 as a defence. The application of the defence was therefore subject to the law's power to produce its own knowledge by defining the status of victims as either children or adults. This process is a further example of the legal system's functional requirement to reduce the complexity of human relationships into binary alternatives. Furthermore, the definition process followed in cases such *Ausage v Ausage*⁴⁴⁷ demonstrates the role of autopoietic processes of self-reference in producing definitions of "child".

The Court in *Ausage v Ausage*⁴⁴⁸ had to determine whether the old s 59 could be used by a father to defend his use of force against his 17-year-old daughter. The Court therefore had to decide whether the term "child" included 17-year-olds. To reach its decision, the Court specifically referred to the provisions of the UNCRC, which define "child" to include young people up to and including 17 years of age. This self-reference confirmed the closure of the legal system to the particular world of the 17-year-old child as it was the provisions of the legal system itself that determined the outcome of the law's knowledge production process.

⁴⁴⁵ The offence of assault of a child under s 194 for example restricts 'child' for the purpose of this offence to assaults against victims 14 years of age or younger.

⁴⁴⁶ The replacement section 59 does not define the term 'child' either.

⁴⁴⁷ [1998] NZFLR 72.

⁴⁴⁸ *Ibid.*

6.3.3 “Justified”

The old s 59 explicitly provided a justification for parents to use force against their children. Section 2 of the Crimes Act defines “justified” to mean “not guilty of an offence and not liable to any civil proceeding.” This definition was particularly significant for the operation of the old s 59 as it extended the legal protection offered to parents beyond protection against criminal proceedings under the Crimes Act itself to include civil proceedings. Consequently, the old s 59 was considered relevant in custody disputes,⁴⁴⁹ domestic violence proceedings⁴⁵⁰ and care and protection proceedings under the Children, Young Persons and Their Families Act 1989.⁴⁵¹ Some judges expressed surprise at the wide scope of the old s 59 defence. Fisher J in *Sharma v Police* commented that:

The first question is whether the defence of child discipline under s 59 ... is available to a person (charged with breaching a protection order). Given the overriding objectives of the (Domestic Violence) Act I would have expected the answer to be No. Even in harmonious families, the issue of corporal punishment is controversial enough. How much more dubious must it be where there is a protection order in force.⁴⁵²

Despite his surprise at the wide scope of s 59, Fisher J found that he was bound to allow use of the defence, even outside the criminal jurisdiction. However, courts were sometimes reluctant to accept this apparently universal defence and could take a strict interpretative approach when considering the application of s 59 outside the criminal jurisdiction. In *Wilton v Hill*⁴⁵³ for example, although acknowledging the relevance of the old s 59, the Court considered that the use of physical discipline by the father, even if it did not lead to criminal charges, was nevertheless a

⁴⁴⁹ See, for example, *Wilton v Hill* [2002] NZFLR 193 and *Spence v Spence* [2001] NZFLR 275.

⁴⁵⁰ See, for example, *Sharma v Police* [2003] 2 NZLR 473, *Ausage v Ausage* [1998] NZFLR 72 and *Steyn v Brett* [1997] NZFLR 312.

⁴⁵¹ See, for example, *Re I, T, M and J* [2000] NZFLR 1089.

⁴⁵² [2003] 2 NZLR 473.

⁴⁵³ *Wilton v Hill* [2002] NZFLR 193.

relevant factor for the Court to consider in assessing the best interests of the children.⁴⁵⁴

The wide scope of the justification provided by the old s 59 is arguably based on the conception that children are the objects of parental rights and responsibilities.⁴⁵⁵ Given that this conception focuses on parental rights, it was logically consistent for the defence constructed by the conception and codified in s 59 to apply whenever the law considered a parent's application of force against a child. Furthermore, the self-referential processes of the legal system contributed to systemic closure by establishing the defence as a norm to be generally applied.

6.3.4 “Force”

The application of the old s 59 could be considered whenever a child was subject to the use of “force” by a parent. Although the term “force” is not defined in the Crimes Act it is well defined at common law: to constitute a criminal act, the application of physical force must be intentional⁴⁵⁶ but does not necessarily need to involve violence⁴⁵⁷; the purpose of the force applied is also relevant as is the subjective response of the recipient (a kiss on the cheek may be acceptable in most cases but can constitute an illegal application of force if it is done against the will of the person being kissed)⁴⁵⁸; and the slightest degree of force is sufficient to constitute a criminal act.⁴⁵⁹

The law's definition of “force” has therefore developed over time and is now encapsulated within legally accepted precedent. As previously noted, Teubner argues that although legal rules may initially represent underlying social values, over time they develop, through self-referential processes of production and maintenance, to exclude references to the social

⁴⁵⁴ Ibid, 198.

⁴⁵⁵ Supra at 44 – 55.

⁴⁵⁶ *R v Howe* [1982] 1 NZLR 618 (CA).

⁴⁵⁷ *R v Terewi* (1985) 1 CRNZ 623.

⁴⁵⁸ *Police v Raponi* (1989) 5 CRNZ 291, 296.

⁴⁵⁹ *Cole v Turner* (1705) 6 Mod Rep 147; 90 ER 958 and *B v Police* (1991) 7 CRNZ 55.

environment altogether.⁴⁶⁰ This process is evident in the way in which a concept such as “force” is defined. When considering whether a particular action against a child constitutes a use of force, the legal system refers to its own definitions through the self-referential system of precedent, not exclusively to the subjective experience of that child. A recipient of unwanted force, whether an adult or a child, must be able to translate their subjective experience into a format acceptable to the legal system as a valid legal communication before they can receive any redress. The way in which the legal system defined “force” therefore contributed to operative closure when the law considered the use of force for the purposes of correction under the old s 59.

6.3.5 “Correction”

One of the most significant points to note regarding the old s 59 is that it justified the use of force for the purposes of “correction”. As explored in chapter 4, the law is able to use a number of conceptions of children to support the use of force for the purposes of correction. The physical discipline of children has been supported by the apparently contradictory conceptions of childhood innocence and childhood corruption. This indicates that support for the use of physical discipline may have more to do with attempting to exonerate adults from claims that they take advantage of their physical power over children than with a genuine concern for the healthy development of children. By constructing children as innocent or as corrupt, adults and the law have been able to construct the use of physical force against children as a necessity for the protection or correction of the child victim.

Conceptualising children as either corrupt or innocent also constructs differences between adults and children that operate to entrench the power differentials between them. This entrenchment of adult power would be more difficult if alternative conceptions of children and childhood were adopted, such as choice-based rights conception that children are

⁴⁶⁰ Supra at 9.

rights-holders in their own right and entitled to exercise some agency over their own lives. Conceptions of childhood have therefore contributed to the legal system's operative closure and the entrenchment the power of parents over the lives of their children through legal norms such as the old s 59.

6.3.6 “Reasonable”

The old s 59's use of the term 'reasonable' was an attempt to inject some objectivity into the legal construction of parental behaviour as legal or illegal. However, as noted by Margaret Davies, legal claims to objectivity are questionable as objectivity is, at best, an impossible ideal given the inherent limitations of human decision makers.⁴⁶¹ By excluding reference to the subjective nature of human decisions, claims of objectivity marginalize considerations of context and alternative constructions of reality. By doing so, they support the legal system's operative closure by contributing to the law's production of knowledge that meets the abstract and changing requirements of the legal system itself and those who hold power within that system.⁴⁶² Consequently, despite its claim to objectivity, definitions of “reasonable” force have remained elusive.

The elusive nature of 'reasonable' force has been evident since the concept was incorporated into New Zealand legislation by the Children's Protection Act 1890. As early as 1902 for example, the Court of Appeal held that defining the concept of 'reasonable' punishment could not be approached as if

the exact amount of punishment which is reasonable under the circumstances were capable of being mathematically estimated ... such a matter is not open to mathematical determination, because the data are not mathematical.⁴⁶³

⁴⁶¹ Davies, *supra* n 26 at 8.

⁴⁶² *Ibid*, 246.

⁴⁶³ *R v Drake* (1902) NZLR 22, 486.

An examination of the historical application of the old s 59 and its predecessors clearly demonstrates the extent to which the definition of what constitutes 'reasonable' force against children has been historically and politically constructed.⁴⁶⁴ Definitions of "reasonable force" have been particularly elusive because cases where the old s 59 has been available as a defence can be tried before a judge or a jury. As a general rule, juries were traditionally more prepared to accept a lower threshold of reasonableness than judges were.⁴⁶⁵

Given the wide variance in outcomes arising from cases involving the old s 59, the law used the concept of 'reasonableness' to give itself the appearance of objectivity. However, more recent cases have attempted to set some guidelines for determining the boundaries of 'reasonable' force and thereby confirm the validity of the law's claim to objectivity. In *Ausage v Ausage*,⁴⁶⁶ for example, the Court listed a number of specific factors to be considered in determining whether an adult's force was 'reasonable'. These factors included the age and maturity of the child, specific characteristics of the child such as physique, sex, and state of health, the type of offence and the type and circumstances of punishment.⁴⁶⁷ These factors are revealing in themselves. Why should the reasonableness of force depend on the sex or age of the child recipient? The nature of these considerations confirms the extent to which the law produces its own knowledge about the world by reducing the complexity of human existence into a manageable form that can be listed into discrete facts. By reducing complexity in this way, the law's attempts at objectivity contribute to operative closure through actively constructing a simplified world for the law to respond to.

⁴⁶⁴ For examples of inconsistencies during the late nineteenth century, see Maclean, supra n 263 at 40. For an examination of modern cases with the same conclusion see Hancock, J *Case Summaries: Parental Corporal Punishment of Children In New Zealand* (2003) www.acya.org.nz/site_resources/library/Documents/Reports_to_UN/S59_report_UNCROC_28Aug2003.rtf

⁴⁶⁵ Breen, supra n 457 at 386.

⁴⁶⁶ Supra n 447.

⁴⁶⁷ Ibid, 80. This approach has been accepted in subsequent cases such as *Re I, T, M and J* [2000] NZFLR 1089 at 1100.

6.3.7 Summary

The law employed a number of conceptions of childhood to justify the existence of the old s 59. In doing so, the legal system was able to reduce the complexity of relationships between parents and children to a more manageable level amenable to the law's systemic processes for resolving disputes. Such conceptions also supported and entrenched adult power over the lives of children. The old s 59 therefore contributed to the legal system's operative closure and this was evident in the inconsistency of legal decisions delivered under the old s 59.⁴⁶⁸ However, as concern increased about the maltreatment of children in society and the inconsistent legal response under the old s 59, public and political attention turned to the operation of the section and this led its amendment in 2007.⁴⁶⁹ In the following section of this chapter I will argue that the reform process illustrates the autopoietic, closed nature of the legal system and the limited usefulness of Habermas' theory for understanding political processes.

6.4 The law reform process.

6.4.1 Autopoietic self-reference in action

Given that the old s 59 entrenched the power of parents over children, the law reform process focused on the rights of children as a means to redistribute power to children. This focus on the rights of children was evident in the United Nations Committee on the Rights of the Child's regular reports on New Zealand's compliance with the UNCRC.⁴⁷⁰ These reports, prepared following New Zealand's ratification of the UNCRC, criticized New Zealand for continuing to allow the use of corporal

⁴⁶⁸ Supra n 464.

⁴⁶⁹ The amendment took effect on 21 June 2007 by virtue of section 5, Crimes (Substituted Section 59) Amendment Act 2007.

⁴⁷⁰ See, for example, United Nations Committee on the Rights of the Child *List of issues: New Zealand*. CRC/C/Q/Nzl.1. (List of Issues)16/10/96: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9fc569413c12cbb3c125643400525c55?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9fc569413c12cbb3c125643400525c55?OpenDocument) (27 June 2008).

punishment through the old s 59.⁴⁷¹ The Committee strongly recommended in its reports that New Zealand “amend the law to prohibit corporal punishment within the family”⁴⁷² and that the old s 59 should be repealed. The operation of the old s 59 was also criticized by a number of legal and social commentators.⁴⁷³

Many of these commentators, and the United Nations in its regular reports, based their arguments for the repeal of s 59, at least in part, on its inconsistency with the rights of children recognized in the UNCRC.⁴⁷⁴ In particular, article 19 of the UNCRC specifically provides that:

States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Although article 19 is not framed as a “right”, but as a set of duties imposed on States Parties, the source of this duty is an acceptance that children have an interest-based right to be protected from maltreatment and that this imposes obligations on States Parties.⁴⁷⁵

The use of references to legal rights such as the rights contained in the UNCRC⁴⁷⁶ as a justification for repealing the old s 59 is an example of the

⁴⁷¹ Treadwell, P “Editorial: To hell with UNCROC! New Zealand still giving them the bash” (2003) 4 BFLJ 107 at 107.

⁴⁷² Ibid.

⁴⁷³ Ibid and see also Children’s Issues Centre, University of Otago and Office of the Children’s Commissioner “The discipline and guidance of children. A summary of research.” June 2004. Available online (PDF). URL: http://www.occ.org.nz/media/files/discipline_guidance (March 2008); and Hassall, I and Fanslow, J “Family violence in New Zealand: we can do better” *The New Zealand Medical Journal* [27 January 2007] Vol 119 No 1228.

⁴⁷⁴ Ibid.

⁴⁷⁵ This is confirmed not only by the title of the UNCRC itself which confirms that it is designed to recognise the rights of children but also by the provisions of the preamble that establish that the provisions of the UNCRC are a result of recognising the rights of children and their special interests as children.

⁴⁷⁶ For a thorough examination of other rights referred to as part of the debate, see Breen, supra n 457 at 359.

self-referential nature of the legal system as identified by Luhman and Teubner. This self-referential process structured the debate regarding the reform of s 59 by moving the debate's focus from the subjective needs of children, to competing and objective rights. As part of the law reform process, communications regarding the old s 59 were translated into "legal communications" that generated themselves through referring to the requirements of the legal system itself and were regulated by the requirements of legal process.⁴⁷⁷ These autopoietic, self-referential processes constructed children and adults as objectified rights-holders (a form of "semantic artefact"⁴⁷⁸) and this confirmed the legal system's operative closure.

The legal system's process of translating children and adults into objectified rights-holders was evident in many of the parliamentary speeches regarding the old s 59.⁴⁷⁹ The following excerpts provide examples:

Judith Collins (National) claimed that the law change "gives people a right to say: 'I can tell you what you do in your home. I can be in charge of you in your home, because you as a parent have no greater right than a school teacher over your child.'⁴⁸⁰

Bill English (National) argued that the "ideological push to separate children and their rights from those of their families, in the context of people who care for them, has reached its high tide and is now receding" and referred to "the established right and care of a parent to discipline a child."⁴⁸¹

⁴⁷⁷ These processes are discussed supra at 18.

⁴⁷⁸ For a discussion of this terms see supra at 14.

⁴⁷⁹ See infra at 111 for a discussion of the relationship between the legal and political systems and its implications of operative closure.

⁴⁸⁰ (2007) 637 NZPD 7990, accessed at http://www.parliament.nz/en-NZ/PB/Debates/Debates/3/d/e/48HansD_20070314_00001195-Crimes-Substituted-Section-59-Amendment.htm (27 June 2008).

⁴⁸¹ (2007) 638 NZPD 8850, accessed at http://www.parliament.nz/en-NZ/PB/Debates/Debates/3/f/6/48HansD_20070502_00000954-Crimes-Substituted-Section-59-Amendment.htm (27 June 2008).

Heather Roy (ACT) claimed that “[p]arents in this country want the right to be able to choose for themselves how they bring up their children.”⁴⁸²

Gerry Brownlee (National) argued that parents should be able to “exercise their right to ensure their children are brought up with some discipline in their life.”⁴⁸³

All of these references illustrate how both adults and children were constructed as objectified semantic artifacts to which the legal system could respond by allocating rights. Consequently, the ‘thing’ at stake in the debate became not children themselves but objective rights. It is this process of responding to objective constructions of reality rather than subjective realities that is the basis of operative closure. The systemic requirements of the law as an autopoietic system, with its self-referential focus on rights-holders, therefore played a significant role in limiting the debate concerning s 59 and closing off the legal system from the subjective realities of children (and adults).

The parliamentary debates regarding the old s 59 often focused on the rights of parents, rather than on the rights of children. This focus on parental rights minimised the number of references in the debates to social science research findings regarding the efficacy or long-term effects of physical discipline. The exclusion of social science research is a feature predicted by Luhman’s and Teubner’s theories on the basis that such research, as discourse not amenable to being constructed into the stark legal/illegal dichotomy required by the legal system, cannot be referred to in legal discourse without significant translation.⁴⁸⁴ Furthermore, the emphasis on parental rights minimised the consideration of the rights of children. Although the rights of children played a significant role in the arguments for reform presented by advocates for repeal of the section,⁴⁸⁵

⁴⁸² Ibid.

⁴⁸³ Ibid.

⁴⁸⁴ Supra at 18.

⁴⁸⁵ See, for example, Breen, supra n 457 at 391.

such considerations were not a feature of the parliamentary debates regarding s 59.

The focus on parental rights in the Parliamentary debates, rather than on the rights of children themselves, was another result of the self-referential nature of the legal system constructing the debate. The legal system was required to respond to communications about the maltreatment of some children by their parents. The primary tool at the legal system's disposal was the creation of a boundary between legal and illegal behaviour, a boundary established by the old s 59 in conjunction with other provisions of the Crimes Act. By referring to this binary distinction, the legal system was able to translate the communications generated within the political system into a legally valid form. This, in turn, dictated the structure of the law's self-productive response by restricting it to the establishment of a new boundary between legal and illegal conduct through the criminal law. However, as criminal law is one of the clearest examples of the use of state power to create norms and enforce compliance, the legal system's construction of the reform process within the criminal law context focused the debate concerning the repeal of s 59 on the exercise of power over children and whether that power should be exercised by the state or by parents.

6.4.3 Operative closure

The role of the political system in amending the old s 59 appears to contradict Luhman's and Teubner's claims that the legal system is operationally closed and unable to interact with other systems.⁴⁸⁶ The political system clearly interacted with the legal system throughout the law reform process for the old s 59. However, Luhmans' and Teubner's theories of operative closure are based on the thesis of informational or semantic closure, not closure to matter or energy from other systems such as the political system.⁴⁸⁷ Consequently, the apparent relationship between the legal and political system does not contradict Luhman's and

⁴⁸⁶ Supra at 20, although Teubner allows for the possibility of limited "interference".

⁴⁸⁷ Supra at 17.

Teubner's theories. Their theories of operative closure focus on the systemic requirements for producing knowledge through communication and argue that these processes are operatively closed.⁴⁸⁸

Luhman's and Teubner's theories provide an explanation for the extent to which the political debate concerning the old s 59 was controlled by the legal system's functional requirements, particularly the requirement to reduce complexity through use of the legal/illegal dichotomy and focus on objectified rights. Complex family dynamics were reduced during the political debate to binary distinctions and objectified rights-holders and this resulted in the legal system producing abstract knowledge about the world and family relationships. This abstract knowledge, in turn, led to operative closure of the legal system. If Luhman and Teubner are correct, this operative closure will prevent the reform from being effective as a tool of social regulation because the norms created by the new law will be caught within the law's closed and abstract world.⁴⁸⁹ However, if Habermas is correct, this closure could be overcome if the new law is perceived to be a valid exercise of power through democratic processes.

6.4.4 Power and validity

The legal system's requirement to define a boundary between legal and illegal conduct emphasises its basis in state power, as it is the state's ability to enforce the distinction through the exercise of power and the imposition of punishment that gives the boundary its significance. Although moral arguments for and against corporal punishment could be potentially significant aspects of debates within the political or other social spheres, they had little impact during the law reform process for s 59. The process was governed by the techniques of power.

The legal system's foundation on techniques of power was particularly evident during the s 59 amendment process. Although the process led to a change in the law, the change was not supported by a majority of the

⁴⁸⁸ Supra at 11.

⁴⁸⁹ Supra at 20.

voting population. Before the amending bill passed, opinion polls indicated that up to 85% of the voting public were opposed to the amendment or repeal of s 59.⁴⁹⁰ After the amendment was passed, surveys indicated that potentially 78% of parents would continue to smack their children when they considered it reasonable to do so for the purposes of correction.⁴⁹¹ It therefore appears that the amendment did not enjoy the support of a potentially significant percentage of New Zealand's population at the time it was made.

As examined in chapter three, Habermas argues that for the legal system to perform its function of maintaining social integration,⁴⁹² it must be perceived to be valid. This validity has both subjective and objective elements and is created through processes of 'deliberative democracy'.⁴⁹³ Consequently, for law reform such as the amendment of s 59 to be valid, it must arise from social consensus generated through democratic processes. Given the lack of general support for the amendment to s 59, it may not be perceived to be valid by a potentially significant part of New Zealand society and this may have an impact on its ability to influence behaviour.

Even if the amended s 59 is not perceived to be valid, compliance with the law is still possible but, in Habermas' terms, such compliance will generally be strategic rather than performative compliance.⁴⁹⁴ Compliance with the new s 59 may be based on an appreciation of the consequences of non-compliance rather than on a belief in the validity of the legal norm itself. Arguably, from the perspective of children who will be affected by the law change, compliance enough will be sufficient, regardless of whether such compliance is performative or merely strategic. However, if Habermas is correct, the validity of the legal system as a whole is

⁴⁹⁰ Houlahan, M "Public opinion says 'no', but Clark and Cullen say 'yes'" *New Zealand Herald*, 28 March 2007 viewed at http://www.nzherald.co.nz/topic/story.cfm?c_id=247&objectid=10431255.

⁴⁹¹ "78pc of parents say they'll still smack" *New Zealand Herald* 18 June 2007 viewed at http://www.nzherald.co.nz/feature/story.cfm?c_id=1501165&objectid=10446314.

⁴⁹² *Supra* at 28.

⁴⁹³ *Ibid.*

⁴⁹⁴ *Supra* at 31.

weakened the more it relies on strategic compliance. Furthermore, reliance on strategic compliance reveals the power that provides the “mystical foundation” of law’s authority,⁴⁹⁵ as obtaining strategic compliance is dependent on the state’s ability to use force against its citizens.

To avoid excessive reliance on strategic compliance with the law, and the resulting loss of perceived legitimacy for the legal system, the state needs to work towards achieving performative compliance with all legislation, including the new s 59. However, given that the legal system’s operations are restricted to defining and enforcing the boundary between legality and illegality, there is little that the legal system itself is able to do to convert strategic compliance to performative compliance. The state needs to employ other tools, public education for example, to achieve performative compliance. The risk for the legal system with unpopular law reform such as the amendment of s 59, is that strategic compliance can be considered sufficient by political actors, particularly given the costs (both financial and political) of obtaining performative compliance, and this can ultimately destabilize the democratic process.

6.4.5 The operations of democracy

The debate concerning s 59 highlights some of the theoretical difficulties with Habermas’ approach to democratic processes when considering the legal system’s response to child maltreatment. Although Habermas argues that the law’s validity should be based on social consensus developed through the processes of deliberative democracy, in New Zealand, as in other Western democracies, it is the consensus of elected *representatives* that creates the law. The link between legal validity and political reality is therefore somewhat haphazard, as individuals subject to the law cannot necessarily perceive themselves to be the rational authors of the law. As evidenced by the s 59 amendment process, representative democracy can create law which does not reflect the consensus of opinion

⁴⁹⁵ Derrida, *supra* n 3 at 12.

amongst those represented and yet it is the participation and consensus of all citizens affected by the law which, for Habermas, creates legal validity.

If legal validity is dependent on a consensus of those affected, particular difficulties arise when the law responds to the interests of children given their exclusion from democratic processes. Sue Bradford specifically acknowledged this point during the Parliamentary debates concerning the amendment of the old s 59. She pointed out that "... children should be at the centre of this debate ... but sadly children's voices are not often heard in this place of power"⁴⁹⁶ and she argued against a referendum proposed by United Future on the basis that it would be just "another way in which children and young people are completely disenfranchised."⁴⁹⁷

The fact that children's voices were not heard during the amendment process for s 59 is a clear breach of article 12 of the UNCRC, which gives children who are capable of forming their own views a right to express those views freely in all matters that affecting them. Given the link between rights and deliberative democracy identified by Habermas⁴⁹⁸ it is particularly significant that the right for children to participate in the s 59 debates was not recognised. This normative requirement of the legal system was not communicated to the political system and is a further example of the inter-system communication difficulties that lead to operative closure.

As previously noted, if Habermas' theory regarding the validity of the law is correct, it could be used as an argument against Luhman's and Teubner's theories of operative closure.⁴⁹⁹ However, the law reform process for the old s 59 indicate that democratic processes proceed on a representative basis, can rely on strategic rather than performative compliance, and that social differences (differences in social power, to use Derrida's definition⁵⁰⁰) operate to exclude children in particular from participating in

⁴⁹⁶ (2007) 637 NZPD 7990 supra n 478.

⁴⁹⁷ Ibid.

⁴⁹⁸ Supra at 34.

⁴⁹⁹ Supra at 122.

⁵⁰⁰ Supra at 4.

law reform processes. All of these factors indicate that Habermas' theory offers more of an ideal description of the law, rather than a description of how the law actually operates. In contrast, many of the features of the s 59 debate were predictable using Luhman's and Teubner's theories of autopoietic, operative closure. Although the new law is perhaps too new to be subject to final judgement, the influence of the new law to date indicates that it has had little influence. This confirms Luhman's and Teubner's argument that the legal system, as a consequence of its operative closure, is limited in its ability to reform society.

6.4.6 The influence of the new law

On 21 June 2007 the old s 59 was replaced with an amended section that specifically excluded parental correction as a justification for the use of force against children.⁵⁰¹ It could be argued that this amendment represented a significant response by the legal system to child maltreatment.⁵⁰² However, if the law operates as a closed system, through autopoietic processes such as self-reference and self-production as I have argued in this chapter, the amendment simply represents an internal adjustment within the closed world of the legal system itself.

This conclusion is supported by a review completed three months after the amendment came into effect, which found that the new law had had little, if any, practical impact on police activity relating to child maltreatment.⁵⁰³ Even during the law reform process, the proponent of the bill acknowledged that the amendment would not change the "culture of violence against children in New Zealand" or change the fact that "many minor and technical assaults take place" in New Zealand each day without legal consequences arising.⁵⁰⁴

⁵⁰¹ Section 5 of the Crimes (Substituted Section 59) Amendment Act 2007.

⁵⁰² Such arguments also need to establish that physical punishment by parents is a form of maltreatment. An examination of this argument is beyond the scope of this thesis.

⁵⁰³ Three Month Review of Police Activity Following the Enactment of the Crimes (Substituted section 59) Amendment Act 2007 available at <http://www.police.govt.nz/resources/2007/section-59-activity-review/>

⁵⁰⁴ Bradford MP, S Parliamentary Speech 21 February 2007 available at <http://www.greens.org.nz/searchdocs/speech10600.html>. (27 June 2008).

The fact that the amendment of s 59 appears to have had little practical effect, despite the significant public debate and political activity it generated, confirms the operative closure of the legal system and the restriction this places on its ability to respond to child maltreatment. This operative closure was evident throughout the law reform process. It arose from the system's functional requirement to construct an appropriate boundary between legal and illegal behaviour, from the limitations generated by normative conceptions of childhood, the role power dynamics played in constructing the discursive processes of reform and balancing competing rights and the objectifying nature of rights discourses in general. All of these factors played a part in constructing the debate to meet the semantic requirements of the legal system itself, rather than the needs of children who, when they were considered at all, became objectified as semantic artefacts.

These arguments do not mean that the reform process was futile. Sue Bradford argued that the repeal of s 59 would be "a small but necessary step towards beginning to turn ... attitudes (accepting violence towards children) around."⁵⁰⁵ Habermas' theories can be used to support this argument on the basis that the law reform process encouraged public debate and involvement in democratic processes of reform, both of which assist with constructing perceptions of legal validity and encouraging performative compliance when consensus is achieved. Although the lack of social (as opposed to political) consensus regarding the amendment suggests that even these goals may not have been achieved by the s 59 reform process, this may change over time as societal inertia gradually transforms strategic compliance into performative compliance. However, this process is by no means inevitable and in the meantime the legal and political systems must manage the risks to ongoing validity associated with relying on strategic compliance with the law. Furthermore the production of knowledge through the democratic processes excluded participation

⁵⁰⁵ Ibid.

from children, despite their right to be heard (a failure of the legal system to communicate its normative requirements).

In this chapter I have argued that the process of law reform evident from the s 59 amendment process supports Luhman's and Teubner's claims that the law operates as a closed system. As a consequence of this closure, the amendment of the old s 59 has only achieved goals relevant to the legal system itself (complying with the UNCRC for example) but has not been able to communicate its norms in any effective way to society. I have also shown that although Habermas' theory offers some useful concepts for understanding how law reform processes can be improved by encouraging debate and performative compliance, his theory ultimately fails to describe how the legal system operates or negate the operative closure proposed by Luhman and Teubner.

This chapter has focused on the processes involved with the *creation* of law. In the next chapter I will examine how the law is *applied* by examining some recent cases of child maltreatment. I will argue that these cases also confirm Luhman's and Teubner's claims that the law operates as a closed system and is consequently limited in its ability to regulate society to protect children.

Chapter 7 Applying the Law

7.1 Introduction.

In chapter 6 I examined the processes surrounding the law's creation and argued that these processes operate autopoietically and consequently limit the law's ability to prevent child maltreatment through law reform. In this chapter I will examine some recent cases where the legal system was called upon to apply existing law. These cases confirm that the systemic restraints that limit the effectiveness of law's creative processes also apply when the law is applied. I will begin by examining the operation of the care and protection regime established under the Children, Young Persons and Their Families Act 1989 ("the CYPTF Act"). I will then examine the law's response to child maltreatment when the care and protection regime has not been invoked and children come before the legal system under the custody and access regime.

7.2 The care and protection of children

The CYPTF Act establishes a legal regime for the care and protection of children. One of the CYPTF Act's objectives is to protect children from "harm, ill-treatment, abuse, neglect and deprivation"⁵⁰⁶ and to achieve this objective it gives wide powers to the Department of Child, Youth and Family Services ("CYFS") and to the Family Court to intervene in the lives of children and their families.

A full review and critique of the care and protection regime established by the CYPTF Act is beyond the scope of this chapter.⁵⁰⁷ I will therefore focus on how the law's ability to respond to the needs of children through the care and protection regime is limited by the nature of the legal system.

⁵⁰⁶ Section 4(e)

⁵⁰⁷ For review and critique see, for example: New Zealand Council of Christian Social Services *Is Any Progress Being Made in Care and Protection for New Zealand Children* (2006) and New Zealand Ministry of Social Development *Care and Protection Blueprint 2003: Families, Communities and Government Working Together for the Safety and Wellbeing of Children, Young People and Their Families* (2003).

To do so, I will examine how the care and protection regime failed to protect Olympia Jetson and Saliel Aplin from their stepfather as these failures confirm and illustrate many of the limitations of the legal system identified in this thesis.

7.2.1 The Aplin Report

Olympia Jetson and Saliel Aplin were murdered by their step-father when they were 11 and 12 years old respectively. The Office of the Children's Commissioner completed a detailed report on the state's involvement in Olympia and Saliel's lives ("the Aplin Report").⁵⁰⁸ The Aplin Report noted that, in their short lives, Olympia and Saliel:

1. Lived in ten homes;
2. Attended six different schools;
3. Lived in eight different towns or cities;
4. Lived with their grandparents for two years after being removed from their mother's care;
5. Lived apart from their younger sister for five years;
6. Lived with their mother and two different partners, both of whom were violent;
7. Lived in a house with up to ten children intermittently for four years;
8. Were exposed to 12 recorded incidents of violence and at least 35 violent incidents not reported;
9. Alleged abuse on at least five occasions;
10. Attended counselling intermittently since they were three and four years old;
11. Were psychologically assessed by court order on at least two occasions; and
12. Were monitored by CYFS nearly all of their lives.⁵⁰⁹

These factors illustrate two points in particular. Firstly, any attempt to respond to child maltreatment must adopt a holistic, 'whole child'⁵¹⁰

⁵⁰⁸ Office of the Children's Commissioner *Report of the Investigation into the Deaths of Saliel Jalessa Aplin and Olympia Marisa Aplin (also known as Jetson)* (2003).

⁵⁰⁹ *Ibid*, 14.

approach. The maltreatment Olympia and Saliel suffered, maltreatment that culminated in their murders, occurred within a wider context that included significant issues of poverty, housing difficulties, transience, on-going domestic violence and possibly sexual abuse.⁵¹¹ Their story highlights that responding to child maltreatment requires a wide-ranging response to a variety of social and individual factors. However, such a wide-ranging response is beyond the power of the legal system which, due to its inherent systemic limitations, is only able to respond to individual situations and specific events.

The second feature highlighted by the brief summary outlined above is that Olympia and Saliel were monitored by the legal system's care and protection processes (both through court ordered assessments and by CYFS) nearly all of their lives and yet, despite this monitoring, they were not only exposed to significant levels of violence and disruption throughout their lives but were ultimately murdered by their step-father. The state's response to Saliel and Olympia's plight was clearly ineffective.

7.2.2 Lost in translation

The Aplin Report identified that the state's ineffective response was due to a number of factors including, in particular, poor practice within CYFS (attributable in part to inadequate resourcing and poor management) and a lack of sufficient communication between the various statutory and other entities that had involvement with the Aplin/Jetson family (including CYFS, the Police, schools and the professionals involved with the family at various stages).⁵¹² It is significant to note that these conclusions were almost a repeat of the conclusions of a report the Office of the Children's

⁵¹⁰ For an overview of such approaches, see Breen, C (ed) *Children's Needs, Rights and Welfare: Developing Strategies for the 'Whole Child' in the 21st Century* (2004).

⁵¹¹ Despite the allegations of sexual abuse made against their stepfather, Bruce Howse, he has not been convicted of any charge of sexual abuse and the Court of Appeal noted that the allegations of abuse Olympia and Saliel made to their school friends should not have been admitted during the murder trial as their allegations did not meet the test of sufficient apparent reliability; *R v Howse* (2003) 20 CRNZ 826, paras 27-32, 42.

⁵¹² Office of the Children's Commissioner, supra n 508 at 1.

Commissioner had prepared 3 years following the murder of James Whakaruru (“the Whakaruru Report”).⁵¹³ That report concluded that:

There ought to be fundamental and operational adherence to the care and protection legislation and clear, strong links between the policies and practices of other jurisdictions, so that in all matters the best interests of the child are of paramount concern.⁵¹⁴

Both the Aplin Report and the Whakaruru Report therefore highlight the importance of communication between systems such as the legal system and social services systems such as CYFS. However, Luhman and Teubner both argue that social systems operate as systems of meaning and produce their own knowledge in order to meet their own systemic requirements and that once these systems become autopoietically closed, they are unable to communicate with other social systems.⁵¹⁵ Their theories may therefore offer some explanation for the communication problems that contributed to the state’s failure to protect Olympia and Saliel from their step-father. Examining the way in which the legal system responded to Olympia’s and Saliel’s allegations of abuse confirms that it generated its own communications in accordance with its own functional requirements and knowledge production processes and that this contributed to the communication difficulties identified in the Aplin Report.

The Aplin Report and the criminal case against the step-father⁵¹⁶ both examined the way in which the legal system dealt with allegations that the step-father had been violent towards both Olympia and Saliel throughout their lives. This violence occurred to such an extent that shortly before her murder Olympia recorded in her diary that “my father is going to kill me.”⁵¹⁷ However, for these allegations to be effective within the legal system, they had to be translated into legally valid communications.⁵¹⁸ It was this

⁵¹³ Office of the Children’s Commissioner, *Final Report into the investigation of RIR-O-TE-RANGI (James) Whakaruru*, (June 2000).

⁵¹⁴ *Ibid*, 25.

⁵¹⁵ *Supra* at 8 and 16.

⁵¹⁶ *R v Howse* (2003) 20 CRNZ 826.

⁵¹⁷ Office of the Children’s Commissioner, *supra* n 508 at 7.

⁵¹⁸ This translation process is examined *supra* at 18.

translation process that limited the legal system's ability to respond to Olympia and Saliel adequately because the realities of Olympia's and Saliel's situation were lost in the translation process.

One translation difficulty arose from the systemic requirement, or at least preference for, a formal complaint. Consequently, when Olympia and Saliel's mother withdrew the formal complaints she made,⁵¹⁹ the legal system was left without a legally valid communication to respond to. Further difficulties arose from the evidentiary requirements for a valid legal communication. Complaints that were made to the family doctor, for example, provided insufficient evidence to proceed with a formal legal process.⁵²⁰ On a more practical level, other complaints were not actioned because of a "failure of the statutory agencies to report and respond."⁵²¹

These translation difficulties prevented the formation of valid legal communications and illustrate one of the most significant limitations on the legal system's ability to prevent maltreatment: the legal system *responds*; it is inherently reactive. Without the generation of a legal communication on terms acceptable to the legal system itself, the legal system was unable to respond to Olympia's and Saliel's needs and exercise its power to protect them from their step-father. Furthermore, these translation difficulties not only limited the legal system's ability to receive communications from other systems but also limited the legal system's ability to communicate its norms *to* those other systems.

As discussed in chapter five, legal rights, particularly participation rights, are designed to transfer power to children and enable them to participate in the creation of knowledge about their own lives.⁵²² To complete this transfer of power, the legal system must be able to communicate its norms to other systems. Olympia and Saliel had a right under s 5(d) of the CYPTF Act to participate in any decision concerning the state's role in

⁵¹⁹ Office of the Children's Commissioner, *supra* n 508 at 11.

⁵²⁰ *Ibid.*

⁵²¹ *Ibid.*, 45.

⁵²² *Supra* at 77 – 96.

their lives. This right should have empowered Olympia and Saliel to participate in generating legal communications to trigger the operation of legal power on their behalf. However, it is clear from the Aplin Report that the establishment of a legal right for Olympia and Saliel to participate in the production of knowledge about their lives was not communicated to the other social systems that were involved in Olympia's and Saliel's lives.

Although Olympia and Saliel both had the right to express their views, there were only five records of the social workers involved with their family actually talking directly to them.⁵²³ Consequently, the social workers related almost exclusively to the adults in the family and this, in turn, had a significant impact on their ability to “objectively consider the risks the children faced in an environment of ongoing domestic violence and abuse”.⁵²⁴ The existence of the legal right of participation may have been known to these social workers, but it was not communicated at a systemic level to alter their behaviour or the requirements of the social service systems they operated within.

7.2.3 Enforcing legal norms

The failure of the social workers involved with Olympia and Saliel to recognise their right to participate in the production of knowledge about their lives highlights a major consequence of the law's operative closure; creating the law achieves little, it requires implementation in practice to be effective.⁵²⁵ Attempts to use the legal system to protect children from maltreatment therefore need to recognise that the law's effectiveness is dependent upon the activities of other systems to recognise and enforce the law's normative standards. However, these other systems operate within their own systemic restraints and struggle to receive and implement communications from the legal system. This ultimately restricts the legal system's ability to respond to child maltreatment and protect children such as Olympia and Saliel.

⁵²³ Ibid, 3.

⁵²⁴ Ibid, 3.

⁵²⁵ Freeman, supra n 370 at 173.

7.2.4 Power produces knowledge

As noted in chapter four, one of the ways in which the law produces knowledge about the world is by using the conception that children are the objects of parental rights and responsibilities. The CYPTF Act develops this traditional conception by locating the primary responsibility for the care and protection of children within their family group, rather than their parents alone. The CYPTF Act incorporates a wide definition of the term “family” that includes whanau, hapu and iwi or any culturally recognised family group or any extended family where the child has psychological attachment to at least one of the adults in the group.⁵²⁶ To recognise the rights and responsibilities of the family group to care for and protect children, the CYPTF Act established the Family Group Conference as the primary mechanism for resolving care and protection issues.⁵²⁷

By locating responsibility for the care of protection of children primarily within the family group, the law gives to such family groups the power to produce knowledge about children that can form the basis of valid legal communications within the legal system itself. This empowerment of family groups, rather than children alone, has significant implications for the way in which knowledge is produced within and outside the legal system. However, the CYPTF Act also empowers social workers and other professionals to contribute to the production of knowledge about children.

The Aplin Report specifically considered the way in which social workers produced knowledge about Olympia and Saliel. The writers of the Aplin Report argued that the social workers involved with Olympia and Saliel placed too much emphasis on forming and maintaining relationships with the family at the expense of a careful analysis of the child’s situation.⁵²⁸ Consequently, the knowledge that was produced about Olympia’s and

⁵²⁶ Section 2. The reference to “psychological attachment” allows the definition to include foster parents; *Re P* (2000) 20 FRNZ 19.

⁵²⁷ Sections 20 - 38 of the CYPTF Act.

⁵²⁸ Office of the Children’s Commissioner, *supra* n 508 at 51.

Saliel's lives failed to incorporate their subjective experiences or perspectives and only reflected the views of the adults who held power over their lives. It is difficult to determine whether this was an unforeseen consequence of the importance given to family relationships within the Act or the result of the psychological and human dynamics that arise between social workers and those they encounter when carrying out their duties. Whatever the cause, it is clear that the legal system's ability to respond to child maltreatment can be restricted by a focus on the adult relationships surrounding children at risk, a focus supported by the conceptions of childhood used to justify the law itself.⁵²⁹ This limitation contributes to the operative closure of the legal system by allowing the legal system to produce knowledge about the world that serves the interests of power, rather than the interests of children themselves.

7.2.5 Summary

The Aplin Report is harrowing reading. Olympia Jetson and Saliel Aplin were subjected to violence and abuse throughout their lives, culminating in their murder at the hands of their stepfather.⁵³⁰ They suffered despite the care and protection regime established by the Act. Although the Aplin Report did not raise any particular concerns about the care and protection regime established under the CYPTF Act, it did raise significant concerns about the implementation of that regime and the communication failures that restricted the ability of the various state systems from responding adequately to Olympia's and Saliel's needs. These concerns confirm that the care and protection regime established under the CYPTF Act is operationally closed and consequently limited in its ability to protect children from maltreatment. The regime cannot communicate its norms to other systems and can only act reactively to impose consequences rather than proactively to address systemic causes of maltreatment. These limitations are exacerbated by the difficulties of communicating between

⁵²⁹ See also *infra* at 135 which discussed similar issues arising in the context of a custody and access dispute.

⁵³⁰ Although the details of this abuse may never be known, as acknowledged by the Court of Appeal in *R v Howse* *supra* n 511, it is clear that significant maltreatment was a feature of Olympia's and Saliel's lives.

social systems and the legal system's own requirements for producing legally valid communications. All of these limitations confirm Luhman's and Teubner's claims that the legal system is operationally closed and consequently unable to regulate society. In the next section I will review the case of *PCN v JCF*⁵³¹ ("*PCN*"), to determine whether operative closure is evident in another area where the law is often required to respond to child maltreatment; custody and access.

7.3 Custody and access - *PCN*

PCN is a case that involved custody and access applications within the context of a violent family. It illustrates a number of difficulties with the legal system's ability to respond when children live within a violent environment. In particular, *PCN* illustrates the power that the law has to produce its own knowledge about children and how this power leads to operative closure.

7.3.1 The facts of *PCN*

The decision in *PCN* arose from custody applications made by the mother and father of two children (an 11-year-old boy and a 6-year-old girl) and was decided in 2005. The children who were the subjects of the case had been living with their father since 2003, although their mother had not given consent to this custody arrangement. Although the mother had originally been granted custody, the father had removed both children from her care in 2003. The mother stated that she did not resist the father's removal of the children in 2003 or apply for custody until 2005 because she was "too afraid" of the father.⁵³²

The father initially applied for interim and final custody orders in July 2003 but he did not bring to the Family Court's attention at that time the facts that the mother already had a final custody order or that he was uncertain whether a final protection order had been granted against him. Nor did he

⁵³¹ [2005] NZFLR 625.

⁵³² *Ibid.*

advise the Court that his supervised access order had been suspended in 2000 after he had seriously assaulted the mother. The Court eventually considered the father's application and the mother's response in March and April 2005.

The Court found that the father had used sustained and serious violence against the mother throughout their relationship. The father had used this violence to control the mother and it had damaged her physically, emotionally and psychologically.⁵³³ His violence included an attempt to run the mother over with a car; an attempt that led to a six-month prison sentence.⁵³⁴ Significantly, the children were in the car with the father when he attempted to run over their mother.

Various reports concerning the children were prepared throughout 2004. On the basis of these reports, the Court found that the children had suffered "considerable psychological and emotional harm" as a result of witnessing the violence their father inflicted on their mother.⁵³⁵ One report, stated that the son appeared "to be stuck in a pattern of fear and worry as a result of what he has experienced" and that he was "experiencing traumatic memories from the past ... accompanied by fear or anxiety at a level that is disturbing or aversive."⁵³⁶

The father described the violence in the relationship as equal.⁵³⁷ Although he admitted that he had acted violently towards the mother he did not accept the level of violence the mother alleged, despite his three criminal convictions for assaulting her. In contrast, the mother described the way in which the father used his violence to exercise power and control over her life. She believed the father would kill her.⁵³⁸

⁵³³ Ibid, 631.

⁵³⁴ Ibid, 630.

⁵³⁵ Ibid, 635.

⁵³⁶ Ibid, 634.

⁵³⁷ Ibid, 629.

⁵³⁸ Ibid, 630.

Overall, the Court found that the evidence was

overwhelming that the violence used by Mr N against Ms F was serious. It was cruel, harsh and brutal without regard to the consequences for Ms F.⁵³⁹

Furthermore, the Court found that although the children had not been the victims of physical violence directed against them, they had been significantly affected by the violence between their parents.

In *PCN*, the legal system was required to respond to the needs of two children living within a context of significant family violence. Examining how the law responded confirms that the law generally produces its own knowledge about the world and consequently operates as a closed system. However, the case also indicates that family law in particular attempts to overcome this operative closure by actively incorporating communications from other social systems. Both of these elements are evident in the way in which the law produced knowledge about the lives of the children involved in *PCN* by defining whether they were victims of abuse.

The custody applications in *PCN* were made in 2003 and the definitions of abuse and the consequences of that definition established by s 16B of the Guardianship Act 1968 therefore applied. Although the Guardianship Act 1968 has now been replaced by the Care of Children Act 2004, the provisions of s 16B were repeated in ss 58 to 61 of the Care of Children Act 2004 and the issues arising from *PCN* therefore continue to be relevant.⁵⁴⁰ I will therefore consider the operation of 16B in *PCN* in detail to illustrate how the application of the law contained in s 16B confirms the

⁵³⁹ Ibid.

⁵⁴⁰ Although the terminology in the Care of Children Act 2004 differs from that in the Guardianship Act 1968, in particular in its references to “day-to-day care” and “contact” rather than “custody” and “access”, the same processes apply under both Acts. Consequently, although this chapter refers to the historical position under the Guardianship Act 1968, the comments are equally applicable to the operation of the Care of Children Act 2004.

operative closure of the legal system. I will focus particularly on the operation of sections 16B(4) and (5).

7.3.2 Section 16B(4)

Section 16B(4) of the Guardianship Act 1968 provided:

Where, in any proceedings to which this section applies, the Court is satisfied that a party to the proceedings (in this section referred to as the violent party) has used violence against the child or a child of the family or against the other party to the proceedings, *the Court shall not* –

- (a) make any order giving the violent party custody of the child to whom the proceedings relate; or
- (b) make any order allowing the violent party access (other than supervised access) to that child,

unless the Court is satisfied that the child will be safe while the violent party has custody of or, as the case may be, access to the child [emphasis added].

I will consider two significant aspects of this section. The first is that the section reflects a wide definition of child abuse by applying not only when a child is the recipient of violence themselves, but also when violence has been used against other family members. The second aspect I will consider is the nature and effect of the jurisdictional barrier to custody or access created by the words I have emphasised in the section.

7.3.3 Defining child abuse

Through its power to construct and apply definitions, the law produces knowledge about the world.⁵⁴¹ In custody cases such as *PCN*, the law exercises this power to define the nature of adult behaviour and its effect on children. Traditionally, the law's approach was to consider the impact of family violence on children only if they had been the recipients of

⁵⁴¹ *Supra* at 3.

violence or abuse themselves.⁵⁴² However, there is increasing evidence that children are significantly affected by observing, hearing and being aware of the violence inflicted on members of their family and that children raised within violent homes face an increased risk of becoming victims of violence themselves.⁵⁴³

The risk that spousal violence will be detrimental for children, both in terms of emotional and psychological harm and in terms of an increased risk of physical maltreatment, has led the legal system in New Zealand to expand its definitions of abuse. These expanded definitions of abuse have allowed the law to produce knowledge about children that takes account of broader contextual issues. Consequently, definitions of abuse in legislation such as the Domestic Violence Act 1995,⁵⁴⁴ the Care of Children Act 2004⁵⁴⁵ and s 16B(4) of the Guardianship Act 1968 all define abuse to include both actions directed towards children and actions that create an unhealthy, violent environment for children. Section 16B(4) of the Guardianship Act used this definition by restricting custody and access rights for adults who “used violence against the child *or a child of the family or against the other party to the proceedings*” [emphasis added].⁵⁴⁶

The Court in *PCN* accepted that the children had been “emotionally and psychologically harmed by witnessing family violence between their parents.”⁵⁴⁷ The wider, contextual understanding of abuse incorporated into s 16B(4) therefore structured the Court’s response to protect the children from the effects of their father’s violence against their mother. However, the Court was still able to employ conceptions of childhood to

⁵⁴² For a summary of this approach see Chetwin, A, Knaggs, T, and Young, P “The Domestic Violence Legislation and Child Access in New Zealand” [1999] <http://www.justice.govt.nz/pubs/reports/1999/domestic_violence/introduction.html#1.1%20Background%20to%20research%20study>

⁵⁴³ Robertson, N and Busch, R “Not in Front of the Children: Spousal Violence and its Effects on Children” (1994) 1 BFLJ 107. See also Office of the Children’s Commissioner, *supra* n 508 at 29. For an alternative view see Doogue J, “The Domestic Violence Act 1995 and s 16B of the Guardianship Act 1968 -- the effect on children’s relationships with their non-custodial parent” (2004) 4 BFLJ 243.

⁵⁴⁴ Section 3(3).

⁵⁴⁵ Sections 58 to 61.

⁵⁴⁶ Section 16B(4).

⁵⁴⁷ *Supra* n 531 at 635.

discount the effects of the father's use of force against the children themselves.

No evidence was presented in *PCN* that the father had caused any physical harm to either child.⁵⁴⁸ However, the father acknowledged that he had been "quite hard" on his son and would "boot his bum' or smack him on the bum with open hands."⁵⁴⁹ He would also smack his daughter. The father defended this behaviour on the basis that it was parental discipline. The Court appeared to accept this claim as it simply noted that the father's actions were "in the context of discipline."⁵⁵⁰ However, it must be borne in mind that the father's use of physical force for disciplinary purposes occurred within a family context that included extreme physical violence towards the mother, violence that the children had witnessed and that had been used as a tool of power and control. This context could have had an impact on how the children subjectively experienced their father's use of physical discipline. Although the father may have intended his use of force against the children as simple discipline, it is not clear that the children experienced his use of force in such a de-contextualised way. However, because the father was able to raise 'parental discipline' as a defence for his applications of physical force against the children, the children's subjective experiences of that force were overlooked. Consequently, the knowledge the law produced about the children confirmed the legal system's operational closure from the realities of their lives.

Although the Court was able to disregard the father's use of force against his children by employing conceptions of childhood and parental rights of discipline, it was bound to follow the processes set out in s 16B once it had determined that the father had used violence against the mother. These processes established a jurisdictional barrier restricting the options available to the Court and confirm the self-referential nature of the legal system's response.

⁵⁴⁸ Ibid, 633.

⁵⁴⁹ Ibid.

⁵⁵⁰ Ibid.

7.3.4 The jurisdictional barrier

Through use of the word obligatory words “shall not ... unless”,⁵⁵¹ s 16B(4) established a jurisdictional barrier for legal decision-making.⁵⁵² If a Court was satisfied that violence had occurred, it had no discretion but was obliged to make decisions regarding the safety of the child or children involved before making any decision regarding custody or access. Unless a Court could be satisfied that granting the violent applicant custody or access would be safe, it was jurisdictionally unable to grant the violent party anything other than supervised access.

The jurisdictional barrier established by s 16B(4) was designed to remove the inconsistencies that could arise as a result of different judges applying differing conceptions of childhood when applying the law, particularly the conception that parents’ rights over ‘their’ children include a right of access. This conception is obvious in critiques of s 16B such as that offered by Doogue J, who argues that the section could result in an “unacceptable disenfranchisement” of parents.⁵⁵³ Section 16B therefore attempted to reduce the possibility for inconsistency by prioritising the rights of children to safety over the rights of their parents to have contact.

Section 16B’s goal of securing a consistent application through the establishment of a jurisdictional barrier was specifically referred to in *Blom v MacKay*⁵⁵⁴ where Heath J stated:

It is not for this Court to express any view as to the preferable policy approach. The role of this Court, as a Court exercising appellate jurisdiction from the Family Court, is to interpret the legislation passed by Parliament with a view to ensuring consistent application of that legislation in like cases.⁵⁵⁵

⁵⁵¹ For a copy of s 16B(4) with these words highlighted, see supra at 130.

⁵⁵² *Blom v MacKay* (2004) 23 FRNZ 644 at para [70].

⁵⁵³ Doogue, supra n 542 at 243.

⁵⁵⁴ (2004) 23 FRNZ 644.

⁵⁵⁵ *Ibid*, para [31].

The goal of consistency reflects the arguments of Habermas,⁵⁵⁶ Luhman and Teubner⁵⁵⁷ that the function of the law is to stabilize divergent behavioural expectations. Habermas argues that it does so by generating mutual understanding⁵⁵⁸ whereas Luhman and Teubner claim that the law achieves this goal by reducing complexity with binary alternatives, primarily the legal/illegal binary.⁵⁵⁹ Section 16B(4) does not support Habermas' arguments as the section did not establish, or arise from, a process designed to generate mutual understanding. However, it supports Teubner's claim because, through using its power to define behaviour as either legal or illegal violence, the law was able to establish a binary alternative and reduce complexity into a form amenable to resolution through the legal process.

7.3.5 Operative closure

Section 16B(4) incorporated an expanded understanding of child abuse that took account of abuse within the wider family context and established a jurisdictional barrier for granting custody or access when such abuse had occurred. By doing so s 16B(4) appeared to have been able to overcome systemic closure, at least to some extent, and incorporate the insights of research developed in and communicated from other social systems. The law's ability to incorporate such research findings from the social sciences in s 16B therefore appears to be a counter-argument to Luhman's and Teubner's claims that the legal system is operationally closed and cannot receive communications from other discursive systems.

However, Luhman and Teubner do not argue that communications to a closed legal system are impossible but that such communications can only influence the legal system indirectly through a process of reconstruction whereby the legal system 'translates' the external communication into a

⁵⁵⁶ Habermas, *supra* n 101 at 449.

⁵⁵⁷ Teubner, *supra* n 24 at 38 and King and Piper, *supra* n 13 at 29.

⁵⁵⁸ *Supra* at 28.

⁵⁵⁹ *Supra* at 10.

legally valid form.⁵⁶⁰ Examining how s 16B of the Guardianship Act 1968 was applied in *PCN* supports this argument.

Given the Court's findings that the father had used serious and sustained violence against the mother it was clear that the requirements of subsection 16B(4) had been satisfied. Consequently, the Court could not give the father anything other than supervised access unless satisfied that the children would be safe in his care.

Although s 16B itself focused on the safety of children, the legal system's functional requirements led to a focus on the nature of adult (and, in particular, parental) relationships, rather than on the children themselves. In practical terms, the legal system's functional requirement was to grant custody to one of the two parents thereby stabilising their behavioural expectations. This functional requirement not only reflected the conception that children are the objects of the private rights and responsibilities of their parents but also the legal system's processes of reducing complexity with binary alternatives. Consequently, the decision in *PCN* devoted significant attention to the nature of the relationship between the father and the mother and the violence the mother had suffered. When reading the case, it is easy to overlook the fact that it is a case requiring a decision to be made concerning the interests of two children, and that it was the considerable "psychological and emotional harm"⁵⁶¹ the children were suffering as a consequence of their living arrangements that the legal system was required to respond to. Despite the maltreatment the children suffered, the focus of the case was on the nature of the relationship between their parents.

Concepts of family autonomy and private parental responsibility also prevented the legal system from acting proactively to protect the children. The entire system of custody and access⁵⁶² of which s 16B was a part

⁵⁶⁰ *Supra* at 10.

⁵⁶¹ The Court specifically found that the children had been "emotionally and psychologically harmed by witnessing family violence between their parents." *Supra* n 531 at 635.

⁵⁶² Now a system of "day-to-day care" and "contact", under the Care of Children Act 2004.

restricted the legal system's response to a reactive decision between the mother and the father, as applicants, rather than a proactive consideration of what was best in all the circumstances for the children. This restriction of the legal system's response contributed to the legal system's construction of the process as a competition between the two parents.

Although many cases claim that the legal system's role in custody disputes is to focus on and act in the best interests of children,⁵⁶³ *PCN* indicates that the limitations of the legal system operate to focus legal processes on the relationship of parents rather than on the interests of children. In *PCN*, the legal system operated in a reactive, dichotomising way, forcing the decision concerning the responsibility for looking after the children into a contest between the two parents. In doing so, wider contextual issues were excluded from consideration. Issues such as poverty or socially systemic issues of oppression impacting on the future welfare of the children were beyond the scope of the legal system's investigations.

In summary, s 16B(4) incorporates communications from social science research establishing the significant impact that family violence can have on the welfare of children. However, when translated into the legal system, these communications have not led to an increasing focus on the interests of children, but have re-distributed power between their parents. The legal system's response to children living within violent families continues to be constructed by the functional requirements of the legal system to establish binary alternatives and produce knowledge relevant to making a decision between those alternatives. This confirms operative closure by excluding a consideration of the wide range of other factors that have an impact on the lives of children. Similar issues arose in *PCN* with the application of s 16B(5) of the Guardianship Act 1968.

⁵⁶³ See, for example, *M v M* [2002] NZFLR 743 at 747 and *PCN* itself.

7.3.6 Section 16B(5)

Section 16B(5) provided that:

In considering ... whether or not a child will be safe while a violent party has custody of, or access (other than supervised access) to, the child, the Court shall, so far as is practicable, have regard to ... the wishes of the child, if the child is able to express them, and having regard to the age and maturity of the child.

Section 16B(5) therefore allowed the Court in *PCN* to have regard to the wishes of the children when considering whether the children would be safe while in their father's custody or during periods of access.

7.3.7 The children's wishes

The decision in *PCN* is particularly significant for the way in which the Court dealt with the children's wishes. Initially, the older child refused to disclose his wishes. When he was interviewed by the Court appointed psychologist, he specifically asked whether his father knew about the interview.⁵⁶⁴ He was only willing to say that "he would be more worried if the Court granted custody to his mother, not for himself, but for his parents."⁵⁶⁵ However, between the first and second interview, a period during which both children spent time with their father, he had changed his mind. During the second interview he stated that "he wanted to stay living with his father and have contact with his mother on the weekends."⁵⁶⁶ The Court did not consider the influence either parent may have been able to exert during the period between the two interviews. The daughter, who was too young to recall most of the violence that had occurred between her parents, stated in both interviews that she wanted to remain with her father.

⁵⁶⁴ *Supra* n 531 at 634.

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*, 637.

The psychologist appointed by the Court to interview the children stated in her report that:

The domestic violence had a very strong overlay on the children's attachments and wishes and ... an overriding consideration for them was wanting to keep things safe for their mother, their father and themselves. The children's wishes could not be considered without fully seeing the effects of the violence on them and their attitude ... one should be very cautious about interpreting the children's wishes and she would give them less weight.⁵⁶⁷

I will examine two particular aspects of the part that the children's wishes played in *PCN* that illustrate limitations in the law's response to children; the first relates to the way in which the law produces knowledge about children by interpreting the wishes they express and the second is the problem of enforcement highlighted by my consideration of the Aplin Report.⁵⁶⁸

7.3.8 Producing knowledge by interpreting wishes

As discussed in chapter four, the law has creative power to produce knowledge about the world.⁵⁶⁹ This power arises because the meaning of language is dependent upon context and the intentions of the speaker. Consequently, sociologists refer to the 'action orientation' model of language⁵⁷⁰ to describe the way in which people use language to achieve particular goals. In contrast, the law has traditionally operated on the basis of the 'correspondence model' of language and assumed that language accurately reflects a discernible reality.⁵⁷¹ Using this model of language can contribute to operative closure and this is evident in the way in which the Court in *PCN* interpreted the children's wishes.

⁵⁶⁷ Ibid.

⁵⁶⁸ Office of the Children's Commissioner, supra n 508.

⁵⁶⁹ Supra at 37 – 38.

⁵⁷⁰ Tuffin, supra n 167 at 83.

⁵⁷¹ Davies, supra n 29 at 45.

It was clear to the Court appointed psychologist that although the children expressed a wish to remain with their father, their wishes could only be understood within the context of violence and fear existing within their fractured family unit. The psychologist therefore considered that the children's wishes should not be interpreted literally but functionally, as language designed to achieve a particular goal, being safety for all members of the family. The psychologist therefore employed the action orientation model of language to recognise the significance of the context in which the children's wishes were expressed: the violence the children had witnessed and the use of that violence to control, the influence of the father between the two interviews, and the father's treatment of the children.

Although the Court in *PCN* did not examine the children's wishes in great detail, it was prepared to take their wishes into account and for that reason the access given to the father was "more extensive than what might otherwise have been considered appropriate."⁵⁷² This indicates that the Court simply employed the legal system's traditional technique of constructing the wishes of the children to correspond with the literal meaning of their statements. By doing so, it separated the meaning of those statements from the contexts in which they were made. This result illustrates how the law, by employing its own discursive tools for producing knowledge about the world produces a version of the world that is separate and distinct from the world as subjectively experienced. This separation of the world of the law and the world of subjective experience is a significant aspect of operative closure.

7.3.9 Enforcing the law

The Aplin Report I referred to previously in this chapter⁵⁷³ highlighted that creating a law achieves little; the legal system's ability to use its norm creating power to protect children is dependent upon effective

⁵⁷² Supra n 531 at 645.

⁵⁷³ Supra at 119 -126.

enforcement and implementation.⁵⁷⁴ Similar issues arose in *PCN* as the Court used the children's wishes in a way not provided for in s 16B(5).

Section 16B(5) provided that the wishes of children would only be relevant to the question of their safety. As previously noted, s 16B(4) provided that if a parent had been violent, they could not have any contact with their children (other than supervised access) unless the Court was satisfied that the children would be safe. By restricting the children's right to participate to an ability to participate in the decision about safety only, s 16B(5) prioritised the interest-based rights of children over the choice-based rights of children and conceptualised children as particularly vulnerable to manipulation in situations of domestic violence. This conception is supported by significant social science research and reflected in law reform documents such as Sir Ronald Davison's inquiry following the deaths of the Bristol children.⁵⁷⁵ The restricted nature of the participation rights granted by s 16B(5) was therefore an attempt to incorporate communications from social science research into the legal system.

However, despite the restricted nature of s 16B(5)'s participation rights, the Court in *PCN* took the children's wishes into account to determine whether access should be granted, not simply to the determination of whether they would be safe if it was granted. The children's wishes recorded in the judgment do not refer to the question of their safety at all and yet their wishes led the Court to grant their father more extensive access rights than it would otherwise have considered appropriate.⁵⁷⁶

The fact that the children's wishes played a role in determining the final outcome, not just determining the issue of safety, indicates that even if operative closure can be overcome to allow social science research to be incorporated into the law, the effectiveness of the law is still dependent upon the law being applied in accordance with its terms. This was

⁵⁷⁴ Freeman, *supra* n 370 at 173

⁵⁷⁵ Davison, R (1994), *Report of inquiry into Family Court proceedings involving Christine Madeline Marion Bristol and Alan Robert Bristol*. Unpublished report to the New Zealand Minister of Justice.

⁵⁷⁶ *Supra* n 531 at 645.

particularly significant in *PCN* because of the way in which the operative closure of the legal system led the Court to construct the wishes of the children in such a literal way. This literal interpretation combined with the Court's failure to apply s 16B(5) in accordance with its own terms and led to a violent father being granted access rights that even the Court considered to be more extensive than it would generally consider appropriate.⁵⁷⁷

7.3.10 Self-reference

The formal structure of s 16B(5) also played a part in constructing the approach of the Court in *PCN*. In addition to allowing the Court to take account of the children's wishes, the subsection included a list of factors for consideration by the Court, including factors such as the nature and seriousness of the violence used, how recently the violence had occurred, the frequency of the violence and the likelihood of further violence occurring. These factors structured the Court's response by providing the framework for the Court to use in producing its knowledge about the world of the applicants and their children. The Court considered each of the factors listed in the s 16B(5) in turn.

The way in which the law structured the Court's approach and its production of knowledge illustrates the self-referential nature of legal processes identified by Luhman and Teubner.⁵⁷⁸ This structured response performs a number of significant functions within the legal system. It reduces inconsistencies in the application of the law and thereby stabilises behavioural expectations. It also allows the law to reduce human complexity into a more manageable form. However, a structured response is less able to respond adequately to unique and particular circumstances. Derrida describes this conflict between establishing universal norms and responding adequately to individual circumstances as one of the contradictions central to the operation of the legal system. Recognising the existence of this contradiction confirms Derrida's

⁵⁷⁷ Ibid.

⁵⁷⁸ Supra at 8 – 13.

argument that the legal system's authority is ultimately founded on force and dependent upon the threat (and availability) of force for its continued validity.⁵⁷⁹

7.4 Conclusions

PCN confirms that the legal system's functional requirements operate to restrict its ability to respond to the needs of maltreated children when adults dispute questions of custody and access. The functional requirement for binary alternatives restricts the legal system to responding reactively and choosing between, generally, two alternatives.⁵⁸⁰ This can lead the legal system to focus on the relationships of adults, rather than on the interests of children as occurred in *PCN*. Secondly, although the legal system increasingly attempts to incorporate the insights of the social sciences when creating the law, these attempts can fail as a consequence of the legal system's operative closure. Although attempts to incorporate the recommendations of the social sciences led to the introduction of s 16B, *PCN* indicates that the requirements of the section, the jurisdictional hurdle in particular, can be disregarded or reinterpreted when the section is actually applied. Furthermore, by using its own models of language and rights to interpret the wishes of children, the law can overlook alternative interpretations and an appreciation for the context dependent and purposive nature of communication. All of these factors contribute to the legal system's operative closure and restrict its ability to respond to the subjectively experienced needs of children living within violent families.

Given these restrictions on the law's ability to respond to the needs of children, it is not surprising that the Court in *PCN* ultimately found itself relying on hope. Johnstone J concluded the judgment by stating:

⁵⁷⁹ *Supra* at 24.

⁵⁸⁰ Other alternatives only arise when other parties, grandparents for example, also make applications for custody and/or access.

I hope for the children's sake that Mr N will not revert to his former ways when the children cease to be in his primary care.⁵⁸¹

It is disappointing, but given the restrictions outlined in this thesis unsurprising, that despite the effort expended by the legal system to try and protect the children in *PCN* the Court found itself having to rely on hope that the father would not return to violence.

⁵⁸¹ *Supra* n 531 at 645.

Chapter 8 Conclusions

In this thesis I have used the systems theories of Luhman and Teubner to argue that the law is limited in its ability to protect children from maltreatment because the legal system creates and responds to its own world, rather than the world as experienced by human beings. The world of the law may approximate the world as subjectively experienced, but is in fact an abstraction that often overlooks, ignores or reconstructs that subjective world. This process of abstraction arises from the law's functional requirements that require the law to reduce the chaotic complexity of human existence into binary alternatives. These reductive processes limit the way in which the law produces its knowledge about the world and control how power is distributed within the world the law creates. Most significantly, operative closure limits the law's ability to reform society and proactively address social problems such as child maltreatment.

I have also examined Habermas's theories, which offer an alternative and more optimistic description of the relationship between law and society. He argues that knowledge is created through a process he describes as 'communicative action' and that this process is the foundation of modern democracy and the law's legitimacy. Habermas therefore argues that the knowledge the law produces is the result of communicative action, not the result of the law's operative closure. Consequently, he argues that the law is able to regulate society because it is not an operationally closed system but, through its genesis in the participatory processes of modern democracy, exists in a symbiotic relationship with society. However, I have argued that Habermas' theory offers an idealised vision of the relationship between law and society, and that, in practice, the law is often created and applied without using processes of communicative action. At most, the ideals Habermas proposes offer useful guidance for law reform processes by emphasising the importance of obtaining general consensus for law reform efforts.

One of the ways in which the law produces its knowledge about children is by using conceptions of childhood. I have argued that the law is engaged in an exercise of power when it creates its own world using such conceptions. These conceptions contribute to the law's operative closure by constructing an abstract vision of the world based on normative, binary distinctions. Furthermore, the knowledge the law produces generally serves the needs of the legal system itself, not the needs of children. Luhman's and Teubner's theories predict these results as the exclusion of children from the law's knowledge creation process is concomitant with operative closure. Advocates for children have attempted to overcome the exclusion of children from the law's processes of knowledge creation by advocating for a redistribution of social power through the grant of rights.

Granting rights to children is therefore an attempt to redistribute power to them in order to give them some power to participate in the production of knowledge about their lives. However, the effectiveness of legal rights as a mechanism for redistributing power is entirely dependent on the law's ability to communicate and enforce this transfer of power outside the world of the law. I have argued that the operative closure of the legal system can limit the effectiveness of rights as a tool for transferring power. My analysis of the way in which law reform processes operate and the way in which the law is applied have both confirmed these limits of legal intervention.

I examined law reform processes by examining the recent amendment to s 59 of the Crimes Act 1961. The legal system's operative closure was evident throughout the law reform process. It arose from the system's functional requirement to construct an appropriate boundary between legal and illegal behaviour, from the limitations generated by normative conceptions of childhood, the role power dynamics played in constructing the discursive processes of reform and balancing competing rights and the objectifying nature of rights discourses in general. All of these factors played a part in constructing the debate to meet the autopoietic, self-referential requirements of the legal system itself, rather than the needs of

children who, when they were considered at all, became objectified as semantic artefacts. The operative closure of the legal system resulted in a law reform process that generated significant debate but that appears to have had little impact on child maltreatment.

My examination of the Aplin Report confirmed that the legal system's operative closure also has significant implications when the law is applied. The Aplin Report highlighted the communication difficulties that arise from operative closure and the gulf that can exist between the normative requirements of the law and the way in which human beings actually behave in the world outside the law's abstract world.

Similar issues arose in the case of *PCN*. The operations of the legal system in *PCN* also confirm that the legal system's functional requirements operate to restrict its ability to respond to the needs of maltreated children. The functional requirement for binary alternatives restricts the legal system to responding reactively and choosing between, generally, two alternatives. In *PCN* this led the legal system to focus on the relationships of adults, rather than on the interests of the children. Secondly, *PCN* also confirms that the legal system's attempts to incorporate the insights of the social sciences in the creation of the law can fail to deliver any real benefits because of the operative closure arising from the law's reductionist approach to language and the production of knowledge. By using its own models of language and rights to interpret the wishes of children, the law can overlook alternative interpretations and an appreciation for the context dependent and purposive nature of communication.

Throughout this thesis I have referred to the role of power in shaping both the law and society. Children in our society are treated differently to adults. Although in part this recognises the physical realities of childhood, it also reflects a difference in the ability of children to exercise social power. In many ways, children are powerless. In contrast, the law is a system founded on the exercise of power. This is particularly evident in

rights discourses as rights are designed to redistribute social power. Many of the limitations the law faces when responding to child maltreatment are the result of using a system of power such as the law to respond to the needs of the powerless.

All of these factors contribute to the legal system's operative closure; closure that restricts the law's ability to respond to the subjectively experienced needs of children and to reform society to protect them from maltreatment. Although the law may be able to exercise its power once maltreatment has occurred or act symbolically to expound norms of appropriate behaviour, it only has a limited ability to act proactively to prevent maltreatment and change human behaviour. Furthermore, the legal system's operative closure is an inescapable element of the legal system given its functional requirements and role in society. In short, the law has no "magical power" to protect children.⁵⁸²

I have written this thesis in an attempt to identify ways in which New Zealand society can act to protect all children in New Zealand from maltreatment. I have concluded that the legal system is operationally closed and therefore limited in its ability to protect children from maltreatment. I therefore make the following recommendations for those who want to protect children in New Zealand from maltreatment:

1. Attempts to protect children need to move beyond law reform to address the wider context of children's lives through social policy initiatives that address issues such as poverty, housing difficulties and cultural conceptions regarding the acceptability of family violence. Although advocates for children generally recognise the importance of a contextual response to child maltreatment, the conclusions of this thesis emphasise the importance of this approach. Although changing the law may be politically expedient (it is relatively cheap, fast and public), the claims of expedience need to be resisted if children are to be protected.

⁵⁸² Goldstein, *supra* n 5 at 36.

2. To overcome operative closure, consideration should be given to changing the way in which decisions are made within New Zealand's family law system. Legally trained judges currently make such decisions and this prioritises the discursive processes of the legal system in the law's decision-making processes. Consideration should therefore be given to providing for decision-making panels that could include lawyers and experts from the social sciences. Alternatively, the qualifications for Family Court judges could be altered to require not only legal but psychological or social work expertise and experience.

Although these recommendations are important, the focus of this thesis has been to develop an understanding of the way in which the law operates. By contributing to an understanding of the way in which the law operates on a systemic level, I hope that this thesis will enable debate regarding New Zealand society's response to child maltreatment to proceed on a fully informed and therefore more effective basis.

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