Law as Ouroboros

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**Abstract**: Despite law’s many failures, we see it being deployed everywhere both at the domestic and the international level. This thesis approaches this puzzle and attempts to provide a better understanding of the role of law in society through the concept of juridification. I conceive the problem of juridification of Western societies in qualitative rather than quantitative/managerial terms. I do this by connecting the expansion of law to a theory of law that is sensitive to legal sources, legal roles and norm-use. In particular, I focus on soft law to show how the problem of legal normativity in domestic and transnational spheres is more similar than usually acknowledged and how it can elucidate the juridification process. This conceptual strategy allows me to challenge the literature on de-regulation and alternative dispute resolution mechanisms leading to the conclusion that these counter-movements to juridification actually reinforce it. I further argue that the coupling between judicial review and the constitutionalisation of rights produced a qualitative change in the role of law that enabled the legal system to supersede the political one. This leads to a lock-in situation where the legal system has the capacity of deciding its own reach, thereby becoming, with qualifications, autopoietic. This historical narrative also shows that, contrary to autopoietic theory, juridification is not purely an endogenous process to law. Here, the thesis offers a methodological break from spontaneous evolutionary narratives in social sciences à la Luhmann’s systems theory, which fail to treat genetic events as causes rather than effects. Similarly, by claiming that rights discourse and judicial review as the mechanisms responsible for the expansion of the legal systems’ capabilities through the re-articulation of the public/private divide; the thesis overcomes the abstractedness of recent arguments highlighting that social systems are embedded in law. The expanded role of law in society is not without problems. I show how European case law extended state liability in domestic legal orders replacing the once predominant public-interest justifications by the “one size fits all” rights talk. For the same reason, while often heralded as a sign of progress, I demonstrate how a rights-based social order is plagued by practical problems. In particular, I focus on the way in which three projects advanced to solve conflicts of rights – balancing, specification and trumps – hide its fundamental agonistic nature. These chapters further document the difficulties of breaking away of a culture of rights. Finally, I use the findings of the study of the domestic process of juridification to evaluate recent conceptualizations of international juridification. Particularly problematic are: (i) the inadequacy of the evolutionary metaphor; (ii) the complications behind importing systems theory to the international level and; and, (iii) the lack of a political community and a shared meaning of what law is.
Bio: Guilherme holds a Degree in Law from Universidade Nova de Lisboa, a Joint LL.M. in Law and Economics from Bologna, Hamburg and Haifa Universities and an M.Res. in Social Sciences from the European University Institute (EUI). During the Ph.D., he was the Executive Editor of the European Journal of Legal Studies and coordinator of the Legal and Political Theory Working Group at the EUI. Guilherme finalised his thesis as a Visiting Student at the University of Queensland - School of Political Science and International Studies where he also tutored “Introduction to International Relations”. Still in Australia, he lectured “Business Law & Ethics” at James Cook University - Brisbane Campus. He is a referee for the International Journal of Constitutional Law. He has published theoretical pieces on systems theory, jurisprudence, law and governance in international peer reviewed journals. He has also published more applied work on the quality of the Portuguese civil justice system and legislation, political funding and constitutional amendment. In the first semester of 2013, he will lecture “Ethics in International Politics” and tutor “Introduction to International Relations” at the University of Queensland. He is currently working on the reception of systems theory in international relations, the problem of transnational law as well as a critique to evolutionary social sciences.