How the law defines the special educational needs of autistic children

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This article offers an account of the ways that the legal system is able to make it appear as if it has found 'the right answer' in cases involving the special educational needs of children with autism. The article explains the uncertainties and complexities relating to the identification, diagnosis and treatment of autism and the problems that these present for schools and local education authorities. Applying Luhmann's theory of social systems, it describes how courts and tribunals dealing with special educational needs are able to transform these uncertainties and complexities into knowledge on which it is able to base its decisions. These decisions may make satisfactory law, but they are likely to leave unresolved fundamental problems concerning the education of children with disabilities.

Introduction

Law's need for certainty or, at the very least, sound knowledge on which to base its decisions, is often at odds with the tentative, inconclusive and provisional nature of psychological theories and findings. In this article we examine the way that legal decisions concerning the education of children with autism (and other special educational needs) are able to overcome any shortfalls in existing knowledge by giving the impression that these decisions are underpinned by a sound body of knowledge. This enables Special Educational Needs and Disability Tribunals (SENDISTs) and the courts hearing appeals by parents from the decisions of these tribunals to claim that they are complying with all the demands made by special educational needs law. At the same time, they are able to convey the impression that the right educational decision has been made for the child. By applying a theoretical approach that concentrates on the interfaces between different social systems, we raise difficult questions concerning both the claim of justice and that of meeting the educational needs of children with autism.

Our particular concern is autism or, to be more precise, those psychological impairments which are given the label of 'autistic spectrum disorders'. These impairments may take on legal relevance and affect the outcome of tribunal and court decisions in a number of different contexts. In criminal law, for example, an adolescent boy suffering from Asperger's syndrome (high functioning autism) killed a young girl and was recently found guilty of murder, while Anti-Social Behaviour Orders have been imposed on autistic children who exhibited odd and disturbing behaviour. The focus of this article, however, is on 'special educational needs' and the
Theoretical Approach

Until recently, both academics and practitioners have tended to conceptualise the relationship between law and those areas of science concerned with childhood disorders as one of symbiosis. According to this conceptualisation, while the knowledge and treatment of childhood disorders on the one hand and the knowledge and practice of law on the other are clearly very different, information between these two disciplines could be freely exchanged. Scientific knowledge could enter the legal system directly, mainly through the device of expert evidence, and such evidence could be incorporated in legal decisions. Similarly, within medical and psychological practice, law, whether in the form of statute or case-law, has been seen primarily as a body of knowledge which informs practitioners about their legal duties, what constitutes unlawful activity and, in particular, how to avoid claims for negligence, breach of contract and failure to report child abuse. We shall call this approach the input-output model.

Sociology has produced many theoretical accounts of law, and the sciences of childhood disorders. There is the notion that both are engaged in creating and disseminating power gained from specialist forms of knowledge to be interpreted and applied only by professionals or experts. Alternatively, these forms of knowledge have been seen as providing the information necessary to allow society to conceptualise and operationalise notions of risk and safety. More recently, the ideology of children's rights has been reformulated as a social theoretical way of understanding the relationship between adults and children in different social settings, including those of health, education and law. This approach offers a critique of a developmental psychology which portrays children as incompetent and unable to make decisions for themselves. All relationships involving adults and children are analysed in terms of the ways that power is exercised by adults over children through the pervasive notion of childhood incompetence.

None of these theories, however, begin to provide a satisfactory operational model of the complex manner in which information is transferred between the different institutions or professional bodies which exist side by side in modern society. While the input-output model, with its implicit assumption that information is freely transferable and may be reproduced unchanged in different social contexts, still prevails among practising lawyers and scientists who work together in different areas of the law, there has been an increasing recognition of the defects in law's attempts to control 'expertise' and make it more reliable for the purpose of legal decision-making. This recognition has found expression in the ever-continuing quest among judges and law reformers for the perfect test for identifying what is, and what is not, scientific knowledge, and for a 'philosopher's stone', through which such knowledge may be transformed into reliable expert evidence. The relentless pursuit of this quest has resulted in frustration and disappointment, as all efforts fail to prevent cases being decided on 'scientific' information which subsequently turns out to be over-simplified, incomplete or even entirely wrong.

On the 'scientific side', the intrusion of law into ever-wider areas of social activity (accelerated recently through the development of human rights law) has produced an increasing reliance on specialist scientific information. This, in turn, has provoked strong criticisms of the courtroom process and the demands made of expert witnesses. Within some scientific disciplines it has even resulted in a general reluctance to take on the role of expert. Although the belief among lawyers and scientists remains that these problems are solvable within the general framework provided by the input-output model, there has been a gradual but increasing awareness that the issue of making scientific knowledge available for legal decision makers is not nearly as simple as previously appeared to be the case.

Within the last 20 years a new theoretical model has emerged within sociology which totally reconceptualises the relationship between what it describes as different systems of communication. This is autopoietic theory or the theory of closed systems. It was the late German social theorist Niklas Luhmann who was responsible for developing this theory as a sociological account of the way in which modern society operates. Luhmann's...
general approach is entirely counter-intuitive. It portrays society as consisting not of individuals, but of communications which are organised socially within societal systems. Society becomes, therefore, the sum total of all meaningful communications. According to Luhmann, the essential feature of the organisation of modern society is its differentiation into separate and distinct social communication systems. Certain of these systems have become functional to the organisation of meaningful communications for society. These include science, law, politics, health, economy and education. Each of these sub-systems has its own unique, non-replicable function which determines the form and nature which its communications take.

The essential point for our purposes is that each of these ‘function systems’ constructs, through its understanding (or coding) of the external world, a version of that world which is limited by its blinkered vision. The world ‘in the eyes of law’ consists, therefore, of a world which is divided into what is recognised as pertaining to law (Recht), and thus belonging to the legal system in a broad sense, and what is not law (Unrecht). Everything within that world-constructed-by-law is seen, therefore, in terms of its relevance to legal issues. Moreover, everything that the legal system recognises as belonging to law is reducible by the legal system to its code of lawful/unlawful: it becomes, in other words, amenable to legal decision-making.

Law’s world (or law’s environment) includes not only its self-identity (how law sees itself), but also law’s version of all of society’s other systems, such as economics, morality politics, science and education. This means that although the legal system may give the appearance of importing information directly from these other systems, what it is in fact doing is invoking information from its own pre-constructed version of these systems, so that this information will always depend on the vision of the world that the legal system has itself created. This is equally true for all other systems, which, like law, have no way of relating to the external except by referring to the version of that world which one of them has constructed. They are all self-referring systems.

The theory does not deny the existence of reality. Rather, it sees reality as inaccessible from within society except through the medium of social communication systems. Relationships between two systems are based, therefore, upon each reconstituting the other on its own terms, with each system generating its own version of what reality consists of. Thus, when communications produced by psychology -- whether theories, research reports or assessments based on psychometric testing, enter the legal system, they do so as reconstructions of psychology within law. Similarly, when psychology concerns itself with legal communications, such as courtroom processes, issues of legal guilt or children’s best interests, it does so necessarily by applying its own scientific coding of psychologically true/psychologically false. Within the terms of the theory, it would be impossible to do otherwise, since, as we have explained, the only reality that psychology recognises is that constructed through its own operations.

The final point that we wish to make in this brief summary of the theory is that its implications for the operations of the legal system in its relations with other social systems is not limited to concerns over the reliability of expert witnesses. It permeates, rather, all aspects of legal decision-making where law invokes information from extra-legal sources. In other words, it applies wherever legal communications go beyond a reiteration and interpretation of the law itself. In the particular area of special educational needs that we shall be examining in this article, there is usually no formal distinction between experts and other witnesses, and no special rules (other than time limits) governing the presentation of professionals’ reports or oral evidence, or criteria for testing the reliability of the information presented in evidence. Yet professional or expert witness’s accounts of children’s developmental disorders and educational impairments are nevertheless treated as if they represent facts or the truth and, as such, as knowledge on which to base decisions on how children’s special educational needs will effectively be met.

The issue as to how scientific knowledge about developmental disorders and their implications for education finds its way into legal decisions is complicated by the fact that there are three distinct social communication systems involved: science in the form of psychology (or, in some cases, psychiatry and paediatrics), education and law. As we shall demonstrate, by the time that issues fall to be resolved by law, what started as accounts of children’s impairments, as originally formulated within the system of science, have already been reconstructed in such a way as to make sense for educational purposes. Let us start, therefore, with the psychological account of ‘autism’ as a way of describing and diagnosing certain impairments in cognitive and affective functioning.
What do psychologists understand by autism?

Autism is a developmental disorder characterised by social and communication impairments and often accompanied by restricted interests and activities. Prevalence is estimated to be five per 1,000,\textsuperscript{12} although this includes not only 'classic' autism, but the full range of autistic spectrum disorders. Four times more boys than girls are thought to be affected. Diagnosis, under \textit{International Classification of Diseases} (ICD), 10th Revision\textsuperscript{13} and \textit{Diagnostic and Statistical Manual of Mental Disorders} (DSM) IV,\textsuperscript{14} focuses on three areas of impairment:

- impairment in reciprocal social interaction;
- impairment in communication (verbal and non-verbal);
- restricted repetitive and stereotyped patterns of behaviour, interests and activities.

There is considerable agreement over these behavioural criteria of autism and they have come to be known as the 'triad of impairment'.\textsuperscript{15}

Autism was first recognised by Kanner\textsuperscript{16} and later by Asperger,\textsuperscript{17} who were working independently of each other in Baltimore and Vienna. A division is now commonly made between Kanner's autism (classic autism) and Asperger's syndrome (high functioning autism). In 1969 Lorna Wing identified the concept of an autistic continuum whereby autism can be found with various degrees of impairment and functioning, but with all autistic individuals showing impairment in reciprocal social interaction.\textsuperscript{18} At the lower end of the spectrum children may be severely impaired, have little or no language, low cognitive abilities and often other accompanying disabilities. Inevitably they will require very specialist provision and care continuing into adulthood. Higher functioning children with autism have cognitive scores within the average or above average range, relatively good (but not unimpaired) language ability and are less likely to have accompanying disabilities. Although these children also need good care and provision to progress, they are less likely to need the level of care in adulthood of that of the child with classic autism.

The exact causes of autism are unknown, although there is strong evidence to show that it is due to a brain dysfunction which is biological in origin.\textsuperscript{19} Genetic factors are clearly important\textsuperscript{20} but it is unlikely that one single gene is implicated. There are a number of cognitive theories which attempt to explain the link between brain and behaviour and these have generated a great deal of research which has furthered understanding of this disabling syndrome. Although a range of therapies and treatments are employed to help in the management of autism, as yet there is no real consensus on the most effective way to treat the disorder. This is in part due to the wide variability existing amongst individuals with autism. Therefore, psychologists specialising in the field accept the need to assess each child and to develop an individual treatment and management plan. Yet there is no cure for autism -- it is a lifelong disorder, although individuals often make progress and develop coping strategies.

Children can be diagnosed with autism at various ages. Even those with severe impairments are often not diagnosed until over two years of age, when they start to fail to reach the same social and communication developmental milestones as other children. A delay in language development is often the first obvious sign that something is wrong, but many parents will maintain that they had no concerns about their child until they entered pre-school or school. At this stage, when a child becomes part of a group situation, social and communication difficulties become more obvious. There is evidence to show that early diagnosis and intervention can be beneficial,\textsuperscript{21} but there is an obvious tension between early diagnosis and premature labelling of children who may exhibit difficulties, unrelated to autism, which could disappear with maturity.
What does psychology identify as the needs of the child with autism?

Many children with autism do not look any different from other children and it can therefore be difficult for those around them to appreciate that they are nevertheless suffering from and struggling with the 'triad of impairment'. As they grow older, social situations, including those related to attending school, are likely to prove challenging for them. Their difficulties in making sense of the world can lead to increased anxiety levels and may result in behaviour which appears bizarre and anti-social. Although every child with autism is different and the behavioural manifestations of the cognitive impairments variable, there are certain key issues which make the education of these children within mainstream schooling a particular challenge. The 'triad of impairment' summarises the difficulties of the autistic child, but the actual manifestation of these in the dynamics of the classroom can vary from situation to situation and child to child.

**Impairment with reciprocal social interaction**

A deficit in 'theory of mind', that is, a lack of understanding of how others think about and understand the world, means that children with autism fail to appreciate the feelings, beliefs and viewpoints of others. Understandably this leads to social difficulties and misunderstandings. Although all children with autism will have this impairment, some may react by withdrawing totally from social interaction, whilst others attempt to interact but may upset, bore and irritate by their lack of sensitivity for the feelings of others. Group activities, including games and play, will all present difficulties. The child with autism will often say what they think without any heed to social conventions. In certain situations this can be amusing and refreshing but in the school system this will inevitably cause problems. The classroom teacher may not appreciate being told that the lesson is boring and stupid -- even if it is! Specific teaching of social rules and skills is needed if the child with autism is to develop strategies to enable him to cope in the social world.

**Impairment in communication**

As we previously mentioned, children with autism range from those with no language at all to, at the higher functioning end of the spectrum, those with adequate verbal expression. However, even these children are likely to have difficulties with non-verbal communication and with the pragmatic aspects of language, that is the appropriate use of language to carry on a conversation. They will need to be taught explicitly aspects of communication, such as turn taking, intonation and eye contact and gestures, all of which come naturally to other children. Children with autism also have difficulties with receptive language (comprehension of language) and may either completely misunderstand what is being said to them, or interpret literally language which is metaphorical or ambiguous, for example: 'It's raining cats and dogs'. A teacher cannot assume that instructions given to a child with autism have been fully understood.

**Restricted, repetitive and stereotyped patterns of behaviour, interests and activities**

Children with autism find change very difficult. They can become very set in their routines and resist any alteration. Often they develop obsessive interests which they are capable of concentrating on for long periods of time. The school day is full of changes, many sudden and without warning, and the child with autism lacks the flexibility of thought needed to deal with this. They respond best to an environment which is consistent and has an established routine. Without this they may become very anxious and distressed and behaviour problems can ensue.

How does the education system deal with children with autism?

All aspects of the triad of impairment associated with autism are potential barriers to learning in the
conventional school. The problems for education, posed by the need to show that it is attempting to fulfil the potential of children diagnosed by psychology as suffering from ‘autistic spectrum disorders’, have been compounded in recent years by a widely held belief that children with disabilities should not be educated separately from ‘normal’ children. Based upon the political ideologies of human rights and equality, this belief has led to declarations to the effect that every child suffering from a disability has the right be educated with ‘normal’ children and not ‘segregated’ by having to attend a special school reserved for disabled children.  

In the UK, as in all post-industrial nations, this concern for equality for children with disabilities has inspired concerted campaigns for ‘inclusive education’ for such children. More recently, the Education Act 1996 consolidated the legal framework in England and Wales for the implementation of a general policy of inclusive education and it is now estimated that over 66% of pupils officially identified as having special educational needs are educated in mainstream schools.

The way in which the education system implements this policy in respect of children with autism is not uniform. It depends, first, upon the effects of the individual child's particular psychological impairment upon the education system; and secondly upon the way in which the policy of inclusive education is interpreted by the different institutions responsible for education, both in schools and (in England and Wales) by local education authorities (LEAs). Not surprisingly, those children who exhibit ‘behavioural difficulties’ are seen as more difficult to include within mainstream schools. Some commentators have questioned whether it is possible at all to meet the ‘educational needs’ of these children through inclusion, and have pointed out the particular difficulties faced by schools in containing them and involving them in school activities. Nevertheless, these concerns have not prevented some educational bodies from pursuing a policy of inclusion even in the case of severely autistic children who have serious and multiple impairments, including little or no language and severe behavioural problems.

It is generally admitted within education, however, that children with autistic spectrum disorders (ASD) do present a major challenge, not so much for politics, which simply has to lay down a general policy for all school-age children with disabilities, but for education, which has to interpret this policy in respect of each individual child; and for law, which is required to determine whether these interpretations comply with the procedural criteria and rules of natural justice.

Since autism affects the way children understand and react to the world around them, this can lead to social, emotional and behavioural difficulties. As noted above, the variability and unpredictability in the behaviour of children with autism means that there are no easy solutions to the problems that they present to the education system.

In addition, the education system has to cope with a prevalent political ideology of individual rights which, when translated into educational terms, means that parents' views about the kind of education that they want for their children should, at the very least, be taken into account in educational decisions. In one instance, the legislation for England and Wales insists that these parental views should be followed, unless there are specific reasons for not doing so. Where parents of autistic children express a preference for ‘mainstream provision’, that is education in a mainstream school, the parents' wishes must be followed unless that is incompatible with the provision of efficient education for other children; others choose a specialist provision (a school that takes only children with disabilities).

The purpose of this article is not to offer solutions to these problems confronting the educational system, but rather to observe how law reconstitutes them within its own communication system -- a system that sees a general notion of 'educational justice' as its overriding objective, but is able to achieve this only by coding its environment in terms of what is lawful and what is unlawful. Once reconstituted in this way, highly complex issues, which appeared intractable for education, become simplified to the point that -- always with the help of expert opinions -- they emerge as amenable to legal decision-making. This, as we shall show, may create its own problems, but they are of a very different kind to those experienced by education or the scientific knowledge that supposedly informs the educational system.

**Special educational needs within law**
The same political ideology of individual rights that allowed parents to choose (within certain limits) the kind of school in which they wish their autistic child to be educated has also, in England and Wales, offered these parents a legal process through which they may appeal against educational decisions made by an LEA. Since 1994 these appeals have been decided by an independent tribunal, the Special Educational Needs Tribunal (SENT) -- recently renamed the Special Educational Needs and Disability Tribunal (SENDIST). It consists of a legally qualified chair flanked by two lay members, both experienced in the area of children's education. Tribunal decisions are open to challenge by appeals on a point of law to the High Court and from there to the Court of Appeal and, with leave, to the House of Lords, the highest judicial authority in the UK. Appeals against the initial decisions of the LEA are not confined to choice of school, but extend to every stage in the process of the educational system's assessment of an autistic child's special educational needs and the educational provision that should be put in place to meet those needs. A parent may, for example, appeal to a SENDIST against the LEA's decision not to assess a child who, the parents claim, has special educational needs. Parents may also challenge the LEA's decision, following an assessment, that a statement of special educational needs is unnecessary. Once a statement has been made, the parent may argue that the resources that the LEA proposes to put in place are not appropriate or sufficient to meet their child's needs as set out in the statement, or may propose a different school to that which the LEA has chosen to meet the child's special educational needs.

The introduction of these tribunals has, needless to say, created within the legal system a whole vast new area for its communicative operations. In Luhmann's terms, 'special educational needs law' has emerged as a programme within the legal system where law's lawful/unlawful coding of its environment may be applied to issues defined initially by other social systems, but reconstituted as legal problems requiring legal decisions. As a measure of the rapidity of the expansion of 'special education law', one needs only to refer to the annual increase in tribunal appeals since 1994 (see figure 1) which shows a year-by-year increase which starts to tail off only in 2003-04.

Figure 1: Number of Tribunal Appeals

Moreover, a comparison of the annual number of court cases on special educational needs appearing in LEXIS/NEXIS for 1991/92, the year before the introduction of the independent lawyer-chaired tribunals, with the number reported eight years later, one finds a considerable increase of 800% (see figure 2 below). Although there has been a decline in the number of cases the last five years, the figure still stands at over four times that for 1991/92.

Figure 2: 'Special educational needs' cases in Lexis/Nexis Professional 1/8-31/7

We have already drawn attention to Luhmann's general theoretical model of autopoietic social systems and the operation of the law as one of society's function systems. Indeed, much has been written in recent years about autopoietic law as a system of communication. For the present purposes of examining how the legal system is able to transform psychological accounts of autism in a way that makes them useful for legal decision making, however, we may legitimately distil these accounts of the complex nature of legal operations and apply them to special educational needs to extract the following:

(1) The self-referential nature of the legal system means that law invariably operates in a paradoxical way. On the one hand it presents itself as doing justice by invoking 'the truth', 'facts', moral principles, common sense and rationality to justify its decisions. On the other hand, law has no way of knowing what these consist of, except through the optic which it itself has generated. The legal system, therefore, is involved in a continual process of concealing the paradoxical nature of its decisions by claiming that they are underpinned by values external to its own operations. It is only observers of the legal system who are able to see that these
values are in fact the creation of law itself, fabricated out of a version of reality that exists only within the legal system. This applies equally to rational, moral, economic, scientific or educational justifications for legal decisions, as well as to those which invoke children's welfare or best interests.37

(2) Law's crude code of lawful/unlawful does not enable it to perform the task of determining issues relating to special educational needs. The existence of these needs and the help necessary to meet them are in themselves neither lawful nor unlawful. If law is to make decisions concerning special educational needs, therefore, there has to exist within the legal system a programme specialised for that purpose. This involves not only reconstituting 'the facts' in ways that make it possible for the code to be applied and for legal decisions to emerge. It is also necessary to introduce 'interpreters' into the system, whose task it is to 'translate' communications from other systems so as to make them amenable to legal decision-making. Nevertheless, for this process to produce recognisable 'legal communications', it is not enough for courts and tribunals simply to endorse the opinions of experts or underwrite what seems educationally right, scientifically proven or economically expedient. Legal communications need to conform to what the legal system itself recognises as law. Only law, and not education, psychology or paediatrics may produce legal communications on children's special educational needs.

(3) Since law exists within an environment which is the product of its own operations, its binary code applies not only to events outside the legal system, but to legal decisions and legal operations themselves. If 'justice is to be done', these decisions too need to be coded as either lawful or unlawful.38 They must conform to all the procedural requirements laid down by law and, where they take the form of legal judgments, they must correspond to what law recognises as acceptable legal reasoning. This will usually, although not always, mean following the path laid down in cases of a similar kind, or at least not deviating too far from that path. Once special educational needs becomes a programme within law, therefore, it should be anticipated that the issues that present themselves for legal decisions will involve not only those directly concerning the education of children with 'learning difficulties', but also procedural matters and challenges to the way that tribunals and courts dealing with special educational needs arrived at their decisions.

(4) Unlike some other social systems, law's performance does not depend upon the results of its decisions; it is not 'purpose orientated'.39 Where, for example, a tribunal rejects a parent's appeal against the refusal of the LEA to pay for education in a small private school, it cannot subsequently be held legally (or educationally) responsible for that child's failure to make satisfactory progress in the large state school. Only if the tribunal failed to follow the correct procedures, or if its reasoning was faulty, would the decision be wrong in law. Assuming there was no such transgression, the decisions stand as legal and valid both for law and for all other social systems. All legal programmes, therefore, take the form of conditional programmes, that is, of 'if ... then' programmes.40 In special educational needs law this could take the form of such conditional statements as: 'if the tribunal failed to take into account in its decision the educational psychologist's evidence of the child's needs, then the decision was faulty and the case must be reheard'. While conditional programmes may take the future into account, they do so always within the limits of what is known in the present, that is, at the time that the decision is made. They cannot be made provisional upon the occurrence of some future event, such as the child's examination performance. They avoid judgment by results.

'Autism' as a concept within special educational needs law
**Attaching the autistic label**

The form that autism takes when it enters legal communications and the meaning attached to it will depend upon the particular programme that the legal system applies to filter 'noise' from the environment and so make it amenable to its code of lawful/unlawful. Within the Education Act 1996, the law sees autism as relevant to special educational needs only: (a) if it gives rise to a 'learning difficulty'; and (b) if this learning difficulty requires special needs provision. Only if these conditions are fulfilled does the question arise as to whether making a formal statement of special educational needs is necessary for determining and putting in place the special educational provision required -- a clear example of law's conditional mode of operating. In systems operating a purpose orientated mode of operation, the method for determining whether the needs of the child with autism are being met would be one of continual monitoring and adjusting of different therapies and teaching methods. This may still be possible through 'informal' measures put into practice by the school through School Action or School Action Plus. Once the issue goes to tribunal, however, any decision on how to meet the child's future needs must take place in the present on the basis of what the tribunal accepts as present knowledge of these needs and how these needs may be met by future provision.

A diagnosis of ‘autism’ by a psychiatrist or paediatrician in a child of school age will almost always be sufficient to satisfy that part of the conditional programme that requires proof of the child’s ‘learning difficulty’ and so set in motion the first stage in the process -- the ‘statutory assessment’ -- during which a range of experts examine and produce a report on the child's problems and their implications for education. It is clear from reported cases that, so far as education and law are concerned, autism or 'autistic spectrum disorders' represents a category of disability which gives rise to learning difficulties. Within psychology, psychiatry and paediatrics, diagnosing a child as autistic, rather than as suffering from some other disability, often involves considerable difficulties and may be open to controversy, while within education and law, no such problems exist. Once the autistic label has been attached, they may simply assume the validity of the diagnosis and treat the child as having special educational needs of a particular kind. Indeed, there have been, to our knowledge, cases where the LEA, having initially refused to assess, immediately changed its tune once presented with an expert's report diagnosing Autistic Spectrum Disorder (ASD). Within the legal system, as the following brief extracts from reported cases illustrate, the labels 'autistic', 'ASD' or 'having an autistic spectrum disorder' is sufficient, without further questions, to trigger the presumption of the need for special educational provision.

'C, aged 14, was autistic'

'O has an autistic spectrum disorder (ASD)'

'G is 6. He has an autistic spectrum disorder'

'J was diagnosed in December 2000 as functioning at the high end of the autistic spectrum'

Only in one reported case was there a hint of the tentative nature of some diagnoses of autism and this involved a child who was too young for a clear diagnosis to be made.

'At the age of 19 months, A had been diagnosed as "probably autistic"

Even though medically and psychologically the diagnosis of autism is likely to be of far less importance than identifying the particular and specific disabilities of the individual child, for education and SEN law this diagnosis operates initially as a passport to specialist educational provision. Put the other way round, the absence of this label often operates as a considerable hurdle in the attempt by parents to obtain special provision, particularly at the high functioning end of the autistic spectrum. Here the children may look 'normal'
and have no obvious disabilities. Their deviant behaviour could well be interpreted as boisterousness, poor concentration, 'hyperactivity', or aggression resulting from adverse home conditions or a poor teaching environment. Alternatively, they may present no obvious behavioural problems for the teacher, but are withdrawn and uncommunicative.

**Fragmenting the autistic child**

Once a statutory assessment has been put in place and the reports of the various experts filed, LEAs have to decide what provision is appropriate to meet the child's needs, whether to make and maintain a statement of special educational needs and, if so, what should go into the statement.\(^5^0\) The preconditions that most LEAs impose before they are willing to undertake a statutory assessment are set out above. When the LEA decides that it is necessary to 'statement' a child, its duty is to identify and make provision to meet the autistic child's *special educational needs*. So far as the law is concerned, these needs are entirely separate and distinct from other needs of the child, such as health needs or social welfare needs. As a general rule, neither SENDISTs nor courts hearing appeals from these tribunals have any power to order area health authorities or social services departments to make any provision for the child. Indeed, according to the law, the needs of autistic children are divided between these three agencies\(^5^1\) and if parents wish to take steps to oblige health or social services to fulfil their statutory duties, they need to start an entirely different legal process. This division of labour reflects the organisation of administrative agencies in the UK. As a result, one of the tasks that SENDISTs and the courts frequently face is that of determining what are 'educational' and what 'non-educational' needs. In terms of law's conditional formula, if the need is 'educational', only then is the LEA acting unlawfully by failing to provide for that need.

The courts have, in their decisions on this issue, tried to mitigate the obvious absurdity arising from this distinction by determining that not all therapy provided by clinics should be classified as non-educational. According to the judge in one case, although speech and language therapy was provided by health, 'to teach a child who has never been able to speak ... seems to us as much educational provision as to teach a child to communicate in writing'.\(^5^2\) It was, therefore, capable of being 'a special educational provision', although this does not mean that all speech and language therapy would be regarded in this way. The SEN Code of Practice,\(^5^3\) which was published after this decision, states that 'speech and language impairment should normally be recorded as educational provision, unless there are *exceptional* reasons for not doing so'.\(^5^4\)

However, the matter did not rest here. Psychological and educational complexity has been transformed and reconstituted as legal complexity. Within law there is a constant battle going on between LEAs who frequently place speech and language therapy in that part of the statement which falls beyond their direct responsibility, and parents (and their advisors) who insist that it should appear as an educational provision. Nor is this all. As the law stands, it is open to the LEA to determine in the statement what level of speech and language therapy is appropriate. A common practice is to provide for a visit once or twice a term by a therapist who will monitor the child's progress and give teachers and classroom assistants advice on what exercises will help the child. Those parents who have obtained legal advice, on the other hand, will frequently press for 'hands on' therapy at regular intervals by the therapist him or herself. In this way, the amount and form of speech and language therapy becomes a bone of contention to be fought over in the negotiations between parents and LEAs and/or an issue to be decided by the tribunal. We should add here that there is absolutely no evidence that children who receive therapy from a therapist make any greater progress than those who take part in group interventions or who obtain the therapy 'second-hand' from parents or teaching assistants.\(^5^5\)

While the status of speech and language therapy as a 'special educational provision' has now been largely settled in law, albeit with unintended consequences, the same is not true of other therapies. In *London Borough of Bromley v Special Educational Needs Tribunal*\(^5^6\) the Court of Appeal decided that 'physiotherapy, occupational therapy and speech therapy were all measures which related directly to S’s learning difficulties, and therefore amounted to a special educational provision ... provided that it is not read as meaning that these therapies were exclusively educational'.\(^5^7\) In cases of controversy, decisions were best left to the judgment of the specialist tribunal. So, in the case of children with autism, it is up to the law to decide between *educational* and *non-educational*; between provision that the LEA is lawfully obliged to
within law, the child with autism has become fragmented, according to which social agency is responsible for which of the child's disabilities. We should add that the distinction between education and social services is even more fraught with legal issues than that between education and health. The recent case of *W v Leeds City Council and the Special Educational Needs and Disability Tribunal*\(^{58}\) exemplifies the problems. This concerned C, an autistic boy aged 9, who soiled himself, had considerable trouble with eating, communicated only by gestures or use of pictures and was aggressive and bit people. He had no sense of danger and needed constant supervision. The SENDIST rejected his mother's claim that he should be provided with a 'full waking day' curriculum and decided that C's special educational needs could properly be met within the normal school day, stating that it was not up to the LEA to provide help and support that was not essentially educational. On appeal the judge\(^{59}\) made the following, telling comment:

> 'the tribunal were well aware of the deficiency in the social service provision and indeed criticised it. While recognising the hazy line between social and educational support, the tribunal had to decide what educational provision was required. It made that decision on the evidence as to C’s educational needs, and ... rightly decided that, having reached its conclusion ... it was not its function to throw upon the educational authority the burden of providing what was properly social, rather than educational support.'\(^{60}\)

Unfortunately, children with autism frequently fall between the three stools of education, health and social services and parents are left as helpless bystanders as local government bureaucrats argue amongst themselves as to whose responsibility it is to provide services and resources for the child.

**The programme of 'special educational needs law'**

The task for law, as we spelt out earlier in this article, is to transform perturbations within its environment into communications which are understandable and recognisable as legal communications. In effect, this means converting them into conditional statements which are amenable to law's coding of lawful/unlawful. Yet it would be a mistake to believe that this process starts only when cases reach the specialist tribunals. In highly technical legal programmes of this nature it is more and more usual for this process of transformation to begin with the drafting of statutes and subsequent detailed regulations which the statutes enable. Throughout the drafting process, there is usually continual consultation with and lobbying by interest groups, who, if they wish to be taken seriously, are required to formulate their demands in terms that are amenable to legal coding. They are obliged, in practice, either to respond to the clauses that appear in the draft statutes (in the UK, 'Bills') by proposing new provisions (clauses) or amendments to those proposed by the government or by arguing against the inclusion of provisions. From the theoretical perspective that we are applying, the function of these requirements, as far as law is concerned, is not the political one of conforming to the principles of the democratic process, but rather to construct legal 'order out of noise';\(^{61}\) to convert scientific, educational and economic communications into law, to convert purpose-oriented statements into conditional statements which are capable of being subjected to law's coding -- lawful/unlawful. There is insufficient space in this article to offer a detailed account of the lengthy legislative process that precedes the introduction of any new legislation or codes of practice relating to special educational needs. Suffice it to state that there are typically representations by groups representing LEAs and scientific and educational bodies, as well as groups acting on behalf of autistic children and their parents, such as the National Autistic Society, the Independent Panel for Special Educational Advice and the Advisory Centre for Education. All of these, as we have seen, are drawn into the legal system purely and simply by the need to transform the demands and interests of those that they represent into terms that are acceptable as law, as legal communications.

One further important matter affects legal decision-making involving children with autism. This is the publication of the *Special Educational Needs Code of Practice*. Although the many detailed paragraphs of this code are not strictly law, but merely guidance\(^{62}\) within the programme of special educational needs law, many of them have been and continue to be transformed into legal communications -- that is statements of lawfulness -- with non-compliance by LEAs being treated as unlawful.\(^{63}\) An example given earlier in this
Moving onto the actual processing of cases, education is transformed into law by the programme of special educational needs law in a variety of ways. To begin with, there are the two lay panel members, who sit either side of the legal chair. Their role ostensibly is to make available their specialist educational knowledge and experience to the tribunal hearings and decision-making process. Again, however, all their knowledge and experience has to be framed within the specific legal questions that the panel has to decide. It is not a matter of: ‘What can we do to help this child with severe autism?’ but, for example, ‘Is it lawful for the LEA to refuse to name an independent special school for this child?’ and ‘Is the LEA acting lawfully by claiming that it is able to meet this child’s educational needs in a mainstream school?’.

Given the growing complexity of the special educational needs law stemming from the government's statutes, statutory guidelines, regulations and code of practice, as well as from the courts' continual production of reported decisions, it is not surprising that the representatives who appear on behalf of the LEA and parents have increasingly become specialists in what has become special educational needs law. They too operate as 'translators' or 'mediators' who, in the promotion of their interests, have no alternative but to transform communications that originated in science and law in ways that make them recognisable as relating to legal issues. Appearing before the SENDIST is as much about winning and losing cases as in any court of law. However, it is also about presenting difficult, technical information from a number of different 'expert' sources in ways which make it possible for the legal decision-makers to reach a conclusion which stands up to legal scrutiny on the educational needs of children with autism and on how to meet them. Needless to say, this involves no small degree of selection and reductionism, but, more than this, it also involves reconstructing them in a way that makes it appear that the knowledge exists that permits right and wrong, lawful and unlawful, decisions to be made about a future that is, and will always remain, uncertain.

Educational Psychology

This leads us to the experts themselves. As we observed early on in this article, the transformation from scientific facts about autism and children with autism into communications that make sense within a programme of special educational needs law is a two-stage process. Scientific communications must become amenable to the education system's pass/fail code before they become visible to law, or rather to this particular programme of the legal system. Educational psychology plays a central role in this transformation process. The appendix of every statement of special educational needs refers to the report of at least one educational psychologist. Most of these reports contain observations of the child's behaviour in the classroom and in interview; accounts of the concerns that the parents have expressed to the educational psychologist; and the results of standardised tests designed to evaluate the child's performance against the norms for children of the same age.

Educational psychologists' reports almost invariably then go on to make a series of proposals or recommendations -- often in very general terms -- on ways of improving the child's educational performance. It is here that educational psychologists achieve the task of transforming psychological disorders into 'special educational needs' and from there to educational methods designed to meet these needs.

For children with autism to be eligible for special educational provision, it has to be shown that they are 'failing' in their education. Almost by definition, even those children with high functioning autism present as 'failures' in educational terms, since their capacity to meet the demands of normal school life, such as sitting still in class and concentrating on their work, accepting the authority of the teacher, switching from teacher to teacher and from classroom to classroom, is likely to be impaired and these failures to conform alone are likely to result in difficulties which, if not addressed, are likely to affect adversely the children's performance in Standard Assessment Tests (SATS) or school exams. Educational psychology then serves to reconstruct the raw data of developmental psychology into terms that are recognisable as educational communications and amenable to educational decisions. It operates in such a way as to identify the child's educational 'failures' and propose educational methods through which these failures may be mitigated and even
reversed, so that education may live up to its self-image of fulfilling children's potential. In performing this task, the complexities and uncertainties in diagnosing and understanding the causes of autism, the problems of subjectivity involved in observing children and the controversies surrounding many psychometric tests tend to be forgotten or ignored in the quest for educational solutions to what have now been posed as educational problems. True, some of these uncertainties and complexities may reappear, if and when the issue of the child's special educational needs enters the legal system, transformed into controversies between LEAs and parents as to the wording of the statement and as to what the LEA needs to do in law to meet the child's needs. Yet when this occurs, it is not psychology itself which is called upon to resolve such controversies (even if it were able to do so), but legal precedent or law's own version of the psychological issues, a version that is constructed by law itself from what it regards as valid evidence and reliable information.

Conclusion

Special educational needs law, as it has evolved in England, provides ample evidence (as if any were needed) of the legal system's ability to extend its operations through the creation of new legal programmes. Once science and education have been reconstituted within law, it simply does not matter, from law's perspective, whether decisions about the education of children with autism have been based on a sound scientific diagnostic of autism. Nor does it matter whether psychological tests of cognitive ability are able to measure educational potential, or whether therapeutic or educational interventions actually work. All that matters in law is that legal decisions should be lawful and, where a child's special educational or educational needs are concerned, that they should be capable of validation through law's own construction of scientific and educational knowledge. Accordingly, conflicts between parents and LEAs over the choice of school, teaching methods within schools, over the need for therapeutic interventions, or over what qualifies as an efficient use of resources to meet a child's special educational needs, may all be resolved without reference to the tentativeness or the complexity of scientific and educational knowledge, by the expedient of finding the right answer in law. Of course, the search for the right legal answer may be a complex one, but the complexities involved here are those generated by law itself, and concern not 'what is best for the child' but how to determine what is lawful and unlawful from the ever-increasing body of statutes, regulations, case-law and codes of practice.

As we have demonstrated in our discussion of children with autism, this method of determining legal decisions can be achieved only once scientific and educational complexities have been constructively misinterpreted so as to provide a clear indication for and within the legal system as to where the child's special educational needs lie and how these needs may be met. Any ambiguities or admissions of ignorance in law's reconstruction of scientific or educational knowledge are likely to emerge as an opportunity for a contest between competing versions of where the child's special educational needs really lie and what is the right way of meeting them.

Finally, let us return to the prevailing rights ideology which inspired the granting of a right of the appeal to parents and the network of independent tribunals set up under the Education Act 1993. It is not difficult to appreciate that from the perspective of liberally minded lawyers and politicians, these reforms were seen as a major advance in helping children with learning difficulties to secure the help needed to overcome these difficulties. Yet from the sociological theory of autopoietic systems, it is clear that the reliance on the expedient of rights enforceable through legal processes to redress what was seen as the imbalance of power between LEAs and parents would result inevitably in the evolution of a new programme within the legal system. Moreover, the only way that a programme of special educational needs law could operate was on the one hand, to simplify, reduce, distort and filter psychological and educational information to make it amenable to law's operations and, on the other hand, construct a legal complexity which reflected the complexity generated by these other systems.

This reliance on a legal process of decision making might well have resulted in what passes for justice in the eyes of the law, but at the expense of creating or turning a blind eye to other injustices that the law is unable to remedy. There is no doubt, for example, that it operates to the detriment of parents who are unable to gain
access to specialist legal advice and representation to help them navigate the legal complexities. There is also no doubt that the availability of special educational needs provision for children with autism varies considerably from one educational area to another, leading to the accusation of 'injustice by postal code'. Of course, the analysis set out in this article does not provide any solution to these problems. However, in concentrating on the way that social systems reconstruct one another in their own terms, we hope to have increased awareness that the difficulties confronting the provision of special educational needs for children with autism go far beyond the current inclusion/special schools debate.

Our article also raises the wider social issue of the difficulties in using legal programmes to steer social policies and legal decisions, or to regulate those institutions set up to put these policies into effect. The decisions that emerge from legal programmes may make perfect sense in law -- the 'right decision' has been made according to 'the best knowledge' available to the tribunal or court -- but there is no guarantee that they will steer policies or regulate social institutions in the way that was originally intended by parliament, or by those groups who pressed for more rights, more resources or other equally well-meant reforms.

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2 The involvement of courts in these decisions usually takes the form of a judicial review on an issue of law by the administrative court of a decision previously made by a Special Educational Needs and Disability Tribunal (SENDIST). This right of appeal was introduced in 1994. From the administrative court, further appeals may lead to both the Court of Appeal and House of Lords being involved in deciding issues of special educational needs law.

3 See, for example, M. Foucault, The Order of Things: An Archaeology of the Human Sciences (Routledge, 1974); M. Foucault, 'Disciplinary Power and Subjection' in C. Gordon (ed), Power/Knowledge: Selected Interviews and Other Writings (Pantheon, 1980); and M. Douglas, Risk and Blame. Essays in Cultural Theory (Routledge, 1994).


6 Examples of the search for 'the right formula' for distinguishing reliable scientific evidence from 'junk science' are the US Supreme Court cases of Frye v United States 293 F 1013, 1014 Dc Cir 1923; Daubert v Merrell Dow Pharmaceuticals (1993) 113 S Ct 2786; and Kumho Tire Company v Carmichael (1999) 119 S Ct 1167. In England expert scientific evidence may be discounted by the courts because of the witness's lack of qualifications or experience, or because the evidence is based on incomplete facts or research or represents an unorthodox position: Manchester City Council v B [1996] 1 FLR 324; Re AB (Child Abuse: Expert Witnesses) [1995] 1 FLR 181.

7 An obvious example is the recent controversy concerning Sir Roy Meadows' expert evidence in the Sally Clark murder trial and his subsequent striking off by the British Medical Association for serious misconduct in misleading the jury over the statistical likelihood of two children in the same family dying from 'cot death'. The more general discrediting of expert paediatric diagnoses of Munchausen's syndrome by proxy and criticisms of the very existence of this syndrome is another example. See C. Wells, 'The Impact of Feminist Thinking on Criminal Law and Justice: Contradiction, Complexity, Conviction and Connection' [2004] Crim LR 503.

9 Carole Kaplan, a consultant child psychiatrist, wrote recently ‘A major challenge is how to encourage junior colleagues to work as experts’ in ‘Children and the Law: The Place of Health Professionals’ (2002) 7 Child and Adolescent Mental Health 181, at p 185.

10 ‘The system of society consists of communications. There are no other elements; there is no further substance but communications’ in N. Luhmann, Essays on Self Reference (Columbia University Press, 1990), at p 100.

11 M. King and C. Thornhill, Niklas Luhmann’s Theory of Politics and Law (Palgrave, 2003), at pp 3-12. For a general account of Luhmann’s theory, see chapter 1.


16 L. Kanner, ‘Autistic disturbance of affective contact’ (1943) 2 Nervous Child 217.


24 In England and Wales this includes children with all manner of disabilities, physical as well as psychological. Section 312(2) of the Education Act 1996 defines a child with ‘learning disability’ as having: ‘(a) ... significantly greater difficulty in learning than the majority of children of his age (b) ... a disability which either prevents or hinders him form making use of educational facilities of a kind generally provided for children of his age or (c) ... [being] under the age of five and is, or would be if special provision were not made for him, likely to fall within paragraph (a) or (b) when of or over that age’. Local education authorities (LEAs) have a duty to identify special educational needs (SEN) in children for whom they are responsible. These children may become the subject of a SEN statement, in which case the LEA becomes responsible for meeting the child’s needs. This may be achieved either within a mainstream school, at a special school within the state system or at an independent school paid for by the LEA. Children who are not the subject of a SEN statement may still receive help within the provision normally available at school. This usually occurs within the School Action and School Action Plus programmes.

26 The Education Act 1981 provided a legal imperative for the 'inclusion' of children classed as having special educational needs.


28 The London Borough of Newham, for example, set out a policy statement in 1988 which contained the following: ‘The ultimate goal for Newham council's inclusive education strategy is to make it possible for every child, whatever special educational needs they may have, to attend their neighbourhood school, to have full access to the national curriculum, to be able to participate in every aspect of mainstream life and achieve their full potential’ (emphasis added). In a tribunal case in which one of the authors of this article appeared as an advocate, Newham argued that they were able to meet the needs of a child with severe autism in a mainstream school.

29 Under Sch 27, para 3(3) to the Education Act 1996, the LEA is obliged to name in the statement the maintained school of the parent's choice, unless: (a) the school is unsuitable to the child's age or aptitude or to his special educational needs; or (b) the attendance of the child at the school would be incompatible with the provision of efficient education for the children with whom he would be educated or the efficient use of resources.

30 See Education Act 1996, s 316(3)(a) and (b).


32 Ibid, s 329 and 329A.

33 Ibid, s 325.

34 Ibid, s 326.


42 See n 23. In 2001-2002, the last year that autism was treated as a separate classification, appeals to the Special
Educational Needs Tribunal concerning children with autism represented 14.7% of all appeals. As such, they constituted the second largest category of special educational need.

43 Education Act 1996, s 324.

44 These are programmes through which schools offer special educational help to pupils through the resources normally available to the school (including advisory and assessment services offered to schools by the LEA). This does not involve the LEA in providing specialist individual provision such a learning (or teaching) assistant or regular therapy from a speech and language therapist. The LEA is obliged to make such provision only when it has been specified in a SEN statement.


50 Education Act 1996, s 324.

51 The Education Act 1996, and all previous SEN legislation, leaves open to interpretation what precisely is meant by the term ‘education’, although s 322 refers to help being given to the LEA by ‘any Health Authority or local authority ... in the exercise of any of their functions’, this making a distinction between the LEA’s functions and those of health and social services.


53 The SEN Code of Practice 2001 (DfES 581/2001) was published pursuant to the Education Act 1993.

54 Ibid, at para 8:49.


57 Ibid, per Sedley LJ.


60 Ibid, at para [27].


62 Increasingly government departments in the UK publish codes of practice and guidelines in an attempt to influence legal
decision-makers in their interpretation of statutes and to direct them to the issues they should be considering in their decisions and the weight to be given to arguments and evidence. Within special education needs the government has also published statutory guidance on *Inclusive Schooling -- Children with Special Needs* (DfES 0774/2001).

63 See Education Act 1996, s 313 and *R (Jane W) v Blaenau Gwent BC* [2004] ELR 152, per Owen J, at paras [16]-[17].

64 Many LEAs now have appointed tribunal officers, or their equivalent, whose job it is to spend their time representing the authority at SENDIST hearings. Similarly, parents' advice and assistance organisations, such as the Independent Panel for Special Educational Advice (IPSEA) train and appoint volunteer tribunal representatives.


66 It is notable that a major empirical study of special educational needs tribunals has the title 'Getting it Right': J. Evans, *Getting it Right* (National Foundation for Educational Research, 1998).

67 Parents, as well as the LEA, are entitled to submit reports during the assessment process, and some take the opportunity to have their child examined by an educational psychologist who is independent of the LEA.

68 See, for example, J. Morton, *Understanding Developmental Disorders* (Blackwell, 2004), chapter 3.


