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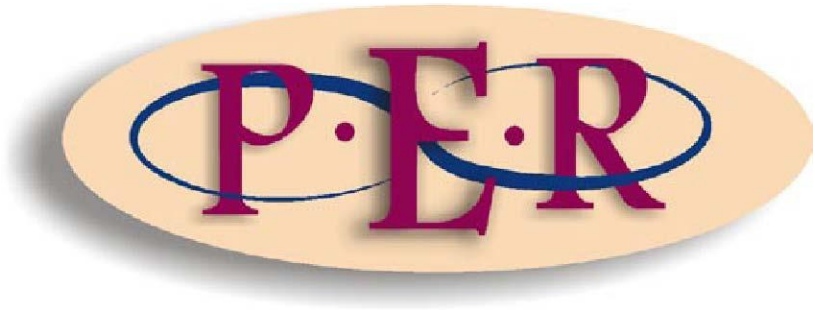

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AFRIFORUM v MALEMA: THE LIMITS OF LAW AND COMPLEXITY

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1 Introduction

In this note we reflect on the case of *Afriforum v Malema*[1] through a tentative engagement with systems theory. Various systems theorists, most prominently Niklas Luhmann,[2] have described law as an autopoietic system. By this they mean that law is a self-referential system that isolates itself from the complexity of its environment and deals with problems in a highly selective and instrumentalised manner. An important aspect of this description of law is how law, because of its fear of having justice challenge its legitimacy, has effectively severed contact with the demand of justice.[3] It is submitted that one way in which the relationship between law and justice could be reopened is if law's temporality could be revisited and accordingly other aspects neglected by law such as identity, agency and ultimately justice reconsidered.

We clarify and expand on this below with reference to the facts and decision of *Afriforum v Malema*,[4] that after more or less two years of contention was settled outside of court. The case is a good example of an instance where the court had to deal with an account of history that stretched beyond the immediate facts at hand and where law's narrow approach to time limited the factors, narratives and contexts to be taken into account.

The section directly below deals with the facts and the decision of the case, whereafter we focus on arguments concerning the limits of the law and complexity.

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1 *Afriforum v Malema* 2011 6 SA 240 (EqC).

2 Luhmann *Law as a Social System*.

3 Luhmann *Law as a Social System* 22.

4 *Afriforum v Malema* 2011 6 SA 240 (EqC).

2 *Afriforum v Malema*

Afriforum is a civic organisation particularly concerned with the protection and promotion of the Afrikaner community in South Africa. In 2011 it approached the Equality Court for an order prohibiting the then leader of the African National Congress Youth League, Julius Malema, from singing a particular struggle song at political rallies. The song in question is called "*Awadubula (i) bhulu*" or "Shoot the Boer". Afriforum claimed that singing the song caused systemic disadvantage for Afrikaners, undermined their human dignity and could propagate hatred and incite violence based on language, culture and ethnicity.[5]

The songs were alleged to have been sung during the month of March 2010 on various occasions meticulously laid out to the court.[6] Malema claimed that since it was a struggle song, he had the right to sing the phrases in question.[7] He contended that the song referred to the symbolic destruction of white oppression, should not be taken literally, and was a part of the heritage of the liberation of South Africa.[8]

The media's reaction to the case was significant. Especially after the song had been sung at the University of Johannesburg, articles appeared in all of the major newspapers.[9] A large section of the public followed the press coverage and was outraged by the fact that the song had been sung. A common argument made in what the Court referred to as the "black press" was that the song was not an incitement to violence, but was sung in recognition of the past struggle and as a reminder of the need to oppose the current oppression of black people.[10] More extreme opinions held that the considerations of oversensitive white fears should not

5 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 49.
6 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 49.
7 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 53.
8 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 61.
9 Rademeyer *Beeld*. Also see Malan *Beeld*.
10 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 80.

have precedence over black aspirations.[11] An interdict was granted against Malema, prohibiting him from the continued singing of the song, which he respected.[12]

The court outlined the issues that it had to determine, including the meaning of the song's words, what meanings different groups ascribed to it, whether it constituted hate speech and whether the fact that it was part of a struggle heritage overrode the right of those claiming that it was hate speech.[13] The court found that through the reporting and interpretation by the press the song's words had taken on a specific meaning to certain sectors. Whatever Malema's original meaning might have been, he had continued to sing the words after becoming aware that the words had taken on a character that the court considered "derogatory, dehumanising and hurtful".[14]

The court emphasised that while the song was appropriate during the struggle years, the original figurative meaning of the song now seemed out of place. According to subsequent laws and agreements the enemy has become a friend and a brother and singing such re-contextualised words was out of order.[15] The court decided that the words of the song could reasonably be construed to:

> ... demonstrate an intention to be hurtful, to incite harm and promote hatred against the white Afrikaans speaking community ...

and that it constituted hate speech, intention being regarded as irrelevant.[16] The words were shown to have different meanings and each meaning was to be accepted. The judge stated that people who felt an attachment to the song should develop a new morality and embrace new customs in the new South Africa.[17] In closing, the court declared that specific phrases of the song constituted hate speech

11 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 74.
12 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 76.
13 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 55.
14 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 107.
15 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 108.
16 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 109.
17 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 110.

and the respondents were interdicted from singing the song. The judge stated that morality should prohibit South Africans from singing it.[18]

The respondents took the decision on appeal to the Supreme Court of Appeal in Bloemfontein. However, on the 1st of November 2012 the parties reached a settlement agreement, which was made an order of court the following day, substituting the order of the Equality Court.[19] The agreement stated that the song does in fact constitute hate speech and that the "morality of society" dictates that it should not be sung. This conclusion was reached on the grounds that the words are hurtful to some communities, and that the particular historical circumstances in which the song had its origin are no longer applicable.[20] The decision to settle and to abandon legal proceedings was praised publicly.[21]

In a critical discussion of the case, Joel Modiri[22] reflects on the reluctance evidenced in the judgment to engage with the full implications of identity and the complex nature of the facts. Modiri relies on legal realism and critical race theory in order to expose the inherent ideological and racial bias embedded in the decision and in the legal structure at large. Our aim is to address this reluctance through the lens of law as an autopoietic system and the limitations that this places on law's ability to cope with identity and complexity.

3 The limits of the law I

As alluded to above, law as an autopoietic/self-referential system requires the drawing of boundaries; such a drawing of legal boundaries is clearly illustrated in the case of *Afriforum vs Malema*. Early in the case Lamont J issued the parties with a directive to isolate before the court what the legal issues were, the evidentiary and factual matters regarding the issues, and the extent to which the parties differed

18 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 120.

19 *Mediation Agreement Made and Entered into by and between the ANC and Mr Malema and Afriforum and TAU-SA* (1 November 2012) (Politicsweb 2012 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=336778&sn=Detail&pid=71616) (hereafter the *Mediation Agreement*).

20 The *Mediation Agreement*.

21 See *Afriforum v Malema* 2011 6 SA 240 (EqC) para 80.

22 Modiri 2013 *SALJ* 274.

with regard to them.[23] The implication of this directive for the purposes of autopoietic law is clear. In a complex matter such as this, one that encompasses a broad temporal context and human communication, the court needed to know which of its own unique norms were at stake. This is the translation of environmental problems into the binary legal/illegal vocabulary of simple legal oppositions. Systemic operational memory had to be informed of exactly which norms to recall in order to assess what was at stake in a strictly systemic sense. Once the specific norms had been identified it became easy to establish which parts of the narrative fell within the ambit of the law and which do not. The complexity of the problem immediately became reduced to the fulfilment (or not) of a small set of norms, ignoring active engagement and dialogue.

One result of this is the denial of the fully-fledged identity of the parties. As the *leitmotif* of systems theory goes: "human beings do not and cannot communicate - only communication can".[24] How can hate speech be dealt with in a system that has this as a foundational premise? Paul Ricoeur's[25] notion of narrative time can be recalled as a notion that forces us to deal with the complexity of identity and the reclamation of subjectivity. It identifies speech (or singing for that matter) as a constituting element of the unchanging *ipse* identity.[26] Individual bodies are held accountable for their speech over temporal distances, because narrative time can never be ethically neutral.[27] Autopoietic legal systems, through identifying the relevant legal norm (hate speech) to measure the individual against, effectively disengages from the puzzle of extralegal norms of justice as well as removing the "I" that spoke the contentious words.[28] The *ipse* narrative identity of the speaker immediately becomes irrelevant to law.

There is also the matter of institutional, public or political identities. Law is of course one of these, but in this plot we have the ANC and its Youth League on the one

23 *Afriforum v Malema* 2011 6 SA 240 (EqC) para 44.
24 Moeller *Luhmann Explained* 5.
25 Ricoeur *Time and Narrative*. Also see Dowling *Ricoeur on Time and Narrative*.
26 Rasmussen "Narrative Identity and the Self" 159.
27 Dowling *Ricoeur on Time and Narrative*.
28 Moeller *Luhmann Explained* 83.

hand, and Afriforum and the other complainants on the other. These political organisations both fashion themselves as spokespeople for entire cultural groups, or at least for their own members, each with different social imaginations of the good life. In a case such as this one, the normative claims of both the individual identity as well as the political identities of Malema and the larger political entities need to be assessed. Political identity is an identity that focuses not on common humanity but on differences. The political identities on either side of this case have an ideological claim that their rights in question are stronger than those of the other.

Narrative forces these different identities to engage not only with the other but with themselves to re-evaluate what this identity means. If the law strips away the ethical character of identity it makes itself incapable of enacting justice. In a case such as this where temporal considerations impart meaning to the facts over a span of decades (or even centuries) it is irresponsible to be temporally insensitive, thus disregarding the value-judgments that narrative time demands. Autopoietic legal systems disregard individuality on both the individual and political level, regarding society as a homogenous mass. The parties to this case are labelled "complainant" and "respondent", and each is given legal roles with rights and obligations that are evidentially proved either true or false. The facts of this case are clearly in conflict with such a position.

In autopoietic systems humans cannot be said to act, but instead it is always the system that acts (acts themselves being communicative events). Thus an element of causality becomes lost in translation when it crosses the boundary from environment to system. Environmental events enter the system, forcing it to make selections. The facts are internalised as difference, and law itself decides what the causal implications are. The moment a complex case, with a vast possibility of future outcomes such as this one, crosses the boundary we are left with a very limited amount of outcomes. Importantly these outcomes are almost necessarily legal outcomes. This allows for improper outcomes to be logically explained. Action loses much of its complexity when described through the designations of legal causality. The facts of the case at hand are particularly intricate, but the facts are typified as

follows: the song had been sung, the press widely printed translations, Malema became aware of this but continued to sing the song. In a nutshell this is what remains of the action and causation as the court saw it.[29]

A pre-narrative structure exists in which we can make sense of the facts of the case. This symbolic order imparts meaning to the identities, actions and contexts that make it understandable to us and imparts causality to it. We need to understand these narratives within the spatiotemporal context to make them part of a teleological whole. It is this that makes it possible to be evaluated and judged. The final part is the stage of interpretation known as refiguration. At this stage the individual nuances and prejudices of the interpreter come into play, such as his own experiences, his background or his culture. This implies imperfect knowledge on the part of the interpreter or judge, meaning that the facts of a narrative need to be struggled with in order to arrive at a good interpretative conclusion.

Ricoeur[30] sees human action as rooted in cultural reality, much as the causation of physics is rooted in the material world. This kind of causality is situated within narrative time. In the case at hand the judgment seems to be an *a posteriori* one with little regard to the *a priori* events of the narrative essential to the teleological understanding of the facts. The temporal distance to the past is never really overcome. Even though the past does not exist anymore, we still inhabit it.

As stated earlier, the parties reached a settlement on the 1st of November 2012. While Afriforum celebrated the settlement for being superior to a court order (for reasons such as that court orders are difficult to enforce; that it would humiliate one party; and that it prevents constructive engagement between communities)[31] the question is begged: why was the law chosen by the very same complainants as the norm-system in which to address the matter in the first place?

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29 A similar argument about the limits of the law, or the limits of the court to truly hear and listen to narrative has been made in the context of the Schubart park case. See Van Marle and De Villiers 2013 *AFLJ* 129-148.

30 Dowling *Ricoeur on Time and Narrative* 54.

31 The *Mediation Agreement*. Also see Malan *Beeld.*

Is it possible that law could never have been an adequate avenue in which to resolve this matter? The parties themselves certainly gave reasons as to why a court order would be undesirable, and it appears that the parties have realised that law seems incapable of dealing with this complexity. Law could only translate the problem into a binary opposition where the song was either legal or illegal, where one party lost and the other won. In a case such as this, where the issue at stake is the peaceful and respectful co-existence of two race-groups (at least that is how it is portrayed by their self-appointed representatives) and the recognition of one of the groups' heritage of liberation (again as portrayed by the respondents), a simple legal prohibition seems like a fundamentally inadequate measure to appease the matter. This problem is one that required dialogue, temporal sensitivity and respect for the narrative identity of the other. This would have allowed for ethical considerations to come to the fore. Justice cannot be achieved and is simply incompatible with a system of communication that is temporally biased toward the present, denies identity and refuses to engage with norms that do not suit its agenda.

4 The limits of the law II

One of the problems of autopoietic reasoning is that it immunises itself from external critique. It is capable of this escape act through its self-drawn boundaries and differentiation. It becomes easy for law to reject criticism as not being directed at law itself, as if saying "you might be right, but what you are talking about is not law". One possible solution to this counter is to make sure that we are talking about law, that is, to establish a location for criticism inside the system itself. Is it possible for critique to infiltrate a system in such a manner at all?

One possible argument supporting such an internally-located space for critique is offered by Christodoulidis.[32] While he frames his argument within Luhmann's system theory of the political, and is even dismissive of the potential to employ it within the law, some fundamentals are translatable. The aim is to make a system "reflexive", allowing a degree of self-consciousness and self-distance that makes judgments of

[32] Christodoulidis 1991 *Economy and Society* 380.

the system possible by the system. This circumvents the escape act of designating critique as incompatible or not with the system.[33]

Systems draw boundaries that allow them to differentiate external information and to turn this into meaning particular to the system.[34] The system creates representations of reality that are meaningful within these confines. These different systems become increasingly separated from one another until they are autonomous and incompatible to the point where one can no longer perform the function of the other.[35] One of the reasons for this is the important constitutive difference that makes up each system, the binary judgment code of each system such as legal/illegal or just/unjust.

This allows a construction of the environment that is typified uniquely by each system. It structures the discourse in which a system can communicate about human events.[36] So while a system is operatively closed in that it reconstitutes itself through its own past operations, it is this differentiation of reality that is said to make a system cognitively open. This gives the system the ability of self-observation in that it can distinguish between its environment that it makes subject to it as well as the internality of its own autopoietic operations. It is this point that Christodoulidis[37] is interested in: the connection between operation and self-observation. This self-observation is defined as the application of the differentiating code and an indication of something on that basis.[38] It is exactly this self-awareness that lies at the root of boundary-drawing.

It is possible for a system to recognise a third value separate from its binary code in the form of information that the system cannot process and thus falls to the wayside. This is a contingency value in order to asymetricise itself, which in the case

33 Christodoulidis 1991 *Economy and Society* 381.
34 Christodoulidis 1991 *Economy and Society* 382.
35 Christodoulidis 1991 *Economy and Society* 383.
36 Christodoulidis 1991 *Economy and Society* 383.
37 Christodoulidis 1991 *Economy and Society* 384.
38 Christodoulidis 1991 *Economy and Society* 384.

of law could be called justice.[39] It allows for a degree of sensitivity for external reference from the system. Since autopoietic systems cannot directly observe their environment, this becomes a gauge for the fulfilment or disappointment of the system. When the system observes its environment (albeit through vastly reduced complexity) it decides to make the environment subject to its operations, which then gives it an opportunity to observe itself. It can also be called the "re-entry" of the system/environment distinction into the system.[40] This sensitivity of the system, however, remains subject to what its binary code allows it to understand and deem relevant.

Justice insists that it should be done, for example through re-entry, and that we can always attempt to act justly. It allows us to question what is legal and how the law should be. It is the very thing that should allow us to redefine what legal communication is. Justice as such, however, cannot allow itself to be channelled into the existing scheme of the system. It ultimately remains an external value, and upon entry into the system it loses some of its character and gains a legal definition.

Part of the problem is that systems each create a unique environment relative to itself. The result is that society has no "centre" from which law and justice can deliberate. There cannot be a whole of self-knowledge.[41] There is no environmental locus for collective rationality, since it is undermined by the incompatible system accounts of reality. In the case of law, it becomes reflected upon from the meta-level of politics in order to establish its limits. The question then arises, which problems should be taken up again by law, and which should be distributed to other systems?[42] The problem becomes a circular one: in which way is the political system more suited to deliberating these problems than the law is? Yet this meta-level of deliberation has made its way into political and legal systems, for example in the forms of constitutions. Given the binary code of systems, how are these meta-level deliberations supposed to be understood? The answer is that the distinction can be

39 Christodoulidis 1991 *Economy and Society* 385.
40 Christodoulidis 1991 *Economy and Society* 386.
41 Christodoulidis 1991 *Economy and Society* 388.
42 Christodoulidis 1991 *Economy and Society* 393.

placed through theory into the context of another distinction.[43] The code that decided what was meaningful to the system can now be reflected upon. It is exactly through this meta-level that critique finds leverage from and can be carried into the systemic discourse itself. Law can question its very legal/illegal binary and realise that not all problems have to be differentiated and designated in this way. This could result in a different way in which the system perceives and presents the reality of its environment.[44]

The third contingent that allows observation also allows for the possibility of seeing how things could be different. The meta-level of theory in the system allows for a second-order observation. Theory can see what is visible and invisible to the first-order observation,[45] brought about by the third "rejection value".[46] It allows law to reject the very choice between legal/illegal, of whether problems should even be taken up legally. Is it possible for this rejection value to call to norms of justice, of narrative time and of ethics?

Justice, however, demands temporal sensitivity. One of the ways in which law has shirked its responsibility is by being presentist. Law's relationship with memory and the forgetting that accompanies official memory is something that Christodoulidis[47] also discusses. Memory after all is important for all temporal locations including the future. As he writes: "[W]hat future does not seek its point of departure in some origin in the past?"[48] Can we ever begin anew while being temporally sensitive, or does a new future necessitate a forgetting of the past? Even Ricoeur[49] says that new generations feel the need to distance themselves from the "old Terror" of those that came before. It allows the new generations to wipe the slate of hereditary debt. Can this be done at the price of historical continuity? After times of crisis newer generations seek a split with the communal narrative, unable to carry the burden

43 Christodoulidis 1991 *Economy and Society* 394.
44 Christodoulidis 1991 *Economy and Society* 394.
45 Christodoulidis 1991 *Economy and Society* 395.
46 Christodoulidis 1991 *Economy and Society* 395.
47 Christodoulidis "Law's Immemorial" 207.
48 Christodoulidis "Law's Immemorial" 207.
49 Christodoulidis "Law's Immemorial" 208.

that it imposes. Is it possible to free the future from the legacy of the past, and what role does the law have to play in this?

The preamble of the South African *Constitution* gives a special role to memory, urging to remember the injustices of the past. Christodoulidis[50] characterises this as a responsibility that we can never truly meet. He remains sceptical of the integrity of memory in an institution that "closes down memory ideologically".[51] He evokes memory as an "immemorial", what can be remembered only as being forgotten. He makes important statements regarding memory: that memory is necessarily selective; memory is released from sequence and jumps, cuts and moves in chronology, also implying omission; and that memory is never presented as pure reality, but is constructed in the light of a question in order to illuminate the what, who, where or how of the past.[52] It is thus always presented with reduced complexity in service of certain presuppositions. In this manner even law can deal with the past only through certain questions and goals, thus establishing what is remembered and what is forgotten, what is memory and what is immemorial.[53]

Christodoulidis[54] criticises philosophy for not having dealt with time in terms that are its own, time instead always being related to something else such as physical change. Such causal theories of time are problematic, since time is needed for causal events to unfold; it becomes tautological to use these events to then define time. This echoes the sentiment of Ricoeur, who wishes to break away from the internal/external debate regarding time. Yet how can we define time if not through causality? Christodoulidis offers a definition very similar to that of Luhmann. Time is defined self-referentially as the difference between past and future.[55] This means that time doesn't need events or change to be constituted, and allows for different versions of memory for individuals. Lacking the substantive element of causality, memory needs a frame of reference, which it finds in the differentiation between

50 Christodoulidis "Law's Immemorial" 212.
51 Christodoulidis "Law's Immemorial" 212.
52 Christodoulidis "Law's Immemorial" 213.
53 Christodoulidis "Law's Immemorial" 214.
54 Christodoulidis "Law's Immemorial" 215.
55 Christodoulidis "Law's Immemorial" 216.

events, keeping in mind that memory is structured through some specific question or angle of inquiry.[56] The past cannot be accessed without memory, automatically linking it with time and narrative time.

Of course memory is never neutral and even legal memory has an "institutional imprint".[57] Law structures memory with the same questions that access the past, and in this case these questions will have a certain legal character. Even the way that time is engaged with and how past events are defined are predetermined by the legal system. While narrative time allows us to look at time teleologically, law is a structure of *a posteriori*. Law needs to manage the past in order to stabilise social expectations.[58] These expectations do not cast a fixed version of the past, and can thus be reinterpreted. Yet this memory will always be selective. The very functioning of the legal system requires that the past be classified, stripped of ambiguity and then settled and closed. Law is interested in reading the past only insofar as it can be rejected or accepted in the present in an act of constant constitution of the system and its reality.[59] This makes a true engagement with the past impossible. Christodoulidis[60] believes this can be changed through "... asking the system to remember what it forgot and to remember that it forgot".

Through shared interpretative experience, a common memory can be built. Law is one interpretative model that attaches value to certain aspects and discards others as unimportant. To remember the past through the law side-steps the terminology of ethics.[61] As we have said before, the individuality of an ethical agent is replaced by the homogeneity of the legal subject. Any call of justice toward the Other becomes lost.

What does this mean for collective memory? How can someone take on the memories of another, never mind that of an entire population? Law has developed

56 Christodoulidis "Law's Immemorial" 217.
57 Christodoulidis "Law's Immemorial" 217.
58 Christodoulidis "Law's Immemorial" 218.
59 Christodoulidis "Law's Immemorial" 220.
60 Christodoulidis "Law's Immemorial" 220.
61 Christodoulidis "Law's Immemorial" 224.

mechanisms of abstraction and reduced complexity in order to facilitate this, such as being selective of which events are remembered, and by expressing only those events which can be cast in legal language. Law "sees" in its environment only that which it deems relevant, turning a blind eye on all else. This can never represent the whole truth and nothing but. Legal mechanisms all:

> ... trivialise, professionalise and rationalise, and thus fail to represent the memory of suffering, fail to make familiar what is senseless.[62]

Institutionally, law is embedded within the immemorial.[63]

The parallels with the *Afriforum* case are obvious. While we did not see an active performance of a rejection value, the parties themselves seemed to have realised that their problems were too complex for a legal/illegal typification. One interpretation could be that the law was unable to identify this problem effectively as a non-legal one, and it took a few years for this fact to become apparent. Regardless, it seems that the parties were sensitive to the fact that a strictly legal resolution of the case would consign certain aspects of history to law's immemorial, an officially sanctioned forgetting. It would also appear that the parties became more aware of the different questions they asked when framing the recent history of the song, giving them very different meanings in their recollections.

5 Complexity

We now turn to the late Paul Cilliers's engagement with complexity. Our argument is that law attempts to evade complexity by drawing strict boundaries between what is deemed legal or not pertaining for example to time, history and narrative. The common pragmatic counterargument to the criticism of law's reduction of complexity is to appeal to efficiency. Surely being more sensitive to time, identity, justice and ethics can only further bog down a court system that is already struggling to meet its demands? Wouldn't slowing down cases be in conflict with justice and good law?

62 Christodoulidis "Law's Immemorial" 226.
63 Christodoulidis "Law's Immemorial" 227.

According to Cilliers[64] it is destructive to positively link the "cult of speed" with efficiency. He argues for slowness because it will help us to deal with complexity better. It is a radical stance that recognises the importance of the past and memory in looking toward the future. It is an example of the ethical temporal neutrality that doesn't only emphasise present results but underlines the knowledge that the past and future carries. Speed is not a virtue for progress since "it is actually an unreflective fastness which returns you to the same place".[65]

Contemporary society deems decisive action in the present as necessary to control the future.[66] This has led to society losing its ability to retain the past.[67] Technology has made it so that our private time has been overtaken by public time, the immediate response taking precedence over reflection.[68]

Society needs the future to be predictable in order to plan its projects. Since we can never truly know what the future holds, the best way to control the future is to make it as similar to the present as possible, causing a state of the perpetual present.[69] This is a denial of the very notion of temporality, despite our being temporal beings in a temporal environment.[70] Spatial difference and temporal delay give structure to meaning.[71]

Complex systems such as law are unavoidably situated in time but are also not symmetrical in time. They have pasts and futures that are not interchangeable.[72] Even autopoietic law has a kind of memory that carries past operations into the present and the future. Complexity needs memory to function. The relations between elements are maintained only if they are successful, and it is because of this that we can say that memory adds a measure of constitutive qualities to

64 Cilliers 2006 *Emergence* 106. Also see Van Marle 2009 *Verbum et Ecclesia*.
65 Cilliers 2006 *Emergence* 107.
66 Cilliers 2006 *Emergence* 107.
67 Currie *About Time* 9.
68 Cilliers 2006 *Emergence* 108.
69 Cilliers 2006 *Emergence* 108.
70 Cilliers 2006 *Emergence* 108.
71 Cilliers 2006 *Emergence* 108.
72 Cilliers 2006 *Emergence* 109.

systems.[73] Already this insists that systems are unavoidably situated in time and that memory is important for the evolution of the body of knowledge of law. It follows logically that the more we understand of the past, the better we can anticipate the future.[74]

Since we know that memory cannot but be selective, the issue at stake is the principles on which autopoietic legal systems make such selections. When law is presentist, the future teleological significance of past events is ignored in the selection process, and good decisions cannot be made through fast selection. Law remains trapped in a fastness that leads to stasis, leading to its dealings with an environment that is disappointed in it. As Cilliers[75] writes: "It is the anticipation of what it could yet mean which draws us forward". Slowness demands from us an ethic of time and reflection in order to separate noise from complexity.

In this age it is considered more sophisticated to approach the law in a scientific manner. Whilst the scientific method has led to brilliant advances, as it has been applied by legal positivists it is an approach not suited to law. Scientific reasoning is necessarily reductionist and eschews and underestimates complexity.[76] Law must ethically be considered as an interpretative discipline. Positivist claims of objectivism are a false appeal to legitimacy that ignores complexity and finite human knowledge and thus becomes a matter of ethics, and through its disengagement with ethics, an unethical position.[77] Cilliers[78] makes the distinction between modest and assertive claims of knowledge. Modest claims are ones that are reflective and careful about what they claim. When we are dealing with complex problems, we need to make modest claims rather than assertive ones, considering our limited ability to deal with complexity. In making assertive claims we ignore the contribution that slow reflection can make. This echoes the deconstructivist claim that meaning cannot be

73 Cilliers 2006 *Emergence* 109.
74 Cilliers 2006 *Emergence* 110.
75 Cilliers 2006 *Emergence* 112.
76 Cilliers 2005 *Theory, Culture & Society* 255.
77 Cilliers 2005 *Theory, Culture & Society* 256.
78 Cilliers 2005 *Theory, Culture & Society* 256.

reduced.[79] Denying this difficulty and the limits of our understanding becomes an unethical denial of ethics. Modest claims are thus responsible claims.

It has been shown that because of our finite knowledge of complex systems we have to engage with ethics when engaging with such systems. We know already that ethics simply cannot exist in isolation of narrative time. Complexity demands engagement from us that is sensitive to these elements. Our finitude means that we cannot calculate from a positivist vantage - instead it calls for creativity in our efforts.[80] Law being a complex interpretive body of knowledge calls for this same creativity, but one limited by our responsibility towards modesty, justice, ethics and narrative time.

A court order was never going to deliver justice in the *Afriforum* case. By its very nature it is too tainted by efficiency and rejects ethical modesty in favour of absolute statements. Justice is something that we must wait for.[81] There is an ethical imperative for delay, to give attention to difference and to engage more deeply with the temporal aspects presented to us. It might be impossible to capture justice within a system,[82] but attempting to deal with complexity in a fast and rushed manner will guarantee failure.

6 Conclusion

Luhmann's description of law as an autopoietic system proves to be true when viewed through the lens of the *Afriforum* case. While it may be accurate it is certainly not desirable. It illustrates how autopoietic legal thinking uses abstraction and instrumentality to neutralise aspects of problems that require thoughtful engagement. Through narrative time those aspects are again brought to the fore, and can force the law to engage in a manner that will allow it to consider justice as well as its own future improvement.

79 Cilliers 2005 *Theory, Culture & Society* 259.
80 Cilliers 2005 *Theory, Culture & Society* 264.
81 Van Marle 2003 *SAJHR* 243.
82 Van Marle 2003 *SAJHR* 251.

Law typifies its environment through forming a binary code in which it problematises all information presented to it, but a possibility of a third rejection value is possible. While it wasn't strictly speaking present in this case (other than perhaps in the dawning realisation of the parties themselves), it can be a vehicle for self-consciousness in the legal system to identify when problems are suited to its code or not. Law deals with complexity through reduction and with the past through forgetting. It constructs an immemorial that allows present generations to break with those of the past. As we have seen with the struggle history at hand, in autopoiesis true engagement with the past is impossible because the law accepts only the information that aids in its reconstitution. Ricoeur describes responsibility as calling from the fragility of the Other,[83] yet law does not allow us to act responsibly when it reduces the complexity of the environment and the past. In this case a solution resembling something of this responsibility seems to have prevailed over a legalistic one.

Knowledge is taken from memory and projected and imagined upon the future in order to decide upon the most desirable course of action. The court failed to unleash the radical potential of recollective interpretation in the *Afriforum* case. It displayed a limited engagement with the past and effectively tried to settle the matter efficiently rather than to keep the debate open, allowing ourselves as well as the legal system constant exposure to the Other that could lead to more radical self-definitions.

Complexity exposes our limits and therefore cannot be dealt with non-ethically. It implies that time must be a factor when dealing with the complex situations that law is presented with before it is reduced. This requires a degree of creativity and imagination from us when interpreting law. It cannot be done through a rushed process but instead demands patient contemplation from us. This was why a court decision was always going to give an unsatisfactory result in the *Afriforum* case. Law is not only too fast, but also gives too absolute and forceful answers to attempt the resolution of such complex problems effectively. Instead, justice requires of law to consider matters - especially ones as sensitive, intricate and important as the

83 Ricoeur *The Just* 28.

Afriforum case - slowly and to give modest solutions that can always be re-evaluated. As can be seen, the refusal of law to deal ethically with time has far-reaching effects, but we cannot believe that they are inherent to law and that there aren't real steps we can take to make the law better.

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LIST OF ABBREVIATIONS

AFLJ	Australian Feminist Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal