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### Acquiring a Community

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*Published in:*  
European Law Journal

*Publication date:*  
2003

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
Lindahl, H. K. (2003). Acquiring a Community: The Acquis and the Institution of European Legal Order. *European Law Journal*, 9(4), 433-450.

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# Acquiring a Community: The *Acquis* and the Institution of European Legal Order\*

Hans Lindahl\*\*

To my late colleague, Bas van der Kleij,  
subtle interpreter of Merleau-Ponty

**Abstract:** *The theme ‘law and disorganised civil society’ raises the fundamental question concerning the junction between legal order and disorder, hence the passage from instituted legal order to the institution of legal order. The emblematic manifestation of this passage, in the framework of the Community legal order, is the *acquis communautaire*: What is the nature of the process that leads from acquired community to acquiring a community? In a first, preparatory, step, it will be argued that determinate conceptions of truth, time and the giving and taking of reason underlie the process of acquiring a European community. These findings are confronted, in a second step, with Antonio Negri’s theory of the multitude as a constituent power, which opposes revolutionary self-determination to representation. Deconstructing this massive opposition, this paper explores three ways in which representation is at work in revolutionary self-determination. As will become clear in the course of the debate, instituting (European) community turns on the interval linking and separating law ‘and’ disorganised civil society.*

## I Introduction

An inquiry into law and disorganised civil society ultimately evokes the general question concerning legal order and its relation to disorder. Indeed, what do we have in mind when qualifying civil society as ‘disorganised’? Do we mean to say that civil society counts as *orderable*, i.e. as not yet ordered but amenable to ordering by the law? Or is civil society disorganised by virtue of *breaching* legal order? Or is civil society disorganised in a more fundamental sense? These questions are intimately bound up with yet a further query: How radically are we prepared to conceptualise ‘disorder’? Is not an inquiry into law and disorganised civil society continuously pushed to tempering the virulence of disorder, such that—it is hoped—an overarching legal order might be found which integrates and reconciles law and disorganised civil society?

I will attempt to at least begin to shed light on these questions by analysing the *institution* of legal order, in the twofold sense of instituted law and the instituting of law. Focusing on the European Community, my aim is to show that this twofold sense of institution lies at the crossroads between Community legal order and disorder; more precisely, it *is* this crossroads. In effect, the institution of legal order is never only an inaugural act; it is also

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\* Published in *European Law Journal*, 9 (2003) 4, 433-450.

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always the *transgression* of an instituted order and, in this sense, disorder. Merleau-Ponty has captured the correlation between transgression and inauguration very well, albeit in the context of a discussion of artistic expression, by noting that ‘disorder is always another order.’<sup>1</sup> This incisive comment provides an initial, albeit far too compact, indication of the way to go in addressing the questions posed above: disorder is not simply the orderable, nor merely what breaches an existing order, but also, and primarily, the source of a novel order. From this perspective, the theme ‘law and disorganised civil society’ invites us to adumbrate the general features of the passage from instituted legal order to the institution of legal order.

This topic will be approached in two steps. Section II brings Merleau-Ponty’s distinction between a ‘speaking word’ (*parole parlante*) and a ‘spoken word’ (*parole parlée*) to bear on the process of constitutionalizing the EC Treaty. An analysis of the European Court of Justice’s famous *Van Gend & Loos* ruling reveals that determinate conceptions of truth, of time and of the giving and taking of reason underlie the process of acquiring a community. Section III considers a fundamental objection to this account of the institution of legal order, namely Antonio Negri’s theory of constituent power. Negri’s question is whether the revolutionary enactment of a legal order does not imply a radical form of normative innovation which cannot be accounted for in terms of the ECJ’s ruling. Is not the revolutionary enactment of a novel legal order—and *only* such an enactment—what is at stake when referring to ‘disorganised civil society’ as a constituent power? As we shall see, addressing this objection requires looking more carefully at the relation between presence and representation, and its implications for the concept of collective self-determination.

## II Normative Innovation

The distinction between instituted order and the institution of order has obtained legal currency in terms of the opposition between constituted power and constituent power. In the tradition of democratic theory, the sovereign people is, and remains at all times, the constituent power; the constituted powers—typically the legislative, executive and judiciary—are subordinate to the people. If, as is conventional wisdom, there is not (yet) a European people which could exercise its constituent power, it is difficult to see how we could make sense of normative innovations in the European Union in terms of constituent power and constituted power.

Ignoring, for the time being, the conceptual confusion underlying this traditional approach, I will instead turn directly to what I take to be the emblematic manifestation of the institution of the Community legal order, in the twofold sense noted above: the *acquis communautaire*. It is remarkable that this expression, used constantly by politicians, legal practitioners and legal theorists, is so little reflected on in terms of what it says. Invariably, legal doctrine approaches the *acquis* from the point of view of its content.<sup>2</sup> This approach, while justified by doctrinary purposes, by no means exhausts the richness and importance of this notion for Community law. Notice, to begin with, that the expression invites us to look at normative innovation as something which has already taken place, as something we can take for granted and which is at our disposal. Moreover, the expression suggests that what

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<sup>1</sup> M. Merleau-Ponty, *The Prose of the World*, transl. John O’Neill (Northwestern University Press, 1973), p 63.

<sup>2</sup> A case in point is the official Glossary of the European Union, according to which ‘[t]he Community *acquis* or Community patrimony is the body of common rights and obligations which bind all the Member States together within the European Union... Thus the Community *acquis* comprises not only Community law in the strict sense, but also all acts adopted under the second and third pillars of the European Union and, above all, the common objectives laid down in the Treaties.’ See, to this effect, <http://www.europa.eu.int/scadplus/leg/en/cig/g4000c.htm#c16a>.

has been acquired is acquired *by* a community, a community in a process of normative accretion to be sure, yet a community which precedes and exists independently of these accretions.

Although plausible and even ‘natural’, this interpretation of the *acquis* no doubt conceals a far more fundamental connection between the two terms of the expression: is not the *acquis communautaire* also and above all about a *communauté acquise*? In turn, can we at all make sense of the European community as *acquired*, other than by reference to the process of *acquiring* it? Could we not then view the *acquis* as the privileged locus for an inquiry into the genesis of Community legal order? Conversely, does not this term suggest that the genesis of legal order is all about acquiring a community? Would not, moreover, the interplay between acquired community and acquiring a community provide the key to the manner in which constituted power and constituent power are at work in the Community legal order? Would not, finally, the *acquis* provide us with a privileged perspective from which to grasp the interface between Community legal order and disorder?

#### *A Innovation through Transgression*

To address these questions, I propose to consider the ECJ’s *Van Gend & Loos* decision. We have become accustomed to think of direct effect as ‘acquired’, as a definitive and irreversible building block for further European integration. But what are the features that made this ruling into an act of acquiring a community? In what way does the Court’s reasoning shed light on the genesis of legal meaning and, thus, on the junction between Community legal order and disorder?

Consider the passage with which the ECJ closes its reasoning: ‘The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.’<sup>3</sup> This passage reveals that the genesis of legal meaning has the structure of *innovation by transgression*. The acquired reading, with respect to which *Van Gend & Loos* is both blatant transgression and daring innovation, was, of course, that the Treaty, turning the ECJ’s own words against it, is nothing but ‘an agreement which merely creates mutual obligations between the contracting States.’ A threefold paradox lies at the heart of the ECJ’s reasoning: it claims to comply with the Treaty by destroying its acquired meaning; it claims to remain within the Treaty by going beyond it; it claims to remain faithful to the Treaty’s authentic meaning by betraying its conventional interpretation. What the ECJ claims to express, by introducing direct effect, is, ultimately, what European Community is about. The ECJ’s decision transgresses acquired community in view of acquiring a community. The innovation introduced by *Van Gend & Loos* is analogous to ‘working or constitutive language’ in literature, whereby ‘constituted language, suddenly off center and out of equilibrium, reorganizes itself to teach the reader—and even the author—what he never knew how to say or think.’<sup>4</sup>

Innovation by transgression points to two different but interrelated aspects of the genesis of legal meaning:

1) *Van Gend & Loos* deploys a creativity which is irreducible to the acquired meaning of the Treaty. Although the ECJ’s teleological reasoning is, retrospectively, a possible reading of the Treaty, it is by no means, as the ECJ suggests, an ‘implication’ thereof. The ECJ’s motivation dries up long before it has been able to provide a ‘sufficient reason’ for its ruling. Accordingly, the ECJ cuts off further discussion by appealing to a *circular* reason-

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<sup>3</sup> Case 26/62 *Van Gend & Loos* [1963] ECR, 1-30; 12.

<sup>4</sup> Merleau-Ponty, *Prose of the World*, n 1 above, p 14.

ing. For the claim that the Treaty is more than an ordinary treaty under international law only holds if one presupposes that the functioning of a Common Market is not of ‘direct concern’ only to the states but also to individuals, that is, only if one presupposes that the Treaty is not an ordinary treaty under international law! Yet it would be a grave mistake to simply write off the Court’s reasoning as specious; instead, the circularity points to the fact that *acquiring a community always involves a rupture which cannot be fully bridged in terms of ‘deliberation.’*<sup>5</sup>

2) Paradoxically, what is acquired by transgressing established order becomes itself a part of established order. Innovation—by definition the manifestation of unorthodoxy—congeals into orthodoxy. Borrowing Husserl’s vocabulary, Merleau-Ponty refers to this dialectic as a process of sedimentation. *Van Gend & Loos* illustrates, we could say, ‘[t]he *Stiftung* of a meaning which will be *nachvollziehbar*.’<sup>6</sup> The transgression of the acquired interpretation of the Treaty lays the basis for the iterability of a normative meaning. If *Van Gend & Loos* was at its moment an exercise in *parole parlante*, its very success guarantees that it became *parole parlée*, i.e. that it became an acquired normative meaning, available for future normative iterations.

### *B Constituent Power – Constituted Power*

Merleau-Ponty’s distinction between ‘speaking word’ and ‘spoken word’ sheds light on the distinction between *pouvoir constituant* and *pouvoir constitué*. For power can manifest itself as an act which either primarily institutes a novel legal meaning or primarily repeats an acquired legal meaning. Power in a strong sense—constituent power—refers to the capacity to institute legal meaning, and this means to generate a normative point of view from which individuals can understand and identify themselves as members of a legal community. *This* feature determines the enactment of a constitution as the exercise of constituent power, not the fact that what is enacted is a constitution. The ECJ’s ruling also plays such a role, to the extent that direct effect posits the European Community not only as a community of states but also, and even primarily, as a community of ‘market citizens.’ In this way, *Van Gend & Loos* is an act of acquiring a community, and the European Court of Justice proves to be a veritable constituent power.

Accordingly, the ECJ’s ruling exhibits a paradox akin to what Giorgio Agamben calls the ‘paradox of sovereignty.’<sup>7</sup> Indeed, *Van Gend & Loos* shows that the exercise of power stands both *inside* and *outside* the Community legal order. This paradox remains concealed in cases in which the application of a normative meaning approaches the limit of pure repetition. Yet, the paradox becomes visible at moments of normative innovation, in which the exercise of power suddenly manifests itself not only as *subordinate* to the law—constituted power—but also as power *over* the law—constituent power. In such situations, power not only claims to stand inside the law but also places itself outside the law, in view

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<sup>5</sup> A similar circularity closes the reasoning of *Costa v ENEL*: ‘The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the Community itself being called into question’ (Case 6/64, *Costa v ENEL* [1964] ECR, 585-615; at p 594). It is as though the ‘circle of understanding’ can only be productive if it is vicious; but then the question is whether, as Gadamer asserts, understanding deploys a circularity, that is, a dialectic. *Van Gend & Loos* and *Costa v ENEL* can be seen as supporting Derrida’s critique of Gadamer in their well-known encounter, in particular Derrida’s question whether ‘the precondition for *Verstehen*, far from being the continuity of *rapport* ..., is not rather the interruption of *rapport*...’ See J. Derrida, ‘Three Questions to Hans-Georg Gadamer’, in D. P. Michelfelder & R. E. Palmer (eds.), *Dialogue and Deconstruction: The Gadamer-Derrida Encounter* (State University of New York Press, 1989), pp 52-54, p 53.

<sup>6</sup> Merleau-Ponty, *Prose of the World*, n 1 above, p 38.

<sup>7</sup> G. Agamben, *Homo Sacer: Sovereign Power and Bare Life*, transl. Daniel Heller-Roazen (Stanford University Press, 1983), pp 15 ff. For an analysis of the paradox of sovereignty close to that of Agamben’s, see B. van Roermund, ‘De rechter: Grenswachter of grensganger?’, in E.-J. Broers and B. van Klink (eds), *De rechter als rechtsvormer* (Boom Juridische Uitgevers, 2001), pp 149-173.

of acquiring a community. This paradox suggests, therefore, that there is no simple disjunction between constituent and constituted power: the ECJ acts as constituent power by presenting itself as constituted power. Yet more forcefully, the ECJ can only function as constituent power to the extent that it *credibly* presents itself as constituted power.

These ideas are intimately bound up with collective self-determination. Remember that by introducing direct effect, the ECJ claimed that the EC Treaty enacted a ‘new legal order of international law for the benefit of which the states have limited their sovereign rights ...’<sup>8</sup> And in *Costa v ENEL*, the ECJ held that ‘the EEC has created its own legal system’ and that the Treaty is an ‘independent source of law.’<sup>9</sup> By referring to a ‘new’ and ‘own’ legal order, the ECJ claims that the enactment of the EC Treaty was, from the very beginning, an act of collective self-determination, if we understand by that the collective act of instituting a legal order and submitting to it by virtue of the fact that a multitude of persons identify themselves as the members of a community. It is no coincidence that there is a certain circularity in this notion of collective self-determination. For, paradoxically, the act of collective self-determination is not independent of the ECJ’s *claim* about collective self-determination. It is only possible to view the enactment of the EC Treaty as an act of collective self-determination if it is presupposed that there is a community of persons which, by virtue of sharing a common understanding of the good—the realisation of a common market—, institutes itself as a community of market citizens; yet, simultaneously, the presupposed subject of the EC Treaty, and with it the community of market citizens, is created by the ECJ’s ruling. We will come back to this point shortly.

### C Power and Truth

The dialectic between constituent power and constituted power points to two intertwined aspects of the *measure* of community. First, to recognise that the ECJ creates a novel normative meaning is to recognise that it transgresses a given measure of community. Yet, no less interestingly, in the very act by which the ECJ creates a new measure of what counts as European Community, it also recognises its subordination to the EC Treaty as the measure of Community. Direct effect is neither implied by the Treaty of Rome, such that the decision merely repeats what is already contained therein, nor is it *ab initio* purely an arbitrary construction which the ECJ grafts onto the Treaty. In the same blow by which the ECJ effectively *creates* direct effect, it also holds that direct effect is *congruent* with the Treaty, i.e. that its ruling expresses the meaning of the Treaty *itself*.

The reference to the ‘measure’ of community evokes the relation between truth and power. According to the traditional philosophical view, truth presupposes something which functions as a measure and something else which is compared with that measure to establish whether their relation is one of correspondence or adequation. Such a measure, in the context of our discussion, is none other than the normative meaning available for application in law-setting, e.g. the EC Treaty. Now, in those cases in which law-setting primarily repeats or conserves the meaning it applies, the measure of legal truth appears as given prior to and independently of the act of setting the law, as that to which law-setting adjusts itself. In this mode of the relation between power and truth, power appears to be constituted, and the application of a normative meaning a ‘ready-made truth’ (*vérité toute faite*).<sup>10</sup> But *Van Gend & Loos* reveals another mode of the internal connection between truth and power, a mode which Merleau-Ponty calls the ‘paradox’ of creative expression. In effect, the ECJ’s decision is creative in a radical sense because it is a ‘creation which is *at the same time* an ade-

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<sup>8</sup> Case 26/62, n 3 above, 12.

<sup>9</sup> Case 6/64 *Costa v ENEL*, n 5 above; 593, 594.

<sup>10</sup> M. Merleau-Ponty, *Adventures of the Dialectic*, transl. Joseph Bein (Heinemann, 1974), p 153.

quation.’<sup>11</sup> Far from being radical, the idea of a *creatio ex nihilo* is simply the inverted image of pure repetition, and in this sense no different from the latter: both are manifestations of originalism. *Van Gend & Loos* shows that the act of acquiring a community has the paradoxical structure of a *creative adequation*. Borrowing Merleau-Ponty’s felicitous turn of phrase, the exercise of constituent power reveals that all ‘ready-made truths’ lead back to a ‘truth in the making’ (*vérité qui se fait*).<sup>12</sup>

It is important to note that the paradox of creative adequation cannot be resolved or dissolved. The ECJ’s decision is radically creative because the loss of an ‘original’ measure of European community, whether produced or reproduced, opens up a gap between creation and adequation, between the claim to legitimacy raised by the ECJ and the charge of arbitrariness to which the ECJ exposes itself, a gap which can never be fully closed by European integration and which keeps this process going.

#### *D Power and Temporality*

The paradox of a creative adequation confronts us, furthermore, with the relation between *power* and *time*. This should not surprise us, if we bear in mind that the capital distinction between constituent power and constituted power rests on an implicit theory of time. Indeed, constitutional doctrine tends to understand power relations as temporal relations, ordered according to a linear scheme, where the scheme’s starting point marks the fullness of a simple present and presence in which the community founds itself as a community. Once the new legal order has been instituted, constituent power gives way to constituted power. Accordingly, traditional constitutional theories tend to view the distinction between constituting and constituted power as a *representational* relation, where ‘representation’ is construed according to a specific temporal pattern: constituted power re-presents constituent power, such that the prefix ‘re’ means the repetition of an original present and presence.

One would have to ask oneself, however, whether this interpretation of the concept of representation does justice to the temporal complexity of the act of acquiring a community. The question we need to address is whether, in its most intimate recesses, power is not a structure—better yet, a structuring—of time in its different, yet correlative, modes of past, present and future.

Consider again the core the ECJ’s reasoning in *Van Gend & Loos*: ‘The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting States.’ We need not return to discuss the circularity as such; notice, instead, the paradoxical structuring of time which comes to the fore in this passage: the ruling which, by introducing direct effect, effectively creates an autonomous legal order, projects this creation onto a past which is held to function as the origin of the new legal order. This structure is precisely what Derrida calls a ‘supplement of origin’: ‘... by delayed reaction, a possibility produces that to which it is said to be added on.’<sup>13</sup> The very act which gives rise to a novel and autonomous Community legal order transfers the birth of this order, as novel and autonomous, to the past, and then goes ahead to assert that direct effect is but an ‘implication’ of the origin. But as the Member States, when signing the Treaty of Rome, in no way understood themselves

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<sup>11</sup> M. Merleau-Ponty, *The Visible and the Invisible: Followed by Working Notes*, transl. Alphonso Lingis (Northwestern University Press, 1968), p 197.

<sup>12</sup> Merleau-Ponty, *Adventures of the Dialectic*, n 10 above, p 153 (trans. altered). See B. Waldenfels, *Deutsch-Französische Gedankengänge* (Suhrkamp, 1995), pp 105-139, for a careful study of the interrelation between truth and expression in Merleau-Ponty’s work.

<sup>13</sup> J. Derrida, *Speech and Phenomena and Other Essays on Husserl’s Theory of Signs*, transl. David B. Allison (Northwestern University Press, 1973), p 89. The notion of a supplement of origin is, as Derrida notes, related to the structure of temporality that Freud, in his study on the Wolf Man, called *Nachträglichkeit* (*ibid.*, p 63).

to be instituting an autonomous legal order, *Van Gend & Loos* refers back to ‘a past which has never been a present.’<sup>14</sup>

This, then, is the radical meaning of ‘re’ in representation: ‘re’ does not refer to what supervenes or follows an original present and presence, a ‘now’ in which a community constitutes itself as a community in the plenitude of a simple presence to itself. Instead, and paradoxically, one must say that *everything begins with the representation*, that the origin is forcibly a *represented origin*. Drawing on Merleau-Ponty, one could say that the exercise of constituent power makes manifest what remains concealed in constituted power, namely the ‘primary process of signification in which the thing expressed does not exist apart from the expression.’<sup>15</sup> If, in metaphysics, a simple present and presence are deemed to be the ultimate guarantee of the unity of a community and of the legitimacy of legal order, the structure of *Van Gend & Loos* shows us, to the contrary, that a radical absence of the origin of the European Community is inscribed in the act which founds it as an autonomous legal order.

The temporal productivity of the ECJ’s ruling is not limited to the past. Indeed, the retrospective projection of the origin of the Community legal order goes hand in hand with an *anticipation* about the meaning of European Community. In other words, *Van Gend & Loos* links a ‘prospection’ to a retrospection. For the introduction of direct effect, which, according to the ECJ, is ‘implied’ by the EC Treaty, is in fact a *wager* about the way to go in view of realising a common market. Hence, the ECJ’s ruling structures time in such a way that the meaning of the present, namely the state of affairs brought to the ECJ’s attention, is fixed by an act which opens up a future by retrospectively assigning the past a meaning it did not have.<sup>16</sup> Thus, the present is not given simply, absolutely, in the act of acquiring a community, but only mediated by past and future; conversely, to assign a meaning to the present in the ECJ’s ruling is to *represent* past and future. The act of acquiring a community not only represents the past in the present, but also the future, and in such a way that the connection between the three temporal modes proves to be *internal*.

This, I submit, is the time of constituent power. As normative innovation always goes hand in hand with a transgression, acquiring a community manifests itself as an opening and rupture of time. If constituent power catapults us into a new future, by means of the image it offers of a realisable community, it also involves a breach with the past. Paraphrasing Merleau-Ponty’s reference to a ‘truth in the making’, constituent power confronts us with a ‘time in the making.’<sup>17</sup> As such, *Van Gend & Loos* interrupts the repetition and accumulation typical of linear temporality, in which European integration for the most part takes place. Whereas constituent power distends, as it were, present, past and future, revealing these modes of time in their internal correlation and tension, constituted power tends to level off the differences between these temporal modes, contracting them into mere ‘points’

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<sup>14</sup> M. Merleau-Ponty, *Phenomenology of Perception*, transl. Colin Smith (Routledge, 1989), p 242.

<sup>15</sup> Merleau-Ponty, *Phenomenology of Perception*, n 14 above, p 166.

<sup>16</sup> The genesis of the United States as a federal legal system follows a parallel development to that of the European Community, as evidenced by the American Supreme Court’s famous *Martin v. Hunter’s Lessee* ruling of 1816. In view of securing uniformity of federal law, the Court interpreted the reference to ‘the American people’ in the Preamble of the American Constitution by way of a reasoning that a commentator summarizes as follows: ‘since a *single* people formed the Constitution, it is logical that a *single* body of law should apply to all American people.’ Yet, as shown by American constitutional history, this inference begs the question, for the creation of a federal order was not envisaged at the time of enacting the Constitution. As is the case with *Van Gend & Loos*, the retroactivity of creative expression is also at work in *Martin v. Hunter’s Lessee*: a single people *follows* from a single body of law in the very process by which the single body of law is held to be its consequence. See S. Boom, ‘The European Union After the Maastricht Decision: Will Germany be the “Virginia of Europe”?’’, in *American Journal of Comparative Law* (1995) 43, p 189.

<sup>17</sup> The parallel between truth and time, as it emerges in the foregoing analyses, is not, I submit, fortuitous; an ontological radicalisation of an inquiry into the act of acquiring a community would need to address the question concerning the internal connection between truth and time. I am not at all sure that a hermeneutic approach would succeed in capturing this connection.



of a repetitive and predictable temporal continuum. Here again, the dialectic of ‘speaking word’ and ‘spoken word’ is at work: the opening and rupture of time effected by the act of acquiring a community is levelled down to the predictability of time in acquired community, a predictability which every legal order claims to be able to provide by virtue of being order.

### *E Giving and Taking Reason*

If, as argued above, acquiring a community involves a transgression of acquired community, then community cannot be instituted without *seizing the initiative*. The notion of constituent power ultimately points to the capacity to commence things. This idea can also be expressed in terms of the *performative force* of constituent power, a performativity which manifests itself in the acquiring of a community. In some aspects, this idea is akin to Hannah Arendt’s discussion of ‘action’ as a fundamental feature of political life.<sup>18</sup> Yet, radicalising her insight, no less important than the capacity to commence things is the fact that the political initiative must always be *seized*.

In effect, the ECJ takes upon itself to show the way towards a novel conception of community, and only retrospectively can we establish whether this initiative is the inauguration of a novel order or the expression of judiciary arbitrariness. Accordingly, two aspects go into the *performative force* of constituent power. On the one hand, the act of acquiring a community is a commencement by virtue of opening up a space in which individuals can identify themselves as members of a community. On the other hand, the impetus required to set something new on its way always involves a rupture, a breach, and, in this sense, an inevitable moment of violence. To ‘seize’ and to ‘commence’ are welded together into one and the same *performative force* deployed by constituent power. In this sense, truth and violence can never be fully distinguished in the act of acquiring a community.

This ambiguity comes to the fore in the circularity referred to earlier. What is perhaps most striking about the ECJ’s line of reasoning is the way it addresses the capital question raised by the process of acquiring European Community, namely *who* is an ‘interested’ or ‘concerned’ party to the EC. The ECJ’s circular reasoning reveals that acquiring a community involves a claim about the meaning of community, a claim which is not the result of a process of prior ‘deliberation’ between interested parties. To the contrary, this claim lays down an initial determination of who is an interested or concerned party to deliberation in the framework of the Community legal order.<sup>19</sup> The ECJ not only presents itself as the representative of interested parties—the market citizens—without having obtained a mandate to this effect, but also the latter *could not* mandate it because the Court’s ruling creates market citizens as interested parties to the EC. It is tempting to interpret this fact as an additional confirmation of the dubious democratic credentials of the Treaty of Rome and of the European Union as a whole. But, prior to all normative qualifications, whether ‘positive’ or ‘negative’, the ECJ’s reasoning illustrates something which is far more fundamental: *every* act of normative innovation, *all* exercise of constituent power, necessarily involves a self-mandating act, whereby a political actor claims to represent a community without having received prior authorisation to this effect.

Granting that no collective self-determination is possible without acts of seizing the initiative, surely we cannot make full sense of community only on the basis of such acts. For an act of seizing the initiative must be *taken up* again by further acts of setting the law to establish itself as a viable initiative; normative innovation only proves viable by way of

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<sup>18</sup> H. Arendt, *The Human Condition* (Chicago University Press, 1958), pp 175 ff.

<sup>19</sup> For a perceptive discussion of the problem of self-mandating in the framework of a critique of Antonio Negri’s theory of constituent power, see B. van Roermund, ‘Constituerende macht, soevereiniteit en representatie’, in (2002) 64 *Tijdschrift voor Filosofie*, pp 509-532.

normative iteration. In other words, a normative innovation must *catch on* to be able to institute a community, and this means that innovation must be conserved by new acts of setting the law. To cite Merleau-Ponty, ‘... what is acquired is truly acquired only if it is taken up again in a fresh momentum of thought...’<sup>20</sup>

This relay determines the further career of direct effect. Indeed, without the collaboration of the national judiciaries, the Court’s initiative would have come to naught.<sup>21</sup> There is no guarantee that a normative innovation will not prove to be stillborn, which is another way of saying that innovation is a risky endeavour. Significantly, Merleau-Ponty often introduces a conditional in his analyses of the genesis of meaning: creative expression, if ‘successful’ (*réussie*) ...<sup>22</sup> Whether or not the exercise of constituent power is successful, whether or not it provides a normative point of view by reference to which individuals identify themselves as members of a community, can only be determined retrospectively, from the perspective of acquired community. The ECJ succeeds if it ‘hits the mark’, if it reveals what European integration is about. But it cannot achieve this on its own, for the Court’s exercise of constituent power is but a *claim* about the meaning of community, a claim which must be validated time and again, not only by national judiciaries but also—and crucially—by European citizens.

This brings us to theories of law-setting in general, and constituent power in particular, as ‘reason-giving.’ The ECJ’s reasoning, as we have seen, ultimately boils down to a vicious circle, and this circularity points to the fact that normative innovation brings about a rupture of meaning which can be neither fully closed by justificatory practices nor precluded by procedural safeguards, however refined. The ECJ’s ruling is an example of ‘reason-giving’, not so much because it can be fully justified by reference to the Treaty, but because it *creates* a reason for action, ‘gives’ a reason to act in a certain way. The counterpart to this ‘giving’ is a ‘taking’: a reason for action only proves to be such if it is taken up again and carried forward. The so-called ‘dialogue’ between the European and national judiciaries unfolds a ‘truth ... by reprise.’<sup>23</sup> The dialectic of sedimentation and reactivation discussed earlier acquires a new density in the light of these considerations: the reprise of the ECJ’s normative innovation by national judges and EC citizens involves an *identification* which transforms transgression into normative iterability, unorthodoxy into orthodoxy, disorder into order.

Finally, the ECJ’s claim about collective self-determination remains credible only in and through renewed identifications and iterations. This dependency is not, I submit, the price to be paid for the fact that the ECJ, rather than a ‘European people’, instituted a ‘new’ and ‘own’ legal order; instead, it is a consequence of the fact that the act which gives rise to a novel legal order necessarily has the structure of creative expression: because the subject of the novel legal order must be both presupposed and created in one fell swoop, this initial act is ever dependent on iterations which lend credence to the claim of collective self-determination.

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<sup>20</sup> Merleau-Ponty, *Phenomenology of Perception*, n. 14 above, p 130. In the same vein, Castoriadis notes that ‘... what is already constituted as such is already dead once it has been constituted, what has been acquired must, without exception, be reinserted within living actuality in order to maintain its existence’. See Cornelius Castoriadis, *The Imaginary Institution of Society*, trans. by Kathleen Blamey (Polity Press, 1987), p. 89.

<sup>21</sup> M. Poiarses Maduro, ‘The Forms of European Power’, in N. Walker (ed), *Sovereignty in Transition* (forthcoming Hart, 2002). A fascinating issue that I can only point to here is what the national judiciaries have made of direct effect in the process of applying it in the national legal orders. See S. Prechal, ‘Does direct effect still matter?’, (2000) *CML Rev* pp 1047-1069.

<sup>22</sup> See, e.g. his *Prose of the World*, n 1 above, p 57 *in fine*.

<sup>23</sup> Merleau-Ponty, *Prose of the World*, n 1 above, p 133 (translation altered).

### III. Constituent Power, Presence and Representation

Even if one grants that the foregoing analysis is correct as far as it goes, does it go far enough? Does the foregoing analysis do anything more than unveil the structure of normative innovation *within* an existent legal order? It would seem that it loses sight of, or even belies, a far more radical form of normative innovation, namely the revolutionary act which institutes a legal order *ex novo*. This radical form of normative innovation seems to imply a rupture which cannot be assimilated to that of the ECJ's ruling. Consequently, is not the celebration of innovation in *Van Gend & Loos* in fact a covert celebration of capitalism, of acquired community? Is not revolutionary normative innovation—and *only* revolutionary innovation—what is at stake in referring to 'disorganised civil society' as a constituent power? In sum, does not the focus on the ECJ appeal once again to the constitutionalist gambit of attempting to contain revolutionary self-determination by means of representation?

#### *A Collective Revolt*

Such, I take it, is the fundamental objection to the foregoing analysis which arises from Antonio Negri's interpretation of constituent power, an interpretation vigorously defended by Emiliios Christodoulidis in his excellent contribution to this workshop. Both authors argue not only that there is a distinction between constituent power and constituted power, but also that, whereas representation, as the exercise of constituted power, leads back to and depends on the exercise of constituent power, the latter is conceptually independent of representation. Yet more emphatically, representation has a mystifying function: it operates as the privileged category by means of which constitutional discourse attempts to frame and neutralise the radical creativity of constituent power. As Negri puts it, '... the crisis of the concept of constituent power will ... also concern the concept of representation because, at least from the theoretical point of view, a primary and essential denaturalizing and disempowering of constituent power takes place on this theoretical-practical node.'<sup>24</sup>

In my view, Negri's and Christodoulidis's interpretation of constituent power carries forward and modifies Carl Schmitt's theory of the 'political forms' of a polity. According to Schmitt, there are two opposed 'forming principles' which, variously combined, determine the empirical forms of political communities, namely identity and representation.<sup>25</sup> Although no political community can entirely avoid representational institutions, representation is an 'anti-democratic' principle.<sup>26</sup> Identity—Schmitt's name for collective self-determination—is, to the contrary, the democratic principle *par excellence*, and this implies that the people, as constituent power, '... exists as an immediately *present*, real magnitude—not mediated by previously circumscribed norms, validities and fictions.'<sup>27</sup> Accordingly, the people does not function as a constituent power in, say, elections or referenda, for these forms of decision-making take place within a legal order; they presuppose the legal category of *citizenship*. By contrast with these modes of representation, the people is immediately present when, prior to and independently of all such legal forms, it gathers to 'do what belongs to [its] specific activity: to *acclaim*.'<sup>28</sup> And, as Schmitt notes, acclamation encompasses both assent and dissent.

This is where Negri and Christodoulidis intervene to modify Schmitt's theory of constituent power. While, technically speaking, acclamation accommodates both assent and

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<sup>24</sup> A. Negri, *Insurgencies: Constituent Power and the Modern State*, transl. Maurizia Boscagli (University of Minneapolis Press, 1999), p 12.

<sup>25</sup> C. Schmitt, *Verfassungslehre* (Duncker & Humblot: 1993 [1928]), pp 204 ff.

<sup>26</sup> Schmitt, *Verfassungslehre*, n 25 above, p 80 (my translations throughout).

<sup>27</sup> Schmitt, *Verfassungslehre*, n 25 above, p 242.

<sup>28</sup> Schmitt, *Verfassungslehre*, n 25 above, p 243.

dissent, the word's every-day semantics involves a bias in favour of approval, which Schmitt surely was keenly aware of. It is hardly necessary to dwell on the political implications of this bias. So Negri's and Christodoulidis's move, as I see it, is, first, to reject the notion of people in favour of multitude, thereby ridding constituent power of the presupposition of unity, and, second, to narrow the scope of acclamation: the multitude gathers to *revolt* against the acquired legal order. In this sense, they *invert* Schmitt's thesis: rebellion, not acquiescence, is the specific activity whereby the multitude manifests itself as constituent power. Here, then, is the core of Negri's and Christodoulidis's challenge: what representation—and constitutionalism—continuously attempt to deny and contain is *immediate presence*, for immediate presence is the mode of appearance of collective revolt, and collective revolt is the unalloyed manifestation of constituent power. This is the gist of Negri's assertion that 'the constitutive processes of historical reality are discontinuous, burning in their unpredictability and immediacy ...'<sup>29</sup> Christodoulidis's two examples of constituent power, namely collective revolt against the regime of the DDR and that of Ceausescu in Romania, aptly illustrate Negri's incisive thesis.<sup>30</sup>

### *B 'Formless Forming'*

Let me note straight away that immediate presence is a structural element of constituent power. I concur with Negri and Christodoulidis—and with Schmitt before them—when they argue that limiting constituent power to representation would be reductive. Even so, a fundamental question remains open: Granting that we cannot make sense of constituent power without immediate presence, is constituent power, revolutionary or otherwise, conceivable without representation? To settle this issue, and assess its implications for law and disorganised civil society, we must look more closely at the structure of constituent power, focusing initially on immediate presence and, subsequently, on representation.

#### *1 Constituent Power and Immediate Presence*

No theory of constituent power can afford to waive the moment of immediate presence without, as Negri put it, 'denaturalizing and disempowering ... constituent power.' That much is indisputable. However, need we take the further step of equating immediate presence with collective revolt?

At first glance, this equation finds a powerful theoretical ally in Hans Kelsen. In contrast to Negri's hasty rebuttal of Kelsen's theory of the basic norm, Christodoulidis recognises that Kelsen can be read in a way which provides support for a radical theory of constituent power.<sup>31</sup> By calling attention to the contradiction involved in referring to a 'first constitution', Kelsen effectively acknowledges that the act of will which gives rise to a novel legal order is not mediated by legal forms, i.e. that it is an immediate manifestation of power. This is another way of saying that the exercise of constituent power stands *outside* the law and that, only retrospectively, by way of the presupposition of the basic norm, can this act be brought into the fold of the legal order it creates.

Kelsen's theory of the basic norm is attractive from the perspective of Negri's and Christodoulidis's theory of constituent power, not only because it supports the view that the concept of constituent power implies immediate presence, but also because, by focusing on the 'first constitution', it upholds the view that immediate presence is linked to the foundation of a novel legal order, and *only* thereto. By contrast, further acts of setting the law

<sup>29</sup> Negri, *Insurgencies*, n 24 above, p 321.

<sup>30</sup> E. Christodoulidis, 'Law and the Framing of Post-national Civil Society', (in this issue), pp \*\*

<sup>31</sup> Negri, *Insurgencies*, n 24 above, p 5; Christodoulidis, 'Law and the Framing of Post-national Civil Society', n 30 above, p \*\*; E. Christodoulidis, 'The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse', (2001) 12:1 *King's College Law Journal* pp 111-133.

move *within* the legal order, such that constituent power is suspended in favour of constituted power. But Kelsen's limitation of immediate presence to the 'first constitution' flows from his untenable assumption that a legal norm is an ensemble of meanings defining in advance a range of possible applications.<sup>32</sup> Indeed, Kelsen effectively restricts law-setting to *parole parlée*. But if *Van Gend & Loos* is anything, it is *parole parlante*; the very notion of 'speaking word' entails a normative rupture, and this discontinuity is a structural component of constituent power. For, as has been discussed in some detail in section II, the ECJ steps *outside* the accepted reading of the EC Treaty to introduce direct effect. The ECJ *transgresses* acquired community to acquire a community, and this transgression, no less than collective revolt, is a manifestation of immediate presence. Accordingly, immediacy pertains not only to the 'first constitution', as a literal reading of Kelsen might suggest, but more generally to the *first legal norm*, that is, to every act which breaches acquired community in view of creating a novel legal meaning. For this reason, as noted earlier, it is only possible to establish *retroactively* whether the introduction of direct effect proved to be legal or illegal, whether it was an act of acquiring a community or of judicial arbitrariness. If, then, immediate presence is a structural element of constituent power, there is no reason to deny that the ECJ acted as a constituent power.

However, Negri's and Christodoulidis's challenge cuts deeper than this. For the normative rupture to which collective revolt gives rise is incomparably more radical than the rupture effected by *Van Gend & Loos*. Collective revolt sweeps aside a legal order in its entirety, such that the constituent power operates in a legal vacuum. The ECJ, by contrast, acted as a *judicial* body: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed' (Article 220, ex Article 164 EC Treaty). This means, concretely, that, however daring the normative innovation introduced by *Van Gend & Loos*, the Court could not waive the EC Treaty's fundamental choice in favour of a market economy without betraying Article 220. While the introduction of direct effect created the market *citizen*, the price to be paid for an innovation that remains within the EC Treaty was the creation of a *market* citizen, i.e. the reproduction of capitalism. From this perspective, the ECJ's ruling is *parole parlée*.

So, if we are to speak of constituent power in terms of *parole parlante*, we can only do so when the multitude revolts against a legal order as a whole. Constituent power in its proper sense, i.e. revolutionary constituent power, would sever the relation between 'market' and 'citizen': the institution of citizenship would be the revolutionary process of suppressing capitalism and introducing, say, collective ownership of the means of production. The negation of acquired (European) community as a whole, the immediate presence of the multitude, brings about a radical *openness*—'radical' because the multitude manifests itself in that instant as unlimited, as absolute, as the 'formless forming.'<sup>33</sup> Indeed, it is by virtue of the *formlessness* brought about by collective revolt that the multitude can go ahead, as the subject of constituent power, to create a novel legal order, that is, to *form* itself in an act of collective self-determination.

## 2 Constituent Power and Representation

The concluding remarks of the foregoing paragraph culminate the case against representation; they not only convincingly show that immediate presence is a structural element of

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<sup>32</sup> H. Kelsen, *Introduction to the Problems of Legal Theory*, transl. Bonnie Litschewski Paulson and Stanley L. Paulson (Clarendon Press, 1992), pp 80 ff. I deal at greater length with this issue in 'Dialectic and Revolution: Confronting Kelsen and Gadamer on Legal Interpretation', (2003) 24:2 *Cardozo Law Review* (2003) pp. 769-798.

<sup>33</sup> Schmitt, *Verfassungslehre*, n 25 above, p 81. In a passage of great intensity, reminiscent of Schmitt's analysis of constituent power, Castoriadis refers to instituting society (*société instituant*) as 'an unformed forming element.' See Castoriadis, *Imaginary Institution of Society*, n. 20 above, p. 112.

constituent power, but also that any theory of constituent power which avoids dealing with the extreme possibility of collective revolt neutralises constituent power to the benefit of acquired community.

Ironically, these concluding remarks also mark the point of involution where representation, which seemed to have been definitively expelled from a theory of constituent power, must be invited to return if this theory is to make good its claim to offering an account of *constituent* power. The involution I am referring to takes place in the white space, the interval, separating and uniting the two words ‘formless forming.’ For recognising that the multitude is not only formless but also a forming principle entails acknowledging that the multitude is the *subject* of a novel legal order, not merely its object. In other words, at issue is not only a ‘forming’ but also a *self-forming* process.

How is this possible? For, notwithstanding Negri’s disclaimers, it is nonsense to speak about a collective as the *subject* of constituent power without presupposing unity. Yet how can the multitude, in all its heterogeneity and multidirectionality, be the subject of constituent power? This same problem reappears in the passage from revolt to revolution. Indeed, although collective revolt prepares the way for the creation of a new legal order, it by no means coincides with the latter. As Kant taught us, the suspension of the binding power of the existent is but negative freedom; freedom only obtains fulfilment as a self-binding, as self-determination.<sup>34</sup> Could it be the case that the passage from revolt to revolution can only take place when mediated by a representation of unity? Is it merely a regrettable concession to terminological tradition when Negri notes that one should not deny ‘the fact that multiplicity can *represent* itself as a collective singularity ...’?<sup>35</sup> Is not the expression ‘formless forming’ a remarkably accurate formulation of the task of a theory of constituent power, namely accounting for the internal connection between immediate presence and representation?

I will limit myself, in the remainder of this paper, to sketching out three connected ways in which the exercise of constituent power, revolutionary or otherwise, involves a representation of unity.<sup>36</sup> In doing so, I will in fact be drawing on the analyses of *Van Gend & Loos*. My thesis, after having taken stock of Negri’s and Christodoulidis’s challenge, is that the process of creative expression at work in this ruling yields the blueprint of the representation of unity indispensable to collective self-determination, revolutionary or otherwise. Indeed, I submit that it is not enough to ‘deconstruct’ representation and hold on to collective self-determination.<sup>37</sup> For this approach remains tied to the presupposition that these are purely disjunctive terms. Against Schmitt, Negri and Christodoulidis I argue that what is required is deconstructing the simple and massive *opposition* between collective self-determination and representation in such a way that a radicalised conception of representation, centred in the notion of creative expression, proves to be a structural component of collective self-determination.<sup>38</sup>

A first aspect of representation to be considered pertains to the fact that constituent power posits a normative point of view from which a multitude of individuals can identify

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<sup>34</sup> I. Kant, *The Moral Law: Groundwork of the Metaphysic of Morals*, trans. H.J. Paton (Routledge, 1991), p 107 (*Akademie Ausgabe*: BA 97, 98).

<sup>35</sup> Negri, *Insurgencies*, n 24 above, p 28 (translation altered, emphasis added).

<sup>36</sup> The German-speaking reader will easily recognise that I deal successively with *Vorstellung*, *Stellvertretung* and *Vergegenwärtigung*, three aspects of the presence/absence dynamic that English amalgamates into the single term ‘representation’.

<sup>37</sup> Christodoulidis, ‘Law and the Framing of Post-national Civil Society’, n 30 above, p \*\*

<sup>38</sup> Although I agree with some aspects of Christodoulidis’s critique of Neil Walker’s paper on constitutionalism, I believe that a deconstruction of the alleged opposition between collective self-determination and representation allows of defending the core of Walker’s model of constitutionalism (See N. Walker, ‘The Idea of Constitutional Pluralism’, (2002) 65:3 *Modern Law Review* pp 317-359).

themselves as the members of a community. More generally, every legal order necessarily presents itself as legitimate, that is, the law claims to represent the *common good*. This feature has led Christodoulidis to assert that representation plays an ideological function in politics and political theory. The claim that the law represents the common good conceals, he argues, the exclusionary codes at work in the law, thereby contributing to entrenching the established self-descriptions of a community. What representation ‘misses’ is social differentiation and multidirectionality, the very features which occupy centre stage in Negri’s description of multitude.<sup>39</sup>

Were this is all there is to the representation of unity, Christodoulidis’s critique would be unimpeachable. But there is more to this concept. If constituent power claims to represent the common good, the inverse holds as well: there is no direct access to the common good; it is only accessible mediately, by way of its representations. Deprived of representations which *concretise* it, the common good is but an empty normative signifier which provides no normative orientation whatsoever.<sup>40</sup> This explains why the concept of representation is not, as such, ideological. For to assert that representation concretises political unity is to acknowledge that every representation of the common good includes and excludes values. Ineluctably, representation is an ambiguous achievement. On the one hand, exclusion is a positive feature of representation: closure is a necessary condition for the disclosure of a common or public space. On the other hand, the operation of normative inclusion and exclusion implies that representation always brings about a normative reduction: the disclosure of the common good as concretised in ‘this’ or ‘that’ value necessarily involves a normative closure of the good. A full-blooded concept of representation recognises, therefore, that representation reveals and conceals, actualises a meaning of the common good by eliding other possible meanings.

Notice, once again, the ambiguity: the very act which creates legal order also creates disorder; no community can establish itself without a representation of unity, yet the representation of unity, although transformable to a certain extent, also guarantees that no community succeeds in establishing itself definitively. Disorder confronts a legal order with the fact that *more* is possible than what a concrete order of positive law has actualised or could actualise. To recognise that society is always more than acquired community is to recognise that society cannot be definitively contained by any legal order. To a lesser or a greater extent, what requires ordering by the law conserves the potential of contesting—ultimately *revolting* against—acquired community. This is the experience of contingency confronting every order of positive law, an experience which animates all references to ‘law and disorganised civil society’. Far from belying collective revolt, the concept of representation heralds it as the extreme possibility of normative rupture.<sup>41</sup>

Two implications follow from this line of thinking about representation. First, if collective self-determination is an act whereby a multitude of persons bind themselves legally

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<sup>39</sup> Christodoulidis, ‘Law and the Framing of Post-national Civil Society’, n 30 above, p \*\*

<sup>40</sup> See, further, my article ‘Sovereignty and Representation in the EU’, forthcoming in Walker (ed), *Sovereignty in Transition*, n 21 above.

<sup>41</sup> A particularly telling illustration of the predicament of representation was provided by what is surely a manifestation *par excellence* of disorganised civil society, namely the European Social Forum, which met in Florence from 6 to 10 November 2002. As a commentator pointed out, the Forum witnessed a confrontation between a revolutionary and an institutional left, in which the former effectively marginalized non-government organisations in favour of labour unions and social movements. “‘Our movement is not reformist; it is radical”, declared Vittorio Agnoletto, former spokesman of the Genoa movements and member of the International Committee of the World Social Forum, thereby forgetting the charter of principles of Porto Alegre, which stipulates that the Forum is “an open meeting space”, and that “no one is authorised to express ... positions that claim to be those of all the participants”.’ See L. Caramel, ‘Forum de Florence: offensive de la gauche radicale’, in *Le Monde*, 16 November 2002 (my translation). Notice the quandary: a space remains open only as long as no claim is made in name of a whole; but unless a claim is made in the name of the whole, hence unless there is a closure, no alternative political and legal order can be founded.

by virtue of identifying themselves as the members of a community, the point is not that representation ‘over-determines’ the ‘self’ of self-determination,<sup>42</sup> but that we cannot even begin to make sense of determination as *self*-determination without representation. Second, if, at a minimum, representation means rendering present what is absent, then this concept of representation implies that absence is *definitive*, not provisional. For if the common good is the way of conceiving the collective as a *unity*, to argue that the common good is only accessible through its concretisations is to assert that unity is necessarily a *represented* unity.<sup>43</sup> A hiatus between ‘formlessness’ and ‘forming’ opens up a first time: if revolt against acquired community marks the moment of *immediate presence* of the collective, the collective retires into definitive, ineluctable, *absence* at the moment which, by means of a representation of unity, it is posited as the subject of a novel legal order. So, returning to challenge an earlier citation of Negri’s, the fact that a collective must represent itself as a unity if a novel legal order is to be instituted, definitely undermines confident assertions about an ‘adequate relation between subject and procedure.’<sup>44</sup> A theory of constituent power which satisfies itself with simply opposing collective self-determination and representation risks falling prey to the very charge of ideology it levels against representation.

*Who* posits a collective subject as producing the legal order? This issue harks back to our foregoing analyses. One of the central insights arising from *Van Gend & Loos* is that all exercise of constituent power, all normative innovation, unavoidably involves a self-mandating act: the ECJ could only introduce direct effect by claiming to represent the market citizens, yet these could not mandate the Court to this effect because the introduction of direct effect creates market citizenship. After all is said and done, what is most instructive about *Van Gend & Loos* for a theory of constituent power, including one which takes seriously the extreme possibility of collective revolt, is not that it creates *market* citizens but that—and above all *how*—it creates market *citizens*. For the revolutionary overthrow of capitalism in view of founding a community based on the principle of collective ownership of the means of production cannot but create citizenship through a self-mandating act. Revolt becomes revolution when, in the face of the legal vacuum ensuing from the overthrow of acquired community, the initiative is seized to say what community is about, i.e. when a unity is presupposed as the basis of citizenship in the new legal order.<sup>45</sup> What interests me in this paper is understanding how the ECJ’s ruling sheds light on this process of acquiring a community, not engaging in an ideological celebration of the contingent economic order we call capitalism.

This insight points to a second sense in which representation is ensconced in the exercise of constituent power:

The ‘we’ which constitutes itself in such declarations [e.g. ‘We the People of the United States’] and enacts a constitution for itself, eludes itself (‘entgleitet sich

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<sup>42</sup> Christodoulidis, ‘Law and the Framing of Post-national Civil Society’, n 30 above, p \*\*

<sup>43</sup> This is another way of formulating Claude Lefort’s main insight about the symbolic structure of power: ‘The fact that a [community] is organized as one despite (or because of) its multiple divisions and that it is organized as the same in all its multiple dimensions implies a reference to a place from where it can be seen, read and named. This symbolic pole proves to be power, even before we examine it in its empirical determinations ...; power makes a gesture towards an outside, whence [a community] defines itself. Whatever its form, [power] always refers to the same enigma: that of an internal-external articulation, a division which institutes a common space’. See C. Lefort, *Democracy and Political Theory*, transl. David Macey (Polity Press, 1988), p 225.

<sup>44</sup> See citation of n 35 above.

<sup>45</sup> That collective revolt leads to a legal vacuum in no way implies that revolutionary self-determination takes place in a *normative* vacuum. The revolutionary enactment of ‘the first constitution’ has the structure of creative expression, not of a *creatio ex nihilo*. Ulrich Preuß’s apodictic assertion, ‘The power to make a constitution is the power to create a political order *ex nihilo*,’ fundamentally misconstrues the paradoxical structure of constituent power. See Ulrich K. Preuß, ‘Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution’, in *Cardozo Law Review* 14 (1993), pp 630-660, p 639.



selbst'). Linguistically speaking, this means that the 'we' of the utterance content does not coincide either with the 'we' of the utterance process that speaks about the we or with the 'I' that speaks for the we.<sup>46</sup>

A hiatus between 'formlessness' and 'forming' opens up a second time: the exercise of constituent power, revolutionary or otherwise, is necessarily representational because the self-mandating required to posit a novel legal order is an abridged way of saying that those in whose name constituent power creates community are radically, unavoidably, *absent*. The ambiguous dialectic of giving and taking reason, of constituent and constituted power, is already at work: because unity is both presupposed and produced at the moment of instituting a legal order *ex novo*, this initial act is ever dependent on iterations which lend credence to the claim of collective self-determination.

I shall conclude by briefly considering yet a third manner in which representation is at work in revolutionary self-determination, namely the structuring of time. This issue first emerged when I noted that, in the aftermath of the formlessness brought about by collective revolt, the multitude could 'go ahead' to create a novel legal order; it appeared a second time when it was noted that revolutionary self-determination overturns capitalism 'in view of' instituting a legal order which embraces collective ownership of the means of production. The temporal passage from revolt to the creation of a novel legal order is beguilingly smooth and continuous in these passages. For the 'in view of' and 'going ahead to', which link the overturning of capitalism to the institution of socialism, are the work of creative expression. In effect, these conjunctive expressions, which lend the process of collective self-determination a reassuring semblance of linear purposiveness, point to the structuring of time that we already encountered in *Van Gend & Loos*, and which Freud called *Nachträglichkeit*.

Indeed, the collective subject of constituent power is both necessarily presupposed as existing *before* the creation of a legal order and created retrospectively, in view of realising a *future* community. The collective which must be postulated as a unity to be able to function as the subject of a novel legal order does not coincide with the collective which overthrows a legal order because, as Negri points out, the negation of acquired community marks the triumph of multitude as heterogeneity, disorder. Hence, the 'before' presupposed in referring to the collective subject of a legal order does not lead back to the 'now' of revolt. Again: the 'before' of the collective subject of a legal order points back to a past which, to cite Merleau-Ponty, was 'never a present', i.e. a present which is definitively *absent*. A hiatus between 'formlessness' and 'forming' opens up yet a third time: the passage from revolt to revolution, from immediate presence to representation, marks an ineluctable temporal dislocation, for if collective revolt is the moment of a pure, immediate, present, the representation of unity required to create a novel legal order sees to it that immediacy is irretrievably lost.

Yet this temporal dislocation is not merely a privative condition of collective self-determination, a regrettable implication of the representation of unity. Instead, it is what ensures that the future contains the unexpected, in excess of all fixations effected by the legal anticipation of a realisable community. The hiatus between formlessness and forming ensures, therefore, that collective self-determination remains an ambiguous achievement, ever fluctuating between determination *by* a self and *of* a self. This threefold hiatus is, I believe, the key to understanding what is perhaps the most enigmatic word of our workshop's title: 'Law and Disorganised Civil Society'.

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<sup>46</sup> B. Waldenfels, *Topographie des Fremden: Studien zur Phänomenologie des Fremden I* (Suhrkamp, 1997), p 149 (my translation).