

**Law and Reflexive Politics**  
**A Systems-theoretical Critique of Republican**  
**Constitutionalism**

Doctoral Thesis Submitted to the Faculty of Law of the University  
of Edinburgh

by  
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I, Emiliios Alexandros Christodoulidis, declare that this thesis has been composed by myself and that it has not been submitted in candidature for any other degree, diploma or professional qualification.

Στὸ γιο μου Θόδωρο,  
τον αναγνώστη

# UNIVERSITY OF EDINBURGH

## ABSTRACT OF THESIS (Regulation 3.5.10)

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I begin by exploring the foundational notion of popular sovereignty as guiding ideal - or at least key precondition - of constitutionalism. By sanctioning the public political sphere, constitutional law maps out a universe of politics. I will approach the intersection of law and politics from the republican perspective, where the role of law is seen as substantiating the ideal of popular sovereignty and as empowering politics. Constitutionalism, here, is above all about self-determination and sovereignty and sanctions the processes where the sovereign will is formed. I review the theories of some key advocates of "civic" republicanism and describe their institutional suggestion for the "containment" of the politics of civil society.

I employ systems theory in order to confront the republican claim that the politics of civil society can be contained (and empowered) by the law; with the help of the theory I explore the relationship between conflict and law and suggest that law allows for conflict only selectively, by setting the thresholds of valid dissensus, the *when* and *how* of possible conflict. In the process not only is much repressed but much is appropriated as well, as political conflicts to be represented are forced to meet criteria of legal relevance. I argue this via 11 inter-related theses against republicanism. In each of these theses I discuss one aspect of this silencing or depletion of political conflict to suggest that at crucial junctions where constitutive political connections are articulated, republicans advocate a containment that is either arbitrary, question-begging or self-defeating. My analysis of subversive speech in this context is both an example and a test case. It is a test case because of the paramount importance of free speech in the construction of the public sphere. Speech undergirds the conception itself of democratic politics. The constitutive moment of participation as discussion of the terms of our common public life cannot afford the displacement that I claim law inflicts on political speech.

What motivates my critique of republicanism is a perception that politics is neither contained, nor empowered through law but instead largely silenced by it. I attempt a re-construction by suggesting elements of a theory of reflexive politics that will re-politicise all the assumptions behind conflict, action and identity that the law takes for granted. What is reflexive politics? It is a politics that keeps the question of its revisability always open and where the political constellation of meanings is always disruptable: *only in that* does it gain its quality as political. By replacing the reflexive with the exclusionary, which dictates its own limited mode of revisability, law dictates the terms of closure of the field of political possibility. Reflexive politics is an attempt to recover it.

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## Introduction

Law is the great concealer; and law is everywhere. Or so claimed Marxists once upon a time. "[Law] was imbricated within the mode of production and productive relations themselves ... it intruded brusquely within alien categories, reappearing bewigged and gowned in the form of ideology; ... it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic, it contributed to the definition of the self-identity of both the rulers and the ruled." <sup>1</sup> Does the old critique of domination still hold any sway?

Apparently not. Or so the scholars even of the Left keep reminding us in their eagerness to embrace law and proclaim their allegiance to the new constitutional politics of civil society. Old Marxists now describe popular sovereignty as "co-original" with constitutional rights<sup>2</sup> and find it hard to remember what it was they once disagreed with liberals over. No *tension* left between emancipatory politics and oppressive law; instead we have *reciprocal constitution*, simultaneous realisation. In the Left's embracing of the new constitutionalisms its old critique of law - the critique of the law's concealment of class inequality, class conflict and class action - is left behind. In a way that is indicative of the embarrassment with which the Left faces up to its tradition today, it is now all too willing to abandon all that it once held with such commitment. Radicals seem to have forgotten all that with the same ease that we all have forgotten that the Left was not all about central planning and state coercion but was equally, if not more, against it; and in the same way as we have forgotten that the Left has been chiefly responsible for those achievements and compromises of the last half century that have made our western societies humanly functional.<sup>3</sup>

Against so grand a coalition I will attempt to make a case for the critique of legal ideology. I will claim that the law *does* conceal and that its ideology masks the exclusion and the compulsion of meanings. I will claim that this compulsion is not external but structural and occurs at the very point of the recovery of meaning. In effect to treat law, as many advocates of republican constitutionalism do, as a lever and substitute for politics depletes the emancipatory potential of politics. I argue against impoverishing politics in this way. My argument draws - selectively and sometimes "heretically" - on Luhmann's version of systems theory. Constitutionalism is about the intersection of law and politics. Through recourse to Luhmann I will explore what kind of intersection this is, and why it makes the republican celebration of constitutional politics somewhat hollow, and to the extent that ideology is at play, somewhat dangerous. Then, in place of legal politics, I will put forward a suggestion for

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<sup>1</sup> E P Thompson, 1978, 288

<sup>2</sup> E.g. Habermas (1992b)

<sup>3</sup> See Glasman (1994)

*reflexive* politics, that is emancipatory, utopian and an-archistic.

Before I explain in more detail how I will set out the argument, I want to establish at the outset that not for a moment am I suggesting that constitutionalism does not have a place - an important and indeed valuable place - in the politics of civil society in guaranteeing limitations on State power. That aspect of its value, associated with the rule of law, is not in dispute. What I am arguing is that the law cannot, as the republicans would have it, contain the politics of civil society and exhaust what these politics are about. The law cannot contain and voice our strivings for the communities we want to have and our aspirations for the people we want to be.<sup>4</sup> The constitutional arrangements, that purport to provide merely the organising principles within which societal self-determination would be elaborated, simultaneously facilitate and frustrate the political. Constitutional processes do allow for constitutional deliberation and self-determination but in a significantly limiting and limited way; they simultaneously lend resilience and opacity to what remains unchallengeable. My project thus addresses *the ideological function of law and its ideological use by republican theory*.

**Part I** explores the foundational notion of popular sovereignty as guiding ideal - or at least key precondition - of constitutionalism. By sanctioning the public political sphere, constitutional law maps out a universe of politics. I will approach the intersection of law and politics from the republican perspective, where the role of law is seen as substantiating the ideal of popular sovereignty and as empowering politics. Constitutionalism, here, is above all about self-determination and sovereignty and sanctions the processes where the sovereign will is formed. I review the theories of some key advocates of "civic" republicanism and conclude this section with an account of their institutional suggestion for the "containment" of the politics of civil society.

**Part II** draws from systems theory to confront the republican claim that the politics of civil society can be contained (and empowered) by the law.

It begins with a short introduction to some very basic premises of autopoietic theory. This introduction only aims to kickstart the analysis and has absolutely no aspirations to completeness; aspects of the theory will be visited at much greater depth later in the dissertation. This expositional structure is justified for the following reason. All too often autopoiesis, in truth much too rapidly marketed,<sup>5</sup> is recruited to back empirical studies of regulatory failures without any serious attempt to fill in the middle ground. From a theoretical

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<sup>4</sup> The allusion is to Dworkin, 1986, opening and closing phrases.

<sup>5</sup> "Autopoietic theory has been perhaps truly too rapidly marketed" says Luhmann (1985b, 389)

account of why the logics of systems do not, and cannot, meet we are transported to a practical account of, say, social workers who misunderstand their clients' needs. This is regrettable because systems-theory is invaluable in probing what is precisely missing in these analyses: it makes available a heuristic device of great power and precision that can lend insights into the mechanisms of the construction of meaning, the dynamics of overlapping and mutually undercutting accounts of problems, of the communicative media that seduce certain linkages at the expense of others, the simultaneity of coupling and closure of communications, that are at once "the same and different."<sup>6</sup> My expositional structure thus denotes my intention to work *with* the theory and not *from* its already given conclusion of incommunicability.

Law is an index of how much conflict has to be suppressed. That is how Alasdair McIntyre describes the main function of the law of liberalism. (1981, 253) My own exploration into the relationship between conflict and law, in chapter 3, aims to explore the degree to which dissensus can be represented in law. I suggest here that law allows for conflict selectively, by setting the thresholds of valid dissensus, the *when* and *how* of possible conflict. In the process not only is much repressed but much is appropriated as well, as political conflicts to be represented are forced to meet criteria of legal relevance. If law is to be the vehicle and guarantor of the public deliberative processes it must host people's entry and engagement in public life and guarantee that their dissenting voices will be heard. It must be able to voice conflict over the terms of social life - the expression of our disagreements, griefs and angers. If it fails to do that by allowing only certain conflicts to register, it is not containing but instead selectively privileging and suppressing. And if that is so, then our legal democracy is prejudicial and deaf to genuine aspirations expressed in civil society - aspirations which are manifest in political conflict but not in legal argument. Or so I will argue.

And I will argue this via 11 inter-related theses against republicanism. In each of these theses I will discuss one aspect of this silencing or depletion of political conflict. I will suggest that at crucial junctions where constitutive political connections are articulated, republicans advocate a containment that is either arbitrary, question-begging or self-defeating. To this end I will discuss the 'generation' and consolidation of identity through conflict, participation in conflict, symbolic conflict, the depiction of conflicting political interests, the impossibility of institutionalising solidarity and the law's mode of empathy to dissenting voices. In all, law's claim to 'contain' the politics of conflict in its own meta-politics of order will be shown instead to "conflate" (theses 2-4), "re-enact" (theses 5-6), "sever" (theses 7-10) and "normalise" (thesis 11) political conflict in ways which impoverish its meaning.

Chapter 4 on subversive speech is meant as an inquiry in depth into one of the aspects

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<sup>6</sup> Glanville (1981)

of conflict depleted in law. It is both an example and a test case. It is a test case because of the paramount importance of free speech in the construction of the public sphere. Speech undergirds the conception itself of democratic politics. The constitutive moment of participation as discussion of the terms of our common public life cannot afford the displacement that I claim law inflicts on political speech. It is a displacement that occurs as the law re-aligns and re-enacts our political claims when these tap the seam of subversion of the constitutional processes. As I will explain it is not the verdict that matters here but rather the deployment of the operative distinction that views subversion as the opposite of politics. In the process law works out a concept of political speech for itself through self-reference and then, on this basis, renders every challenge to its rendering invisible.

What motivates my critique of republicanism is a perception that politics is neither contained, nor empowered through law but instead silenced by it. In every aspect discussed in Part II fundamental aspects of the political are submerged, litigated away, obliterated. In the final **Part III** of the thesis I will attempt a re-construction by suggesting elements of a theory of reflexive politics that will re-politicise all the assumptions behind conflict, action and identity that the law takes for granted. What is "stilled" by law here becomes contested terrain again, and as such, political.

Having tentatively defined the reflexive as the opposite of the exclusionary, I visit certain key theorists to retrieve elements of reflexivity in their writings; I find them all wanting in some respect or other. Then I look at Luhmann from this perspective; why does his theory appear so incompatible with emancipatory politics? While criticising the theory in some respects I again extract and exploit key elements of systems-theory to ground a theory of reflexive politics.

To make a case for reflexive politics I advance an argument about how politics is like love. Both are reflexive and self-referential in the same way, and moreover, in both cases, this reflexivity and self-reference is of constitutive importance. I cannot anticipate the full implications of this argument at this stage, save to say that as a consequence, both love and politics do not admit of any middle range, exclusionary reasons - such as legal ones - that can stand in the way of constant revisability and re-evaluation of reasons to act.

I claim for reflexivity that it is the constitutive moment of politics. In a sense reflexive politics straddles both the descriptive and the normative. On the one hand I argue that politics should best be understood as reflexive. But my argument is also descriptive because my claim is that the constitutional forms celebrated by the republicans silence meanings that *are* political *not* that *ought* to be that. What is lost in the republican argument can only be assessed in the light of what it means, aspirationally, for politics to be reflexive.

What is reflexive politics? It is a politics that keeps the question of its revisability always open and where the political constellation of meanings is always disruptable: *only in*

*that* does it gain its quality as political. By replacing the reflexive with the exclusionary, which dictates its own limited mode of revisability, law dictates the terms of closure of the field of political possibility. Reflexive politics is an attempt to recover it.

The "autological" consequence of this line of argument is that the definition of politics itself has to understand itself reflexively as contingent, as always subject to revision. A theory of reflexive politics does not cower from reflexive risk, but - since the riskiness involved expands the field of political possibility - assumes it and embraces it.

## Part I

## Chapter 1

### **Constitutionalism and Popular Sovereignty I:** **The Public Sphere as Institutional Fact**

Of that freedom [of speech] one may say that it is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal.

Judge Cardozo

"A community is a universe of discourse in which the members participate by speaking and listening ... the individual can feel free by participating in this enterprise. The First Amendment takes the universe of discourse for granted."

Z Chaffee

Within the affluent democracy the affluent discussion prevails and, within the established framework, it is tolerant to a large extent. All points of view can be heard: the Communist and the Fascist, the Left and the Right, the White and the Negro, the crusaders for armament and disarmament. Moreover, in endlessly dragging debates over the media, the stupid opinion is treated with the same respect as the intelligent one, the misinformed may talk as long as the informed, and propaganda rides along with education, truth with falsehood.

H Marcuse

# I

## The Concept of the Public Sphere

The debate over the meaning, functions and limits of the public sphere is as old as politics itself. The notion of the public sphere has a peculiar dynamic of its own for it includes the debate over what it is about. Our very activity of entering public life to debate and provide competing interpretations over the meaning of publicity, political and social life, turns the public sphere into an "essentially contested concept".<sup>1</sup> One of the reasons that Jürgen Habermas has, in recent years, been held as a major theorist of the public sphere<sup>2</sup> is because he not only provides a theory of the public sphere, but a theory of rational discourse as a means to substantiate it.<sup>3</sup>

When Habermas wrote his Strukturwandel der Öffentlichkeit<sup>4</sup> in 1962, it was hailed almost immediately as a major work in the tradition of the Frankfurt School,<sup>5</sup> and contributed in shaping many of the main ideas of the then emerging New Left. The book was an exploration into the formation and demise of the public sphere (Oeffentlichkeit), a category that has since remained a central focus of Habermas's work.

The public sphere, claims Habermas, is central to our understanding of modern society and its evolution since c1700. As a category underlying and informed by that evolution it is a category historicised. Habermas locates its origin in such 18th century fora of public discussion as clubs, cafes, journals and newspapers. With the growing division between State and society following the expansion of market economies, the public sphere emerged as a specific sphere between those of State and society, its structure and more importantly its function determined by the nature of the confrontation between the absolutist

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<sup>1</sup> In the sense of Gallie, later Connolly (1974)

<sup>2</sup> On this see Thompson (1993), Rasmussen (1985)

<sup>3</sup> In this context, and in anticipation of much of the argument to follow, I would like to venture a suggestion as to what is already wrong with this position. It is that by positing law as the forum or instance of such rational, uncoerced contestation over the meaning and possibilities of the public sphere, what was essentially contested becomes institutionally contested, and the public sphere, sometimes in spite of Habermas, turns from political possibility to institutional fact.

<sup>4</sup> Now in English: (1992): The Structural Transformation of the Public Sphere. Cambridge: Polity

<sup>5</sup> By everybody except the Frankfurt school that is; in fact so unenthusiastic was its reception by Horkheimer and Adorno that Habermas had to submit the work to Marburg as his Habilitationsschrift.



State and a bourgeoisie in the process of emancipation from the old regime.<sup>6</sup> That function was to oversee the absolutist State in order to make political decisions transparent. And what was the medium of making them transparent? The public use of reason that Habermas, anticipating much of his later writings, defines as free and unconstrained. "Between State and civil society," Habermas says, "[lies] the realm of people assembled into a public, which as a citizenry mediates the government with the needs of bourgeois society in such a way that, ideally, political authority of this kind is gauged in the medium of the public realm." (1962, 263-4)

In the book Habermas traces both the emergence and the demise of the public sphere. While he locates the emergence and flourishing of the public realm in the constitutional enactment of rights in the era of liberal constitutionalism, he stresses that the ideal of free speech and discursive will-formation was not fully realised in the era of early liberal capitalism. What was not realised then, is today no longer feasible because of structural constraints. Much of the book is involved in analysing this demise of the public sphere, but I will say very little here on this. The demise is described in terms of a regress to a "refeudalisation". Only briefly, the latter is due to the withdrawal, in late capitalism, of the "space" between State and society that formed the public sphere. Due to the increasing involvement of the State in the workings of civil society, their strict separation began to break down. In his more recent work Habermas would describe this as the State's 'systemic' impingements on the Lifeworld that prevent a critical logos from being articulated. Here "refeudalisation" has been re-coined as "colonisation" to describe the process, in late modernity, whereby "systemic exigencies" - monetarisation and expanded administrative control - take over the public sphere-as-"lifeworld" and imbue it with their logic.<sup>7</sup> This logic is alienating for the political actor and destructive of the kind of communication that Habermas views undergirding his discourse theory of democracy. Due to the "refeudalisation of the public sphere", the role of politics is reduced to the occasional recourse to a public opinion that is little more than a "acclamatory assent" managed by public relations managers.<sup>8</sup> Perhaps one of the most noticeable features of constitutionalism as an ideology is its reluctance, in the face of rapidly declining participation and the erosion of the political lifeworld, to distance itself from the now redundant categories that once described the public sphere.<sup>9</sup> Because while, as Habermas explains, "the political public sphere of the social

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<sup>6</sup> Hohendal, 1974

<sup>7</sup> 1987a, vol 2, passim, esp pp345ff

<sup>8</sup> Thompson 1993, and Habermas 1962, final ch. passim

<sup>9</sup> In this mode, Douzinas C (1983) on a study of the legal construction of the category of freedom of speech, questions the discursive representations of power, law and legitimation that are embodied in

Welfare state is characterised by a peculiar weakening of its critical functions," (1974, 55) the State professes to be committed to making politics public and subject affairs to public reason. This disparity between structural conditions and rhetoric can be fruitfully elaborated as one of the principle sites of "constitutionalist" ideology.<sup>10</sup>

The discussion about the demise of the public sphere is not immediately relevant here however. Much more important is Habermas's definition of the concept. Habermas defines the public sphere as a realm of rational argumentation where differences of opinion from across society can be discussed and settled. It is important to note that Habermas does not equate the public sphere with the public as such; rather "the concept is directed at the institution which assumes concrete form through participation."<sup>11</sup> In Habermas's own words, the public sphere is to be defined as "a sphere that mediates between State and Society, in which the public organises itself as bearer of public opinion." (1974, 53) The decisive moment here is the institutional one, the key formulation is "organises as public opinion." What does this "organisation" involve? It involves the legal institutive rules<sup>12</sup> that set up the realm of political participation as public sphere. The institutionalisation is explored historically, as a process of organising that involves a succession of steps, which Habermas, in his much later Theory of Communicative Action identifies as "juridification thrusts". We should understand this as a process whereby the realm of the social, more generally, and the realm of the political, more particularly, come under legal sway.

"Juridification [Verechtlichung]", says Habermas, "refers quite generally to the tendency toward an increase in formal (or positive) law that can be observed in modern society"; juridification includes both an expansion of legal provisions into hitherto unregulated areas of social life, as well as an increase in the "density" of the law, the breakdown, that is, of general formulas, characteristic of the Rule of Law ideal, into particularised regulation (1987a, vol 2, 357). As we shall see (in ch 3 s 1) this account of Juridification breaks down upon closer scrutiny. However a formulation in such general terms allows Habermas to treat juridification as a descriptive category that includes *all* communication through law, and not the pathology of somehow "distorted" communication it is usually taken to be.<sup>13</sup>

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the constitutional mode of discourse as remnants of an era long gone, whose present function is to conceal the realities of the operation of power and the law and by concealing them, legitimate them.

<sup>10</sup> See also Warren M (1989): "By evoking the image of rational discussion in a public space, liberal constitutions legitimate this progressive principle of politics." (519)

<sup>11</sup> Hohendal, 1974, p45

<sup>12</sup> MacCormick (1974)

<sup>13</sup> The pathology is instead, for Habermas, tied more narrowly to the phenomenon of "colonisation" and has to

"Juridification thrusts" are epochal processes whereby certain areas of the social realm come under legal sway, and Habermas identifies four. The first led to the bourgeois State, the rise of the absolutist Nation-State in Europe. The second wave led to the Constitutional State [Rechtstaat]. The third wave led to the Democratic Constitutional State "which spread in Europe and N America in the wake of the French Revolution. The last stage (to date) led finally to the Democratic Welfare State which was achieved through the struggles of the European workers' movement in the course of the twentieth century." (1987a, vol 2, 357)

Of the four waves of juridification, it is the second and third that concern the emergence of the Public Sphere as we know it. The second wave introduces constitutional regulation of the State's executive power. This marks, to put it crudely, the "liberal" moment of constitutionalism. The citizens are given actionable rights against the sovereign even if they do not yet participate in the sovereign will. It is with the third wave that sovereignty is transferred from the person of the king to the person of the citizenry. With it "constitutional power was democratized; the citizens, as citizens of the state, were provided with rights of political participation. Laws now come into force only when there is a democratically backed presumption that they express a general interest and that all those affected could agree to them. This requirement is to be met by a procedure that binds legislation to parliamentary will-formation and public discussion." (1987a, vol 2, 360) Underpinning the procedure are equal suffrage and political rights of expression and association.

The third "juridification thrust" is crucial to this discussion, because it is the one relevant to the "organisation" of the new form of the political public sphere. Of course the liberal moment of protection against State power is maintained (and integrated) in the new constitutionalism; but now, through the extension of the vote and political rights, a new concept of political action emerges as participation in the public sphere. The Public Sphere is reconceived as a body politic comprising of citizens who contribute equally to the formation of Public Opinion, which is uncoerced/sovereign to the extent that the contributions are uncompromised. Free speech underpins participation in the public sphere in that very important sense. There are a number of key concepts here that need to be more accurately distinguished from each other:

(i) Freedom of Speech underpins freedom as political self-determination. The need to protect that freedom stems from the need to uphold popular sovereignty as guaranteed by the political process. This is by no means the sole justification for the protection of speech. Thus the need

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do not with the communicative medium of law as such (juridification) but the form of law specific to the Welfare State (law as medium) (1987a, vol 2, pp367ff). It is only the latter that, through its autonomous logic, impinges upon the lifeworld, leading to - what is Habermas's major pre-occupation throughout his later work - an "un-coupling" of system and lifeworld.

to protect speech as contribution to the formation of Public Opinion needs to be distinguished from the protection of speech that is dictated by other rationales. These are far from straightforward delineations. Suffice it to say here that the literature on the question of freedom of speech includes a multitude of cross-cutting categorisations of speech, stemming from a multitude of rationales for protecting speech.<sup>14</sup> To complicate things further, judicial practice has also developed a multitude of legal tests both for delineating categories and identifying rationales. Not all this is relevant to Public Opinion as it is understood here, and in that sense freedom of speech is a broader category: the protection of the freedom of speech is motivated by reasons not all of which are relevant to the formation of a Public Opinion that can be claimed sovereign.

(ii) The concept of the Public Sphere, even as employed in Habermas, is also broader than that of Public Opinion. Because the Public Sphere is the more general framework within which "the public organises itself as the bearer of Public Opinion". The Public Sphere thus provides the mode of that "organisation". It provides the institutional framework and support of the realm of political participation, the institutional matrix for the formation of Public Opinion, and as such includes also procedures and practices; for example, the distribution and access to the means of communication are elements of the Public Sphere, which although relevant to the formation of Public Opinion are not reducible to it.

(iii) The notion of Popular Sovereignty is also internally linked to but not interchangeable with that of Public Opinion, although the boundaries here are rather more difficult to fix. The idea that the citizenry is free and self-determining finds its institutional expression in the notion of popular sovereignty inscribed in constitutions. Popular sovereignty, that is, finds expression in and as uncoerced Public Opinion. But popular sovereignty finds other constitutional outlets too,<sup>15</sup> and to subsume them all under Public Opinion would be stretching the latter to the point of blurring its own precise meaning.

Having explained Habermas's useful classificatory terms let us now see not how the concepts are distinguished amongst themselves, but how they are linked. The crucial linkage is between the concepts of public sphere, public opinion and popular sovereignty. Constitutionalism meets the aspiration of popular sovereignty by providing the institutional

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<sup>14</sup> Indicatively see Schauer, 1982, Barendt, 1985, Greenawalt, 1989

<sup>15</sup> The sovereignty principle is also exemplified in the status of the Constitution as supreme law. It is exemplified also in the fact that Constitutions are to varying degrees "fixed": they cannot be amended through ordinary legislative majorities but only special majorities in the form of constitutional referenda, constitutional Conventions, or constitutional legislative majorities

moment for participation and political praxis. The equal distribution of political rights of participation<sup>16</sup> and their entrenchment at the constitutional level guarantees that Public Opinion is sovereign, its expression shielded from State inhibition. In sanctioning the channels of representation, the Constitution provides the institutional vessel for Public Opinion to be communicated to the State in the ultimate expression of self-government: law-making. The sovereign will of the citizenry thus translates into the sovereign will of the State. The Constitution guarantees that the transition is an authentic one, through the principles of open government, publicity, and underpinning those, freedom of the press, administrative review, etc. By institutionalising the political process along these lines, constitutionalism promises that Public Opinion will, at all times, be an authentic expression of popular sovereignty.

Hence for Habermas too, freedom of speech is the supreme form and index of political action. As this may seem excessive, a clarification is needed as to why this reduction of "political action" to "freedom of speech" is legitimate. The insistence on centring this whole analysis on speech is not intended at the exclusion of, but rather on behalf of, other political rights of participation. Viewed from the perspective of participation and contribution to the deliberative process, rights of assembly, association and petition are peripheral to freedom of speech and should be seen in the context of the deliberative process, as the Public Sphere's organisational patterns of participation in politics. Consequently, I will downplay the formal distinctions and use the formula freedom of speech to cover all of these rights.<sup>17</sup>

This is how Habermas puts it: "Although construed as power, legislation ... issues not from political will, but rational agreement." By evoking the image of rational discussion in a public space, Habermas ends up bringing together Public Sphere and State, in the following sense at least. The legally protected political speech of the individual actor becomes a contribution to the institutional process that conveys the rationally formed deliberative will of the people to the State for execution. The State thus becomes the agent of the people's self-government. "According to the normative ideas of our political tradition," Habermas will claim much later in *The Philosophical Discourse of Modernity*, "the democratically legitimated apparatus of the State ... is supposed to be able to put into effect the opinion and

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<sup>16</sup> And at the fringes of rights, the neo-liberal concern to accommodate some expressions of direct action and civil disobedience (Rawls (1973), Dworkin (1977, pp206ff), Pope (1990, pp366-8: "Read in context the first amendment carves out the constitutional space for direct popular power"), Carter (1973).

<sup>17</sup> For theoretical backing for this reduction, I draw, among others, from Nowak et al (1986) s.16.53 at 1004. For a judicial decision to this effect see *NAACP v Button* 371 US 415, 429-30 (1963)

will of the citizenry as a public. The citizens themselves participate in the formation of collective consciousness but they cannot act collectively. Collective action means that the government would transpose the intersubjectively constituted self-knowledge of society organizationally into the self-determination of society." (1987b, 360, my emph.) Of course Habermas never claims that this is anything more than an ideal, realised only to small degrees throughout modernity. But as an ideal, the Public Sphere as the institutional expression of critical and rational public deliberation is elevated by Habermas to no less than "the Normative Content of Modernity".<sup>18 19</sup>

## II

### Citizenship, Passive and Active

Citizenship, with its roots in both the ideas of State membership and political participation, stands in an important way witness to a tension between the two. I will refrain from exploring that dual membership as a tension at this stage, because that would be going prematurely into what is properly an argument of later chapters. Instead I will mention briefly how the concept evolved from the former to the latter and how it reconciles within its strands of both.<sup>20</sup>

For a long time "citizenship", "citoyenneté" or "Staatsbürgerschaft" meant political membership as understood in the language of the law. Membership was conferred from "above" and citizenship was the legal link with a State that exercised effective power over a given territory. Membership was established through a network of duties and rights that connected citizen and State. While the element of membership did not change, as a result of the dramatic events of the late 18th C sovereignty was transferred from the king to the people

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<sup>18</sup> 1987b, last chapter

<sup>19</sup> According to Thompson, "Habermas wishes to maintain that, despite the decline of the bourgeois public sphere which provided a partial and imperfect realization of this idea, the critical principle of publicity retains its value as a normative ideal, a kind of critical yardstick by means of which the shortcomings of existing institutions can be assessed. The critical principle of publicity is the core concept of a theory of democracy and of democratic will-formation." (1993, pp178-9)

<sup>20</sup> Like most terms in political discourse, and like the concept of the Public Sphere before it, the concept of citizenship is essentially contested. Hall and Held have claimed that "there is no essence to citizenship" (Hall and Held, 1989, 175). And in fact such is the "semantic maze" (Heater, 1991) surrounding the concept that "citizenship" has been claimed to mean almost anything: "far more spontaneous sociability and helpfulness to neighbours and strangers - fraternity" (B Crick, quoted in Heater 1991, 143). "A person may hold citizenship as a legal status but not display [it] as a quality ... The individual must identify with his state. This identity is partly a legal status, partly a feeling." (Heater, 1991, pp153, 155, my emph.) Turner identifies it with social involvement as such: "Citizenship as an institution is constitutive of the societal community." (Turner, 1990, 189)

(see discussion of the third juridification thrust, above). The transferral enriched the liberal moment of civil liberties (liberties from the State) with rights of (political) participation in the formation of the people's sovereign will.<sup>21</sup> There was a shift of emphasis from membership to participation. The shift is so decisive as to alter the understanding of the status of citizen and establish the participatory element as the decisive one.<sup>22</sup>

How does the legal status of citizenship tie in with the right to freedom of speech and political participation in the formation of the Public Opinion analysed above? Citizenship is a status that confers a set of rights upon individuals. Citizenship, in other words, is the right to have those rights.<sup>23</sup> The ascription of the legal status grants the capacity to operationalise them. Sovereignty means self-government and freedom of speech underpins it in this sense: the speech of the individual citizen is the input into the formation of public opinion that gears

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<sup>21</sup> Marshall's famous work on citizenship still stands as departure point of any discussion of rights, in Britain. Marshall locates in the 18th C a development of civil rights in Britain, targeted primarily at the acquisition of legal status, equal access to the legal system and fair trial. The 19th C witnessed the emergence of political rights in terms of more immediate access to the halls of power and the parliamentary process (electoral rights and provisions for political parties.) Finally in the 20th C he located the emergence of a series of social welfare rights establishing entitlements to social security and compensation for unemployment, illness or accidents, "abating" the prerogatives of property and wealth established during the previous centuries. (Marshall T H, (1950))

<sup>22</sup> The transfer of sovereignty from the body of the king to the body politic of citizens has found only partially an institutional expression in the U K that still adheres to the old formulations of the "Crown in Parliament" for the sovereign body, and "subject of the Crown" for the citizen. The notion of citizen, developed in most constitutions is only a term of art in the UK for the British concept of subjecthood. It is indicative that the 1948 British Nationality Act continued to refer to the subject as fundamental category (Dummet & Nicol (1990)). Even where the term "citizen" is employed it is done to distinguish from "aliens", those who lack the national status. One should note that the retention of the archaic notion of subjecthood is not irrelevant to the secrecy under which the business of government is conducted in Britain and the rapid decline of civil liberties in recent years. In this vein, Charter 88 demanded "a clear legally defined status of citizenship" enshrined in a Bill of Rights that would enhance Britain's position as a democratic polity.

I will take the cue from Paul Craig, here, and distinguish three ways to understand the concept of citizenship in the UK context. "It could first be used to describe and evaluate the law relating to nationality and immigration, in order to determine who is and who can become a citizen of the United Kingdom." The distinction citizen/alien, above, is relevant to this understanding of the concept. The second meaning of citizenship "would be a description of the legal rights and duties which actually operate between citizens and the state." A third meaning "would be concerned with the principles that ought to appertain between citizens and the state." The brief comments on the need of entrenchment of the concept in a Bill of Rights belong to the latter. It is the second meaning, however, that is relevant to our discussion. In relation to this, Craig explains away convincingly the apparent "hurdle that is felt to lie in the way of protecting citizenship in the UK, that of the sovereignty of Parliament. (Craig, 1993, pp307-8)

However in need of change the concept of subjecthood may be, the question is more one of updating the terminology. Indeed the superceded concept of the subject takes on board the capacity in law elsewhere ascribed to the citizen, as, among others, Marshall's celebrated account of the development of the legal status of citizenship in the UK has shown.

<sup>23</sup> In the words of Chief Justice Earl Warren in Trop v Dulles, 356 US 100-2 (1958)

self-government.<sup>24</sup> The status of citizenship is realized in this contribution. Citizenship is not a pre-condition to the freedom to speak. The right to speak, as input into the collective self-determination is the vessel of citizenship; only in that process is citizenship realised. The intimate connection between speech and citizenship is essential if the argument from citizenship is to be understood properly: speech is the mode of existence of the citizen; free speech makes the citizen sovereign. Freedom of speech is integral to rather than a result or a condition of democracy; it defines the democratic conception of politics.<sup>25 26 27</sup>

It is of paramount importance to stress that whether the emphasis falls on membership or participation, the link with the State, membership, is crucial to citizenship and cannot be severed.<sup>28</sup> A double connection underlies citizenship: on the one hand the connection to political participation; citizenship is the status or office that can operationalise political rights. On the other hand, the connection with the State that defines the contours of the relevant political community and in effect the circumference of political space.<sup>29</sup> Citizenship not only involves a common membership but relies on that membership to initiate and direct participatory undertakings.<sup>30</sup> The civic republican tradition - that we will turn to shortly -

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<sup>24</sup> This position may be further qualified. For example P P Craig (1991) argues, and this is the central motivating force of his study, that the theory of freedom of speech one adopts depends on the theory of democracy one postulates. For interesting re-readings of the principle of free speech from "Shumpeterian", elitist and republican theories of democracy, see passim and esp. pp198ff.

<sup>25</sup> Cf Tassopoulos, 1993, introduction.

<sup>26</sup> "A community is a universe of discourse in which the members participate by speaking and listening ... the individual can feel free by participating in this enterprise. The First Am. takes the universe of discourse for granted." Chaffee, 1947, pp21-2

<sup>27</sup> See Schauer, 1982

<sup>28</sup> Of course one of the major pre-occupations of the last few years in legal and political theory has been the demise of the State and the need to re-think many assumptions underlying political community and the very concepts we used to describe its sovereignty, its politics and its law. In respect to the latter, see Neil MacCormick's overview of the repercussions of the demise of the sovereign State on legal theory. (1993) However, my own argument here concerning the relation between membership and participation would not be substantially different whether membership is conceived in the Nation State or a supra-national entity like the EEC. My argument relies, instead, on the fact that whether at the statal or supra-statal level it is the law that constitutes and underpins participation in the politics of the community.

<sup>29</sup> For a notion of "political space" see Wolin, (1960). Briefly, political space includes both objective and subjective elements; on the one hand institutional practices and processes. On the other, subjective perceptions and shared political meanings, including hierarchies of valued priorities.

<sup>30</sup> Hence Preuss's argument (1995). Preuss relies on the dialectic between community - membership - participation but reverses it. Rather than relying on membership in a community to initiate participation, he uses participation as the integrating force that will bind citizens as members of a community. A laudable case this, that would "considerably facilitate access to the status of



purports to re-invigorate citizenship as praxis and has located itself in this space.<sup>31</sup> Habermas's notion of "constitutional patriotism" pronounces its ties to both active participation and membership in the State (and consequently the Nation due to the historically contingent connection between State and Nation.) Even Turner's concept of "revolutionary citizenship," that relies on the "horizontal" connection between members (or connection from below) proclaims the citizen as "an active bearer of effective claims against society via the state,"<sup>32</sup> because it is the State that grants the capacity to act politically.

However, while the element of membership is not contested, there exists a tension that has turned "citizenship" into the "essentially contested concept" par excellence of our times. The opposition is between citizenship "active and "passive" (Turner (1990), et al), between "liberal"/"pluralist" and "republican" (civic or new republicans), between "instrumental" and "political" (theorists in the Aristotelian tradition of politics, principally Arendt, Wolin, Strauss, see ch 2), between "individualist" and "communitarian" (Taylor, below), between "participant and "participator" (Pranger, 1968, 91) and underlying them, between freedom negative and positive (Crick (1969)). The opposition has even found a resonance in law, with the introduction of active citizenship (Aktivbuergerschaft) in the text of the Swiss constitution and re-interpretations of Art. 33 of the German Constitution in this light.<sup>33</sup> As Habermas describes it,

"From the first perspective, citizenship is conceived in analogy to the model of received membership in an organization which secures a legal status. From the second, it is conceived in analogy to the model of achieved membership in a self-determining ethical community. In the one interpretation, the individuals remain external to the State, contributing only in a certain manner to its reproduction in return for the benefits of organisational membership. In the other, the citizens are integrated into the political community like parts into a whole." (1992, 8-9)

This is how Charles Taylor describes the oppositional understandings:

"One model focuses mainly on individual rights and equal treatment, as well as on government performance which takes account of citizen preferences. This is what has to be secured. Citizen capacity consists mainly in the power to retrieve these rights and ensure equal treatment, as well as to influence the effective decision-makers. These institutions have

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citizenship" of largely excluded groups. But it stumbles, I will argue, on its reliance on citizenship, the legal personality, as the lever of participation.

<sup>31</sup> It is worth stressing that Habermas appends the importance of constitutional forms to their integration into a system of political expectations, to remind us that, "the institutions of constitutional freedom are only worth as much as the population makes of them ... [T]he legally institutionalized role of a citizen has to be embedded in the context of a political culture imbued with the concept of freedom." (1992, 10) Under the structural conditions of late modernity, Habermas is very pessimistic about whether the availability of the fora will make the public critically attentive to politics.

<sup>32</sup> Turner, 1990, passim and p200

<sup>33</sup> Habermas 1992, 5

an entirely instrumental significance ... No value is put on participation in rule for its own sake.

The other model by contrast, defines participation in self-rule as of the essence of freedom, as part of what must be secured. This is an essential component of citizen capacity. Full participation in self-rule is seen as being able ... to have some part in the forming of a ruling consensus, with which one can identify along with others." (Taylor, 1989, pp178ff)

The opposition between the two models is usually assumed to correlate to a liberal/republican divide. For present purposes what is significant is the connection with law underlying both models. It is a pre-requisite of this divide to see constitutionalism as the inclusive whole within which the divide is located. By saying this I do not mean to pre-empt what the republicans argue against liberalism. I merely mean to designate, in a language that I hope does not already inhibit either claim, what in the course of history has emerged as the category that circumscribes the outer limits of political action, both liberal and republican. Let me take us briefly back to our previous discussion. Like Habermas, I understand constitutionalism as the institutional expression of the Public Sphere in the era since the emergence of the democratic constitutional state. "Institutional expression" because a political Public Sphere - Habermas stresses this too - exists as institutionalised rational discussion. It exists in the rational discussion of public matters by individuals who are organised as a body politic according to legal rules of inclusion/exclusion in citizenship. Constitutionalism provides the institutional form (and guarantee) of political communication through freedom of speech and the press, assembly, association and petition, suffrage and the right to form and join political parties. Within the contours of this constitutionalism, liberal and republican accounts of Public Opinion can be accommodated. The existence of the constitutional framework underpins both competing positions because neither transcends the language of citizenship and rights and both seek their anchorage, ultimately, in law. It is from that shared premise that they then diverge, and it is that shared premise - the constitutional context - that centres the opposition and allows the pivot. Having shared the pre-supposition the positions then diverge greatly. Where the liberal sees accommodation of interest the republican sees the grounds for an intersubjectively shared praxis. Where the liberal sees a one-way process of feeding his/her contribution into the collective Public Opinion, the republican sees also a feedback in that participation in debate turns back to situate the lone political actor in shared intersubjectivity. But underpinning both positions is a shared legal/constitutional premise, seen in the one case (liberal) as a guarantee from the collective will, in the other (republican) as a springboard for collective praxis.

## Chapter 2

### **Constitutionalism and Popular Sovereignty II:** **The Civic Republican Variant**

We live in and by the law. It makes us what we are. We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do

[Law] is a fraternal attitude, an expression of how we are united in community ... That is anyway what the law is for us: for the people we want to be and the community we aim to have.

R Dworkin, Law's Empire, opening and closing passages

Republican Constitutionalism implies a politics of law

F Michelman

There are paradoxes everywhere, wherever we look for foundations

N Luhmann

## Civic Republicanism

The last few years have witnessed a remarkable renewal of interest in citizenship. The ideal of an active citizen has made a spectacular return to the political agenda of both the Left and the Right.<sup>34</sup> On the Right the active citizen is resurrected along the lines of "the more Victorian concepts"<sup>35</sup> of charity, philanthropy and self-help and called upon to compensate for the gradual abolition of the Welfare State. The Left has viewed it as an appropriate lever to retrieve its tradition of solidarity. Indeed, rarely in recent years has a theory gripped the imagination of legal scholars of the political Left with such force as the new republicanism. The Left appears increasingly attracted to the promise of a republican constitutionalism as the site where the politics of the people will be redeemed. And citizenship-talk has become so pervasive that conceptions of republican "empowered" citizenship have come to signify not only political involvement and popular sovereignty as such but also individual self-government and even self-fulfilment. Why? On the face of it the answer seems simple. The republicans are advancing a theory about the self-determination of community. The emphasis has been shifted from "rights" and individualism to duty and care; from myopic bargaining to public disinterested deliberation; from self-interest to "empathy"; from compromise to the pursuit of common collective values. The theory professes to fulfil the promise of what Habermas calls a "constitutional patriotism" or even the more elusive one of social solidarity, which, as Walzer once said, is the patriotism of the Left.<sup>36</sup> In all, it exerts the appeal of an emancipatory project that is ambitious and all-inclusive.

If one contrasts the promise of the new politics with the otherwise poor condition of contemporary political imagination, one can discern the source of their appeal. After the popular mobilisations of the late 60s theorists like Donzelot described the retreat of the political - the decline of political passions - as "nous detachant de la chose politique au lieu de nous offrir sur elle la prise renouvellee que nous escomptions" (1984, 9). "Liberal democratic politics," writes A Wolfe in a similar vein, "has given many citizens of Western societies [the] unique gift [of] liberation from politics .. Released by politics from politics [Western societies] can remain unaware of power struggle."<sup>37</sup> But now civil society has been "re-discovered", claim the new democratic theories, in their numerous strands of "strong

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<sup>34</sup> 1. On the revival of the notion of citizenship in British politics, see Heater (1991), Oliver (1991), Oldfield (1990)

<sup>35</sup> Hall & Held, 1989, p174.

<sup>36</sup> Walzer, 1970, p191

<sup>37</sup> Wolfe, 1989, 1

democracy",<sup>38</sup> "adversary democracy", "constitutive democratic theory", etc.<sup>39</sup>

Within the ambit of the "re-discovery" of civil society there is a crucial split. This split has too often been ignored. It divides the re-discoverers into, on the one hand, advocates of associational democracy, on the other, advocates of republicanism. I employ both terms in a loose, broad sense to cover also strands that do not describe themselves in these terms. But what is crucial to the division is the distinction that each broad category employs as significant to the re-discovery they claim.

Associational democracy views the State as the significant other of civil society. Theorists of associational democracy focus on social groups and voluntary associations as embodiments of partisan solidarities, ideological and interest group affiliations, partisan beliefs and interests, competing, overlapping, even mutually undercutting. This commitment to a pluralist democratic culture unites theorists that warn against subsuming this heterogeneity under State political institutions and processes<sup>40</sup> and writers from and on eastern Europe whose obvious target is still the nightmare of collective harmony under the watchful State.<sup>41</sup> What is significant to this position is that it does not view dissonance and fragmentation as undermining civil society's self-discovery and therefore assigns no integrative function to State-sanctioned processes; in fact the latter would prove erosive to that heterogeneity that is constitutive of civil society.<sup>42</sup> In this view associations are conceived of primarily as countervailing forces to the State.

The civil society that republicans have in mind is one that conceives of the State and civil society on a continuum. Michal Walzer writes characteristically: "Only a democratic state can create a democratic civil society; only a democratic civil society can sustain a democratic state." (Walzer, 1991, p302) Far from being the "significant other" of civil society, the state is its pre-supposition in this formulation. Walzer's argument here is reminiscent of that powerful current in communitarian theory, most evident in Charles Taylor's work, that understands deep allegiance to the State and commitment to one's community as interchangeable. The "atomism" of liberalism and pluralism - rather than the State - become civil society's significant other. The individualist underpinning of both liberalism and pluralism, claim the republicans, with the consequent emphasis on issue-based memberships and pre-political interests, misunderstands the value of the integrative function

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<sup>38</sup> Barber, 1984

<sup>39</sup> For an overview, see Rosenblum 1994, esp 68-75

<sup>40</sup> Typically here the British pluralist tradition, see Hirst (1989)

<sup>41</sup> See H Gordon Skilling (1988) and Lukes (1989)

<sup>42</sup> In this respect see Sullivan, 1988

of political participation itself.<sup>43</sup> As benign guarantor of the democratic process, thus, the State is not rejected but endorsed. No resonances here of the "bourgeois state" to "be seized", "occupied" or to "wither away". The empowerment of civil society gains its leverage from the State and its law, so that even Habermas's recent work treats democracy and rights as "co-original"<sup>44</sup> and indirectly thus recognises state law as guarantor and vessel of the political discursive process (see ch 3).<sup>45</sup>

It is precisely here, at the constitutional junction of law and politics, that public lawyers locate civic republicanism as a theory about the empowerment of civil society. Civic republicanism is a theory that draws on a number of disciplines and integrates the insights into constitutional theory to suggest a thorough rethinking of the premises of constitutionalism.

Republicanism is a variant of constitutionalism, as was analysed in the first chapter, a theory about how political sovereignty finds expression in law. But where in liberal constitutionalism, the constitution is primarily a framework of constraint for politics, in the republican variant the constitution becomes the springboard for politics. Law, claim the republicans, substantiates popular sovereignty by lending it constitutional provisions as vehicle or "home"<sup>46</sup> of political deliberation. It is with this double connection, of law to politics and the community, that I will take issue. While republicanism is a theory that is all about the empowerment of political community through law, my concern is, perhaps paradoxically, to rescue from it a notion of the political that is reflexive and a notion of community that is interpretative, these notions, I will claim, being true to the authentic nature of the political and the communal.

While avoiding going into the contentious liberal/republican dichotomy at this point, I

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<sup>43</sup> Neither is membership in civic associations - as constant source of democratic socialization - confined to political institutions *stricto sensu*. Michael Sandel, for example, suggests reading republican potential in existing institutions like "the family and neighborhood, religion and patriotism." (Sandel, 1988, 20).

<sup>44</sup> Habermas (1994)

<sup>45</sup> Cf Teubner's suggestion here re associations (1993b, 556ff). Teubner suggests that we conceive of associations neither as agents of civil society opposing the State, nor as State agents, but as mediators between the State and civil society that allow for a "meeting" of sorts (in systems-theoretical language the structural coupling) between the two. This meeting is possible because of the associations' simultaneous "multiple memberships in different worlds of meaning", those of the formal organisation of the State with its bureaucratic logic, the political system's mapping of the debates through its Government/Opposition guiding distinction of democracy and the autonomous social fields of civil society. For an analysis of what all this means, see subsequent chapters, esp. ch 5

<sup>46</sup> Pope, 1990, pp324ff

want to stress again at the outset the limited yet important way in which liberal and republican constitutionalism are at one. Both seek a home for political deliberation in the Constitution. It is as freedom of speech, broadly understood,<sup>47</sup> that both see political sovereignty substantiated in law. The citizen is free and sovereign in that his/her speech is uncompromised. Both liberal and republican constitutionalism begin from this premise. While both locate the site of political deliberation in the Constitution, the republicans attribute far more decisive functions to constitutional political deliberation. For them, the political is rooted in law, and it is from the constitution that it draws for backing and aspiration.

Republicanism, of course, is not a new idea. What characterises this re-working of older ideas of civic participation in politics is the commitment to a notion of active citizenship as well as the suggestion of a plausible scheme about how this engagement can be institutionally realised in law. The suggestion is of an intimate, mutually nurturing relationship between law and politics. But that is not all. The writings of republicans are all the more appealing because they are highly ambitious; today's civic republicanism is not simply a theory about how law and politics emerge in a new synthesis - it is also a theory about retrieving the self in the process. The citizen actively participates in forming the political future and this active involvement, in turn, feeds back and situates the self-in-community. Tying the argument together, the republicans purport to point the way to self-fulfilment and self-determination through institutionalised political participation. It is by drawing this interconnection that we may appreciate the enormity of the republican argument that ties human fulfilment to constitutional law by driving it through community and politics.

The complex interrelationship is established by the republicans through a number of stages of argumentation and there are of course variations between the major exponents as to how the interrelationship is to be understood precisely. I will introduce the argument here in terms of premises the major exponents share and to simplify things slightly I will distinguish two stages in their central argument.

The *first stage* involves them in arguing against a view of the interrelationship between law, politics and community that they oppose. More accurately the view they oppose cannot sustain their preferred interrelationship at all. This is an argument very much on communitarian lines, in the way that the communitarians set up liberalism to argue against it. The republican twin targets here are liberalism and pluralism.

With the first I will deal only briefly, not so much because I am personally doubtful that there is much mileage left in the communitarian/liberal opposition, but because the civic republican attack here appears to me either too thin or directed at a straw man<sup>48</sup> and thus

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<sup>47</sup> See ch.1, about downplaying the formal boundaries between rights of participation.

<sup>48</sup> It is often without doubt a liberal straw man that the republicans set up. The new liberalism also

does not serve to set their position up adequately. While the philosophical controversy between liberal theory and its critics is multifaceted and ever shifting, the republican attack targets primarily the liberal "thin" theory of the self. Often their communitarian argument here is inadequate, a forgery even.<sup>49</sup> The most eloquent account draws its inspiration from Michael Sandel. The liberal image of the individual, says Sandel, is one of the 'unencumbered self', whose values and convictions - as attributes of the self - become relegated to the external and the contingent "as features of my condition rather than as constituents of my person." (1982, 94) In this way liberal theory mis-construes communities that generate value and commitment because it remains blind to the intricate ways in which these values and beliefs impinge upon the very constitution of the self. For liberals, already constituted selves, "enter" the community they inhabit in the same way that they would enter a voluntary association. Sandel contrasts this with his "constitutive" conception of community whose members understand it as describing "not only what they have as fellow citizens but also what they are, not a relationship they choose but an attachment they discover, not merely an attribute but a constituent of their identity." (1982, p150) The recourse to communitarian theory allows republicanism to confront liberalism first and foremost on an epistemological basis. This in turn allows them to argue the fundamental importance of participation in politics as constitutive of both communities and selves.

It would be wrong, however, to view this opposition to liberalism as the significant one for republicanism, for two reasons. Firstly, because the republicans are not united in their rejection of liberalism (see Sunstein below), and secondly and more importantly because this opposition does not yet allow them to establish the other two central tenets that, alongside participation, are central to republicanism: those of civic virtue<sup>50</sup> and the common good. For this they will confront the tradition of political pluralism.

What needs to be resisted, say the republicans is the pluralist assumption that politics is a bargaining process where interests battle for recognition and superiority. According to the

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condemn the abstraction that the traditional liberal "dispossession of the self" entails. Indicatively Dworkin, 1989, Kymlicka, 1991, or Raz, 1986. As Raz argues (1986, p18): "If there is one common thread to the argument of this book it is its critique of individualism and its endeavour to argue for a liberal morality on non-individualistic grounds."

It is the republican caricature of liberalism that makes Sunstein sceptical about setting up his own theory around the opposition republicanism/liberalism

And a secondary point as to the set-up of liberalism. Pocock has talked of "critics of liberalism who maximise its importance in order to provide themselves with an antithesis." (1981, 70)

If liberalism did not hold such sway and was not so fundamentally flawed, perhaps republicanism would lose much of its force. (Herzog, 1986)

<sup>49</sup> see Dworkin's counter-attack on Tushnet's "forgery" of liberalism in 1986, p440, n.19

<sup>50</sup> For the new emphasis on civic virtue even outside mainstream republicanism see Heater (1991). What he defines as civic virtue is "[that] psychic side to citizenship [that is] expressed as commitment."



republicans, the pluralists view the public sphere as a political market that functions on the lines of the economic market.<sup>51</sup> Here, individual preferences and interests seek a mechanism to best accommodate their competition. Groups are nothing more than organisational forms through which individuals pursue their individual interests more effectively. What wins the competition is conceived as approximating public interest, and the market logic underpinning the political process guarantees democracy's self-correcting capacity. What the republicans most oppose is this conception of the political actor projected from within the logic of the homo economicus, that pulls away the ground from any possibility of conceiving an objective public interest in politics that transcends individual and group interests.<sup>52</sup>

So what is wrong with political pluralism? Nancy Rosenblum summarises it: "Individuals bring interests ready-formed to groups, which simply amplify them; interests are partial and contingent and thus without significance to moral identity; liberal pluralism is based on scepticism about our ability to communicate needs and values in a fashion that moves others towards consensus." (1994, 74) Finally, I would add that the republicans are very sceptical of the pluralist commitment to the sovereignty of associations and their superiority over state sovereignty, because this would erode the fundamentally integrative role of the democratic deliberative process and the production of authoritative public norms.

Having established their opposition to the theory of political pluralism in the broader framework, the republicans then direct the debate to constitutional theory. The republicans oppose an understanding of constitutional provisions as simply placing limits on political bargaining. Politics is the site where communities strive for self-determination, and the constitution, claim the republicans, hosts the political process.

In this context the republican rebuttal of pluralism is a rebuttal of a misconception that understands law as external to politics and community. The Constitution is misconstrued as a mechanism of checks and balances for - but external to - the bargaining process that is

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<sup>51</sup> The market-place of ideas formula has dominated Constitutional theory and practice and motivates much First Amendment literature. Typically associated with O Holmes, the market place of ideas is conceived as the medium of competition of ideas and the mechanism of striking a balance.

<sup>52</sup> This is a pluralism most associated with Bentley, Buchanan, Tullock, etc. Obviously the question arises, as it arose with liberalism too, whether it is not a straw man the republicans are setting up here. Why, for example, are there practically no references in their work to Dahl, Laski and the important British school of political pluralism? The question is not irrelevant to how under-explicit political pluralism is as a theory. Or is it maybe "a mutating theory; an inconsistent theory" queries Grant Jordan (1993). Jordan writes: "The inconstant qualities perhaps explain why pluralism has been 'in the ring' with such different alternatives as elitism, corporatism and totalitarianism. Thus the first issue is whether or not it is possible to recognize pluralism. Is there an agreed description of the suspect? Since pluralism is so vague a set of ideas it is difficult to understand how opponents can have rejected it with such confidence." (1993, p49)

politics. The rebuttal of the pluralist mis-conception keys into a constitutional issue of the greatest importance.

The mis-conception that law is external to politics underpins, claim the republicans, the contradiction that has haunted constitutional theory. The contradiction is generally referred to, following A Bickel (1962, 16) as the "counter-majoritarian difficulty or paradox."<sup>53</sup> In a nutshell, the problem is that the constitution at once proclaims popular sovereignty and at the same time establishes limits - rights - and a mechanism - judicial review - that may override what the populace may wish at a particular time.

The paradox has so dominated American constitutional theory as to have been occasionally identified with constitutionalism itself,<sup>54</sup> and underlies many other famous distinctions. In early American history we encounter it as the opposition between federalists and anti-federalists (Madison v. Jefferson), later as the contrast schemata of "democracy (as majority will) and rights", (and consequently the liberal opposition of 'policy and principle'), as 'will and reason', as 'government based on political consent and government based on political science', etc. However the opposition is identified, it currently finds its most urgent expression in the suspect legitimacy of judicial review or, as Bickel put it, in the fact that judicial review remains a "deviant institution" in democratic thinking (1962, 18). Because how can it be consistent with basic democratic principle that the Court should be able to invalidate decisions of We The People as expressed through their representatives?<sup>55</sup>

There have been (at least) two lines of argument out of the quandary. The first, "fundamental rights" theory, is more a blatant admission of the tension rather than an attempt to overcome it, although the paradoxical dimension of the tension is downplayed. This line of argument subordinates democracy to rights and maintains that individual rights should always outweigh - or "trump" - democratic choices when the two compete. But this does not automatically translate as a privileging of law over politics because, as fundamental rights theorists argue, our very political culture incorporates both rights and democracy as of fundamental value. Western democracy has developed a commitment to upholding

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<sup>53</sup> There are, says Luhmann, paradoxes everywhere, wherever we look for foundations. The paradox needs to be unfolded, for a theoretical description of society cannot tolerate either tautology or paradox. The republican dissolution of the paradox is just such an attempt. "But paradoxes have a fatal inclination to re-appear." (1988a) Civic republicans dissolve the paradox by collapsing the opposition that sustained it, namely that of individual/State. Then the paradox reappears, as I will argue, in the form of a priori or postulated communities.

<sup>54</sup> At least in the US context: Klarman, 1992, 796 : " Constitutionalism: that is, restricting the choices open to a current majority"

<sup>55</sup> In an interesting article Leubsdorf (1987) suggests a deconstruction of the Constitution in a way that reveals these tensions as inherent in the text itself. Then it is no paradox that the Constitution is at once a Constitution of power and a Constitution of limits. "Any Constitution," he writes, "participates in the tensions oppositional goals create and in the tensions that attend its own creation." (p201)

fundamental rights as inherent and constitutive feature; therefore, no externality, and therefore, no paradox. Dworkin is considered one of the most prominent figures in this camp, on account of his Taking Rights Seriously, although I would argue that his recent work has brought him closer to the theorists of the opposite camp.

The second line of argument subordinates judicial review to the broader democratic ethos. Ely (1981)<sup>56</sup> is usually hailed as the first major exponent of this orientation but many variations on that argument have since appeared. Judicial review exists, according to Ely, to "unblock stoppages in the democratic process" (1981,117) and maintain open the channels of political change, by, for example, facilitating the representation of minority interests. By securing political freedoms, judicial review secures what is integral to the function of "an open and effective democratic process." (ibid 103) Ely's path-breaking work could thus, more broadly be seen as suggesting that democracy provides a kind of master-narrative that gives content and meaning to provisions about rights and lends the perspective through which rights may be interpreted.<sup>57</sup> Thus understood there is little doubt that Dworkin of Law's Empire falls within this category<sup>58</sup> and so do, if less straightforwardly, the republicans.

As far as I know, the republican argument has not been explicitly tied to the democratic grand narrative approach by any of the commentators and Ackerman himself criticises Ely for cloaking rather than dispensing with the paradox (1985, pp737ff) and is careful to proclaim he is steering a different course. In spite of the disclaimer, the republicans are putting forward a grand democratic narrative even if it is a different one from the one the "monist"<sup>59</sup> has in mind. It is by claiming a special role for law in the democratic deliberative process that the republicans "dissolve" the constitutional paradox and disprove thus the

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<sup>56</sup> And its forerunner under the eloquent title "Toward a Representation-reinforcing Model of Judicial Review" (1978)

<sup>57</sup> Cf MacCormick D N (1993, 143): "The advantage of of insisting on rights as constitutionally derivative is, as we now see, that this leaves them in the end subject to democratic processes ... It is to the people as a whole that belongs the decision about the exact specification of those rights, and about the other essential elements of constitutional structure and distribution of constitutional authority. In this way democracy acquires a self-referential character."

<sup>58</sup>The question admittedly needs to be reformulated slightly from Ely's articulation of it. Ely subordinated judicial review to the democratic narrative that first gives it perspective. Dworkin seeks that perspective in a reconstruction of constitutional history that first enables and constrains legal meaning, and thus judicial interpretation as well. Integrity provides the grand narrative here rather than Ely's democratic ethos. But thus seen, Dworkin's is a specification rather than a qualification. And so too, one might claim, is that of Stanley Fish. In each case, an "ethos" (Ely), a commitment to coherence (Dworkin), or the constraints to a logic internal to an interpretative community (Fish) supply a kind of master narrative that first enables legal meaning as such in the broadest sense and thus neutralises the "deviant" nature of judicial review.

<sup>59</sup> Ackerman talks as "monist democrats" (1989, pp7-13, 23) as those who take this line, and has Ely as his primary target here.

externality of law to politics.

Having argued against conceiving law and politics as mutually opposing forces (as the pluralists would have it), the republicans proceed to the *second stage* of their argument and suggest a different function for law. They will claim that the constitution provides for the possibility of politics and the substantiation of community. By inserting law into the picture they add a new and decisive variable to the "communitarian" interconnection we saw them putting forward earlier. For the republicans it is the Constitution that underpins the community's politics, thus in one and the same stroke, promoting "participation, capacitation and emancipation." (Michelman, 1986, 43) The communitarian connection lingers here not only in the argument about the social construction of the "embedded" self, but also in the argument that although citizenship is a universal category the dialogue into which it facilitates entry is specific to the historical community.<sup>60</sup> This is perhaps one of the few departures from what otherwise sounds very like the old "Aristotelian" republicanism of Hannah Arendt, Leo Strauss, etc.<sup>61</sup> The debt to these theorists runs deep. Arendt's own definition of politics sounds very apposite: "The realm of politics," she says, "is the organisation of the people as it arises out of acting and speaking together, and its true space lies between people living together for this purpose." (1958, 198) As Luhmann would say, Arendt (and the republicans) conceive society as a politically constituted system.<sup>62</sup> The most important element here - and in the new republicanism - is that membership in the political community is not seen - as the liberals and pluralists would have it - as means to an end, the pursuit of partisan choice but

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<sup>60</sup> Michelman draws from Pitkin, 1984, p276, to stress "the simultaneous discovery of our particular, historically selves, and the particular, historically shaped way of life of our community. The community, like the choosing self, already exists in its historical particularity."

<sup>61</sup> Despite their reliance on the concepts of civic virtue, participation and the common good, it would be wrong to assume that for the new republicans, the modern political process is identifiable with the classical politics of the polis. There is little doubt that the background to new republican theory is a tradition of political thought with roots in Aristotle's *Politics*, Cicero's *Res Publica*, Macchiavelli, Harrington, a tradition renewed by Hannah Arendt and Leo Strauss. This tradition envisages man as a "political being" who could only realise his telos in a vivere civile, a republic. The new republicans may retain the key notions but reject the ancient view. The republicans reclaim the idea from its original context and "do not share in its nostalgia" as do modern theorists like Arendt or Leo Strauss. Republicanism must be divorced once and for all from "organicist, solidaristic communities" (Michelman, 1988 1526). Instead, as a "tradition in political thought, republicanism figures less as a canon than ethos, less as blueprint than as conceptual grid, less as settled institutional fact than as semantic fields for normative debate and constructive imagination." (Michelman, 1986, 17)

This is how a sympathetic critic resumes the relationship to the past of the new republicanism: "[The new republicans] seek a discourse which retrieves the civic virtue and the dedication to deliberation and the common good that was the side of republicanism that links them to liberalism's respect for individual diversity, while at the same time abandoning the [old] republican tendency to homogeneity and the tyranny of the majority ..." (Kerber, 1988, p1666)

<sup>62</sup> See Luhmann, 1986e pp84ff and my Ch5, below

instead it is in the very process of participation as its own end that perspectives engage with one another and conceptions of a good that is common are shaped. Whereas in the liberal/pluralist world-view, politics is about promoting diverse goods and thus relies on bargaining within a framework of rules neutral to the bargaining parties, the republican picture of politics is one of the pursuit of the common good. In their account, the heterogeneity of interest (of the Hobbesian rent-seekers) associated with liberalism, gives way to the heterogeneity of perspective. Bargaining gives way to arguing, and this shift allows the republicans to claim "civic virtue" for their politics, a tenet so central as to be characterised by both Michelman and Sunstein as the "animating principle" of civic republicanism.<sup>63</sup>

This is a re-statement of popular sovereignty in no uncertain terms. Having argued the meaning and significance of their three key notions - participation, common good and civic virtue - the republicans can now celebrate having established a connection between the embedded self, where the form of that embeddedness is participation in a dialogue, that at once both constitutes the realm of politics and substantiates community, and finally law as enabling the dialogue in the constitutional forum. It is this final connection to law that the republicans are called most urgently to establish. What they need to prove is the connection between the political and the legal, their recourse to constitutional-legal discourse as communal, political discourse.

While the republicans all share the basic premise of the interrelationship I described between self, community, politics and law, they diverge in their accounts of the institutional vessel of the political dialogue. They disagree about where and how to locate the constitutional "home" of the deliberative practice. Their differences arise around the question of the legal outlet of the political. Thus Michelman designates the Supreme Court as the most appropriate forum of the deliberative practice and Sunstein the Congress, while Ackerman seeks to locate his republican politics in the "constitutional" mobilisation of the citizenry at large. The initial disparity between the theorists, between elite and populist institutional solutions has given way, more recently, to some convergence (see below). But the problem of designating the appropriate constitutional realm of the political dialogue still remains the issue that most sharply divides republicans. The following sections will explore the answers they give to the problem independently. I will in each case, rehearse the basic premise only briefly and focus more extensively on the various suggested constitutional outlets of the

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<sup>63</sup> Michelman, 1986, p18, Sunstein, 1985, p31. For an attempt to make a feminist case of civic virtue see Sherry S (1986): "Where liberalism finds the primary purpose of government to be promotion of the diverse goods of its individual citizens, republicanism finds its primary purpose to be the definition of community values and the creation of public and private virtue necessary for societal achievement of those values." (551)

political dialogue to explore how it is that they perform the function of "carrying" the political dialogue onto legal-institutional ground.

One need only thumb through any current American legal or political science journal to notice a spectacular proliferation of literature on civic republicanism. I will unfortunately - and unjustly - have to ignore more recent adherents to the theory and concentrate on those leading figures of the movement that I have already mentioned: Bruce Ackerman, Frank Michelman and Cass Sunstein. To these leading figures I will add a fourth, Ronald Dworkin, in spite of much literature that would contest this classification. The sections of the present chapter are only an exposition of the republican argument, and the occasional critique that I include aims to clarify the exposition, either because it brings critical aspects of the theory into relief, or because it is a critique to which the republicans themselves have responded by qualifying their positions. This way of proceeding does justice to republicanism as a project in progress - which also explains why the positions are often related as in a dialogue, and why there are occasional interruptions and overlaps in the narrative. The aim of the exposition is to explore the republican deep connection of law to community and to politics. I will explain this as the containment thesis. It is this thesis that the chapters to follow will take issue with and which the prime objective of this thesis is to counter.

## II

### Ackerman:

#### The Discovery of Constitutional Politics

Ackerman launches his grand scheme to "discover" the constitution in order to map out the contribution of American constitutionalism to no less than "the rebirth of Democracy in the modern era." (1991, pp295-6) His discovery is a most ambitious one, suggesting that the constitution's past and present role has been to serve as a lever for politics in a way that empowers and compounds a sense of community among citizens. To advocate his republican grand synthesis of law and politics, however, he first needs to argue against a position - already discussed - that understands the two as mutually external and even incompatible. He argues against this mis-conception by confronting the traditional constitutional problem, the counter-majoritarian paradox. "The root difficulty," Ackerman explains, "is that judicial review is a counter-majoritarian force in our system. There are various ways of sliding over this ineluctable reality." (1984, p1013). Under whatever formulas the sharp edge of the paradox has been removed, this limitation upon popular sovereignty is impossible to deny. Whenever the Supreme Court reverses a legislative decision, it "thwarts the will of the representatives of the actual people of the here and now; it exercises control not on behalf of the prevailing majority but against it" (1984, 1013). There is, says Ackerman, a tension here between politics (the overturned legislative decision) and law (the Court decision) and this tension gives rise to a mis-conception: the externality of law to politics. This misconception is a liberal one. Ackerman will set up the republican project in opposition to liberalism but in a most novel way:<sup>64</sup> by attributing the paradox to the "liberal democratic compromise that is levelling democracy" (1984, 1038, my emph.) In place of the liberal understanding, he places his own republican "promise of the dualist constitution" (1984, 1039), the lynchpin of his theoretical enterprise. The levelling accounts for the paradox; the dualist constitution dissolves (1984, 1016) it. By dissolving the paradox Ackerman steers his republican project clear of the impasses that have blocked both the liberal "rights-foundationalist" and the "monist democrat" positions in dealing with the paradox (see above).<sup>65</sup>

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<sup>64</sup> "If Ackerman is right," comments J Simon (1992, 501), "then the most contentious issues of modern constitutional theory have been fought out on a map that misses the most significant features of our political landscape."

<sup>65</sup> I find it far from obvious that Ackerman's position is incompatible with Ely's treatment of the

The liberal 'levelling' understanding of democracy fails to distinguish two quite distinct levels of political conduct, says Ackerman. "The leveller treats all acts of political participation as if they were accompanied by the same degree of civic seriousness" (1984, 1038) Ordinary or normal politics consists in advancing private ends. But the liberal 'leveller's' "impoverished constitutional vocabulary" does not give form to those "constitutional moments" in a people's history when "the people sacrifice their private interests to pursue the common good in transient and informal political association." (1984, 1020) It is during such moments that the true voice of The People is heard. It is in such moments that citizens act in their capacity as sovereign populace. "Levelling," as Kahn puts it concisely, "represents a political world-view that simultaneously drains the Constitution of any special, public meaning, undermines the conditions of the democratic legitimacy of a substantive judicial review and reduces citizens to private individuals using politics for the pursuit of of purely personal ends." (1989, 19)

What is a constitutional moment?<sup>66</sup> According to Ackerman's definition, it is an occasion upon which The People exercise deliberative, "considered judgements" regarding "the rights of citizens and the permanent interests of the community." (1991, pp240, 272-4) The appeal to the common good "ratified by a mobilized mass of American citizens expressing their assent through extraordinary institutional forms" (1984, 1042) defines Ackerman's republican vision. He is prepared to concede that these moments of exceptional

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paradox (briefly, above). But Ackerman insists that Ely's theory cloaks rather than dispenses with the problem (Ackerman 1985, p737ff). I think that Ackerman would find it difficult to sustain this critique that Ely simply passes over judicial value judgements, in view of the position he too reserves for the Court in times of "ordinary politics".

<sup>66</sup> And how do we identify an instance of popular mobilisation as a constitutional moment? In his recent book (1991) Ackerman designates criteria for this task in a detailed and precise account of a set of formal stages that the "moment" must pass through to qualify as a constitutional one. Very briefly these involve (i) that one branch of government alleges a mandate to transformative policy (ii) opposition to this by another branch of government leading to stalemate (iii) a critical election which addresses the choice to a deliberating citizenry and (iv) acquiescence to the will of The People by the initially reactionary branch, followed by the sanctioning of the new state of affairs by the Supreme Court (Ackerman, 1991, ps 48ff, 266ff, 272ff). In those few constitutional moments that Ackerman has identified and discussed (the Founding - Philadelphia Convention, in (1991), and the Reconstruction and New Deal in the two volumes to follow (1991)) he claims the formal criteria were fulfilled and furthermore there was clear proposal, long deliberation and super-majoritarian consent. There have been, however, he acknowledges, also "lesser" constitutional moments such as the Civil Rights movement and the "Reagan revolution" (1991, 108ff, 51) that did not fulfil all the conditions. For a well-argued charge of inconsistency at this point, see Klarman (1992, pp769-70). If Ackerman abandons his constraining formal criteria and characterises as "near-miss" constitutional (moments), episodes that scarcely fulfil those criteria, how will he insulate his "moments" from every case of popular mobilisation? "If the 60s Civil Rights movement why not the 20s Ku Klux Klan crusade?" Especially since Ackerman obviously inserts no evaluative threshold or premise (and explicitly- 1991, p308, does not include "political correctness") in his criteria of a constitutional moment.



politics occur rarely and "should become preeminent only under well-defined historical situations. When these conditions do not apply, the claim of the legally established authorities to speak in the name of the people must be conceded by all thoughtful citizens." (1984, 1020) Normal politics must be tolerated in the name of individual liberty; it is however democratically inferior to the intermittent and irregular politics of public virtue associated with moments of constitutional creation." (1984, 1022) During these moments of profound rupture, citizens re-claim their delegated sovereignty through direct popular action.<sup>67</sup>

According to Ackerman's account of this dualism, constitutional regimes designate two levels of politics: a level of representational politics, and a level of politics of direct

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<sup>67</sup> Ackerman's episodic constitutional politics begs the question of what constitutes an episode. (This line of criticism has been persuasively argued by Kahn (1989, ps23-8).) Even in Ackerman's major examples of constitutional moments, there is always a question of precisely what level of national participation is necessary to the occurrence of a constitutional moment. Historically it has been overwhelmingly the case that Ackerman's constitutional moments have been initiated and pursued by active minorities of the population who have come up against and managed to curb the "normal-political" attitude of large indifferent majorities. These majorities were conducting business as usual, in a non-constitutional, non-identity-generating mode. If this is the case, do we identify the politics of the minority as 'constitutional' on a qualitative basis, or do we compromise the notion by projecting it on the indifferent majorities? If we opt for the latter - without mobilisation and the rest - the argument for the two degree democracy is hardly sustainable; if we opt for the former and accept that minorities can conduct constitutional politics then what happens to the question of identity in community? If, that is, we abandon the criterion of We The People - as a whole - mobilising around community issues, how will the identity-generating involvement of the few spill over to furnish the sense of identity of the Nation/citizenry as such? (I run nationality and citizenship together intentionally, because Ackerman draws no significant distinction between We The People (the legal capacity) and We Americans (nationality).)

There are spin-offs from this argument too. For example, even on those rare occasions when Ackerman can persuasively argue that a constitutional moment did occur in the past involving mass mobilisation, there were invariably large parts of the populace excluded (usually blacks and women). How, then, does Ackerman propose to explain the sense of identity of the excluded? Also, more caustically, there is the question of how he can account for the sense of identity of present day Americans who have not had the chance to participate in a 'constitutional' moment. Even if it is The People who spoke during past constitutional moments, Ackerman needs a separate argument as to why that voice is binding over present day people who may not wish to be ruled from the grave. Why, as Klarman has argued (1992, pp764-5) is the will of past generations - even if "genuine" - to be privileged over the will of present generations' stand-ins? And how, given the necessary projection of founding moments of community into the past, do 'We the People' understand national identity, to use Michelman's words, during "Our long vacations"? For both those who chose not to partake and those to whom the chance was never given, an implied consent is called upon to do all the work of identity-generation. And extracting "involvement" from the mere inference of assumed consent is a move that Ackerman has had some difficulty justifying. "What if there was a constitutional crisis and nobody came?" asks T Dumm in a recent review (1992, 342). The question makes sense in this context and points to the limitations of Ackerman as a theorist of crisis. The American public has kept reverently silent on the mass scale in the face of what even Ackerman has identified as a lesser constitutional moment - the Reagan revolution. "This silence has been interpreted to mean many things," says Dumm, "but for those who worry that it means an alienated disengagement by the citizenry from higher politics ..., Ackerman's faith seems overly optimistic to the point of naivety." (p343)

participation. During the latter the political community re-emerges to re-define itself. As Simon writes (1992, p512), "Ackerman sees our history as the periodic efforts of our people to break through the structures created in one democratic process into another democratic process." What this means more precisely is the following: because the constitutional provisions do not licence these moments of creativity,<sup>68</sup> the amendment that the constitutional moment carries is not, legally speaking, democratically licensed. Yet they are democratic in a more fundamental sense as exercises of political sovereignty. These moments are moments of "constitutional creativity" (1991, 314ff) and democracy reborn (1991, 295-6), in the sense that the populace as sovereign periodically instigates transformations of such depth that they can be credibly claimed to have re-situated the meaning of freedom and democracy.

It is within this "two-track democracy" that Ackerman places the important function of the Court. The role of the Constitutional Court is to safeguard prior moments of constitutional politics. This means that during the long periods of normal politics, the Court remains the sole bearer of that constitutional momentum that marked past achievements of heightened politics. To fulfill its role is to interfere in interest-gearred politics (through judicial review) and remind the factions of the meaning of the Constitution, that is, of the meaning that 'the people' as community ascribed to their acts. "[The Court] signals to the mass of private citizens in the U S that something special is happening in the halls of power; that their would-be representatives are attempting to legislate in ways that few political movements in American history have done with credibility" (1984, 1050). <sup>69</sup>

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<sup>68</sup> I am referring here to the constitutional provisions that designate the conditions and the procedure of Amendment of a Constitution. Article V of the US Constitution specifies the procedure that needs to be followed and the majorities that are required in order for the Constitution to be constitutionally amended. Amar (1988) criticises Ackerman for, in championing a mode of Amendment outside Art. V, "[he] misreads Philadelphia ... [in] subtle yet important ways." (1091) Of course, concedes Amar, Art.V should not be understood as exclusive; it cannot be understood as binding The People themselves, who are indeed the very source of Art.V in the first place. Constitutional Amendment by direct appeal to and ratification by The People is surely legitimate. But Amar has in mind a direct appeal to The People in Convention or through constitutional referendum, whereas Ackerman champions an Amendment process where "ordinary governmental agencies are allowed to alter the express constitutional limitations imposed on their own authority by The People without either complying with Art.V or securing the express approval of The People themselves in a constitutional referendum." (ibid)

On Constitutional referenda as constitutional moments, see Castiglione (1995)

<sup>69</sup> Ackerman shares the fixation with the Supreme Ct that is one of the trademarks of American Constitutional Theory. And he delegates to it a nearly impossible task to safeguard the constitutional moments from the usurpation of other normal-political moments. But this involves the following multifold task: of identifying the occurrence of a constitutional moment; of determining the opposition, identifying the winner, and pitching the winning claim at the appropriate and desired level and form in a way that transcends its embeddedness in the situation that gave rise to it; and of interpreting it in the light of previous constitutional moments (See also Klarman on this point, 1992, particularly p 773

What is it that defines this "highest kind of politics" (1984, 1022) and how does it substantiate the claim for individual self-realization through politics? As Kahn writes (1989, p20), "[t]he difference between these two forms of politics is the difference between a politics founded on a community of discourse and a politics of private individuals. Republicanism reconceptualizes the character of public order as a domain in which individuals construct their identity through the dialogical creation of a community."<sup>70</sup> It is indeed in informal association, "in sustained debate and struggle, [that Americans] hammer out new principles to guide public life," and it is in this "transient" form that that the citizen crosses the threshold from private to public life (1984, 1039, 1032-3)

"What does the Constitution constitute?" asks Ackerman towards the end of the Storrs lectures. The link he attempts with the constitution of self-identity is the point where Ackerman moves from mere political speculation to establishing the 'scientific' premise for Republicanism. Constitutionalism now extends into the politics of identity. This is a crucial link with the deep premise of republicanism.

Ackerman begins with the 'private citizen' with the emphasis on the 'private'. This citizen is immersed in the private spheres of family, profession, friendship and only views politics as a 'sideline'. There is however a point at which this citizen, without reverting to a totally public persona, can shift the emphasis and enter the public sphere in a committed, private-transcending way.<sup>71</sup> "While established Constitutional Law did not always resolve America's deepest crises, it has always provided us with the language and the process within which our political identities could be confronted, debated and defined- both during the periods of normal politics and on those occasion when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose". (1984, 1072) The effort is undertaken "in sustained debate and struggle" through "suspending self-interest" (that motivates lower-track politics)<sup>72</sup> and instead "expressing

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on the double difficulty of synthesis of antithetical principles and "intergenerational synthesis.

<sup>70</sup> Is it true that American politics come in two and only two kinds? Or, as Michelman would argue, is it the case that both kinds, as ideal types, co-exist to varied extend at all times? (1988, 1493) Do constitutional moments come as the ruptures that Ackerman would have us believe, does it all occur in "fits and starts" (Klarman, 1992, 791) or is the constitutional narrative more continuous and even? Maybe it would make sense then for Ackerman to compromise the rigidity of his distinctions and the all-or-nothing quality of his categories and focus instead on constitutional history as a specific, continuous, political practice? But could his theory survive the evening out of levels of politics?

<sup>71</sup> Ackerman's debt to the earlier constitutional theorist A Meiklejohn is evident here. The transcendence of the private persona is reminiscent of Meiklejohn's urgent appeal to abandon the "excessive individualism" of American life in favour of a higher "public rationality". If people stopped thinking like "farmers, trade-unionists, employers, etc, and become more of citizens devoted to the common welfare," wrote Meiklejohn (1960, p74) the plan of self-government enshrined in the Constituion would be accomplished.

<sup>72</sup> For Ackerman (and the republicans in general) it is vital to distinguish politics that are motivated by self-interest and politics of "suspended self-interest", or the individual's and community's

deliberative judgements upon the rights of citizens and the permanent interests of the community." Ackerman's two-track model accounts for that possibility and views the higher rank of politics as instituting a specific form of interaction, a specific forum of community.

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permanent interests. But many have argued that these dichotomies are descriptively implausible and normatively suspect. Pope (1990, 347-51) urges that the distinction be abandoned because it cannot perform the function it is assigned and uphold the opposition of republicanism to interest-group pluralism. How will the noble protests, he asks, be distinguished by judges from other, less virtuous ones? He brings the example of the black workers' boycott in NAACP v Clairborne Hardware Co (393 So.2d 1290, 1295-97 (Miss. 1980), reversed 458 U.S. 886 (1982)). The case concerned the boycott of white merchants after a petition by of a Mississippi local union had petitioned the county government, urging them to provide equal treatment for blacks, and were rejected.) These demands - later to be viewed as political and fundamental - were initially seen as narrow, self-interested and factional. For a similar argument see Klarman (1992, 764) Klarman (1992) argues that Ackerman fails to convince that even the Founding - the subject of volume I of We The People - Foundations - was free of self-interested decision-making. Tushnet also raises doubts about the possibility of credibly sustaining the distinction between constitutional and ordinary politics (1988, pp25-6).

### III

#### **Michelman and Sunstein: Deliberative Communities and the Law**

Since Ackerman's influential beginnings, new voices have enriched the tradition of civic republicanism. In the context of American constitutional theory, the most important theorists to engage in the debate and renew the tradition have been Cass Sunstein and Frank Michelman. Like Ackerman, these writers suggest constitutional law as the forum that will elevate politics from a bargaining process to a process of self-government and self-determination. But unlike Ackerman, whose republicanism invites and relies on popular mobilisation, Michelman and Sunstein propose elitist institutional solutions. It is because of this premise they share that I discuss them together like this, while ensuring that the distinctive features of each theory comes across as such.

#### Deliberation, Distance and Empathy

Michelman begins his most important contribution to civic republicanism - Law's Republic (1988) - with a footnoted definition of political freedom. Political freedom, he says, means the "achievement of personal freedom through the institutionalized social power that regulates social conflicts." (1988, fn2) In the mode of a manifesto that characterises much of the argument in this work, Michelman declares law the sufficient and necessary condition of freedom. To assume otherwise is to fall into the classic liberal mistake of thinking negative freedom as co-extensive with freedom. Michelman declares the value of "positive" freedom as the appropriately political one.<sup>73</sup> He defines politics as the community's dialogical engagement over the terms of common life, and with the Constitution hosting the dialogue, he reserves the term "citizenship" for "freedom as activity."<sup>74</sup> This is an argument that has many stages and we will need to discuss them in some detail.

Neither Michelman, nor Sunstein contribute much that is novel to republicanism's "negative" claim (see 'first step' above, ch 2 s 1). Michelman attributes to the (liberal) pluralist

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<sup>73</sup> An argument similar to B Crick's (1971)

<sup>74</sup> "Citizenship stands for freedom as activity: the constant re-determination by the people for themselves of the terms on which they live together." (1988, 1518)]

the misconception of assuming that negative freedom<sup>75</sup> is exhaustive of freedom as such and of treating the protection of this negative freedom as the organising principle of politics. Michelman's "pluralist" is Ackerman's "leveller", and the latter's distinction between "constitutional" and "normal" politics is replaced by Michelman by a similar one, that between "republican" and "pluralist" politics. The "pluralist" view is set up as presupposing primary interests of individuals as pre-political, and politics as a secondary instrumental medium for protecting or advancing those 'exogenous' interests. Sunstein also argues against the view that politics is about the competition of "naked interests" or "private preferences"<sup>76</sup> in the political marketplace. Republican politics calls for a commitment to deliberation not bargaining. Unlike Ackerman, however, Sunstein refrains from identifying the pluralist as liberal. In fact, Sunstein's stance towards liberalism remains a matter of heated debate.<sup>77</sup>

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<sup>75</sup> For the origin of the distinction positive/negative freedom, see Berlin (1969)

<sup>76</sup> Sunstein, 1986

<sup>77</sup> Sunstein argues against the liberal/republican dichotomy, in favour of his own "liberal republicanism." (1988, 1566-71) Because the republican revival, he claims, draws on a tradition that is both liberal and republican. "in their emphasis on the possibility of forming public policy through deliberation, on political equality, on citizenship, ... republicanism and liberalism are at one." (1988, 1567-8) And while the "most collectivist forms" of republicanism contradict "the most atomistic versions of liberalism ... [r]epublican thought, understood in a certain way, is a prominent aspect of the liberal tradition." ((1988, 1569). The ambivalence of this Sunstein's position has been criticised as a swaying between polar opposites and has raised doubts about central tenets of his theory and his own standing as a republican. (Kerber, 1988) About the central tenet: "liberal republicanism" is dangerous because it undermines the very dichotomy that sustains the republican thesis. By dissolving that distinction republicanism is left without a significant Other, and runs the risk of lacking self-identity. As to his own standing as a republican: Sunstein goes a long way in his attempt to graft liberal principles onto his version of republicanism, but it seems, both too far and not far enough. His half-hearted endorsement of liberal principles, leaves his liberal republicanism midstream, an easy target for both liberal and communitarian critics (or radical republican - eg Brest, Pope, Tushnet). For the liberal critic, Sunstein does not break away thoroughly enough from what has been described as the "Unfortunate Revival of Civic Republicanism" (Gey (1993)). The republican preoccupation with the common good, civic virtue and the organic concept of community are all present in Sunstein's account and attract the liberal scepticism. They all appear to resurrect substantive value and substantive commitment instead of the preferred liberal procedural prescriptions. But what appears most suspect to liberals is his position towards "fundamental rights", "the category [of which]," Sunstein acknowledges in a republican system "is a small one." (1986, 1129, 1133) As one liberal critic resumes it, "Sunstein's skepticism about rights extends far beyond a limited critique of traditional natural rights jurisprudence and in fact casts doubt on many, if not most constitutional rights." (Gey, 1993, 855).

From the opposite shore, Sunstein has been criticised for conceding too much to liberalism. Sunstein explains he is "too fearful of public power," (1988, 1551) and "not hostile to the protection of individual or group autonomy from state control" (1988, 1569). Consequently he sets up criteria for when perspectives of "losers" in the political process should have been taken into account. This he presents as a protection of the condition of the deliberative process, but for communitarians and radical republicans it smacks too much of inalienable rights and liberal "loser" talk. As Sullivan says, "Any criteria [about when perspectives of losers should be taken into account] will turn out to look suspiciously like rights emanating from "above" or "outside" politics - just what the republican deliberative norm was meant to avoid." (1988)

The "pluralists", for Michelman, are guilty for divorcing law from politics under the false assumption that "law must, once enacted, immediately abscond from politics to higher ground. It must become an autonomous force against politics, a force elaborated through its own non-political modes of reason by its own non-political judicial organ." (1988 1509) <sup>78</sup>

Sunstein stresses that interest-group pluralism understands politics solely as the extension of market behaviour and principles into the public-political realm.<sup>79</sup> Whereas interest-group pluralism treats politics as a mechanism of "aggregating citizen preferences" and the constitution as the framework within which prepolitical wants, needs and ideas could be negotiated, republicans "treat politics as above all deliberative; and deliberation is to cover ends as well as means." (Sunstein, 1988, 1540, 1548)

By departing thus from the "pluralist" world-view Michelman and Sunstein can begin to counter-pose their own republican project; if freedom is not negative but also - and predominantly - positive, freedom needs to be understood as political; and as self-government, as self-determination. "Another name for positive freedom is self-government," says Michelman. (1986, p26). Freedom can be both negative - the liberal freedom as absence of coercion and 'positive'- "action and self-direction according to reasons, but reasons that one gives to oneself" (1986, p25). These reasons are not a-historical; they are drawn from common resource pools, from commonalities of meaning, where reasons become intelligible because they are informed by common narratives. The argument seeks its foundation on communitarian ground. "Every person is thoroughly conditioned by a shared social context that helps constitute that person's identity ... each community is a community of individuals whose own identities are inseparable from their social involvements." (1986, p32) The vision expressed is one of emphasising "openness to 'otherness' as a way toward recognition not only of the other but also of oneself." (p33)

Openness to otherness and the process of recognition require dialogue. Michelman and Sunstein share a concept of positive freedom grounded in dialogue; a dialogue that is both universal in its conditions and particular to the community. It is indeed politics understood as dialogue, the deliberative practice of a community, that make freedom and self-determination possible.

The situated nature of meaning - situated in time and in community - lends a new (or

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<sup>78</sup>Note the inclusiveness of this category, note how many fit the description of a 'pluralist': depending on where the emphasis falls it applies to theorists as diverse as Hobbes, laissez-faire liberals and individualists of all kinds, libertarians, mainstream constitutional lawyers, "fundamental rights" theorists, etc.

<sup>79</sup>"Interest group pluralism regards politics as an exercise of will and power. These pluralists believe that individuals bring their own set of arbitrary, external and unalterable preferences to a political marketplace, and therein make their deals, taking into account their original endowments, the costs of transacting, the perils of political defeat and the gains from successful political action." (Epstein R (1988, p1637)

maybe the only possible) reading to positive freedom. It now "rejects all predeterminations of human essence" (Michelman, 1986, 31) and thus essentialist claims of natural primary interests etc. Social construction of meaning precedes, contains and circumscribes the possibility itself of practical reason and thus the possibility of positive freedom as "action and self-direction according to reasons." It precedes every social process of normative deliberation within which we "recognize, reflect, define ... one another as we ourselves are reciprocally recognized, reflected, defined ..." (p33). Positive freedom is possible only in situ and "implies a social process of normative deliberation, based in commonality." (p31)<sup>80</sup>

What the republicans need to ensure at this stage is that the dialogue will not degenerate into the pluralists' process of bargaining over self-interest. As in Ackerman, their republican dialogue needs to transcend ordinary bargaining and accommodate that extra-ordinary moment of transient association. Both Michelman and Sunstein need to insert criteria as to what counts as normative deliberation that can sustain republican politics - sustain "the characteristically republican belief in deliberative democracy" (Sunstein, 1988, 1563) - because it is inadequate for this conception of politics for political actors to argue on the basis of interest. Instead, "political actors must justify their choices by appealing to a broader public good." (1544) Deliberative practice requires participants to reflect critically on their preferences and to alter those preferences if this is made necessary by the deliberative process that brings "new information and different perspectives" to bear directly on one's choices (1544). Republican dialogue consequently is what provides "the possibility of mediating different approaches to politics, or different conceptions of the public good ..." (1554) "Critical reflection" of this kind requires distance. While Michelman and Sunstein are at one in their commitment to critical deliberation (as they were in arguing against the pluralists), their precise prescriptions as to how this distance from one's own preferences is to be achieved vary.

Michelman calls his "distance" principle "practical reason" and undertakes to explain what it involves very much on Habermas's lines. Practical reason facilitates the "recovery of practical knowledge, situated judgement, dialogue, and civic friendship." (1986, p25) Practical reason, in the way Michelman positions it as the centrepiece of republican deliberation, alludes to Habermas's concept of "practical", emancipatory reason, that involves self-reflection and an intersubjectivity of observation. Habermas distinguishes this form of reason from "technical" rationality that involves instrumentality, means -ends rationality.<sup>81</sup>

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<sup>80</sup> To make his claim for the situated nature of meaning, practical reason and identity, Michelman draws on a vast variety of resources. His references include Sandel, Taylor, Rorty, Pitkin, MacIntyre, Arendt and Cover but also Habermas.

<sup>81</sup> See generally Habermas, 1971, pp308ff



Michelman's debt to Habermas is not confined to the use of the distinction practical/technical reason. The notions of dialogue and consensus that underpin his republican project of deliberative politics, draw heavily on Habermas's account of communicative action. In particular it is from Habermas's "ideal speech situation", that Michelman seems to draw his own criteria for "normative interchange" (1986, 32-33). Note the similarity here: Michelman's prescriptive criteria are that the interchange be (i) mutually intelligible, (ii) potentially critical and (iii) free from a priori privileged status; Habermas's that (i) a claim to intelligibility is precondition of all communication (p108), (iii) "only those are admitted [to the ideal speech situation] who have equal opportunity to participate," (p120) [and Michelman's "privileged status" would fall here under the category of impermissible "external constraint" upon discourse,] and (ii) the ideal speech situation designates an "equal opportunity ... to problematise, justify or refute claims to truth." (p120)<sup>82</sup>

When it comes to suggesting criteria for filtering out self-interest from the deliberative process, Sunstein is more precise and more daring than Michelman. He does not borrow from Habermas for his "distancing" criteria. He employs his own. His argument is long and detailed here but it boils down to two major principles that will serve as safeguards of deliberation. The first is what he calls "political empathy" (1988, p1555).<sup>83</sup> This "embodies the requirement that political actors attempt to assume the position of those who disagree." A second related requirement is that citizens during the deliberative process should set aside their own perspective and "think from the point of view of everybody." (1988, p1569)

The prescriptive point in all this is that the individualistic perspective must be buried. Deliberation requires laws to be "supported by argument and reason" (1544), and private interest cannot be a sufficient basis for argument. Such private perspectives are cancelled out when one adopts the empathetic stance. But Sunstein ascribes to empathy an even more important task than that. It is not enough to agree to disagree; instead empathy is assumed to lead sooner or later to a convergence of opinion, a substantive consensus, and this convergence, Sunstein assumes, will only fail to be achieved if - and there will thus be political losers only if - the deliberative process itself, guided by empathy and interchangeability of perspective, breaks down.

To summarise the argument up to this point: Republican dialogue under the requirements of "distance" is about reaching a consensus on the question of the common good. The result of the republican dialogue is a conception of the common good, an

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<sup>82</sup> All references to Alexy, (1989), my emphases. I am suggesting only that these similarities are indicative and nothing like a strict one-to-one mapping of criteria.

<sup>83</sup> Empathy is a key concept of the republican political universe. See Minow (1987), Winter (1991, 1002): "Ultimately we must come to see it is our similar embodiment and shared social situatedness that jointly provide the common grounds upon which the work of empathy can - and must - be done."

agreement upon what is right for the community, in its specific circumstances of here and now. No-one is coerced into adopting this social vision for the future. In that the dialogue tends to nurture rather than to diminish diversity.<sup>84</sup> The republicans are eager to stress that they do not intend to strait-jacket diversity with some "old" solidaristic republican concept of the common good. Instead the republicans respect and celebrate diversity and invite diverse all perspectives on questions of social value to engage in the republican deliberation. Even so, there still remains open, for the republicans, the question of the apparent incompatibility of diversity and a good that is common.<sup>85</sup> How does the heterogeneity of perspective converge around common conclusions about the good? Moreover, the assumption that there will be a

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<sup>84</sup> Also on the question of diversity: Can the constitution accommodate local understandings and difference? While acknowledging that this as a powerful narrative, Gardner J (1992) argues that it makes little sense because state constitutions do not in fact describe distinctive and coherent ways of life.

For an excellent defence of diversity and "group difference", see I Young's critique of universal citizenship (1989) whose "generality" undercuts difference. Also Smith A D (1986) who argues that the creation of citizenship within the *gesellschaft* character of the modern State undercuts or subordinates the "*gemeinschaft*"-type membership characteristic of other groups. Smith has in mind the ethnic primary group (or "ethnie").

<sup>85</sup> The republican ideal of the pursuit of a common good is one of the most contentious aspects of the theory. There are two basic lines of contestation: (i) Is a common good possible? or, does talk of a common good still make sense for western societies? (ii) Is a common good desirable?

Republicans argue that the articulation of a common good is compatible with the nurturance of social plurality (Michelman, 1988, 1533). But this claim to the best of both worlds has been condemned as implausible. The republicans' disclaimer about the solidaristic uniform community that tends to suppress diversity has not convinced all the skeptics. Bell D and Bansal P for example remind us that "regardless of the epoch any attempt to define human essence or to posit a notion of the common good, historically has resulted in hierarchy, exclusion and alienation." They renew this concern against the new republicanism on behalf of "blacks struggling to carve out a space in the nation's political imagination." (1988, 1610)

So, to claim a common good for a pluralistic society is to either misunderstand the nature of pluralism and our societies or to water down the concept of the common good so much as to empty it of any substantive content. "Where citizens are entangled in a network of obligations and involvements ... unmediated by common identifications or expansive self-definitons that would make them tolerable," Herzog (quoting Sandel) claims that the republicans "owe us an account of how we are to build a politics of civic virtue in the pursuit of the common good. If liberalism is the problem how could republicanism be the solution?" (1986, 484) Surely not by making the common good procedural (the conditions of uncoerced dialogue) rather than substantive, because in that case, why not liberalism? As to the claim that uncoerced dialogue will conclude in a substantive common good, this is a claim that the republicans must prove rather than assume. Why will the dialogue conclude at all in the first place and yield a concrete determination? And what in effect, in the case where there is no unanimity, justifies the imposition of a good upon losers in the dialogue? For the latter point see Gey (1993) who argues that in this position lurks a latent majoritarianism. Because no matter how uncoercive the dialogue, there will be losers upon whom the common good will be inflicted in spite of what they willed. Personally, I find Sullivan's rejection of the appeal on grounds of implausibility already convincing. Sullivan writes: "[R]epublican dialogue appears unworkable ... [Because members of different groups] conceive of the good differently depending on their different histories, experiences, needs, and attributes. Such fractures on perspective will mar agreement on an overarching common good." (1989, 1718)

convergence of perspective in the end, let alone one guaranteeing a "correct solution" <sup>86</sup> appears a statement of faith, an a priori in any case. I will contest these assumptions in my critique of republicanism in ch 3. In the meantime let us reiterate republican politics as this vision of political dialogue, in pursuit of the common good, under conditions of distance from self-interest, that encourages diversity, is historically specific, and in the very process of involving all in a discussion about all, substantiates community.

### The institutionalisation of the dialogue

So far the republican theories discussed offer little other than a version of mainstream communitarian theory that has integrated certain insights from discourse theory. At the threshold of institutionalisation the republicans are called upon to make their substantive contribution. So far they have talked about the acquisition of self-identity through social involvement; they have designated dialogue - or deliberative practice - in the community as the appropriate social involvement, an involvement that defines politics. Their contribution must be to carry these insights onto legal institutional ground and to explain how their political theoretical claims can be translated into constitutional theory. Sunstein acknowledges this task when he undertakes, on behalf of republicanism, "to design political institutions that promote discussion and debate among the citizenry." (1988, 1549) The challenge that the republicans need to meet is to carry the deliberative practice they profess across the institutional threshold without compromising it in the process.

That constitutional law provides this possibility is declared unanimously. Citizenship, the institutional category, is to be understood, say the republicans, in the context of deliberative commonality as "direct, equal participation in the determination of common affairs". According to the republican "view of the human condition that self-cognition and ensuing self-legislation must be socially situated; norms must be formed through public dialogue and expressed as public law." (Michelman, 1986, p27) Citizenship is about exposure to the national debate, self-identification, -reflection, and -revision thereof. Self-government and community fuse in the constitutive constitutional moment, to the extent that "positive liberty is hardly conceivable without citizenship." (Michelman, 1988, 1503). In

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<sup>86</sup> Republicans claim that the deliberative process can settle "normative disputes with substantively right answers ...[or] uniquely correct outcomes" (Sunstein, 1988, 1541, 1555) This assertion has been often and seriously questioned (eg Powell (1989)) The criticisms, however, I think, fail to recognise the proximity of the republican argument to Habermas'; where similarly, conditions for uncoerced dialogue are put forward as, optimally, conditions of truth of normative (as well as factual) statements.

all, republicanism professes political emancipation through law; and in this lies the crux of the containment thesis.

To substantiate these claims, Michelman and Sunstein, like Ackerman before them, address the "counter-majoritarian" paradox. It is the 'pluralist' misapprehension, they claim, that is accountable for the paradox that has plagued constitutional theory. Like Ackerman, they confront the paradox as a misleading contradistinction between sovereignty in politics on the one side and law on the other and contends that republicanism will show the way out.<sup>87</sup> Michelman indeed treats it not as a difficulty but "as constitutionalism's problematic and dynamic core [that allows] the interplay between the principles of legality and self-government." (1988, p1518)

The misapprehension consists in arbitrarily allocating law and politics to different fields. It consists in seeking a transcendental justification for law in justice, reason, nature, morality, good sense, etc, rather than viewing it as an intrinsic feature of self-government, the medium through which communities express, argue and revise their normative commitments. It is in this context that the paradox of constitutionalism - "the problematical relationship between self-rule and law-rule" (Michelman, 1988, 1500) - is answered. In the constitution Michelman and Sunstein discover the resources that enable the community's ongoing revision and the paradox is collapsed as law-rule becomes self-rule and the constitution becomes "both law and ours."

In their understanding of the counter-majoritarian difficulty and the collapse of law-rule into self-rule the republicans are very much at one. Both Michelman and Sunstein exhibit ultimate confidence in the law as expression and home of the community's politics. But while they agree on the possibility and logic of this convergence of law and politics, they disagree on the implementation of the project. At the threshold of institutionalisation, of translating the communal into institutional dialogue, the different republicans disagree about where, in constitutional politics, to locate the dialogue. Each of them puts forward a different view as to what legal forum is the most conducive to the republican project. The question that divides them is thus that of seeking the legal outlet of the political, deliberative process. I will explore both their suggestions in turn, with greater emphasis on Michelman's whose theory here necessitates a brief detour also into Ronald Dworkin's legal theory.

(i) Sunstein's institutional suggestion

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<sup>87</sup> "[T]he republican tradition and its relationship to American Constitutionalism, points away from the countermajoritarian difficulty as the true focus of democratic concern" 1986, p16

The institutional solution that Sunstein offers is the Congress - but one made up of virtuous legislators. Legislative decisions, in Sunstein's scheme, are made after principled dialogue and deliberation. Legislative deliberation is taken up along republican lines. The cue that Sunstein takes from the federalists of early American history<sup>88</sup> is that republicanism requires that "representatives ... have the time and temperament to engage in a form of collective reasoning ... The representatives of the people would be free to engage in the process of discussion and debate from which the common good would emerge." (1985, 140) Sunstein treats the motivations of legislators as the critical issue underpinning the possibility of republican politics. Consequently he argues that the constitution provides a number of filters ("institutional arrangements and doctrinal shifts", 1988, p1541) to inhibit what Sunstein terms "naked preferences" (1984) from entering the process of collective reasoning.

Sunstein offers a number of institutional arrangements that I will only give a summary account of. In his earlier work which deals with the question of "naked preferences", he offers institutional safeguards for representatives' insulation and release from their constituents' and lobbyists' pressure, since unreflective representation of popular will would, according to Sunstein, allow self-interest to erode the republican dialogue in Congress. What underlies Sunstein's position is a willingness to distance the representatives from the represented, something which would increase, Sunstein believes, the representatives' predisposition toward public-regarding deliberation.<sup>89</sup> <sup>90</sup> Another suggestion he puts forward is the

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<sup>88</sup> Sunstein's argument is as much institutional as it is historical. A great corpus of civic republican literature is engaged in arguing what the federalists and anti-federalists really intended. But does it really matter what the Founding Fathers thought? asks Klarman. Surely what matters is what is right for us, here and now (1992, p762)

Don Herzog (1986) provides an illuminating discussion of the significance of the historical connection. Why, as M Sandel would have it, does "the debate about the meaning of our past carr[y] consequences for the debate about present political possibilities"? (Sandel, 1985, 39) In a culture like the American where the Founders are caught up in such extra-ordinary a process of myth-making (p478), and with the language of the common good "sadly or predictably" still exercising such force on the American imagination and language (pp480ff) the need to pre-empt the Fathers' allegiance is of obvious urgency for ideological reasons. A persuasive argument this, but there is significantly more to be sought in retrieving a tradition. A fuller explanation would need to emphasise the significant ways in which tradition bears on the very foundations, categories and logic, of the possibilities of understanding our present condition - cf the work of McIntyre.

<sup>89</sup> On a very experimental note, it would be interesting to compare Sunstein's with Hayek's criteria on how distanced or dis-interested legislative deliberation could be achieved (Hayek F A, 1979). Hayek's basic scheme is to distinguish governing from law-making; the first is delegated to the competition of political parties, "government assemblies", which are "quasi-commercial corporations competing for citizens," (1979, pp132-3) a situation similar to the one Sunstein deplors in (1986). The second task, law-making, is entrusted to the "legislative assembly", an assembly that Hayek prescribes be "composed of independent public figures, mature individuals, free from considerations of personal or group interest." (1979, p116) His "nomothetae" operate in a climate that is very different from interest-group politics, are assured tenure and do not depend on party support." The similarity is only apparent of course and the differences of motivation and ideological background between Sunstein and Hayek are deep. Despite this, would it worry Sunstein that Hayek puts forward his "detachment"

endorsement of proportional representation to allow greater diversity in parliaments (1988, 1588ff). Sunstein's suggestions are numerous and extend to the level of detailed legal specification: from campaign finance regulation to provisions about devolution and local autonomy. One of his most important suggestions is relevant to the role he envisages for the Supreme Court. He suggests judicial review of legislation should be strengthened. This would provide the incentive for legislators to abstain from the pursuit of "naked interest" and engage in "principled" deliberation. Judicial review is there to remind the legislature of its commitment to civic virtue. In this context the role of the Court is instrumental. It is not, as it will be in Michelman, the bearer of republican politics; its role is, instead to police republican politics within the legislature.

### (ii) Michelman's institutional solution

Michelman's suggestion of an institutional outlet for deliberation is very different from Sunstein's, and while it shares in the latter's elitism, it in fact owes much of its inspiration to Ackerman's theory. Yet even from Ackerman Michelman effects a double departure on two substantive points. While acknowledging Ackerman's as the "most deeply popularist and genuinely republican [project]... now going" (1988, p1520), (i) he abandons the criterion of popular mobilisation because "actual episodes of such constitutional politics - of republican popular mobilization - have been and must probably forever be rare" (1988, p1522) and (ii) he is not happy with the way Ackerman understands the role of the Court. In what concerns the latter, he criticises Ackerman for making judicial alteration of constitutional law dependant on judicial acknowledgement of prior popular ('constitutional') mobilisation. Without the intervening event of popular upheaval, a Court that claims to be truly republican has no legitimate reason to depart from prior constitutional understandings. In this Michelman sees a lurking danger of authoritarian Constitutional jurisprudence, an approach he deplores in the Bowers case.<sup>91</sup> "In Ackerman's theory, the judiciary is cast as

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proposal under the label of "dethroning politics"? For an excellent critical retelling of Hayek's suggestions see Bellamy R (1993).

<sup>90</sup> Does a citizenry that is already greatly alienated from the political processes really need this extra layer of distance? M Fitts (1988) articulates a number of "practical" concerns and "cautionary remarks" regarding Sunstein's institutional prescriptions. Will the proposed "distancing" not make representatives less accountable to democratic control? (p1661) Would the "ultimate result of an ... ideological debate be an even more apathetic public?" (id). Indeed, he adds, insulation of government actors and dispersion of government power through the decline of political parties as centralising institutions is, for much political science literature, a problem in that it facilitates the influence and power of concentrated and wealthier special interest groups (pp1657ff)

<sup>91</sup> 478 US 186 (1986). The US Sup CT upheld the State of Georgia's ban on homosexual sodomy between consenting adults in private.

the agent of our constitutional past ... [which implies] that it cannot also be a spontaneous agent of our future ... the judiciary's role in the process of constitutional change can only be benedictory, never prophetic." (1988, p1521) Michelman does not want the potential of the Court depleted; he attempts to disengage judicial doctrine from the community's actual transformative politics. The Court should not be confined to prior jurisgenerative episodes, as it is in Ackerman, but should be able to take upon itself the instigation of a constitutional moment. The Court becomes, in Michelman's theory, the very bearer of constitutional moments of republican politics; it becomes the vessel of the deliberative process, of the community's dialogue. "The role we attribute to the Supreme Court," he says, "is that of representing to us the possibility of practical reason." (1986, 24) This astonishing claim will seem less so when we see how seriously Michelman takes Dworkin's theory. Dworkin's theory of Integrity permits this step without giving up the republican ideal. It allows him to build a theory of virtual transformative politics, and in place of the community to make the Judge the narrator on behalf of the community.

#### The Empire turns Republic: Michelman's debt to Dworkin

In concluding "Traces of Self-Government" (1986), Michelman engages directly with Law's Empire. He is quick to declare his allegiance: "Dworkin's narrative-constructive model of legal interpretation is part of an account of political self-government through which socially situated individuals realize moral freedom or personal integrity" (1986, 69). Michelman undertakes to defend Dworkin's theory of Integrity by focusing on a question he too most urgently needs to answer. Dworkin maintains that Integrity "asks the good citizen to interpret the common scheme of justice to which they [he and the judge] are both committed" (1986 p189). But if the question is addressed to the citizen, why is the judge doing the answering? It seems a vindication of the moral freedom of judges (1986, p69) rather than of citizens.

It is not hard to see why Michelman asks this specific question. He is accountable for a similar displacement of communal/political self-government from the citizen to the Court. Dworkin projects a theory of adjudication onto the citizenry and claims for it, as we will see, that it "fuses citizens' moral and political lives" (Dworkin, 1986 p189). Michelman develops a theory of political self-government and entrusts it to the Court. These are arguments in cross-directions but they exhibit an obvious symmetry. Both claim that the displacement (from citizen to judge or vice versa) is a legitimate one.

In the following section on Dworkin, we will discuss how Dworkin establishes that

his theory of integrity as guiding ideal for legal reasoning is of constitutive value for the community itself. Michelman maintains that the answer to the puzzle why it has value for the community must finally lie "in virtual representation". "Integrity's value to the community is representational: the judge represents integrity - self government - to the community, not of it".

Michelman endorses "virtual representation" but he qualifies it first. What is most notably wrong with Hercules is that he "is a loner ... His narrative constructions are monologues ... He has no encounters ... He meets no otherness ... What is lacking is dialogue" (1986, 76). Michelman takes up the communitarian standpoint and seeks to situate his actors in dialogue. Fortunately for him, the Appellate Court has nine members and can provide the possibility of dialogue. Dworkin has disregarded this "plurality." "We ought to consider what this plurality is 'for'." It is here that virtual representation resides. As Dworkin "envisions" him, "the judge represents by his own self-government our missing self-government, by his own practical reason our missing dialogue ... Could that be what we value?" As we reach the end of the argument we are assured that "there is a message here for the politics of law". The dialectic stands complete: "dialogue in support of judicial practical reason, as an aspect of judicial self-government, in the interest of our freedom." (1986, 77)

Michelman recruits Dworkin's help in order to establish these interconnections that only together uphold the republican thesis. He recruits Dworkin's help particularly to justify his recourse to the Court as political institution capable of carrying republican engagement. However crucially important all this is for the republican containment thesis, one is tempted to stop here and query the meaning of Michelman's qualification "that carries 'plurality and dialogue' into the Supreme Court." Surely this qualification of the Court as dialogic blurs rather than clarifies the picture. If the communitarians make a case for dialogue it is because they want to stress that the individuals' embeddedness in community comes about through social involvement; and the dialogue is a means of involvement. But a dialogue between Appellate Court Judges is as external to community and self-identity as Judges' monologues are. We are not after all interested in the involvement or embeddedness of the judges in their setting. What is decisive for the argument is popular/communal participation in the dialogue, not the mere existence of a dialogue. Without participation, Michelman has not escaped the externality of that dialogue and the consequent need to justify the legitimacy of the authority of the Court's decision. No communitarian correction can redeem that externality. Only direct participation in the deliberative process would make the outcome - the decision - self-legitimizing.<sup>92</sup> (For the full argument see \*Thesis [10] below.)

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<sup>92</sup> Let us ask with Michelman what the dialogue is 'for' and see how D Cornell, and S Benhabib, two of Michelman's favourite writers, answer the question (Respectively in 1988, at 1220-24 and 1985, at 348) Cornell explains personal identity and freedom via law as grounded in interpersonal "dialogic reciprocity". Reciprocity is "for" identity then, presumably not the judge's. Benhabib's recourse to dialogue is to reveal and substantiate plurality, where by plurality she means "that our embodied



Back to the central thesis: how is the judicial office adequate an institutional vessel to carry the full weight of the republican project? Michelman reverses the terms of the traditional (counter-majoritarian) dilemma by claiming that the judge is no longer there to hinder political will but to assist in maintaining what he calls "the jurisgenerative" (see below) political engagement. The judicial role consists in initially guarding the conditions for an uncoerced dialogic process.<sup>93</sup> But more importantly: judicial review is the corollary of the deliberative nature of republicanism. It no longer makes sense to succumb to the "Thayerite objection", the fear that judicial review may "dwarf the political capacity of the people and to deaden its sense of political responsibility." Dworkin allows Michelman to justify turning jurisgenerative popular politics into jurisgenerative judicial politics. He can then claim jurisgenerative politics to be a permanent feature of our political society, a permanent form our political engagement assumes in a way that "spreads Ackerman's rare and far between constitutional moments] over continuous political time" (1988, 1525). The second reason for locating republican politics in the judiciary is precautionary; "The Court helps protect the Republican State- that is, the citizens politically engaged - from lapsing into a politics of self-denial. It challenges the people's self-enclosing tendency to assume their own moral completion as they are now and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends" (1988, 1533)

### The Critique of Elitism and the Retreat from the Institutional Dialogue

Sunstein's and Michelman's projects attracted a critique that Ackerman's did not.<sup>94</sup>

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identity and the narrative history that constitutes our selfhood ... is only revealed in community of interaction with others." This 'revelation' addresses and concerns (is "for") the individual in community, not the judge. I do not want to labour the point longer save to say that dialogue only has the identity-generating effect if it reveals to the participating members the narrative they share; the dialogue must be located in the community that is providing the narrative, not the community that is providing the official interpretation.

In his later writings, after the shift to be addressed below, the externality of the judicial dialogue is removed through the notion that our dialogue is "of course" conveyed to their dialogue. This argument creates new absurdities but evades the one above.

In any case, Dworkin steers clear of all this. One can pass over Michelman's criticisms here, because Dworkin defines clearly what his presuppositions for 'best' interpretations are, and it being 'dialogical' plays no part in it being 'best'.

<sup>93</sup> As P Craig has explained, the role that Michelman reserves for the court in the republican dialogue is first of all "to establish the conditions for the process of dialogue. This process can only operate where certain prescriptive social and procedural conditions exist which serve to prevent any such dialogue from being coercive and a violation of one's identity." (1990, p353)

<sup>94</sup> This is not altogether accurate. Ackerman has been criticised for elitism, for relying too heavily on the Court to safeguard constitutional moments on behalf of the people and occasionally in spite of them (see Michelman above), as well as for conservatism. For example Fitts M is fearful that

They have both been criticised for elitism, because they both delegate the deliberative practice underpinning republicanism to elite institutions. The problem arises because both Sunstein and Michelman remove republican politics from the participants themselves. In the words of one commentator, "[Michelman] reflects a retreat from the collective self-direction that has been the hallmark of republican thought; [Sunstein] a circuitous way of achieving it."<sup>95</sup> What motivates republicanism is the question of how to re-animate and maintain participatory politics. The elitist solution may be an interesting answer to the "institutional" question but the institutional question was intended as instrumental to the vision of participatory politics. The institutional solution thus appears to abandon what it was meant as a solution to. Because the debate among the two theorists re-enacts a debate between elites both claiming the republican mantle in the name of, but in the absence of, participation

Can the republican vision survive this distrust of grassroots participation? Michelman distrusts popular mobilisation enough to be willing to turn actual self-government into virtual self-government. Sunstein's willingness to distance representatives from represented is also suspect in a way that brings out a paradox. Because if the distancing stems from a distrust in the capacity of the public to select its delegates and control their dialogue through the appropriate institutional channels, then this republican distrust can be read as compromising participatory democracy itself. If civic virtue is to guide political debate why is the public assumed not to possess it?<sup>96</sup>

There are several arguments along these lines, some convincing, but one, I think, decisive. The elitist solutions erode a crucial connection in the republican thesis. What underpins the thesis and holds it together is the identity-generating effect of the individual's involvement in the communal, political dialogue. Republicanism relies on dialogical engagement, in which, individual and community, speaker and discourse, come about simultaneously. It is in participation that the individual's political identity as member of a

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"[Ackerman] creates a structural bias in favour of the status quo." (1989, 1662). Ackerman's wariness of "Transformative Appointments" (1988) exhibits a strange sort of tension between elitism and conservatism. He rejects transformative appointments for amending the Constitution via judicial appointments and radical politicians in Washington in the absence of popular mobilisation (1991, pp52-5)

<sup>95</sup> Brest P (1988)

<sup>96</sup> For this critique see H J Powell (1988, esp. pp1708ff) and Fitts M (1988). In the context of this critique of elitism, Brest P (1988) rehearses the arguments why judicial exclusivity in constitutional matters is not desirable, and urges the republicans to abandon their obsession with Courts and work towards the de-centralisation and democratisation of constitutional discourse and decision-making. He comments on the irony "that much of the legal scholarship of the republican revival ... is as court-centred as the pluralist scholarship from which it distinguishes itself." (p1625) "Civic republicans," he argues, "must broaden their focus beyond the judiciary and beyond government institutions. A civic republican conception of citizenship supposes that people must be engaged in framing the rules and administering the institutions that govern all aspects of their communal lives (p1626)

commonality is moulded, and it is this connection that makes the republican argument self-validating too. Elitist solutions sever the participatory element, the necessary social involvement. Without it, the republicans have lost their "communitarian" backing and will also need a new theory to answer the familiar objection which asks why should a process that is at a distance from the citizen be able to claim legitimate authority over the citizen.

It is not surprising then that Sunstein and Michelman, in their most recent work have moved away from their initial institutional solutions to emphasise the popularist, participatory strains of their argument. The "Yale Symposium on the Civic Republican Tradition", during which the critique of elitism was most forcefully articulated and a more "radical republicanism" put forward by a number of participants<sup>97</sup> jolted both Sunstein and Michelman beyond their earlier institutional suggestions. The shift was remarkable and intriguing; they moved beyond the state-centred republicanism they had so forcefully advocated, to one whose contours embraced "social life at large" (Michelman, 1988, 1531) The new republicans now seek traces of republican self-government in local communities, unions, religious congregations and other intermediate groups (Michelman, 1988, 1531, Sunstein, 1988, 1578) to the extent that, eventually, social controversy as such becomes synonymous to republican debate. Thus the republicans' latest suggestion for dealing with the legal-institutional threshold is to do away with it altogether.

Sunstein is quite explicit about it: "[c]itizenship," he says, "understood in republican fashion, does not occur solely through official organs." Additionally, private associations can "serve as official outlets" for "deliberation," "community" and "civic virtue" (id). In effect Sunstein puts forward the appealing suggestion to "multiply the points of access to government" and to "generate institutions that will produce deliberation among those differently situated" (1988, 1573, 1585-89) <sup>98 99</sup>

Michelman's work takes a similar sharp turn as he opts for a "non-state notion of republican citizenship". Citizenship now becomes synonymous to "dialogic engagement" and spreads "to all arenas of potentially transformative dialogue." He is worried that "the formal channels of electoral and legislative politics ... cannot possibly provide much direct

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<sup>97</sup> Brest (1988), Sullivan (1988) Tushnet (1988) and also, later, Pope (1990) arguing for a republicanism that incorporates "direct, popular power"

<sup>98</sup> For similar suggestions see Sandel, 1988, 20

<sup>99</sup> Sunstein focuses republican theory on private association as a means of stimulating dialogue to be fed into the legislatures that can bring together and integrate greater diversity of perspective from the whole spectrum of society.

experience of such engagement". Michelman is no longer advancing a theory of constitutional law then, or is he? He assures his reader that he is, since "understandings that are contested and shaped in the daily encounters and transactions of civil society at large are of course conveyed to our representative arenas" (1988, 1531, my emph.)

I will submit the republican position to critique in the chapters to follow, so I will confine myself here to a few first comments regarding this retreat from the legal institutional dialogue.<sup>100</sup>

Michelman includes "voluntary organisations", "clubs" and "street-life" as forums of republican debate. This allows him to argue the easy point and screen off the hard one. It allows him to argue for the constitutive importance of identity-generating dialogue. But thus the hard question is avoided. The innovative suggestion that the republicans professed to supply was about how "our" dialogue could become "legal" dialogue and still appear as ours and not external, autonomous and not heteronomous. The republicans, that is, professed to carry the deliberative practice onto institutional ground and establish that the legal/constitutional forum *could* contain it. Through the initial "elitist" solution the republicans lost sight of the potential participants in the deliberation. Now, in restoring that, they lose sight of the institutionalisation, the specific nature of the institutional form that prevents the interchangeability of communal and legal discourse as put forward by Michelman. In Michelman's argument the legal discourse is assimilated into people's ongoing normative speaking, like a radical version of "living law." Our dialogue, he assumes, is always-already - "of course" - the law. By collapsing law into politics, into the "people's on-going normative contention", and making law synonymous to dialogue in spontaneous contexts and unofficial fora, the republicans have comfortably evaded the institutional question; Michelman has presupposed it in that "of course".<sup>101</sup>

I believe that this latest retreat from the previous elitist solutions lets the project down, because republicanism depends on the articulation of the deliberative with the institutional. To the extent that the latest retreat is an evasion, not an argument, I will ignore it because it does not show republicanism in its best light. Republicanism is a theory about how law can

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<sup>100</sup> Even Kahn, one of the most perceptive critics of republicanism, limits his criticism to Michelman's earlier work, while acknowledging that that in his more recent work (1988) Michelman has "moved away from the Court centred perspective on the discursive community ... to argue for a non-state centred notion of republican citizenship." (1989, p28, fn120)

<sup>101</sup> Citizenship only makes sense when it is conceived as our input into the official processes, even simply as designating that relationship of individual to the state. Any other use of the term that removes its intimacy with the law shifts the coordinates unrecognisably. Are we meant to agree with Abrams' comments on Michelman, that "acts or judgements that emerge from this [informal] process of recollection are regarded as law, regardless of the formal source from which they emanate."? (1987, p1593) Or are we simply to concede that our informal dialogue crosses the line into law's expert, exclusive and official discourse without any loss of meaning, without compromise?

contain politics, and thus needs to be true to both the legal/institutional and the deliberative/political. There are ways of reconciling this tension maybe - as opposed to defining it out -, and republicanism needs to be assessed on the merits of its attempt to do just that. That is why I will take the elitist solutions - the suggestions about containment - as the true republican solutions and now look at how, particularly in Michelman's case, republicanism finds its most valuable ally in Ronald Dworkin.

#### IV

#### Dworkin:

#### Legal Argumentation as Communal Dialogue

To classify Dworkin as a republican flies in the face of much conventional labelling, notably the division that wants interpretivists opposing republicans.<sup>102</sup> I will say nothing about the division because I believe it misleading, but will treat Dworkin as both interpretivist and republican because, it is my claim, his major work Law's Empire (hereafter LE) relies on law's interpretive nature to provide a powerful statement of the containment thesis. This work not only sets community at the heart of a theory of law, but also uses law as a lever for politics and the self-determination of community. I will take Dworkin up on his suggestions; the interpretive one, that the nature of law can only be understood in the practice of a community; and the republican one, about how the community substantiates itself through arguing legal questions in the interpretive way, and how this thorough involvement in legal argument allows communal self-government through law.

The first part of this section will outline Dworkin's "interpretive thesis" - the relevance of community to the practice of interpretation, and his prescription for Integrity as the guiding ideal behind the interpretive undertaking. This, I will argue is the point at which the interpretive thesis meets the republican thesis around a commitment to containment. As a consequence of this meeting, I will argue in the next chapter, the interpretive thesis isn't interpretive enough. The present section is merely an exposition of Dworkin's version of the containment thesis, and I will reserve the critique, as I do for the republicans, for consequent chapters. Provisionally only, what motivates this defence of the 'interpretive thesis' against Dworkin himself is the concern that Dworkin's imperialist theory of law undermines the interpretive, reflexive, ultimately political nature of community.

#### The Interpretive Thesis

Interpretation of a practice, says Dworkin, such as that of law, is only possible in a community in which it occurs. Contrary to what theorists arguing semantically assume there

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<sup>102</sup> Kahn, 1989, 43 and Feldman, 1992, passim.

is no object -law - that is identifiable outside what the community holds as its practice of law. This shift he suggests from the "semantic" plain-fact view to the interpretive view brings community to bear directly on the very possibility of a practice being meaningful. The meaning of the law, as is the case with every practice and concept, inheres in usage and is therefore can only be retrieved from within a shared context, a shared form of life.

With the "interpretive" move to context, Dworkin shifts the understanding of the nature of law from text to practice, from settled fact to ongoing revision. Law is now an interpretive concept, its nature that of a practice situated in community and understood through interpretation. In every sense community makes law possible.

This last point cannot be stressed enough. Community underlies Dworkin's theory of law in more than one way. To begin with, Dworkin places himself in the hermeneutical tradition in claiming that an understanding of a social practice requires turning to the meaning it has for participants.<sup>103</sup> Interpretation of law is based on practice, requiring even from the social scientist to take up the participant's viewpoint (LE p55) even if this participation is only virtual (LE 442). The internal/participant's point of view is the central methodological assumption. Firstly, in order simply to understand the meaning of law one must participate in the community and in this sense the internal point of view becomes constitutive of legal practice itself.<sup>104</sup> Secondly, Dworkin understands community not only as condition but also as object of interpretation. We identify community in terms of practices that we share. In interpreting law our efforts are directed to one such instance of community. The dialectic is intimate: Community in the sense of shared context of meaningfulness is precondition of what can be said about practices that in their totality yield community. There is finally a third sense in which community is significant in Dworkin's theory. Through recourse to the concept of integrity, community becomes, ultimately, the objective of interpretation, to the extent that interpreting law with integrity becomes "constitutive of political community" (LE p211).

How is it, more specifically, that community informs the interpretive undertaking?

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<sup>103</sup> There is an ambivalence in LE about where "the point of a practice" is to be sought. Should we assume with Postema (1987) that the point of a practice exists as the shared understanding of participants, or should we take Dworkin up on his word that a practice is "an entity distinct from [people]" (LE 50) and has little to do with group consciousness? S C Smith (1990, p263) explains this confusion in Dworkin's account of the internal point of view, the latter carried at both the "subjective" level of participants' minds and the "social" level of the autonomous discourse. Smith pushes the independence between practice and practicing individuals "further than Dworkin ever has," by proposing a reading of "practice" in Luhmann's systems-theoretical terms. An insightful argument this, but one that would disarticulate law's connection with politics and self-determination in community, a connection that Dworkin vitally needs to uphold.

<sup>104</sup> As G Postema has resumed it: "Law is a social practice. Participants of the social practices act from an understanding of their actions as appropriate to the practice and this understanding is constitutive of the practice." (1987, p286). Dworkin says: "This book takes up the internal, participant's point of view; it tries to capture the argumentative nature of our legal practice by joining the practice and struggling with the issues of soundness and truth participants face." (LE 14)

For the interpretive attitude to take hold, Dworkin says, borrowing again from the hermeneutical tradition, it must be the case that "people try to impose meaning on the institution - to see it in its best light - and then to restructure it in the light of that meaning" (LE 47) Institutions and practices embody purposes open to interpretation. The purpose is not to be imputed at will by the interpreter. To interpret is "to apply an intention" (LE 56), and to impute purpose to the practice means for Dworkin, who cites Gadamer here (LE 58-9), to read the practice in its best possible light, ie in the light of what would most fully realise its implied purpose. This is a "structural requirement", performed on objective ground; not, that is, by imposing upon the practice outside moral or personal purposes, but by retrieving purpose from within the practice, as it is intelligible to the people participating in the common form of life, the community.

To shed light on the intricacy of the process, Dworkin draws out three stages of interpretation. It would be wrong to see these stages as a temporal sequence; rather, the separation into stages should be seen as an analytic device, patterning out a process of understanding in its simultaneity.

At the preinterpretive stage "rules and standards taken to provide the tentative content of the practice are identified ... Some kind of interpretation is necessary even at this stage. Social rules do not carry identifying labels." (LE 65-6) "The classifications it yields are given in day-to-day reflection and argument" (id) In a sense the preinterpretive level furnishes the assumptions that people share when they share a cultural background. It is the inventory of common understandings, the ambit of possibilities of what a practice may require, and in that sense it is a condition rather than a phase because it locates the practice in the context we share of its possible meanings.

It is worth stressing here that at the pre-interpretive stage a level of understanding is established that is specific to the community. "We share a preinterpretive sense of the rough boundaries of the practice on which our imagination must be trained." (LE 75) This shared context of understanding, this field of possibility for the imagination is particular to the community in the specific circumstances of its here and now. Historicity and contingency reside here and Dworkin's theory is not vulnerable to the argument that has haunted liberals, the charge that their individual is not situated in community or in history.

The second stage, the interpretive stage hosts a debate about the meaning and the purpose of the practice, or "why a practice of [any] shape is worth pursuing." Interpretation is always justification (LE 66) says Dworkin, the imputation of justificatory principle or purpose, but a principle or purpose that is already embodied in the past record of the practice, retrieved not posited. It is in this tension between "fit" and justification, that interpretation becomes possible. Competing interpretations are different rationalisations of the history of the





practice competing on the terrain of "fit".<sup>105</sup> This tension and competition also exhibit interpretation's essentially conflictual nature; interpretation is the site that hosts conflict in the community by bringing together contrasting understandings laden with value judgement.

The postinterpretive stage, finally, is the reformist moment of all interpretation. Again it is not to be understood as a temporally separate moment of reform of an already existing object - 'interpreted' law. Rather it involves a conceptual shift - a shift in the understanding of the practice - that occurs as the justification shifts the 'fit'. Interpretation is always, even at this stage, interpretation of the practice 'in its best light' not a change of the practice.

### Integrity: the right answer

Having established the interpretive character of all social practices, Dworkin lays out three directions that legal interpretation may take, or rather, three distinct priorities that may guide the interpretive undertaking; he calls them Integrity, Pragmatism and Conventionalism.

At its most simple formulation, Integrity would read something like: "treat like cases alike". But integrity does not mean consistency pure and simple. Rather integrity means consistency in principle with past decisions which requires retrieving that principle in precedent.

We can understand Integrity better by looking at the alternatives: conventionalism and pragmatism. The conventionalist ties law to the outcomes of conventions and compromises reached in the process of political bargaining (LE p115). So long as decisions respect the rules of the game, conform to the designated, binding procedures and are products of genuine negotiation and compromise, the conventionalist will treat them as law. This view is compatible with inconsistent schemes of justice running through the legal history; principle may be differentially applied across the board.<sup>106</sup> The pragmatist's recourse to principles, on the other hand, only serves his/her own pursuit of an ideal. There is no commitment to working out common schemes of principle embodied in the law; simply principles are

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<sup>105</sup> On this see Fish's argument (1982) that if we rightly take "fit" to be interpretative it can no longer provide the testing ground for the competition of justifications, for as "best fit" it is itself absorbed in the justification.

<sup>106</sup> A "bare" rulebook community would opt for the conventionalist type of law. A conventionalist theory of law would attach the legitimacy of law or political obligation towards the law to the necessity of having publicly ascertainable rules for coordinating behaviour.

Note the proximity of the conventionalist's "checkerboard" legislation with the republicans' description of the legislative outcomes of "ordinary politics", that also consist of compromises and coalitions in the political marketplace. (See also Hunt, 1991, 39)

imputed strategically in order for "judges [and lay participants] to make whatever decisions seem best for the community's future" (LE 95)

Like Integrity, conventionalism and pragmatism provide interpretations of law on the basis of imputation of purpose or principle. However "Integrity demands that the public standards of the community be both made and seen, so far as this is possible, to express a single, coherent scheme of justice and fairness in the right relation." (LE 219, my emph.) Although every decision about what the law is can be debated as to what the principle to be read into text and precedent ought to be, integrity, unlike pragmatism, does not leave the question open, but provides a guiding ideal that will yield the answer. It insists that the operative principle should fit the most coherent scheme of justice that can be envisaged for the past history of legal decisions. Integrity demands that the rationalising principle of the decision at hand be part of a pattern that coheres as a whole.

Dworkin will not deny that people hold to distinct conceptions of what justice, fairness and due process mean and require in each case. Integrity does not privilege any of these conceptions on the basis of substantive criteria. Rather, it is a second-order value that attaches to first order values of justice and fairness. It requires simply that the community does not alternate in its interpretation of law between conceptions of justice. Integrity demands that the community act in a consistent manner in applying the conception of justice, fairness, e t c. Through the notion of Integrity Dworkin can construct a concept that is true to demands of interpretation and community. Interpreting a set of social practices under the demands of integrity sustains the unity of community.

By putting forward the argument for Integrity, Dworkin has already made a strong case for the obligation to obey the Law. The obligation to obey the law has usually been associated with the argument that there must be publicly ascertainable standards of behaviour that alone can make communal co-existence possible. Alternatively it has been associated with the law's inherent goodness, with the danger of anarchy that may result from disobedience, etc. The multitude of arguments in this vein impose external reasons for conformity. In Dworkin, like in the civic republicans, political obligation acquires an internal premise. Interpreting law with integrity gives the practice the coherence necessary to sustain the community. Then the obligation to obey the law is a requirement towards a practice that sustains community. The intimacy of the connection between law and community (that Law-as-Integrity is constitutive of community) allows Dworkin to explain away the externality of traditional theories about obligation to obey the law, and instead allows him to reconceive that obligation as one towards one's community.

### Integrity, Coherence, Narrative

To bring the connection between law's interpretation and law's coherence forcefully home, Dworkin uses the metaphor of a collective novel in which judges assume the roles of the consecutive co-authors. The interpretation of law resembles the writing of a novel, where each of the writers must add their own chapter to an on-going story.<sup>107</sup> In adding his/her chapter the author must both ensure it reads coherently as a whole, as well as being the best in its genre. The author will add his/her chapter to a story s/he reconstructs as coherent.

On the question of the identity of the author, Dworkin establishes a direct link between community and adjudication. The role that Dworkin reserves for the judge is the task of applying law as Integrity. The judge is to act as representative of the community in making sure that the law is applied with Integrity. His decision will reconstruct the diversity of past episodes into one coherent whole that reconstructs the practice in its best light. In creating this role for the judge, Dworkin allows the community to be represented in the recollection of its history.

In writing his/her own chapter as a new contribution to a continuing story, the author reconstructs the novel as a meaningful whole; in the same way the judge, through his decision, reconstructs the practice as a meaningful whole, thus sustaining the unity of community by giving coherence to the understanding of its practices.

Note the proximity of Dworkin's notion of the chain novel to the concept of the "narrative".<sup>108</sup> Narratives organise past events, diverse experience into coherent, singular stories. They order diversity and make sense of diversity by ordering it into a pattern of coherence. This pattern can be projected into the future to formulate predictions on the basis of what coheres now. For the narrative this projection is its litmus test. It will be revised or supplemented on the basis of what it cannot rationalise into its pattern of coherence.

Like chain novels, narratives are stories that we make up as we go along. They too make sense of the past by reading it through a rationalising pattern. They too compete with other narratives in telling the best, most coherent story of past diversity. They too reconstruct history into a story that best explains the present instance. They have justificatory power too

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<sup>107</sup> Dan-Cohen (1989) puts it this way: "that we should be wary of a fable that likens the operation of the judicial system to the composition of a novel. It is quite a strange novel that has as its dramatic punchline the execution of some of its intended readers. And this prospect, while no doubt concentrating the readers' minds, may put a strain on their interpretive skills that is quite unfamiliar in literary circles." (p1676)

<sup>108</sup> The concept of the narrative is, of course, a favourite of the structuralists in the 60s. For an early, structuralist account, see Barthes (1977). I employ it here in the way MacIntyre does in (1981, passim and ps 204ff). Also S Benhabib, 1987, 349: "At any point in time, we are one whose identity is constituted by a tale. This tale is never complete; the past is always reformulated and renarrated in the light of the present and in anticipation of a future."

because, like chain novels, they explain by justifying the inclusion of the present instance into this rather than that story. Like chain-novels, finally, they are revised in the light of every new instance that they must include, and this revision (if it is not going to be a breakdown), involves internal shifts of emphases so that the deviant instances may be accommodated and the rationalising pattern can in each new case be seen to cohere. In fact I have very little doubt that Dworkin was thinking of narratives when he was writing about chain novels.

In the end, underlying the coherence thesis is an argument about a communal narrative. If the law is interpreted as Integrity it yields coherence and with it a coherent narrative; by providing the narrative, it fulfills the interpretive condition for the existence of community. The rest is a story about the sustenance, in law, of communities' struggle over meaning and self-determination.<sup>109</sup>

### Dworkin republican

There are striking similarities between Dworkin and the republicans in how they envisage the relationship of law to politics.<sup>110</sup> It is particularly Michelman's debt to Dworkin that is the most notable. The analogy between their arguments Dworkin's is more intimate

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<sup>109</sup> A convincing deconstruction of Dworkin's argument is persuasively suggested by D Couzens-Hoy (1987, p350). Couzens-Hoy does not suggest that one reads the past legal history in its worst light; instead he proposes that past legal history is read in its best light, where best requires accurately depicting the law as reflecting social division, structures of hierarchy, disharmony, stratification. Such an approach is not unfaithful to Dworkin's own prescriptions, since for Dworkin too, 'best' does not advance an independent moral judgement but means most appropriate to the practitioners' understanding. To extend my own argument in this light: if community is a postulate so is coherence as the guiding principle of 'best'.

What is one to make of this innocent pre-supposition of coherence then, the postulation of a methodological assumption, on the basis of which Dworkin's theory pulls itself up by its own bootstraps?

Compare N Poulantzas' strikingly relevant connection of coherence and ideology:

" Ideology has the precise function of hiding the real contradictions and of reconstituting on an imaginary level a relatively coherent discourse that serves as the horizon of agents' experience." (1973, p207)

<sup>110</sup> A difference between Ackerman and Dworkin is worth noting here. While for both the judge looking backwards retrieves and articulates the narrative that informs present identity-moulding legal decisions, what Dworkin describes as a task fit for Hercules, for Ackerman describes as a potentially oppressing activity that he attributes to the "traditional professional narrative" (1991, ps 42-4, 62). The task is that of reading past constitutional history as a coherent whole. Such a coherence imposing reading would stemroller over Ackerman's constitutional moments as disruptions of the narrative and would thus "unduly minimize [the community's] creativity." Constitutional moments need to be preserved as breaking points with past history and as initiating future chain novels. Ackerman's would best be read as a three-chapter chain novel, coherence playing an important part in legal interpretation within but in no case beyond the time-span between two consecutive constitutional moments.

than even the excessive reliance on the Supreme Court suggests. In a sense, their theories are mirror images, motivated only by different questions. Michelman's is an argument from the point of view of politics, validating the Constitution as an ongoing instantiation of popular self-creation and therefore of political freedom. Dworkin's is a theory of political legitimacy based on self-creation, as the community pulls itself into self-understanding and substantiates its freedom with every new act of interpretation. In order to substantiate this claim about self-creation, both rely heavily on political community. In Dworkin, law as integrity constitutes the community, integrity is its constitutive commitment. Michelman's jurisgenerative politics also describe the moment of the community coming into being through law. Both theories locate the possibility of community squarely on adjudication.<sup>111</sup>

In view of this, like Michelman, Dworkin needs to answer the question about why the community's self-constituting endeavour is delegated to the judge. It is true of course that Dworkin invites lay participants to the legal business of arguing the content of the chain novel's new chapter; integrity addresses the interpretive question to "the good citizen". In the end however it is the judge who will be the author on behalf of the community, it is Hercules who is entrusted with the articulation of the narrative. There lies a problem here, in the connection between vicarious authorship and the coming about of community that I will argue under \* thesis [10] of ch 3. Only briefly here, I find that any concept of 'virtual' authorship here, such as that introduced by Dworkin, and adopted by Michelman as "virtual participation", breaks down the intimate dialectic of community and narrative, their simultaneity and reciprocal inter-dependence. The argument applies to Michelman and Sunstein as it does to Dworkin. Without traces of participation we can hardly talk of authorship and justifiably the terms introduced by them are virtual participation and virtual authorship. Representation through the officials - whether delegates or judges - breaks the simultaneity of community and narrative. This abstraction makes the argument hollow. Virtual authorship runs very close to unreal authorship and virtual participation very close to non-participation, and these abstractions at such crucial junctions may be fatal for a community's effort to pull itself into self-understanding.

To conclude: like the other republicans, Dworkin leaves behind the community's understanding of its politics in the name of constitutional politics that, as

I will argue in the 11 theses against republicanism of the following chapter, impose institutional assumptions and legal a prioris at those junctions where, in the name of politics,

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<sup>111</sup> The similarity extends to the devices through which both pursue their projects. The chain novel reconceptualises the past into a present coherent whole and similarly the fund provides the resources "for the translation of past into future" (below), the respect to history making the narrative a continuous one rather than a newly invented one. Both the chain novel and the fund of public normative references can be described as narratives. Very importantly to this analysis, the fund closely resembles the preinterpretive plateau that "always already provides normatively effective material" in Michelman's case, and in Dworkin's provides the normative resources to engage in justification for practices.

things ought to be understood and decided reflexively. This adherence to the legal containment of politics is what makes Dworkin a republican.<sup>112</sup>

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<sup>112</sup> Finally, a point of terminology: when a separate argument is not provided for Dworkin, the republican position will be intended in a broad sense to also cover Dworkin's. In many ways this is a grave simplification. Legal theorists tend to draw sharp divisions between republicans and "interpretivists" like Dworkin and this tradition of separateness is well adhered to (for a detailed account of what divides these positions see Kahn P (1989) *passim*). The task of drawing parallels is often seen as demanding (for a reconciliation attempt see Feldman (1992) ) or unlikely. My own reason for disregarding this division is that I intend to confront a (deep) premise Dworkin shares with the republicans. The (latent) imposition of normative/external criteria onto properly interpretive - and thus political - questions is the theme that is central to this thesis; it is also this premise that the republicans and Dworkin are guilty of sharing, and consequently that which justifies my running their arguments alongside each other. It is also, more broadly, because both Dworkin and the republicans understand the constitutive connection between law, politics and the community in very similar terms. I have not established this as yet, but I hope that in the objections I put forward in the following chapters apply equally to Dworkin and the republicans will bring that proximity into relief.

## The Containment Thesis

Republican theory claims nothing less than that the constitution provides the possibility of politics and the substantiation of community. The legal-institutional connection is the significant one: what characterises the republican thesis is the centrality of law both to politics and to the moulding of community.

This is an argument that has several steps. Implicit in the republican thesis is the communitarian argument about embeddedness in the community, not only in the social construction of the self, but also in the argument about discursive particularity: although citizenship is a universal category the dialogue into which it facilitates entry is specific to the historical community. It is in the very process of participation in the deliberative process - which becomes an end in itself - that perspectives engage with one another and conceptions of a good that is common are worked out. The deliberative practice that the republicans claim the Constitution provides a "home" for, substantiates community between people who invest in a dialogue that matters to them deeply. But what of those, one might ask, that do not feel at home in the [legally] interpreted world?<sup>113</sup>

I will take issue with this question in Parts II and III. In the meantime it is vital to clarify, in summary form now, how the republicans establish that the Constitution comes to underpin the community's politics. The answer that the republicans give is that the constitution contains the deliberative practice of a community, the dialogue of all about all. As Macedo summarises it: "critical reflection is a public commitment, a commitment, most fundamentally, to a way of deliberating publicly about what our political arrangements should be. Constitutional institutions are forums that structure and sustain the ongoing debate." (1990, 12) The double articulation is evident in the above formulation. Firstly that of law and politics, because by participating in the dialogic-deliberative practice, citizens engage in politics. During the communicative exchange principles to guide public life are hammered out. Secondly that of law and community, because the participation in the public realm in turn feeds back in a way which "interpellates" the individual as a political actor. The entry into the public sphere through citizenship - the legally backed capacity to partake in the political dialogue - mediates the assumption of political identity. Citizenship holds up the mirror for

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<sup>113</sup> The allusion is to Rilke:

"... dass wir nicht sehr verlaschlich zu Haus sind  
in der gedeuteten Welt" (Duineser Elegien, 1)

each participant to make sense of his/her identity within the community. As Michelman puts it, republican politics is about the intrinsic value of citizenship because "the self is constituted by, or comes to know itself through, such engagement." (Michelman, 1988, 1503)

According to the containment thesis, then, law substantiates popular sovereignty by lending it constitutional forms and procedures as a vehicle of political deliberation. But what is the nature of the vehicle and how, more precisely does it effect the containment? There are two essential pre-suppositions here. Were either of the two to be compromised, the containment thesis would not hold. These are the requirements:

(i) that the law will "pick up" all voices in the political arena, and not be prejudicial or deaf to some of them.

ii) that the law will pick up those voices such as they are, and will not re-align or transform them in the process. The law must accommodate without distorting, otherwise it could hardly be claimed a vessel for the community's dialogue.

I will begin with the second requirement (ii):

As participants in public life we can claim to be self-determining only insofar as we ourselves are able to revise and alter the terms of social life; insofar, that is, as no external constraints hinder our self-revisionary powers. Nor can these constraints be built into the institutions themselves. Should the institutional vessel carry its own limitations of vision into the community's self-revisionary process, then the republican argument would not make sense. If self-revision of a community is to be carried out through law, then the significant pre-condition must be that the law's own logic does not inhibit the possibilities for change. Otherwise there would be only limited self-government, its possibilities hedged in by, and dependant upon law. In order to avoid this pitfall, the republicans must ensure that their project does not stumble on the very institution they employ to effect it. They must treat law as malleable, as open to reflexivity, as capable of self-revision. This explains their (too often under-rated) debt to Critical Legal Studies. Michelman's work in particular, is full of references to and allusions to Unger. Unger allows Michelman to make the claim that law's institutional logic does not hinder freedom - of self-revision and thus of self-determination. The solution he offers is immanent critique. Law can be rationalised to meet specific, even competing, political objectives. It is a supple, malleable means that can be made to express alternative social visions.

"The legal form of plurality is indeterminacy," writes Michelman, and Unger's imprint could not be clearer. "Legal indeterminacy is the pre-condition of the dialogic, critical-transformative dimension of our legal practice variously known as immanent critique, internal development, deviationist doctrine, social criticism and recollective imagination." (Michelman, 1988, 1528-9) This argument is vital to the republican endeavour to account for



political plurality through law. If the law is indeterminate it can harbour, in legal argumentation, a competition of views. Therefore the law should not be conceived of as sealed off from and immune to political challenge. Legal indeterminacy becomes the space that discloses political options. Immanent critique becomes the mode of political contestation and action. The scope of possible indeterminacies accounts for the scope of political plurality; law can accommodate, as indeterminacy,<sup>114</sup> every political challenge to settled patterns and so it circumscribes in this way the potential for communal self-revision. In the republican argument, law discloses and circumscribes political space.

Like Unger, the republicans deny that law should be kept at bay from genuine "controversy over the basic terms of social life." Instead law should be seen as an intrinsic feature of self-government, the medium through which communities express, argue and revise their normative commitments. To see this is to understand the self-revisionary potential of law itself.<sup>115</sup> To ignore this is to fall for the false necessity of its inherent constraints; this is a myth expounded by the dominant formalisms and must be resisted. Against formalism Unger, and with him the republicans, will argue that our legal institutions have the in-built capacity for reflexive criticism, that they can host normative argument and become the vessel for our communal self-realisation and consequent transformation. Michelman (and to a lesser extent Sunstein) rely on Unger's account of legal politics to back their own collapse of politics into law.<sup>116</sup>

On the first requirement (i):

Martha Minow, a favourite republican ally, says of this: "Seeking unusual perspectives enables justices to avail themselves of the partial superiority of other people's views and to reach for what is unfamiliar and perhaps suppressed under the dominant ways of seeing ... Dialogue in courtroom arguments can stretch the minds of listeners ... [and] inventive approaches can bring the voices of those who are not present before the court ... The introduction of additional voices may enable adversary dialogue to expand beyond a stylized either/or mode, prompting new and creative insights." (Minow, 1987, 88-9)

One of the two fundamental conditions for the containment thesis is that the

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<sup>114</sup> Cf Postema here: "The principled politics of constitutional rights makes possible the continual re-articulation of a community's public conception of morality. The indeterminacy and lack of closure of this form of public justification is, in this instance, not a defect, but a virtue." (1989, 127)

<sup>115</sup> Michelman alludes to this when he claims that "an order or practice may retain its identity while undergoing transformation through a process of reflexive criticism". (1988, footnote2)

<sup>116</sup> But this does not mean, as the republicans would have it, that law can accommodate political plurality as such. It merely means that law is not immune to its political environment. It is open to political challenge that feeds into it as indeterminacy. But this CLS "law-as-politics" formula is not interchangeable with the republican "politics-as-law". For more on this, ch 3 s 8.

deliberative process that the republicans advocate is open to and attuned to voices from across society. Michelman stresses that voices that carry innovative potential into settled understanding, and that are likely to stimulate the social dialogue, are particularly those which "enter the conversation - or, as we sometimes feel, seek to disrupt it - from its margins." The capacity for "dialogic self-modulation" depends on the inclusion of these voices, that alone allows "the process of self- [and communal-] revision under social-dialogic stimulation." He says that most of the country's "normatively consequential dialogue" is carried out in informal settings, not formal channels of politics. Most areas of social life are "arenas of potentially transformative dialogue," or "arenas of citizenship ... as it encompasses ... distinct and audible voices in public and social life at large." Michelman will not doubt for a moment that the voices that carry "understandings that are contested and shaped ... in civil society at large are of course conveyed to our representative arenas ... So the suggestion is that the pursuit of political freedom through law depends on "our" constant reach for inclusion of the other, of the hitherto excluded- which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups." (1988, 1529) (We noted above that Michelman sees this process as unproblematical. Michelman collapses law into politics, into the "people's on-going normative contention", and makes law synonymous with dialogue in spontaneous contexts and unofficial fora. In his argument the legal discourse is likened to people's ongoing normative speaking.)

There are severely question-begging assumptions in both requirements (i) and (ii). I will only briefly mention them at this stage of the exposition and undertake a fuller critique in the next chapter. Briefly, this thesis presupposes a congruence that cannot be guaranteed at the outset. The presupposed congruence is that between official and unofficial processes,<sup>117</sup> between the formal democratic process and informal networks of public deliberation. Let us see more specifically what this means.

Civil society consists of a wealth of groupings and collectivities and thus allows an infinite number of points of entry into public space. Many such groups generate communal attachments that do not correlate with the republican discursive model of civil association in

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<sup>117</sup> This kind of interplay between formal processes and informal networks of public deliberation is also characteristic of Habermas's account of the Public Sphere, and is specifically elaborated in (1992). In that article, Habermas stresses the necessity for a political process to be open to and sensitive to the influx of issues and value orientations from its informal environment of public debate at large. Only such an interplay ensures communicative pluralism. Note however that, unlike the republicans, Habermas approaches this possibility with increasing pessimism. In other writings he sees some potential in the role of the New Social Movements and their involvement in "Grenzenkonflikten" (boundary conflicts) (ind. 1987a, pp390ff, and for an overview White, 1988, 123-7) that in this case could be conceived, without much distortion I think, as the boundary between official and unofficial process.

the public sphere. Because all too often group attachments inhibit democratic character formation.<sup>118</sup> And all too often not only is the congruence not guaranteed but the "voice" of such groups is in fact meaningful as incongruent. Incorporating them into the democratic process would then do away with what is crucially significant to them: their opposition to the democratic community, ethos and language. I am conscious that in this form the argument is still far too vague and I will attempt in the next two chapters to state it more forcefully and at greater depth by utilising the concepts of systems theory. Suffice it for the moment to note the possibility of a deep incongruity between formal and informal deliberation. An example may prove helpful here.

In Law's Empire Dworkin claims that a "true" community must meet four conditions: 1) the relationship within the community is special, it does not hold towards people outside the community 2) the relationship is "established directly from each member to each other" 3) each member has a concern for the well-being of everybody else in the group 4) the concern must be equal towards all. (199-200) Only when these conditions are met can we speak of "true community". This argument relies on a projection of congruence. Because Dworkin's postulation of equality conditions for true communities are inserted in place of the various communities' own understandings of equality, and more importantly their own understanding of the connection between equality and their existence as communities. There are communities that are avowedly anti-democratic in their organisation and that does not compromise their nature as communities since they are nevertheless unitary in their outlook, cohesive, permeated by an attitude they understand to be fraternal. In a similar vein, the republicans set up the conditions of "true" political dialogue and claim that it will bring about community, often in spite of communities' own rather different understandings of their politics.

The privileged status that republicans claim for their "communal deliberation" may well be postulated for a community in spite of the community. If the community consists of self-interested individuals then their communal deliberation will be genuinely - and that is truly to the community - a bargain of interests. The republicans must either rely on a dialogue that is genuinely the community's (and generates identity through individual involvement) and thus run the risk that it may just be self-interested, racist, sexist, alienating etc, or they must give up the claim to account for that community's dialogue and prescribe a framework for their preferred dialogue, that is civic, virtuous and "dis-interested". They cannot have the best of both without facing the paradox of a dialogue that is at once communal and community-excluding in having its conditions established in spite of the community whose dialogue it is. Either the republicans will have to postulate a congruence - in which case the

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<sup>118</sup> See Rosenblum, 1994, 73. Neither can the republicans guarantee at the outset that this involvement will be identity-generating.

(anti-democratic) association will be colonised by the democratic-republican ethic, or they will have to concede the non-congruence in which case it is hard to imagine how the republican project will get off the ground. I will return to this point several times and from many different angles and having recruited the help of systems-theory. My aim will be to uncover the republican readiness to abandon the interpretive premise which would require them to retrieve rather than impose community understandings.

This impossible dilemma facing the republicans is reflected in a deep inconsistency in their argumentative strategies. All too often, there lingers in the republican argument a tendency to abandon "what the law contains as politics" in favour of "what the law constitutes as politics". Republicanism suggests an "empowerment" of politics that all too often becomes a form of "re-constitution".

"What does the Constitution constitute?" asks Bruce Ackerman towards the end of his Storrs Lectures. "While established Constitutional Law did not always resolve America's deepest crises, it has always provided us with the language and the process within which our political identities could be confronted, debated and defined- both during the periods of normal politics and on those occasions when Americans found themselves called, once again, to undertake a serious effort to redefine and reaffirm their sense of national purpose". (1984, 1039) <sup>119</sup>

Preuss renews this argument in the context of the drafting of the new Constitution for a United Germany: "The classic division between the state on the one side and the individual on the other is extended and completed into a triad. In this draft there is additionally what the Americans call civil society. These are the social groupings and associations, the civil rights movements, the public interest groups that have never previously been represented in a constitution ... We have given civil society a constitutional, legal reality."<sup>120 121</sup>

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<sup>119</sup> In the European context, Dario Castiglione writes:

"To understand the function of the constitution in terms of both establishing and regulating a political community is to recognize that constitutional rules are both constitutive and regulative of a practice." When it comes to establishing the practice involved, Castiglione's "suggestion is that a constitution establishes the very practice of politics ... or "language-game" and "form of life" of politics itself - the way in which individuals and groups relate to each other according to the rules of the political game." From this premise the bridge to identity is launched. By establishing the practice of politics, "constitutions affect the very identity of the participants in the practice."

Ulrich Preuss supplements that argument by including "community" in the picture. He asks: "Does citizenship presuppose the community of which the citizen is a member, or, conversely, does first of all citizenship create this very community?" He sides with a concept of citizenship that "understands the polity as a "civil union", ie an association of citizens who constitute the realm of politics in the dialogical form of their communication ... The identity of the members themselves is constituted by their embeddedness in the community." He concludes: "It is not identity that determines citizenship. Rather it is citizenship which creates political identity." (1995)

<sup>120</sup> In an interview in the Tageszeitung of 7/4/90, quoted in Scott and Caygill (1995)

The question the republicans need to address before they themselves undermine their project in the very act of setting it up, is the following: how true to Civil Society is the "new constitutional reality" that they are "giving it"?

Why is this self-undermining? Let me summarise the republican self-defeating argument, and attempt to rescue at this stage, through a terminological query: I have problems with the use of the term "constitutes" because it suggests that the constitution "depicts" associations and persons as something other than their own self-perception. This process of constitution inhibits the possibility of allowing these voices to be heard as their owners intend them to be; the voices enter the legal screen always-already colonised. The inclusion of the hitherto excluded is thus effected on the includer's terms - the excluded has not pierced the terms of inclusion. In all this there lingers an ambivalence that underpins a dilemma. If the constitutional rules are constitutive of a practice, then voices which exist in civil society at large need to be re-conceived (re-constituted) in order to be integrated in terms of the constitutive practice in question. Whereas this reconstitution may be useful in integrating otherwise "egotistical, self-interested individuals ... and associations of such individuals," it is doubtful how far it will carry the quest for self-determination of such individuals and associations. If the communal dialogue is to be uncoerced it cannot re-cast or constitute anew the participants' self-understandings. The republicans cannot have it both ways: they have to side with one of the mutually exclusive options of colonisation or containment. Either the insitutional dialogue will pick up existing voices or it will constitute them. It cannot do both at once.

Rather than dealing with republicanism as a strategy of colonisation I will deal with it, more charitably, as a case of containment. I believe this reads the project in its best light. To read it otherwise, i.e. to read "constitute" as "colonise", would make republicanism self-defeating, because a constitutionalism that addresses Civil Society needs to be true to Civil Society, its diversity and authenticity. It cannot, without creating a paradox, profess to address it as something other than it is, as already colonised by means of the medium that was meant to merely "carry" it onto institutional ground. That is why I opt for the term "contain" rather than "constitute". In the case of containment, republicanism will appear as the endeavour to accommodate without distorting people's and associations' - individual and

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<sup>121</sup> A parallel argument forms the main thrust of Alan Scott's and Howard Caygill's analysis of the draft of the new German Constitution. (1995) Their analysis suggests elements of the strategy of containment. According to them, the draft constitution, amongst its major innovations, proposes (I quote selectively)

- (i) "... constituting associations of civil society which at the same time have participatory rights
- (ii) offers and guarantees a space for free societal formation for social movements, that carry cultural and value innovation and (quoting Melucci 1989) function as a social laboratory
- (iii) "an attempt to constitute responsible, republican and social citizens ..."

collective - self-understandings, by making room for them in newly instituted legal categories. If the republican project is to mean anything at all, it needs to be seen as a suggestion of the constitutional containment of politics.

In this context let me settle a possible ambiguity regarding my own use of the term containment. I use the term not to connote restriction but instead to denote undistorted accommodation. In this way, and in accordance with the point I just made, I attempt to read republicanism in the best light, that of its aspiration to make law the vessel of political deliberation.

The present chapter has aimed at an exposition of the republican project culminating in the "containment thesis," which I take to be the crux of republicanism. Although I have hinted at the critique I intend to advance, my pre-occupation here has been to explore the inter-connections that make containment possible. Republicanism suggests an immediate constitutive link between politics, community and the law. Community is substantiated in political dialogue, and the constitution hosts the dialogue. The republicans claim, in effect, that law upholds the deep self-interpretation of political community. Then law, as Michelman puts it, can be claimed to be the institutional manifestation of the political community's existence and identity as such (1988, 1514). Legal personality, "citizenship as activity" is a name for our political involvement, covers our contribution to the communal dialogue; on the basis of the republican endorsement of the communitarian link, citizenship then informs the sense of political identity of the situated self. By putting forward these inter-relationships, republicanism invites us to reconceive all that is political as legal. The aim of my thesis is to resist this legal imperialism, the false necessity of this assimilation of the political into the legal. There is both a descriptive and a prescriptive side to my argument.

As to the prescriptive side: I argue for an anarchy of political commitment that I will pursue under the heading of "reflexive politics". The claim is that political freedom presupposes the possibility to contest everything politically. Political freedom ultimately lies in the freedom to contest the meaning of political conflict, action and collective or communal identity. Political identity thus only contingently overlaps or identifies with citizenship and to assume an identity between the two as necessary or self-evident is to abandon reflexive politics. My prescriptive argument (advanced in the final chapter) then is against imposing this cost upon politics.

As to the descriptive side: I will argue that the republicans falsely claim that law can serve as the vessel for the political recollection of the national community. In a series of arguments throughout the following chapters I will identify a number of weaknesses in the republican argument and attempt to show that the republicans can only sustain their grand

synthesis of community, law and politics by inserting illegitimate assumptions, illegitimate to their own central commitment to "containment". I will attempt to show the falsity - more precisely the false necessity<sup>122</sup> - of the republican subsumptions of political conflict, political identity and political action under legal categories. In each case the republicans can only make their point, I will argue, at the expense of a political-reflexive question that they must conceal, and an a priori (therefore an anti-political argument) that they must insert in its place. In many ways my project is an exercise in teasing out meta-political assumptions, an exercise undertaken in the name of (reflexive) politics. The aim is to show that there is contingency where the republicans assume necessity or naturalness, a political question where a meta-political one obscures it - whether in Ackerman's dualist meta-structure of politics, Sunstein's prescription of empathy, Michelman's recourse to an always-already common normative "fund", or Dworkin's meta-political prescriptions for political equality and methodological backing of the interpretive undertaking. They all culminate in one all-inclusive claim, a claim that my thesis attempts to disprove. The all-inclusive republican claim is that the law can serve as an (adequate) register of political meaning.<sup>123</sup>

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<sup>122</sup> What begins as a false necessity turns into a falsity. The false necessity of assuming that a group's self-understanding is informed by the law becomes a falsity, when that self-understanding is assumed for the citizenry, that, as a matter of fact, includes groups whose self-understanding is not informed by the law.

In any case the disjunction falsity and false necessity is an important one and gives my own position a more moderate tone. I am not claiming, that is, that law can never be a vehicle to political action or give expression to social conflict in a way that mediates the assumption of political identity in community. That would be manifestly an exaggeration. But law can perform this function, that republicans attribute to it anyway, only so long as political actors find it an adequate description of their conflicts and their own self-understandings. The weakness of the republican claim is in assuming -the false necessity- that it always does.

<sup>123</sup> My descriptive argument against the republicans is that this claim is founded on arbitrary assumptions. My prescriptive argument in favour of reflexive politics is to resist viewing this claim as a meta-political question.

## Part II



## **Luhmann's Systems theory: A Brief Introduction**

To answer the republicans I am going to rely on Niklas Luhmann's version of systems theory. Generally, throughout the thesis, I will avoid any strict exposition-application schema, but will attempt instead to explain those aspects of the theory that are relevant to the argument as I develop it. But initially I need to introduce some central tenets and attempt to set up an inventory of key notions for future use: the concept of the system, the key analytical distinction between operations and observations, the notions of complexity and contingency, coding and programming, etc. Attempting such an excursus within the narrow confines of an introduction is burdensome but necessary; because Luhmann provides a unique re-thinking of the traditions he draws from. It is this novelty that makes it necessary to take a number of steps back and pick up the epistemological thread in the way that Luhmann does. Clearing the slates for such an undertaking is no easy task. I thus hasten to warn that the initial section "system and meaning" on the meaning of system and the meaning of meaning is heavily abstract and is understood best in the light of the more concrete subsequent sections.

### **System and Meaning**

"We cannot escape the fact that the world we know is constructed in order (and thus in such a way as) to be able to see itself.

This is indeed amazing.

Not so much in view of what it sees ... but in respect of the fact that it can see at all.

But in order to do so it must first cut itself up into at least one state which sees and at least one other state which is seen. In this severed and mutilated condition, whatever it sees is only partially itself. We may take it that the world undoubtedly is itself (i.e. is indistinct from itself), but, in any attempt to see itself as an object, it must, equally undoubtedly, act so as to make itself distinct from, and therefore false to, itself. In this condition it will always partially elude itself." (1991a, 210, n13, quoting G S Brown)

"All cognition ultimately consists in distinguishing," says Luhmann, it consists in splitting the whole with a distinction, inflicting a severing which alone allows us to escape from the "undoubted" but unhelpful "the world is what it is." The slants that can be drawn in the whole, the distinctions that can be inserted in the unmarked state are endless, and systems theory in its Luhmannian version is very much "a theory of a perpetuum mobile of [such] difference-making" as W T Murphy put it recently (1994, 14).

"Draw a distinction" says Luhmann, employing the calculus of George Spencer

Brown's "under-rated" epistemology.<sup>124</sup> The whole as unmarked state allows no purchase into it. A whole needs at least one internal boundary if it is to be observed, and for this, we will have to sever the whole by drawing a distinction. The unity of the whole as 'unmarked state' is violated, something is indicated that leaves something out. Something is in that it is not the World. Every distinction indicates a state and establishes an observer that (has to confront the paradox that he) views one thing (the indicated state) as being two (the indicated and the non-indicated). But to establish the observer requires: (i) that the distinction is drawn, (ii) that one side of the distinction is indicated (system) (iii) that the distinction is re-introduced into the indicated side (re-entry).

Note that no observation can be established before the first distinction is drawn. It is not possible to envisage the unmarked state before the initial distinction is drawn. Only by severing the whole can we see it but then it is only in the terms in which we have severed it that we see it. It is in this sense that Luhmann says that the whole always necessarily eludes us. Because all knowledge of the whole is always-already partial knowledge, dependant on the distinction we employed to observe it that alone, through its form, allows us to see the unity that is the world (as that which is both system and environment as we shall see); but with the distinction itself determining the shape of both self and other (indicated and non-indicated), the world that is over and above both is determined through the mark we inflict on it.

Luhmann relies on this calculus to define what a system is. Every observation of the world is a severing of the world; every observer established is a system. Just as there is no purchase into the unmarked state before the mark, there is no account of the world that precedes the system. Systems come about as distinctions are drawn, indications made and "re-entries" effected. We need to understand the concept at that, the most abstract level: the distinctive feature of the system is that it differentiates itself out by establishing a boundary between internal and external, between what it is and what it is not, and conceives of the world as spanning them both. The way it achieves this is in terms of the operation outlined: a distinction is drawn, one side indicated, the distinction "re-entered" the indicated side; because only from the inside is the distinction between inside/outside perceivable.

The operation of distinction-indication-re-entry allows the system to establish - and in time compound - a boundary between itself and the environment, to see itself and, as the non-indicated side re-enters, to see what in contra-distinction to itself the outside world is. Because establishing the self as self requires distinguishing it from something else. In order to define itself the system needs to re-introduce its Other; this re-introduction takes the form of "re-entry." The process resembles Lacan's "mirror stage" in the development of the system; through re-entry the system can observe itself-in-an-environment. Only thus does "emerge the

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<sup>124</sup> G Spencer-Brown (1972). *Sthenograh*y

distinction for the system between the environment which it sees confronting it, and the world to which it belongs," (1975b, 347) enabling both self-observation and observation of the environment. Then Luhmann can say that (1986a, 21) "a system that re-introduces the system - environment difference into the system is capable of equating its boundaries with those of the world." Without the difference, the indication and the re-entry we would have no purchase point into the unity that is the world, no slant into the continuum, or, in Luhmann's words, no "interruption of continuity in the spectrum of the possible, [i.e.] system formation" (1975b, p345). System boundaries have to be drawn, internal and external space designated, for anything to make any sense at all.<sup>125</sup>

In opposition to the dominant paradigm in cybernetics, for Luhmann what gives a system its unity is not some externally verifiable relationship among its elements or elements and structures. A system is a unity that is meaningful as such in reference to a difference: the difference of system and environment.<sup>126</sup> It is this difference that first enables the system to build up a relation with the environment that in turn becomes the topic of the system's self-understanding. Within a system one can observe the environment, reflect on it, talk about it and make decisions concerning it. Underpinning the relation is the unity of the distinction, the now observable world.

My reason for the recourse to systems theory is to elucidate how meaning comes about both legally and politically. That is why I pursue here this question over the genesis of meaning. But I must clarify that in talking about meaningfulness I have already limited this discussion to meaning-related systems. Suffice it to point out that in his typology of systems<sup>127</sup> Luhmann distinguishes living systems, psychic systems and social systems, not all of which are meaning-related. The former were in fact the systems for which the term "autopoiesis" was coined by biologists Maturana and Varela, in order to describe the self-reproduction of organic life.<sup>128</sup> Luhmann transfers their insight to Sociology, significantly not as a metaphor.<sup>129</sup> Social systems are autopoietic in as real a sense as living systems are: they too produce their own elements from their own elements, the difference

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<sup>125</sup> "[A system] must be able to observe [its] operations as the drawing of a boundary, as the fencing in of what belongs to it and the shutting out of what does not. It must be able to distinguish between self-reference and external reference. The intrinsic value of intrinsic values - this is what constitutes the system: the system as boundary, as a form with two sides, as a distinction of system and environment." (1991a, 224-5)

<sup>126</sup> *Ind.*, Luhmann, 1986e, 11, also 1986f 155

<sup>127</sup> Luhmann, 1984, 15ff, 1986c, 173ff

<sup>128</sup> Varela (1981, 14-24) and Zolo (1992, 67) protest against the "uprooting" of the theory from Biology.

<sup>129</sup> Rottleitner, 1987, 97

being that their elements are not cells but communications. But to the extent that communications occur in the real world, the autopoiesis of social systems is an empirically verifiable fact about the world.

Still at this most abstract level (we will see more concrete applications in what follows) observation is defined by Luhmann as the unity of an operation that makes a distinction in order to indicate one or the other side of this distinction. Luhmann inserts 'unity' in this definition to denote that observation does not equal indication but what underlies the indication and allows the indicated side to reflect in the non-indicated side (or in Luhmann's terms, the non-indicated to re-enter). Observing on the basis of this distinction means that the system presupposes the "unity" of the distinction but actualises it from the perspective of the system, the indicated side. Each side, system and environment, depends reciprocally on the other. And it is the environment that holds up the mirror in which the system can observe itself (self-observation) in that it is not the World.

Let us take a more concrete example to see how this works. Luhmann repeatedly returns to the problems that surround the question "what is society?"<sup>130</sup> In the sociological observation of society, sociology has all too often treated society as component of a distinction - society/State, society/individual - and thus caused the discipline to designate its object as the "other" in a distinction it was meant to contain. Luhmann overcomes the problems because for him "re-entry" is an indispensable moment; the distinction between self and other "re-enters" the indicated side - here the system of society - present yet suspended. Then the definition of society presupposes the unity of the distinction between society and its environment, the latter including of course individuals as living or conscious systems.<sup>131</sup> The environment is excluded to be included (as mirror). This, to put it crudely, means that the distinction "acknowledges" both its sides. George Spenser Brown calls the unity of the distinction, its "form". Borrowing from him, Luhmann designates a system - here Society itself - as the form of a distinction.<sup>132</sup>

To recapitulate: In order to observe the world an act of differentiation of systems is required that establishes specific system/horizon perspectives only in terms of which observation of the world is possible. No account of "truth" can transcend the system and

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<sup>130</sup> See esp. Luhmann, 1975b, 1992b

<sup>131</sup> When Luhmann talks of society - or the social system of "world society" - he identifies it as the totality of communication, therefore limited by the boundaries of what is not communicable.

<sup>132</sup> In this context what does Sociology gain by opting for the notion of social autopoiesis? Through the notion of the form, Luhmann will claim that it gains no less than the possibility to designate its object in the first place.

neither archimedean point nor ultimate observer is possible - one that cannot in turn be observed.

We will return later to look at system observation as well as how the system handles internal reference and external reference, reference to itself and its environment. Both these themes are crucial to the chapters that follow. Before that however, still in an attempt to elucidate the complex ideas involved here, let us draw an analytical distinction between observation and operation. Note how the two inter-relate in the definition of the paragraph above: "observation is the unity of an operation that makes a distinction in order to indicate one or the other side of this distinction." It is not an exaggeration to say that "observation" and "operation" are the two "worlds" that meet in autopoietic theory.

### Operations

Autopoiesis means self-reproduction and consequently radical self-determination. The autopoiesis of every system is defined (by Maturana initially) at the level of operations: operations whereby elements reproduce elements of the system.<sup>133</sup> As systems are temporal, dynamic, caught in time, this self-reproduction coincides with the existence of a system. It is because operations are the mode of existence of a system that Luhmann sees as the most important question relating to concept of the social system, the question: "which is the operation that produces the system of society and, we must add, produces it from its products, that is, reproduces it?" (1992b, 71)

"My proposal," he says, "is that we make the concept of communication the basis and thereby switch sociological theory from the concept of action to the concept of system. This enables us to present the social system as an operatively closed system consisting only of its own operations, reproduced by communications from communications." (ibid). Thus Luhmann characterises the operation that reproduces the social system, its particular mode of autopoietic reproduction, as communication, and designates society, the most comprehensive social system of all, as the totality of communications.

The shift of sociological enquiry from action to communication, a shift that marks Luhmann's decisive break from Parsons, is treated by Luhmann himself as a "conceptual revolution." (1986c, 177-8) Society is for Luhmann the totality of communications, not of individuals or groups, nor of their relations, nor of their actions. Unlike Habermas too, for

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<sup>133</sup> An element, like a particle or a cell, is un-decomposable into a more elementary form, at least for the system itself.

whom communication is a way of acting, Luhmann conceives of acting as a way of communicating; this reversal brings far richer possibilities into sociological enquiry and circumvents some fundamental problems of action theory. While sociology as theory of action has always been theory of meaningful action, and thus the element of communication/meaning is already central, it is anchored in a fundamental way to a certain "ontology of doing"; Luhmann's revolutionary suggestion in this context is to leave the latter behind altogether. This circumvents a) the difficulty of distinguishing the elementary action unit itself<sup>134</sup> - the individuation of the event as Davidson would put it<sup>135</sup> -, since we can only circumscribe what "part" of the action we are talking about on the basis of criteria outside the action. Instead systems-theory suggests that what "part" of the action does the communicating is up to the system, and at this point the possibilities are endless; b) the problem that action is not necessarily social, which in turn makes it necessary to look for the social meaning of action (Weber); c) the problem of treating in the framework of action the active decision to abstain from action; d) the fact that the focus on action screens off an essential social aspect of action, ie the impact of the action, that is something - how else could it be - outside the action (someone is talked to) but not outside the communication that always involves communicators. These are not mere problems that are avoided in the shift from action to communication, but are in fact brought back into sociology as questions that enrich sociological enquiry.

How does Luhmann define the elementary unit, the single communication? A communication is not an action involving a spatial transference of meaning, or whatever; nor is it a meeting of consciousnesses; nor is it a function. A communication is a synthesis of three components: information, communicative act/ utterance (Mitteilung - sometimes translated as utterance, others as communication) and understanding (which may also be mis-understanding).<sup>136</sup> Conceiving communication as distinguishable into the three components is crucial. Interlocutor A may stand back and ask why information x is communicated to him/her; his/her understanding of the communication may depend on distinguishing the two. Understanding of the communication thus may involve not the content of the information but why something was said here and now; it may involve the difficulties of understanding the information content; or whether the communicated will be accepted or

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<sup>134</sup> Gouldner has criticised Parsons for this: "A specification of the elements of social action is no more attainable by formal definition alone than are the attributes of "life" which the biologist regards as the "subject matter" of his discipline. Znaniecki, almost alone among the systematic theorists who have raised the question, has stressed that the characteristics of social action cannot be taken as a priori data but are also to be inductively sought and empirically validated." (1973, 178)

<sup>135</sup> Davidson, 1980, 163, and passim

<sup>136</sup> Luhmann borrows the distinction from Karl Buhler, a distinction also employed by Searle and Austin. (Luhmann, 1986c n.2, 1992b, p72)

rejected.<sup>137</sup> Every communication opens up a choice between its acceptance and its rejection. This bifurcation is essential to the system's existence in time. As dynamic the system exists only as new communications link onto previous ones, by taking up the yes- or no- option which a communication as an offer (or provocation) carries with it. The communication's incompleteness, as something always tending into the future, necessitates an answer. This is something that, possibly in spite of Luhmann, I will attempt to exploit in the argument that follows. Why "incompleteness"?<sup>138</sup> Because the communication is always unfinished, it is in anticipation of a response. The system exists not as an aggregate of communicative acts - the communicative act is a zero-point in time - but as a linkage of new communicative acts to those past. Between the two there is a sense in which meaning is pending, because without memory or anticipation there can be no meaning. It is through this linkage capacity - Anschlussfaehigkeit - that the system exists and its autopoiesis consists of this generation of new elements from existing ones.

Finally back the question of the designation of communication over action as the elementary unit. We can formulate the answer more precisely now. Communication allows a more fruitful departure for theorising the social than action does because communication includes action as the 'utterance' component of the communicative event. What were hitherto problems themselves acquire sociological value, as action itself is thematised and information value is drawn from it, the latter too being an elementary component of the element. This is all to say that action is first possible and meaningful against a number of horizons of communication, each absorbing action into a specific template and casting it through system reference. The ontology of doing is displaced by a parallel processing of the meaning of action, and with both what "counts as" action and what action means determined system-specifically, action becomes an artifice. From being the a priori starting point for sociology, it becomes a variable, relativised in a broader element of communication that makes its meaning dependent on the addressee (understanding) and the information value

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<sup>137</sup> Luhmann, 1992b, 71ff, 1986c, 174ff

<sup>138</sup> And why "in spite"? Let me attempt to answer this, but only very tentatively as yet. Because Luhmann says that "the selection of further communication is either an acceptance or rejection of previous communication or a visible avoidance or adjournment of the issue." (1986c, 176). I do not accept that the latter option is possible. The way Luhmann lays the cards, communication reproduces situations with a specified and enforced choice. The enforced choice is either a "yes" or a "no", and avoidance or adjournment is, at least likely, to be thematised as a "no". And this is because communication is always system specific, the options available are available through dispositive concepts (*tertium non datur*) and the choice of abstaining from both - abstaining from the choice itself, is something that the system cannot see (and cannot see that it cannot see). To make this point, however, anticipates a great deal of the discussion on observation etc, so at this stage I will refrain from saying any more.

(information) that does not belong to the action (but to the system and to the World). We will return to all this in examining more closely questions of attribution of action.

A social system is autopoietic in that it produces and reproduces its own elements, new communications from a network of existing communications. The system does not exist as the aggregate of its elements but as their succession: it exists as dynamic, in the continuing linkage of new communications to ones already communicated. And meaning, that is specific to the system, since the system is dynamic has to be based on the instability of elements, their connectability, the opportunities they raise, the potentiality that is actualised in linkage, only suspended in time. The operations of the social system are communications, understood as syntheses of information, communicative act and understanding. By positing communication as the element,<sup>139</sup> Luhmann proposes something much more precise than the social category "relations"<sup>140</sup> and side-steps the problems associated with employing action,<sup>141</sup> individuals,<sup>142</sup> or conflict/co-operation<sup>143</sup> as departures for sociological inquiry.

A communication communicates a meaning and meaning, as we saw, comes about when a system differentiates itself out of an environment and (through re-entry of the system/environment distinction) sees itself in an environment about which it may communicate (trivially, it is individuals who will communicate: utter, convey information and understand or mis-understand the systemic communication). This is to stress that a system's operation is tied to a system's observation.<sup>144</sup> The two are linked internally in a mutually enabling way. Operations are communications about system and environment, internal and external reference, therefore observation. Observation, on the other hand, equips communication with a reference in terms of which it can continue, link up, and thus allows

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<sup>139</sup> Because, naturally, "in dynamic systems - which consist of their operations - operations and elements become indistinguishable." (Luhmann, 1985a, 100)

<sup>140</sup> Luhmann, 1992b, 73

<sup>141</sup> "Without a system there would be neither meaning, nor experience, nor action." Luhmann, 1971, p29

<sup>142</sup> "Meaning must be defined "without reference to the subject since the latter, as a meaningfully constituted identity, already pre-supposes meaning." Luhmann, 1971, p28

<sup>143</sup> See below ch 3 s 4

<sup>144</sup> The mode of that connection is neither uncontroversial nor undertheorised. For an overview of the discussion, see Teuber, ch.2. A distinction suggested by Roth (quoted in Teubner, 1993a) is one between "hard" and "soft" operations, reproduction and observation respectively. Varela distinguishes "operative" and "symbolic" operations (1981a). Luhmann's account of their coincidence is the one I am following the reasoning of above.



the system to effect its operations, produce new elements from existing ones and continue its autopoiesis.

## **Observation**

### (i) Observation, system-centric and system-specific

We have already established that observation requires a system, and we will see now (in this and the following sections (i)-(iv)) why observation is specific to a system, possible only from a system's point of view. In the case of social systems with which this analysis is more specifically concerned, the question of observation turns on the question of meaning. The system makes the world meaningful (meaningfully observed) and the world is made meaningful only for the system. Let us look at these in turn.

The system makes the world meaningful. As we saw, the unobservable whole is severed through the drawing of a boundary, and with it a vantage point is inserted. The two sides are separated, the one indicated then through re-entry the environment reflected in the system. Observation is now first possible as system-specific observation; there could be no other "pure" observation since observation is only possible because a system first actualises - furnishes - a perspective into an otherwise undifferentiated reality. Drawing the (social-)systemic boundary means that the hitherto meaningless unity that is the world now makes sense as a difference between the system (that observes) and the environment (that is observed). System differentiation is a first move in an uncharted - and otherwise unchartable - territory. Because there is a system and because it conceives of an environment, meaning is possible as the systemic representation of the world. No system, no meaning. Everything follows from this: the peculiar processing of meaning within the system, its 'constructivist' observation of reality, its own peculiar self-observation, the radical incommensurability of perspectives, the post-modern condition itself as any hierarchy between systems - or ultimate observers - is abolished. We will examine these propositions in due course, focusing on what this analysis chiefly relies on systems theory for: the system's handling of external reference, its handling of distinctions between internal and other-reference.

If meaning requires the system, meaning is also specific to the system. How is the systemic perspective furnished, the world made meaningful? The answer is: through guiding differences. The guiding differences are the means through which systems achieve entry into the unity that is the world. They achieve this entry, this possibility of observation, by introducing a guiding difference and by making the World relevant to this guiding difference. The guiding difference organises, permeates and "over-determines" the network of

differences, the set of further distinctions and demarcations that meaning requires. Semantic codes specify the differences which form the basis for something to be received as information. The World is, in the case of each system, submitted to the difference that, for that system, makes a difference. A pattern of difference lies at the basis of the system's observation of the environment.

On that basis the system builds up an awareness of the environment, submits it to observation, and renders it meaningful. As we saw this presupposes 're-entry' of the difference between system and environment in the system. The system can see itself and see its other, self-reference and hetero-reference.<sup>145</sup> The function of the guiding differences is that they "carry" or depict this difference of system and environment in the system. How this is achieved is the subject of the section on "Guiding Distinctions", below (section iv).

### (ii) Reduction of Complexity

The world is infinitely complex, it admits of a variety of ways it can be talked about, it possesses many aspects and possibilities of its description. New perspectives relativise older ones, the false necessities of "natural" descriptions are shaken as they do; every such new description reminds us of the World's complexity but also increases that complexity by adding to the possibilities of describing it. So every time that a new system draws a boundary and establishes a specific difference of system and environment it of course adds to the overall complexity but also, importantly reduces it to that specific difference of system and environment. This reduction of complexity is a reduction of the possible states and events to ones that can be envisaged by the system as determined through its specific means of making selections and establishing relevance. Not every societal communication, not every state of affairs that can be talked about, may become subject of each system's communication. More importantly competing categorisations, interpretations of events will not all find expression in the system's terms; each system will restrict the modes in which the world can be talked about by perceiving it in a categorically preformed way. (1986e, 12) This is how reduction occurs:

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<sup>145</sup> Varela explains how every operation is accompanied by a self-indication of the operation. "Every observation, as the application of a distinction, makes possible not only an indication of what is observed but also an indication of the observation itself. One therefore arrives at the possibility of saying 'I' with the application of any distinction ... The system constitutes itself by drawing limits, distinguishing itself from the environment and thus indicating itself ... When it observes the objects of its environment, in the process of observation distinguishes and indicates itself as an observer - whatever the difference-scheme and the object are which determine the observation in each case". (Luhmann, 1985b, 391) Every time that the system observes the environment it achieves at the very same time a self-observation, the possibility to say 'I'.

the complexity of the environment is met from within the system through specific capacities of resonance. The system creates "order from noise" by drawing selectively on the surplus of possibilities - the domain of high complexity - potentially available in the environment. "Noise" is what is not yet reduced. In the process of this selective depiction the system constructs the external world that it cannot conceive in its complexity. A system knows by simplifying, and then by choosing amongst, manipulating and combining these self-produced simplifications that stand in for that which is too complex for the system to conceive. Systems are agents of reduction only in terms of which the unbearable complexity of the world becomes meaningful. This reduction, adds Poggi, allows the system "a simple hold upon possibly highly complex stretches of reality." (1979, px) As complexity in the environment increases, the system adapts its own capacities for resonance by building up its own complexity.

Meaning is always system-specific says Luhmann. It depends on a reduction of complexity, a reduction in the scope of possibilities of all that may be communicated.<sup>146</sup> A system comes about as a specific, reductive, selective way of observing a complex world, with a surplus of possibilities, is established. When a system observes an environment, it observes it through a form of selection that has to do with the distinction that guides it. Put another way, in Husserl's terms perhaps, the world is a horizon; it is not yet meaningful except as a background against which certain possibilities are actualised. This is what Luhmann is saying too, except in the more precise terms of infinite complexity (horizon, the World) and reduced complexity (the system). Systems are thus islands of reduced complexity in a World of infinite complexity. That relationship between actual and possible, the system and the world (I use World here to include the unity of system and environment) is the form of the distinction ("form" in the systems-theoretical sense) between system and environment that alone underlies the possibility of meaning.<sup>147</sup> And it is a relationship in that in the system possibilities become actualised over against those that are not. The dimension of time is of the essence here: every actualisation as selection transforms the system and forms the basis for future selections. It is the specific form of selectivity-in-progress that constitutes the identity of the system.

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<sup>146</sup> "Everything which can be predicated of systems - differentiation into parts, hierarchy building, boundary maintenance, differentiation between structure and process, selective modelling of environments, etc - may be functionally analysed as a reduction of complexity." (Luhmann, 1969, p256, trans. Poggi, my emph.)

<sup>147</sup> Significantly, complexity is not eliminated but reduced. It needs to be preserved, like the horizon, not only to furnish further selections but more importantly to make present ones meaningful.

### (iii) Society and sub-systems

Society, as we said earlier, is the sum total of communications. In Luhmann's words, "society is the closed system of connectable communications, reproducing communication by communication." (1992c, 1419). Its boundaries include all that is communicated and communicable. But a paradoxical situation arises. Whatever unity the formula "all communication" makes apparent is in fact dispersed; for within society's ambit there develop a multitude of sub-systems, each developing its selective and exclusive mapping of the world. Where society cannot communicate with its environment, since it already consists of all that is communicable, sub-systems communicate amongst themselves, of sorts. Each system of the "social" type, be it of the family group interactions, organizations or differentiated along functional lines,<sup>148</sup> is a sub-system of society and each makes sense of the world in different, mutually overlapping, mutually undercutting ways. Sub-systems are not strung together in any pattern, of co-ordination or "dissent."<sup>149</sup> Society's subsystems aren't patterned in a whole/part schema,<sup>150</sup> but instead each system repeats a system/environment distinction within society, distinguishing itself from society through that distinction. Every formation of a sub-system is nothing less than a new exposition of the unity of the whole social system from its perspective. And yet, every formation of a sub-system breaks that unity of the whole system into a specific difference of system and environment.<sup>151</sup>

How does this differentiating out of a sub-system occur? As we will be dealing extensively with functional sub-systems, i.e. systems that are differentiated-out of society on the basis of performing a unique function in society, it may be helpful to say a little about the principle of its differentiation.

"I propose to characterize modern society as a functionally differentiated social system," says Luhmann. "The evolution of this highly improbable social order required replacing stratification with functional differentiation as the main principle of forming subsystems within the overall system of society. In stratified societies the human individual was placed in only one subsystem. ... This is no longer possible in a society differentiated

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<sup>148</sup> On the typology of social systems see 1975a. On Functional Differentiation see ch.3

<sup>149</sup> Miller M (1994)

<sup>150</sup> "The unity of the world is not the unity of an assemblage ..., but rather the unavoidable, indestructible possibility of moving from one thing to another - not an aggregation, but rather a correlation of meaningful experience and action." (1975b, 411, n.48)

<sup>151</sup> Luhmann, 1986e, 107 ff

with respect to functions such as politics, economy, intimate relations, religion, sciences and education. Nobody can live in only one of these systems. But if the individual cannot live in "his" social system where else can he live? As *homo viator* .. ?" (1986d, 318)

Functionally differentiated systems are not manned or "lived in".<sup>152</sup> They consist of sets of differentiated and specialised resources and activities each articulating with others and each contributing through its own operation to the functioning of the whole.<sup>153</sup> "All these subsystems develop their own partial rationality: their own partial options and demands, goals and means, functions and products." (Willke, 1985, p288). Partial rationalities do not combine in a comprehensive social rationality as such, however, and in one sense at least, the sum of the parts is more than the whole. No system is of primary importance to the functioning of the whole, none provides a "summit" (as was the case in stratified societies) or a "centre" for society. Finally, according to the principle of functional differentiation each sub-system performs a function that is unique: were that exclusivity to be compromised the principle of differentiation itself would give way.<sup>154</sup>

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<sup>152</sup> Elsewhere Luhmann says: "As an individual man lives outside the functional systems. At the same time, each person must have access to each functional system, to the extent that a person cannot conduct his existence without addressing claims to societal functions." (1990b, 27) On the position of the individual vis a vis functionally differentiated systems see Luhmann (1986d, esp 319 on the subject "underlying" and supporting attributes) and Teubner (1989) on role-taking and the "multiple self".

<sup>153</sup> As Klaus Eder puts it concisely: "The decisive innovation is the functional autonomy by which structural arrangements are equally and without external constraints able to accommodate the functional consequences of the modernizing mechanisms. By separating and multiplying the fields in which the construction of modern society can take place, functional differentiation makes this accommodation possible." (Eder, 1993, 91)

<sup>154</sup> Does this make Luhmann a functionalist? I think not. There is a vastly significant distinction to be drawn between his functional analysis and functionalism with the conservative connotations the latter carries. Luhmann's theory is committed to the first but in no way to the second. His commitment to the first, ie functional analysis, stems from the impossibility of causal explanation in a world where privileged or ultimate observation is no longer possible. Among other reasons because causation requires a succession of cause and effect that cannot cross systems - systems cannot act causally on each other - because it cannot survive the systems' differing self-organisation of time. But Luhmann's theory is not functionalist. (Luhmann, 1984, pp83ff, Smith, 1991, pp334-5, King and Schutz, 1994, pp265-6). Briefly: functions are not given at the outset but emerge as systemic selections that could be otherwise; what as observers we could identify as functional to society's maintenance is merely one systemic account among others; there is no premise within the theory from which parts could co-ordinate in order to contribute to the maintenance or survival of the whole, not least because fit, compatibility or integration between subsystems are ruled out at the outset. Habermas, it could be said therefore, "won" his famous early exchange with Luhmann with too easy a charge of functionalism: "Behind the attempt to justify a reduction of the complexity of the world as the highest reference point of functionalism in the social sciences hides the unavowed commitment of the theory to ways of posing the questions which conform with the structure of domination, defending the existing state of affairs in order to keep it in existence. Thus the theory is reserved for technocratic use." (quoted in Murphy, 1984, p619)

"[Sub-system] differentiation," says Luhmann, "reproduces the system in itself, multiplying specialized versions of the original system's identity by splitting it into a number of internal systems and affiliated environments." (1977, 231) Each sub-system draws an internal boundary to reflect the whole system (and in effect the whole system's environment too). Each sub-system thus replicates within the system the difference between system and environment. (It is because functional sub-systems replicate what is already replicated, that Luhmann calls them "second-order" autopoietic systems)<sup>155</sup>

On the basis of the distinction system/environment, every sub-system perceives society and other sub-systems as environment. This reflection is "totalising" in the sense that each encoding makes sense of the whole of reality and claims exclusivity for that depiction (1986e ch16). The social is thus given a reality from every systemic perspective, and done so in incommensurable ways: subsystems do not join together into higher level systems - no ultimate (or meta-) observer will resolve their differences - nor can they be conceived of as instances of a totality. This leaves society in the situation of being the totality of communications yet its unity forever undermined by the irreconcilability of subsystems which not only perceive reality in different ways but also perceive their differences in different ways. *Unitas multiplex*;<sup>156</sup> a society that is at once unity (all communication as distinct from life and consciousness) and multiplicity. And at the same time, in the current evolutionary phase of functional differentiation, a heterarchy; the multiplicity of descriptions of society cannot be coordinated hierarchically.<sup>157</sup> This is how Luhmann summarises all this and we will have to elaborate it closer, in what follows.

"Each system is universally competent and at the same time a system within the world, able to distinguish and observe and control itself. It is a self-referential system and thereby a totalizing system. It cannot avoid operating within a world of its own. Societies [social systems] constitute worlds. Observing themselves, that is communicating about themselves, societies cannot avoid using distinctions which differentiate the observing system from something else. Their communication observes itself within its world and describes the limitation of its own competence. Communication never becomes self-transcending. It can never operate outside its own boundaries. The boundaries themselves, however, are

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<sup>155</sup> All internal differentiation entails the drawing of internal boundaries and the creation of internal environments. see, e.g., Luhmann's discussion of the internal differentiation of the political system in 1990b, p21ff, where he describes the political system as differentiated internally into party politics, government and political public

<sup>156</sup> Teubner, 1993, ch 7, Luhmann, 1986e, 108. Also: "The unity of society is the unity of the difference between system and environment and in functionally differentiated society this unity can only be given expression from the perspective of the subsystems which have emerged in the course of social evolution." (Murphy, 1994, 6)

<sup>157</sup> See esp. 1986a, ps 16-7, 28

components of the system and cannot be taken as given by a pre-constituted world." (1986c, p178-9)

#### (iv) Guiding Distinctions

Since this analysis does not aim to be an exhaustive account of autopoiesis, but rather aims to set specific questions in the context of the theory, the move from the abstract to the concrete within the theory will be informed by the aims of the application. The emphasis on guiding distinctions may appear unjustified, given that not all systems are meaning-processing systems (living systems), not all meaning-processing systems are social systems (psychic systems), not all social systems are society's functional subsystems (eg interaction systems, organizations),<sup>158</sup> and not all functional subsystems employ binary coding as guiding distinction (e g the educational system) . The function systems that will be central to our analysis - law and politics -, however, structure their communication through a binary or two-valued code, that from the viewpoint of a specific function claims universal validity. This makes it important to look at such binary schemata, guiding differences, in some depth.

At the very root of the matter, then, the possibility of cognition for the system, springs from difference-controlled observation. According to Luhmann, "the formulation of the concept of difference makes it possible for events to appear as information and to leave traces behind within the system." (1990a, 108) In view of these specific interests the interesting question is : "with the aid of what distinctions can a [social] system observe internal and external objects?" (1985b, 393)<sup>159</sup>

The importance of the code cannot be stressed enough. The differentiating-out of a system (the original term *Ausdifferenzierung* implies movement-out-of) occurs when one difference acquires primacy, marginalises and re-aligns other differences to it, and in a sense then first enables the new system's observations to "crystallise" around it and the complexity of the world to be reduced to this difference.<sup>160</sup> The code underpins the reduction on which

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<sup>158</sup> "Functional differentiation is certainly no precondition for autopoietic reproduction," says Luhmann (1984, 406)

<sup>159</sup> We must be careful here to distinguish among guiding differences between those that underlie the identity of the system and give it its unity and other more secondary ones, such as those that are operative in programming. In order to pursue our exploration of system observation further, section (iv) explores more fully the differences among guiding differences.

<sup>160</sup> Historically, e.g., the move from stratification to functional differentiation in the West reflected both the emergence of functional systems with functions acting as catalysts for such crystallisations of meanings. See generally Luhmann, 1990b

totalisation depends. (1982, 135) Other distinctions, operative in other systems, are re-aligned to this central difference that renders all the variances and contrasts understandable (observable) because relevant to the difference that enables the system to view the world. All other differences are semantically subsumed under the primary difference (überformt) and permeated with new contingencies (the contingency space specific to the system).

Binary codes are simply a difference between a yes and a no, the difference between a positive and a negative value. This is a calculus that is given specific form by systems at the level of differentiated communications. To explain how the codes of functional sub-systems came about, Luhmann draws from Parsons' theory of symbolically generalised media.<sup>161</sup> These media are not exclusive to a system but exist within society at large and in a sense hold systems together from below (see Teubner's account of the materiality continuum below). But functional sub-systems each reserves a special use for a medium ("couples it strictly") as a code and uses it to direct all relevant communication. Science does this for the medium of truth, for example, encoding it as true/false, politics that of power, economy that of money, etc. What is it that gives each binary schema the power to inform a reading of reality? The value and counter-value of the code, unlike 'evaluative' values, have formal equivalence<sup>162</sup> for the system: designating something as legal or true is not a more likely or favoured choice for the legal and scientific system respectively, than deeming it illegal or false. The power of the code lies in that the very constitution of the identity of a system involves the play between positive value and negative value: the designation of every position is always identified in relation to (in the mirror of) its counter-position. "Communication x is legal, y is true," claim the lawyer and the scientist. How could things be different? They could be different in being illegal or false. The identity of x as legal involves situating it in the difference between legal/illegal. Only by reflecting it in the mirror of its negation does the identity of x as legal come about. The abstract initial discussion of how differentiation creates meaning becomes more obvious in the concrete case here.

This is how the identity of the system comes about: identity as tautology (legal is what is legal) is replaced by identity as difference (the law is the difference between legal and illegal). It may be true that this "identity as difference" means very little before it can be shown how through the latter the system can relate to the World. But it is crucial to note that in whatever context the legal/illegal dichotomy may be used in communication, it will underpin, cause, raise, provide the identity of any information. This is what the theory's critics

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<sup>161</sup> See generally Luhmann, 1976b

<sup>162</sup> Although they started off their semantic careers as Präferenzcoden or "idees directrices" [guiding ideals] 1986f, pp149-50



don't see when they criticise the theory's exaggerated reliance on the code.

This line of criticism maintains that it is a simplification to purport to exhaust what law is about by relying on the difference between legal and illegal. Rottleitner (1989b) reminds us that law assumes a variety of forms, regulatory strategies, licenses, incentives etc, and includes processes for reaching decisions, scientific expertise etc, that cannot all be fitted into the legal/illegal dichotomy. Bankowski points to the Scottish 'not proven' as breaking up the necessary bivalency of the code.<sup>163</sup> There are other criticisms to this effect. One way of confronting these criticisms is to show that they rely too heavily on coding at the expense of programming and other functional equivalents like values, secondary codes (like prohibited/forbidden) etc (we will return to this in ch.3). More importantly however, the critics cannot see that the code gives a communication in law its very identity as legal, allowing in the first place any further state of information about incentives, strategies, etc, to appear, and all this in an immediate way.<sup>164</sup> However legal information is to be processed, and the variety here is immense, it is first comes about as such through coding.

Coding generates information. Codes specify the differences on the basis of which something is received as information. Experience, action, facts are grasped through difference - i.e. against the horizon of other possibilities. Information comes about by virtue of situating an environmental stimulus in the pattern of 'this rather than that'. Information is possible only in this situating, this channelling into a pattern of difference.<sup>165</sup> It is in the situating of a stimulus (noise) in the pattern of 'this rather than that' that codes can be understood as duplication rules. They duplicate the reality they observe. Reality acquires a dimension other than that of being normal. When exposed to the code difference, say the legal code, pure facticity becomes information. Actions become legal or illegal, events become legally relevant. How they are allocated to either value is itself not a matter for coding.<sup>166</sup> What

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<sup>163</sup> Bankowski, 1994.

<sup>164</sup> Murphy points this out too. "That coding is the starting point for which the term system is both a shorthand and an indicator of entrenchment of the coding is easily overlooked ... by the critics of the theory." (Murphy, 1994, 17)

<sup>165</sup> This 'structuralist' use of semantic difference must be incorporated into the overall theory before its contribution can be assessed, and that means incorporating it in the dimension of time, at the level of the communicative event. This is the subject of the next section, where we will explore the intimate link of information with expectation, and how the codes themselves are caught up in the process and respecified in the temporal dimension.

<sup>166</sup> The critics' warning against reducing the legal universe to the difference between legal and illegal can be rebutted on this ground too. The plurality of legal forms can be well accounted for without giving up the primacy of the code. On the contrary, only because of that primacy of coding, that establishes the contingency space, can structures be built up with such ease ("a move that would be difficult to a legal system oriented towards fundamental values" (Smith S C, 1991, 329). As Luhmann writes in *Ecological Communication*: "[E]xtreme elasticity is purchased at the cost of the rigidity of "contextual" conditions. Everything appears as contingent. But the realization of other possibilities is bound to specific system references." (1986e, 109)

duplication means is that the very identity of x as legal involves its negation, i.e. its reflection in the counter-value (x is not not-legal). A statement about x can be made, the system activates a perspective by duplicating reality and making 'x is legal' meaningful because it could be the case that 'x is not legal'.<sup>167</sup> It is this duplication that determines in what sense things could be different. Reflecting in the counter-value enables observation, by setting an assertion against the background of another possibility (this rather than that). Pure fact now acquires the possibility to register, to be observed.

At the same time the duplication through the negative value opens up a contingency space: x could be legal or illegal. The negative value allows us to see how things could be different. In view of this everything is neither necessary nor impossible, therefore contingent.<sup>168</sup> This is a contingency that is bound by the bivalency of the code, it is a "first-order contingency"; there are other levels too at which we encounter contingency and we must be careful to keep these distinct. There is contingency at a second level bound (less bound, nonetheless bound) by specific system references, and there is a further level of contingency that this thesis attempts to establish as the ground for reflexive politics: a (third) level of contingency that allows us to challenge what at the other levels appears always already determined: the existence of the framework of choice and the necessity of circumscribing the contingent within it.

Back to the code. The code is the system's guiding difference because, by employing it, the system can steer its operations and make meaningful the designation of something as legal. But this difference can only designate a 'contingency space' - something can be a or not-a - but can tell us nothing about how positive and negative values are to be allocated. At the code level there is no commitment to either value. The positive value of the guiding difference guides the difference, the negative value providing for duplication. The code itself provides no means for breaking its own perfect symmetry. Neither of the code values can serve as criteria of their own selection. In order to relate to the world it has to break the symmetry of its code; it needs to 'asymmetricize'. Secondary codes (prohibition/ permission, conservative/ progressive), conditional and goal structures, values and functional equivalents, even reflexive structures, can be accommodated here. I will employ the term programming to cover all these; to cover programming *stricto sensu* (conditional and goal structures) as well as all its functional equivalents, i.e. equivalents from the point of view of allowing the system

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<sup>167</sup> It is only under the condition of openness towards both the positive and the negative option that a social system can identify with a code. The code is the form with which the system distinguishes itself from the environment and organises its own operative closure." (1991a, 78)

<sup>168</sup> Luhmann, 1984, 156

to asymmetricise. All these further distinctions that come under "programming" are aligned and correlated to the code difference.<sup>169</sup> Let us look at an example of how this works.

The code [Recht/Unrecht]<sup>170</sup> introduces a distinction into an undifferentiated reality. How else to handle the world that is not a binary one except by reducing it through the bivalency of the code in a way that makes it yield information? It is for this reason that reduction is an "achievement". Things are meaningful as relevant to the code difference; because the legal system observes "itself and everything else in terms of legal/illegal and must make indications on the basis of that distinction" (1985b, 393) All communication that aligns itself to this distinction belongs to and constitutes the legal system. Out of the infinite possibilities of describing a person's action, for example, the legal system addresses what is relevant to deeming it legal or illegal. Further, the person's will is thematised as intention or motive because that is conducive to a legal characterisation of his/her action. The economic system may re-cast that expression of the will as economic-rational preference, the political system assess it in terms of support or disaffection to Government or Opposition. Each system restricts on its own terms the ambit of what is meaningful by filtering communication through system-relevance established by the code. Further distinctions (programming) build on the code: intended/not-intended, fault/strict liability, incitement/ free expression, occupational/ political demand, speech/ action. All the distinctions on the one hand draw on the system's reduction of the World to a single difference (legal/illegal), while at the same time building up the system's internal complexity, that allows it to "see" more things, and cope more adequately with external reality.

In this sense the code enables the system to "construct" its environment, to set itself in context; it enables it to observe environmental stimuli on the basis of the distinction and deal with them by each time indicating one side of the binary schema. The structural technique that makes this possible is a "difference technique".<sup>171</sup> The system introduces its own

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<sup>169</sup> Cf Rottleutner, 1989b, 792. See Smith S C, 1991, 329-31, for a response.

<sup>170</sup> Much has been made of the translation of the original recht/Unrecht into english. A convincing alternative, I think, is lawful/unlawful.

<sup>171</sup> Autopoietic theory is clearly structuralist here. For Saussure concepts "sont purement différentiels, définis non pas positivement par leur contenu, mais négativement par leur rapports avec les autres termes du système. Leur plus exacte caractéristique est d'être ce que les autres ne sont pas (1973, p162).

As systems operationalise different distinction schemas, concepts, for Luhmann too, are not free-floating signifiers, but draw their meaning from the difference pattern that is in each case operative. To use one of his favourite examples, the concept of society means in each case something different, depending on whether the observation draws on the distinction society/state (eg a liberal observes) or society/individual (a sociologist observes) or society/nature (Rousseau observes), or society (Gesellschaft) / Gemeinschaft (a 'communitarian' observes). What side holds up the mirror for the indication of its other makes all the difference; observation both depends and draws on that unity. Its 'meaning schema' (1986e, 122) is contained in the distinction it puts forward (early/late, useful/catastrophic, system/environment), thus bringing much richer meaning possibilities into play

distinction and on that basis grasps states and events as information. The "difference technique" is the device that the system employs to decipher complexity by enacting a system specific reduction which results in a system-centric representation of reality. It is thus that the distinction "establishes a universe, sets up systemic boundaries, structures a discourse" (Grundmann, 1990, p33). Together coding and programming provide the cluster of differences through which the world is localised within the system. Primacy of course lies with the code that that underlies the identity of the system and ultimately generates information; it does not determine, however "which pieces of information are called for and which selection they trigger" (1982, p107). Programming provides criteria for fixing the conditions for suitability of selections. In science, for example, the requirement of suitability belongs to theory and method, on the basis of which the truth or falsity of scientific statements can be assessed. Structures themselves can be varied at the level of programming, as is ultimately the case with a paradigm shift in science, without the system thereby losing its identity, which depends on the coding. To move this to law: norms (programs) provide the correctness of the allocation of legality and illegality (code), method (program again) here consisting of rules of interpretation of norms; structural variations, in law, occur when norms are varied through new legislation or new constitutional interpretations.

To recapitulate: the identity of the system comes about at the level of the code. The system's identity as tautology (legal is what is legal) is replaced here by identity as difference (the law is the difference between legal and illegal). But the symmetry has to be broken because it is otherwise unproductive for the system. On the basis of programming (other differences) the system is allowed to steer its operations by allocating events to either side of the contrast-schema. Together coding and programming allows the system to see the world in a certain way (it can be legal or illegal, true or false), and to operationalise its mode of seeing. We do not need any more background information in order to make sense of those cryptic and controversial descriptions of systems as "closed and open at the same time", of the legal system, for example, as "cognitively open because normatively closed." It is the difference of coding and programming that makes possible the combination of closure and openness in the same system. These are flip-sides of the same coin, internally linked, mutually supportive, reciprocally enabling: it is the very structural constraints that enable the system to relate to the environment. The system is cognitively open in terms of its means of closure. It is only because the code reduces options and maintains its closure around its code, that it allows a point of view into an otherwise undifferentiated reality and that information about that reality

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and then reducing them through selective designation. Observation is selective designation from a pool of richer possibilities; the bracketing of the non-indicated side holds the mirror for the indicated side.

can build meaningfully. The system's capacity for reaction to the environment, 'resonance', which is steered through programming, rests on the closed polarity of the code. The possibility that the environment registers at all is due to the code, and in that sense closure is a pre-condition for cognitive openness.

Finally, in this context, let me point to a distinction between identity and unity. The system acquires its identity through its characteristic means of reducing complexity, in the act, that is, of imposing sharp edges on the world that has none. But what over and above this reduction accounts for the system's unity? We need to look at the dimension of time here to understand unity, because the system as temporalised acquires its unity over time. Unity comes to the system through the temporal dimension. Notice Luhmann's oft-emphasised departure from structuralism. "Structuralists have never been able to show," says Luhmann, "how a structure can produce an event. At this point, the theory of autopoiesis offers a substantive advance. It is the network of events which reproduces itself, and structures are required for the reproduction of events by events." (1986c, 174-5)<sup>172</sup> Structuralism cannot but conceive of the event as always a realisation of the existing matrix. In a sense post-structuralism redeems structuralism's inability to draw the structure/event distinction. This is what the dimension of time is doing in Luhmann's theory too, and that is why unity over time is a necessary complement to the identity of the system. If it can be said, albeit somehow crudely, that the identity of a communication as systemic instantiates the matrix in a structuralist way, the unity of the system can account for why it is that codes are re-embedded and thus re-specified as the system evolves and why the system thus respecified is still the same one. It is in this sense also, I think, that Teubner's elaborate account of what degree of self-reference counts as autopoiesis should be read. The autopoiesis of the system is maintained only when self-reference as self-observation, self-description, self-organisation and finally hypercyclical linkage<sup>173</sup> makes it possible for the system to re-instate its unity as it changes in time, only on the basis of which unity is the new element still an element of the system, kept within its bounds.

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<sup>172</sup> We will see how structures as expectations perform this function in the chapter to follow (ch3).

<sup>173</sup> Teubner, 1993, ch.2

## Chapter 3

### Political Conflict Under Legal Categories

Peace is nothing more than a change in  
the form of conflict

M Weber

It becomes necessary to have a power  
seemingly above society that would  
alleviate the conflict and keep it  
within bounds of order

F Engels

If, on the one hand, the law is the site of class struggle, its ideology, on the other hand, must make it unaware of the ground on which it is in action. The juridical expression of the relation between law and the political in this way necessarily implies the dialectic of this contradiction.

B Edelman

I will locate my discussion of conflict and law in two prevalent contexts. The first is the broad context of the sociological discussion of the relationship of conflict and society. The second is the narrower one of the "juridification" of conflict. I will engage in both debates (sections 2-4 and 1 respectively), take cues from both, but also distance my position from both by re-working central assumptions from the point of view of systems-theory, or at least of my view of how systems theory makes best sense of both debates. Such a fundamental re-tracing of the interrelationship between conflict, law and society aims to confront the deep and multi-faceted mis-understandings that underlie the republican suggestion for the legal containment of politics in the crucial area of political conflict.

The relationship between conflict and society has been sociologically elaborated in two basic ways, each informed by radically different orientations and concerns. For the one "school", conflict is constitutive of society. Society *is* its conflictual reproduction. Typical of this orientation, Marxist theory claims class cleavage and conflict thereover as constitutive of society. The second orientation, sociological functionalism, sees society not in terms of cleavage but of an equilibrium of interrelated functions. Conflict is understood in its performing certain functions in society. Taking the cue from Durkheim, this tradition has developed very elaborate and insightful analyses of the role of conflict in society, its various performances where what may initially appear as a problem is reversed as functional. My discussions of Touraine on the one hand and of Simmel and Coser on the other, brings into my analysis some of the work done in both traditions and, in one sense at least attempts to bridge them. I will use the terms "constitutive" to refer to conflict in the first tradition, the term "phenomenal" for the second. Anticipating much of what is to come, it can be said that systems theory accommodates both positions by posing the question of conflict as one of observation; observation and expectation structures mediate the disparity and allow both positions, but not simultaneously. An observer at any one time can see either one or the other state of affairs: either a state of conflict co-terminous with society or one where conflict is a pathology that performs certain functions in society.

I will take up this discussion in section 2 of this chapter. In the meantime, in a rather counter-intuitive move, I want to briefly locate my position regarding the other of the questions, the juridification of conflict. The republicans claim that law can contain politics and a crucial aspect of this is that law can contain political conflict. Much of the literature on juridification, too, purports to be about that containment. My own position is quite different here, not attentive to the many subtleties of the juridification literature. I do not accept that only a certain type of law - regulatory law - has the adverse effects tied with juridification. Instead my claim is that all political conflict in law, all conflict juridified, is conflict

de-politicised. Is all conflict then political to begin with? Yes, implicitly. <sup>174</sup>

## I

### The Juridification of Conflict

The rapidly growing literature on the "juridification of social spheres" seems a natural point of departure for this discussion of the legal containment of political conflict. Juridification is a term meant to denote not merely the increasing legal sanctioning of communication and action but more crucially the process whereby the law defines for itself the realm of its application, selectively bringing it into existence. This is an insight as old as sociology itself, so that neither the idea nor the term itself can claim any great novelty; in fact by the time Habermas popularised the latter, it already had a long history, loaded with political significance. Juridification was a denunciatory term used by radical labour lawyers in Germany in the 30s to describe the "petrification" of class conflict.<sup>175</sup> What Habermas did was to abstract the term from its origin in labour relations and to use it to designate what he describes as a legal impingement on the social domain, a process whereby a spontaneous social context comes under legal sway. This is the theory of juridification as the colonization of the lifeworld.<sup>176</sup> This is a complex argument to which very little reference is made in what follows as I find the category both over- and under-inclusive; my own reliance on the concept of juridification is from the systems theoretical perspective and aims to illustrate the ways in which the law appropriates and depletes politics by legally differentiating out the area of what is significant as political.

I will focus the discussion of juridification on conflict and, initially, employ Teubner's account of the phenomenon to set my own discussion in context. This is not only because Teubner's introductory article in the Juridification of Social Spheres (1987) is, despite its brevity, one of the most comprehensive accounts of the problem to date. But also because while locating my argument in the context of his mapping of the debates, I want to argue against him that the juridification of conflict *is* its de-politicisation. This is in fact the crux of the whole argument of this chapter against the republican thesis of the legal containment of conflict.

Teubner clarifies at the outset that to explore juridification as a problem of law in

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<sup>174</sup> My discussion of reflexivity in the last chapter is relevant to this assertion

<sup>175</sup> Fraenkel and Kirchheimer, in Teubner, 1987, 9

<sup>176</sup> Habermas, 1984, esp. vol.2, 113ff



general would be asking the concept to do too much work; rather juridification can be more fruitfully explored as a problem associated with a special type of law: regulatory law. This is the type of law instrumental to the implementation of Welfare State policy, and juridification becomes an umbrella term to cover questions of function, legitimacy, structure and success of this "managerial" type of law<sup>177</sup>. Teubner sets aside the usual frameworks for explaining the problem and instead pursues the explanation as a question of "structural coupling" between the political system, where regulatory strategies are hampered, the legal system that is the former's means of implementing that policy and the social field to be regulated, each with its autonomous logic that defies direct manipulation. Problems of juridification then appear as failures to respect the boundaries and logics of the systems involved, a failure to see that what is really involved is in fact a co-evolution of autopoietic systems, only reciprocally stimulated, not causally inter-acted. It is all too easy to overstep boundaries on all sides in this delicate process. The result of such over-stepping is experienced as juridification.<sup>178</sup>

In Teubner's analysis, questions of the function, legitimacy, structure etc of the law are explored in view of the law's failure to achieve the goals it was set to achieve. Thus juridification is a name for that failure. Teubner's account is motivated by the desire to address questions of regulatory failure ( a motivating force behind much of his work). This is important because it makes much of Teubner's account uninteresting to an analysis that is not driven by a concern about regulatory failures; for me, it also points to the limits of Teubner's account in what concerns "the expropriation of conflict", and the easy dismissal on his part of a question that I will argue is broader.

Teubner begins with an attempt to establish an adequate definition of the term "juridification", not "for terminological clarity", "but in order to create a working framework." Conceptions of juridification, he says, "always contain a theory of the conditions in which it is developed, an evaluation of its consequences and a strategy for dealing with it." (1987) I suggest that Teubner opts for the definition he does because he has a "strategy for dealing with it." On the road to establishing, on the basis of the strategy, his own preferred definition, he visits the options not taken.

The first option, that which identifies juridification as "legal explosion", an inflation of laws, can be discarded for relying on a quantitative criterion that is of practically no use. Because where would the threshold of tolerable quantity be set and why? To answer those questions would be to engage seriously with the problem of a definition, and "inflation of norms" pure and simple allows no purchase into that. The second and third options are more promising. My own suggestion, as I will explain later, is for an understanding of juridification

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<sup>177</sup> Kamenka and Tay, 1975, 127ff, Unger, 1976, 58ff, Cotterrell, 1984, 171ff

<sup>178</sup> On the relevant to this notion of the "regulatory trilemma" see Teubner, 1983 and 1987

that includes both these categories but cuts across the ways Teubner has defined them.

The second definition of juridification, that Teubner draws from legal sociology, is that of "the expropriation of conflict." Juridification here becomes "a process in which human conflicts are, through formalization, torn out of their living context and distorted by being subjected to legal processes. Juridification, as it were, is the expropriation of conflict."<sup>179</sup> This is the crux of juridification as expropriation of conflict. As Teubner very concisely puts it, "in this view juridification does not solve conflicts but alienates them. It mutilates the social conflict, reducing it to a legal case and thereby excludes the possibility of an adequate future-oriented, socially rewarding resolution." (p9)

Teubner also suggests that there exists a third definition of juridification that he distinguishes from the second. The focal element in this definition is de-politicisation. This definition, not adequately worked out in Teubner's article, pivots on a co-operation/conflict distinction with examples here drawn exclusively from the area of labour law. "Juridification re-enforces cooperative trade union policies ... at the expense of "conflictive" trade union policy." The reference here seems to be exclusively to the old, original meaning of the term in the context of labour relations, the dilemma which presented itself as the legal institutionalisation of employment relations threatening to petrify class-conflictual action.

Having discarded the first quantitative approach to the problem as naïve, Teubner turns to the second and third accounts. What, he asks, is the problem with the accounts of juridification as expropriation and as de-politicisation? He identifies failures in these accounts of juridification by relying exclusively on "the strategies" proposed for dealing with the problem. He only finds these accounts of juridification "wanting" in that he finds the strategies put forward wanting. In dealing with the first of these, the problems that he identifies are all to do with the "alternatives to juridification" proposed by the exponents of informal justice. He, rightly I think, finds the strategy of informal justice as only surrendering conflict to different power constellations. More broadly he finds the relevant school in legal sociology misguided in "confining itself to the classical tasks of law (conflict regulation) and has only marginally concerned itself with the really explosive aspects of modern juridification (social regulation)."<sup>180</sup> Rather than focusing on "the explosive effects of law that threatens

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<sup>179</sup> Typically Christie's notion of "conflicts as property" would fall under this category. He argues for an organization of social systems such that "conflicts are both nurtured and made visible and also see it that professionals do not monopolise the handling of them." (1977, 1) There does remain the question of course as to what the nature of the free-floating signifier "conflict" is, and also whether Christie's idea is not self-defeating by relying on the legal notion of property to save conflict from law.

<sup>180</sup> What's the point of this contra-distinction, one may ask at this stage. Is the former not instrumental to, or even identical to, the latter? What Teubner has in mind, that makes sense of this dichotomy, is a distinction ultimately between the function of law - tied to but not identical with the former -, and law's performance, its instrumentalisation towards policy implementation.

entire social spheres", this first, "legal-sociological formulation of the question, harmlessly and almost provincially" locates the problem as one "delivering up conflicts to the court system." In the end juridification as expropriation of conflict is confined by Teubner to a "judiciary-critical" definition which he is happy to dismiss as an account of a relatively insignificant part of the problem.

Having dealt with the first category, Teubner turns to juridification as depoliticisation, a problem he sees as "limited to the labor union perspective" and "abstains from socio-structural explanations." He also "finds wanting" this second, "political science perspective which sees juridification as restricting the room for manoeuvre of social movements and interest groups." On this account juridification "tends to depoliticise social conflicts by drastically limiting the labor unions' possibilities of militant action." Again, what Teubner seeks in his analysis of this approach is the "implied counter-strategy" it suggests.

I will argue two things. The first is that the distinction between the second and third categories cannot be seriously maintained. The expropriation of conflict *is* its depoliticisation. The "cooperative or conflictive strategy" dilemma is only a case (in Labour Law) of the dilemma present in all expropriation: of either "buying into" the official discourse, in which case the original conflict disappears, or of not being heard at all. The second thing I will argue, in the sections to follow, is that expropriation as de-politicisation represents the crux of what is at stake in juridification: the re-enactment of conflict from law's point of view.

I suggest that Teubner's analysis ignores both these points because it is driven solely by the attempt to rebut accounts of juridification on the basis that they do not suggest feasible or desirable counter-strategies. No doubt the way one sets up a problem pre-empts certain ways of dealing with it, but the set-up of a problem and its treatment are distinct questions. More importantly, in the process of dealing with the category of "expropriation", Teubner gradually belittles it to a judiciary-critical account, important no doubt, but certainly not broad enough. But there is no reason for this confinement. It is only because he quietly allows the slip, that Teubner can then designate the central category of de-politicisation - that one naturally assumes is a central category of expropriation - as distinct. Why is it important to resist this distinction and instead assume that de-politicisation is an instance of expropriation? Because a conflict conceived as a political one, in class-conflictual terms typically, is expropriated when cast in law, in a significantly similar way that a "vital" or "spontaneous" conflict is expropriated when cast in law. In both cases, system-internal relevancies are projected to make sense of the conflict, which then resonates in law in an alienated way or, as I will argue soon, is re-enacted in a way that distorts and depletes it. If moreover, as I will explain, the political is reflexive and harbours as such a conflict over conflict, to juridify is indeed (not only to expropriate but also) to de-politicise.

Of course all this creates problems that Teubner's careful account evades; most importantly his analysis evades the difficult designation of the point at which a conflict is expropriated, "mutilated", uprooted from its spontaneous setting, usurped. This is a difficult designation because to a large extent conflicts are first cast in law: law prompts, furnishes and creates conflict.<sup>181</sup> To delineate an area of "original" conflict that can be usurped involves very difficult questions about the socialisation of law and the socialisation of actors into law, questions of the law's relative weight in social discourse etc. Teubner's account steers clear of these problems but at a cost. I don't intend to go into these questions any further because the argument of this chapter does not depend on such a delineation. The argument merely assumes *ex hypothesi* that actors often enough entertain normative orientations underpinning conflictual positions that may be irrelevant or hostile to law. The term "political" is reserved for the freedom to contest the terms in which conflict is cast, and sees in law this possibility withdrawn. In that sense law usurps politics by eradicating conflict over the terms of conflict, thus expropriates and *in the same move*, thus depoliticises.

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7 for an interesting account of how this happens see Festiner, Abel and Sarat, 1980. For my own account, see ch 3 s 3, below

## II Double Contingency

Before I deal with the question of conflict "constitutive" and "phenomenal" (and its relation to law) I need to discard an ideological use of the distinction that only tends to confuse the issues in order to set up easy targets. This ideological use of the distinction mis-identifies "phenomenal" conflict with equilibrium, consensus and conservatism, and "constitutive" conflict with change. Associated with this, there has been a deep divide in much sociological literature between perspectives furnished by such purportedly exclusive alternatives as conflict and consensus. Conflict theory and consensus theory are all too often seen as seeking their departure from, gaining their leverage from, and positing some kind of teleology to, mutually exclusive alternatives. This in turn has occasionally led to simplistic equations of consensus to social structure and conflict to social dynamics. Confrontations on that basis have not been rare. For example, Lewis Coser's analysis of the function of social conflict of upholding group structures has been criticised by conflict theorists as depleting the radical potential of conflict theory.<sup>182</sup> This dichotomisation simply confuses the issues. Conflict is as much inimical to social structures as it is intrinsic to them. Cooperation contains conflict as it does consensus.<sup>183</sup> Of course whether one approaches questions from the point of view of conflict or consensus pre-empts much of what one finds, yet it is simplistic to deny the value of either theory by imputing pre-destinations or pre-commitments (constancy/dynamics) to either. 184 185

Systems theory, too, invites a reconciliation of the exclusive alternatives by making the stronger claim that it is in fact impossible to keep them apart (except temporarily, as a distinction that "unfolds" a tautology - see earlier discussion on distinctions and observation). For, as Luhmann would say, is it not the case that conflict is always-already in cooperation as

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<sup>182</sup> see Rex (1961) and Coser's answer in (1965, p5 and passim)

<sup>183</sup> "The more one thinks of it the more he will see that conflict and co-operation are not separable things, but phases of one process which always involves something of both." (Coser, 1956, 18. Also Coser, 1965, pp11, 26.) See also Simmel: "Contradiction and conflict not only precede unity but are operative in it at every moment of its existence." (1955, 13)

<sup>184</sup> "The kind of theory we have been suggesting is, by its very nature, a theory of social disruption and social change. Finally, something should therefore be said about the rather unexpected theory that conflict contributes to the stability of systems." (Rex, 1981, 72)

<sup>185</sup> For an early (pre-Habermas) inventory of the notions of conflict, consensus and cooperation for sociology, Horowitz's excellent study (1962) may still serve as a point of departure, in spite of its leaning towards defending conflict theory from the threat of its absorption into consensus theories.

implicit regulative of its forms and conditions? <sup>186</sup> In any case, to make sense of conflict systems-theoretically we will have to take a few steps back from the distinction conflict/consensus and pick up the thread at the level of the most basic question of sociology: how is the social possible? (and hence also, how is meaningful social interaction possible at all?) This is the prior question to all other questions and the set-up of all sociological categories, including that of conflict at issue here. Before any pattern of social interaction can be designated and distinguished, be that cooperation or conflict, it is necessary to establish how social interaction is possible in the first place. This may seem an extreme question but it is less so in view of Luhmann's account of society's overwhelming complexity.<sup>187</sup> Since society is (the sum total of) communications then the most basic question for the theory of society becomes "how is a communication possible?", or in the way that Luhmann breaks up the elementary communication, "how is the information content of Ego's utterance understood by Alter"? The cue that Luhmann takes from Parsons is that the answer to this most basic of sociological questions should be approached as a problem of Double Contingency (henceforth DC). <sup>188</sup>

My purpose in the present chapter is to deal with questions of conflict and the law and attempt to demonstrate the impossibility of the containment of the former in the latter. I begin to explore the realm of conflict by taking this discussion back to the question of DC because before we can explore what conflict means we need to explore how expectations articulate to pattern out interaction in the first place albeit conflictual or consensual. Thus the recourse back to the "basic" question allows us to follow Luhmann's re-mapping of the territory on which much of my rebuttal of republicanism depends.

Luhmann returns to Parsons to retrieve a solution to the "unlikeliness" [unwahrscheinlichkeit] <sup>189</sup> of social interaction. Interaction depends on social-cognitive

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<sup>186</sup> The question can of course be approached from the point of view of the 'reflexive value of negation'. We know what it means to trust because we know what distrust is, we love "relexively" in the mirror of the lack of love: thus with cooperation draws from conflict: not only are they not mutually exclusive forms of interaction, but conflict is built into cooperation itself as secret regulative, ie as reflexive negation.

<sup>187</sup> "Wie ist soziale Ordnung möglich?" In Luhmann, 1975c

<sup>188</sup> An early comprehensive discussion of Double Contingency is contained in the Rechtssoziologie. As this is Luhmann of the pre-autopoiesis turn, one must be careful in selecting what part of this work is consistent with his later writings. Indeed that discussion has been qualified later in Soziale Systeme (ps 148-190) (Earlier in 1971, ps44ff, later, indicatively, 1990c). The following discussion draws, with caution, on both.

<sup>189</sup> Luhmann, 1984, 165

concepts regarding Ego/Alter relations. Interaction requires that the social actor (Ego) relate the meaningful sense of his/her action to that of others. Interaction implies that success or failure of a communicative offer oriented to Alter depends on what Alter expects. Otherwise there is no communication. In order to achieve this elementary interaction with Alter, Ego not only has to predict and take account of Alter's behaviour but also Alter's expectations of Ego's behaviour. This creates a double indeterminacy that has to be settled. Parsons uses "contingency" in the sense of "dependence" and the term "double contingency" to designate the double dependence of Ego's action on both Alter's behaviour and on Alter's expectation of Ego's behaviour. Because Ego's perspective on Ego/Alter relationships must take on board (is contingent on) Alter's perspective, there exists in this inter-dependence two self/other cycles that need to be coordinated. The locus classicus in Parsons for describing this interdependence is the following:

"Since the outcome of ego's action (eg success in the achievement of a goal) is contingent on alter's reaction to what ego does, ego becomes oriented not only to alter's probable overt behaviour, but also what ego interprets to be alter's expectations relative to ego's behaviour since ego expects that alter's expectations will influence alter's behaviour" (Parsons, 1962, p105) 190

In order for people to inter-relate their behaviour, the complexity of this double indeterminacy has to be reduced, says Parsons, through the mediation of norms. That is because norms serve to integrate mutual expectations of behaviour and stabilise a certain 'complementarity' of expectations (ibid, p15ff). In putting forward this function for norms, Parsons is bringing together Weber and Durkheim at a higher level of abstraction, says Luhmann (1972, p17). Parsons brings together, on the one hand, Weber's focus on the subjective meaning of social action, on the other hand, Durkheim's insistence on the objective social normative structures through which meaning is experienced. Parsons offers an integrating pattern for the two in his account of the function of norms:

"... the double contingency implies the normative orientation of action ... If punishment or reward by alter is repeatedly manifested under certain conditions, this reaction acquires for ego the meaning of an appropriate consequence of ego's conformity with or deviation from the norms of a shared symbolic system. A shared symbolic system is a system of ways of orienting, plus those external symbols which control these ways of orienting, the system being so geared into the action systems of both ego and alter that the external symbol bring forth the same or a complementary pattern of orientation for both of them." (quoted in 1984, 175) 191

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<sup>190</sup> Also for a more detailed account, Parsons and Shils, 1951, pp3-29

<sup>191</sup> Cf Weick: "A mutual equivalence structure can be built and sustained without people knowing the motives of another person, without people having to share goals, and it is not even necessary that

If Luhmann is to accept this, he will first attempt to clear up some Parsonian mis-understandings. There are problems in Parsons' theory that Luhmann points to. The first is the one-sidedness of viewing the structure of social systems as consisting exclusively of normative expectations to the exclusion of other kinds of structures.<sup>192</sup> There is also a second problem that Parsons creates, says Luhmann, when he emphasises 'shared symbolic system' and, underlying it, sufficient value consensus (1984, 175). Parsons' pre-commitment to normative integration overestimates the consensus that is structurally necessary, or that exists. (1975a, 73-74) Luhmann argues that neither the possibility of such consensus nor (contra Habermas) the willingness of actors to reach it can be guaranteed at the outset. Assuming it on the basis of a shared cultural background, leads Parsons to over-estimate the integrative function of culture which he uses as a ready for use provision, a postulate that begs the crucial question of how it came to be. (1984, pp149ff)

Luhmann returns to fill in these gaps by emphasising Parsons' failure to engage with the dimension of time. The postulate of "culture" needs to be re-thought as a process of repetition in actual social practice. In the extract quoted above, Luhmann tells us that Parsons should have put the emphasis on 'repeatedly' to denote the notion of time as constitutive of normative orientation. Double contingency is transformed into ordered interaction, to begin with, as a process that repeats itself, and also, significantly, as a process where self-referentiality is at play.

Parsons' formulation of the problem of DC allows Luhmann a departure into his own preoccupations with complexity and contingency. The complexity of the social world that results from the fact that Alter's behaviour needs also to be seen as a selection from a number of possibilities must be reduced for meaningful communication and interaction to become possible. There is a need in other words for fixing a context. This context will furnish a background of mutual expectancy that will accommodate the reciprocal communicative offers. Only thus will the radical indeterminacy inherent in DC, in the fact that the selectivity of experience and action is not yet context-bound, be disciplined. In Luhmann's more precise language of system, that radical contingency is reduced through systemic "expectancy" structures that provide for the expectations of expectations through system-specific reductions - i.e. system-enforced selectivity - a kind of 'channelling' of communication. It is important to stress that it is this channeling into a "systemic" frame of reference that first enables

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people know the entire structure or know who their partners are. What is crucial in a mutual equivalence structure is mutual prediction, not mutual sharing." (1979, 100)

<sup>192</sup> ... other structures which are then integrated into other component systems of the whole action system, a displacement that obscures the function of the normative in society - see also 1972, ch1, n.23



meaningful interchange. We will take a closer look at what this means and why it should be so.

Double contingency spells incommunicability if Ego's and Alter's communicative offers do not articulate and mutually resonate.<sup>193</sup> Interaction first becomes meaningful when the communicative offer is bound to a common context that alone allows its recognition. More precisely, Luhmann talks of a reduction of double contingency through a structuring into frameworks that have the form of "expectations of expectations". Communication becomes context-bound in being integrated into these structures. The structuring effect first allows every single communication to surface as meaningful (therefore as communication), as the common ground where Ego meets Alter around a communication they both understand; where, that is, the informational intention uttered by Ego is understood by Alter.

Therefore: what is understood as a communication depends on how the context accommodates the communicative offer, what Alter expects and what Ego expects Alter to expect. This varies according to how the structures set up the interaction, how the message is filtered into the specific framework of expectations of expectations. And it is in time that such contexts form, as recurrent schemas of processing messages, ways of doing things that consolidate through repetition, rather than, for example, Parsons' fast recourse to culture. Our previous discussion of the unity of the system is particularly important here. The system is dynamic, its unity compounded in time as structures produce events-as-communications that are tested, feed back and re-embed the structures, thus reproducing the system. In time, then, systems come about, as constraints that facilitate meaning. And this is no paradox: only constraints as reductions can allow intelligibility and interaction by setting up a context, and carving out only a certain part of the totality (of possible communication) as expectable. The expectability of expectations underlies all social interaction, but acquires specific forms through specific reductions that are particular to systems. Recognition of Alter's intended meaning must be structurally facilitated or it will remain underdetermined. The structural processing is effected through systems, the set-up of specific templates that impose specific reductions to the open contingency of (proto-) communication and make it structured and meaningful. What reductions structures impose has to do with what observation-schemas the system avails to make sense of reality, what thematisations, what programming it activates and the rest. A lot has been said, and will still be said, about how the selectivity mechanisms set up the system domain and how themes of communication develop, around which communicative offers may be organised. Taking it all back to DC allows Luhmann to establish that communication is only possible through reductions which are in turn premised on system selectivity. In his own words "Kommunikation ist koordinierte Selektivität." (1984,

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<sup>193</sup> My frequent use of the term 'resonate' throughout the thesis is to allude to the "order from noise" formula.

212) It is of constitutive importance for communication that communicative offers crystallise in systems around selective alignments of meaning selections (SS, p192) and thus ensure the possibility of successful communication.

Retracing the problem of DC not only allows Luhmann to begin from what he construes as the most basic question of sociology, but also points a way out of traditional impasses sociologists have faced when tackling such fundamental questions. Let us take the example of the traditional sociology of roles to trace some of the problems encountered with DC. Interacting actors, says Parsons, perform roles which are orientations "organized about expectations in relation to a particular interaction context." (1951, 38-9) But the interaction contexts are numerous. In standard role theory, multiple roles - as mediators between structure and agency - substitute for "concrete others" in order to meet the functionally specific requirements of communication of modern industrial societies.<sup>194</sup> "So far theories of role-taking," says Max Miller, "concentrate only on one side of double contingency. They have been interested in ego's or alter's abilities to take multiple roles or perspectives, and they have left open the question how this taking of multiple roles or perspectives can be coordinated between ego and alter." (1992, 10) The problem Miller is identifying is that while the assumption of roles by individuals is extensively covered, the co-ordination of multiple roles, the problem of DC, is not, and theory has indeed faced great difficulties in addressing that question.

In my view, systems theory treats this problem of the co-ordination of multiple role-taking in a way that turns what is seen as a deficit in theory construction into a source of sociological insight. A system ascribes roles as descriptions of identity, it allocates roles as the points of attribution and address of Ego and Alter within the system; roles are Ego's and Alter's "modes of entry" into the system. Roles are part of the system's selectivity mechanisms, an aspect of its reduction achievement, the means through which the system simplifies the unbearable complexity of the interaction of the "concrete" Ego and Alter. Through its specific mode of reducing complexity, then, the system establishes the possibility of communication between Ego and Alter as always-already role-players. Motive, identity, implied reciprocities that stem from role, are always-already aligned system specifically. So what about co-ordination problems? The answer that systems theory has to offer is that the problem of co-ordination of multiple roles is a real social problem due to the fact that systems do not articulate amongst themselves and also do not admit any meta-coordination or meta-metric. So what appear to Miller and others as problems of theory construction, are instead dealt with as real problems that result from the fact that systemic logics do not meet at

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<sup>194</sup> Roles, stresses Dahrendorf are more than just patterns of human activity. The connection with expectations is crucial. Roles are "expected modes of behaviour corresponding to social positions." Dahrendorf, 1968, p35

any level. Luhmann's answer is that role-indeterminacy as context-indeterminacy becomes settled by the system but only for the system. Co-ordination is settled by the system because the system that is doing the reduction work is thereby fixing the contingency space within which the interlocutors' offers can be nothing but co-ordinated, as each takes up one of two exclusive alternatives, the yes- or no- option (see above, on operations and linkage).<sup>195</sup> But co-ordination is thus settled only for the system. In the absence of any hierarchy between systems or meta-level at which (role-taking) differences between systems could be settled, role-coordination remains forever open to competing contingencies, competing observations as to what Ego expects of Alter and what is expected of Ego to expect Alter to expect. <sup>196</sup>  
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We must at this stage identify the variety of stages or number of filters through which DC is handled by each system and crystallises around specific structures of expectations. It is a constitutive feature of all social systems that they provide for their self-structuring, in a self-referential way. But the level of self-reference varies depending on the complexity of the system. In simple interaction systems the selectivity achievement is low and develops on a kind of base level of self-referentiality [basale Selbstreferenz]; central themes develop and communicative offers are made sense of on the basis of contributing or not to the theme. For example, one's communicative offer of raising one's hand in simple interaction systems may serve as a salute in one encounter, may signal approval in a debate, a bid in an auction, a request to speak in class. In more complex systems, including of course functional sub-systems like law, politics etc, a second-order self-referentiality develops, which Luhmann calls "Reflexivität" (1984, p601, 610ff). It is here that one would speak of structures taking hold as expectations of expectations, providing for the meaningfulness of communicative offers. The selectivity achievement, in complex systems, is thus premised on a second level of self-referentiality. <sup>198</sup>

At the level of reflexivity, expectations can be integrated and maintained in social systems. "Integrated" in that double contingency is "disciplined" through a structure that

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<sup>195</sup> Context-indeterminacy is thus also settled by the system self-referentially, as the system establishes itself as the arbitrator of the co-ordination problem

<sup>196</sup> Problems of alienation, role-strain etc therefore come about due to the synchronicity of multiple/competing systemic role ascriptions

<sup>197</sup> I would like to thank Beverley Brown for helping me clear up some confusion concerning role-theory

<sup>198</sup> At a third level of self-referentiality, Luhmann identifies "Reflexion" as the final controller of selectivity, setting further conditions for the integration of communications in complex systems. (1984, 610)

delimits what expectations are compatible within the domain of the system. "Maintained" because a provision for cases of disappointment "is built into the system itself" (1971, 46) so that the non-fulfilment of Ego's expectation does not discredit the expectation but only disappoints it; Ego does not assume that he has not been understood but that he has been understood and rejected. The expectation is not dissolved but rather maintained or corrected in given ways. 199

Double contingency, in Luhmann's words, constitutes "die Grundlage für den Aufbau sozialer Ordnung und für die ihr entsprechende Erwartungsunsicherheit" (1981, p99) 200 - the very foundation for the most primary form of social order. A number of templates/systems absorbs the double uncertainty of expectations in specific ways. "Double uncertainty" is replaced by "single" uncertainty: social systems stabilize "objectively" valid expectation. Only once we agree on what we disagree about can we meaningfully disagree. The absorption of uncertainty occurs at the initial agreement, which is (more accurately) the setting up of a context of disagreement. I am still uncertain whether you will agree or disagree but my uncertainty is premised on the absorption of a second-order uncertainty of what we will disagree about, an absorption that is the foundation of order. Concurrence or contrast, consensus and dissent acquire a rational basis,<sup>201</sup> conflict becomes optimally finite.

There remain, of course, many templates that may effect the second-order absorption and consequently many contexts against which the terms of disagreement can be cast. The argument of this chapter is against the false necessity of seeing only one - law. 202

### Some interim conclusions.

1. Note a point already made earlier as to the existence of structures (expectations of expectations). Systems are fully temporalised and exist at the level of elements. Structures do not exist in the same way that elements do. As emergent properties of systemic reproduction

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<sup>199</sup> It needs to be clarified that all this is at a level prior to the distinction normative/cognitive expectations that we will analyse in the next section.

<sup>200</sup> "the foundation of social order and the corresponding uncertainty of expectations". See also 1992a, 94-5

<sup>201</sup> I am alluding to Max Miller's notion of "rational dissent" here (1987, 1994)

<sup>202</sup> It is a bit early to identify the 'political' at this stage, before the absorption. This can only be explained at a later stage, after the limitations of the process of 'absorption' into different templates is illuminated.

they allow the production of new elements thus underpinning the unity of the system. Functionally speaking they allow for a matching of elements, they make it possible for new elements to link up (Anschlussfähigkeit). They provide a kind of memory that allows the recognition of a new element as one belonging to the system. This has been their function as reflexive expectations: as constraints on possible communicative offers, they have provided for a "fit" with previous systemic communications and thus linkage capacity. Their existence is however always complementary to the elements, only in terms of which the system exists.

2. Luhmann maintains that the existence of double contingency as a real problem is a productive factor for human interaction, because new systems, therefore new possibilities of communication, emerge to deal with it. And whereas double contingency underpins all social interaction, it is settled by each system for itself <sup>203</sup> and establishes the reality of each system at a distinct level. At this distinct level meaningful interaction is settled objectively along systemic lines and "order" is achieved that is specific to the system. For social systems where "reflexivity" is at play this means that a level of reality is established, at which meaningful interaction is stabilised and maintained that is not reducible to the persons involved (below, 2.1) nor their (simple) interaction system (below, 2.2).

2.1. The settlement of DC at the level of the social system is the emergence of a level of interaction where the contingency of the interplay of the actions of Ego and Alter is facilitated according to intentions determined and imputed system-specifically, self-referentially (again, of course, trivially, it is the individuals who have intentions). It is in this sense that the system displaces the actor: intentions are handled by the system. What does this mean exactly? It means that the system designates a specific contingency space for intention: ego may either intend a or not-a where a and not-a are exclusive alternatives specific to the observation possibilities of the system. Such imputation of intention cannot be defied by the actor. The actor cannot defy, in law, the meaning of his/her action as settled by law. Because his/her defiance will resonate in the system in ways (through contingencies) that undercut other possible intentions. Denunciation resonating in law as contempt (chapter 4) is a case in point. This re-alignment of intention applies even to silence. The political actor may decide to defy the law or play along. Either way his/her behavior will not discredit a legal expectation. Whatever a "political" intention to remain silent, the silence will be thematised into law around specific contingencies; law settles the options of what silence means for itself. That is

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<sup>203</sup> "Autocatalytically" Luhmann will add: "[DC] ermöglicht, ohne selbst verbraucht zu werden, den Aufbau von Strukturen auf einer neuen Ordnungsebene ... Dabei ist, deshalb kann man von Auto-katalyse sprechen, das Problem der doppelten Kontingenz selbst Bestandteil des Systems, das sich bildet." (SS p170)

why "the Law thinks" <sup>204</sup> in ways that are not reducible to actors' thoughts. It "thinks" on behalf of the actor because it makes sense of what the actor does by reducing the contingency of the actor's intention in ways that are intelligible to the system; the reduction of DC through reflexivity is the system's way of doing just that: of absorbing contingency into specific templates and thus displacing the actor in making sense of intended meaning.

2.2. The self-reference of the settling of contingency in social systems also draws a line between social sub-system (e.g. law, economy, religion, politics) and interaction system. An interaction system is typically one organised around a theme and requires the presence of the interlocutors. There is far greater fluidity in how contingency is settled in interaction than there is for a social sub-system. The interaction system answers to limited structural constraints because what are absent are the more complex requirements a social sub-system has to meet. In the case of a social system settling contingency needs to be effected with an eye to relating it to the system's own stability and continuation (through the more complex processes of reflexivity and reflection).

\* Thesis [1] against republicanism

There is much in the argument of this section already to allow a first tentative rebuttal of the republican argument, a rebuttal that will be further qualified as the argument develops.

As we have seen the problem of DC has been described as a problem of settling or reconciling ego's and alter's differences regarding ego/alter differences. This basic formula of DC involves a second order (a) and a first order (b) contingency. Potential incommunicability from DC gives way to meaningful interaction once contingency (a) has been reduced, and we explored how this reduction is effected in social systems through the double filter of "reflexivity" and "reflection". But this reduction carries a cost and this is the important point against the republican argument. That meaningful interaction requires contingency (a) to be settled, means disciplining the difference over context. Yet if the republicans are going to make an argument about self-determination, they must allow freedom of choice over the context of disagreement. What does this mean more concretely?

First let me point to some repercussions of the argument more generally for the possibility of communication. Among communication theorists, Habermas too ties the possibility (or meaning) of meaning to intersubjective communicative action. For him

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<sup>204</sup> Teubner, 1989

meaning is identical signification in reference to a reciprocal reflexivity of expectations on the part of actors engaged in a communicative exchange.<sup>205</sup> But the problem that DC brings into relief is how is the "reflexivity of expectations" maintained while allowing expectations to articulate in context? How is the reflexivity over context - the leaving open of contingency (a) - compatible with mutual recognition of validity claims that alone allows communication to proceed? The problem of DC is that this initial reflexivity needs to be reduced to make communication successful. Seen from the systems-theoretical perspective, systems are agents for that reduction. Reciprocal reflexivity is purchased, to paraphrase Luhmann here, at "the cost of the peculiar rigidity of its contextual conditions." (1986e 109) In his most recent tour de force - Faktizität und Geltung - Habermas indicates his preferred solution to the dilemma by elevating law into the centrepiece of societal deliberation. To the extent that he does thus turn to law to set the framework of rational discourse he does establish the possibility of meaningful argumentation in context, but at the cost of reflexivity over the contextual conditions. In what terms, for example, will the (philosophical) anarchist communicate that reflexivity other than as a freedom - (rights and democracy are "co-original" now) - always-already disciplined by the contextual conditions, therefore no longer reflexive about them.

Since the republicans also treat law as the centrepiece of political deliberation - the containment thesis - they need to answer the above objection too. But my first thesis against them can be expressed in a much more concrete way. For this we will turn again to their aforementioned argument about "empathy". (above, ch.2, s.3)

Empathy is a key concept of the republican political universe. (See Minow (1987), Winter (1991, 1002)) It receives its fullest elaboration in Sunstein's theory. For him political empathy "embodies the requirement that political actors attempt to assume the position of those who disagree." A second related requirement is that citizens during the deliberative process should set aside their own perspective and "think from the point of view of everybody." (1988, p1569) This is because deliberation requires laws to be "supported by argument and reason" (1544), and private interest cannot be a sufficient basis for argument; such private perspectives are cancelled out when one adopts the empathetic stance. Sunstein says: "If the groups cannot actually be included in the deliberation they are to be evocatively

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<sup>205</sup> And Habermas's critique of Luhmann is particularly harsh in this respect. He contends that, in Luhmann, language affords no solid basis upon which ego could meet with alter in a consensus about something. "For communication, language is used - but this simply permits signs to be substituted for meaning ... Suprasubjective linguistic structures would entwine society and individual too tightly with one another. An intersubjectivity of mutual understanding among agents that is achieved via expressions with identical meanings and criticizable validity claims [has no place in Luhmann]. [Neither does] the commonality of any intersubjectively shared context of meaning and reference - that is to an explanation of communicative participation in a lifeworld that is represented in a linguistic world-view." (Habermas, 1987, pp370ff)

included by legislators' and judges' empathy with their perspectives." (in Sullivan, 1988, 1717).

My argument against the republicans here is that empathy cannot survive DC. Empathy, as we saw, is the attempt to assume the positions of those who disagree. Here are empathy's impasses. The problem that DC throws up for empathy is what happens with contingency (a), ie the contingency over context. Empathy always-already presupposes a context which in turn assumes away contingency (a). Why? Because one can empathise with Alter only if one knows or at least expects alter's expectation, just like the exercise of empathy presupposes that at least the parties to the disagreement agree about what they disagree about. The empathetic stance is impossible both outwith the complementarity of expectations and about it. Because to empathise outwith is to fail to empathise. And because does not to empathise about the complementarity open empathy to infinite regress? Empathy thus must assume the expectational framework into existence and thus do away with the contingency of that choice, and with it the potential disagreement over the contextual conditions of the disagreement (contingency (a)). Empathy cannot but assume the double contingency away. But to concede this and assume the complementarity of expectations, i.e. to assume agreement over the disagreement given, is also fatal for empathy. Because as an a priori, it postulates rather than retrieves a commonality of the pattern of disagreement. In the process of thus pulling itself up by its own bootstraps empathy denies that empathy is about articulating with alter's true - not postulated - expectation and becomes its opposite: it turns from Alter-regarding to Alter-excluding.

The "containment thesis" allows the republicans to pass over the difficult question and define away difference (a) by assuming that the political actors' difference over their differences is always-already settled. This is because they take on board law as obvious context. It is a legal blindspot that treats as unproblematic the point of view from which difference is seen. While the legal "reduction achievement" indisputably facilitates, by ruling out potential incommunicability from contingency (a), the price it inflicts is a compromise of freedom and self-determination; freedom to resist legal understandings and self-determination on the basis of that freedom. Law provides one of many rival templates for the absorption of DC. To ignore alternative templates is a decision a priori. To reduce contingency (a) on the basis of that a priori, is to close off the reflexive question over the understanding of differences, which is the political one.



### III

#### **Legal Expectations: The Absorption of DC in Law**

There is as we saw a fundamental need to discipline the DC of social life in order to provide a basis for interaction; in this framework, Luhmann's is a description of how systems counter potential incommunicability. Systems are templates that absorb the double contingency of social life and thereby reduce complexity. This is no easy feat for the complexity is vast: double contingency is, in fact, a short-hand formula that stands in for a multi-dimensional overlap of contingencies. Social interaction may demand that one does not only expect expectations but expects expectations of expectations "and all this with a plurality of thematics, in the face of a plurality of people and with continuously changing relevance from situation to situation" (1972, p28). The dissections of these multiple possibilities are mapped by and stabilized by system specific reductions. Each system as we saw, organises the picture. Each turns, for itself, second order into first-order contingency (contingencies (a) and (b), above). What is designated thus is a specific space for contingency that is a huge reduction in the scope of contingency of possible states. At the first-order level, the uncertainty remains. Something that is legal today may well be illegal tomorrow. But that contingency space is fixed by absorbing the uncertainty at the second-order level of what the uncertainty is about.

In the present section we will turn to the legal system to explore the system-specific reductions that law imposes on DC. In other words we will be exploring how the complexity of the social world is probed and deciphered through legal expectations.

In order to explore how DC is absorbed in law, we will have to turn to the function that law performs in society. Why? It is true that a vast number of systems make sense of social interaction by imposing reductions on DC and yet not all perform a function in society. Not all social systems are differentiated-out as functional sub-systems, not all acquire their identity in connection to a function they perform. As Luhmann stresses "functional orientation is certainly not a requirement for self-referential reproduction." (1984, p406). It is therefore misleading to seek, as Deggau does (1988), the logical and systematic conditions of autopoietic closure - as such - in functional differentiation. But in systems that are differentiated-out as functional sub-systems, function underpins their identity and unity. Because the important thing about the functional sub-systems of society is that they achieve their unity as systems in view of their function. At a second stage, after we have explored the connection of function to the formation of expectations and therefore the autopoiesis of the system - ie the reproduction of elements through the mediation of expectations as structures -

we will turn to the intimate connection of the function of law with conflict.

### The Function of Law

We have already briefly visited the key notion of functional differentiation. For Luhmann, social subsystems are differentiated out of the social system in terms of their performance of a unique function. The function of every sub-system needs to be sought in reference to society, not other sub-systems (for the latter relationship Luhmann reserves the term performance). According to the principle of functional differentiation, a social sub-system is, and can only be, differentiated out of the totality of social communication by performing a function, one that is unique. To compromise this uniqueness would undermine the differentiation principle. All the more so because in functional analysis, a function is understood as a problem area concerning alternatives. If the designation of the function is not itself water-tight and itself invites alternatives - functional equivalents - then the overlapping sets of alternatives at both levels would be devastating. Devastating because function serves as the principle of differentiation here and cannot as such be compromised without undermining the very existence of the system. Hence the one-to-one mapping of (sub-)system and function is essential. In Luhmann's words:

"The system performs a specific function which is not performed anywhere else in society. As a result it becomes possible for the system to treat everything else as environment ... The subsystems relate everything which they use as unity to their function and at the same time can assume that there is no equivalent for this in their environment ... The sub-system [creates its autopoiesis] by exclusive orientation to a function." (1988b, ps26-7)

Let us pause to stress the intimacy of this connection: the system exists by drawing a boundary and isolating itself from all else, where the drawing of the boundary, in functional sub-systems is oriented towards the function that the system performs for society in general. Luhmann says that the legal system is functionally differentiated in that its specific means of achieving closure and openness are informed by its function:

"There exists a connection between the principle of differentiation of the social system [functional differentiation] and the form in which subsystems in society differentiate themselves as self-referentially closed and as open to the environment. ... For the legal system this means the differentiation of a connection between normative closure and cognitive openness. Here that which serves as a contrafactual norm is, in the process of social evolution, increasingly pointed to the function of law." (1988b, 31)

This last point about normative closure points us in the direction of the function of law. Is law about generating "normative" expectations? If it is, is that narrow enough as a

designation of a unique function? Or should we define the function of the law in terms of "social control", "conflict resolution", "co-ordinating behaviour", "social regulation", "discipline and punish", or even, less credibly, "giving lawyers an income"? Which of these captures what is specific about the function of law and thus ground the delineation of the legal and the non-legal?

This is a difficult question and it is an open one. Luhmann has an answer but he invites, like in an auction he says, better offers.<sup>206</sup> It is quite obvious that all the above suggestions, while in themselves important suggestions, cannot do the job. For example, while the law is definitely about producing normative expectations, that is, expectations that do not learn from disappointment, so does morality, as does social custom. But law "claims a specific use of normativity for itself" (1988b, 27). Because in the case of custom, the normative expectation is ad hoc; in the case of both custom and morality there is no way of guaranteeing either the stability or change of the normative expectation as is the case in law, where there exist institutional/systemic guarantees for both their stability and change. In this way law guarantees a kind of second-order normativity, whereby normative expectations, abundant throughout society and operative in many systems, may be normatively expected. Law provides these internal systemic guarantees and thereby "stabilises normative expectations through regulating their temporal, material and social generalisation" (1993a, p91) Law guarantees reliability of normative expectations under recognisable, systemically stipulated, conditions.

So what is the function of the law according to Luhmann. As is often the case with Luhmann, the answer to this has been qualified throughout his writings. According to the early Luhmann of, say, "Die Funktion des Rechts",<sup>207</sup> the function of law consists, merely, in the stabilisation of expectations, an account echoed also in the Rechtssoziologie. Law's function is there described as the 'congruent (consistent across all dimensions) generalization of structures of expectation' (1972, 40ff, or p24ff) since law, functionally understood, "attains selective congruence and therefore forms a structure of social systems" (Rs p77). With the autopoietic turn, with law no longer a structure of society, this account had to be qualified and enriched. Because, as we said, for there to be functional differentiation no two systems could be seen to perform the same function as would be the case if we did not narrow down the account of the legal function. The existence of functional equivalents would erode the premise of functional irreplaceableness, differentiation on the basis of that, and finally systemic closure in view of the function.<sup>208</sup>

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<sup>206</sup> Luhmann, 1992b, 79

<sup>207</sup> Initially 1974; included in Luhmann, 1981

<sup>208</sup> For more detail see 1986b, 120 & 1993a 92

Luhmann's suggestion for the function of law, is that it be viewed in conjunction with "the exploitation of conflict perspectives for the formation and reproduction of congruently generalized behavioural expectations" (1988b, p27).<sup>209</sup> Law achieves order by "using the possibility [better: occasion] of conflict for a generalisation of expectations in temporal, social and substantive aspects." (1986b, p121), a formulation also echoed in his latest book on law (1993a, ch. 3) 210 211

For the remaining part of this section we will take issue with this formulation of the function of law: "the exploitation of conflict perspectives for the formation and reproduction of congruently generalised behavioural expectations", the "generalisation," that is, "of expectations in temporal, social and substantive [material]<sup>212</sup> dimensions." In a nutshell, if rather crudely, it could be said that the function of law is to discipline DC and achieve order by "exploiting" conflict in order to stabilise expectations in particular sorts of ways (temporally, materially, socially). Having explored the function of law, and stressed that only by reference to its function can the legal system differentiate and distinguish itself from the environment, we will now turn to what it means for expectations to be generalised along the three dimensions and explore the role of conflict in (its structural coupling with) the legal system. I will reserve the connection with conflict for the end, simply for reasons of exposition since conflict will be the main pre-occupation of this chapter. For the time being suffice it to say that in order to "generalise" expectations the law relies on (a legal perception of) conflict.

### The generalisation of expectations as legal

A generalisation is an abstraction. Expectations that stand in some "measure of independence" apart from particulars to which they refer can be called generalised. (1984,

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<sup>209</sup> But even the connection with conflict does not as such provide the functional premise. Not only law is geared to the resolution of conflict. Not always resolution: the severity of the win/lose, in the shadow of the law (1988b 25) But also law is not simply about the resolution but also the production of conflict, as we shall see. And not all conflict (many conflicts have been shifted out of the sphere of law - deregulation) and not resolution as such (for example ad hoc resolution).

<sup>210</sup> Which Luhmann deems "a slight variation" 1986b, n.24

<sup>211</sup> Also Teubner: "[T]he central function of law: using the occasion of conflict to create congruently generalized expectations." (1992, 1459)

<sup>212</sup> Luhmann's term "Sach-dimension" has been translated variably as objective, substantive or material dimension. I will employ the last term.

445)<sup>213</sup> Of course one might say that generalisation is of the essence of expectations, that expectations exist as generalisations, as links between instances. Two concrete instances can only link up through an expectation that generalises certain of their features to establish their mutual relevance and thus allow their linking. Luhmann will add that there is a second level at which systems (reflexively) establish and entrench expectations of expectations. It is at this second level that DC is absorbed into functional sub-systems where - through "reflexivity" - expectations are generalised into more abstract types that can be held constant and then "function as generative rules for individual expectations." (1972, 64).<sup>214</sup>

When one generalises one organises particulars into certain patterns, into encompassing categories. A generalisation tracks a distinction between member and class by designating amongst instances certain of their features as significant. In the process of that designation and in order to organise the generic category, a generalisation selects certain aspects of the instances as significant, keeps them constant, and only on the basis of what is selected and kept constant does it include each instance within its ambit as member of a class. As selectivity grids for particulars, generalisations are at once selective inclusions and selective exclusions. In this sense generalisations are "selective suppressions" as Schauer put it recently,<sup>215</sup> but also importantly selective actualisations: they retrieve as instances aspects of the world that meet the properties they designate as relevant to their operation.

Put in this way a generalisation can be clearly seen as a system-specific abstraction. What features are isolated and "kept constant" are particular to each system. The selective organisational principles are many, and in fact a particular instance is at any one time simultaneously absorbed by a number of them (this explains the simultaneity of an infinite number of competing categorisations of events in the world.) But each time, each system actualises the instance from the point of view of what it holds significant and "builds into" its generalisations. I must stress that I am consciously simplifying the picture at this stage of the exposition by implying that the instance has a common ontology amongst systems; it does not. My purpose however here is still to stress something more elementary. That it would be definitely wrong to see generalisations as penetrating through systems; they are specific to systems and run counter to generalisations within other systems.<sup>216</sup> That is why, contra Parsons, the reduction of DC does not rely on generalisations with a social base of the type

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<sup>213</sup> Generalized expectations leave to a greater or lesser extent undetermined as to the content, what exactly is expected ... Through temporal, objective and social generalizations is uncertainty taken up and absorbed."

<sup>214</sup> Thus it is, at this second-order level, that in law one normatively expects normative expectations.

<sup>215</sup> Schauer, 1991, 21

<sup>216</sup> Smith, 1991, 333-4; see examples: the market

"culture", but on the specificity of systemic reductions.

Law uses conflict "for the generalisation of expectations in temporal, social and substantive aspects." Leaving aside the connection with conflict till later, what does it mean for expectations to be generalised - abstracted - in the three directions?

#### (i) The temporal dimension

Law gives a kind of priority to the temporal dimension since legal expectations are primarily understood as a transference of normativity.<sup>217</sup> The system is temporalised, as we have seen, and expectations "carry" it through time in the following sense. The expectation will produce a legal claim to be tested; the claim will be fulfilled or disappointed and in that will furnish a new expectation of the legal position. Within this schematic account of evolution, there has occurred a transference of "normativity" between two points in time. The priority of the temporal dimension for law lies in the transference of this "quality" of meaning from element to element (1988b, 20). What "transferring normativity" means has to do with how the system handles the disappointment of expectations.

Two types of expectation can be differentiated on the basis of how disappointments are handled: normative and cognitive. The nature of expectations as normative and cognitive is based on their different ways of "learning". "Normativity means clinging to expectations despite disappointments" (1972, 22). Cognitive expectations on the other hand "learn" through disappointment. Cognitive expectations change and adapt in cases of disappointment whereas normative expectations do not. This of course is not absolute; as Luhmann points out (1972, 38) normative expectations exceptionally learn as when the law provides procedures for its own change or when the elasticity of legal structures prompts judge-created law. On the other hand cognitive expectations do not always learn as when a disappointment is classified as an exception to the rule; not every slight deviance from the expected results leads to a paradigm shift in science.

To prevent a misunderstanding that has caused some confusion: normativity has no transcendental status across society, there are no social expectations which are "normative" or "cognitive" as such. Rather these qualities have to do with how an expectation is processed within a system, whether the system maintains expectations despite disappointment or not. The system itself, the legal system in this case, will determine which disappointment it will

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<sup>217</sup> "In a way that no other system does, the law processes expectations that are capable of maintaining themselves in situations of conflict." (Luhmann, 1989, 140)

learn from and which it will not; under what conditions it will vary normative expectations. And, of course, as pre-condition to these other questions, it will determine what counts as a disappointment, what events in its environment it reads as having the disappointing effect. This is all to say that no expectation is naturally normative or cognitive. Where an expectation begins; its content; what possibilities of variation it permits; what forces it into variation; how elastic it is; what disappoints it; are all questions that are determined by the system that projects or "releases" expectations for, what Luhmann would call, selective actualisation. With some degree of arbitrariness we could say that the distinction normative/cognitive expectations that is to be found "all over" society, loosely coupled, is taken up and processed by each system, be it morality, even science, and strictly coupled within it - imbued with system-specific thresholds of disappointment.

Legal expectations and their reproduction are seen as an ongoing process. Normativity - generalising expectations as disappointment-proof - is one way in which expectations are stabilised. It is one way in which complexity comes partially under control. And by "combining normative and cognitive, learning and not learning dispositions" (1986b, 122) the system will respond to noise from its environment through perceiving an instance as confirming an expectation, varying its own (expectational) structures to accommodate it, rejecting the stimulus, or ignoring it.

#### (ii) The social dimension

Until now the discussion of double contingency and stabilization of expectation structures had only involved two parties, Ego and Alter. Luhmann reserves the term institutionalisation for the introduction of third parties. For Luhmann, this gives the legal system its social dimension.<sup>218 219</sup>

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<sup>218</sup> This dimension is usually associated only with the backing of expectations with sanctions through the involvement of third parties - the neutral referee. Institutionalization, however, does not only mean that the maintenance of normative counterfactual expectations is supported by the threat of sanctions - this is only part of the story.

<sup>219</sup> Luhmann is not alone in claiming this. Outwith the vast anthropological literature on the function of third parties in dispute settlement, Aubert makes a powerful argument similar to Luhmann's here (1983, pp57-75). His central hypothesis is that "the development of legal thought is a concomitant to the intervention of a third party... When a conflict is turned into a law suit ... the basic interaction changes from a dyad to a triad. Between these two transformations there exists a functional relationship." (pp63, 69) Aubert traces the shifts in the parties' interests, needs, wishes, etc, that accompany the transformation. He concludes that "with the third party the norm of objectivity has been institutionalized." (71) He relates this to a most insightful distinction. He says: "Irrespective of the qualifications and mode of recruitment of the third person, it may be asked why this conceptualization [of the relationship with the third party] should tend to be normative and not causal or functional." Aubert ties his answer - although not in these words - to what he takes to be the emergent quality of the dispute as legal, which demands that the third party normatively co-expect

The most important consequence of the introduction of third parties is that it is through this institutionalisation that the shift from the interactional to the social-systemic context is primarily effected. (See above, s.2.2, on the distinction between social and interaction systems.) Law disciplines the DC of social life because it allows one to abstract one's expectation from the "concrete" Alter. The personality of Alter ceases to determine the context of expectations and is substituted by Alter-as-role-player. Or, what amounts to the same thing, an expectation becomes legal in that it is assumed to be backed by the expected consensus of third parties who know not the concrete Alter and so must rely only in his capacity as role-taker to form expectations. The introduction of third parties as normatively co-expecting means that the expectation context is now first abstracted from the concrete interactional situation and first cast through a system-specific referent. Institutionalization thus abstracts into an impersonal context and allows specifically legal attributions that are removed from the person that expects or is expected to act.

An expectation is legal only if third parties normatively co-expect. This is what is meant by the generalisation of expectation along the social dimension. For the expectation to be legal it must be backed by the expected consensus of third parties (1972, 73). The social dimension of law makes such consensus constitutive of legal expectation. But at the same time the impersonal backdrop for institutionalizing legal expectation makes any pragmatic conditions of consensus irrelevant. Third parties are removed from any concrete context and only in this is the expectation lifted from interactional contexts to the systemic context of law. Any actual consensus is irrelevant, and the power of institutionalisation depends on this irrelevance, on removing the "pragmatic" conditions of any such consensus. The third co-expecting party has no concrete features, no social location. Law depends on the fact that the consensus is fictitious, abstracted from real social relevancies.

Law depends for its existence on this "a-social" social dimension. But how will law thus give content to expectation and make interaction possible because reducible to an expectational context? It will have to abstract from specific people's expectations of specific people and provide a plane where these expectations can latch on and be attributed to fictitious, but invariant from case to case, units. This is where the abstraction of the legal person becomes operative. The legal personality is such a point of attribution and address. Thus the introduction of the third party allows the system to abstract from what Ego expects Alter to expect in an interactional setting and to settle DC in a legally specific way. In order to complete the picture of how such disciplining of DC is effected in law, we will look into the third axis of generalisation, the material dimension.

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(in his words take sides rather than "cure" the dispute which would mean looking at the causal not the normative).



### (iii) The material dimension

In characteristic style Luhmann explains that "the expectation of expectations is only possible through the mediation of a common world to which expectations are identically attached" (1972, p62). Meaningful interaction is only possible on the basis of a commonality of events, visible action and symbols for the invisible. The infinite possibilities of envisaging events and deciphering them through symbols is reduced through system specific reductions that provide horizons of other possibilities against which selections can be tested. In the introductory pages on Observation we discussed how a system observes through distinctions that set up system specific horizons, an idea that will be revisited in the (next) chapter on action, under the heading of thematization. All that was (and will be) said at various stages regarding observation becomes operative here, contained in the material dimension, and operationalised in time by being integrated into expectations.<sup>220</sup> In the legal expectation, therefore, legal meaning comes about in the selective access to other possibilities. The world becomes meaningful as legally relevant, through the selectivity, the alignment to referents provided by law. That these possibilities of observation are self-stipulated and internally select the object of observation may mean that the system duplicates its map as object. More will be said in this in the reversal of "brute and institutional" that I will attempt in ch 4 s.4. Suffice it for now to point out that distinctions enable and condition the selective access to meaning.

The next question is, in Luhmann's words, "at which level of abstraction the relatively invariant core of meaning formation is fixed by which the context of expectation is fixed ..." (1972, 65) We will identify here roles, programmes and values.

We saw previously, in discussing the social dimension, that institutionalisation brought about a shift from the personal to the impersonal so that expectations could be associated with the role rather than the person of the interlocutor. The system's "self-description" of person as role (legal personality) indicates a first abstraction along the material axis. A more concrete and inflexible frame of expectations can be fixed to role, and stabilization of expectations is facilitated in more ways than one. In the Rechtssoziologie for example, Luhmann mentions the knock-on effect of "stabilization through indifference": the fragmentation of Alter's self into roles prohibits a disappointment of one role from spilling over to discredit Alter in other roles, as would be the case with personal expectations, i.e. expectations we have of "concrete" others.

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<sup>220</sup> Indeed we are approaching the same questions but integrating them in the dimension of time. By focusing on how expectations carry the system in time, the nature of systems as temporalised comes to the fore. The material dimension of expectations is, in other words, where observation meets operation.

Roles are not the only abstractions at which generalisations in the material dimension crystallise. There are also programmes, and values. Programmes fix expectations through rules, both goal-oriented and conditional. Again, correctness of behaviour is lifted from the personal context and fixed at the impersonal level, at which level rules ground the normativity of expectation of individual action through impersonal criteria of correctness that displace the personal reference. One can mention here, indicatively, how legal liability is fixed on objective grounds through objective indicators of mens rea that are removed from concrete personal capacities of predicting consequences and assessing correctness; or how responsibility is fixed (variably) in various areas of law: family law, tort etc.

Values, the most abstract of abstractions along the material dimension, furnish rules of preference even if they do not specify the content of preferable action.<sup>221</sup> They also do not specify their own hierarchy for cases of clashes of values. In Soziale Systeme, Luhmann, writes that "Values are general, particularly symbolized rules of preference regarding states or events ... Actions can also be evaluated as friendly, right, polluting, as expressing solidarity, readiness to help, racial hatred ... But the fact that actions can be brought under the positive or negative description, the ascription of value tells us nothing about the rightness of the action." (1984, pp433ff, my tr) This would require a ranking of values, that the enhancement of freedom e.g is more important than that of peace, culture, profit etc. No ranking, no criteria of rightness. Luhmann argues thus that values are crude, poorly selective devices for reducing complexity, appropriate only to a "pre-modern", "old-European" phase of social development. The selectivity aspect brings us to a second point. The values that can be employed in critique or appraisal are tied to specific patterns of observation, the system-specific processing possibilities. What market economics may assess as catastrophic behaviour, may be all at once conducive for a State-based economy, politically dangerous, morally right; this is what Luhmann means when he writes, in Soziale Systeme, that the role of values lies in probing specific expectations. Due to these various indeterminacies they contribute very little to the stabilisation of expectations and the reduction of DC.

Roles, programmes and values are mutually dependent and determine each other reciprocally. For example, rules determine hierarchies of values, roles are operationalised through rules or become points of attribution through rules and values, and rules depend on the existence of self-descriptions such as roles.<sup>222</sup> For example, in the case of the rule of law it is evident that the program level becomes the level at which third values (certainty, equality), excluded at the two-valued code level, become accommodated. They are ways to

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<sup>221</sup> For the difference between programmes and values see 1984, pp432ff

<sup>222</sup> See 1972, pp70ff

handle the choice of "which code value?", since the code itself provides no 'top value', no means to furnish a choice. Again, revisability in the material dimension depends on the fact that some of the expectations remain constant as the structural backbone that allows the system to make sense of change. As the law evolves, roles, programmes and values shift and, what is more striking, their interplay and interdependence shifts. The rise, for example, of formal rationality and the uprooting of legal relations from their *Gemeinschaft* context, as well as the reversal of this evolutionary trend in the era of the Welfare State is reflected in a mutually re-inforcing re-negotiation of values (certainty and justice) a shift in programming (a retreat of conditional and an expanse of goal programming) and a "re-materialisation" of roles (from the all-inclusive legal personality to more concrete loci of attribution of rights and duties).

A more important interplay and reciprocal determination, however, is the one among the three dimensions of meaning, temporal, social and material. This is of extreme importance for the arguments to be advanced later in the thesis. It goes without saying that the temporal dimension that determines the nature of the expectation as normative (disappointment-proof) relies for content on the material dimension and for backing on the social dimension. But there are subtler interplays. We already briefly examined the interplay between the social and material dimension in reference to the way that the shift from personal to impersonal contexts of expectation in the social dimension was mediated by the self-description 'role' of the material dimension. Another is an interplay between the material and the temporal: role is necessary for identifying the disappointment threshold of the normative expectation (temporal). I will bring the example of love and marriage to illustrate this, an example that will be often used and extensively analysed throughout the thesis. In law (marriage) as opposed to love, the spouse's expectation will turn normative at the point at which the law designates a disappointment, sanctions an attribution of wrong-doing and provides remedies for the frustrated expectation. On the other hand, in love as opposed to law the disappointment threshold varies according to what the lover normatively expects of the concrete Alter - the beloved; this in turn turns on questions of what matters enough, what the expector is ready to concede, overlook or on the other hand be especially sensitive to, all of which can only be answered from within and uniquely about the specific relation. No generic category disappointment thresholds can be set in love, no co-expecting third parties. The normativity threshold is not set through impersonal standards but through interpersonal ones.<sup>223</sup> Only where such disappointment thresholds are fixed through universal and thus

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<sup>223</sup> The setting of disappointment thresholds is intimately tied to conflict, and we will revisit this example in the following section.

impersonal standards can normative expectations be born, and voiced as appropriate to marriage; and in love the standards are not fixed but retrieved inter-personally. There are other aspects to this interplay of role and normativity. The very differentiation of cognitive and normative depends on whether we are approaching the loving relationship from law or from love. Love is oriented to getting to know the beloved, the world becomes relevant through the beloved. This points to an overwhelming priority of the cognitive and an overwhelming hesitation to switch to normative; ie one who loves is always willing to learn from disappointments by shifting expectations. On the contrary, role provides more or less fixed points for the switch from cognitive to normative.<sup>224</sup> This is all to say that the very character of an expectation as cognitive/normative depends on the material dimension for providing the 'switching point'.

In the process of effecting these reductions on DC, only a narrow section of the possible is fixed as expectable; expectations furnish narrow possibilities of observation of the environment. Through expectations an event is "isolated, individualized, personalized and becomes a reference point for a processed explanation of disappointment." (1972, 70) Expectations are generalised in law in ways that are specific to the legal system. They are abstracted in ways that run counter to generalizing tendencies/ directions within other systems. Expectational structures therefore cannot directly infiltrate or colonise other systems that acquire their identity and continuity through time by generalizing expectations and forming structures on their own, different system-specific premises.<sup>225</sup> In each case the reductions through which this is possible will be peculiar to the system. The generalisation of expectations along temporal, social and material lines through the appropriate reductions allows the unmanageable complexity inherent in DC to give way to the possibility of (legal) communication; it maps out the world of legal meaning. But to effect these reductions and these generalizations the law has to rely on conflict, or more accurately, the "exploitation of conflict perspectives." Without the reference to conflict there can be no legal operation. Only in relation to conflict can "the formation of congruently generalised behavioral expectations" be achieved, that once "systematised by juristic skill, comparisons of cases, by concepts and by doctrine, results, and is experienced as, law." (1988b, 27-8)

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<sup>224</sup> "I need not inquire into your motives deeper, there are laws for spouses that act as you do!". E's expectation of A is not qualified in the light of A's action to expect something new next time, but is disappointed instead (normative not cognitive); the law designates what actions have this effect, and, although this will only be undersoot fully at the end of the thesis, E reads in this not only a disappointment of a right in law but one that re-enacts a disappointment of the love E had invested.

<sup>225</sup> No juridification due to colonizing structures then, only due to excessive reliance on the legal system for political ends.

#### IV

### The relationship of Conflict and Law

Having explored how expectations, generalised in the three dimensions, emerge as legal, the final leg of Luhmann's definition of the function of law now needs to be established: the connection with conflict. Note that it is this final connection with conflict that pivots my critique of republicanism, although the connection could not have been made in a way that brings out the weakness of the containment thesis, without the discussion of DC and the formation of legal expectations. The disciplining of DC with the emergence of systemic expectations is important if one is to understand how social expectations change at the threshold of legal institutionalisation. And yet the function of law of stabilising expectations cannot yet be understood if one does not look at what gives law the opportunity to perform its function. It is here that one needs to look at conflict, "at the exploitation of conflict perspectives"; and to keep a reversal in view. Luhmann is here not describing the function (in systems theory one would say "performance") of law in situations of conflict - albeit their resolution or creation.<sup>226</sup> Instead Luhmann is describing how conflict is functional for law, in allowing it to draw its boundaries and perform its function in society.<sup>227</sup>

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<sup>226</sup> In what way, according to Luhmann, is law functional for conflict? On the one hand, law is important to conflict in a number of ways. By drawing on a number of Luhmann's writings we may isolate three functions in this respect: law solves conflict, first enables conflict and prevents conflict. Law solves conflict by setting up "distinct contexts of interaction which specialise in handling disputes and conflicts." (1985a, 84) Law prevents conflict by establishing conflict-proof expectations to be maintained in cases of dispute (1986a, 149) One is motivated to avoid conflict if the outcome is already known. Law is also productive for conflict in many ways. It provides additional possibilities for seeking out and withstanding conflict. This latter is evident in cases where without law conflict would be impossible because one is weaker, in a minority, or finds oneself in a morally reprehensible position. In these cases law supports behaviour which otherwise could not be sustained. Law secures freedom, including freedom of conflict and freedom of socially undesirable behaviour by backing with legal securities what without law may be deemed unreasonable or immoral conflicts. Law's function in creating conflict is emphasised in Soziale Systeme: "Law is not only a means of solving social conflicts, but in the first place, and most important, a means of creating social conflict: a prop for presumptions, demands and rejections even in cases where resistance is expected" (1984, 451) ( Also for law's role in multiplying conflict opportunities, see Luhmann, 1984 ps 518, 535 and Freund, 1974) There is a whole other "grey" area of conflict creation, prevention and solution which could be designated as existing "in the shadow of the law". The severity of the solomonic lose-or-win principle gives rise to an area of negotiation set up under the threat of recourse to the law. For an overview of the large literature on this in the sociology of law, see Cotterrell (1984)

<sup>227</sup> Note that this connection is absent in Parsons' work. While Parsons' stresses the importance of boundary-maintaining mechanisms for social systems (Parsons and Shils, 1951, 108, and Parsons, 1951, 482) he reduces conflict to "dysfunctional strain" and fails to stress the connection of conflict to system maintenance.

In the influential essay 'Konflikt und Recht', included in the collection Ausdifferenzierung des Rechts, Luhmann explores the complex interdependence of conflict, law and the stabilization of expectations. A theory of law needs to be able to rely on a theory of conflict, he concludes (1981, p112), in order to elucidate the complex process of relating and counterposing stability and instability that will lead in law to the formation of congruently generalized behavioural expectations. But lets take things more gradually.

Conflict is productive for law in a very important way.<sup>228</sup> Conflict provides the legal system with an occasion of openness to the environment. It is in litigating conflict that the law perceives the social environment and it is in communicating about conflict that law links operations to previous operations and exists as a system. The expectations it employs to make sense of reality refer to conflict. It is in reference to conflict that law generalises expectations and thus evolves as a system, fulfils its function in society and acquires its unity and identity.

Instability, says Luhmann, is inherent in any system, because a system is dynamic, temporalised, it exists in time. Its resonance capacity, its ability to react to a changing environment, to adapt and co-evolve, relies on instability. To achieve closure in the first place it needs openness (it is after all a [closed] system in relation to [openness] an environment). Autopoiesis does not mean "autistic" self-determination but co-evolution. The absence of a high degree of 'coupling' with the environment would lead the system to reduced relevance to and reduced "fit" with the environment and finally stagnation; to retain its dynamic nature it must remain sensitive to environmental stimuli which requires of it to remain sufficiently open to pressure, sufficiently unstable.

In view of this, instability, stresses Luhmann, must not be defined in a way that erodes the distinction between constancy and change. The distinctions stability/instability and constancy/change are separate and should not be confused. In particular instability must not be equated with change; in a counter-intuitive manner Luhmann draws a tight connection between instability and constancy, since the latter is "only possible in complex systems through a sufficient degree of instability." (1981, 95) Dynamic, temporalised, autopoietic systems rely on that instability. It is of their essence that they are endogenously restless. Later, in Ecological Communication, Luhmann will write: "The structural improbability [of autopoietic systems] can be released easily [principle of variation]. Striking an equilibrium means that the system makes instability its principle of stability." (119) The system must be

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<sup>228</sup> There are other, secondary, ways in which conflict is productive for law: it provides the pressure to come to a decision, the continuation of operations, the system's evolution. Also, as we saw conflict tends to expand to new themes. The expanded conflict, not limited to the initial situation that triggered it, offers the chance to refer mutual behaviour to the conflict and from such thematic openness the law profits by developing wide applicability, juridifying social life. Law furnishes criteria for similarity of conflicts as it defines and develops comparison points that acquire a weight of their own. Independently of what sparked off the conflict, law provides for abstracting from the specific features of the case into conflictual patterns of general applicability / validity, etc.

able to control instability. To strike the balance, instability must assume the form of uncertainty of expectations, the fulfillment or disappointment of which will be processed by the system. Through expectations the system opens towards the environment in controllable ways, and while the environment becomes all the more complex and unpredictable, the system builds up its own complexity to meet that unpredictability. It ascertains its own constancy in meeting that environmental complexity and not being threatened by it. We have already mentioned one of his examples relating to the law of Contract; here, while unpredictability is increased through the scope of what people may agree, the object and conditions of the agreement, the system develops conceptual virtuosity and legal formulas to juridify and thus process the new claims. The law of contract develops from very abstract premises to more concrete considerations of individual circumstances and more generally moves from formal to substantive, a phenomenon that has been described as the materialisation of law. Luhmann gives examples from politics and economics too (1981, 96). And yet there is no guarantee, says Luhmann, that instabilities will be sufficiently absorbed, determined and reproduced. Drawing the link between instability and constancy more closely than ever, Luhmann introduces conflict in this context, and designates the function of conflict as the establishment, for the system, of a stable relationship to its own instabilities.

The idea of expectations that stabilise the system by allowing uncertainty in controllable ways is by now familiar terrain. What Luhmann is essentially saying when he assigns to conflicts the function of stabilising systems is that it is on occasions of conflict that expectations are tested and reproduced and varied to meet the requirements of an ever more complex environment. Conflict provides the occasion of openness to the environment, and it is by exploiting such occasions ("exploiting conflict perspectives") that expectations are "congruently generalised" as legal. It is in these terms that conflict completes the picture and that the interweaving of ("die Zusammenhang von") double contingency - complexity - instability - uncertainty of expectations - conflict and law is portrayed by Luhmann.

While it is in the above terms that Luhmann sees the "hanging together" of all the components of the definition of the function of law, where it is the function that allows the system to first come about, we are in danger here of passing over one of the most valuable insights of the theory. It lies in the precise meaning of the term "exploiting", and requires us to take a step back to look at conflict in its own right.

We have seen how the complexity that results from double contingency is "de-complexified" through reductions that are peculiar to systems. Each system offers a way of managing the complexity by deploying specific contingencies, specific forms of expectation uncertainty. A conflict is one such system. That is to say that conflicts are themselves systems in their own right and extraordinarily stable ones at that. They manage complexity and relieve expectation-uncertainty in so far as Ego assumes Alter as enemy and

uses this assumption as a certain principle for the establishment of expectations (1981, 97). From this Ego derives certainty; uncertain expectations are replaced by problematical but stable ones. The fundamental problem of double contingency - what to expect of expectations - is crystallized as a confrontation. "We can speak of conflict," says Luhmann, "whenever one participant in an interaction refuses to accept the choices or selections of another and communicates this refusal." (1975a, 82) As conflict takes over the interaction a new basis for action is furnished.

An interaction system within which a conflict was triggered, cannot easily accommodate it. Whatever interactional expectations or communication themes formed the context of the interaction quickly give way to the conflict. Simple interaction systems can either avoid conflict or become conflicts. (1975a, 83) It is in this sense that Luhmann describes conflicts as "parasites".

In colonising the interaction from which it sprang, the conflict-system tends towards an overwhelming development of the social dimension at the expense of the material one. This means that the opposition Ego/enemy absorbs and redefines the thematic of the interaction. Everything becomes relevant to the vantage point of the opposition; relevancy is built on what may harm alter and advantage ego.<sup>229</sup> This re-orientation allows the conflict a tight constellation. Details of alter's behaviour that would normally be overlooked or go unnoticed suddenly become worthy of interpretation. The temporal dimension is also subsumed under the social one: the future becomes threatening and compels action. So conflict, like all interaction systems, has its own rules and follows its own logic, a self-reproducing, autopoietic one in fact,<sup>230</sup> as conflict "devours increasingly new resources, usurps time and contacts" (1981, 100), includes increasingly "new themes and new persons," and finally aligns the world to system relevancy.

Can a conflict's means of reducing DC and thus of building expectation certainty in instability, be directly appropriated by the law? Does the legal system, in other words, profit from the stability of expectations as they crystallise in conflict? The answer is no. Systems do not meet, they do not share reductions, they do not release instability or relieve uncertainty in common ways. In sanctioning conflict, in providing it with a legal-institutional site, the law inserts a measure of instability in the expectations that had become certain through conflict.

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<sup>229</sup> Luhmann describes them as highly redundant orders in this sense 1985b, pp404ff

<sup>230</sup> Luhmann did not in fact make this point as this is still prior to his "autopoiesis turn". He talks instead of social structure, and, in language reminiscent of the Rechtssoziologie, claims that "[i]f it is true that conflicts absorb expectation uncertainty and therefore social instability .., one can accept that social evolution produces and requires conflicts in order to transform expectation structures, to generalize them and to equip them with sufficient flexibility." (1981, 105)



Law exploits conflict perspectives, it does not take them up as such. In the social dimension, through institutionalisation, the law will insert third parties that will engage in the conflict (normatively co-expect). But while, in effect, a measure of objectivity is imbued, on the other hand uncertainty is re-introduced as ego no longer has to reckon exclusively with the enemy but also with the interfering third party and has to deal also with the latter's presumed orientation to the new situation. In the material dimension too, the certainty that was achieved in conflict is eroded as law "thematizes" conflict and appends issues of conflict on legal conditionals. We will explore all this at length so I will not expand here, except to say that the stake that divided the parts as crystallised in conflict, is now re-imbued in law by instabilities that cut across much of what had become stable. So while conflict through its polar structure had infused instability with a measure of security of expectations, this certainty is now broken up anew and permeated with uncertainty again through law, with the introduction of third parties to the conflictual opposition and the legal thematisation of the issues. This newly introduced uncertainty, says Luhmann, runs counter to the thematic and strategic openness of conflict. Law filters this openness by inserting the differences that, in law, make a difference.

In all: The appropriation of conflict by the law introduces an entirely new situation. The conflict that gave law its occasion is left behind. A new array of possibilities appear in law, in this "externalization' of conflict in the direction of third parties" (1981, 110) and the thematic reshuffling. To put it in terms Luhmann would use: the regulative principle behind the legal conflictual reality cuts across the boundaries of the interaction system which occasioned it. In law, uncertainty is increased through the interference of the third but decreased in other directions, as for example through "issue control" and the breaking up of the conflictual complex into issues that are legal. The picture of how conflict is domesticated by law is not exhausted in institutionalisation and issue control. Conflict is further conditioned by the legal restriction of legitimate means (e.g the restriction of violence). Another selection from the vastness of conflict lies in the filtering out of trifling conflicts ('Bagatellkonflikten' - 1981, 103). Not every disagreement is litigable or worth litigating. In all the production and reduction of complexity in the directions outlined are specific to the legal system and in sum map out the conflict as it is relevant to the law.<sup>231</sup> This is what it means then, for law to exploit conflict towards the production of congruently generalized expectations. The expectations produced by the law hinge upon the pattern of conflict but recast it through increasing and decreasing uncertainty, to produce specifically legal expectations and filter conflict through them.

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<sup>231</sup> In Teubner's words: "Social conflicts trigger processes in law which formulate legally specific conflicts of expectations ... social conflicts are not merely translated into legal terminology; they are reconstructed as autonomous legal conflicts within the legal system." (1993a, 58) Also Teubner, 1992

This is the backbone of Luhmann's treatment of conflict. We have traced it all back to the basic sociological problem of double contingency. Departing from there we saw how the contingency is reduced in law to form and furnish legal expectations that allow interaction and communication in law - legal meaning. Then, turning to conflict, we saw how double contingency is reduced in the interaction system of conflict; we saw how the conflict re-aligns everything to the conflictual pattern and imbues contingency with certainty on that basis. Finally we explored the relation of law to conflict and concluded that conflict provides law with its occasion of openness but that the conflictual reality is re-worked in law.

Having drawn those inter-relationships as Luhmann describes them, we will turn to the relationship between legal and political - or what I will describe in the final chapter as "reflexive" - conflict. Drawing insights from the theoretical framework I will complement an argument I have already begun against the civic republicans [thesis 1] with a series of further arguments [theses 2-11]. My main point throughout is that law depoliticises conflict, where to politicise conflict would be to allow a conflict over conflict. In each of the arguments to follow, I will argue that rather than empowering politics, the republicans, by "containing" politics in law, replace questions over which there is conflict with legal a prioris. In this they impoverish the "reflexive" potential that inheres in conflict; they impoverish rather than contain or empower that which is political.

I will advance the critique under four headings, depending on whether the republicans' "depoliticisation" of the question relies on a prior "conflation", "re-enactment", "severing" or "normalisation" of conflict.

## V

### Conflicts conflated

We began the chapter with a distinction between conflicts constitutive and phenomenal, and to pursue my argument against the republican containment of conflict I will correlate that distinction to a system-theoretical one between conflict-system and conflict-occasion. We saw that conflict both constitutes a system in its own right as well as provides the legal system with an occasion of openness to the environment. Whether we are discussing expectations from the point of view of conflict or of law determines what we find differently. In the system of conflict, expectation-uncertainty is absorbed in the interactional context and contingencies are cast in a way that runs counter to law, where the conflict becomes the system's "occasion of openness" to the environment (allows the system to "asymmetricise"). In the first case the referent is the conflict-system, in the second it is the legal system. Specifying the context will lead to totally different answers to what is uncertain, what contingent, and how expectations control both. Furthermore, keeping the system-referents (contexts) distinct will help us explore what is wrong with a theory such as republicanism, that collapses them into one.

The world can be observed by both systems, but the observer cannot assume both perspectives simultaneously. While this is all consistent with Luhmann's theory, Luhmann himself appears to occasionally conflate the perspectives, which not only makes his position - at least in "Konflikt und Recht" - inconsistent, but more importantly submerges one of his theory's most promising heuristic devices for deciphering conflict. The conflation lingers in a number of points. Most noticeably it lingers in his offhand dismissal of an argument advanced, among others, by March and Simon (1958). "We assume," they write, "that when conflict is perceived, motivation to reduce conflict is generated. This assumption that conflict represents a disequilibrium in the system is implicit in all treatments of the phenomenon." (p115). Now March and Simon confine this assumption to Organisation Theory, as relevant to organisation systems, but others have broadened it to cover social systems too. Coser, for example, in his influential work in the sociology of conflict, insists that one is "sensitized to the fact that wherever there is conflict or disruption there will be social forces that press toward the establishment of some new kind of equilibrium." (1967, p10)<sup>232</sup> (Importantly this in itself does not elevate the idea of equilibrium to normative grounds, in assuming that disequilibria are "deviances" that threaten legitimate order. This is a move typically associated with certain types of sociological functionalism. Coser is careful to distance his

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<sup>232</sup> See also his 1962, 172 in this respect.

analysis from such a pitfall and in a much earlier essay (Coser, 1950)) attacks Parsons for his "ideological" use of functionalism.)

What is common to these positions - March and Simon's in *Organisation Theory*, Coser's in *Social Theory* - is that they perceive conflict as a disequilibrium that automatically generates a reaction. Luhmann dismisses this self-healing process and attributes it to a misunderstanding of conflict. Conflict, he says, once generated does not subside; instead as parasite it takes over the interaction system that generated it, then totalises its image of the world as a universe of conflict. But surely we need to insert the distinction here that we have been discussing. Luhmann's dismissal of the self-healing process, where conflict merely triggers a reaction, may be correct for the conflict-system, where conflict rather than instigating a return to order instead makes reality - action, expectations of behaviour, time - conflictual. However, it may be that March, Simon and Coser have described the function of the conflict-occasion quite accurately. Neither the organisational nor the social system, (more importantly the latter type that concerns us here,) "give in" and neither is "taken over" by conflict. Instead each manipulates it - exploits conflict perspectives - to gear its own self-reproduction. The essence of "conflict as occasion" is that, by allowing the legal system to release and control its instability, it leads it back to restabilisation and order.

A number of arguments against the republicans follow. They are relevant to the conflation I identified. I will explore, in other words, through the systems-theoretical distinction of the two referents, some fundamental weaknesses of the republican argument: the failure to draw distinctions where distinctions are called for, and the impoverishment of possible conflict through a fast and easy recourse to law.

### **\* Thesis [2] against Republicanism**

The distinction between the two system referents allows us to formulate this second argument against the republican containment thesis as follows: the law addresses the system of conflict but contains it as occasion. Republicans see conflict as an occasion of openness for law and have no time for conflict as a system in its own right. In the process, I will argue, they lose sight of the possibility of reflexive politics.

The conflation of conflicts, inherent in the very meaning of "containment", comes across most clearly in Dworkin's theory. For him, law provides the "meta-narrative" that will accommodate without distortion the conflict of normative commitments. His own preferred way of putting this, is that law lifts conflict "from the battleground of politics to the forum of principle." (1985, 71) The legal position becomes the conflictual position par excellence; in Law's Empire law is the argumentative practice of a community, the practice that hosts its

conflicts. Dworkin completes the conflation as he forces social actors in conflict into positions of participants in legal conflict, by methodologically assigning them insiders' positions, and thus assimilating their understandings of conflict to legal accounts. (see my (1994), pp11-13. Also, more generally Postema, (1987))

What is precisely the meaning of this assimilation of conflict-system into conflict-occasion? The decision to focus on the latter referent cloaks a decision (methodological or ideological) to adopt the legal system's perspective to the exclusion of conflict's own perspective. The asking price for the use of the tools of observation of one system (in this case law) is the acceptance of the exclusionary effect this choice has on other perspectives. This effect comes most dramatically into relief as the observation of conflict in law is effected to the exclusion of a different conflict perspective in which law itself has a specific place in the set-up of the conflictual domain.

The existence of a blindspot is in evidence here: the law can only thematise conflict at the expense of being itself thematised in conflict. The law cannot in one operation observe the distinction it is using to distinguish. It cannot observe conflict through distinctions and at once observe those distinctions it is operationalising.

What these systems-theoretical conclusions mean for the republican containment thesis is that in taking to law to provide the perspective they lose sight of the perspective that is specific to conflict itself. The most serious effect of this is that they thus lose sight of the position of law in conflict, by assuming that law is always-already the natural setting of conflict.

Let me put this more concisely then: the republican containment thesis extends an invitation to read conflict in the community as a conflict around positions in law. There is a political question that needs to be rescued from this imperialism: it is the question over the staging of the conflict. In republican theory, law is always-already the stage that will host conflict over normative understandings. What disappears as contested in this "always-already" is the conflict over the mode of staging the conflict. This is the effect of the conflation of the two systems. The recourse to law as providing the perspective allows a designation of the staging or forum of conflict such that over it there can be no conflict.

As we saw in our discussion of the formation of legal expectations - and will see in detail in chapter 4 again - in law the conflict is staged through categories that pre-ordain its form and content, demarcate the problems and pre-empt what can be said about them. At the same time other demarcations of the problem and its object are prevented. To put it briefly, in the legal system conflict is necessarily aligned to legal coordinates where concepts of rights, liberties, legal notions of harm and legal analogies, legal tests and legal presumptions first make sense of it. Who can allege to have suffered harm, who counts as injured, why and when, as well as what enters the balance and what tilts the balance, to what side, all depend on a multitude of legal descriptions and conditional attributions (programming) that create the

necessary relevancies and legal evaluations; in a word all that is experienced as law. All these relevancies allow for conflict selectively, they impose reductions on possible conflict. What remains outside the sphere of legal relevance, outwith the area of legal contingencies, appears as natural, obvious, given, inert to conflict. But further: in the process of submitting the conflict to these legal categorisations, what one party in conflict may see as depicted, the other may see as distorted. Then the opponent's action of taking the conflict to law and thus attempting to legitimate this distortion becomes a strategic move in the situation of conflict, an ideological move aiming to conceal what the conflict is really about. My point is that by taking law as the neutral forum for conflict, one loses sight of the position of law itself within the grander framework of conflict. Unacceptably to a theory that purports to account for political conflict and "addresses itself to politics in the broadest sense", the unquestioned recourse to law imposes a selective screening of what actors and communities assume to be politically at stake.

Therefore: the unquestioned prominence of law as neutral container of conflict, in republican theory, steamrollers over a plurality of political options at the level of staging the conflict and has serious repercussions on the grand scheme to account for community through law. If it is the case, as Dworkin and the republicans maintain, that community is substantiated in engaging in interpretive questions, then, in the area of conflict this means that the question over the staging of conflict needs to be an interpretive one too. This would be achieved if conflict over the staging of conflict were absorbed into conflict itself, if it were left interpretive, left to the community and its understanding of its conflict. But in the containment thesis the interpretive question over conflict is strait-jacketed by an a priori commitment to legal conflict. This privileging is arbitrary, axiological, a priori, non-interpretive.<sup>233</sup>

In many ways, the question over the staging of the conflict is the reflexive-political question. The reliance on conflict as the system-referent was meant to make obvious this dimension: the conflict over conflict captures the reflexive moment. In the conflict-system the question over its staging is absorbed into conflict itself. Defining terms, stake and form becomes a question over which there is conflict. And that is why the distinction of the two

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<sup>233</sup> And thus exhibits features of what J Freund has described and dismissed as "legal utopia" (utopie juridique). "J'entends par utopie le procede qui consiste a extrapoler une relation sociale, dans ce cas la relation juridique, et a en faire la relation ideale de la solution des problemes sociaux par meconnaissance de la pesanteur des relations politiques, economiques et autres. Il s'agit donc du procede qui privilegie une relation dans l'infinite des relations existantes." (p49)

In the context of deep social conflicts that questions the form of society in the light of models of "utopies de la contre-société", it would be to mis-construe their stake, were one to "méconnai[tre] la contestation du droit comme tel" and to ignore that "le droit lui-meme ... devient objet de litige." (1974, 47-8).

system referents, conflict and law, is a good way of setting up the notions that need to be kept apart - reflexive conflict and conflict in law - and which civic republicanism is guilty of merging and thus submerging the possibility of reflexive political conflict.

There is a possible objection to this. As Luhmann stresses conflict arises only around something about which there is no conflict (1971). The complexity of possible patterns of conflict must be reduced to determinable complexity if conflict is to be meaningful. Teubner renews this warning when he talks about turning infinite to finite conflict.<sup>234</sup> What all this means is that contradictions that give rise to conflict arise around possible contingencies; in the same way that what appears as natural, obvious, given, is inert to conflict, so the indeterminable complexity of overlapping mappings of conflict must be reduced to make sense of conflict in a mutually comprehensible way. Law provides those contingencies in reduction from possible states of conflict and there is surely a gain in reducing that complexity (in very similar way as there is a gain from the play of all exclusionary reasons - see ch.5). My more urgent concern however is with a loss. Because once reduced around specific legal patterns, what was challengeable in the initial conflict becomes naturalised and given, if only in order to make the specifically legal contingencies possible. Legal contingencies are hedged in by reductions on all sides, reductions of possible conflict. Where there was challenge and grounds for change, there is in legal reduction the givenness of the world in law. The exclusionary language of law bars access to the reflexivity of conflict. My argument against the republicans is that in celebrating the specific legal reduction of conflict they cannot see the impoverishment of possible contingencies. Normative commitments shape around a diversity of contestable premises. It is the acknowledgement of this wealth of contingencies of conflict that the republicans need to take into account, rather than relegating to legal contingencies alone the constitutive function of driving communities to shape around normative commitments. The republicans cannot have the best of both worlds: reduced conflict and community substantiated in conflict.

### **\* Thesis [3] against Republicanism**

I will put forward an argument that straddles both the one that precedes it and, if the focus is shifted, the one to follow it. It concerns a latent almost natural pull towards consensus, present in the republicans' accounts of conflict. The question that I want to address to the republicans is: Why should one assume conflict to have a latent, in-built tendency to resolve

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<sup>234</sup> Teubner, 1993a, p17 For the origin and meaning of the terms see Coser, below.

itself?<sup>235</sup> My suggestion is that without this assumption, however, the containment thesis does not hold.

Neither Dworkin nor the civic republicans address the question of consensus directly, though, I will argue, they make the question-begging assumptions, only by virtue of which can they salvage the containment thesis. Appropriately enough though, to the defence of this position - of the necessary orientation of conflict towards consensus - come sociologists of conflict of the Frankfurt camp. Max Miller subdivides social conflicts into three classes (1992, p11ff): the first class contains those conflicts where "participants don't even agree upon what their conflict is all about." This is the case of infinite conflict that Teubner too mentions in passing and that both borrow from Simmel and Coser. In such cases "social communication is powerless, the persons involved may as well stop talking ... because they could not reach a joint definition of their conflict." With infinite conflict out of the way, Miller can concentrate on the remaining two types. Finite conflict generates what Miller calls "coordinated dissent",<sup>236</sup> a kind of compromised Habermasian consensus that retains most of the elements of rational structures of discourse. A "coordinated dissent" involves a joint identification of the points of controversy. "If the persons involved also succeed in transforming the coordinated dissent into final consent we have an example of the third class of social conflict." (id.) (Why this final consent is still a conflict, I do not know, and Miller provides no relevant further guidance in his article).

All this is not yet particularly interesting until Miller advances an important claim: "Once a coordinated dissent has been reached the persons involved will have an interest in transforming it into final consent - after all, the primary action goal of the complex verbal action "discourse" or "collective argumentation" is to find a jointly accepted answer to a jointly identified controversial situation." <sup>237</sup> This is why "coordinated dissent" is so important. Because it serves the "primary action goal" of human communicative action. And this is where law becomes so important too - in ensuring that "coordinated dissent" may come about. Reducing infinite conflict to finite conflict is an achievement of law and in that law exhibits that vital "integrative power of available structures of social cooperation." (p10) None of this is in fact very far from Luhmann's own account of the reduction achievement of law that facilitates the constellation of agreement around specific contingencies. On the basis of the previous argument from the collapse of the levels or systems, one might ask Miller: reduction achievement, yes, but at what cost for reflexive politics?

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<sup>235</sup> Luhmann says: "It is false to impute to communications an inherent, quasi-teleological tendency to consensus. If that were the case, everything would already have been over long ago and the world as silent as it once was." (1992b, 72)

<sup>236</sup> A notion that is central to his other work, see, for example, Miller, 1994

<sup>237</sup> This precommitment is typical of the work of Habermas. See also Miller 1987



In the context of this discussion of conflict finite and infinite, and the importance of the former for communicative action, let us distinguish two separate arguments and address them to the republicans:

(i) how can they justify the pre-commitment to finite - ie resolvable - conflict?

(ii) Why is finite conflict indispensable to community and thus a "primary action goal" whereas infinite conflict inimical to community?

(i) Through an argument that merely reproduces its presuppositions, the republicans can establish that conflict is finite because they hold the containment thesis. A community's conflict is assumed resolvable because it is contained in law and law can - and has to - reach decisions. Such imposition of the decisionist model on conflict is quite obviously question-begging; there exists in the republican argument a vicious circularity. They want to establish that a community's politics can be contained and indeed empowered by the law and they do it by first imputing legal assumptions to that politics. That they remain oblivious to this imputation can only be explained on the basis of how steeped in law the republican leading assumptions are. For example they always pitch their community at the level of citizenry; however divided that citizenry, the division is assumed internal (see thesis [5]). Or, there is always a pre-interpretive plateau of legal proto-understandings (in Dworkin) or a "jurisgenerative fund" (in Michelman) and legal argument is the process of retrieving something that is already there (see thesis [4]). My argument here is that they can only get away with these question-begging assumptions because containment conflates the systems, collapses the referents. Only because conflict is already presupposed as contained - treated as an occasion - can the law's assumption about finitude be super-imposed on political conflict and consensus assumed the implicit telos of conflict; these in-built presuppositions alone in turn - and totally circularly - allow the republicans to deduce that politics can in fact be contained in law in a way that better resolves the conflicts and thus allows people a greater proximity in community.

(ii) Making no effort to hide his suspicions about consensus theorists, Horowitz wrote in the 60s: "Consensus theorists starting from the metaphysical need for consensus as universal, can talk only about absolute or relative consensus, complete or partial integration but never about conflict as a means of expressing genuine social needs and aspirations." (1962, 183) For Miller, for example, consensus is unquestionably the primary goal of communicative/social action [\*cos] and at least the possibility of consensus, as "coordinated dissent" needs to be established. This is the premise from the republicans also depart. Conflict is entertained in the community as "coordinated dissent" as divergent yet optimally resolvable legal confrontations. But why this a priori commitment to finite (as opposed to infinite) conflict?

Interaction is perfectly possible in the face of conflict, it is possible even as conflict. Conflict mediates the assumption of identities through which individuals enter public space (and thus also community). It allows people to see what public life is about and the lack of "coordination" underpins the freedom to make sense of the social in mutually cross-cutting and under-cutting ways.<sup>238</sup> None of this is detrimental to community, to people coming together within meaningful group self-descriptions. So why give up infinite conflict for the possibility of consensus in the name of community? I suggest it is because of the conflation of conflicts. In Dworkin's argument as in the republicans', conflict is always-already treated as "occasion". By abandoning the possibility that conflict itself (as system) may shed perspective on the world its community-generating power can no longer be sustained. Infinite conflict is assumed incompatible with community precisely because the republicans have no time for community generating effect that conflict itself has. The legal perspective that takes over brings with it its own form of conflict - finite - and its own community: the citizenry. The form of conflict that would have allowed it otherwise has been defined out, collapsed and conflated. The containment thesis can now contain a conflict that is always-already finite. The rest follows unproblematically.

Coordinated dissent around conflicting legal positions is a theoretical device through which a pattern of resolvable conflict is superimposed on a group that shares a location;<sup>239</sup> with both the matching of the positions of conflict and the possibility of consensus already patterned out in law, a community is artificially pulled up around a conflict that is always-already internal to it. By assuming the community engaged in argumentative practice around a finite legal conflict, the drive to consensus is assumed for the community that employs law as the medium to settle its internal conflicts. Miller's "interest to transform it [dissent] into final consent" (p12) is really the decisionist interest of law, as is Dworkin's assumption that common normative understandings will settle again in the new post-interpretive phase, as is Michelman's conviction that new common principles will be hammered out over which, for some time at least, there will be no conflict. At the junction of law and community, optimal consensus - or finite conflict - is assumed necessary for both. In the name of what, then, this reified parceling of the political? The community or the law? <sup>240</sup>

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<sup>238</sup> A correlation here of finite/infinite conflict to Coser's distinction between realistic/nonrealistic conflict (1956, 46-50) would not be unhelpful. Particularly if we resist identifying the function of nonrealistic conflict with the harmless "tension release" (49), the distinction could give an insight into why it is the conflict itself, not its resolution, not consensus that is so important to identity and community.

<sup>239</sup> See my argument about "trivial" community in (1994, 9-10)

<sup>240</sup> The conflation has effects not only in the direction of imputing features of law onto conflict but also drawing from conflict features and imputing them to law, even where the law cannot possibly accommodate them. M Minow, for example writes: "Dialogue in courtroom arguments can stretch the

### \* Thesis [4] against Republicanism

Republicanism is an invitation to read conflict in the community as legal argumentative practice. It is the conflation of the separate systems that allows the collapse and imposes the blindspot on the containment thesis. My argument is that the fact that a conflict can be described in legal terms does not mean that a community necessarily employs the legal account as the one that does justice to its understanding of its conflict. To assume that it does is to insert an apriori where there is an interpretive question and thus to impoverish the community's politics by removing that question from contestation. Let us see how two of the theorists effect this screening off of the interpretive political question.

As Dworkin develops his argument for the connection between integrity, community and the interpretation of practices, he initially uses law as one instance of an interpretive practice, and there are many others that exhibit the same link to community. As the argument develops however, he uses law at the expense of any other instance for the function of the

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minds of listeners ... [and] inventive approaches can bring the voices of those who are not present before the court ... The introduction of additional voices may enable adversary dialogue to expand beyond a stylized either/or mode, prompting new and creative insights." (1987, 88-9)

This argument of Minow's in favour of "multi-polar litigation" and against the necessity of circumscribing legal argumentation to two voices flatly pitted against each other defies what is in essence the reduction-achievement of legal argumentation. Legal argumentation is about reducing Minow's multi-polar perspective through legal relevancies. Legal argument is, to paraphrase Simmel, about dissolving such divergent dualisms. Then meaningful argument can come about because through its reductions the legal discourse resolves potential complexity and enables voices to be pitted against each other in meaningful confrontation. The legal decision cannot evade a resolution in an either/or mode.

To "salvage the power of seemingly antagonistic views" (what function does the moderating "seemingly" perform here I am not clear) Minow recalls the old story of the rabbi who listens to the claims of both adversaries and replies to both that they are right. To his wife who reminds him that this is not possible he also concedes that she is right. It is a strange coincidence that Luhmann resorts to the same story to claim the opposite. That the judge does not have the luxury to avoid an either/or choice. (Luhmann, 1988c )

<sup>241</sup> Another way of putting this is that the existence of conflict and law's processing of (what it perceives as) conflict only coincide contingently (see also thesis [5]). As Freund put it, "C'est parce que le droit appartient aux conditions du conflit, soit qu'il forme l'objet du litige, soit qu'il le nourrisse, qu'il peut aussi en être la solution." (1974, 52) Where there is contingency, the republicans assume necessity.

But to complicate things even further, even fully institutionalised conflicts like the ones that Freund too, here, has in mind, ie "those whose end-points can be specified and recognised by the contenders" (Cosser 1956, 12, 40), only transforms infinite to finite conflict to the advantage of community (in fact only bears on the question of community) on the assumption that it was communal conflict to begin with. In that the transformation is a necessary but not sufficient condition for the existence of community.

'recollection' of community through its practices. The point where the transition from law-as-an-instance to law-as-the-paradigm is effected is not obvious since Dworkin oscillates with ease between 'political integrity' and 'law as integrity', the overall and the particular<sup>11</sup>. But it is arbitrary that Dworkin chooses the legal chain novel as the means for recollecting his society's history; the law's story is only one among many narratives and to employ it as the definitive one steamrollers over questions that should be interpretive. Dworkin yields community by presupposing it.

"The legal form of plurality is indeterminacy," writes Michelman. "Legal indeterminacy is the pre-condition of the dialogic, critical-transformative dimension of our legal practice variously known as immanent critique, internal development, deviationist doctrine, social criticism and recollective imagination." (1988, 1528-9)

In presenting this as a simple sequence, Michelman like Dworkin, has inserted the legal a priori. For him legal indeterminacy becomes the space that discloses political option. Immanent critique becomes the mode of political contestation and action. The scope of possible indeterminacies accounts for the scope of political plurality; law can accommodate, as indeterminacy, every political challenge to settled patterns and circumscribes in this way the potential for communal self-revision. In the republican argument, law discloses political space, and that is the crux of containment.

What the republicans are silent about in all this, is why we should consider law as the primary vessel of our engagement in dialogue or conflict with others over the terms of social life.<sup>242</sup> They simply assume we do that in law, and since law harbours and voices our conflicts, it generates community and "fuses moral and political lives" (1986, p189) even among people who find law oppressive or irrelevant to their normative commitments. The point is that narratives that inform normative commitments, conflictual positions and identities are cast in as diverse forms as there have been communities in history. But for the republicans communities reach self-understanding through law and this leads surely, if indirectly, to a deep identification of the political actor with the citizen, as the law's history is the past narrative of our collective political identity - law our collective repository of value and justice commitments. Identity is immersed in an overwhelming legal narrative. This sidesteps all the intermediate loci where commitment takes shape, conflict is consolidated and identity is formed, and I use "intermediate" with no connotation of hierarchy under the State. This locus may be, among others, the religious community, the ghetto, the closed secular community, the racial or national minority movement, the new social movement, the party or the revolution. Each creates a normative cosmos and casts identity and 'otherness' in diverse and incompatible ways. Each avails an alternative template to the same social complex, making sense of conflicts in different ways, applying them to different rationalising patterns,

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<sup>242</sup> This echoes Lawrence Tribe's implausible claim that we are all constantly engaged in "constitutional choices." (1985, vii)

employing different terminologies to describe them and different causal relationships to explain them. This is an argument about normative anarchy, of narratives that cast conflicts and communities in varied and incompatible ways, none of which is definitive at the level of the citizenry.

The republicans proceed on the assumption that law is constitutive of the 'texture' of our communities, the means through which our communities are instituted and within them commitment and conflict perceived and voiced.<sup>243</sup> This may be so, or it may not. The point is that by building their theory on that premise, the republicans again impose that assumption rather than retrieving it, again concealing an interpretive question with an a priori, again containing the political question that defies containment and thus, again, silencing the reflexive political question.

Before ending this section, I would like to point to some linkages between the argument about the "conflation of conflicts" and those that follow. The distinction of two system referents will be central to the whole discussion of re-enactment (below). Re-enactment relies on accounting for the first of these systems (conflict) in terms of expectations projected from within the second (law). In discussing the first of these systems, Luhmann told us that conflict is a system that builds (and stabilises) world relevancy around the reduction to its polar pattern. The system of law exploits conflict but it does not take on board the certainty that results from this reduction. Conflict provides law with an occasion of openness. But the conflict is only picked up by the legal sensors as already re-aligned to legal-systemic coordinates that break down (reduce) issues in ways that are legally processable. The uncertainty introduced thus works all the way back to recast the conflict as is relevant to law.

The distinction of the two system referents will also be central to the discussion of the severing of conflict as well as its normalisation. The severing occurs as issues that divide the parties in conflict and the identity of those parties are removed by one system (the law) from their embeddedness in another (conflict). Normalisation, on the other hand, results from integrating conflict into structures that have already imposed reductions on possible conflict. Normalisation is the process of re-alignment of what has meaning in one system to already existing frameworks of meaning in another. Thus our future discussion bears on the present

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<sup>243</sup> Note another absurd consequence: under this identification of law and community to raise the question of the obligation to obey the law would be to raise the question of one's commitment to the community's existence as such. The invitation to conceive communal obligation as legal can be refuted also, following a suggestion by Dan-Cohen, by employing Goffman's concepts of role-taking and role-distancing. (1989)

one of the designation of system-referents.

## VI

### Conflict re-enacted

The argument about duplication is the argument about how hetero-reference, ie reference to the environment, builds on the back of the system's own self-reference. It is specifically this argument that the chapter on political speech aims to develop and deepen.<sup>244</sup> Regarding political speech it will be argued that the political utterance never enters the legal screen but all reference to it is instead mediated through a legal distinction that makes the meaning of the political utterance dependent on law. Law's reference to politics, its hetero-reference, is based on self-reference, on the projection of a legal distinction that makes sense of politics. Law thus imposes upon politics the realm of relevance - in carving out the ontological space of the action it takes as political - and the mode of relevance - the sense in which something is "politically" relevant.

The story of re-enactment repeats itself in conflict. The system builds hetero-reference - its understanding of political conflict - on the back of its own conception of conflict - self-reference. In order to deal with political conflict the legal system uses a number of concepts, and distinctions around those concepts, that make it possible for law to observe social conflict. What the law in effect does is to project certain criteria and delimit a realm of relevant conflict according to these criteria. What is delimited through these criteria is a projection, yet it is taken in law as conflict itself, pure and simple. As in the case of political speech, where an area of action is delimited through legal criteria then treated as political action pure and simple, so in conflict, political conflict is a projection effected by the legal system. The story of re-enactment is repeated. The difference now is quantitative: the re-enactment of conflict is effected through a multitude of distinctions along a number of axes.

Teubner puts forward the notion of re-enactment of conflict very concisely:

" [T]he resolution of conflicts through law can be construed as legal self-regulation operating strictly within the system itself. The legal system detects the presence of conflict in its social environment with its internal sensors (roles, concepts, doctrines). It then reconstrues these

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<sup>244</sup> In this sense the present section merely anticipates a much more complex argument, that I hope will in turn help illuminate arguments that here may appear rather sketchy. But there is an important reason for including this section at this stage. What will be discussed later in some depth with regard to only one "schema" of observation - the distinction Freedom of Speech/Sedition - is relevant here but this time in regard to a large number of such patterns that allow observation. Addressing re-enactment as is relevant to conflict is much broader, here, than addressing it to speech. It therefore serves to set the later, more specific, inquiry in the context of the broader question.

conflicts in its own terms as conflicts of expectations, processing them through norms, procedures and doctrines. ... All this takes place exclusively within the limits of legal communication as defined by the law itself." (1993a, p99)

The description provided by Teubner is extremely close to Luhmann's account that we examined above (ch 2 s 4). Teubner's "law reconstrues conflict" is Luhmann's "law re-imbues conflict with system-specific instabilities". Teubner's rather simplifying formula "sensors" in which he includes "roles, concepts" etc, is a short hand formula for Luhmann's more complex account of how law generalises expectations in temporal, social and material dimensions. We will explore, by repeating to some extent what has gone before, the notion of the re-enactment of political conflict in law.

Before that, a minor objection to Teubner's formulation. The problem I will identify may, of course, be due to the brevity of Teubner's exposition here. In any case, as we saw, what signals a conflict in law may not constitute a conflict in a different context (system) and alternatively what is a conflict in a different system may not register in law as conflict. Therefore it is a mistake to assume that law always picks up or is stimulated by something that is already conflict in the environment. Already existing, full-fledged, social conflict is not a requirement for a stimulus to register as conflict in law.

Luhmann is more careful on this point. He says, on the one hand, that social conflict does not always stimulate a legal response. For example trifling conflicts (Bagatellkonflikten) are not reckoned with in law:<sup>245</sup> not everything is worth litigating. On the other hand, and this is the point I am making against Teubner, he says that law facilitates conflict, in that for example, it first allows conflict that would otherwise have been impossible, by propping up assumptions for conflictual positions. (see above, 2.3).

Law may thus do two things not accounted for in Teubner's passage. On the one hand it may deny social conflict by not picking it up and thus defining it out of (legal) existence. On the other it may first create conflict where there was none in its environment. That is why Teubner's account captures only part of the story.

Notwithstanding this minor objection, the notion of re-enactment comes across strong and clear in Teubner's extract. The crux of duplication is that when "social conflict" is picked up it is reproduced as a conflict of expectations in which the "sensors" are operative in determining the where and how of the disappointment that gave rise to conflict.

What does the term "sensors", in Teubner's text, signify exactly? Teubner calls "roles, concepts, etc" "sensors" because their function is to "pick up" social conflict. They perform their function by picking up social conflict as relevant to the law. This brings us to the crux of

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<sup>245</sup> Luhmann,1981, p103



the matter. Information about the environment, including the environment of social conflict, can only be acquired by the system through affirmation or disappointment of what we could call a projection of possible states; expectations carry these hypotheses and test them. What is thus produced is a mapping of the (inaccessible to the system) environment of social conflict. The reason it has been mapped out "as relevant" to the law is because what was operationalised in the first place - furnishing the expectations - were specific sensitivities, vulnerable in specific ways. That is why Teubner calls them the system's "sensors" that serve to scan the environment. We will resume this, the crux of the re-enactment argument, by briefly revisiting how, in Luhmann's theory, disappointment thresholds are set up, making normative expectations "sensitive to" and "vulnerable to" specific environmental stimuli.

We will approach this argument by explaining away two important misunderstandings about re-enactment that must be resisted:

- (i) The first is to view it as a fictional reproduction of real social conflict. Autopoietic systems are (empirically) real systems and the conflict they harbour and give expression to is in no way fictional.
- (ii) The second misunderstanding relates to their nature as institutional representations of a "brute" reality outwith them.

The first of these points is vividly illustrated in the misguided attack that one of the most prominent exponents of the empirical sociology of law, Hubert Rottleitner, levels on systems theory (1989b) Either Luhmann is describing empirical, real systems, he says, or he is describing analytical forms, calculi. Either way he is wrong. If he is doing the latter, then his theoretical exercise ("autopoetry" Rottleitner calls it) is hardly relevant to sociology. If he purports to be doing the former then he is contradicting himself. Because then he must acknowledge that "constitutive role of legal norms for the majority of social relationships" (p282) in which case law is constituting reality in a way that cuts across the supposed complete autonomy/closure of social systems that are deemed to each constitute its own reality.

The idea of law's constitutive role in society is convincing but undercuts nothing of what Luhmann has to say. The law employs its guiding distinctions to guide its operations and on the basis of those distinctions thematises reality in system-specific ways. Law constitutes reality but it constitutes reality for itself- for the world of legal communications and communicators. It totalises its description of the world, makes sense of everything through its totalising, guiding distinction (codes, secondary and primary, and programming). "This is specific because of the way the difference divides the world up, but not at all partial in the sense of dividing up only part of the world." (Smith S C, 1991, 334) The reason Rottleitner cannot make sense of how legal categories can at the same time be constitutive of

reality and not cut across other subsystem accounts of the world, is because he is relying on some version of "ontological realism".<sup>246</sup> His is a world where legal categorisations exist at the expense of other system mappings. But he does not understand Luhmann's more profound account of the existence of temporalised systems.

Conflict within and outside the legal system, thematised in interaction, in religion, in the family, in law, or in politics - to name but a few rival thematisations - all exist simultaneously, where the (same) communication that communicates the conflict is absorbed into rival linkings by each system. (An example that will be used later is that of a Northern Irish district councillor's refusal to repudiate Sinn Fein which is at the same time a political statement in politics and a non-political-because-terrorist statement in law that in fact disqualifies him from political office.) Meaning is actualised in the world from a multitude of perspectives and these rival worlds of meaning exist simultaneously, (which may explain why an observer only sees one at a time - Smith S C, *ibid*). "The same is different" according to Glanville (1981), the visible sign absorbed in systems that clash around it and couple through it.<sup>247</sup> We will have to look closely at system organisation of time, notions of "synchronicity" and "structural coupling" to make full sense of this, but, in any case, we must do away with any ideas of causality transcending systems. This may explain why Rottleutner, the empirical scientist, has a problem with it. What motivates people to accept one linking and refuse to accept another has to do with questions of (legal) socialisation, or in more systems technical terms, "symbolic media" that attract people to certain mappings of the world, sometimes with such force as to vest what is perceived with a sense of self-evidence. Whatever the motivation may depend on, and however strong it may be, law is never constitutive of reality tout court, but only of yet another systemic perspective on reality, an additional possibility of making things meaningful.

So much for the "reality" of systemic constructions, but what about the second misunderstanding? The idea of re-enactment as explained above is a reversal of the usual way of understanding the relationship between "worlds I and II", i.e. respectively the world of raw, brute facts and the institutional mapping of that world. Contrary to the view that draws on MacCormick and Weiberger's seminal work,<sup>248</sup> systems theory (indisputably amongst others here) suggests that what is conceivable as brute fact only comes about as a projection from the institutional world II. One goes into the world to look for the brute/natural datum

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<sup>246</sup> For a defence (of even the pre-autopoiesis Rechtssoziologie) along these lines see Smith, 333-4

<sup>247</sup> On this see Teubner, 1992

<sup>248</sup> MacCormick & Weinberger (1968)

"political conflict". What one encounters as natural fact depends on what one has set off to look for, on the basis of what assumptions the search is initiated. These assumptions are institutional. It is thus misleading to assume that the same ontologically existant conflict gives rise to rival mappings in the institutional worlds on the basis of some kind of institutional "distortions" brought about by the peculiarities of institutional logics. Institutional projections precede "natural" conflict in every sense, "individuating the event" (Davidson), delimiting its contours. And yet law perceives a conflict as "naturally" occuring and purports to fix sanctions and conditionals upon that which exists as a matter of fact, independently of law. In the chapter (4) on speech this reversal will be further developed.

Now neither Luhmann nor Teubner explicitly reverse the worlds in this sense but I think it only follows from their accounts. It is only a small step from hetero-reference, as an "unfolding" of self-reference, to the reversal I pointed to. In the case of conflict, the system does not simply re-align previous conflict but first carves it out as such - abstracts and isolates a section of its environment as "brute" conflict.<sup>249</sup> For example Teubner says that "[s]ocial conflicts are not merely "translated" into legal terminology; they are reconstructed as autonomous legal conflicts within the legal system."<sup>250</sup> This does not necessarily imply the point I made but can accommodate the strong reading of re-enactment I suggest. This reading is in line with the constructivist premises of the theory in general. It holds that the purchase into reality, into the natural, is provided by the system. In neither Teubner's nor Luhmann's account is social conflict taken on board as such. This means that there is no "real" but only constructed hetero-reference. In Teubner social conflict is "reconstructed"; in Luhmann law does not take on board social conflict either, it "exploits conflict perspectives", and "generalises" them in system-specific ways. In both cases they are generalised "as conflicts of expectations". What can be disappointed, and at what threshold, have to do with what assumptions furnish those expectations. Such vulnerabilities and disappointments are all institutionally projected. These are all the institutional assumptions that carve out a realm of interaction as "natural" conflict. When, therefore, the communication of a refusal (Widerspruch) becomes a conflict has to do with what can be taken a refusal of what. All these stimulants are set by a system. That's why they are identified as "sensors" in Teubner's text. To give an example: the fact that law establishes a duty of care between spouses and gives that duty specific content also establishes the threshold and occasion of the disappointment. Levels of aspiration and feelings of disappointment are relative to institutionalised expectations. The transgression of a duty as stipulated by law may go

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<sup>249</sup> This further step in re-enactment helps us get around those inconsistencies and minor objections to Teubner's formulation of the presupposition of some form of social conflict that triggers legal conflict. It also bridges the two categories in Luhmann of conflict re-worked and conflict first propped up (see also Luhmann, 1989).

<sup>250</sup> Teubner, 1993a, ch 3

unnoticed in love where care may be given a very different content and disappointment threshold. Or love may set a much higher level of care so that disappointments that do not register in law disappoint expectations in love. Similarly with other interaction systems, each with its specificity of setting conflict thresholds. Teubner calls roles "sensors" because they identify conflict thresholds and they do so in system-specific ways, as the "roles" (system-descriptions of identity) of spouse and lover indicated in this example.

Luhmann explains the re-enactment of conflict as its being re-imbued with instabilities. Conflict is re-cast along all three dimensions. In the social dimension the Ego-Alter confrontation is mediated by the positing of the co-expecting third. We explored, in the previous section, how this institutionalisation of the conflict abstracts it from its social basis. We will pick up that argument again in the following section. For the remaining part of this section, we will explore more systematically and in some detail how the re-enactment of conflict works in what Luhmann terms the material dimension. The question here is about what appears as the stake of legal conflict.

The notion that the political conflict is re-enacted along the material dimension means that what appears as the stake of the conflict is legally projected. Not in a simple, superficial way as would be the case with legal distortions of actual positions. Rather the duplication works all the way down. The conflict is first set up around a stake that is a stake in law. The stake is then projected into the realm of politics; what conflict is read there as environmental ("sensed") depends on what was projected in the first place. It is thus that hetero-reference becomes an unfolding of self-reference. The legal system effects specific projections into the political realm and reads stakes and contestation of those stakes when it senses specific environmental reactions to its projections. Again, what is contested and when has to do with what is projected. What the legal system avails as disappointment sensors are the ones Luhmann describes as pertaining to the the material dimension of the system: roles, programmes and values.

Expectations from role allow stakes to appear around which conflictual positions emerge. Roles are the first type of sensors that set thresholds of disappointment around specific stakes. Roles, that is, orient the allocation of importance to specific issues, furnish certain expectations pertaining to identity, that, when contradicted, create conflict. Here is an example: where adultery constitutes a reason for divorce in law, the marital status itself is endangered by the adulterous spouse. Where refusal to consummate marriage is repeatedly communicated from one spouse, a disappointment from role is perceived that may lead to a set-up of a conflictual situation in law. The law steps in to protect an "interest" in sex, or less crudely, an interest in fulfilling the role of sexual partner institutionalised in marriage, and now disappointed. The disappointed spouse may seek remedy in the termination of marriage in the first case, its annulment in the second. Significantly for the notion of re-enactment, it is

a disappointment from love that the law perceives here, a disappointment from the "brute" world of love not the "institutional" one of marriage. The disappointment that is generated from legal role is projected into love, as if it were a disappointment of love that is at stake. The legal expectation re-enacts an expectation from love here, it makes sense of the referred on the basis of the referrer oblivious to the fact that both are institutional creations. I will take up this example and explore it more fully in the final chapter and, for present purposes, suggest a politically more relevant one - rights and interests - below. But the love/marriage example still illustrates the point I am arguing, that conflicts are perceived on the basis of projections of disappointments that stem from assumptions that furnish legal concepts, in this case roles.

The same can be said of programmes and values, only in terms of disappointments of which, can a conflict resound at all in law. We have discussed the meaning of the terms in section 3 of this chapter. Programmes, like roles, serve as selectivity mechanisms for what resounds as conflict in law. There is, we have said, no direct, causal, linear relationship between a cause in the system's environment and a reaction in the system. Conflict in the environment is in no way directly dealt with in law. What counts as environmental information to which a system can respond is produced by the system as the latter transforms "noise" (or "chocs exogenes") into meaningful, for the system, information about the environment. The system then reacts to that information - processes it - which means also adjusts expectations to it. "Chocs exogenes" only prompt a selectivity process on the basis of which information about the environment enters the system. Programmes are such forms/patterns of selectivity. They serve the selective processing of information from the environment, they determine the terms in which the environment is perceived as relevant to the system and therefore also select conflict from the environment as is relevant to law.

System selectivity depends on programming. Programmes set up selective processing, a mechanism through which noise is turned to order, social conflict becomes perceptible. Luhmann identifies two types of programming in the legal system, conditional and goal oriented programmes.<sup>251</sup> In a conditional programme, a condition is stipulated (and kept invariant), so that whenever that condition is seen to be fulfilled, the effects that append are activated, the system responds in the stipulated way. This is the form of programming most typical to law, the "if p then q" formula. In a goal-programme on the other hand, the system selects a response as desirable, sets it up as invariant and uses it as a rule for selecting causes that can bring it about. This is a formula increasingly apposite to the interventionist type of law. Luhmann adds that "these two fundamental types of program are jointly exhaustive. But they can be combined in numerous ways and embedded in each other, so that it is often difficult to assign concrete programs to the one type or to the other." (1967, 111)

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<sup>251</sup> Luhmann, 1986a and 1967, ps110-113

Programmes select and activate values, the final, most abstract "sensor". Programmes assimilate values, select and take some on board while neutralising others. The goal-oriented programme, for example, fixes a value as the invariant rule for selecting causes that will fulfill it; it becomes, so to say, a cause for selecting causes. But values are at play in conditional programming too, as is the case of the value of the rule of law underpinning the "if, then" formula. Of course this does not in any way mean that the conflict of social values is taken on board in law. The assimilation of values into programmes means that even in the case of goal-programming, what is relevant as conflict to law is what the law perceives can bring about the value as response (a legally thematised value anyway) or, in the case of a conditional program, the law isolates as relevant that component of conflict that can activate the "if q then p" sentence and builds its account of conflict as a confrontation in view of that sentence; not least by designating the conflictual positions thus: whoever proves the "if" sentence true can activate what the "then" sentence prescribes. As always, to paraphrase Luhmann, only a small portion of possible conflict is thus fixed in law as expectable.

The relevant point of all this for our analysis of social and legal conflict is that all these are selectivity mechanisms that transform (re-enact) social conflict into legally relevant, or legally resolvable, conflict. These are more than "filters"; the closed system that has no access to reality projects hypotheses that allow that environment to resonate inside the system. Only via these projections into the social environment does conflict acquire legally meaningful form. Re-enactment means that these issues about which there is conflict, are assumed in law to have divided the parties naturally, as a matter of brute fact. They are referred to in law as if they are the issues of conflict as it occurs in its environment. The re-enactment comes across most forcefully in that "as if".

I will explore an example of the re-enactment of conflict that is central to a discussion of the relationship of law and politics. I will introduce the term thematization here, which is an important aspect of re-enactment- of how hetero-reference builds on the back of self-reference - and will be explored more fully in the next chapter. Suffice it here to say that the thematisation of conflict means that conflict is worked into law through legal concepts. In the example to follow, "interests" is the concept that law reserves for what clashes in political conflict. Law treats interests as exogenous to its analysis, as pertaining to politics proper. Law itself purports to come into a world of already clashing interests. It gives people rights and thus a way out of the "battleground" of politics (Dworkin) and the irresolvable clash of pure interest. Interests are mediated through rights; in this way law's hetero-reference to a political clash of interests, is transcribed purportedly without any significant distortion into a clash of rights that is possible to process in law. But the point is that interests are as much concepts of the legal system as rights are. Interests carry into politics claims that are processable in law. They are the names for what has resonated in law as politics.

A very short account of the interdependence of rights and interests is contained in Luhmann's "Interesse und Interessenjurisprudenz im Spannungsfeld von Gesetzgebung und Rechtsprechung".<sup>252</sup> In its reference to its political environment, law perceives politics as encompassing "the constant conceptualisation of the protection of interests in [terms of a] search for common grounds and grounds of comparison," and on the other side, its own (legal) "constant questioning of [legal] concepts and conceptual constructions [rights, balancing formulas] in the direction of interests that are affected by them " (p10).

It is thus that Luhmann describes how reference to political interests is mediated by law in a way that is constitutive of the law's picture of politics; law's account of politics is only an unfolding of its own self-reference. Interests is politics re-enacted, the re-enactment completed in the natural assumption that the lingua franca of law gives expression to political interests that exist as a matter of (political) fact.

To see more precisely how "interests and [legal] concepts organise other-reference and self-reference for the legal system" (p11) it would be worth looking at a specific political conflict and its re-enactment in law, in terms of a clash of rights "carrying" political interests. I suggest focusing the discussion on a specific problem that engages both law and (feminist) politics.

There are many sides to and expressions of the dissatisfaction of women with the way the claims and demands of the feminist movement(s) are processed in law,<sup>253</sup> or, more appropriately in the present context, to the way feminist claims carry in legal argument. Some strands of feminism, usually grouped under the umbrella term "liberal feminism,"<sup>254</sup> define the problem as one of the application of the law. Were "like cases treated alike" the inequality and oppression suffered by women would be substantially lifted. Biased application of the

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<sup>252</sup> Cf Teubner's analysis of "interest analysis" (1989, 747) for some similar, if more confined, formulations.

<sup>253</sup> To explore the limitations of rights we could turn to Marxist literature or alternatively we can turn to feminist literature. In her book *What's Wrong With Rights?*, E Kingdom explores the limitations that the use of the language of rights brings to feminist discourse. In many ways she introduces an emphasis away from traditional concern with the content on the law and towards structural limitations that inhere in the form itself (Smart, 1986, 120) This shift of emphasis at a first glance seems very promising for an argument about the political cost of the deployment of the form of a right to accommodate political confrontations. However her concerns turn out to be strategic in a narrow sense. The problem with pressing feminist claims as rights is that these claims would be beaten in confrontation in law (because they provoke powerful counter-claims in law, because without a Bill of Rights law provides only a very weak basis to invoke general rights in law only as principles) whereas I want to argue that the very couching of a political claim in terms of a right occludes a great deal of what is at stake. Kingdom's analysis is thus at once too broad and too limited for purposes of exploring questions of re-enactment of political positions in law.

<sup>254</sup> Brown, 1993, pp152ff

law is attributed to sexist motives and attitudes of individual decision-makers. This is a case of legal inertia or contingent prejudice, and there are, at least aspirationally, ways of redressing this discrimination that can be brought about institutionally. In effect, this "liberal" feminist understanding of oppression does not pose insurpassable problems to the republican containment thesis.

But there is a second, more radical, understanding that does. On this account, the law structurally inhibits the feminist case from surfacing and prevents the claim from being heard. Although much can be made of the "hidden content" of the law, I am primarily talking here about the inhibitions inherent in the "form" of the law.<sup>255</sup> MacKinnon, for example, treats the form of law as the reflection of male power. She argues that it is part of the feminist project to reject the "objective" and the "neutral" as these are the very projections of male power that objectify women.<sup>256</sup> "When law is most ruthlessly neutral," writes MacKinnon, "it will be most male; when it is most sex blind it will be most blind to the standard that is being applied." And then: "[a]bstract rights will authorise the male experience of the world."<sup>257</sup> Gilligan too, suggests that the moral code, transcribed in law as general rights and neutrality, reflects men's values and can therefore not accommodate women's concerns. "This form of critique," summarises Brown, "finds the very ideals of neutrality and objectivity unacceptably indifferent to the concrete specifics of lived reality."<sup>258</sup>

The question of pornography has been of central concern to feminism and my discussion in this, and in the following section, draws on Beverley Brown's paper "Debating Pornography: The Symbolic Dimensions" (1990). The point, I stress again, is not to show the more general (and convincing) point that politically conflictual positions are distorted in law, but the more difficult point that what is perceived in law as the political positions in conflict is re-enacted from the point of view of law.

Politically speaking, we can identify a number of divisions in the stance that feminism takes towards pornography. While the denunciation of discrimination informs or accompanies most of the formulations of the argument against pornography, some more radical versions of the argument are worth particular mention. Broadly speaking, we can identify three: (i) the argument that likens pornography to violence and represents it "on a continuum with rape and child abuse ... [Pornography] reflects and reinforces the reality of male power at its most

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<sup>255</sup> *ibid*, 163-4

<sup>256</sup> Smart, 1986, 121

<sup>257</sup> MacKinnon, 1983, pp644, 658

<sup>258</sup> Brown, 1993, 164



coercive."<sup>259</sup> (ii) the argument that "centres on the axis of discrimination and the mechanisms of inequality." The emphasis here is on the function of legitimation through belief systems, that legitimate ascribing to women only one social role, that of sexual objects, an ascription that carries through social life and spreads outside sexual relations.<sup>260</sup> Finally (iii) "pornography as representation" feminists argue that pornography objectifies<sup>261</sup> women: "It constructs woman as object of an objectifying, consuming, fragmenting gaze ... This position of the woman identified with the to-be-looked-at quality of pornographic images underlies important processes of identification and vulnerability,"<sup>262</sup>

Law takes the plurality of stances and the maze of the underlying political values and levels them down to incorporate them under its own central distinction, that of legal/illegal. The law is after all, to paraphrase Simmel, about resolving divergent dualisms: that is its reduction achievement. Either pornography is illegal or it is not. Then, to use Luhmann's terminology, the law complements that guiding distinction, that coding, with programming. If pornography is illegal, it is because the harm it creates, where what counts as harm is determined through legal criteria, overbalances legal reasons for protecting pornography. If it is lawful it is because the harm in censoring pornography overbalances the reasons for protection from the harm it might cause the alleged injured side. Who counts as injured, why and when, as well as what enters the balance and what tilts the balance to what side can include a multitude of legal descriptions (the definition of pornographic), conditional attributions that create the necessary relevancies and legal evaluations, hierarchies of norms (for example, constitutional guarantees of freedom of speech against legislative prohibitions of harm) and criteria, etc, in a word all that we experience as law. There is no doubt a lot of room for manouver in all this and critical scholars (incl feminist CLS) are surely right to identify transformative potential within law, shifting priorities and relevancies, upsetting legally settled meaning. Whatever the possibilities of immanent critique however they do not relax the rigidity of the guiding reduction that made all subsequent flexibility possible. One would have to look to the suggestion of the constitutive dependence of programming to

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<sup>259</sup> Brown, 1990, 137

<sup>260</sup> "This is what pornography means ... It institutionalizes the sexuality of male supremacy, fusing the eroticization of dominance and submission with the social construction of male and female. ... pornography is the harm of male supremacy made difficult to see because of its pervasiveness, potency, and principally, because of its succeed in making the world a pornographic place." (MacKinnon, 1992, 461)

<sup>261</sup> "Those aspects of pornography's recognisability so often regretted on aesthetic grounds, far from being gratuitous, are essential to it; it is the way in which the organization and disorganisation of bodies operates as a short cut to desire which constitutes 'objectification'. (Brown ,1985)

<sup>262</sup> Brown, 1990, 138

coding. There is an ultimate reduction that has to be taken on board if only in order to make all else possible. And that is the re-alignment to law's ultimate contra-distinction. To repeat it: Either pornography is illegal or it is not.

If this is so, what does it tell us about the re-enactment of political conflict? The question turns on the political interests that the law "sees" associated with the raising of the question of pornography. For the law, one abstains from raising the claim because one is politically motivated by the interest to uphold the freedom of speech. In contrast, the political motive behind raising the claim is the interest to prevent the harm. Both of these are political interests in a broad sense, political motives that the law picks up as motivating the conflict around pornography. That is a hetero-reference based on self-reference. The clash of interests in politics is the legal postulate of the clash of rights in law. This was the point repeatedly stressed by Luhmann: "what occurs in both directions is internal structural workings of internal operations and not a pressure of interests originating in the social environment." The "semantics of "interests" makes the legal system sensible to stimulation and thus sets in motion the systems own explorations," activating in the system a process of turning order into noise and the rest. Throughout this process "the interests that the legal system processes are its own constructions, [and] these constructions make explicit the irritation from the environment." But "in the construction of interests a considerable reduction of environmental complexity has already been effected" (p11) Because "the boundaries of the system excludes all that cannot be expressed in this language of concepts and interests." To negotiate conflict through negotiating rights, is to allow a vast area of conflict, and an infinite area of potential conflict, to be defined away.

How does this apply, more specifically, in the area of pornography? What is here the broad area of political conflict that has been defined away during the legal processing of the issue? It is this. If feminists denounce pornography as violence (above, i), the question in law becomes the force of the causal connection between the two. There is a silencing here. Law seeks a political interest to refer to, but the political interest it finds is so weakly captured in law, it practically collapses: it becomes that of seeking to redress the serious crimes of violence and exploitation of the young and other vulnerable categories. The question in law is how forceful a causal connection can be established between pornography and the protection of vulnerable categories.<sup>263</sup> The political perspective that gets lost is the denunciation of the

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<sup>263</sup> "The requirement that demonstrable connections be shown urges that pornography have its effects in a very literal way ..." and concentrates only on the most extreme material that may have such a literal harmful effect. "The classic dilemma around pornography is thus a balancing of extreme harms of doubtful direct connection with pornography against the harms censorship offers ... But this anxious irresolution is not the essence of feminism's problem with pornography." (Brown, 1985, 12)

male-power context that frames, informs and re-inforces these instances of coercion and violence. Gender-based violence becomes in law violence simpliciter, and as such furnishes a claim that is only too weak, or needs to rely on analogy (with harm to other vulnerable categories like children, etc). No political denunciation of gender-informed practices can be accounted for in law, because the gender-neutral category of citizenship screens off the discrimination. But even if harm were to be proven, the law still needs to put the claim to the test and balance it against the freedom of the press, that of speech, that to indulge "tastes and pursuits". The feminists denounce oppression and find themselves, in law, opposing basic constitutional principles instead.

In what concerns the second strand: here feminists denounce pornography as discrimination, and the law sees this denunciation as motivated by an interest not to be discriminated against. The re-enactment here is in form and in content. In form because the claim is couched in terms of an interest, by definition therefore balanceable against others. In content, because the concept, at this second stage of legal self-reference, acquires its meaning from, and grounding in, formal equality before the law. Upholding legal/formal equality is postulated, by the law, as the political reason for taking pornography to court. The "political" (I always mean reflexive-political) cost of this processing is the withdrawal of the possibility:

- (i) to defend the priority of non-discrimination over the balancing itself. In law this priority disappears and anti-discrimination becomes a competitor in the balance of freedoms that the law hosts. But the political claim that needs to be discerned and kept out of the balancing act, is that non-discrimination is not one among many freedoms but a necessary condition of how freedoms should be understood in the first place, as well as what it means to balance freedoms fairly;
- ii) to contest what constitutes discrimination, beyond the confines of formal equality.

Neither of these political claims can resound in law. For law, politically speaking there is an "interest in not being discriminated against". This interest stands in, re-enacts, and exhausts whatever the feminist may conceive as the political stake of discrimination.

Finally, the strand of the argument, that denounces pornography as objectifying women, is also silenced in law. In the eyes of the law, if these feminists do not raise the harm principle it is because they value freedom of expression too highly. The law cannot see the political motivation for not taking to law: that law does not offer the categories for redressing the objectifying effect; and that, strategically, a success in law will not reverse the overall cultural reproduction of meaning that is at issue. This assumed endorsement of a basic constitutional principle extends to cover even a polemical stance towards law. The claim that the masculine fragmenting gaze that objectifies women in pornography is the one that gazes at them in law too, can only resonate in law as its reversal, as endorsement. From the point of view of politics, these are paradigm cases of non-engagement and travesty, and from the point

of view of sociological observation, cases of what Brown elsewhere calls "a contradiction in the most basic terms of social analysis."<sup>264</sup>

### \* Thesis [5] against Republicanism

I went to some length in the example of pornography to show how the law re-aligns political voices in the public realm by re-casting claims about facets of oppression into claims about political interests that, when resonating at all (in the case of pornography-as-representation they didn't), resonate as something alien to what was politically intended. To put this claim against the republicans concisely: what is re-enacted is not contained. If the republicans are putting forward a theory about how political conflict can be contained in law, and thus allow law to accommodate people's entry into public space by accommodating their conflicts, then people's conflicts need to be depicted not re-enacted.<sup>265</sup>

There is a possible counter-argument here; that not all conflict is re-enacted. After all, as we saw, law often first props up assumptions that furnish conflictual positions. Also, to the extent that people are thoroughly legally socialised, they may come to perceive legal conflicts as expressing genuine feelings and aspirations. To that extent, genuinely, there maybe no re-enactment.<sup>266</sup> But there remains a problem for republicans because their claim is a strong one. They cannot afford to distinguish between conflicts depicted and conflicts re-enacted; they cannot afford to acknowledge at all the category of re-enacted conflict. Were they to concede such a distinction, they would need to justify something impossible: that re-enacted conflicts too express genuine political engagement. In the absence of such a possibility the republican position is untenable. While it may be true that some people and groups, sometimes, perceive their conflicts as already institutionalised, already legal, the assumption cannot be universalised except at the cost of carrying a blindspot. And if it is not universalised, it cannot uphold the republican position.

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<sup>264</sup> Brown, 1990, 142

<sup>265</sup> The logic of re-enactment covers here also Ackerman's notion of a constitutional crisis that precedes his constitutional moments. This would be an argument about the legal-institutional reception of the political crisis. How does a crisis present itself to law? Law, in view of its re-enacting political "noise" cannot serve as a register of political crisis. It can only re-act to what it re-enacts as crisis in its environment. The political crisis does not feed into law, the law feeds off what it feeds itself as crisis.

<sup>266</sup> "C'est parce que le droit appartient aux conditions du conflit, soit qu'il forme l'objet du litige, soit qu'il le nourrisse, qu'il peut aussi en être la solution." (Freund, 1974, 52)

I would like to stress, once again, a valuable insight we have gained from systems theory regarding the aforementioned blindspot. The re-enactment is always latent. The conflict perceived in law is a conflict that the law perceives as really occurring; it is a conflict that the law assumes has divided the parties as a matter of brute fact. Law is innocent of its blindspot. It cannot see that the conflict it sees is an enacted environment that acts as surrogate. It cannot see that what it takes to be "brute" conflict is always-already institutionalised conflict; it cannot see its re-enactment of conflict. The ideological, mystifying, moment is the republican moment, where law is mobilised, in view of its innocence, to perform a task it cannot manage - contain all conflict - and is celebrated, by the republicans, as having managed it.

### **\* Thesis [6] against Republicanism**

The articulation of this sixth argument against the republicans depends, for its differentiation from the one above, on drawing a distinction between what it means to accommodate and what to empower the politics of civil society. We already saw that the republican "constitutional reality" of civil society is prejudicial and deaf to a great deal of what is articulated there as political conflict. According to the republicans, however, law not only accommodates (thesis 5) but actually empowers (thesis 6) politics by ensuring that all interests can be heard and debated. This is achieved by securing the right of free speech for all. Politics is empowered through law in that politics that is the voicing of interests is secured as equal access to the institutional arena. It is the republican connection between free speech and political conflict that brings the empowerment aspect most obviously into relief. This is properly the subject for my next chapter, so here I will confine myself to indicating the place of that future discussion in the context, broadly, of the containment of conflict and, more narrowly, of its re-enactment.

Finally and on an experimental note, in this context of re-enactment and blindspots, I will venture some very brief comments on the possibility of a societal rationality of the type advocated by Habermas. Habermas's very "republican" recent tour de force, his Faktizitat und Geltung is above all an endeavour to restore law as the centrepiece of democratic organisation and deliberation, vessel and guarantor of political rationality. But as lever of collective communication law stumbles on the very reduction that it imposes on the world of possible meanings. In many ways the debate between Luhmann and Habermas can be understood as respectively denying and asserting the possibility of communication occurring across the boundaries of system rationality. Whereas for Habermas, communicative rationality brings together claims from across society, for Luhmann, such a potential is countered by the

semantic closure of autopoietic discourses. Each system's structural limitations, and ultimately its closure around its code, is a pre-condition for any kind of cognitive capacity. A blindspot first enables a system to see. Blindspots cannot be eliminated without a serious loss of ways to reduce complexity, therefore of perspective and insight.

The problem for Habermas is that a theory of rational consensus cannot tolerate blindspots or structural limitations. A rational consensus must transcend such limitations of vision. But for Luhmann, meaning in the world is based on limitations of vision. Blindspots, in a paradoxical kind of way, are the conditions of insight. Institutional logics cannot be done away with as patterns of coercion that must be eliminated to achieve consensus, truth and freedom, as Habermas would maintain. In this context, Habermas's recent "republican" turn is most perplexing. By elevating law into the centrepiece of societal deliberation, vessel and host of rational discourse, Habermas, like the republicans, attempts to both contain and empower the politics of civil society, and delegates to law the impossible task of transcending its own confinement and re-alignment of meanings, the task therefore of seeing its blindspot and of shaking it off.

## VII Conflict severed

If the conflation of conflicts already analysed - the failure to draw the necessary distinctions between the two system referents - is in itself a serious flaw in the theory of republicanism, the severing of conflict that this entails is even more alarming. The main idea here is that what is severed is the connection between the broader conflict and what appears as the particular legal issue. What the severing does to the meaning of conflict will be explored, in turn, along two dimensions, "material" and "social".

### (i) The material dimension.

When we discussed conflict as a system in its own right, we saw how the social dimension, the perception of Alter as enemy, was dominant in the sense of setting up both the temporal dimension - time would work to the advantage or disadvantage of the enemy - and the material one - in the sense that reality became confrontational, situations acquired meaning as relevant to the conflict. From the point of view of the legal system, however, neither the temporal nor the material dimension of the conflict are in any similar way submerged. The social dimension ceases, in law, to dictate the terms. In the material dimension, that will concern us first, the identity of Alter-as-enemy ceases to be the pivotal point for the casting of a conflictual reality. The identity of Alter is neutralised as litigant, remains meaningful only as a point of allocation and address of rights and duties. Broadly speaking, law introduces a new emphasis on the material dimension, an exclusive focus on a subject that divides the parts.

That the material dimension is rescued from its submersion under the social one, does not mean that law treats the theme of the conflict as such. We have already explored one aspect of the "appropriation" of conflict by the law in terms of its re-enactment. Law re-enacts conflict by perceiving through sensors it makes available, and in this re-casts conflict in its own image. The emphasis in this section shifts: what is important here is that the ties between the parts and the whole of the conflict are severed in law's abstraction from the theme of conflict of a specific (legal) issue. The emphasis this time is not on the re-enacting but on the severing. The difference is not always plain to see, but depends on the legal breaking up of a political conflict, of disarticulating connections that are constitutive of political conflict. Let me clarify this by discerning and discussing two instances of severing.

In the first, the theme of conflict is appropriated by the law in so far as it is fragmented, decomposed, "factorised" or "fractionated"<sup>267</sup> into simple issues to which concrete (legal) solutions may be provided (1981, 110). When a conflict is "fractionated", the "complex" of dispute is dismantled into partial questions. In the material dimension of legal conflict, the theme of the conflict is fragmented into issues and the totality that conflict claimed for itself is compartmentalised. While the observing system "fractionates" by inflicting divisions on the subject matter that are relevant to how it can process the problem, the accompanying notion of "factorising" connotes that the breaking up is into components that are constitutive of the conflict at hand. On the one hand, lines of division are drawn that depend on what the law can process as issues; on the other hand, the parts are assumed at the same time parts of a more inclusive whole and yet processable separately. The law can depict, conceptualise and process the parts: the break-up is effected in a way that is relevant to the system. Taking a suggestion from Luhmann (1984) the break-up is effected by positing functionally specific differences upon the whole. Fractionating thus means assuming the whole by depicting conflict-components in ways that are relevant to the observing legal system. The discussion is quite technical, and the technicalities are not all necessary for my argument here. Whatever the precise technical meaning of "factorising", there remains in the legal observation of conflict a severing, a compartmentalisation of the whole into parts that stand in for the conflict. Where workers contest models of managerial organisation in the name of the democratic control of the workplace (the whole), the law perceives a conflict with the employers expressed as legal or illegal occupational demands (the parts). Where the workers proclaim solidarity in industrial action, the law sees "sympathetic" strikes (and "secondary" picketing), action whose aim is not to forward occupational demands and which is thus illegal because overtly political.<sup>268</sup> The severing in both cases is the breaking up of the comprehensive categories "democratic control of the workplace" and "solidarity", that inform the workers' political conflict, in terms of the legal "occupational/political claims" distinction. Why is this a severing? Because the insertion of the occupational/political legal distinction defines the two as mutually exclusive. The distinction is the blindspot that prevents the legal system from seeing that what is occupational may also be political. More accurately, the insertion of the distinction that divides the whole into differentially distinguished parts, is the (analytically, not temporarily distinct) moment that accompanies the severing, which, more precisely, occurs as the "occupational" is abstracted out of the broader "political" context. The worker's perception of the conflict is mutilated into the

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<sup>267</sup> According to the formulation of Fischer, 1964. Luhmann relies on this in his account of conflict in 1981, 110

<sup>268</sup> On the relevant UK legislation see Davies & Freedland, 1984, pp.798, 805-13



occupational (lawful) and the political (unlawful) components, and their interdependence is severed as the former component is abstracted (and defined in opposition to) the broader latter.

There is a second aspect to the severing and this time it turns on symbolic conflict. Let us turn to pornography once again to understand how this severing is effected.

As we said, the severing in the material dimension is the decomposition of a theme into issues. Now, the point that needs to be highlighted is the difference that it makes to view pornography as an issue (the point of the previous section on Duplication was what kind of an issue it was - the conflict was duplicated as a conflict of interests to be litigated as a clash of rights-claims) and to view pornography as an exemplary instance of a much greater stake. To see pornography in the first limited sense as an issue in itself, engaging questions of freedom of speech and harm, violence etc, is to be dealing at the level where the greater theme has already dispersed and the constitutive links between the instance and the whole are already severed. In systems theoretical terms it means seeing the conflict-as-occasion at the expense of the conflict-as-system. It is only if we resist the legal reading, the substitution or conflation, that we may appreciate how pornography becomes the name of the greater stake in the larger complex gender-power conflict, in a clash with patriarchy as such.

What all this involves initially is to understand pornography in its symbolic dimensions. In the politics of the symbolic, pornography becomes exemplary of a greater conflict. Because, as Brown says, "pornography speaks the culture of sexism in its exemplary form. Pornography is thus the issue representative of the whole of patriarchy ... A political world that cannot see pornography as the most outward and visible sign of a patriarchal culture ... has made itself intentionally deaf and blind to the obvious." (ps134-5) The emphasis on the symbolic function of pornography is evident throughout the spectrum of feminisms; MacKinnon, for example, writes: "The critique of pornography is to feminism what its defence is to male supremacy. Central to the institutionalisation of male dominance ..." Then "tolerance to pornography is an index of the society we live in." 269

Gusfield's notion of a "symbolic crusade" illustrates an instance of political conflict in the domain of the symbolic.<sup>270</sup> The notion is useful for both the social dimension of the conflict to be analysed below and the material dimension here. For the social dimension the notion is useful, as we shall see, because it is relevant to the group's description of itself.<sup>271</sup>

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<sup>269</sup> Quoted in Brown, 1990, 139

<sup>270</sup> Gusfield, 1963

<sup>271</sup> Notwithstanding the affinity of this politics, in the case Gusfield describes, with specifically

In the material dimension the notion is useful because it denotes that the issues in a certain sense "stand in" for the conflict, turn it into a test case and perform the function of "emblem or metaphor, a genre of iconography that stands to the social order as a whole and represents its collective values." (Brown, 1990, 147)

The symbolic achieves a specific link between the particular and the total conflict. It mediates and establishes the connection between the particular and the total. It provides the reason why the total is instantiated in the particular. The problem with an argument such as the republican, that relies on law to address political conflict, is that the symbolic "connection" is invisible to law that deals only at the level of the "particular". This underlies the difference between conflict-as-occasion and the conflict-as-system. For the latter the conflict that sheds perspective on the world thematises the instance; then "total" conflict can be played out in small arenas, symbolically. But with the abstraction inflicted by law on the conflictual reality as envisaged by the conflict-as-system, the legal issue contains and exhausts what is at stake; it is no longer seen as indexical to much greater questions and stakes of conflict. And with that connection severed, the possibility of symbolic politics - a vital aspect of our political engagement - is withdrawn too.

Systems theory allows us to articulate this severing of the symbolic in law, and what I suggested here is but one possibility.<sup>272</sup> Two distinct systems at once at play "structurally couple" around pornography. In one of them - the legal system - the conflict is necessarily aligned to legal coordinates where concepts of rights, liberties, legal notions of harm and legal analogies, legal tests and legal presumptions first make sense of the conflict. In the other - conflict - where reality is ordered as conflictual, there is room for the symbolic. Here, conflict first sheds perspective on the world and as specific issues are absorbed into the conflictual pattern they are thematised as instances of the greater conflict, acquire meaning in the light of the greater stake. This is where the symbolic function best is depicted, in that connection to the greater conflict-system which permits the total stake to be symbolically played out in small arenas around smaller questions.

Not only the invisibility of the symbolic, but also a certain distortion is at issue here. In the mirror of pornography the law reads a conflictual pattern about rights, and appended on them, claims of harm. What for law is a mirror of representation for the conflict-system is a mirror of distortion. The distortion itself then generates demands for political action. Even the opponent's action of taking pornography to law and thus attempting to legitimate this distortion becomes, since everything is absorbed into the pattern of totalising conflict, a strategic move in the situation of conflict, an ideological move aiming to conceal what the conflict is really about.

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conservative concerns for the maintainance of group status.

<sup>272</sup> For one other see Smith S C, 1991, 329-331

### **\* Thesis [7] against Republicanism**

The silencing of symbolic politics is one part of the impoverishment of possible politics that comes with the "severing" of the material dimension. The fragmentation of total conflict into particular conflicts is another. In the former case, as in the pornography example, the law severs the connection that would allow the particular conflict to be played out symbolically, as an index of the greater one. In the latter case, as in the workers' conflicts example, the severing withdraws the possibility to articulate the overall political stake, that disappears in the legal processing of the conflicts. In this the law silences the claim for the democratic control of the workplace and therefore the self-determination of the workers' productive life, as well as any notion of class solidarity. In severing the connections between total and particular conflict, the law disarticulates connections that are vital and constitutive of political understandings. This means that certain political understandings and claims do not "carry" into law. Most significantly, and unacceptably to a theory that celebrates the legal containment of political conflict and "addresses itself to politics in the broadest sense", the severing imposes a selective screening of what actors and communities assume to be politically at stake.

(ii) The "severing" in the social dimension

To turn to the social dimension of conflict is to focus on the intimacy between stake and enemy that is eroded in the legal processing of political conflict. Where the conflict claims totality no more, that is, where conflict no longer - as system - equates its boundaries with those of the world, the source on which Ego draws to make sense of his/her identity changes and with it possible perceptions of what is at stake also change. We saw how this worked in the question of pornography and I will re-visit the example very briefly for the last time to draw out the implications. What of the social dimension here, and where is the political cost of the severing? It is this: the legal abstraction from the identities of the parties-in-conflict carries through to the legal assumptions that furnish the legal tests. Who can be harmed and how? The formal category of the legal person blocks in law the visibility of the specific political vulnerabilities of women's social positions. Where there is no category to accommodate harm as degradation of women as object of pornographic imagery, that in turn underlies identification of women's positions, no claim of harm can resonate. This is a restatement of the masculinity-as-form argument.<sup>273</sup> Here legal abstraction is viewed as rendering the conflictual position unintelligible as such. The severing is structural and in effect, ingenious as the attempts may have been to relate pornography to sexual violence as legal claim,<sup>274</sup> the reliance on the legal medium of legal personality, which provides formal comparators to furnish analogies and presumptions, undercuts not only much of the specificity and urgency of the claim, but also the nature of the conflict as such.

I want to focus this discussion on possibly the most crucial area of the republican argument concerning the ideal of community. The severing of conflict, that I claim occurs when we take our conflicts to law, is best illuminated when we look at the question of collective identity. The hallmark of the republican thesis is the empowerment of community. If the severing along the social dimension can be conclusively argued as a case against collective identity in law, then the republican attempt to account for (let alone empower) community through law fails even aspirationally.

I will take the category social movement as an example of a category of association whose collective identity cannot be given a "legal reality", since the movement's perception of

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<sup>273</sup> Brown, 1993, 164

<sup>274</sup> Brown, 1990, 142

conflict, which would establish such an identity, is severed in law. I will explore this argument by relying on two major theorists of social movements, Alain Touraine and, only briefly, Alberto Melucci. I will then complement their argument about the connection of conflict and identity, with the arguments of Georg Simmel and Lewis Coser.

By exploring the nature and action of social movements today, I will attempt to show that what singles out movements as such is the challenge they present to the capacity of the institutional sphere to deal with the kind of politics they advance. The movement can only be understood as advancing a political discourse that cannot generate organizational forms to act within institutional politics without becoming something other than itself. It creates a rupture in that system, revealing the incompatibility of legal form and the politics it informs and understands. In this sense, law cannot contain the movement.

### Touraine and Melucci: Identity and "constitutive" conflict

Touraine insists that New Social Movements struggle primarily to re-assert collective identity, whether that takes the form of "defensive" withdrawal into collective identity or that of the creation of societal counter-models. The insistence on collective identity is not accidental, particularly in the French context. The "political" is (and has traditionally been in France) related to a certain "quality of association." In that sense, a movement represents a very distinct moment of intersubjectivity, marked out by a distinct level of integration, sociality and imagination in the pursuit of politics. It is what the French, in more inspired days, called "la verité du mouvement"; what Sartre refers to when he defines the group by its undertaking and by the constant movement of exclusion and integration which tends to turn it into "pure praxis";<sup>275</sup> and it is that undertaking that Willener claimed was re-situated as both form and content of politics in the events of May.<sup>276 277</sup>

The central theme in Touraine's sociology of action is an image of society which produces itself through the conflicting action of class actors struggling over the control of "historicity". Conflict is situated at the heart of society to the extent that society is actually no

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<sup>275</sup> Sartre, 1976, pp256ff

<sup>276</sup> Willener, 1970, passim and 281-98. Willener argues that at the period of upheaval the emergent (instituant) had only the most tenuous links with the established (institute).

<sup>277</sup> Of the two elements that Melucci identifies as characterising the ideology of the movement, the first is "the negation of the gap between expectations and reality. The birth of a movement is marked by "moments of madness" when all things seem possible ... Ideology thus overcomes the inadequacy of action." (1992, 133)

more than its own conflictual self-production. "At the core of the society lie the social struggles in which what is at stake is society's self-production" (1981, p30). Rather than viewing conflict as a "phenomenal" (see above), a pathology when order and interdependence within the functional whole break down, rather than viewing conflict, that is, as occurring at the boundaries of society, Touraine chooses to situate it at the heart of society. Social movements are the central collective actors<sup>278</sup> involved in class-conflictual action.<sup>279</sup> This situating of conflict at centre-stage in a way that makes all else dependant on it, is what makes Touraine's work so relevant to this analysis that relies, in a similar way, to conflict(-as-system) to set the parameters.

Touraine provides an analytical concept of a social movement as "the organized collective behaviour of a class actor struggling against his class adversary for the social control of historicity in a concrete community."<sup>280</sup> The components identified here are: the actor (and the sense s/he makes of his/her identity), the adversary, the social field and the stake. Indeed, for Touraine, "the social movement [presents itself] as the combination of a principle of identity, a principle of opposition, and a principle of totality."<sup>281</sup> Identity (I) as the answer to the question : what self-understanding underpins "our" struggle?; opposition

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<sup>278</sup> Touraine's theory invites critique at least as to the definition of social movement it advances. Touraine reserves the term Social movement for too broad a category of action since he uses it to cover the whole field of conflictual collective action. If that is the case than at least the heuristic value of his model disappears since it removes from sight what is distinct about the nature of movements as opposed to other forms of collective action, eg simple protest, institutionalized action etc. On such a broad outlook, the movement becomes inoperative as a paradigm.

<sup>279</sup> The theory is susceptible to criticism on the identification of the action of social movements with class struggle. The class nature of social movements is at least questionable. For example the student struggles of the 60s and 70s did not in themselves embody class struggles but rather assumed the role of catalyst through worker-student contacts and alliances intended to mobilise the 'true' class actors. Of course it is true that all this may have changed if we take seriously the purported shift to post-industrial / programmed Society: if, that is, the coordinates have shifted so that we can maintain the term class struggle to describe a social situation where new lines of conflict are formed by new actors about new stakes. This is Touraine's claim and this is how his evolutionary typology ties in with the rest of his theory: the form that the class struggle has assumed is that of the new social movements fighting for self-management against the class adversary that now assumes the face of technocracy. In this context, Touraine purports a transition from industrial to 'post-industrial' (or 'programmed') Society, a term which Touraine co-initiated (almost simultaneously but for different reasons) with D Bell.

The objective was to provide a new paradigm that would allow his to retain the central notion of class conflict and to account for the displacement of the centre of class conflict from industrial relations to new sites of class domination. Therefore the stakes could still be claimed the same, what had changed were the collective actors and the field where the conflict was to be played out. Melucci has challenged this aspect of his teacher's work (1989, 80)

<sup>280</sup> Touraine, 1981, 77

<sup>281</sup> *Ibid*, p81

(O) as the adversary to be identified within the field of reference, against whom to wage the struggle; finally the stake of the struggle, which for Touraine is Totality (T), the control of historicity. 282

The three components do not in themselves suffice to describe a social movement if they are not conceived of as interdependent. The interdependence (I-O-T) must be "total". Only together do the components constitute the field of reference against which context each of them in turn draws for meaning. If we conceive of the relation I-T (that between actor and stakes) without O, then what we are describing is not the stakes of a struggle, a conflict, but a society as a single actor striving for an objective that can be described e.g. as progress or modernization.<sup>283</sup> The linkage O-T on the other hand is what reveals the aspect of domination in society, in the sense that the actor (I) is excluded from the definition and the pursuit of the stakes which become determinable by O. At a more fundamental level, (I) only becomes (I) in contesting (O) over (T), and that holds true of the other components as well. The connections are numerous, as are the conclusions that can be drawn from these connections. Touraine provides such a detailed exposition,<sup>284</sup> making sure that it comes across clearly that, "[a] social movement can never be defined by an objective ... It is nothing but the ensemble made up of the three components, an unstable ensemble, never fully coherent ...",<sup>285</sup> but nonetheless always presupposing that interdependence.

The crux of the matter is that the "total interdependence" (the integration of the three

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<sup>282</sup> Although the latter may seem to overstate the case for social movements, it in fact ties in coherently with the overall framework of Touraine's sociology. I think that even to adopt a more cautious attitude and to make a more modest claim as to what the stakes specific to a movement are, does not diminish the analytical power of the schema. But while conflict can be played out over smaller stakes - and Touraine is helpful here in identifying other levels like "institutional blockage" etc - it remains crucially important to be able to identify what constitutes a stake adequate to uphold a social movement. This must be more comprehensive than the partial demands advanced at various stages of the conflict. It is a matter of distinguishing (middle range) strategic aims from the stake itself. To give an example, the middle-range targets of the student struggles of the late 60s in France and 70s in Germany, were the authoritarian way universities were run, the lack of student representation in the decision-making bodies, the prospect of unemployment, etc. It would be a mistake to identify these as the stakes of the movement. The student movement also and explicitly challenged the social utilisation of knowledge in the way the normative structures of their society supported it, and in that sense even advanced a counter-model for society. What is in doubt is whether we can call this the new site of class conflict in the way Touraine does, but what is not in doubt is that the stakes of a struggle, if it is to uphold a movement, must be identified at the more comprehensive level.

This of course brings into relief another problem. Need such identification be conscious and explicit on the part of the activists or is it something attributed to the movement by intellectuals outside of it? For Touraine's account of the interaction of intellectuals and activists in the moulding of theory and collective action, see his The Voice and the Eye (1981)

<sup>283</sup> The point has been elaborated by Melucci (1982)

<sup>284</sup> Touraine, 1981, ch.5, and 1977, pp310-25

<sup>285</sup> Touraine, 1981, 84

components in the three dimensions) is what forms the political context, within which movements and their struggles make sense. Withdrawing from this context, the social relation within which they are situated, leaves the struggles politically undetermined. When it comes to making sense of the movement this withdrawal from the context is potentially destructive. The insights that this lends to the legal/political problematic are valuable: within the categories of legal discourse (i) the actors are not defined in their class conflictual relationship (I-O), (ii) their field of struggle and the stake is defined independently of them (T-I, T-O). By abstracting from that interdependence (I-O-T), the interdependence that stems from the situation of the parameters in conflict, law severs the political basis of the movement.

If this contention is true it provides a solid base for proving the claim advanced here: that legal discourse submits the political self-understanding that the group has of its identity to such abstraction that it annihilates it. The question we are seeking to answer is how actors conceive of themselves, of their identity. It is trivially true that a pre-condition for collective action is the possibility of identifying with the other members of the group, the self-reflexive capacity that allows actors to say 'we'. That in turn means that the movement must constitute a field of reference wherein identity is formed.<sup>286</sup> On the basis of Touraine's sociology that field can be described as a tightly integrated I-O-T; within it the common identity is

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<sup>286</sup> Cf Teubner (1989, 729) for the mode of that emergence in self-reference. Teubner describes how the capacity for collective action emerges when organised collectivities produce actions and then organised action feeds back to produce collective identity. See also his 1988a, 137-8: "It is ... communication on its own identity and capacity for action that constitutes the corporate actor or collectivity as a mere semantic artifact, as a linguistically condensed perception of group identity. It is only to the extent that such a corporate actor becomes institutionalized, ie that organizational actions are actually oriented round this self-description, that the corporate actor takes on social reality." (137-8) This indeed appears to me correct and insightful. But there is an ambivalence in Teubner's paper that makes his argument occasionally baffling and does not live up to his own presupposition of the radically constructivist nature of the legal person. The ambivalence is relevant to his demarcating the "social substratum of the legal person". Teubner here spends a lot of time trying to find an adequate description of the social reality underlying the legal person, and, having discarded both individuals and groups as such, names it as a communicative process on which, and this is important, the legal reality superimposes itself and reworks to the extent that the two are no longer "identical" (138) in any possible sense. But in what sense is the social substratum a communicative process in its own right at all? I think it cannot be. Because the communication underlying the law - albeit organisational or interactional - and "strictly coupled" by it into the law's own idiom, has its own boundaries around its own topics and own self-descriptions. If that is so, the social substratum of the legal person is thus not co-terminous with the legal person, and if it is not, it cannot be a substratum. The law's selectivity is constitutive of its "substratum"; the law enacts into being its own "surrogate" environment - including its social "substratum" through its own editing. It is thus impossible for the observer to demarcate an area of communication to serve as substratum that precedes what area of social communication the legal institution itself selects as constituting its substratum. The law is always already there before its social substratum. My objection to Teubner then is that in this paper he too goes down the same line of inquiry as the theories he rejects, and that he rejects the theories on the basis that they have found something wrong not that they have gone about looking for it in a way that is wrong. His methodology here concedes too much and undermines the crux of his substantive argument.



articulated through identification with the stakes of the conflict. Collective identity is conceived here as emergent property of collective action. There are neither fixed identities nor determined ascribed memberships prior to their generation in "totalised" conflict. But in contrast to this focused commonality, the law's projection of the universal category legal subject/citizen screens off the forcefield where identity is shaped, by defining out the significant Other: the opponent. The category provides no purchase into partiality<sup>287</sup> and opposition, where partiality is what underpins the actor's political identity. By disarticulating this frame of reference, severing the connection with conflict, the legal discourse renders the movement invisible to itself (and to others) and its political praxis meaningless.

Alberto Melucci, a student of Touraine's, has extended and enriched this analysis by focusing it on the cultural and symbolic reproduction of collective action. "The very idea of a social conflict," he stresses, "implies the opposition of two actors struggling for the same resources, symbolic or material. The adversaries share the same field but they interpret it in opposite ways... They identify themselves with the whole field while denying any role to the opponent."<sup>288</sup> The point here is the one that Touraine suggested before: that individuals within the movement "construct" their action in ways that are incompatible to outsiders' understandings and in the process appropriate the relational field of conflict (they "reify" it according to Melucci). To append meta-political categories to such understandings of action, conflict and identity, and to fix the conflict through categories alien to the parties involved, cancels out the understanding that the movement has of its identity and action.

But more importantly, Melucci discusses the New Social Movements in a way that raises the central question of whether there are forms of conflict that are being directed against the logic of complex systems. He designates not only solidarity and engagement in conflict as definitional elements of a social movement, but designates as a necessary feature

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<sup>287</sup> As Sullivan writes in her defence of partiality, "[i]ntermediate organizations not only facilitate individual self-definition and expression but also keep the state from replicating itself by nurturing deviance, diversity and dissent. These functions depend on subgroups' private status - on their detachment and distance from the all-inclusive State." (Sullivan, 1988, 1721)

<sup>288</sup> Melucci, 1992, 137.

Melucci explains the interdependence in similar terms to Touraine (note the proximity of the following exposition with Touraine):

"The meaning of collective action, which is to be found in the system of relations of which the actor is a part, is identified with the particular point of view of the individual actor: the field of social relationships, which is always made up of a network of tensions and oppositions, is restructured according to the position occupied by the actor ... The adversary is seen as only having a negative relationship to the totality: the adversary is in fact the very obstacle that prevents general needs from being satisfied, or general goals from being attained ... It is, then, always possible to identify in the ideology of a social movement a definition of the social actor who is mobilized, of the adversary against whom the movement must struggle, and of the collective objectives of the struggle." (1992, 132)

that "a social movement breaks the limits of compatibility of a system."<sup>289</sup> The system Melucci has in mind is the one the republicans have in mind too: the legally constituted political system of participation. What defines a movement is a conception of its opposition to a system. The "expressive politics" in which it engages as a continuous source of identity consolidation, is an exercise in defying the dominant codes of participation, the institutional forms of politics. The movement draws for self-understanding from its very resistance to the containment of its identity in law.<sup>290 291</sup>

### Simmel and Coser: Identity and "phenomenal" conflict

While Touraine and Melucci elaborated the mode in which conflict - that is "constitutive" of society - as played out in the realm of identity constitutes social and political identities, Simmel, and following him Coser, focus on the "phenomenal" performance of conflicts in the maintenance and consolidation of identity. And as opposed to the former insistence on class conflict, the collective-identity-moulding function of social conflict is extended by the latter also to gender conflict, generational conflict, national and ethnic conflict.

In his influential study on conflict, Simmel has placed particular emphasis on the connection between conflict and collective identity. His central thesis is that "conflict is a form of socialisation." The analysis is undertaken on two axes, in-group and out-group conflict. Regarding the former, Simmel maintains that in the absence of conflict, groups would be devoid of process and structure: the existence of conflict is not necessarily disruptive to the unity of a group but may in fact be instrumental to strengthening group solidarity and identity. Simmel's out-group conflict is more relevant to our concerns. "Conflict," he says, "heightens the concentration of an existing unit, radically eliminating all elements which might blur the distinctness of its boundaries against the enemy; ... The unifying power of the principle of conflict nowhere emerges more strongly than when it

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<sup>289</sup> Melucci, 1989, 29. Melucci provides abundant empirical evidence of such forms of collective identity-generation through expressive activities in (1989)

<sup>290</sup> Eder: "Theories of social movements assume that the self-description of the collective actor as a social movement places him beyond the institutional framework." (1993, 60)

<sup>291</sup> Cf B.Turner here, who argues that as the redefinition of society and therefore social membership is the intention of social movements, social movements are "inevitably [!] movements about the rights of citizenship." (1986, 92)

manages to carve a temporal or contentual area out of competitive or hostile relationships." (pp98-101)

Taking the cue from Simmel, Coser provides a systematic account of the Functions of Social Conflict. Coser built on Simmel's idea that social conflict is intrinsic and organic to social structure and more specifically that it fulfills a number of determinate functions in groups and interpersonal relations. In what interests us most directly, Coser undertook to establish that "conflict serves to establish and maintain the identity and boundary lines of societies and groups," and that, "conflict with other groups contributes to the establishment and reaffirmation of the identity of the group and maintains its boundaries against the surrounding social world." (p38) He pursues these matters under the eloquent groupings: "Group-Binding Functions of Conflict", "Group-Preserving Functions of Conflict", "In-Group Conflict and Group Structure", "Conflict with Out-group and Group Structure", "Conflict-The Unifier" etc.

Coser's is a complex analysis that apart from the central in-group/out-group distinction engages various others; he attempts links with social psychology by stressing throughout the distinction between an engagement of "total personality" and "segmental" engagement through roles; he analyses the balance between the multiplicity and the intensity of conflict; he also brings an innovation to Simmel with a distinction between realistic and non-realistic conflict. We will not go into all this now except to note that the general thrust of the work is toward proving the "various conditions under which social conflict may contribute to the maintenance, adjustment or adaptation of social relationships and social structures," (p151) predominantly group cohesion and group identity.

Simmel and Coser both argue the "phenomenal" connection between conflict and collective social identity. They stress the facilitative, constructive side of conflict: in conflict are identities formed and consolidated, through conflict is entry into public space effected in a way that attracts commitment and allows solidarity in consolidating oppositions. Because in Simmel's telling phrase: "Conflict is designed to resolve divergent dualisms; it is a way of achieving some kind of unity." (p15) "Once groups and associations have been formed through conflict with other groups, such conflict will serve to maintain boundary lines between the group and the surrounding social environment." (p155) In this context Coser develops an argument that is of utmost relevance to the republican theory. He says: "Conflict may serve to remove dissociating elements in a relationship and re-establish unity. Insofar as conflict is the resolution of tension between antagonists it has stabilizing functions and becomes an integrating component in the relationship. However not all conflicts are positively functional for the relationship, but only those which concern goals, values or interests that do not contradict basic assumptions upon which the relationship is founded." (p80) This difference allows Coser to draw a distinction, following G Simpson and R

MacIver<sup>292</sup> between "communal and non-communal conflicts." "Non-communal conflict results when there is no community of ends between the parties to the conflict ... Non communal conflict is seen as disruptive and dissociating. Communal conflict, that is based on a common acceptance of basic ends, is, on the contrary, integrative. When men settle their differences on the basis of unity, communal conflict will ensue." (p75) Marxism expounds the typical case of non-communal conflict. We will re-visit the republicans' containment thesis now to see how in order to argue for containment they always-already dispose of the dangerous non-communal type of conflict, and follow up this argument with a number of related arguments about collective identity, some more general, some more particular, drawing from the severing of conflict as I have explained it here.

### **\* Thesis [8] against Republicanism**

It is the republican theory of community that will come under scrutiny here.<sup>293</sup> Many theories of law claim an integrative function for law and there is much valid and sophisticated arguments to this effect.<sup>294</sup> But without nuances and qualifications, it is simply wrong to claim as the republicans do, that law binds people and creates a sense of community amongst them. Coser's aforementioned distinction inserts one such elementary qualification. Employing it here, I suggest that the republican argument relies upon the assumption that conflict is always-already of the communal type. In that, the idea of the "basic cleavage" that underlies non-communal conflict, is already conveniently disposed of. Then, of course, by definition, people's engaging in conflict will bring them closer together because there isn't a basic cleavage in the first place that could drive them further apart. Having presupposed that the conflict was of the communal type anyway, having therefore begged the "reflexive" question, the argument about the consolidation of community can be made straightforwardly. For the republicans, any cleavage, however deep, can always be bridged. I will rely on their concrete treatment of some historical examples to show how the

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<sup>292</sup> Coser discusses their argument in 1956, 75ff

<sup>293</sup> Note that I am not for a moment suggesting any blanket formula for community, a name that has been given to as diverse groupings as those which share, among others, a paradigm (Kuhn), a nomos (Cover), a culture, or a world-view (Goodman). My argument pivots on the "sharing" and allows the "what" to be designated reflexively by those whose sharing of it appears significant and adequate to their sense of togetherness.

<sup>294</sup> M Virally, e.g., describes law as a force of collective integration in 1960, 210ff. For an overview of theories and debates on the integrative function of law see Cotterrell, 1984, 73-103

republicans establish their preferred type of conflict by begging the question (or at least defining away the reflexive one).

There are three moments in American Constitutional history that no constitutional theory has been willing to ignore, let alone one like civic republicanism that advances a re-interpretation of American political identity. The first is the enfranchisement of Black Americans. The second is the re-interpretation of equality in Brown v. Board of Education.<sup>295</sup> The third is the Civil Rights movement that - and this is problematical for the republicans<sup>296</sup> - post-dated Brown. The civil rights movement found its constitutional expression in the Warren Court "revolution" of the 1960s, a series of path-breaking decisions.

Ackerman,<sup>297</sup> Dworkin<sup>298</sup> and Michelman deal extensively with all or some of the above, but it is Michelman's analysis of them that is the most revealing in the context of this arguemnt about conflict, communal or not.

To argue the republican interpretation of the historical events, Michelman elaborates his own vision of the republican project which, as we have already seen and discussed earlier, he calls "jurisgenerative politics."<sup>299</sup> He writes:

"Jurisgenerative political debate among a plurality of self-governing subjects involves the contested 're-collection' of a fund of public normative references conceived as narratives, analogies ... Upon that fund those subjects draw for identity and by the same token, for moral and political freedom. That fund is the matrix of their identity "as" a people or political community, that is, as individuals in effectively persuasive, dialogic relation with each other,

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<sup>295</sup> 347 U.S. 383 (1954)

<sup>296</sup> It is problematical for the republicans in that the period of popular mobilisation did not, as they would have it, feed the new understanding of equality into law. And Ackerman needs to rely on a previous constitutional moment to justify the reasoning in the case, not the civil rights moment that had not yet occurred.

<sup>297</sup> For Ackerman only the first of the moments, the "Reconstruction", is a full-blown constitutional one. The second is a compelling synthesis of the Reconstruction moment with the New Deal moment of activist government (1991, pp140-1). It is thus a prime example of what Ackerman calls "intergenerational synthesis" by the Court. The third moment is a minor constitutional one because it does not fulfill all the necessary criteria Ackerman identifies. The civil rights movement is more or less a late expression of the New Deal constitutional moment. What matters for present purposes however is that there exists in Ackerman's account an intimate feedback, a dialectic, between legal understanding and direct political popular mobilisation. And that the political voices calling for inclusion and equality carried into law and forced a revision of fundamental legal understandings.

<sup>298</sup> 1986, 387ff

<sup>299</sup> "Jurisgeneration" for Cover is the process of giving birth to meaning within community but the community he is talking about is bound to a normative universe (a nomos) that is discrete, insular and specific. Cover makes this point over and over "The nomos that I have described requires no state" (p11). His community is not a part of but an alternative to the state. (Cover, 1983) For more on Cover, see last chapter.

and it is also the medium of their political freedom, that is, of their translation of past into future through the dialogic exercise of recollective 'imagination. The republican idea of political jurisgenesis thus presupposes that such a fund of normatively effective material - publicly cognizable, persuasively recollectible and contestable - is always already available." (1988, 1513-4) The normative efficiency of the fund<sup>300</sup> "depends on a context that is everyone's - of the past that is constitutively present in and for every self as language, culture, worldview and political memory." (ibid)

Jurisgenerative politics argues Michelman should not be understood as requiring a pre-existing consensus. All that is required is the existence of a fund that consists of various narratives, normative commitments, etc. By drawing on the fund, people are able to enter the dialogic relationship on the road to freedom. As long as the dialogue respects some minimum requirements (for the Habermas connection see above), as long as the point is to persuade each other rather than coerce, they will generate community in the strong sense: it will be identity-generating.

On the basis of these thoughts, Michelman advances his republican interpretation of the favourite historical examples. About the civil rights movement he declares: Black Americans used their own "partial citizenship" and effected a self-revision of our communal standing; they drew from the common normative resource pool - the "fund" - to pursue a politics that lead to a self-revised position. "So the suggestion is that the pursuit of political freedom through law depends on 'our' constant reach for inclusion of the other, of the hitherto excluded- which in practice means bringing to legal-doctrinal presence the hitherto absent voices of emergently self-conscious social groups." (1988, 1529, my emph.)

But there is a problem here for Michelman. Does the legal redefinition of equality in the celebrated Brown case, the Warren Ct extension of political and civil rights to Black Americans, or even, ultimately, the great constitutional moment of their inclusion in the citizenry through the extension of equal political status (universal citizenship), create community where there was none? Michelman will, at least, concede that, initially, "they [Black Americans] had an oppositional understanding of their situation and its relation to our (and increasingly their) Constitution." (1988 1530) We are to assume then that at the start there was no community, just a stark confrontation of narratives, of two positions that only generated community within and not between them. The one was a narrative of oppression, of enmity, and of the promise of emancipation through struggle. The other, in so far as it wasn't split into further, even more partial, patterns, was one of privilege and achievement, of a

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<sup>300</sup> Michelman relies on D Cornell's concept of the fund as a body of public normative references conceived as narratives, analogies and other professions of commitment (1988, p1171-2)

sense of ownership of the land, but also of insecurity and fear.<sup>301 302</sup> There is a problem here, and its solution depends on how seriously Michelman takes his own presuppositions. If, as he admits, communities draw from oppositional and mutually exclusive narratives, surely they have very little, if anything, in common to recollect from the fund.

That Americans at the time of the Reconstruction - both Blacks and Whites - "shared a political memory, world view [etc]" is simply wrong in the face of starkly oppositional narratives; surely Michelman is not employing here the notion of a shared memory to describe the experience of both master and slave of their "common" history? If, on the other hand, Michelman is making the smaller point that the "fund" is an all inclusive category that includes potentially all those proto-understandings that will later furnish normative positions in such stark confrontation as the ones he is dealing with here, then the point is so small as to become trivial; because in "sharing" the fund - the precondition of community - the communities in conflict share nothing in any recognisable sense of sharing. This is as true for the republican "fund" as it is true for Dworkin's "pre-interpretive plateau", their arguments strikingly similar here.

So much for sharing the fund. But further: To the extent that the black movement was successful in each of the mentioned moments, does it follow that this led to integration into communal identity? Why ever would it? Why would super-imposing the status of equal citizenship on a genuine diversity of identities, needs and expectations fulfill the quest for community? In fact could not the converse be argued: that the success of the movement rather than creating a community, actually divided one in that a substantial minority of white segregationists found themselves pushed out of a community of new sensibilities?<sup>303</sup> Theirs

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<sup>301</sup> "Fear of the Negro ... is a means of keeping the status system intact, of rallying all members of the white group around its standards." Because if the Negro is seen as dangerous, "those in the white group who befriend him can be effectively characterized as "renegades" endangering the very existence of the white group." (Cosser, 1954, p109). For the facets of fear and the function in maintaining the white group's identity, see indicatively, Myrdal (1944)

<sup>302</sup> F Tannenbaum describes it thus: "The South gives indications of being afraid of the Negro. I do not mean physical fear. It is not a matter of cowardice or bravery; it is something deeper and more fundamental. It is fear of losing grip upon the world." (Tannenbaum F, 1924, pp 8-9)

<sup>303</sup> Historically there is abundant evidence of this danger. And the republicans can celebrate the Constitutional moment only at the expense of downplaying the often successful resistance "within" the new community. Even the most widely celebrated republican moment of "Reconstruction" is conceived as a birth of a new community only by downplaying the successful white Southern resistance to the practices of Reconstruction that profoundly altered not only the nature of the objectives of the "Radical Republicans" (Ackerman's critical constitutional vanguard) but also the depth of implementation and ultimately the constitutional form of the ensuing era. (On this see Foner E (1988)). As Simon J (1992) stresses, "[a]t a minimum the Redeemers must be seen as achieving a special status for the South as "a distinct society" within the new constitutional order of the Union." (p510) "The same forces that galvanized the Reconstruction Republicans also mobilized counter-revolutionary forces in both sections of the country that sought to find ways of channeling and eventually dissipating the Reconstruction effort." (512)

would be a story of the birth of a new narrative that explains past common history of the white community in a new way. Probably this new narrative would explain away the unity of the original white community. How do the republicans suggest dispensing with this possibility? Why should one assume that the end result of our dialogue will move us any closer to a shared community, the sharing of a narrative, rather than a breakdown of the communal? What makes the danger impossible?

This is precisely the problem that Dworkin also faces. Even if we concede that national citizenries are in fact unified as communities through law at the expense of all that divides and differentiates them, Dworkin's argument, like the republicans', is still fallible. To argue as he does that a community in the process of self-revision (every act of interpretation is potentially an act of self-revision) will yield community, is to fix an outcome that ought to be contingent. There are many reasons why communal narratives break down and why the coordinates, around which the unity of identity takes form, are shifted. All this may turn a process of self-revision into a process of breakdown and disintegration of communities.<sup>304</sup>  
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Dworkin's community is not vulnerable to such real dangers because it is a postulate. Postulates don't suffer breakdowns. The continuity of Dworkin's community over time is guaranteed because the community is a projection of unity, its narrative the law and its communal identity the citizen as legal personality. The unity is built into the concepts and it is therefore not vulnerable to real danger. Dworkin is caught up in circularity: he is attempting to yield communities by presupposing them in the form of national citizenries. For him there is always, by definition, a further chapter to be written in the chain novel. Why does the community's self-revision never create a disruption substantive enough to destroy the narrative? The answer is because the narrative precedes the community; because in Dworkin's mind it is the narrative that counts and the community is simply postulated on the basis of that narrative's coherence.

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<sup>304</sup> I owe this point to Maurice Glasman. It relates to the argument that McIntyre makes about "epistemological crises" that come about when narratives can no longer rationalise the unexpected. (McIntyre, 1977)

<sup>305</sup> Only tentatively I suggest as relevant a discussion of constitutions in crisis (see Finn, 1991) Emergency legislation and the release of law-making from the constitution that binds it, is more often than not passed in the name of protecting the constitution. Because even a liberal needs to acknowledge limits to political action so that, as Finn put it, "political violence constitutes a type of constitutional emergency in a very specific sense and a challenge to the task of constitutional maintenance in a larger sense." (1991, 7) In the context of this discussion of thesis [8] on cleavage, breakdown and self-maintenance, I merely want to point here to the relationship between political challenge to the constitution and the constitution's safeguard mechanisms that prevent breakdown and ensure constitutional continuity. In the process constitutional suspension is something effected against political actors but in the name of their self-determination.



To recapitulate: Michelman's community-moulding jurisgenerative politics, his deliberative dialogue, depends on a shared context, "on a context that is everyone's", and this context Michelman assures us, is "always already available" "as shared language, shared world-view and political memory." In juxtaposing language, world-view and political memory as functional equivalents, Michelman submerges the difference that makes the difference. Dworkin does the same when he passes all too easily from a plateau of intelligible argument to a plateau where people engage (already) as community in reasoning about the meaning of "their" practices (Dworkin's methodological assignation of the internal/participant's viewpoint to all - actual or virtual - parties in conflict is crucial here - see my 1994, 11-12). Like Dworkin, Michelman has no problem in designating the American culture, worldview and memory as already a common fund. He thus sets himself the easy task of arguing that politics will bring to the surface as political/communal identity, an identity that is already there. But why is the difficult question avoided? Why are the terms "common" and "fund" used for the very thing that separates Americans? It can only be claimed a common fund because a community is postulated, a community mistakenly read into the simple sharing of a language and a location. With the community smuggled in, the republicans can reverse the very terms we use to describe our separateness. And it is then that those paradoxical catchphrases that the republicans are so fond of - as exhibiting a tension that they find constructive and insightful - reveal their true nature as oxymora: that republicanism "invites recognition of how difference is our sameness" (Michelman, 1986, 32), that "our community [is one] of diversity" (Sherry, 1986, 615), that "difference is what we have in common" (Michelman, 1986, 4) or that it was all a question of "oppositional understandings of their situation in relation to our - and increasingly their - constitution." Is it not more likely that the political dialogue that the republicans envisage, is not that of one community coming to self-realisation but the cacophony (or in systems terms the "noise") created by a number of distinct communities that partly overlap, partly confront and partly talk past each other?

The difference between conflict communal and not can be described also in the following terms: in conflict, the shaping of identity pre-supposes the existence of Alter-as-Enemy involved with Ego in a situation of conflict. According to the republican position, however, the shaping of identity takes place under conditions where conflict and the positions of alter and ego are instrumental to bringing alter and ego together in a community that then includes them both.<sup>306</sup> For the republicans the alignment around the stake of

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<sup>306</sup> In discussing the "emancipatory activity of Black Americans," he asks: "does anybody doubt that the judicial agents of the challengers' accumulating citizenship drew on interpretive possibilities that the challengers' own activity was helping to create?" (1988, 1527)

conflict is transitory; "basic assumptions", basic understandings of which are always shared anyway as "fund" or "pre-interpretive" understandings, will in the end be shared again, qualified by having undergone the process of conflict. There exists always in the republican argument an overriding common interest to secure the "common good" that in turn allows them to depict conflicts as always secondary or sectional, conflicts that are about how to bring the common good about. And Alter-as-enemy never remains for long the mirror for the assumption and maintenance of the identity of Ego.

My argument here is that we should resist the stipulation of conflict as always-already communal on the grounds that it imposes an a priori where there should be a reflexive question. How does the community understand the conflict? If one is professing to contain the politics of a community it is a question for the community to answer whether or not a conflict allows the community to consolidate its collective identity in overcoming it or in preserving it. Republicanism silences the reflexive-political question whether or not the conflict is in fact communal, and only thus clears the scene for the law to contain a conflict that is a priori postulated as such.

### **\* Thesis [9] against republicanism**

In Touraine's sociology, the constitutive link between I - O and conflict over T is in broad outline very close to how the system of conflict "orders" reality; in the social dimension the assumption of identity is effected through the confrontational pattern where the existence of the enemy is all important. In law, where the conflict can no longer claim totality, in Touraine's sense, or as system guarantee the conflictual ordering of reality, in Luhmann's, identity (as legal personality) retreats into a capacity to operationalise legal claims. Constitutive importance is relegated to the material dimension, ie to the question of what those claims may be.

We discussed above that the depiction of conflict in law involves a substantive shift from the social to the material dimension. The ego/enemy opposition ceases to be in law the decisive factor and the key to deciphering conflict. Law introduces an exclusive focus on the issues that divide the parts, the parts themselves retreating to mere neutral "points of allocation" of claims that may be operationalised in law concerning the issues at hand. This shift in law severs the connection with "total" conflict (conflict-as-system) in the social dimension. It withdraws from conflict conflict's constitutive importance for political identity because it disassociates a community from its constitutive involvement in conflict, i.e. the drawing from conflict of its (the community's) standing, of its form and the strength of its binding. One's entry into public space is no longer effected conflictually, in solidarity to one

group, in enmity to another, over a stake that can accommodate such total confrontations. Instead the instrumental role that law reserves for identity - instrumental to the material dimension - renders social-conflictual identity irrelevant. There is a crucial area of conflict that is defined away in this shift that creates the "irrelevancy": we may designate it as the politics of identity.

In the conflict-system, questions of the definition of identity were absorbed into conflict itself. Conflict dictates what significant features underpin the self-understanding of the common "we", in collective conflict, and more generally, under what capacity or in the name of what cause the political actor enters conflict. The important correlate is what one attributes as identity to Alter. In the example of the strike that was mentioned earlier, for the workers the politics of identity turn on the question of whether the opponent is designated as an employer, with whom we have entered a contractual relationship, or an owner of the means of production who appropriates our surplus production; whether the opponent is designated as a formally equal party to each employment agreement in which case the strikers are ganging up on him, or a member of a class to whom the workforce relates in class-conflictual terms. The freedom to designate these identities, to contest them, to be reflexive about them, is withdrawn in law where identities are either rigidly fixed (in essence invisible as mere operators of rights) or at least restricted to a limited pool of alternatives (where law has to some extent "re-materialised"). The assumption of the legal persona as presupposition of legal conflict withdraws the contestation of the identity of the enemy from the conflict itself; in law identity becomes a semantic artifact, a neutral container. The two aspects of conflict that are screened off in law are relevant (i) to the freedom to choose the description under which one enters the conflict - in the name of what ego wages the struggle, and (ii) the correlate freedom to deny the identity of Alter, which includes the freedom to choose how to identify Alter. These are the two aspects of the politics of identity that do not resonate in law. And the republicans, by relying on law to voice politics, lose sight of how this important aspect of the political is legally annihilated.

There are numerous examples where the political is played out on the terrain of identity. Marxism provides the obvious example and both the rise and defeat of what could be called the "insurrectionary" brand of politics in the 60s is testimony of the importance of the politics of identity. Insurrection by the radical groups involved in the university uprisings was conceived as a means only, to serve as catalyst for the emergence of class consciousness and working-class solidarity. Such strategic use of conflict turned on the assumption that the State would not fail to rise to meet this challenge and in the process reveal its real nature as an instrument of class oppression; that would in turn trigger processes that would foster class-consciousness. Importantly for the present discussion, it was through law that this politics was defeated. It was defeated because in law the logic of this politics was screened

off. Movements as a whole have no legal personality, no point of entry into the legal world. Entry can only be effected by disintegrating and defusing that which is constitutive of the movement - its collective nature - and the basis of its claim to legitimacy - the collective claim to which individual actions are only instrumental. The law screens off all else and focuses directly on the latter by initiating selective prosecutions on individualistic grounds (how could *mens rea* apply to the group?). The legal system collapses the understanding behind collective action. It does not give voice to that which is essential to the politics of collectivities: the corporateness of the group that underlies its politics. It is no surprise then that an invitation to learn from the "repeated lesson of many struggles" comes from Marxists.

Piccioto (1979, 171), for example, writes:

"Substantive gains are achieved through collective struggles building up class solidarity: the channeling of such struggles into the form of claims of bourgeois legal right breaks up that movement towards solidarity, through the operations of legal procedures which recognize only the individual subject ... Of course we have learned and must go on struggling to overcome this: in criminal prosecutions through collective defence strategies and solidarity groups, [etc] ... But these merely enable us to probe the limits of bourgeois law as a social form. To transcend those limits ... involves a determination to struggle within but also through and beyond those legal forms, or around and in spite of them." (pp171-2)

Law offers a "we" beyond politically constituted differences.<sup>307</sup> Law "stills" identity in a way that allows political conflict to be played out around "material" stakes neither affecting nor affected by the politics of identity. It is not that the law "intends" this in any way, only that it cannot evade assumptions that are in-built in the system's most fundamental premises of observation, the self-descriptions it sets in motion to observe its environment. Outwith (and in spite of) this "innocent" observation politics continues, and the party that takes the conflict to law may be seen by the opponent as performing a discursive manoeuvre aiming to obscure the identities of the parties, as performing, that is, an ideological/mystifying move. Taking to law is not an innocent move in that understanding of conflict. By assuming and propagating the naturalness and innocense of law's perception of collective identity, the republicans are conspiring to the silencing of politics in a way that transposes the ideological/mystifying moment from the level of practice to the level of theory.

### \* Thesis [10] against republicanism

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<sup>307</sup> Sunstein's prescription that a judge ought to assume "the point of view of everybody" - the point of view of a "we" beyond currently constituted differences - is not irrelevant here.

The argument I will put forward here is an argument about and against the delegation of conflict. Very explicitly in Michelman, Minow and Dworkin, implicitly in Ackerman, Sunstein and other republicans, the community's conflict is delegated to the judge to "solve". The problem here is one of the incompatibility of this delegation with the function that republicans, rightly, attribute to conflict: that of allowing people entry into public political space and consolidating a collective identity among its members. A community's engagement in conflict, albeit a heated competition of claims, a confrontation or a struggle, is constitutive of the community. Can such a necessary engagement be delegated without losing its essential quality as engagement?

At the one extreme, Dworkin (and following him Michelman -see above) - will unproblematically delegate the resolution of the community's conflicts to Hercules. The judge will undertake the task with Integrity and add his/her chapter to the on-going chain-novel, the community's narrative. The community's existence in time is sustained by a narrative of how its disagreements and conflicts have been resolved in law. Dworkin entertains a worrying thought about its authorship. The judge is the author on behalf of the community, it is Hercules who is entrusted with the articulation of the narrative. There lies a problem here, in the connection between vicarious authorship and the coming about of community, a problem Michelman faces too.

Communities and their narratives (their chain novels as developed through law) are in a dialectic relationship, so that the continuity of the community requires and informs an on-going narrative. This means more than that communities require a narrative. If we take communities, as Dworkin rightly does, to exist as communal imagination, as the bringing of meaning to practice, then they must exist through the narrative, they must exist in articulating their narrative.

The question is then: can the community be replaced or represented in the very activity that constitutes it, i e in the authorship of the communal narrative out of which community emerges? I find that any concept of 'virtual' authorship here, such as that introduced by Dworkin, breaks down the intimate dialectic of community and narrative, their simultaneity and reciprocal inter-dependence. Dworkin acknowledges this and is at great pains to establish that his is a theory that addresses the citizen and expects from the layman "fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme" (1986, 190). In the end, however, the task is entrusted to the judge as he has the resources to do it better, even if on behalf of the citizen.<sup>308</sup> My argument is that no single authorship, however Herculean, can ever replace the community's authorship because it breaks the dialectic of community and narrative. I find this concept of virtual authorship deeply self-contradictory; an abstraction that removes any element of

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<sup>308</sup> This is not strikingly different from the old position in favour of common law that argues that judges express the mores of the community. On this see Lindsay Farmer's excellent (1993)

participation (and thus community in the literal sense) from the process. Virtual participation runs worryingly near non-participation and a theory that propounds it worryingly near ideology.

## VIII

### Conflict normalised

"Generalization bridges the discontinuities ... Thus normation gives a lasting quality to an expectation despite the fact that it is disappointed from time to time. General consensus is assumed by institutionalization regardless of the fact that individuals do not agree. A unity of meaning and context are guaranteed by identification regardless of the material differences between expectations. Thus generalization achieves a symbolic immunization of expectations against other possibilities" (Luhmann, 1972, p74)

When Luhmann talks of immunisation of expectations he is referring to the disciplining of DC. Expectations allow uncertainty in specific, controlled ways and immunise the system towards other uncertainties it cannot control. The system reduces the complexity of possible contingencies: it allows for some, and re-produces itself by responding to them. By the same token it immunises itself against others, that are precluded because expectations are not attuned to them. A system modulates its reaction to its environment by changing expectations and controlling this change at the level of expectations of expectations. We have explored all this already and focused it already on law. We have already asked: how does the legal system stabilise system-specific contingencies, and achieve an immunisation of expectations? We saw that this occurs along all three axes of meaning:

In the *temporal* dimension, expectations are immunised through normation, i e held to even when disappointed.

In the *social* dimension, expectations are immunised from real dissensus through institutionalisation, through the assumption of a fictitious co-experiencing third party.

Finally, in the *material* dimension, expectations are immunised in relation to content. The contingency of what is at stake is reduced through fixing expectations to specific issues and contents, points of allocation and address, like roles, programmes and values.

This immunisation from other possibilities is law's reduction achievement. It is the consistent theme of my argument throughout, but one that will be more fully articulated in the final chapter, that this (immunisation or reduction) achievement, while facilitative in many ways, has its cost, a cost for reflexive politics. The immunisation that facilitates the crystallising of expectations works to the exclusion of other possible political conflict. We have explored the impoverishment of conflict, a conflict that was re-enacted, conflated and severed in law. We will now focus on another aspect of the impoverishment of conflict,

normalisation, that underpins, in law, the deep affiliation of conflict to order. This affiliation extends to include, as always, conflict that is radical and dangerous.

I will tie the discussion of normalisation to the evolution of the legal system, in order to show how the evolutionary logic of the autopoietic system imposes such exigencies on conflict that lead to its normalisation. A few words on the evolution of systems, therefore. A system, we have seen, must be open to irritations from the environment, otherwise it could not be. A system's openness consists in its reading, in its environment, of disappointment or fulfilment of the expectations it itself projects into the environment. But to remain responsive to a changing environment the system must also vary the expectations it projects. New legal possibilities need to be projected to respond to innovations in the environment. The system, thus, varies its structures, re-constructs and alters them. New expectations test new patterns of conflict around new issues, and their fulfilment or disappointment is fed back into the law. In the process the legal system learns and evolves. Conflict allows law to asymmetricise, break its order, envisage new positions and evolve. The law does this by providing legal answers to the conflictual expectations that face it requiring litigation. Conflict is necessary for law because it provides input into the reproductive process without which the system of law would stagnate. But in dealing with conflict, law only achieves a new return to order. It pushes back the threat of disorganisation by conceiving and resettling disturbed practice on the basis of uncontroverted practice.<sup>309</sup> Law conceives of conflicts as disturbances that must be overcome. The conflictual pattern is transitory; a destabilisation that allows legal evolution through successive steps of return to order. The uncertainty of expectations that law introduces into the situation of conflict (the temporal sequence is a touch schematic here as it is not the case that first a conflict appears, then it is taken up by law) is fruitful ground for resonance and in the same move for the genesis of legal order. The system overcomes the turbulence that it sees conflict as presenting it with, by resettling disturbed practice and sanctioning the re-settlement with permanence for the time being. For the legal system the conflictual pattern is a transitory phase that permits the return to order,<sup>310</sup> a pathology in the healing of which law evolves and thus exists as a temporal system.

Theorists of autopoiesis describe the process of evolution of a system in biological terms, as a process of variation, selection and stabilisation. This is a complex discussion, a much contested one, and I will only very briefly rehearse it here.

Luhmann borrows the biological analogy<sup>311</sup> and generalises them to the evolution of

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<sup>309</sup>On examples of this see Heller, 1988, p187 and n. 15

<sup>310</sup>On the transitory nature of conflict situations in law see also Broekman 1989, 318



all systems. Teubner, I think, provides the most articulate account of the logic of evolution of the legal system. The way he suggests that the law internalises these evolutionary functions is that "norms take over the function of variation, institutional structures (particularly procedures) that of selection, and dogmatic[doctrinal]-conceptual structures that of retention." (Teubner, 1993, 51)

Much of the internal theoretical debate here, turns on how to combine "endogenous and exogenous evolution" in a way that does not compromise the closure of autopoietic systems. I will say nothing further on this because I see no immediate relevance to my argument about normalisation. My aim here is to employ the logic of evolution to address the republican logic of containment, to explore what exactly happens as the voices in political conflict cross the threshold of the legal system. How do (for example Michelman's) "voices" in interactional (spontaneous) settings feed into the institutional arenas and how do political claims for change resound in law, if at all, as an impulse for evolution, a pattern of variation? The more general political question I am seeking an answer to is: what is resistant to conflict and challenge and why the inertia? Is "normalisation" an adequate description of what happens to political claims behind positions of conflict as they enter the legal screen?

Rather than treating the question of evolution at a general level, where the theory has to answer the charge of social Darwinism and the rest, we will draw a cross-section, in the way Teubner does, and visit the evolutionary logic at the level of the individual episode. At this more localised site, we will look at both evolution and normalisation, as specific political claims are confronted and negotiated in that central<sup>312</sup> institutional forum of law, the trial.<sup>313</sup>

In order to explain how the law learns and evolves during the trial, Teubner borrows

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<sup>311</sup>On this see Teubner, 1993, pp51-5 and for the critique of systems theory as neo-Darwinist, see Rottleitner, 1988, 97

<sup>312</sup>Cf 1972, 134 on the nature of the trial: conditions concern "the specification of the interaction system in preparation for a binding legal decision under previously established criteria instead of the general task or arbitration with consideration of all the relevant circumstances; the neutralisation of the judge's individual personality as factor in decision-making; the removal of the orientation to one's other roles for all involved parties ..., ignoring public reactions, particularly the *colere publique* ... ; and finally a separation between court and procedure ... For their part such differentiations require complex societal preconditions; for example those concerning contact mobility, degree of abstraction in the processing of experience, tolerance and indifference within social relations." (pp134-5) See also 1993a, ch.6 "Die Stellung der Gerichte im Rechtssystem."

<sup>313</sup>This focus on the trial is interesting for yet another reason. In both Michelman's and Dworkin's theories, the judge is accorded central significance in (a) picking up the voices from the margins, (b) substituting the community in settling its conflict, (c) substituting the community in its self-determination by litigating its conflictual self-reproduction (above, \* thesis [10]).

from Habermas' vocabulary of "ontogenetic learning and phylogenetic development".<sup>314</sup> He suggests that this is a useful framework for describing the complex interplay between the individual trial and the law's evolutionary mechanism. ("Ontogenetic") learning occurs in the trial in which a specific solution is given to a clash of expectations. The problem is how this learning feeds into the dynamic of legal evolution and informs legal ("phylogenetic") development. So while possibilities of variation are developed as new legal possibilities are tested at the level of the trial, the innovations only feed into law to inform its evolution through an interlocking of the two cycles that are distinct systems, one interactional (the trial), one functional (the law). The process of variation, retention, stabilisation is best captured in that interlocking.

What Teubner is attempting to explain here is how expectations, competing at the interactional level of the trial, feed into the legal system to re-shape its assumptions, i.e. vary the expectations it will henceforth project. It is the individual interaction that makes social experimentation possible, says Teubner.<sup>315</sup> "Social experimentation" as variation allows new impulses to be felt in law. The trial is where the claims for change are articulated. In this sense the trial, itself an interaction system, is the negotiating post between the vast area of social demands and their sanctioning in law, i.e. their being vested the status of confirmed legal expectations. The innovation that Teubner's schema brings is that it is through this negotiating process that evolution makes sense and that thus evolution must be understood as involving the "interlocking of two communicative cycles", that of the trial and that of the legal system proper. The legal system's mechanism of retention (the legal decision) "bequeaths what has been learnt in the process of interaction." Stabilisation, the final step, involves the play, in law, of all those mechanisms that "enable insights gained in one trial to ... become part of the memory of the law," and thus allow its autopoiesis, when that memory furnishes new legal expectations to be tested, affirmed or disappointed in future legal episodes. Through the tripartite process, the insight gained in one trial, (a variation possibly), is "skimmed off as normative surplus," to establish (through retention and stabilisation) a principle for future selection in law.

The degree to which the system is open to learning is, of course as always, an internal matter. In Luhmann's terms this would be expressed in the following way: the system itself controls the balance of redundancy and variety.<sup>316</sup> It is a distinction that bears on the

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<sup>314</sup>Teubner, 1993a, pp59ff, but adjusts it to describe the relationship between a single interaction and society as a whole. What he retains from Habermas is the interface mechanism, the connecting process between the two.

<sup>315</sup> Also Heller: "Litigation, when not simply a form of debt collection, is designed to upset legal practice, invoke the search for meaning in legal reason." (Heller, 1988, 186 n.13)

<sup>316</sup> Luhmann, 1989, 144

system's readiness to vary its structures in the face of an evolving environment. Variety is about increasing responsiveness, redundancy about suppressing the element of surprise in the system.<sup>317</sup> The shift in the importance of goal programming at the expense of conditional programming, the evolution towards "responsive" forms, "material" as opposed to "formal" trends in modern law, all exhibit an increase of the relative weight of variety in its balance with redundancy. The system's control over its de-stabilisation and learning can be contained in this discussion of its control of the balance between variety and redundancy.<sup>318</sup>

There is no real need to emphasise again that the two interlocking cycles do not occupy separate ontological space (it could in fact be claimed that the interlocking itself is an achievement of the two systems' organisation of time). The clash of expectations does not "happen" in the trial at the expense of its "happening" in law. The clash is at once an event in both the interaction system of the trial and the functional subsystem of law. Similarly the legal decision is simultaneously the moment that ends the interactional system (the trial) and the moment of selection in the legal system. (In the same way that a communication in any other interactional system may cross thresholds of legal relevance and become a legal communication without ever "leaving" the interactional system. The simultaneity of the existence of systems around the single communication is one of the most central and fruitful insights that the theory of autopoiesis has to offer.) What permits the designation of the clash to either system is the alignment to system coordinates that make sense of it - the absorption into the system that provides the variables of observation.

There is however a problem with Teubner's formulation, a problem that makes a great deal of difference. The problem lies with his designation of the trial as the locus of social experimentation.<sup>319</sup> Because Teubner stresses one boundary when in fact there are two. Teubner is surely right to discard any simple linear progress from the legal expectation in the trial, to change in the legal system itself; there is a boundary there, in the complex logic of the interlocking of the two cycles, the interface of the two systems, that prevents any direct conclusion of a trial to be fed immediately into a valid premise of the legal system. But there is another boundary too. It is the one that prevents social claims from entering trials as legal (variation) claims directly and at no cost. In the way that Teubner buries this additional boundary, the expectations that clash in the trial, are at once both "social" and legally processable. What is not true is that "[e]xpectations of the various subsystems coincide, complement, supplement each other and conflict with each other in the individual trial ..."

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<sup>317</sup>For an innovative use of the systems-theoretical term in legal reasoning, see Smith 1995

<sup>318</sup>It is however I think doubtful whether this analytical formula will help decipher the dynamics of evolution since it is itself open to learning.

<sup>319</sup>An assertion very convenient for the republicans' argument from immanent critique as we shall see

(Teubner, 1993, 62) Instead, negotiation systems, like the trial, develop double boundaries to both systems, expectations of whose they mediate. Teubner stresses the subtle interplay at the trial/law boundary at the cost of losing sight that what resounds in the trial itself as social expectation has already met thresholds of legal relevance. For us, it is of paramount importance that we discern this initial boundary, because it is in the trial that conflictual political claims for innovation and change will enter negotiation, and the boundary comes to symbolise the limitations that the negotiating process inflicts upon the conflictual positions that "carry" the claim.

But let us focus on the first boundary, the submerged one, between political claim and what can possibly enter the trial as legally processable claim. My claim is that, here too, the specific logic of interlocking of political discourse and the trial, imposes its own limits and therefore, in a sense, a boundary. This boundary imposes significant limitations on what may resound in the trial as possibilities, even, of variation. In a nutshell, the evolution of a system is structural variation; and what can vary depends on what already exists. This has deep consequences for radical political critique. It brings already existing structural assumptions into play as pre-conditions to all attempts to push for change. The only way in which a claim for change may register is if it manages to surprise expectational projections. For a claim for change to register, that is, the system's memory has to be tapped.<sup>320</sup> Law thus controls the context against which informative surprises may be articulated. Change will only always come about as structural drift, deviation from already existing structural givens. I will explain why I treat this as a case of normalisation of political conflict. On a scale of varying degree I will distinguish, and deal in turn with, two reasons for normalisation: (i) simple inertia and (ii) structural inertia.

(i) The problem of law's simple inertia to political demands is in no way under-theorised. Roberto Unger's recent tour de force, for example, is quite explicitly a politics directed at the "false necessity" of such inertia that is the product of "formative contexts". More will be said on the subject both in this and in the final chapter. My engagement with Critical Legal Studies at this stage serves a double purpose. To acknowledge the power of their treatment of what I termed the law's simple inertia, which for them would be related to the embeddedness of dominant principle and dominant value in our legal system. But also to warn against

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<sup>320</sup>Cf Neisser: "Following the principle that we can only see what we know how to look for, perception must be based upon an already existing pre-conception of what is to be seen or understood. Neisser calls these pre-conceptions "orienting schemata" and they orient the observer within the complexity and equivocality of the immediately available environment by constructing certain expectations about relevant information." (1976, pp20ff)

investing too much faith in the capacity of their deviationist doctrine to upset law's deeper normalising tendencies, which I will associate with structural inertia. I will, again, take to systems theory for a re-statement of the problem of the inertia of the legal system, both simple and structural.

How does Luhmann describe the first form of inertia? Given law's function in society of stabilising expectations, and the values that consequently accompany its development (rule of law), it is only congruent, says Luhmann, that "the surprising or anomalous event is grasped as concretely as possible, so that the required structural changes can be kept limited in scope and made to proceed along predictable lines." (1971, 33). Does this mean that one can never take to conflict to law to challenge existing structures? No, it only means that "a special effort and special measures within the system are required if this normalisation tendency is to be changed into a tendency for existing structures to be questioned or problematised and information evaluated as a symptom of impeding crisis, as cost, as dysfunction in the prevailing order, or somehow or other looked at as a possible source of alternatives." (1971, 33-4) because the system will always, initially at least, give a disciplining, non-random response to the random event.

In an extract that could easily have been about the CLS had it not preceded them by a decade, Luhmann says: "suitable information ... must be specially produced, brought to light by uncovering some latent aspect of existing order, or retrieved from the existing decision-making process by incogruent questions..." (1971, 34) Both central elements of CLS deviationist doctrine are here: the retrieval in law of the dangerous supplement; and the strategy of playing it up so that what is suppressed surfaces to subvert established patterns and entrenched principle in law.<sup>321</sup> Unger's declaration of war in Politics against all institutional "formative contexts" is very much the logic of deviationist doctrine writ large.

This is no doubt both intriguing and promising. It is a remarkable feat of deviationist doctrine that it forces the system to thematise the extra-ordinary as ordinary and as a possible source of alternatives (1971, 34). But it also points to the limitations of the project that are associated, it is my suggestion, with inertia of the second type, inertia that is "structural". My argument here is that if the CLS present an answer to the normalisation of conflict in law, their answer is confined to combating simple inertia and not any more deep-seeded form of normalisation. In other words, their attempt is to feed deviant conflictual counter-theses into law in ways that will resonate in law. But this, in turn, has to rely on the system's structural flexibility to accommodate such political inputs. And there is a difference between making a political claim resonate in law and feeding it into law as such that it is. Because the former

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<sup>321</sup>What is a disease from the point of view of institutional patterns, says Marx, may be a birthpang of the new to come.

relies on creating, in the receiving system, what could be called an innovative dissatisfaction (or "goal-generating dissatisfaction").<sup>322</sup> This relies on a manipulation of a systemic reduction already in place that one is therefore prepared to leave intact if only to allow the dissatisfaction to register. Because, in Luhmann's words: "Evolution works epigenetically. Only in this way can innovations that presuppose themselves arise." (LaSS 147).<sup>323</sup> What makes this a compromise, and a debilitating one at that, is that there is a limit to what reductions can be challenged, reductions imposed on possible conflict, since it is only through those reductions that the law makes sense of conflict in the first place. (Arguably, in fact, the debilitating occurs at the most crucial foci of challenge. While the CLS thus address the problem of law's simple inertia to political conflict, they do not in fact address that of its structural inertia, and it is to the latter that I now turn more systematically in order to explore this unchallengeable form of normalisation of political conflict by the law which is intricately linked with a form of evolution that, for want of a better term, I will call involution.

I borrow, but qualify, the term "involution" from The Interpretation of Cultures, where C Geertz employs it to designate the tenacity of basic patterns of institutional arrangements.(p80) It is the "tenacity of basic patterns," where variety, the lever of evolution, is overwhelmed by uniformity and monotony, that I too want to connote with the term, but give it a systems-theoretical structural backing. As Heller writes, "a self-referential system's evolutionary history is one of continual internal differentiation of newly organized patterns of information out of pre-existing states." (1988, 197) My argument about the normalisation of conflict in law is that law channels even radical political challenges in a way that always leaves intact core institutional arrangements even when the challenges are addressed directly to these arrangements. In this sense it secures its evolution as involution. And whereas we said that as simple inertia, this tenacity of basic patterns could be challenged, involution, as I employ it here, is associated with a much deeper, structural inertia to challenge. Here the legal system's resistance to take on board the political claim cannot be challenged, no matter how incisive the "special effort to evaluate the dominant view as symptom or as crisis". Involution

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<sup>322</sup> According to M Maruyama's formulation (Luhmann, 1971, fn85). The problem that is being identified here is that of providing the strategically correct stimulus that may make the idiosyncratic system respond in the desirable way, desirable, that is, in terms also of how the social environment will receive the legal decision. We have learnt from Teubner how precarious the process of this "structural coupling" between diverse fields is, how easily it can go wrong, how easily the logics of the systems can be abridged, boundaries overstepped (regulatory trilemma). But Teubner departs from problems of regulatory failure, whereas, for us, the question is different. It is about taking our conflict to law - conflict that arises from and informs spontaneous social contexts - and deciding whether or not we must pay the price that it be compromised, normalised.

<sup>323</sup>In other words, it relies on "bying into" the discourse one wishes to confront, to go back to that dilemma described by Mathiesen some twenty years ago. (1974)

is no longer a problem of simple inertia.

This second, more debilitating form of normalisation, draws on the fact that whatever conflict is to register in law, will only make a difference in the evolution of the system as structural drift, on the basis of its alignment to already existing reductions. Something is an informative surprise against a background of settled meaning. Conflict is dealt with by the (legal) system by being so interpreted as to accord with already existing or accepted meaning. "The unknown is assimilated to the known, the new to the old, the surprising to the familiar." (1971, 33) This is the deep "normalising" function of the law where the contingency of possible conflict has already been reduced in specific ways. This assimilation of the extra-ordinary to the ordinary places a wooden hand on the possibility to contest the given. A system that makes sense of the world by reducing possible states, cannot account for a conflict that defies those reductions, because it is those reductions that first make that conflict meaningful at all. The possibilities of radical political change are radically circumscribed by such structural necessity that, contra Unger, is not "false". In effect, the limits of what conflict the legal system can perceive in order to assymetricise and evolve are strictly delimited structurally, and in effect the system's evolution is an involution, conflict always normalised, kept within the confines of what legal expectations can read as conceivable conflict, always hedged in, always tamed.

### **\* Thesis [11] against Republicanism**

The argument that follows is the most difficult one to level against the republicans, because it aims to confront the republicans' most inspired moment, their debt to Critical Legal Studies. While Unger and Dworkin may appear strange bedfellows, the affinities of, say, Michelman's or Sunstein's arguments with Unger's are many. In any case, the inclusion of Unger's argument here is not incidental or dependent on such affinities. Unger's is a powerful version of the law-as-politics position, in so far as he vests in law the possibility to pursue radical politics and counter the "false necessity" of the confinement of our political vision within rigid institutional assumptions. What puts him in the broad republican category here, is that he gives his politics legal leverage.

My argument against Unger here is the following. He presents an argument to the

effect that it is false (falsely necessary) to view conflict as normalised in and by law. But, I claim, the reason he can say that is because he does not see the distinction between the two levels of inertia. He has an argument against simple inertia and he presents it as also covering structural inertia, therefore the whole spectrum of the normalisation of conflict. My argument is that whatever the merits of his thesis against the first form of inertia, of the law's "formative context", his thesis stumbles on the second form because the deep-structural reductions of the legal system cannot be negotiated away.

As we saw, the Critical Legal Scholar can be seen as attempting to disrupt the first type of "normalisation" described above. Where the law exhibits the overwhelming tendency to assimilate conflict within already existing schemata of processing it, the critical scholar will emphasise alternative possibilities, new relevancies and upset settled patterns. This is an effort to confront the inertia of the system; as such it does not simply fail to address the second type of "normalisation" that comes from the "constitutive reductions"; rather, it relies on them. The revolutionary idiom that accompanies much CLS critique actually blinkers the very real limitations within which the critique is undertaken; their combatting the inertia is often presented as if they were politically challenging every reduction that the law imposes on possible conflict.

I will argue that Unger's futile attempt to thematise solidarity into law as a "solidarity right"<sup>324</sup> is a case in point. Every time he attempts to institutionalise solidarity, I will argue, it slips away.

Unger's analysis of solidarity rights is not simply a convenient target because by mere coincidence the argument works less well at this point. It is true that Unger is more vague than usual in this discussion. Of course much of Unger's most important and valuable theoretical insights are couched in an idiom that is tentative, suggestive, declaratory, never quite concrete enough. But one cannot help wondering if the generality of his analysis here, very much on the lines of a directive for future undertakings, is an intentional evasion. This is worrying. The connection between solidarity and law is the cornerstone for the whole undertaking. Solidarity is the foundation of community. Neither Unger nor the republicans can afford to allow to argument to go floppy at this point. Were a successful theory of solidarity rights to be advanced, Unger (and consequently the republicans) could claim to have given communities the institutional medium to achieve solidarity and to that extent a language for self-realisation.

Unger has no qualms about pronouncing the importance and breadth of the project of institutionalising solidarity. "Solidarity rights," he says, "form part of a set of social relations enabling people to enact a more defensible version of the communal ideal than any version

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<sup>324</sup> Unger, 1987b, pp535ff. All page refs in this section are to this text.



currently available to them." (p535) He accepts that these rights do not sit comfortably with the typical form of a right that remains "devoted to the model of consolidated property." (536) What the introduction of this type of right achieves is to "prevent people from taking refuge in an area of absolute discretion<sup>325</sup> within which they can remain deaf to the claims others make upon them." (p537) This opens the road to solidarity. Unger makes sure to clarify that the conflict, in terms of which solidarity rights will be raised, does not erode solidarity. Solidarity he says is not the opposite of conflict. Rather people should be encouraged to recognise and use the element of conflict "that marks even the closest personal [solidary] connections." (536)

Although very little is mentioned on what content of these rights is to be precisely, one can assume on the basis of Unger's other writings, that the content would be retrieved through accentuation of counter-principle already present in existing legislation. The mechanisms and logic of its retrieval has been elaborated at length elsewhere by Unger as deviationist doctrine<sup>326</sup> or negative capability more generally.<sup>327</sup> It is an interpretative method of reasoning that draws on and exploits existing if latent institutional possibilities. In the case of solidarity rights, reconstruction would proceed from "solidary" elements in existing law of contract and delict such as protection of reliance and protection of the disadvantaged party, general clauses of good faith etc "by which private law supports communal relations while continuing to represent society as a world of strangers."

Even assuming that the content of these rights is unproblematical, the real problems begin with institutionalising them. What are the structural features of these rights and how can they be operationalised without undercutting what they are meant to enact, ie solidarity?

The point is that there is an incompatibility here that makes the legal device of a "solidarity right" deeply paradoxical. Sacrifices made in solidarity towards fellow members of the community must be voluntary if they are to be solidary; enforceability of a duty - the constitutive flip-side of a right - , whether in court, but even "in the shadow of the law", makes the right the opposite of solidarity. Either the right is enforceable in which case it is not solidary, or it is solidary therefore not enforceable and therefore not a right. Unger is aware of this and claims that "it does not follow from the establishment of solidarity rights that they ought to be coercively enforced." (538) I am not quite sure what to make of this. One can hardly fail to be aware that coercion is necessarily involved in the enablement that comes with a right.<sup>328</sup> Unger's suggestion is that "many of the solidarity rights may best be

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<sup>325</sup> Through immunity rights and market rights, 1987b, pp520-30

<sup>326</sup> Unger,, 1983, pp15-22, 88-90.

<sup>327</sup> Unger, 1987b, pp277ff

<sup>328</sup> A relevant point is also argued by Flathman, 1976

enforced, when they are enforced at all, by more informal means of mediation." Notwithstanding this reference to informal justice, he is happy to accept that "many solidarity rights may best remain unenforceable, as a statement of an ideal ... because the threat [of enforcement] might fatally injure the quality of reciprocal trust they require." (539) This is the argument I made above about enforceability being the opposite of solidarity. In any case, however much Unger stresses this point, the concept cannot withstand this contradiction. An unenforceable right is no right at all, to the extent that even its symbolic value is undercut by the lack of enforceability, because it takes away that sanctioning that is specific to law and is therefore anterior to any symbolic value the law may have as law (not least because enforceability is the expression of the will of a society to back the rightness of its law by force if necessary).

But enforceability is not the only problem. As to the question of legal identity: what is the point of designating such a point of allocation or address in law, if it is the case that the right-holder only fulfils the solidary purpose of the right by not raising a claim of entitlement? As to the other structural features: the designation of a disadvantaged party has to rely on criteria that by definition must be legal. But Unger says that this is not enough; what is required is "an additional definition of context, ... for only the specific relational context can reveal a structure of interdependence because it undermines rigid role systems ..." How will this additional definition be worked into law if not through legal relevancies? And how will notions of interdependence be worked into law if not through legal self-descriptions of positions in law (employer-employee, spouses, seller-buyer, commissioner-commissioned, producer-consumer etc), in other words "role systems"? Legal self-descriptions become more varied as law becomes more "responsive" or "material" but the variety is still produced by a proliferation of relevant positions that are reductions in law: points of allocation and address. The law cannot take social interdependence on board as such. We stumble once again here into the familiar problems of a system that can process information only on the basis of certain reductions, being required to defy those reductions and take the total context on board. Unger's third structural feature of the right, demands that "the determination of where the rightholder stands along the spectrum of legal protection depends on an analysis of his pre-legal relation to the person against whom he wants to assert the right." This is unworkable for the same reason. "Pre-legal" only resonates in law as legal. Otherwise what criteria is law to operationalise to determine the "pre-legal" that are innocent of their own classificatory logic?

"A system of rights," concludes Unger, "is fundamentally the institutionalised part of social life, backed up by a vision of possible and desirable human association." This is indeed possible and optimistic; that the non-institutional realm provides the pressure for the institutional to re-adjust. But the existence of the institutional realm itself means nothing else than the imposition of reductions in the directions outlined above, that give rights and

solidarity rights their specific legal nature as an institutional achievement. What Unger fails to do at the cost of eroding the whole schema is keep the two realms apart. What happens in the end is that whereas the backing "of the institutional by the social imagination" allows the constant questioning of structures and the rebuttal of the system's inertia, by eroding institutionalisation itself and defying the system's constitutive reductions that first permit institutionalisation, his theory ceases to be a theory about law altogether, by giving up what is distinctive of law. The legal achievement ceases to be recognisable as law once the basic reductions are challenged; the legal and the social become identical, and law merges with the world.

In Teubner's analysis where the trial was proclaimed as the locus of social experimentation, and where the latter, upon successful interlocking, is retained as valid in law, the problem of the second boundary is this then: a legal claim for solidarity, even couched in terms of a solidarity right, cannot possibly be intelligible to a court that has to deal with claimants and which has to reach an enforceable decision. A social/political claim for solidarity can never intersect with a legal one or even a legally processable one without undercutting what it is actually about. Even in an ideal world, even aspirationally, to litigate such a right would only occur at the expense of solidarity, or, what seems to be Unger's preferred compromise, at the expense of law.

In all, in dealing with the normalisation of conflict, Unger and the republicans are at one in advocating both the containment thesis and attributing to law the reflexivity that would allow it to do the job of politics. Immanent critique, deviationist doctrine, negative capability, disentanglement, critical legal politics, are all supposed to furnish a language for political conflict that is uncompromising, that is able to institutionalise solidarity, and institutionally back any political claim without compromising it by normalising it. My argument has been that while, in principle at least, Unger and the republicans can thus counter one source of normalisation, simple inertia, their endeavour is less powerful than they think when it comes to deep-seeded structural inertia. In dealing with the simple inertia of law, I think they are right. There is transformative potential in law, doctrine can be manipulated, and to that extent transformative conflict can be harboured in law. But all this is only possible at the cost of cashing in on the transformative leeways the system itself provides, and thus of taking on board its main structural givens, its reduction-achievements. Political contestation as such cannot be accommodated in legal indeterminacy, because what is indeterminate is fixed by concepts and assumptions that frame what is indeterminate each time, what is contestable is partly given, as are the in-roads of critique, the slants of the discourse. Inroads of critique map onto given or possible variation. To register as critique something must first register as information. The improbabilities are already institutional and selections will be made within

dilemmas already in place. Law's resistance as involution is unavoidable if we are to continue to talk law and take advantage of the perspective it sheds on the world. We cannot, that is, defy the very reductions of possibilities, reductions in all dimensions social (questions of identity - legal personality - and institutionalisation - co-expecting third parties), temporal (the question of normativity of law) and material (the very existence of legal roles, programmes and values), without losing sight of what is legally meaningful. Challenging the variables of observation successfully would do away with the very reduction-achievement that is law. The distinction needs to be kept constantly in view, between what is inert and thus challengeable, and what is resistant structurally, as in involution, and unchallengeable. As with every system there is a facilitative/confining tension here, between what the law permits us to observe and what it is blind to. The CLS, and following them the republicans, are surely right to suggest that the facilitative/confining balance can be exploited in the direction of the former; immanent critique makes law more aware of what is latent within it and thus less confining. But to identify the facilitative with the reflexive itself, either cloaks the confining moment which makes republicanism ideological, or collapses law into politics, sacrifices the former to the latter by doing away with its reduction-achievement that requires the confining moment, and makes republicanism, as a theory about law, self-defeating.

## Chapter 4

### Political Speech Under Legal Categories

Par mal j'entends et l'on ne peut entendre que l'interdiction des phrases possibles a  
chaque instant, un defi oppose a l'occurrence, le mepris de l'etre

J-F Lyotard

Does not the coherent discourse, wholly absorbed in the said, owe its coherence to the  
State, which directly excludes subversive discourse? Coherence thus dissimulates a  
transcendence, a movement from one to the other, a latent diachrony, uncertainty and a fine  
risk.

E Levinas

Citizenship means the contribution of our instructed judgement to the common good. It may  
lead us to support the State; but it may lead us also to oppose it.

H Laski

# I

## "The Invisible"

In 1987, Nanni Balestrini wrote a book-homage to that lost generation of the "années de plomb" in the 1970s in Italy. She retraces her itinerary from early university political activism - the long march through the institutions -, through the days of the Lotta (continua), all the way to revolutionary activism, armed struggle, prosecution and incarceration. The account does not follow a temporal sequence as two narratives run parallel: The narrative of revolutionary action, manifestos and 'exemplary action', solidarity and militancy, and the narrative of interrogation, trial and solitude. And both narratives are run together, in tension in a text that is unpunctuated, continuous and consists of "phrases murmurées, ressassées."<sup>329</sup> Hers is a stunning testimony, impertinent and subversive, pregnant with tension and contestation, emotion and loss of hope. But more than anything else, it is her account of the encounter with the system that remains most memorable: her discourse, fluid and undisciplined, moves beyond and below the official language of law that leaves a hard echo but remains ultimately unintelligible and unengaged-with. The unhappy co-existence of legal and revolutionary idiom comes into sharp relief as the contrast is fed into the text itself and revealed in incoherences, lacunae, the breakdown of the narrative continuum. And it is to the credit of this literary work as artform that the tension between the discourses is built into the text in this way, making the book not an account of an impossible dialogue but a testimony of one.

j'ai fait oui de la tete pour dire que je voulais repondre et tout de suite le president sans meme me regarder me demande si je plaide coupable ou non coupable il faut que je reponde puisque j'ai fait signe je fais un gros effort mais j'ai la bouche seche brulante et sans regarder personne en regardant seulement le bois de la tribune en face devant mes yeux je reussis a dire avant que je reponde il faut nous mettre d'accord sur la signification de ces mots car ce n'est pas sur que pour vous et pour moi ces mots coupable ou innocent ont le meme sens avant tout il faut eclaircir ce point comprendre j'etais en train de dire plus ou moins une chose de ce genre et j'ai entendu un hurlement du procureur qui me coupait la parole disant que je devais repondre aux questions et ne pas faire des jeux de mots inutiles

Activist and judge inhabit 'universes' in ways rendered available by specific languages or idioms.<sup>330</sup> These languages provide the intentions for action either party can have or

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<sup>329</sup> M Fusco, 1981

<sup>330</sup> I employ the vague term 'language'/idiom intentionally here to avoid premature talk of genre or

envisage. The term 'provide' does not overstate the case. It gives due credence to the intimacy between what can be said and what can be experienced: language "interacts with experience; it supplies the categories, grammar, and mentality through which experience has to be recognized and articulated." (Pocock, 1985, 28) The problem arises because the idioms are incapable of intertraffic of meanings. Notice already how the official account of the intention of the "other" is conducted largely in a language that the activist appears incapable of understanding. Notice the activist's effort to shake the naturalness of the signifiers 'coupable' and 'innocent' and the self-evidence with which the official discourse vests the terms. Notice the judge's invitation to the activist to stop the "jeux des mots inutiles" and to join the universe where these equivocals are fixed to concepts. And notice that the judge attributes to the other the strategy of delaying discussion of the facts through discursive manoeuvres. He denounces this avoidance tactic and at the same time proclaims the law's innocence in the urgency of his appeal to discuss acts as 'brute' events:

vous m'accusez vous dites bande armee que j'ai ete que j'ai participe a une bande armee que je suis un subversif la le president me coupe non non minute ce n'est pas moi qui dit ca et il tape de la paume de la main sur la pile de dossiers qui est devant lui ce n'est pas moi qui dit ca ce sont les actes et il tape encore de la main sur les dossiers et c'est sur ces actes que le code penal se fonde pour etablir contre vous le delit de bande armee c'est a partir de ces actes qu'il faut discuter et que vous devez repondre parce que c'est sur ces actes que nous sommes en train de faire ce proces

Pocock says: "Language is referential and has a variety of subjects. It alludes to those elements out of which it has come and with which it offers to deal, and a language current in the public speech of an institutional and political society may be expected to allude to those institutions, authorities, value symbols, and recollected events that it presents as part of that society's politics and from which it derives much of its own character. A "language" in our specialized sense, then, is not only a prescribed way of speaking, but also a prescribed matter for political speech ... [The latter] obliges one to acknowledge that each language to some degree selects and prescribes the context within which it is to be recognized." (Pocock, 1985, 12)

Pocock is describing how languages become accredited to take part in a political society's public speech. The "allusions" he talks about to paradigmatic instances serve to set up a context within which the languages seek their self-legitimation, lifting themselves into a context within which they may be recognised as paradigmatic instances. The terms of what can be said then become settled through criteria of appropriateness for public speech. It is in

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system, langue/parole, even discourse. The present chapter aims to elucidate what sets apart these 'languages' that inform the respective 'universes'.

time that such a context is compounded, as outlasting the speech act and allowing its recognition as an instance of public speech. Its emergence intimates certain possibilities and, what is more important to this analysis, functions as a formative context that removes others. What emerges is "a mode of utterance which facilitates the importance of some kinds of speech act and inhibits the performance of others; any act performed in it may be viewed as exploiting, recombining and challenging the possibilities of utterance of which it consists." (p12) We will explore again in systems theory how the very terms of inhibition and circumscription (closure) dictate the possibilities (openness), how intimate that dialectic can become, how rigidly the context for political speech in law is set.

For now let us only observe, in Balestrini's text, how the context in which the judicial speech situates itself, imposes on the activist's sense of action a combination of filters that distort and re-align it. Notice how the judicial utterance selects and prescribes the political context with its own possibilities of political action in which the political act can be recognised. And the other side of this opening up of possibility, the mutations it imposes on the utterance of the other as it attempts to re-align it to the prescriptions of this second order language, to filter it into the context. In the move that circumscribes politics to democratic procedure, revolutionary action is identified with hatred pure and simple and, of course, subversion of politics:

en essayant de plonger dans le chaos les institutions fondamentales de notre democratie ce ne sont pas des revolutionnaires que vous avez devant vous mais des hommes et des femmes transformes en betes feroces par leur haine de la societe et les tetes des jures se tournent toutes ensemble vers la cage sans aucun ideal sinon la destruction et la mort chez eux aucune vraie culture seulement le culte de la violence ecoutez-moi bien en semant la haine dans les esprits immatures et naifs des jeunes generations en profitant lachement des libertes que notre democratie offre a tous sans aucune distinction pour realiser leurs desseins subversifs visant a jeter a bas les fondements de notre societe

nous qui unanimes nous dressons pour la defense des institutions et des lois de la democratie nous devons dire et le laxisme irresponsable qui s'est produit attitude evidente de complicité condescendante les jures tendent l'oreille parce que la voix du procureur resonance tellement fort maintenant que ses mots sont devenus incomprehensibles

Note how there is an ambiguity as to to whom the phrase "aucune vraie culture [chez eux] seulement le culte de la violence" is attributed. In the continuum of the narrative it could be part of the prosecutor's speech and therefore attributed to the radicals, and equally it could be attributed by the narrator to the jury as if it is they who are the violent ones. The ambiguity works to underline the reciprocal and simultaneous denunciation by both sides of the politics of the other as violence pure and simple. But, more important, note that the discourse of the



revolutionary is carried in the official discourse through a 'paralanguage' that results as the judge uproots the revolutionary utterance from its context and re-aligns it to conditions of the legal context. The allusion to democratic values by the judge serves to set up a context that can accommodate the judicial but not the revolutionary utterance as political. In the process the radical is deprived of the means to articulate a radical political consciousness other than as violence. The play of all these contradictions, incompatibilities, denunciations and the rest are all present in this final extract from the book:

puis ils attendent que je reprenne la parole le president s'est calme il agite la main allons allons continuons et moi je dis j'etais en train de dire que pour ma part je ne comprends pas ce que signifie pour moi declarer que je suis coupable ou innocent car il n'est pas question pour moi de nier ou plutot de renier ce que j'ai fait et ce que j'ai ete et si je pense que la societe ou nous sommes doit etre changee le president me coupe attendez il faut que vous compreniez que nous ne sommes pas ici pour juger des idees abstraites mais des faits des faits que la loi le code penal considerent comme des delits mais alors je fais pourquoi commencez-vous en m'accusant d'etre un terroriste c'est bien une idee ca peut-etre c'est ce que j'ai dit le president leve un doigt oui mais ce sont des idees qui amenant tout droit au sang qui ont fait couler des flots de sang vous oubliez ou vous voulez deliberement oublier tous les morts qu'il y eu qui sont la consequence logique des idees et des comportements subversifs

J-F Lyotard writes: "A sender [of prescriptions] appears whose addressee I am and about which I know nothing beyond the fact that it situates me in the instance of addressee ... It is the scandal [violence] of a me displaced onto the instance of the you ... Another sentence forms, in which the me comes back into position of sender in order to legitimate or reject, little matter, the scandal of the sentence of the other, and its own dispossession. This new sentence is always possible, like an inevitable temptation. But it cannot annul the event, only tame it and master it." (Lyotard, LD 163-4)

Lyotard's addressor and addressee, the I and the you, both intend their action, attach meaning to its execution. But the recovery of the intention of the other oscillates, in Ballestrini's text and in Lyotard's account, between the I and the you in such a way that in each case the I effaces the you. Because if action is always action under a description the reappraisal of intention in an in-authentic language - by which I mean a language that is not the actor's - severs a constitutive link, dispossesses the actor from his own expressive means, disengages his action from his understanding of it. But this severing, this dispossession goes unacknowledged in law.

"Do not play with language, be true to the event" urges Ballestrini's judge. In effect he urges the radical to abandon political contestation of the language of the law. The law refuses

to acknowledge forms of semiotic opposition as such; it litigates them away. We will establish through systems-theory why this could not be otherwise. The point is that in effacing the opposition over the construction of meaning as a stake of the struggle, the judge establishes the innocence of the legal idiom, so that in positing the idiom as universal, the interchangeability of addressor and addressee can of course be assumed, thus removing the asymmetry of the I and you that now become subsumed under a posited "we". By obliterating the incompatibility of the two languages the rest becomes easy and obvious: the judge can envisage the autonomy of the addressee who can now also become the sender since the asymmetry between them is obliterated, legal imperatives can be universalized. The experience of politics is institutionalised in law.

In all this the I effaces the you in imposing its idiom. Balestrini's book is about the experience of effacement and that is why she calls her book *Les Invisibles*. And her utterance is a lost utterance, the revolutionary discourse is an invisible one to law that by "forbidding sentences possible at each moment," levels "a challenge to the occurrence, a contempt of being." (Lyotard, LD para197)

All this, very much at the level of declaration still, will be explored with the help of systems theory, substantiated and illustrated through examples. I will draw examples from the area of sedition because it is both relevant to subversive action and because it is permeated by sharp confrontations of the political and legal idiom. By no means is it the only area of law to host such confrontations; yet sedition has an important claim engaging the legal concept of political sovereignty and in that it is uniquely suited to this analysis. Because the constitutionalist thesis that law can contain politics needs to face up to the question why certain politics are silenced.

The focus on sedition thus serves to explore in depth certain aspects of the more comprehensive picture already painted in chapter three. Analytically-speaking it builds on and deepens the argument about the re-enactment of conflict (ch.3, s.6, above). Seditious illustrates the logic and mechanism of how law displaces politics and projects its own perception of politics in its place.

## II

### Free speech and political truth

In the first chapter of the thesis we analysed how, in constitutionalism, citizen praxis underpins political sovereignty. The argument about citizenship in a democracy advanced there is an argument about this sovereignty of citizenship. Sovereignty means self-government and freedom of speech underpins it in this sense: the speech of the individual citizen is the input into the formation of public opinion that drives self-government. The status of citizenship is realized in this contribution. Citizenship is not a pre-condition of the freedom to speak. Nor is freedom of speech merely one among many rights of equal weight. The right to speak, as input into the collective self-determination is the vessel of citizenship; only in that process is citizenship realised. The intimate connection between speech and citizenship is essential if the argument about citizenship is to be understood properly: speech is the mode of existence of the citizen; free speech makes him/her sovereign. Freedom of speech is integral to rather than a result or a condition of democracy; it defines the democratic conception of politics.<sup>331</sup>

In this chapter I choose a specific perspective from which to talk about political speech; not its importance, nor its nature, but its limits: sedition. The analysis to follow will centre on seditious speech, the utterance that the law forbids as subversive to the constitutional order. The critical question is: why is any instance of speech that purports to political self-determination not protected under the law on the basis of the sovereignty of citizenship? Or better: if Freedom of Speech bears that constitutive relationship with sovereignty - the citizen is sovereign in that his speech is free - then we cannot curtail the freedom of political speech and still claim sovereignty for the citizen. Or can we?

"Yes" is the counter-intuitive answer, and on the basis of this question and this answer, we will explore the specific meaning of citizen praxis. The formulation I will put forward is paradoxical and the theoretical approach I suggest does not explain away the paradox but treats it as real (in the same way that Marxists talk of real contradictions). This is how the paradox of citizen sovereignty reads: the restrictions that sedition carries into freedom of speech do not compromise the sovereignty of citizenship but uphold it, because

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<sup>331</sup>See generally Ackerman (1980). Tassopoulos, (1993), intro, for an excellent account of the role of the protection of speech in constitutional continuity and change. Also Kalven: "If my puzzle as to the First Amendment is not a true puzzle, it can only be for the congenial reason that free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live." ( Kalven H, 1966, 45)

they are not suffered by the citizen but by the political actor in the name of citizenship. They are a restraint on political action in deference to the exercise of sovereign citizenship. This paradoxical formulation belies the serious intent of addressing the sovereignty of citizenship where it matters most and where it is most sensitive and revealing. It tells us that the limitation to speech that sedition threatens or imposes, as the case may be, does not hedge in sovereignty but substantiates it within an institutional system of public opinion structured around the legal coordinates of identity (citizenship) and action (rights). The law against sedition, that is, disqualifies a certain category of speech from politics by addressing the question of political speech in a very specific way. It imposes, it will be argued with the help of the theory of autopoiesis, a discourse-specific reading of political sovereignty and in the process submerges an interpretative, reflexive, therefore political (chapter 5), understanding of political sovereignty and the kind of praxis that makes it possible.

Let us first approach the question of the sovereignty of citizenship and its curtailment - the prohibition of speech - at the level of doctrine.

In a much quoted, controversial article written in the early 1970s, Robert Bork expounds what has since been held as the minority position in First Amendment (freedom of speech) constitutional doctrine. He begins, rather surprisingly, by deploring the lack of theory underpinning First Amendment adjudication. His concern is doctrinal; it aims to defend two points:

(1) Protection should be extended to political speech only. Bork confines political speech to what is relevant to the uses and allocation of governmental power.<sup>332</sup> Political speech is speech "concerned with governmental behavior, policy or personnel ... [E]xplicitly political speech is speech about how we are governed, and the category therefore includes a wide range of evaluation, criticism, electioneering and propaganda", and does not include "educational, scientific or literary expression". One might object to Bork here. This distinction that conflates medium and content is artificial in the simple sense that education can be propagandist and literature can sometimes carry a sharp edge of political criticism. Bork brushes off criticism here. "Not too much should be made of the undeniable fact that there will be hard cases." The weight of his argument is carried in his second point. It is what concerns us most too.

(2) Protection should not be extended to revolutionary speech. It is interesting, and congruent to the point pursued in this chapter, to note that the second point is not introduced as an exception to the first.

In taking this stance towards 'revolutionary speech', Bork forms part of an outspoken,

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<sup>332</sup> Other constitutional writers who define as political those activities that are directly related to governmental behaviour, policy and personnel include Bickel (1975), and Berns (1957)

if minority,<sup>333</sup> current in First Amendment literature including among others Auerbach (1956), BeVier (1978). Bork sides not with the much celebrated dissenting opinions of the Smith Act cases<sup>334</sup> but rather with the forgotten majorities of those cases. In order to confront the opinion of Brandeis J in Whitney,<sup>335</sup> Bork draws on that judge's description of the benefits to be derived from protecting speech. The first two benefits have to do with individual fulfilment and happiness, the third with a safety value for society. The final benefit from protecting speech comes from its function "of the discovery and spread of political truth."

"Seeking and spreading political truth" is not the most common way to describe what politics is about, but this formulation does lob up the question very conveniently for Bork. What is political truth, he will ask, how is it to be defined? He sees "three possible meanings":

(i) "An absolute set of truths that exist independently of Constitution or statute, (ii) "A set of values that are protected by constitutional provision", (iii) "whatever the majority maintains at the moment ... within the Madisonian model of representative government". (p30)

The first meaning (i), identified with the dinosaur of Natural Law, is easily discarded by Bork alongside the quest for absolute truths. The meaning of political truth is instead to be found in a combination of criteria (ii) ("the highest type of political truth") and (iii) ("political truth is what the majority decides it wants today"). "Political truth ... [is] a concept defined entirely from a consideration of the system of [democratic, constitutional] government."

The field is now set for Bork to discuss revolutionary speech:

"Speech advocating forcible overthrow of the government is not [political speech] ... It is not political speech because it violates constitutional truths about processes [crit. 2] and because it is not aimed at a new definition of political truth by a legislative majority [crit. 3]. Violent overthrow of government breaks the premises of our system concerning the ways in which

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<sup>333</sup>"Freedom of thought soon shrivels without freedom of expression," said Justice Frankfurter in his concurring decision in Dennis, a case which upheld the legislation underpinning McCarthyism. Justice Brandeis's much-quoted defence of free speech was delivered as a concurring judgement in Whitney, convicting the defendant for having organised a left wing political party and supporting union radicalism. The fact that these powerful speeches were delivered as concurring opinions in cases of harsh censorship, makes one wonder whether Bork does in fact represent the minority opinion. See also Gearty (1993).

<sup>334</sup>334 The Smith Act of 1940 made it unlawful to "knowingly or willfully advocate, abet, advise or teach" the duty of violent overthrow of the government. This initiated the Smith Act prosecutions in the 50s against members of the Communist Party who were charged with conspiracy, and the enactment of more than 300 laws aimed at subversive activities by the federal states. (see Gellhorn W (ed) (1952) p358). Famous treatments of the Smith Act in Court include Dennis v US 341 US 494 (1951), Yates v US 354 US 298 (1957), Scales v US 367 US 203 (1961)

<sup>335</sup>Whitney v California 274, US, 357 (1927)

truth is defined, and yet those premises are the only reasons for protecting political speech. It follows that there is no constitutional reason for protecting speech advocating forcible overthrow." (p31) And again, "[In instances of suppression of subversive speech, what] was struck at [was] speech not aimed at the discovery and spread of political truth but aimed rather at destroying the premises of our political system and the means by which we define political truth." (p32) (my emphases)

The argument can be summarised as follows:

- (1) We define political truth by means of constitutional processes (most importantly constitutional protection of speech). Political truth is thus contained within the constitutional framework
  - (2) Revolutionary speech is directed against the constitutional framework
  - (3) therefore, revolutionary speech is directed against political truth
  - (4) therefore, revolutionary speech is not political.
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- (5) The only reason for protecting speech is that it leads to political truth (equally, because it is political)
  - (6) therefore there is no reason to protect revolutionary speech.

(5) and (6) do not necessarily follow from (1)-(4). We can, that is, hold (1)-(4) as valid and still abstain from (5) and (6) because we support additional reasons for protecting speech (because, for example we value toleration, or in the name of protecting truth in general). Bork urges that seditious speech be prosecuted. This is a prescriptive point and as such need not concern us here. In fact confident constitutional regimes rarely have recourse to anti-sedition legislation. What interests us is not whether the sedition charge ought to be pressed. What interests us is the logic underlying it (1)-(4): the law against sedition is directed against speech directed against politics.

Revolutionary speech violates "constitutional truths about processes" which are identified in turn with the "premises of our political system". The term 'processes' is used to make the connection with truth, as instrumental to it, as rendering it. Without undoing Bork's argument, one could substitute 'process' for 'paradigm' to do justice to the comprehensive model of politics that is inscribed in constitutions and to which Bork, too, is alluding.

The term 'political paradigm' that I borrow and redefine from both Raschke (1980) and Offe (1985) has the advantage of providing a comprehensive model of what politics is about. A political paradigm provides answers to three interrelated questions :

- (a) What are the stakes of conflict and/or the issues of action
- (b) Who are the actors and what is their mode of becoming collective actors

(c) What are the procedures, occasions, sites and institutional forms of action through which conflict is carried out.

The contention is, and I think this is Bork's contention too, that the constitution provides specific answers to each of these questions and thus sets up the constitutional paradigm for politics. Bork's 'processes' then circumscribe possible action within this framework, and it is here that political action in institutional form is geared to (articulating) political truth. It is also, only naturally then, on this basis that speech will be assessed as contributing to politics or not. Attempting to dismantle the constitutional system means attempting to abolish the processes we have for reaching political truth - processes which are determined by and contained in constitutional rules.

Laws against sedition sanction that containment. The question of sedition throws the problematic into relief, because it is through laws against it that certain utterances are banished from the accepted parameters of political discourse. The question that motivates this analysis is: If political action is action contained in and prescribed by constitutional processes how is the politics of those who defy or oppose those processes to be expressed?

### III Sedition

Sedition will be employed as a term of art to cover all instances of speech that the law treats as subversive to politics. However, to employ a legal term as a term of art to designate a category of speech and then to criticise the law for setting it up thus would render the argument hopelessly circular. What is required in order to avoid the circularity of presupposing what I want to prove, is an explicit legal base for designating an offence as seditious. The legal premise that holds the category of sedition together is the similarity in the description of the punishable offence. Sedition as I employ it, more broadly but still compatible with its strict legal meaning, is the common category where the punishable offence is the subversion of the constitutional political process, and where this subversion is carried out by rhetorical means. Both premises are inscribed in the actus reus of all the offences that will come under the category of sedition. Sedition in my use becomes a functional term that gathers together commonalities existing in various jurisdictions, with focal and penumbral cases, where subversion may be explicit or implicit, more or less dangerous, its intention direct or indirect. To help focus the discussion and also avoid the circularity (but at the cost of a certain critical edge), the analysis to follow will explore laws where the attempt to subvert is explicitly designated and will not therefore attempt to retrieve judicial intention to punish sedition, interpretatively, in decisions where this intent is covered up.

As is obvious from the broad scope of instances chosen, across jurisdictions and over a large period of time, the point is not to labour the detail of individual legal provisions, but to provide paradigm cases where, under constitutions that entrench popular sovereignty, speech is prosecuted for being subversive to the polity. The choice of broad framework is also meant to support the magnitude of the claim; these are conclusions that are meant to hold for constitutionalism as such (liberal and republican) and not the oppressive practice of one specific legislature or judiciary.

Instances of 'sedition' share two defining features:

- (i) the offence is of a rhetorical nature - i e it pertains to speech, discourse, the propagation of ideas,
- (ii) the offence being punished is the attempt to disrupt the constitutionally-sanctioned political process. Speech is excluded from protection if it endangers or is aimed at endangering, if it offends or aims to offend, the political system as laid out and sanctioned by the Constitution. The precise aim of sedition laws is to remove the conflict in a way that



leaves the political process intact, when the conflict is alleged to have arisen at the level of the rules of the game. The rationale behind the criminalization of utterances is the disruption of the political life of the society at the level of respect for the rules of the political process. Notice how what is prohibited is a form of behaviour - speech - that is generally permitted<sup>336</sup> particularly in the public domain where it occupies a "preferred position".<sup>337</sup> Notice also, in certain instances (below a, b, c), how the prima facie permitted form of behaviour - speech - only becomes an offense as the locus of liability is placed one step back, from the feared action to the encouragement of the action, the latter a behaviour that does not in itself offend or otherwise harm.

The main point, however, and this is to labour the rationale of sedition a bit further, is that the criterion for deciding whether a political act falls under the category of permitted speech or of seditious offence, is whether it is conducive to or subversive of the institutional setting of the political process. Is the act aligned with the formal requirements of the institutional structure of the public sphere and does it, thus, channel conflict through the stipulated ways, or is it subversive of the structure itself, carrying a threat of de-stabilisation to the constitutionally sanctioned political process?

As was mentioned above, this focus is carried in two categories of offences, both of a rhetorical nature. We will explore in turn, both

i) where the offensive behaviour is an incitement to subversion of the constitutional system, an invitation to further undertaking of action (predominantly violence) (below a, b, c); and where the offensive behaviour itself constitutes and exhausts the feared subversion (below d, e).

There is at the outset, a possible objection: sedition laws occupy only a marginal role in constitutional practice today and do not warrant the significance I am attributing them. I am not persuaded by this objection. Even when sedition itself has been supplanted by legislation that fulfils an equivalent function on public order grounds (see below), sedition laws come into their own when governmental authority and the legal system itself are challenged. In times of internal crisis, often through the enactment of emergency legislation, the freedom-sedition balance will weigh on the authoritarian leg. If on the other hand, during 'confident' constitutional regimes, sedition "is hardly ever taken down from the armoury in

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<sup>336</sup>"The fact that political speech is by definition speech that is directed to other people by giving them the possibility of choice and agreement, becomes in the cases of conspiracy to advocate subversion, the primary harm to the state and the very justification of the crime, the reason that is offered to establish its constitutionality." (Tassopoulos, 1993, p182)]

<sup>337</sup> First encountered in the famous fourth footnote by Chief Justice Stone to US v Carolene Products Ltd 304 US 144; see also Jones v Opelika, 316 U S 584 at 600; see further Nowak and Rotunda (1991) at 941-2. See also Barendt, 1985, 146

which it hangs" (below fnx), the fact supports rather than undermines the argument I will make connecting sedition to the system's self-maintenance.

### i) Incitement to subvert

#### a.) The common law offence of sedition in England

It is surprisingly hard to pin down the precise *actus reus* of the offence, as it is "necessarily somewhat vague and general."<sup>338</sup> <sup>339</sup> In his Digest of the Criminal Law<sup>340</sup> Fitzjames Stephen provided the following wide definition "[a] seditious intention is an intention to bring into hatred or contempt, or to excite disaffection against the person of her Majesty ... or the government and constitution of the United kingdom, ... or to excite Her Majesty's subjects to attempt otherwise than by lawful means the alteration of any matter in Church or State by law established, ..." Brazier comments that this could "encompass any forceful criticism of the existing structure of authority within the state."<sup>341</sup> The words of an Irish judge in 1868 reflect and confirm the breadth of this definition: "[sedition] is a comprehensive term and it embraces all those practices ... which are calculated to disturb the tranquility of the State ... and subvert the government and the laws."<sup>342</sup> While relying on Stephen's definition, Cave J attempted to narrow it down slightly, in his direction to the jury, in Burns.<sup>343</sup> In this leading case, the judge identified the nature of the offence as two-fold, "[that] of speaking seditious words, and the other offence is the publication of a seditious libel."

There is a wide range of offences whose focal meaning coincides with that of the common law of sedition. In most doctrinal writings they are grouped under the common

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<sup>338</sup> Cave J in R v Burns, (1886) 16 Cox CC 355, 2 TLR 510

<sup>339</sup> Brownlie notes that the most detailed modern analysis of sedition was made (in 1951) by the Canadian Supreme Court, one of whose members commented that "as is frequently mentioned in the authorities, probably no crime has been left in such vagueness of definition", in Townsend (1993, p117

<sup>340</sup> p56, art.93; 8th ed, art 114

<sup>341</sup> S A de Smith (1985) p470

<sup>342</sup> Quoted in Williams, 1967, p197

<sup>343</sup> (1866) 16 Cox C. C. 333. In this case the defendant was acquitted after having made an inflammatory speech in Trafalgar Square, calling for support for the plight of unemployed workers in London.

category of "sedition and the crimes akin."<sup>344</sup> While seditious libel is not a separate crime from sedition (see Burns), Seditious Meeting (not invoked this century), Conspiracy to Alter the Constitution, Incitement to Mutiny, Disaffection, etc, are.<sup>345</sup> Both Williams and Townsend classify as sedition the "incitement of discontent and disaffection and of unlawful methods of changing the law."<sup>346</sup>

The Incitement to Disaffection Act was enacted in 1934. "The struggle over this law," writes Townsend, "inside and outside Parliament, was more intense and pungent than over any of the Emergency Powers or Official Secrets Acts. The Opposition saw the 'Sedition Bill' as a dangerous redefinition of political crime. The Government saw it as a vital defence of the British way of life." (Townsend, 1993, p98). The relatively recent cases of such incitement to disaffection (in Arrowsmith<sup>347</sup> characteristically) show the persistent relevance of these concerns and have led Bailey et al to stress that "prosecutions in the 1970s show that these offences are by no means obsolete." (p291)<sup>348</sup>

Yet the "decline" of the common law offence of sedition can be understood as a consequence of what could be described as a shift from content to context.<sup>349</sup> In a detailed study of the history of sedition up until the end of the 19th century, Michael Lobban (1990) traces this shift in nearly a century of prosecutions. During this period the criterion of the seditious quality of the words uttered is abandoned in the name of an increasing concern with the effect of words on the audience. This internal shift of focus signals that prosecutions are increasingly initiated on public order grounds, or in Lobban's words "the seditious quality of the words [becomes] increasingly harnessed to the public order effect of words" (p323).<sup>350</sup>

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<sup>344</sup> Joel Feinberg suggests that what underpins and keeps the category together is the common mens rea of the offences, understood as "seditious intent", ulterior intent to subvert. (1980) p147

<sup>345</sup> Many of these crimes have not been invoked for decades yet they have survived in England and other Commonwealth jurisdictions by a number of refinements and qualifications.

<sup>346</sup> Williams, Townsend, 1993, 98

<sup>347</sup> [1975] QB 678, CA.

<sup>348</sup> I suggest this connection only hesitantly, because in order for "incitement to disaffection" to be an instance of sedition as I have defined it, it must explicitly contain a subversive political claim, a claim that Bailey et al. assume is contained anyway (ps 291, 294), but which connection I do not think to be self-evident.

<sup>349</sup> The separation of content and context is artificial and in fact not always that useful. Take for example Greenawalt's (1989) suggestion. Greenawalt borrows the distinction locutionary/illocutionary and applies it to instances of sedition. Are seditious incitements ways of expressing things or of doing things? (If they are the latter they are not worthy of protection.) The only way this distinction can work is with an eye to context, by taking on board, that is, the "pragmatic" meaning of the utterance-in-context.

<sup>350</sup> Lobban refers to the case of J Smith, bookseller, London, 1797, and R v Yorke (1795) 25 St Tr 1003,

The notion that sedition was hidden behind the question of public order is particularly stressed by Lobban. Judges, he says, "dressed up a seditious conspiracy charge which was unlikely to be successful from the mere content of the ideas, into an unlawful assembly one which focused on the vague public order fears." (p345) Recent strict legislation on public order grounds, the Public Order Act 1986, the Criminal Justice and Public Order Act of 1994 and Emergency legislation of the type below (c.), bear witness that Lobban's conclusions remain worryingly pertinent.<sup>351</sup>

"The common law of sedition," write Bailey et al., "sets the bounds for general political discourse." (1991, 291) In similar terms, Barendt writes that "the common law still draws a distinction between the expression of political opinion and the advocacy or incitement of violent political action."<sup>352</sup> We should not consider it decisive that "sedition is hardly ever taken down from the armoury in which it hangs," as the judge remarked in Aldred.<sup>353</sup> "In time of crisis an uncertain executive might resort to it again, as it has done in modern times in areas of British colonial rule." (Brownlie, International Law 239). In any case the argument I am putting forward depends on deciphering the logic behind the designation of the offence and does not depend on its frequency. It is significant for example that although there have been no reported decisions on sedition in Ireland since 1922, the Irish Constitution preserves the offence of seditious libel in the very article that guarantees citizens' freedom of expression.<sup>354</sup>

#### b.) Subversive Advocacy

"The frequent use of the charge of sedition in the eighteenth and early nineteenth centuries in England," writes Barendt, "has been contrasted probably too starkly with the intellectual climate that led to the drafting of the First Amendment." (1985, p153) The question of subversive advocacy, i.e. the incitement to violence as a means of effecting

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and R v Walker, (1794) 23 St Tr 1055.

<sup>351</sup> On the recent Scottish case of Sheridan, see Christodoulidis and Finnie "How the Ace of Trumps Failed to Win the Trick", (forthcoming in Res Publica)

<sup>352</sup> 1985, passim. and 155

<sup>353</sup> R v Aldred [1909] 22 Cox C. C. 1

<sup>354</sup> Art. 40.6 of the Constitution of Eire. Barendt (1985, p154) calls this co-existence "paradoxical", echoing the ("real") paradoxical articulation I hinted at earlier.

political change, has been a consistent pre-occupation of American constitutional courts, and it would not be an exaggeration to say that few other single legal issues have generated in US jurisprudence such wealth of theory to solve them. The long and fierce debate centres on whether the damage inflicted through the censorship of subversive political statements ought to be seen as a contradiction of democratic founding principles.<sup>355</sup> The debate turns on the inclusion or not of "revolutionary" or "subversive" speech under the protection afforded by the principle of free speech. If that principle underpins political sovereignty, by protecting a sovereign citizenry's right to be heard, does the silencing of any political statement, albeit subversive, not fundamentally undermine democratic politics? Or conversely, should we not accept that the subversive effect on democracy is itself too intolerable, so that censorship becomes necessary in the name of democratic politics?

Recently in American jurisprudence the question of the constitutionality of the prohibition of "subversive advocacy" has made a spectacular re-appearance with the flag-burning cases.<sup>356</sup> But it has had a long history involving the contested constitutionality of the curtailment of "fighting words", "criminal conspiracy", "criminal syndicalism", and other political activity that was seen to have an intolerable subversive effect on the polity. These debates over the censorship of political statements are in fact very complex ones, involving a number of mutually cross-cutting and under-cutting distinctions. One important focus is whether or not political speech should be afforded privileged protection. This debate is complicated by the disagreement as to what counts as political speech. The various readings of the justification of the principle - among others truth, democracy, toleration, utility - have unwittingly served to relativise positions further. The rather easy - because blanket - "absolute protection" position has led to occasionally uncomfortable conclusions regarding, for instance, commercial speech and pornography. I cannot hope to even begin to address that debate here, although other parts of this chapter are full of references to the debates. Suffice it here to point out that the offences that come under the umbrella term subversive advocacy share the seditious element: they are all directed against action that endangers or aims at endangering the constitutional political process.<sup>357</sup>

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<sup>355</sup>For an excellent overview of the debate see C. E. Baker (1989). For an overview of the history of the debate in the American Supreme Court and the succession of "tests" devised, see Greenawalt (1989). For comparative studies see e.g. Barendt (1985), Tassopoulos (1993). For an analytical philosophical approach to the problem, see Schauer (1982). In his very interesting work, Greenawalt, in a thoughtful attempt to avoid the impasse, suggests a distinction drawn from linguistic philosophy, namely that between (prima facie) subversive statements that carry locutionary and those that carry illocutionary force.

<sup>356</sup> On symbolic speech more generally see Ely, 1975, 1482. Protection of symbolic speech was recognised in principle as early as 1931 in Stromberg v California 283 US 359. Later in US v O'Brien 391 US 367. Recently considered in the context of nude dancing as entertainment Barnes v Glen Theater Inc. 115 L: Ed 2d 504 (1991)

<sup>357</sup>There is not enough space to trace the same dilemma in other jurisdictions. Indicatively only, in

The US and the UK legal systems are not alone amongst those of democratic liberal states to sanction subversive advocacy. Seditious offences against the "state" and the "free democratic order" exist in a number of other Western jurisdictions. At the height of the terrorist threat in West Germany, for example, the government introduced a number of amendments to the criminal law, including the anti-Constitutional Advocacy Act of 1976. Section 88a of the Penal Code provided that offences "against the Constitution" could be punished with imprisonment for up to three years. The seditious element was designated here as "capable of encouraging the willingness of other persons to commit offences against the existence or safety of the FRG."<sup>358</sup> The legislation was not seen as contradicting the Constitution which requires fidelity to the free democratic order and thus arguably excludes forms of militant democracy and direct action. Section 88a was finally repealed in 1981, but other parts of the Penal code designating offences "Endangering the Democratic Rule of Law" (Title III), and punishing the defamation of the federation (90, 90a, 90b) in conjunction with provisions against criminal association (sections 129, 129a) may be used to punish sedition.

### c.) Support for Terrorism

The offences relevant to our discussion of sedition are those that pertain to the propagation of ideas that law forbids on the basis that they are subversive. The following is only an indicative selection from the mass of relevant provisions of both the Northern Ireland (Emergency Provisions) Act of 1991 and the Prevention of Terrorism (Temporary Provisions) Act of 1989. Three categories will be outlined as indicative.

The first is the expression of support for terrorism. Since 1974,<sup>359</sup> terrorism has consistently been defined as "the use of violence for political ends."<sup>360</sup> Amongst the organisations concerned in, promoting or encouraging terrorism in the UK, the "most dangerous" are "proscribed". While under all the Acts since 1974 the Secretary of State

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Germany, the Federal Constitutional Ct declared the Communist (and neo-Nazi) party unconstitutional under article 21(2) of the Grundgesetz. ( 2 BVerfGE 1 (1952); 5 BVerfGE 85 (1956). See also, decision as to whether the propagation of Marxism is protected as "research and teaching" (5 BVerfGE 85, 141-6 (1956). In Greece, the Constitution of 1952 similarly outlawed the Communist Party.

<sup>358</sup> Quoted in Finn, 1991, 211.

<sup>359</sup> Prevention of Terrorism Act 1974, s.9(1) , 1989, s.20(1)

<sup>360</sup> For difficulties or objections to this definition, see Finnie, 1990, 2. On the self-contradictory nature of the definition, see Christodoulidis and Veitch, 1994, 463.

reserves the power to add other organisations to the list, it is only the IRA and the INLA that have been proscribed to date.<sup>361</sup> How is the - for our purposes seditious - expression of sympathy designated? According to section 28 (on "Proscribed organisations" ) it is an offence (a) to belong or profess to belong to a proscribed organisation, (b) to solicit or invite support for a proscribed organisation<sup>362</sup> (d) to arrange or assist in the arrangement or management of, or address, any meeting of three or more persons (whether or not it is a meeting to which the public are admitted) knowing that the meeting (i) is to support a proscribed organisation or (ii) is to be addressed by a person belonging or professing to belong to such an organisation. Note that not only speakers but knowing listeners to the seditious utterances are held liable under the Act. Note also that the breadth of activity designated seditious is extended beyond speech to embrace also symbolic communication. Section 29 of the Act, under the heading "Display of support in public for a proscribed organisation", punishes any person who in a public place (a) wears any item or dress; or (b) wears, carries or displays any article in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation.

Another example of anti-sedition law is the recently-repealed ban imposed in 1988 on the broadcasting of statements in support of terrorism. On October 19, 1988, the Home Secretary issued directives to the (then) IBA and to the BBC prohibiting the broadcasting of direct statements by representatives of terrorist organisations in Northern Ireland. The ban was not confined to the organisations proscribed under the Prevention of Terrorism Act but involves a more broadly designated category, which includes Sinn Fein. The directive forbids the direct broadcasting of interviews with or speeches made by members of a proscribed organisation, of Sinn Fein or of anyone in support of either. It ordered the BBC "to refrain from broadcasting any matter which consists of or includes any words spoken, whether in the course of an interview or discussion or otherwise, by a person who appears or is heard on the programme in which the matter is broadcast where (a) the person speaking the words represents or purports to represent a [proscribed for the purposes of the Prevention of Terrorism Act 1984] organization, or (b) a member of Sinn Fein, Republican S F or the UDA, or (c) the words support or solicit or invite support for such an organization."

The directive was unsuccessfully challenged by journalists in Brind v secretary of State

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<sup>361</sup> The provision has proved a regulatory failure of the first order. On the one hand because to "de-proscribe" an organisation - such as the INLA which arguably is no longer one of the "most dangerous" - would be a propaganda coup to it. On the other hand, to proscribe another, quite apart from the publicity that would cause, would be ineffective given the ease and frequency with which organizations change their names. See Finnie, 1990, 5

<sup>362</sup> The 1989 Act's lengthy special provisions on "financial assistance," (Part III) extends its scope outwith the organisations proscribed in the Act .

for the Home Department<sup>363</sup> and later revoked.

My final example of the law against sediton in the field of anti-terrorist legislation concerns a disqualification from political office. Section 3(1) of the Elected Authorities (Northern Ireland) Act 1989(3) declares that "a person is not validly nominated as a candidate at a local election unless his consent to nomination includes a declaration in the form set out in Part I of Schedule 2 to this Act". That form is as follows:

"I declare that, if elected, I will not by word or deed express support for or approval of (a) any organisation that is for the time being a proscribed organisation...; or (b) acts of terrorism (that is to say, violence for political ends) connected with the affairs of Northern Ireland."

If the candidate is elected having signed the declaration, he or she may be deemed to have breached the terms of that declaration if, at any time whilst a member of the local council, he or she expresses such support or approval either at a public meeting or in circumstances such that they know or could be reasonably expected to know that such support or approval is likely to become known to the public (s.6(1)). A public meeting includes (s.6(5)) any meeting in a public place, any meeting which the public is permitted to attend whether on payment or not, and any meeting of a local council.

In order to determine formally that a breach has occurred, an application must be made to the Northern Ireland High Court by either a member of the local council or anyone entitled to vote at an election to that council on the date of the application (s.7(1),(2)). Under Section 8(1) of the Act a declaration of breach by a person can result in the disqualification of that person from standing as a candidate for five years.

What all three categories of offence - the common-law offence of sedition, subversive advocacy and the censorship of statements in support of terrorism - share is that they proscribe seditious behaviour in the way we have been employing the term here. That is: all three categories describe behaviour pertaining to speech, discourse, the propagation of ideas. In all three the action struck at is the subversion of the constitutional political order. The two categories of offences to which we now turn are again both "rhetorical" and subversive, but they aim to subvert something more limited than - if vital to - the polity itself: they are subversive attacks on the judiciary.

## ii) Contempt of Court

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<sup>363</sup> [1991] All E R 720



Attacks on the judiciary assume a variety of forms and in answering them it is only natural that the judiciary's main weapon - contempt of court - becomes "the Proteus of the legal world, assuming an almost infinite diversity of forms" (Miller, 1989, p1) In an oft-quoted definition, Lord Russell described the offence in R v Gray as "[a]ny act done or writing published calculated to bring a Court or a Judge into contempt or to lower his authority is a contempt of Court."<sup>364</sup> The scope of what may be deemed contemptuous is vast. We, however, are only interested in two categories where the contempt is seditious, in the way we have defined it.

What is not without significance is the gravity of the terms in which judges tend to describe the offended value, the magnitude of the harm they see threatened and consequently the importance of the stake involved. In what was a leading case of contempt in English Law,<sup>365</sup> Lord Diplock stated:

"The provision of a system for the administration of justice by courts of law and the maintenance of public confidence in it are essential if citizens are to live together in peaceful association with one another. 'Contempt of Court is a generic term descriptive of conduct in relation to particular proceedings in a court of law which tends to undermine that system or to inhibit citizens from availing themselves of it for the settlement of their disputes."

We will focus on two instances of contempt that "tend to undermine the system" or, in our terms, are seditious. The first is the offence of "scandalizing the court". The second is a form of seditious direct contempt.

#### d.) "Scandalising the Court"

In the words of Lord Diplock, "[s]candalising the Court' is a convenient way of describing a publication which, although it does not relate to any specific case either past or pending or any specific judge, is a scurrilous attack on the judiciary as a whole, which is calculated to undermine the authority of the courts and public confidence in the administration of justice."<sup>366</sup>

It is of interest to note incidentally that there exists a problem of classification here,

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<sup>364</sup>[1900] 2 Q B 36, 40

<sup>365</sup> A-G v Times Newspapers Ltd, [1974] AC 273, 307, [1973] 3 All ER 54, 71, HL . Largely reversed now after the European Court of Human Rights decision in Sunday Times (no 1) and the Contempt of Court Act 1981

<sup>366</sup>Chokolingo v AG of Trinidad and Tobago [1981] All ER 244, 248, PC

involving contempt and scandalising. Although 'scandalising' is generally assumed to fall under the more general category of contempt (Miller, 366), this subsumption is not uncontroversial. The objection contests that one aspect at least of the *actus reus* of scandalising is broader than its equivalent in contempt. Unlike contempt, scandalising need not be linked to a case *sub judice* (*pendente lite*).<sup>367</sup> The objection appears convincing but I will not, for present purposes, alter the classification as the objection does not bear on the question of sedition.

The elements of the actus reus of the common law offence are as follows. The bodies protected are only Courts of Justice properly so called, both superior (predominantly cases have been about superior courts) and inferior.<sup>368</sup> It is of paramount importance that the attack is directed at the judge *qua* judge, at the judicial office itself and not the personal reputation of the judge. This general limitation is well established in decisions<sup>369</sup> and in doctrine.<sup>370</sup> The degree of harm required to constitute 'scandalising' sets a low threshold to the offence: that of creating a real, albeit small, risk of prejudice to the administration of justice.<sup>371</sup> But the requirement of "substantial risk" of the Contempt of Court Act has been interpreted restrictively,<sup>372</sup> and in effect any undermining of public confidence in the administration of justice can fairly be described as a serious impediment to justice. The offending conduct is the publication of material that either constitutes 'scurrilous abuse' or imputes a political motive and thus challenges or compromises the assumed impartiality of the judicial office.

Cases where the 'scandalising' is caused by 'scurrilous abuse' - the open and direct attack on the personal character of the judge - are not only extremely rare<sup>373</sup> but more importantly not directly relevant to this discussion as they do not of necessity carry political

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<sup>367</sup> Consequently a preliminary objection must be answered to the effect that the Contempt of Court Act of 1981 has created a new statutory offence of scandalising' to replace the common law offence. In the absence of recent cases to decide the question, the most reasonable option would be to resist this interpretation which subsumes "scandalizing" to contempt. The 1981 Act followed a European Ct decision deciding a case of direct contempt and limits its application to pending litigation not affecting therefore (Walker, 1985, 364-5, Miller, 1989, 367) the status of the offence of 'scandalising'.

<sup>368</sup> Re Borowski [1971] 19 DLR (3rd) 537 (man QB) where the offended judge was a magistrate.

<sup>369</sup> Miller, 1989, n.17, p368 for explicit mentions

<sup>370</sup> Goodhart, 1935, 898: "Scandalising the court means any hostile criticism of the judge as judge; any personal attack upon him, unconnected with the office he holds, is dealt with under the ordinary rules of slander and libel"

<sup>371</sup> A-G v Times [1974] AC 273, 307, [1973] 3 All ER 54 ). Also Walker , 1985, 359, 362

<sup>372</sup> See Miller C J, 1989, pp155, 369

<sup>373</sup> A good example is Gray [1900] 2 QB 36

overtones. Rather, it is the second category of offence, the imputation of bias where the bias is political that is the crucial one for this discussion of sedition. The seditious behaviour consists in imputing a political motive to the adjudicative act. This imputation is countered and rebutted as a contempt, as an effort to destabilise law in its adjudicative function. Such a dialectic is what this analysis aims to pick up and expound upon. The cases illustrate the problematic more directly. Before we move to the cases, however, there is another point that needs to be stressed and for this we turn to the mens rea of 'scandalising'.

While it is more or less settled at common law that for there to be 'scandalising' there must be intention to publicise, it is by no means as clear whether there must also be established intention to 'scandalise'. The controversy is a complex one and I can only hope to capture the main drift here. None of the recent reports or the Law Commission's works on these offences analyse the existing mens rea.<sup>374</sup> The traditional view expressed in two Privy Council judgments seems to require ulterior intent (intention to scandalise) but even this is not clear<sup>375</sup> and is anyway rejected in principle by many commentators.<sup>376</sup> Walker concludes that there are strong arguments that ulterior intention should not be considered of constitutive importance. However he claims one exception. This exception raises a point of the greatest importance for us. There is strong authority to the effect that ulterior intention is required for the offence when it involves imputation of political motive; when such a motive is imputed it must be imputed with a view to subvert, or in other words, with "an intention to bring into hatred or contempt or to excite disaffection against the administration of justice." (Walker, p369)

There is no doubt that contempt and scandalising exhibit such a substantive overlap that the latter can be considered a sub-category of the former. I have chosen to focus on scandalising because it is here that the seditious elements are most pronounced.

1. The offensive instance alleges a political motive behind the judicial decision.
2. The offence is attributed to the judicial office, not the personality of the judge but to a functional unit itself and thus, as every judge and commentator has stressed, to the system of law itself.
3. The mens rea in scandalising through imputation of political motive includes a requirement of "ulterior" intent. The mischief must be aimed at shaking confidence in the administration of justice and is therefore that of sedition. The intention to subvert the legal system rather

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<sup>374</sup> Walker, 1985, 367, n49

<sup>375</sup> See R v Burns [1886] Cox C C 355, 364. The Law Commission expressed uncertainty over this point.

<sup>376</sup> The complex discussions here draw conclusions from the excuse in the absence of forethought

than incidentally subverting it, is inscribed into the offence of scandalising the Court in a way that it is not in direct contempt. The confrontation between scandaliser and judge is total and pre-meditated.

4. It is significant that scandalising the Court is not tied to a case *sub judice*. It is aimed at justice as a continuing process. This quality of the attack further stresses its character as an attack on the administration of justice as such, as subversive to the legal system itself rather to the decision in a specific case.

I will now briefly look at a number of cases of 'scandalising'. The rhetoric here is indicative of the importance still attributed to the crime,<sup>377</sup> echoing Lord Denning's view on the rationale of the offence: "The judges must of course be impartial: but it is equally important that they should be known by all people to be impartial. If they should be libelled by traducers, so that people lost faith in them, the whole administration would suffer. It is for this reason that scandalising a judge is held to be a great contempt." (The Road to Justice, 1955, p73)

The first English case of Wilkinson, concerning a communist agitator, came before a Divisional Court in 1932 and sentences of imprisonment of up to nine months were imposed upon persons responsible for publishing The Daily Worker. At issue was the imputation of political bias to the judges of a previous case. The passage in question read as follows: "Rigby Swift, the judge who sentenced Comrade Thomas, was the bewigged puppet and former Tory M.P. chosen to put Communist leaders away in 1926. The defending counsel, able as he was, could not do much in the face of the strong class bias of the judge."

Lord Hewart, C.J., said that the offender had committed contempt by scandalising the court because the comments had the effect of bringing the judge into contempt - a "gross and outrageous contempt" at that - and lowering his authority.<sup>378</sup>

I will broaden the scope of this inquiry to other jurisdictions that provide remedies for seditious attacks on the judiciary along the same (or similar enough for our purposes) lines.<sup>379</sup>

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<sup>377</sup> The Phillimore Committee - which was appointed to consider the law of contempt after the European Court's decision in Sunday Times - concluded that the offence of scandalising should remain in being because "this branch of the law of contempt is concerned with the protection of the administration of justice and especially the preservation of public confidence in its honesty and impartiality..." (Phillimore Report on Contempt (Cmnd. 5794, 1974), para162)

<sup>378</sup> R v. Wilkinson (1930), Times, July 16

<sup>379</sup> The equivalent Scottish common law offence of 'murmuring judges' will not be treated here because the only recent (unsuccessful) prosecutions were not made on the basis of the imputation of

In the 1981 Irish case of The State (DPP) v. Walsh,<sup>380</sup> the judges of the Irish Courts left no doubt that they felt scandalised. The relevant publication followed the sentencing to death of Marie and Noel Murray for the murder of a policeman imposed by the non-jury Special Criminal Court, a court dealing primarily with terrorist offences. The scandalising document was a report published in the Irish Times claiming that the trial court lacked judicial independence and was

"composed of Government-appointed judges having no judicial independence .. and which so abused the rules of evidence as to make the verdict akin to a sentencing tribunal." (i.e. treated a finding of guilty as a formality)

The evidence adduced by the prosecutor showed that the respondents had accepted full responsibility for the publication. In 1978, the High Court found the accused guilty for contempt of court.<sup>381</sup> They appealed and the appeal was heard in 1980. According to the judgment delivered by Mr Justice Henchy (Griffin J, Parke J and Kenny J concurring), "the principal impression which this statement was calculated to make on the ordinary reader of the newspaper was that the three judges who constituted the Special Criminal Court were so craven, biased and incompetent or corrupt, that they had abused the rules of evidence,, to the detriment of the accused, so that they (the judges) were little better than a sentencing tribunal. It would be difficult to conceive of a publication more calculated to undermine the reputation of the Special Criminal Court as a source of justice. If true, this imputation of judicial misbehaviour would render the three judges in question unfit to hold judicial office of any kind and would cause the Special Criminal Court to be held in the opinion of the public at large to be so debased as to be disqualified from dispensing justice. In short, the facts adduced in this application to commit for contempt constitute a classical example of the crime of contempt by scandalising a court." <sup>382</sup>

The Canadian case of R v. Murphy<sup>383</sup> provides a further example of 'scandalising'. This was an attack levelled at the judiciary as such (notice the breadth of the attack) by a student paper of the University of New Brunswick. The article with the title "Spades Down" read:

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political bias to a judge (Milburn, 1946, S L T 219 and Ellis reported in Gordon, The Criminal Law of Scotland, 2nd ed., p840, n24). Although the possibility of its use remains, the seditious element, as we have discussed it, is absent from the reported contemptuous instances.

<sup>380</sup> [1981] I.R. at 420

<sup>381</sup> For a precise description of the offence in Irish Law, see Walker, 1985, p362, n.25

<sup>382</sup> Henchy J [1981] I.R. at p441-2.

<sup>383</sup> [1969] 4 DLR (3rd) 289

"The courts of New Brunswick are simply the instruments of the corporate elite. Their duty is not so much to make just decisions as to make right decisions (ie decisions which will further perpetuate the elite which controls and rewards them). Court appointments are political appointments. Only the naive would reject the notion that an individual becomes a justice or judge after he proves his worth to the establishment."

The judges had "no hesitation in holding that contempt in scandalizing a court still exists and that proceedings in respect thereto may be resorted to on necessary occasions." (at 292) "The question is not the effect the writer intended his article to have, but the effect the article itself is calculated to have [sic]." "There is," concludes Mr Justice Bridges, "a limit to what a person may say or write of a Judge or Court. In my opinion the defendant exceeded that limit in his malignment of Mr Justice Barry. He was not even satisfied with that and proceeded to make a most uncalled for attack on the integrity of the Courts of New Brunswick. I have no hesitation in holding the article was calculated to bring Mr Justice Barry and the Courts of New Brunswick into contempt." (at 295)

The final case, Schroedt,<sup>384</sup> from De Gaulle's France, exhibits striking similarities to "scandalising". Charges were brought against the political journal Voix Ouvriere for an article published there against the judicial decision of the "Conseil de prud'hommes de Montbeliard" of December 20, 1962. That decision upheld the termination by the Peugeot administration of the employment contracts of the workers' delegates who were held responsible for the insurrection in the Peugeot plant during November 1961. Under the title "Justice de classe", the article attacked this "parodie de justice". The article continues: "Les motifs du jugement ne tiennent pas debout ... C'est se moquer de la classe ouvriere - comme au temps des despotes et des rois, on juge et frappe ceux qui ont le courage de s'opposer aux patrons, au regime ... la justice est bien celle du patronat." Charges were brought against M Schroedt, the editor of the journal, under art 226 of the French Penal Code that designates as an offender "quiconque aura publiquement par actes, paroles ou ecrits, cherche a jeter le discredit sur un acte ou une decision juridictionnelle, dans des conditions de nature a porter atteinte a l'autorité de la justice ou a son independance". The Court decided that the article was a malicious attack aimed at discrediting the administration of justice. The relevant section of the decision reads : " ...telles appreciations et imputations presentent manifestement un caractere malveillant et injurieux qui revele de la part de Schroedt la volonte non equivoque de discrediter dans l'esprit des ouvriers le jugement du Conseil de prud'hommes et de les inciter a tenir en echec par leur action; que, dans cette intention, il presente a ses lecteurs cette decision comme supremement injuste et dictee aux magistrats par la seule consideration de la defense du patronat, partant dans des conditions de

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<sup>384</sup> Gaz. du Palais, 1963 (2), p350

nature a porter atteinte a l'autorite et a l'indépendance de la justice."

Schroedt was found guilty of the offence he had been charged with and a fine was imposed. To stress the similarity with "scandalising" it may be worth mentioning that the defence was at pains to establish that Schroedt's attack was not aimed at "bourgeois justice" as such but at a particular decision. And this line of reasoning by the defence was aimed at rejecting the charge of art. 226 that designates the offence as an attack on the authority of the judicial system itself, just as it is in "scandalising".

#### e.) Direct Contempt of Court

There is a second grand category of seditious instances that are usually dealt with under the category of direct contempt of court. There are problems in dealing with this category because its political dimension is not, as it is in 'scandalising' the Court, inscribed in the very definition of the offence. Instead contempt is a much broader category and to bring out the political dimension in an interpretive way would only beg the question whether this interpretative reading is indeed the law's 'construction' of political speech. I will limit this discussion then to direct confrontations in Court that carry an overtly political denunciation of the system. With the cases *sub judice*, contempt here is mainly dealt with at the level of rules of criminal procedure, in the form of refusals to all petitions, withdrawal of the right to speak, expulsion from the proceedings, penal custody, etc.

Such examples of political confrontation in law were at their most dramatic during the trials of terrorists in the days of urban guerilla warfare that succeeded the big social upheavals of the late 60s and early 70s. The crack-down on the Red Brigades in Italy and the Baader-Meinhof group in Germany provide some of the most spectacular examples. The examples to follow are from the trial of some of the protagonists of the latter, the 'first generation' of the Red Army Faction, a trial that began on 21/5/75 and culminated in the suicide of Meinhof, and later the deaths "compatible with suicide" (official expert release to the press on 18/10/77) of Baader, Ensslin and Raspe.

3rd day, 10/6/75

The defendants refuse their representation by court-appointed lawyers. According to the petition of the defendants "the sole purpose as defence counsel who were in the confidence of the Public Prosecutor and of the court was to ensure the smooth running of the proceedings as puppets in the show trial staged by the imperialist state power and planned ahead in detail."

13th day, 3/7/75

J-C Raspe petitions to "challenge Prinzing [the presiding judge] and this court on grounds of bias." Raspe based his petition on the fact that the judge was refusing to allow independent

doctors to determine the fitness or otherwise of the prisoners to stand trial. He thus, said Raspe, "reveals himself to be a puppet of the Federal Prosecutor's office. If independent doctors were allowed access to the prisoners, the fact of torture, the state's strategy of the annihilation of political prisoners, of guerrillas, of the RAF, would become obvious. It's impossible not to see the analogy with the judicature of the Third Reich. In his arguments, lies and methods, this judge is a model of the type of supposedly independent judicature which got up en masse after 1945 and claimed to know nothing of its victims."

"I am not listening to this any longer," said the presiding judge. "Kindly moderate your expressions. Your comparison with the Third Reich is unacceptable here."

"Maybe you'll realize, some time, what an insult it is to us that you're sitting where you are," rejoined Raspe.

His petition to charge the Court's authority was not accepted.

17th day, 16/7/75

A further allusion to the Third Reich caused the following reaction by the judge. He withdrew Baader's right to speak on the grounds that "the courts, the bastion of freedom, may not be treated with impunity, a defendant could not be allowed unlimited licence to disrupt the course of his trial by creating disturbances, and that it would debase the nation and its judicial system to allow the courts to be tyrannized over, insulted and humiliate."

Dr Heldmann, defending, protested against the silencing of Baader. "He was not silenced for any impropriety in court; refusing to allow him to speak amounts to censoring the expression of political opinion."

The law, said Baader, did not apply to the RAF. "We're to be eliminated."

23rd day, 5/8/75

Baader: "What Federal Presecutor General Buback is doing is by exact definition terrorism, state terrorism. And so the terrorist Buback ... "

Judge Prinzing: "Herr Baader I am withdrawing your permission to speak. If you are trying to accuse the Federal Prosecutor General of pursuing a course of state terrorism, that goes beyond what we ..."

Here Baader wanted to say something but his microphone was switched off.

Meinhof: "Terrorism operates amidst the fear of the masses. The city guerilla movement, on the other hand, carries fear to the machinery of the state."

Judge: "I cannot accept you giving reasons which have no relevance to the case."

On the 40th day of the trial a new legal device was introduced that allowed the trial to proceed in the absence of the defendants. Sections 231a, 231b and 255 of the Code of Criminal Procedure was tailor-made for the Stammheim trial. The introduction of this new law authorised courts to conduct proceedings in absentia, if the defendants themselves were responsible for their unfitness or inability to attend the proceedings.<sup>385</sup> Such inability of course included their expulsion on grounds of contempt of court for which they were held responsible.<sup>386</sup> The business of expulsion now facilitated the proceedings.

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<sup>385</sup> For the similar practice of exclusion in the USA see Snyder v. Massachussets, 291, US 97 (1934)

<sup>386</sup>For details of the provision, see Finn J (1991) pp210-1  
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As the judge announced the measure there was great commotion. The defendants were talking all at once and the judge threatened them with expulsion. Baader moved for an adjournment so that a challenge to the presiding judge could be made. "It's clear enough that you're determined to act with the utmost brutality, here and now." The judge silenced Baader and immediately afterwards expelled him from court.

"This, Dr Prinzing, is an incredible act of oppression," commented Heldmann, defending. "I request an adjournment."

"There will be no adjournment. Please take Baader away."

The presiding judge then tried to announce the expulsion of the defendants from court

Ennslin: "I see it's the judge's business to thin out our ranks."

Meinhof: "We won't forget what you're doing here. And you won't succeed in holding this trial either, a trial with false constructions put on events, the whole bag of tricks. You have to face the fact that the reason we're not fit to stand trial is because we've been tortured for three and a half years. You can't get around that."

The presiding judge had Meinhof expelled from court too. As she was led away she yelled "You imperialist state pig" and then "You're well and truly through your show trial now."

When the dock was empty, Dr Prinzing began reading out the decision of the court. "The defendants are unfit to stand trial according to para 231 of the Code of Criminal Procedure. The law makes provision to ensure that a defendant does not impede the course of the trial by intentionally induced unfitness to plead."

106th day, 4/5/76

Raspe: "The only thing that can come of the attempt to pass judgement on revolutionary politics is a system of lies and false witness ..."

109th day, 11/5/76

Ensslin: "As you've demonstrated, you're a judge under whose auspices two out of five prisoners have been killed ..."

Judge: "First and last warning."

Ensslin: "... and if one of the remaining three now speaks out against the state machine that you sit here to represent, and as whose representative you sadistically act, you interrupt and refuse to allow him to speak ..."

Judge: "You are not entitled to raise objections on the grounds of persistent insulting language."

109th day, 11/5/76

Baader: "I find it hard to say anything at all here. It is my view that we ought not to talk to you or about you any more. Action is called for to deal with the antagonism of the state machine towards humanity, as it actually presents itself in ..."

Judge: "You were not permitted to speak to make a declaration."

Baader: "You want to stop me speaking?"

Judge: "If you are not about to make a petition, then I can't allow you to speak."

Baader: "We are not on that plane any more. We are not on the plane of petitions made to this court, this rat-heap."

Judge: "You are now forbidden to go on speaking for insulting the court."

121st day, 28/6/76

Federal Prosecutor Wunder: "The West German legal system does not cite an alleged right to resist and to employ emergency measures as grounds for waging private wars at one's own discretion and under one's own management."

Otto Schily, defending: "From the fact that the prisoners describe themselves as revolutionaries, the court concludes that it may say: we need not trouble ourselves any further with grounds of justification or extenuation in this case. Because the prisoners have so described themselves, they have placed themselves outside the legal system and now - this is what lies at the heart of the court's decision - they are in fact outlaws. That decision outlaws them."

129th day, 22/7/76

[The RAF member B Monhaupt has been called as a witness for the defence. At the time she had been sentenced by the Berlin regional court to 4½ years imprisonment for membership of a criminal association. After her release she went back to terrorism and was to play a leading part in the kidnapping of H M Schleyer in 1977]

Monhaupt: "I'm not answering any of the questions you [the presiding judge] or the Federal Prosecutor ask. That would be totally ridiculous. The relationship between us on the one hand and the court, the law and the Federal Prosecutor's Office on the other can be summed up in the word 'war'."

There are a multitude of further incidents in this confrontation that could be mentioned, and a great deal more can be (and has been) said about the politics of these legal confrontations. Before going any further I would like to include a brief comment on legislation introduced during the trial. It concerns the aforementioned introduction of art. 231 of the code of criminal Procedure. The article permits a strikingly circular process of legal reasoning, and this circularity exhibits most colourfully law's self-referential working here. The rationale of the provision was that if an inability to be present was self-inflicted, then the procedure could continue in the absence of the defendants. On the basis of this provision, the court decides that being contemptuous constitutes such a self-imposed inability (and then the trial can continue in absentia). In the court's understanding, the inability is self-inflicted in that the contempt is intended. But notice the circularity: it is only on the assumption that the defendant willed the contempt that s/he also willed (and therefore self-imposed) the inability. No intention of contempt, no self-imposed inability. And yet in all this, 'contempt' is merely a description that the judge fixes onto an utterance and on the basis of which the judge inflicts a punishment. Yes, one may well say, but the law does this all the time, fixes self-descriptions onto 'brute' action and imputes motive on the basis of the postulation of that (self-description) to the actor himself. All this will be analysed in the section to follow and is indeed a story of self-reference; but in what way is the provision we are discussing a special case? It is a special case, a further step into self-reference, because the actor is not only required to have intended contempt (the legal description) but is further required to have intended the sanction

that the law attaches to that description. The incredible circularity comes about because in order for the provision to be operative, the defendants must have willed the sanction (the inability), the legal consequence itself. Only on the basis of willing the sanction is the inability willed and thus self-imposed.

Back to the issue of sedition. Possibly the most substantive dimension of what the radicals were saying lies in their conception of themselves and the 'state machine' as warring sides. This underlying idea emerges implicitly and explicitly in the statements of Baader, Meinhof and Monhaupt (and in many others before and since). Similarities can be drawn with the trials of other radicals, where the confrontation took the form of ridicule.<sup>387</sup> Underlying the stance of the accused was a firm refusal to acknowledge the court as the agent of justice and the legal discourse as a forum where the confrontation could be resolved.

The prime problem with this aspect of the confrontation as war or as ridicule, is that it goes unacknowledged in law.<sup>388</sup> These 'total' confrontations go unobserved by the judges. In systems-theoretical terms they do not resound in law, they trigger no response in the legal system, no environmental stimulus to be picked up by the legal sensors. The sensors, instead, break down the confrontational context by picking up stimuli like contempt. This break-down of the context and its replacement by another was the argument about the enacted conflict; it will be dealt with again at length in the following section (iv). Notice also how the activists' declarations of 'war' remain irrelevant to law. This irrelevancy, as a case of silencing, will be dealt with in the final section (v) of this chapter.

But first, to establish what precisely is the meaning of the exchange between activist and judge. There are differences between cases falling broadly under the category of scandalising the court and under direct contempt and I have outlined them already (pending litigation, nature of sanctions etc.) It is the similarities however that allow me to run them together under the common category of sedition, as I have defined it. What is repeated in each case is a common pattern of non-engagement, of an impossible dialogue. In each case political activist and judge are talking past each other along one basic line: it involves an

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<sup>387</sup>See, e.g. the trial of the "Chicago Seven" Hoffman (1970). Conspiracy charges were brought against seven anti-war activists for conspiring to cross state lines to commit a riot. The seven defendants were apparently selected to "represent the varying components of what has been called the new left" (Dorsen and Friedman (1973) p81). The writers draw out a typology of political trials and classify modes of behaviour therein and the understandings that were conveyed.

<sup>388</sup>cf Bankowski and Mungham, and cf ch. 'Epistemology and Oppression'. I am not making the claim here that the confrontation was not played out in law, merely that it could not be resolved. The activists may have well intended their utterances to have been deemed contemptuous as part of a political strategy. This is not something I am disputing: what I am describing is why their utterances could not be heard in law.

incompatibility between different definitions of politics. The political activist says 'you are exercising class justice' and the judge is responding 'this is a contemptuous statement'. In this exchange the political statement of the revolutionary is rendered invisible. Why? It will be argued that what causes the 'invisibility' is that a statement that opposes the system can never be understood by the system; law will incorporate its negation by including it as an illegal act, a contempt.

From the point of view of law, there can be little doubt that the revolutionary's statement is just that - seditious contempt. The notion of independent justice underpins constitutionalism and lends to it a legitimating basis. Courts are agents of justice above politics and also courts are the guarantors of the political process itself primarily by securing that political action in the form of rights is not inhibited. What brings courts into disrepute, in our case the allusion that they are implicated in power, erodes these assumptions and is clearly seditious. To attack courts as class instruments is as subversive as is advocating forcible overthrow of the constitutional order. The activists' statements were seditious, the courts' logic was not flawed. My argument, therefore, is not an argument about the verdict or about the assumed harm that was inflicted. My main claim, and I will employ systems theory of substantiate it, is the following:

In order to deal with the seditious utterance, the law applies a distinction. It asks: can this utterance be protected as an exercise of citizenship (sovereignty) or is it seditious? By virtue of employing that distinction, it will be shown, the law enacts fictively the universe of politics it must refer to. In this enacted universe of politics, the activist who is punished as subversive by the law has been punished as subversive to politics itself, i.e. is punished in the name of politics. Having recast the universe of politics from within, the law then loses sight of what is significantly political in the act of denouncing judges as the instruments of oppression in a class society. This act of political faith is invisible to the dilemma that divides the universe of action into permitted-political and forbidden-seditious action. All this, of course, is still, more or less, at the level of bland assertion. With the help of systems theory we will look at how the distinctions operate in perpetuating law's self-reference. The line between permitted and forbidden speech that licenses speech to enter into the political debate is the very presupposition of seeking political truth.<sup>389</sup> In sedition, the criterion of what is so licensed is brought to bear on the question of respect to the law. That

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<sup>389</sup>We can review Bork's 'three options for political truth' in this light. The issue is that the three options are articulated from the internal, the legal, point of view. Bork is a judge; as an official of the system he is privileging the legal discourse. After discarding the fiction of a natural truth, he can only see truth circumscribed in the constitution and the constitutional processes. That is why his enumeration of 'natural (absolute) truth', 'constitutional truth' and 'majority truth' exhausts the question of political truth, and 'revolutionary truth' cannot even be accounted for as a possibility. Yet if we take political self-determination seriously, the least we can concede is that the quest for the self-determination includes and thus relativizes the definition of political truth.

is how the law sets up and circumscribes the possibility of politics; and it is at that point that sedition meets autopoiesis.

## IV

### **Sedition and Self-Reference**

In this section we will explore from a systems-theoretical point of view the silencing of politics that the logic of sedition has helped bring into relief. Autopoiesis lends a heuristic tool of great precision into the forcefield between politics and law that is my object of study. The complexity that you read into the object of study depends of course on insights that your theory allows. The more complex the tool the easier it is to uncover latent meanings that go undetected through other theoretical routes. In the delicate and intricate processes of the construction of meaning, where ideology so delicately masks compulsion and exclusion, the model opted for will make a difference to what is discovered. I take it from Teubner that "this is the point at which theory should start." (Teubner, 1993, p126)

This chapter aims to explore a certain "invisibility" of the political utterance deemed seditious by law. We saw at the level of doctrine a suggestion as to why the "revolutionary" utterance should be excluded from law's definition of "political truth" (section 2 above). What systems theory does is to give this exclusion an epistemological grounding. This in no way suggests that seditious speech is always punished (in fact it is rarely punished). Most often the answer to this depends on the confidence of the constitutional regime and its readiness to resort to emergency measures when its continuity appears endangered by subversive speech. Nor does it suggest that whether sedition is punished does not in fact depend on a multitude of overlapping criteria and tests involving overlapping definitions of what counts as speech, what counts as subversive and what counts as political. Systems theory reserves all this for the level of programming, and the variety here is great. But I want to suggest - and I will qualify this - that the variety of legal options in the definition and treatment of sedition is in an important sense only superficial. There is a threshold beyond which law cannot accept speech as political. At this threshold the legal demarcation of what counts as political speech is closed off self-referentially.

In this section we will probe the notion of self-reference in some depth. In a nutshell, this is how the exclusion is accounted for systems-theoretically: it is through coding and programming that the environment of politics is legally re-enacted in law's own image. It is the set-up of the political environment on the basis of self-referential operations that occludes what is specifically political about the seditious claim. Exploring in depth the self-referential logic of the re-enactment of political speech will explain (i) why the law has to refer beyond itself to a projection of politics (unfold its self-reference) by its very nature as a system-in-an-environment and (ii) demonstrate that the legal system never in fact engages with politics: that the law is always talking about itself when it talks about politics. But with the question of what is political speech removed from politics - and thus ceasing to be

reflexive as I define it - politics is silenced. The silencing does not depend on whether the seditious speech act is punished or not. The political claim is always-already silenced in being perceived by law through the category of sedition.<sup>390</sup>

A few words on self-reference first: Rather than viewing the self-reference of the legal system as a stumbling block, systems theory treats self-reference as necessary and inevitable for any system in its endeavour to make sense of the world. Self-reference does not signal a mistaken route or a logical failure that has to be explained away. Rather self-reference "exists" in the same way that "contradictions" are "real" for Marxism. Self-reference characterises the reality of the processes of the creation of meaning.

In probing the logic of self-reference Teubner's treatise in autopoietic self-reference (1988b) will be preferred to any of Luhmann's accounts because it is more concise. While Luhmann employs a large number of typologies of self-reference, it is often the case that these typologies conflate 'types' of self-reference and moreover the accounts overlap at various levels with none of them providing a model for the others.<sup>391</sup> Teubner approaches self-reference in a more systematic way, providing typologies of self-referential relations on the axes of "self", "reference" and the relationship between "referrer and referred".<sup>392</sup>

For our purposes, it is the typology referrer/referred that is most useful. Teubner focuses on the element of a system, the single communication, and suggests, following Glanville (1981), that we split the unit of communication "in the way self-reference does ... and replace the unity of the unit ... by the trinity referrer, referred and the relationship between the two. It is important here that the referrer/referred relationship looks quite different depending on whether referrer and referred are identical (pure self-reference) or the referred involves more than the referrer (surplus self-reference) or the referred is only a partial area of the referrer (partial self-reference)" (Teubner, 1988b, 57)

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<sup>390</sup> To locate the invisibility at this fundamental level means that the emasculation of the revolutionary utterance is present even in the most liberal of interpretations of the principle of freedom of speech. On the basis of Autopoiesis, the function of the treatment of revolutionary speech in the evolution of the law will be more accurately assessed and distanced from the usual myth of the "creative tension" between politics and law.

<sup>391</sup> For a comprehensive account of these typologies see Teubner, 1988b, pp48ff

<sup>392</sup> I leave Teubner's discussion of the hypercycle out of this discussion of self-reference although Teubner would include it. The concept is very important to his theory because unlike Luhmann's "big-bang" theory of autopoiesis, Teubner views autopoiesis as "graduated"; a system becomes autopoietic only once it has achieved such a level of autonomy that its components are interlinked in a hypercycle and only then can the self-referentiality of self-determination secure the autopoiesis of the system. For this debate see Teubner (1988b), (1993, ch2), Smith (1991), Luhmann (1985b)

The discussion becomes very complex, and given that much is irrelevant for present purposes, I will follow a through route here. The crux is that if law is to continue as a system it has to break the obviousness of the tautology "legal is what is legal" and relate to something. "Pure self-reference" bears directly on Luhmann's main pre-occupation with tautology and paradox. A case of tautology leads nowhere, either at the level of society 'society is what it is' (or as a paradox 'society is what it is not' (utopia)) or at the level of second-order autopoiesis, for example the legal system's 'legal is what is legal' (or as paradox 'legal is what is illegal'). "Pure self-reference" is unproductive and would not allow the system to get started or to continue through linking further communications upon this tautological premise. Because tautologies are distinctions that do not distinguish, tautologies do not allow but instead block observations. The classical answers for the problem of a system that operates through self-reference are well known, says Luhmann who cites Russell, Whitehead and Tarski's classical answers here: the system must 'interrupt' or 'unfold' its self-reference (Luhmann, 1986e, 23). The problem is not to avoid tautology but to "interrupt self-referential reflection so as to avoid pure tautologies and to suggest meaningful self-descriptions." (Luhmann, 1988a, 136). One way to achieve this is to replace pure tautology (pure self-reference) by what Teubner calls "surplus self-reference", which is the case when the referred involves more than the referrer (Teubner, 1988b, 57).

'Surplus' self-reference is the mode in which the system itself makes tautology productive. It unfolds to include external reference. It asymmetricizes its totally symmetrical description of identity (society is what it is, legal is what is legal). It does this by including a reference to the other, to what is beyond itself, to the environment. The asymmetry here is introduced into the system via the cognitive route: as an attempt to know its environment. Of course the internal premise is never abandoned: the operation of referring to the environment never transcends self-referential closure. But now the self-reference "is based on an ongoing self-referential (autopoietic) process, which refers to itself as processing the distinction [self/other] between [a] itself and [b] its topics." (1986c, 175, my emph.) It is more accurately to this 'surplus self-reference' to 'its topics', corrects Teubner, that Luhmann refers to when he cryptically writes that "self-reference is nothing but reference to this distinction between hetero-reference and self-reference." (ibid) Through "surplus self-reference" external factors, "openness to other, can be circularly built into self-referential closure." Here lies, emphasises Teubner, "the key to an understanding of subsystem autopoiesis: linkage capacity of its elements and their openness to the environment despite operative closure." (1988b, 57) (the closure, that is, that is produced by the fact that only operations of the system can generate further operations.)

Lets look at this more closely to make sense of the breadth of the claim. Why 'linkage capacity'? Because the autopoietic system exists in linking operations to previous operations. By asymmetricising through reference to the environment, each systemic communication



breaks the pure self-reference of a tautology that invites no further communications and thus builds up linkage capacity, in operationalising each time a difference of self-reference and other-reference. The system communicates and processes information about the environment in order to reproduce itself. Its linkage capacity depends on openness to the environment. This is how the two mappings of reality, of operations and observations, of autopoiesis and computations, of hard and soft operations (see introduction to Part II) meet in the concept of self-reference. And Luhmann can say:

" The concept of self-reference is generalized to a description of existence as such [the system exists at the level of operations] which at the same time establishes the conditions of observability." (quoted in Teubner, 1993a, 14, my emph.)

In our venture into the complexities of self-reference I will follow the formula referrer/referred as the most useful lead into the system's perception of self and other. "Surplus self-reference" is the referrer's reference beyond itself to the referred other. Immersed in pure self-reference, we said, the system had no outward reach, no information entered the communicative process - and at the level of operations this spells stagnation. It asymmetricises through submitting its other, the environment, to observation. The environment 're-enters' the system in every operation, in every observation that utilises the distinction self/other and thus depicts the other in the mirror of the self.<sup>393</sup> What allows the environment to re-enter the system-screen and provide the occasion for communication is the stimulation of systemic responses "whenever environmental behaviour triggers a stimulation within the range of the system's possible perceptions" (1986e, 22). It is in the self-referential circuit that the other-reference enters because the conditions of what can be observed is determined by the system that makes available the "sensors". That is to say that it is the system that allows possibilities to appear within the environment, through projections (of expectations) that it fashions itself. Here lies the essence of "re-enactment" that we examined in reference to conflict in the previous chapter. It is this re-enactment that we are to explore in more detail now, by further relying on the referrer/referred distinction and applying it to the question of sedition to examine (i) what does the referring, (ii) what is referred to and (iii) how the two - referrer and referred - articulate (as form of the distinction.)

### **The referrer**

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<sup>393</sup>Every cognitive venture of the system operationalises a distinction between self- and other-reference. Depending on whether we, as second-order observers, view this from the perspective of what happens to the observing system or the observed environment (referrer or referred) we can describe this as a re-entry, or a re-enactment respectively.

Law is the referrer. As we have seen, for law to operate at all, the basic tautology of "legal is what is legal" is "interrupted", "unfolded". As the "unfolding" takes place, law becomes the difference between what is legal and illegal (coding) and the way of handling that difference (programming) in reference to an environment.

What is designated legal and what illegal as speech in the case of sedition? The exercise of the freedom of speech is protected activity, therefore legal, except where the intention is to subvert the constitutional order, where it becomes illegal. The distinction, henceforth free/seditious speech for brevity, covers both coding and programming. The stimulus to be picked up in the political environment (the referred) will be allocated (by the referrer) to one of the values of the code; the precise allocation will be decided through programming. How will this allocation be decided? Indicatively here constitutional provisions regarding the limits of freedom of speech, constitutional 'tests' and 'criteria' developed by the judiciary, doctrinal classifications, even legal-theoretical writings concerning the value of free speech (notably in civilian jurisdictions admittedly), all may inform this allocation. Coding determines, programming informs the mapping of any possible environment selectively, by placing specific 'sensors' that pick up specific stimuli that can be communicated about. "Referrers" are the legal concepts that serve as sensors. A great deal can be (and has been) said about legal programming, that under the aforementioned guises gears the allocation of the event detected in the environment to the one or the other of the values of the code. Programmes can be and are perpetually varied. What remains stable, the rigid base underpinning that incessant movement, is the closed duality of the code. It is within this duality that the space for contingency is enclosed, i.e. the sense in which things could be different is hereby delimited. The legal/illegal code has this triple function: a) it delimits the ambit of possibility: things can ultimately be only legal or illegal, protected or seditious; b) a specific instance is legal in that it is not illegal, protected in that it is not seditious, the two structurally articulated; and c) everything, with no 'ontological' limit, can be forced into this ambit of relevance (or remain invisible): codes are totalising constructions.<sup>394</sup> Why? Because every time that the legal system uses the distinction freedom of speech/sedition to observe the environment of political action, by virtue of employing this very distinction, it universalises its claim to totality and purports to exhaust the scope of possible political action. Of course there are other distinctions that befit political action. But all political action can also be aligned on the axis seditious/non-seditious and hence the distinction's claim to totality (c). And as for claims (a) and (b): an instance x is either seditious or not, *tertium non datur*. Caught in the specific cluster of the exclusive alternatives a and not-a, the identity of the instance can only be asserted in the mirror of its negation, (each is what the other is not) that

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<sup>394</sup> Indicatively, Luhmann, 1986e, 38

brackets out and suspends latent what it is not.<sup>395</sup> Autopoietic observation is clearly structuralist here, the identity of a concept identified, in Saussure's words, "purement différentiel."<sup>396</sup> It is through this pair that the legal system places possibilities within the environment and reads what it finds there as a selection from within: x is the non-negated variant.

Both coding and programming are operative in how the political element will be designated. Coding is significant in that the political utterance can only be either the exercise of a right or a seditious offence. The alternatives are mutually exclusive: it cannot be both but it must be one or the other. At the same time it is one in that it is not the other: it is the exercise of a right in that it is not seditious. The specific structural articulation of the distinction works to entrap the radical utterance also at the level of programming. Sedition is programmed in law as the offence where the intention is designated as the subversion of the constitutional process. That free speech and sedition are coded together in the distinction, brings the exercise of the right to reflect on the counter-value, structurally drawing on the negation to depict the essence/nature of the right.

So much for the referrer, but what of the referred? Because even if the "referrer" does dictate the terms of reference to the "referred", what is wrong with what is captured of the elusive political as "referred", i.e. what is it that makes this "referred" political speech act only self-referentially seditious and not truly that?

### **The referred**

To turn to the 'referred' is to examine the depiction of the other-reference in law, the depiction in our case of the political utterance. My aim is to show that as the political utterance - the radical's claim - is "referred" to in law through the free/seditious speech distinction, it is turned into something other than it is politically speaking, and in that sense silenced irrespective of which way the decision goes. My concern is thus that the law domesticates and usurps the political utterance. This concern dictates the direction of the analysis deeper into the casting of hetero-reference in law and the re-enactment of the radical's speech.

As we have seen the world of events, of pure 'facticity' allows no meaningful entry. The world of pure fact is submitted to the difference that makes a difference, and only then is it observable. (see introduction to part II) Pure facticity allows no observation. Observations

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<sup>395</sup> See non-indicated value as 'Reflexionswert' 1986f, 148, and on the function of negation generally, 1971

<sup>396</sup> For explicit recourse to structuralism see above n.

can only be made on the basis of distinctions.

In order to observe the political utterance, the legal system projects the distinction free/seditious speech. However the utterance is assessed, whether it is deemed worthy of protection or not, the important thing is that it is within this distinction that the options are determined.

The free speech/sedition distinction opens up the possibility of observation. It allows the event to be 'patterned out' in the distinction, ie reflected in the counter-value, (as it were "duplicated fictively" - (1986e, 37), and to become meaningful in the process.

There are two moments in this, the law's reference to the political utterance that I will isolate and discuss. (These are not distinct moments in time, they are distinguished analytically.) The first is a question of ontology, the second of "thematization".

The ontological question involves the designation of the object of reference. The law's first step in dealing with the environmental political instance is to isolate the entity in its environment - the action - that is relevant to the distinction it is operating (here free speech/sedition). The action "referred" to is not, however, at the outset an empirically demarcated, self-contained entity. Instead what 'slice of action' we designate as object of scrutiny depends on what selectivity patterns we use to look for it. This is common ground for all constructivist epistemology and does not particularly warrant a lengthy analysis at this stage.

How would a systems-theoretical approach deal with the question of the ontology of the referred? "Actions," says Luhmann, "find their identity only within the functional context of systems, through the choice of one or another of the possibilities permitted by the system. Only through a demarcation of its selection achievement does the unity of an action become visible as a slice out of a continuous flow of behaviour, which is always choosing from a different constellation of suitably tailored possibilities ... The identity of an individual act, then, is its current reduction achievement within the reference system." (1971, 57) <sup>397</sup>

Teubner too stresses the system-relative nature and autonomy of the various concepts of action. (1993, pp42-4) He lays out five conditions which the system's fixing of a 'slice of behaviour' must fulfil in order to meet the requirements of the autopoiesis of a system. Self-descriptions must be able to link up to other self-descriptions (cr1) in "virtuous circles" (cr2) by employing the same means of simplification or reduction of complexity, coded under

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<sup>397</sup> The circumscription, as relevant, of "a slice out of a flow of behaviour" is internally tied to the reproduction of the autopoietic system. As Luhmann writes in (1984) (also 1985b, 9) systems identify action by means of attributions (in order to observe themselves, and the environment). A specific "slice" will serve as the unit of action to which specific conditions and consequences will be attributed in order for that unit to fulfill specific possibilities of connection. This is because systems deal through specific reductions of complexity and can only link up through operations that employ the same self-simplifications to observe reality, the same means of reducing complexity. Systemic observations in short link up to previous ones by relying on the same means of controlling attribution.

the same guiding distinctions (cr3) with adequate complexity (cr5). But Teubner emphasises a further criterion (cr4) that is of relevance to our discussion: self-descriptions premised on other guiding distinctions, he says, can only be made operative in the system under the condition that they are subsumed under the system's guiding distinction. Teubner uses the term 'incorporated' but I would prefer 're-aligned' to stress the transformation. In the case of law, for example, the distinctions in the environment "do not impair the capacity of the system to make a decision" as to the legality of action. This would be the case with conceptions of action (of psychological or philosophical nature) that downplay free will and thus impair the attribution of guilt. Nowhere is the legal conception of action more intimately legal than in its reduction of causality through attribution of guilt. The self-description of intention that the system mobilises to attribute as a cause of the behavioral unit it describes as action, cannot be contained in other descriptions that remove the specific attribution through guilt of an individualised action to an individualised (legal) actor.

There is an argument here that underlies in an important sense law's intimate relationship to freedom. From law's point of view, actors act out of their own free will, events happen and are then, a posteriori, sanctioned by law. Therefore law fixes onto action already in the world, describes it and sanctions it. What I'm getting at is that law purports to apply to already performed acts that, it assumes, have occurred in objectively observable ways in the world, as a matter of brute fact. But I suggest that the picture needs to be reversed, and can be done so fruitfully in a systems-theoretical way. The legal occurrence that the law treats as a matter of brute fact is more accurately a re-enactment of brute fact from the point of view of institutional fact.<sup>398</sup> This is helpful in at least the following two respects: it solves the problems that institutional theories of law encounter in accounting for World I, the world of brute facts. What level of description captures 'brute' reality?<sup>399</sup> By shifting the primacy to the institutional World II we can get around this problem. The brute fact is only designated as such as relevant to the institutional description. The criterion as to what counts as brute, is that it can serve as the backdrop for the institutional description. The institutional description fixes an area of the world as providing its occasion. It fixes the behavioural unit of action as that which bears the significant features that are relevant to the law as referrer. The 'brute' behavioural unit first acquires its quality of being the unchallengeable "reality" behind the institutional world by being circumscribed, fixed and isolated as such through a criterion of relevance to an institutional description. The system's selective demarcation of action is duplicated fictively as brute fact, and only on that basis can law effect observation of what it

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<sup>398</sup> MacCormick D N , (1974)

<sup>399</sup> G E M Anscombe's example of a man pumping water into a cistern (1957, pp37-45) is an excellent example illustrating the problem of competing accounts all laying a claim to be descriptions of brute reality.

assumes is action external to it. In the case of sedition law's fixing of the brute occasion is its selecting-out of utterances and their re-combination. In the selection much of what constitutes the contextual conditions of the utterances is left out as irrelevant, so that, for example, the activists' declaration of war with the system does not resonate in the system, while specific attributions of intentions to and characterisation of judges do. Often quite spectacularly it is the activists' silence or the councilors' failure to act, i.e. it is the non-occurrence that serves as the brute fact on which institutional descriptions append. But even where designating the "brute" appears in the form of editing statements, the designation of the unit of action is just as "constructivist" as it bears on the question of intention: the law against sedition needs to append an 'intention to subvert' on the brute reality it perceives. Some units of action can sustain this imputation, some cannot. The appropriate editing of what the activists or the sympathisers "said" or "did" allows an imputation of intention such that the institutional description can append on brute fact.

This reversal - the reliance on institutional fact to bring about brute fact - explains law's 'innocence'. The legal actor can be held liable for intending and performing prescribed act x. The law supposedly only enters at a second stage, to sanction the act performed in the brute world. The primacy of the institutional lies in the fact that the law has always already circumscribed (or reduced) "brute" action into relevance. It sets itself in context of the real world by re-enacting 'brute' fact from the point of view of institutional fact. Self-reference always mediates hetero-reference in that constitutive way that makes the ontology of the referred dependant on the referrer. What I have tried to establish here is that the ontology of the political act deemed seditious is already a selection achievement, isolated as a behavioural unit only through the system's means of fixing it as such, an institutional rather than a 'natural' datum.<sup>400</sup>

That this could be described as a variety of "fact skepticism" is not in dispute. My systems-theoretical claim here is that the law's pattern of exposure to facts is dictated by the system self-referentially in terms of an institutional designation of the what and the how of the "brute" event the system scrutinises in its environment. Events depend on the variables of observation that the system makes available, the entrenchment of those variables in self-descriptions, the frequency of their recall by the system, their resistance and "redundancy" as sensors, which in turn brings in questions of time associated with connectability and responsiveness. The system dictates the possible sequences, pathways and timing of "brute" reality and the contribution of systems theory to constructivist epistemology

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<sup>400</sup> Systems-theoretically this could be further argued as a question of linkage. What counts as communicative act can only be determined from within the system that determines the linkages: therefore what counts as brute is what counts as valid because linkable-to a communicative offer within the system. Events "exist" in this connection, in this organisation of linkage in time.

of this type is the complex logic it sees underlying the ontology of brute events, here of the seditious act.

In dealing with the "referred" side of the distinction referrer/referred, we have so far dealt with what is designated as referred but not what it is referred to as. Of course the distinction is analytical, with both questions - the ontology of events and their thematisation in the system - at once at play on the axis of the "referred", both determining the object of legal reference and each other reciprocally. It is now to "thematisation" that we turn to complete the picture of how the political utterance in law is domesticated in the process of being 'innocently' referred to.

As we have seen in previous sections, the system has a complexity deficit in relation to the environment.<sup>401</sup> This means that on the system side of the boundary, only specific reductions of the complexity of the environment are available to the system; it is through them only that the system can make sense of the environment. Of course, as systems develop, they build up their own complexity to keep up with environmental complexity; this means developing the means of depicting external complexity within the system. In our case of the free speech principle, such a build-up of complexity within the system is achieved through the development of doctrine or the deployment of new adjudicative criteria, as ever new 'tests' and new categories like 'symbolic speech', or 'expressive activity' are developed. Whatever the development of internal complexity, however, no matching of complexity between system and environment is ever possible because that would undermine the very premise of the constitution of the system as an area of lower complexity. Matching the complexity of the environment would then mean, for the system, doing away with the boundary and merging with the world. The selectivity of depiction is a necessary feature of the existence of a system.

In the "Unity of the Legal System", Luhmann examines how "the differentiating-out of law lies first of all in the thematic control of communicative processes." (p17) There is a risk of over-reading the notion of control in his formulation. We must, I think, resist reading "thematic control" as if it were a strategic option; instead this control is a mere consequence of reduced complexity in the system. It is merely a consequence, that is, of the fact that a system balances out environmental increased complexity through its own reduced complexity that it exhibits a tendency towards assimilation. Rather than as a strategic option, systems theory can account for such channelling as a natural consequence of requisite variety - the fact that environmental complexity is balanced out through reduced system complexity.<sup>402</sup> There

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<sup>401</sup> Its function and coding, its specific means of reducing complexity, serve to set the boundary between itself and the environment as precisely this complexity difference (see introduction to part II

<sup>402</sup> For more on requisite variety see indicatively 1986e, ch3

is a natural reductive - rather than disciplining - effect that comes about when attempting to make sense through limited means.<sup>403</sup> 404

The reduced means of responding to environmental complexity means that the notions employed by the observing system are simplifications of more complex environmental realities. It also means that the notions employed outside the system, in say, a discourse of power, politics or economics, can only be worked into law with other concepts. Thematisations are simplifications, legal self-descriptions that describe environmental perturbations. At one level this means that everything that enters legal communication receives a legal categorisation. But more is involved in thematising. In order to perceive the environment the system models a representation of the environment by providing symbols for the environment that are its own internal constructs. This means that every occurrence in the environment is observed through distinctions: then distinctions render distinctions <sup>405</sup> that

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<sup>403</sup> Teubner would talk of "partial self-reference" as these self-descriptions come into play. See his 1988b

<sup>404</sup> In the section on the normalisation of conflict (ch.3, s.8) we saw that the system exhibits a natural tendency to return to a state of order. In this context the de-stabilising will be neutralised by assimilation to the ordinary, or as departure from the ordinary in controllable/ordinary ways. It is of course true, we said, that such neutralizations can and often do give way to a questioning of structures and some information is simply impossible to accommodate within existing schemata and has to be thematised as dysfunction, as a possible source of alternatives, and trigger off structural change. In this framework the CLS movement, as was briefly mentioned, have done an admirable job in pointing to such latent alternatives uncovering dysfunctions and initiating structural change. Deviationist doctrine has gone a long way releasing variables hitherto fixed in rigid self-descriptions. There is reflexive potential for the legal system and it manifests that symbolic neutralisations don't work all the way down but can become contested terrain.

Whatever resistance potential we are prepared to grant immanent critique, however, it remains true that the surprising, disorderly, destabilising event is 'symbolically isolated' and the structural changes kept to a minimum. Because is it not the case that accordance with existing structures is an almost unavoidable mode of processing information since structures naturally accommodate better what shakes them less? Now we can add thematisation as a source of normalisation and the control of alternatives. As early as 1971, (in his exchange with Habermas (1971 p33) Luhmann has spoken of normalisation of communication in this sense ("Normalisierung" in the original), communication interpreted so as to accord with already existing or accepted meaning. "The unknown is assimilated to the known, the new to the old, the surprising to the familiar." Again, of course, assimilation does not mean structural immobility. In our example of subversive speech, structural legal change may be stimulated. The boundaries between what the law designates as political and subversive is not fixed in a rigid way; it may be shifted. Depending on the circumstances the balance may lean on the liberal or authoritarian leg. A confident constitutional regime may react through leniency, a troubled regime through the enactment of emergency legislation and the curtailment of speech. Whatever the case may be, because the context that law sets up in order to receive political input is set up in system-specific ways, stimuli can only be sensed through specific channels, political dissatisfaction will enter the screen vested in system-specific thematisations and it only follows that whatever change is triggered, it will be in system-specific ways that normal conditions will give way to dissatisfaction and variation patterns forged, selections made.

<sup>405</sup>1986f, 151



allow systemic indications. 'Class justice', 'puppet of capitalism', and other denunciations within the discourse of power, do not resonate directly in the legal system that understands power in its own way, as legally sanctioned offices and capacities within institutional settings. The legal system will employ its boundary to reflect the political discourse in its own specific way.

The first way, then, in which the "thematic" control of the "referred" is effected is through the complexity difference between observing system and observed environment. Why? Because reference to the referred depends on the boundary sensitivity of the referrer: its preparedness and capacity to be stimulated and to transform something into a legally relevant question. Any access to the environment is effected by the system through relating internal concepts, the symbols that represent the environment in the system. The less prepared the system is to develop its own complexity, distinguish and interrelate its own concepts and thus in a way increase its perceptiveness, the less attuned it will remain to environmental nuances. The law has built up its own complexity immensely, relativising the rigidity of its designators to meet an increasingly complex social reality through specific provisions and differential application of its categories. There is huge scope in the possible balances of variety and redundancy, sensitivity and insensitivity, responsiveness. Yet however large the responsiveness, there remains inevitably a difference between the scope of social communication and the systemic apprehension of it, inevitably that it for a system that can exist only as a domain of lower complexity. To that extent therefore there remains inevitably a thematic control as thematisation. The wealth of possible political statements will only resonate and become relevant as politics to law (become "referred") on the basis of the availability of "sensors" in the law, thematised as sedition, incitement, symbolic speech, expressive activity, contempt, etc. In order to align reality to such categorisations, the legal system breaks down complex social situations that are insufficiently transparent to its logic, or avails a number of linguistic artefacts to affix to relations and situations and provides relevant criteria for the task. What do the radicals' statements about freedom mean in law? Freedom is non-sensical in law outwith a concept of autonomy in turn coupled on the one hand with a capacity to act in terms of rights and duties, on the other with contractuality.<sup>406</sup> What does their denunciation of the judges as Capitalism's lackeys mean, what else could it mean but contempt? The potential expressibility of political stakes is sometimes rendered invisible, sometimes impossible,<sup>407</sup> always at least straightjacketed to the conceptual possibilities specific to law. Straightjacketed because reduced. The thematic control of

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<sup>406</sup> On this see Broekman, 1985, 28

<sup>407</sup> Sometimes this turns political concepts such as solidarity impossible because self-contradictory (on the impossibility of solidarity rights see above, ch.3 thesis [11])

heteroreference is this straightjacketing of the referred.<sup>408</sup> In the case of sedition the "referred" comes into being completely self-referentially through the system's enactment of something that can be deemed seditious in law. Because, to paraphrase Luhmann, the legal system itself determines what kind of events have this [seditious] effect. It is impossible to identify these events without a knowledge of the legal system. The constitution of these elements is an autonomous achievement of the legal system which occurs in the process of self-observation and self-description of the system. (1988b, 17)

I discussed thematisation as result of complexity difference, and now in order to complete the picture of the domestication of the referred political environment by the law I will turn to the thematisation of equivocals.

An equivocal is a pun, a term with at least two meanings tied together by an acoustic knot. (Koestler 1978) Where we can assume that judge and activist share an ontology of events, both departing from the same utterance, the meaning of the utterance is still system-specific. As equivocals the statements are indeterminate and ambivalent, they have significations shared amongst discourses. Yet this apparent sharing is not quite a sharing; it is caught in that dynamic of systems that relate without meeting. One way to put it would be that an equivocal as a term present in two systems allows those systems to structurally couple around it, each giving it a meaning tailored by - and only for - each system.<sup>409</sup> The image is well described by Weick: it is not the case that "the environment is disordered, indeterminate, and chaotic ... but that it is rich in the possible connections that could be imposed on an equally rich assortment of possible punctuated variables." (1979, 174) Generalising what Weick says about organisations to all systems, I paraphrase the rest. "It is the richness and multiplicity of meanings that can be superimposed on a situation that [systems] must manage. An important characteristic of an equivocal is that its multiple meanings cannot be compromised. The meanings originally are distinct, they remain distinct, and the only way they can be managed is for some of the meanings to be suppressed or ignored." (ibid) The qualification that systems theory brings to this is that the system cannot see that it is suppressing or ignoring. It domesticates the equivocal innocently. In other words the

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<sup>408</sup>"Systems make it possible to live in the face of an extremely complex and contingent world and yet always have to choose from among only a small number of consciously controllable possibilities of behaviour." (1971, 53)]

<sup>409</sup> Teubner provides an interesting discussion of equivocality employing Gallie's notion of an essentially contested concept. Such concepts are essential because they take on board significant discursive characteristics. They are "contested" because, like equivocals, they are not shared between discourses. They are no meeting ground between discourses, but confirm discursive particularity. Around them discourses couple and compete; Teubner quotes Lyotard here: "Et enfin: les phrases de régime ou de genre hétérogène se "rencontrent" sur les noms propres, dans les mondes déterminés par les réseaux de noms." (1992, 1458)

equivocality (the distinctiveness of the equivocals) is only visible from the standpoint of second order observation. The meaning that the system brings to the world is one of suppressed equivocality.

All that has been said about the use of distinctions in observation can be applied to the observation of equivocals. What can be distinguished by means of distinctions will become information for the system.<sup>410</sup> The crux of the matter concerning "equivocals" is the following: Concepts - freedom, sovereignty and politics among them- are not free-floating signifiers. They cannot be brought in from the environment, they cannot transcend contexts. Discourses and systems do not share a "language game" that would allow such transference of meaning within some kind of inter-context communication. (See Miller (1994) for this argument and my answer in 1991, pp391-2) Concepts are, of course, operative in diffuse communication and in some sense, then, underpin or hold together systems from below (Teubner's materiality continuum). In contrast however to this loose coupling of ordinary language, concepts operational in system communication (second order autopoiesis) are strictly coupled along systemic co-ordinates.<sup>411</sup>

Whether or not in the context of the distinctions loose/ strict coupling, diffuse and systemic communication etc, the important point to retain is that it is on the basis of indications within distinctions, that meaning comes about, and that means that meaning is tied to the system, and concepts are meaningful in the context of difference-patterns that the system makes operative. Luhmann sometimes reserves the term 'meaning schemas' (1986e, 122) for the differences within which indications are made. Thematisation as selective designation removes equivocality. The difference pattern, or meaning schema, dictates the meaning of the "equivocal". For us this means that freedom (of speech) signifies something very specific in its contra-distinction to sedition. The meaning of "freedom" is "coupled strictly" into the legal idiom and "reduced" through this difference in a way that divorces it from whatever its equivocal in politics.

There is an idea here - in this discussion of equivocality - significant to hetero-reference that is more complex than immediately apparent. It is the idea stressed throughout our discussion of the "referred". What is selected, in law, as the meaning of an

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<sup>410</sup> Luhmann "begins from the assumption that differences are introduced to enable indications [and indications connect with further meaningful communications] only when one knows in the the framework of which difference one indicates the one and not the other." "Wir gehen von der Annahme aus, dass Unterscheidungen eingefuehrt werden, um Bezeichnungen zu ermoeeglichen, so wie Bezeichnungen anschlussfaehige Sinngewinne nur dann erbringen, wenn man weiss, im Rahmen welcher Unterscheidung sie das eine und nicht das andere bezeichnen." (1986f, 147) We should follow G S Brown in viewing distinction and indication as one operation - ie the operation of indication-in-the-context-of-a-distinction.

<sup>411</sup> For a discussion of loose and strict coupling, medium and form, see Luhmann, 1990a, 208-9, 1984, ch 2

equivocal is not selected from amongst political alternatives but from amongst enacted or duplicated political alternatives. Systemic selections occur against the background of enacted political environments, since no system can see its environment. The enacted environment stands in for the "real" environment as appropriate to the law's editing of it. That editing is the offering of fitting explanations and interpretations of political action, as conducive or offensive, protected or seditious. But it is the selection process itself, the process of attribution that sets up the surrogate environment as relevant to the attribution. What is referred to is a fiction of the referrer, a selection achievement. The only thing that can be selected as politically relevant is something that is already there, in law.<sup>412</sup>

### **The form of the referrer/referred distinction**

Having explored first the law-"referrer" and then the "referred"-political of sedition, we now turn to the distinction itself (or more precisely the form of the distinction) between referrer and referred as the moment that completes the self reference because it is here that the law pulls itself into political context (by its own bootstraps as it were) and reconstructs in its own image the universe of politics as context it finds itself in.

Confronted with the denunciation of judges as class enemies, the expression of sympathy to terrorism or the appeal to overthrow the constitutional order, the law asks the following question: should this utterance be protected under the freedom of speech principle as the exercise of a political right or is it seditious? The political utterance is picked up as relevant to law through the distinction free speech/sedition. Looking at the distinction itself rather than the one or the other of its poles allows us now to see both referrer and referred, law and politics, at once. Both legal coding and programming are operative in how the political element is designated. Coding is significant in that the political utterance can only be either the exercise of a right (a Hohfeldian liberty) or a seditious offence. The alternatives are mutually exclusive: it cannot be both but it must be one or the other. At the same time it is one in that it is not the other: it is the exercise of a right in that it is not seditious. The specific structural articulation of the distinction processes the political utterance also at the level of programming. Sedition is programmed in law as the offence where the intention is designated as the subversion of the constitutional process. That free speech and sedition are coded together in the distinction, brings the exercise of the right to reflect on the counter-value, structurally drawing on the negation to depict the essence/nature of the right. In that structural articulation, then, law brings the existence of the institutional process to bear on the

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<sup>412</sup> For a similar analysis concerning organizations, see Weick (1979)

possibility of political truth.<sup>413</sup> Why? Because law reflects its criterion of what counts as political activity (political rights) in the mirror of negating activity that subverts the constitutional process. In the process the possibility of politics becomes 'negated' sedition, 'negated' subversion of the institutional process. The political questions whether judges are instruments of class justice, whether terrorism is political, whether political action can and should be directed against the State and its law, are "reduced" by the law to a question whether this question contributes to the constitutional political process, a question that the law of course solves for itself, as a question of contempt, scandalising, criminal advocacy, disqualification from the district council, etc. The question of what is politics - and what it means for the political actor to be free and sovereign - is asked in law through an internal distinction that makes sedition - as negated other - the significant criterion in the definition of what it means to act politically. The law is simply drawing internal distinctions, always talking about itself when it is talking about politics. But by employing these distinctions to make sense of the political environment, the law brings itself to bear on the very constitution of the political context it purports to 'find' itself in. By drawing on self-produced distinctions that it attributes to the environment, it sets up a political context and itself-in-context. This is the context in which law 'finds' itself. It is in this sense that the system finds itself in an environment of politics that it has re-enacted, drawn its own boundary to reflect. Law's re-enactment of the concept of political action is premised upon a specific rationality of politics that relies on legally projected means, limits and possibilities.<sup>414</sup> Law is always already there, 'earlier' than political sovereignty. And it is only a natural consequence of this setting itself in context that the positive side of our distinction free speech/sedition becomes the sign of politics as such and that sedition now becomes observed as the breaking off point of political action itself. The radical hypothesis that political actors are politically emasculated as right-holders cannot be voiced within a system that circumscribes the political within the exercise of rights. It is the blindspot of the distinction. By operating that

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<sup>413</sup> Note how Bork's defence of the system's political truth finds here a necessary internal premise.

<sup>414</sup> With Luhmann, we can re-state the law's setting itself in context by focusing on the function of law. The freedom of speech / sedition observational pattern sets up functionally specific differences within the observed political universe "to whose problems the functional arrangements [of the legal system] are referred" (1984, p84). So on the one hand we have a system-specific, function-specific distinction. The positing of a functionally specific difference into the universe of politics carries the function of law implicitly into the set-up of the political context. In other words the function's underpinning of the observation schema impinges directly on what is relevant to law as politics. Although bringing the function of law into the discussion would prove fruitful ground for further connections - as for example in building immunity against conflict into the very premise of the political - I would first have to establish on the basis of a further argument the connection between the Freedom of Speech/Sedition distinction with the function of law, that of using the occasion for conflict to create congruently generalized expectations, a connection that would over-burden the present argument.

distinction and by virtue of its blindspot, the law prescribes the context within which it is to be recognised as guarantor and watchman.

We have explored with the help of systems theory how hetero-reference, law's reference to the political instance, is built on the back of self-reference, unfolding but never breaking the self-referential closure of the legal system. How does law refer to politics? By carrying itself as referrer into all access to the referred; in a sense both references are actualised simultaneously. This means that in dealing with politics, law is always talking about law as if it were talking about politics. It carries its own criteria into a) the ontological question over what is carved out as relevant political action and b) its thematisation that, both as reduction achievement and as litigation of equivocals, works to occlude and control much of the fluidity of the political discourse, and in effect the freedom to speak and attach meaning to one's speech. Such legal self-referential designation of the significant features of political action supplants the politics it purports to depict. Every time that the system purports to account for environmental complexity, it claims truth for its account of the environment while obscuring that each time it communicates about the environment it does so by perceiving it in a categorically preformed way. Thematisation mediates every account of the "referred" environment and thus every legal account of political action activates both a self- and other-reference: the law is always-already there, concomitant self-reference. And the formula freedom of speech / sedition becomes a way of describing political action although the description itself does not belong to the environment or take on board the environmental occurrence as such. Having established for itself what politics is, the law then pulls itself into that political context within which it needs to be recognised in its specific function; and occlude that this is a politics that is always already legally pre-figured. This is the basis of law's innocence that we will explore, in the final section, through recourse to the notion of the differend.

So what of free speech and sedition? What of those political utterances that Michelman especially appeals to law to protect, particularly when "we feel they want to disrupt [law]?" and that Sunstein appeals to the empathetic judge to protect. The answer is that the judge cannot empathise with and then protect something he cannot see. Michelman's appeal becomes an appeal to listen to the seditious claim; but the seditious claim is not the political one, it the re-enacted-as-political legal one. The political utterance cannot enter the legal screen save as disruptive - seditious. The initial radical question is duplicated fictively in this reduction, turned into something that it is not, and in effect not contained but silenced.

## The Differend, the Invisible and the Terror

Meinhof: "This is the first political trial in the FRG since 1945. The Federal prosecutor's Office and this Court are not intelligent enough to see that the object of their destructive means is also a victim. All that the Federal Prosecutor and the court see is an enemy they want to defeat. This also shows the difference in the definition of our struggle. We are able to see, in a Fascist, the product of his circumstances and the state machine. We ourselves do not need fanaticism; the Federal prosecutor and the court are the fanatics. They have never come to understand the content of the arguments put forward by Andreas [Baader] and the rest of us. They are merely observing the formalities." (Submitted in a petition to challenge the Court, 30/7/75]

Until this point we have discussed a certain silencing of the political utterance in its re-enactment as seditious. I want to finish by suggesting that the law against sedition is in fact the site of a double silencing. Not only is the seditious statement silenced as re-enacted but the means of challenging that initial silencing are withdrawn in law. The law's silencing of politics remains unchallengeable, the activists' counter-claims impossible to register, the actors themselves invisible. I borrow from J-F Lyotard and use his terms differend to refer to the fact of unchallengeability, terror to characterise the silencing and its cover-up.<sup>415</sup>

I hasten to say that this invocation of Lyotard does not mean that we are abandoning systems theory at this stage. This is true not merely because the question of terror is actually put by Lyotard in Luhmann's terms. But also because my importation of Lyotard's concept into systems theory is meant to illustrate the double silencing of the political utterance in a way that is entirely compatible with Luhmann's conceptual framework. I will not run the theories together but draw out my use of the concept very carefully and only selectively. This importation is possible in the first place because there exists a great proximity between Lyotard's latest theoretical orientation - meaning-in-linkage - and Luhmann's theory. Indeed the idea of meaning-in-linkage between sentence-events<sup>416</sup> is strongly reminiscent of

<sup>415</sup> Lyotard, 1988, passim, 1984, 46, respectively

<sup>416</sup> The "sentence" (or "phrase") forms Lyotard's basic unit in his later work. There is a divergence over the translation of this key concept of Lyotard's: (the French) "phrase". I have opted for sentence because translating "phrase" as "sentence" accords with the definition, in semiotics, of a discourse as everything more than a sentence. "As we know", says Barthes, "linguistics stops at the sentence, the last unit which it considers to fall within its scope. If the sentence cannot be reduced to the sum of the

Luhmann's insistence on the centrality of "Anschlussfähigkeit" or linkage-capacity between the elements of a system. Lyotard's sentence-events are Luhmann's units of communication, where meaning comes about as they are "coupled" in the system, that is, as they link up to previous communications of the system. The possibilities of linkage are provided by the system as each communicative unit is integrated into the system, re-aligned to the systemic coordinates and in that connection to previously constellated meanings, the meaning of the new unit of communication will come about. The proximity can be drawn in much greater

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words that compose it and constitutes thereby a specific unit, a piece of discourse, on the contrary, is no more than the succession of the sentences composing it." (Barthes (1983) p.254.) What is the "sentence" and how does it serve the function of being the primary unit of discourse according to Lyotard's theory? It is primary because, to put it broadly, meaning does not precede the sentence. The sentence is prior because it sets up a "universe" in which both sender and addressee are already situated within the discourse. In Lyotard's own words from LD:

"It should be said that addressor and addressee are instances, either marked or unmarked, presented by a phrase [sentence]. A phrase [sentence] is not a message passing from an addressor to an addressee both of whom are independent of it. They are situated in the universe the phrase presents, just as are its referent and its sense" (1988, 18)

"A phrase [sentence] presents what it is about, the case, ta pragmata, which is its referent; what is signified about the case, the sense, der Sinn; that to which, or addressed to which this is signified about the case, the addressee; that through which or in the name of which this is signified about the case, the addressor. The disposition of a phrase [sentence] universe consists in the situation of these instances in relation to each other." (1988, 25)

While the first three "posts" were, in some form, present in Lyotard's earlier work (although as players, addressor and addressee were "outside" the sentence), the inclusion of a fourth, meaning (or "sense") is clearly decisive: "Previously meaning would have had to be thought as the milieu in which sentences occurred; now, the postulation of any such milieu itself takes place in a sentence, and cannot therefore be thought of as prior to a sentence ... [However] the idea of meaning as immanent is misleading if it suggests that each event-sentence exists in a pure self-sufficiency, with its meaning "in" it; meaning is always in fact imminent, contingent on the event-sentence which links up with this event-sentence."<sup>21</sup> For Lyotard meaning is in linkage, and possibilities of linkage are provided in (and as) "genres". What underlies a "genre" is a goal, a purpose, for example to amuse, to convince, to tease, to justify, to order. Each "genre" is geared to its telos, it employs certain "regimes" as more appropriate to the goal but most importantly invites certain linkings between sentences in view of its goal. Linking possibilities are genre-specific in a strong sense; they are mutually incompatible and cannot be collapsed into one another. So the uttering of a sentence acquires its meaning in linkage and possibilities of linkage are provided by "genres" in view of a goal. Lyotard reserves the term "regimes" for family-types of sentences, e.g. descriptive, prescriptive, ostensive, etc. He emphasises that instances of one regime are translatable only at a cost into instances of another, so that they are integrated within "genres of discourse" on the basis of the latter's specific possibilities of linkage. For Lyotard each linkage is thus a reduction of possible meaning in a direction suggested by a genre, a realignment in view of the genre's goal. The sentence becomes "seduced into" (1988, 148) and absorbed by a genre, its meaning coming about in the connections that that absorption suggests. "Teleology," says Lyotard, "begins with genres of discourse, not with phrases [sentences]. Insofar, though, as they are linked together, phrases [sentences] are always caught up (in at least one) genre of discourse." (1988, 147) Even silence, he hastens to add, can count as a sentence for the genre's "inevitable temptation" to link up to a further sentence. Again it is hard not to notice in all this a similarity with Luhmann's pre-occupation with contingency and complexity. As in Lyotard, in Luhmann too meaning comes about in a reduction of complexity effected by a system. Meaning-in-linkage is meaning-in-reduction from other possibilities, a reduction is system-specific, and where Lyotard would tie this reduction to a "telos", Luhmann, the sociologist, would tie it to function.



depth and such a comparison between the theories would perhaps, in another context, prove fruitful in making Lyotard sociologically more interesting by giving some substance to his sociologically undetermined category of "genre" through invoking Luhmann's richer concept of the system.

Like Luhmann, Lyotard suggests that a sentence can be absorbed into a number of rival linkings and that these rival linkings do not meet on neutral ground. Meaning cannot be negotiated between genres because meaning first comes about in linking, making it genre-specific.<sup>417</sup> The stage is now set for Lyotard to consider the "différend". This is how Lyotard summarises his central concept:

"As distinguished from litigation, a différend would be a case of conflict between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgement to both in order to settle their differend as if it were merely a litigation, would wrong (at least) one of them (and both of them if none admits the rule). A damage [dommage] results from an injury which is inflicted upon the rules of a genre of discourse but which is reparable according to those rules. A wrong results from the fact that the rules of the genre of discourse by which one judges are not those of the judged genre or genres of discourse. (1988, p.xi)

Let us repeat then, here, the logic of the re-enactment of the political utterance that we took in the previous section to be the (first) silencing that the law imposes on subversive political speech. Any one of the seditious utterances we discussed will do: the "scandalising" or contemptuous "judges are instruments of class oppression", the sympathiser's expression of sympathy with terrorism, the activist's incitement to the crowd to overthrow the Constitution. I will not repeat the referrer/referred argument, I will merely point to the equivocality that is suppressed by each system. For activist and judge alike the utterance links up to specific possibilities of meaning. But what for the first is a political statement, for the second undermines politics. That is because, as we saw, the law here operates on the basis of the distinction that is a contrast. The distinction political/subversive that is operative in the actus reus of the offences we have discussed, allows an utterance to be designated as political in that it is not subversive. That is because, as we have said, distinctions themselves are blindspots. Not only can the system not see what it cannot see, but it also cannot see that it cannot see this. In our case it cannot see that an utterance may be both political and

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<sup>417</sup>This is the crux of Lyotard's restatement of non-translatability between language games and the disappearance of a (negotiating or hierarchising) meta-language.

subversive because it can only see on the basis of a distinction that contra-distinguishes the two.<sup>418</sup>

The "différend" is set up in that incompatibility of (genre- or) system-perspectives into what counts as political. For the sympathiser, the utterance is politics; for the judge, it subverts politics. The activist treats the utterance as an instance of establishing political reality through struggle; the judge sees it as undermining the very possibility of political reality. For the radical, the utterance is a political denunciation of a system of domination; for the judge it undermines the (guarantor in the last instance of the) political process itself. But note also how second-order differends build on this initial incompatibility of perspective, and how the differend then perpetuates itself ad infinitum: how do we settle the first-order differend? the activist: through struggle against the judicial definition of political reality; the judge: through dialogue in terms dictated by political reality as constitutional democratic process. It is particularly here, in the build-up of differends, that the double silencing is in evidence.

This dispute is unseizable except in terms of one or the other of the systems. No neutral tribunal can be set up to arbitrate the claims. It is now that we move into the domain of terror. The law does not stop at this incommunicability. It introduces both claims to litigation - as if they were litigable - and on the basis of an application of criteria of law, (of one of the systems) decides a winner and a loser. The law operates a strict win-or-lose principle according to the force of the better legal argument. In the tribunal of law the activist is, legally speaking, the one with the inadequate claim and is therefore legitimately silenced. Of course, one could argue this is exactly what the law was intended to achieve, to censor the subversive utterance. But the point is not quite so simple. The terror comes about at a second stage: what the law cannot account for is that the activist has not simply lost but that s/he has suffered a damage which s/he cannot prove: in that, s/he has suffered a wrong:

"This is what a wrong [tort] would be: a damage [dommage] accompanied by the loss of the means to prove the damage. This is the case if the victim is deprived of ... the freedom to make his ideas public, or simply of the right to testify to the damage, or still more simply if the testifying phrase is itself deprived of authority ... In all these cases, to the privation constituted by the damage there is added the impossibility of bringing it to the knowledge of others, and notably to the knowledge of the tribunal." (1988, 7)

Why are the activist's means of proving the damage withdrawn? Because those means

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<sup>418</sup> In Lyotard this analysis would be less straightforward. It would have to rely on what linkings law seduces the "subversive" sentence into, and how on that basis the "genre" of law sets up an incompatible "universe" to rival linkings within a different genre.

would be the statement: "but my statement is political; to censor it is anti-political, it is against politics"; such a claim is non-negotiable in law, it is rebutted in law as non-political.<sup>419</sup> What is withdrawn is the status of that statement as negotiable, the privation therefore of the means to allege or prove a damage. Such a claim can never be heard in litigation. The paradox of the non-engagement is enhanced by the fact that the activist's political utterance is rebutted by the law in the name of politics.

Law's terror lies in effecting a silencing that goes unacknowledged by it. The law can legitimate its move (censorship) because it cannot account for the wrong it inflicts. The wrong comes about when a *différend* is violated. But the law cannot acknowledge the wrong because it can only see the confrontation of the claims as litigation. That is its blindspot. Claims enter the legal forum - they are "referred" to - as always-already litigable, always already thematised, their ontology given as a matter of brute fact, their equivocality suppressed. Coded to sedition's political/subversive distinction, the defense of the subversive statement as both subversive and political - and therefore negotiable - faces the impossible task of making the system aware of the *différend* - of its blindspot. The existence of the *différend* does not register in law, as is always the case when the arbitration between claims of different systems (genres) is submitted to the tribunal of the one system (genre). In litigating the *différend*, law censors the speech while establishing its own innocence.<sup>420</sup>

Law's innocence depends on not needing to account for this move from *différend* to litigation: it depends on not seeing that it is doing this; it depends on the blindspot. We saw how the blindspot is inevitable for law because the law first submits the utterance to scrutiny under the distinction subversive/political, filtering entry into the realm of the latter of only what is not the former. This blindspot underpins law's innocence in a strong sense. For the system this innocence is in-built. The legal system, like every system, can only see on the basis of a blindspot. It makes sense of politics through its means of arbitration, by submitting politics to differences. Turning *différends* into litigations is the only natural way for the system to make sense of the world, the conversion of *différend* to litigation is indeed the reduction of complexity that first allows observation of an environment of competing political claims. Law can only be innocent of this move from *différend* to litigation and therefore of the wrong it imposes on the political utterance.

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<sup>419</sup> Let us take again the "sympathetic" statement of the type: "we proclaim the right of the proscribed organisation to be heard" or, "the terrorists are making a political statement here which the Council should at least consider", or even most extremely "we espouse the cause of the IRA". To this, the law answers: "Your statement is for terrorism, therefore not political" (or, what amounts to the same, "not appropriate to this forum"). The double silencing consists in this: what the law cannot acknowledge as political is the claim that terrorism is politics.

<sup>420</sup> Litigation means taking as arbitration rules the rules of one system/genre and therefore ignoring that the *différend* depends on the existence of another genre/system.

The dilemma that the law presents to the activist is 'be litigable (enter litigation) or disappear'. Of course this is an apparent dilemma about an impossible dissensus. The differend has already disappeared in entering litigation. The dissensus that underpins the differend is confronted with the dilemma: either accept the language of the tribunal in which case the differend vanishes - the claim against the system has to be processed as a claim (couched in terms that the system can accept) of the system - or do not register in law at all. Either way there is no dissensus. This is system terrorism. The original claim has been re-enacted, hijacked into becoming a legal claim in the broad sense, a legally processable claim, that is, a claim that can be heard, a claim to which the legal system can respond - and in which case the claim becomes something other than it was - or, it will be eliminated. All that remains is for the discourse to be imposed, the tribunal to be set up. The question that remains to be answered is who has the power to litigate the meaning of the sentence.<sup>421</sup> I suggest that we treat this as a 'wrong' inflicted upon the political activist: it withdraws the language in which to state his/her claim.

Finally ideology at the junction of innocence and deprivation. The law has litigated the differend and deprived the activist of the means to prove the wrong s/he has suffered. Law's innocence is preserved because the silencing has gone unregistered and the challenge to the silencing is legally impossible. This is an ideological function in the broad Marxist definition of this term: a situation wherein systems of signification sustain relations of power by keeping them latent.

The connection with Marxism is a dangerous one though. On the one hand Marxism has been exemplary in exposing the ideological function and uncovering differends. Talking of differends, Marxism uncovered the "wrong" done to the workers of not allowing them to express their labour power as anything else than a commodity. The category of use-value lends a leverage to concealed differends, releasing them from a latency that in Marxist terms is ideological. At the same time however the Marxist narrative worked to cover up differends. Both directly and indirectly; directly because the emancipatory narrative rationalized real dissensus out of existence or into false consciousness. And indirectly, as I think Baudrillard persuasively argues in the Mirror of Production, by failing to probe deeper and uncover further differends that remain untouched sites of litigation, un-emancipated 'wrongs'. Although Baudrillard does not use the term, his critique of Marxism here can be viewed as an argument about a differend. Why, argues Baudrillard, does emancipation not also break the mirror of production? He argues that in Marxist theory production dictates the terms of

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<sup>421</sup> "The question is," said Alice, "whether you can make words mean different things."

"The question is," said Humpty Dumpty, "which is to be master - that's all."

Lewis Carroll, Through the Looking Glass and what Alice found there.

"litigation". Value cannot transcend the framework of production, that operates as precondition (and blindspot) behind the distinction between exchange- and use-value, as uncovering the abstraction of the former in terms of the latter. In this sense the backdrop of the 'productive man' operates as formative assumption that suppresses the differend by inhibiting an account of ('unalienated') value that would transcend exchange-value but also use-value. In Marx, then, the wrong consists in that production "litigates" value.

This short excursus into ideology had the purpose of giving some substance to the relationship I alleged between law's innocence and the deprivation-as-wrong that was inflicted on the activist. Law sets up its tribunal to reach the truth and truth presupposes a reference independent of what the law can say about it.<sup>422</sup> Through the analysis in this chapter we have seen how such reference is always fashioned from within the system, how systemic reductions are always-already imposed on the reference - the political utterance here. And yet at the basis of law's innocence lies the supposed indisputable, objective reality of the referred, as a matter of brute fact. Events happen on their own, law sanctions (refers to) action already in the world.

By using systems-theoretical devices, we uncovered various facets of the imposed reduction on the "referred" political utterance. We uncovered, that is, the artifice of the system behind the appearance of brute fact. To recapitulate briefly, it was said that the very possibility of external reference is premised on (a need to interrupt) self-reference; that there is an intimate dialectic between self- and hetero-reference; that systemic reductions are also at work in the 'innocent' appending of descriptions onto the environment as 'thematization', and the consequent assimilation that comes from attempting to make sense of increased complexity through reduced complexity. All these workings are part of the system's observation of brute fact. Reductions work to fashion the reference and the function of ideology is that what was lost in the reduction (the differend) cannot be accounted for. Ideology fixes this 'fiction of non-fiction' on every legal account of the world, including every account of the political. The differend cannot resound in the legal tribunal where sedition is already anti-political and where the litigation has been set up in these terms. And the subversive political utterance, its differend submerged, is forced into the impossible dissensus. One can only agree with Lyotard that this is the doing of an evil.<sup>423</sup>

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<sup>422</sup> In the words of (a much earlier) Lyotard, "the will to fiction that organises the discourse must be disguised as a will to truth of its reference." (In Bennington, 1988, 119)

<sup>423</sup> Where does the legitimacy end and the violence begin? Is it not the "normal" condition of discourse, one that Lyotard subscribes to, that subjective positions are constituted in language? The "I" reflects back in the mirror of the you. Yet this "normal" alienation is not the eradication performed by discursive terrorism - which is something in excess of that: the "terrorist" violence consists in the eradication of the very speaking position that might be recognised by the 'Other'. The "I" of the sympathiser is set up nominally, temporarily, in law as a legal subject (the mirror is set up as legal), in

"By evil I understand and one can only understand the forbidding of sentences possible at each moment, a challenge opposed to the occurrence, contempt for being." (1988, para197)

It is important to stress that 'sedition' has only been one instance of a differend and law litigates numerous others. The focus on a single instance allowed me to pursue in some depth the intricate workings of self-reference to the exclusion of the differend.<sup>424</sup> However the choice of focus on sedition is not totally incidental. The confrontation of politics and law becomes most dramatical in sedition. Here the law presents the stake of the conflict to be the political process itself (or some vital aspect of it, as in the cases of attacks on the judiciary). As we saw the rationale of sedition turns on the question of respect to the constitutional rules of the political game. This legal projection is cast as a rationalizing pattern into politics, into "the heat of the combats, the tenuousness of the compromises, the longings with which society is fraught" to use A Touraine's words. I choose sedition then because the category bears on law's very definition of political action; a definition that inflicts the wrong as inability, in law, to challenge the constitutional set-up of politics politically.

There is a final objection to be met. What if law does litigate this differend out of existence? What if the distinction only allows for speech which accords with the law's own definitions of politics, the legal self-descriptions of rights and subversion. What if the question is asked as if the actors are always already citizens? (After all civic republicanism is a theory about empowered citizenship.) This is an argument about the 'facilitative' side of the exclusionary function of law that we will visit in the next section. Even if the political context is submerged, goes the argument, even if the radical utterance doesn't resonate in law, is that necessarily a bad thing? After all, the law is about creating secure expectations in politics as elsewhere. Law's function is to provide some security even in the form of 'exclusionary reasons'. That means making sure that a legal debate on a ban of a procession does not always turn into a question about bourgeois legality. On the question of sedition, it means that once

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a way that will ultimately withdraw his/her "speaking position" altogether. The sympathiser seeks to be the addressor of a political claim, but this position cannot be reflected in the mirror of law. Law holds up its mirror and reflects back not an "I" that is the mirror of the "you", but no reflection at all - the "you" simply no longer exists.

<sup>424</sup> What may have been gained in depth was lost in scope, and in compensation I would like to offer some suggestions of further differends in other areas of law. The legal distinction between occupational and political strike litigates a differend and inflicts a wrong. It means that the workforce cannot express a claim for democracy in the workplace as an occupational claim. Why? The ground is pulled away from any identification of the occupational as political, because the law operates the distinction occupational/political demands, whose differend is carried in the inability to voice a political demand as an occupational one (which would make a difference given political strikes are illegal and occupational strikes are not).

Other cases of differends, although not described as such, are those described by Bernard Edelman in 1979, Appendix 1, and by Scott Veitch and myself, in (1994)

we have settled on certain patters of "doing politics" we can go about that business without always being forced to question the foundational agreements. There are obvious practical advantages to this blocking and I will not contest that.

But the Republicans advocate that theirs is a theory about the containment of politics in law. They purport to a dialogue that accommodates all voices. Even as only a test case, sedition shows up a non-containment of the "disruptive" voice, which is structural and cannot be healed by "empathy". Containment is purchased at the cost of the infliction of a wrong, a differend that cannot surface. My argument against republican containment is that not only does it concede to the imposition of this invisibility of politics but also with law always allegedly containing every dissensus, it legitimates and celebrates the silencing as empowerment. Why? For the republicans law is the medium wherein all statements are negotiated and negotiable. Law is a form of practical discourse and as such, aspirationally, an ideal speech situation where the meeting of validity claims works discourse pure of coercion. In the argument about law's self-referential casting of politics we saw that the political utterance is re-enacted as seditious, not contained, colonised. The political claim behind sedition ceases to be heard. The radicals' speech is fully compromised. Now, at the site of the second silencing the means to prove the coercion are in turn withdrawn. Not only is the curtailment of speech effected in law (as re-enactment) but the possibility of challenging the curtailment rendered non-negotiable. Republicanism "addresses itself to politics in the broadest sense" by, ironically, containing only law's surrogate for politics and secures the containment by effacing all the posts where the containment may be challenged. Containment, I will argue in the final chapter, cannot be exclusionary, as the republicans would have it, it can only be reflexive.

At the extreme opposite of ideology, the essence of the reflexive thesis is that it allows differends to surface. My argument for reflexive politics is a suggestion as to how the imposition of forced choice and the exclusion of dissensus may be resisted in politics. As opposed to institutional dialogue that is litigation, reflexive action is agon. Political praxis is not contained in the institutional setting of citizenship and equally it is not about that institutional setting - it is neither exercise of or contempt of a right. This would be the trap of litigation. I will have a lot more to say about this, but provisionally the reflexive thesis understands political action as action that embraces the differend and respects the contingency of its own setting-in-context; action as agon brings the criterion of what is political to bear on this respect of its contingency.

## Part III



## Chapter 5

### Reflexive Politics

A picture held us captive. And we could not get outside of it, for it lay in our language and language seemed to repeat it to us inexorably

L Wittgenstein

Tout ce qui est démocratique réfute la doctrine du libéralisme parlementaire. Le social quotidien fait échec à l'institution représentative

J-F Lyotard

## I

### The exclusionary and the reflexive

The concept of an "exclusionary reason" was introduced by Joseph Raz in his important early work Practical Reason and Norms.<sup>425</sup> Having set the concept of a reason for action at the centre of practical philosophy, Raz draws an important distinction between first and second order reasons for actions. First-order reasons are reasons to perform an act; they go into a balance where their relative weights are decided. Second-order reasons are reasons to act for a reason. They may be positive (such as is a reason to act on the basis of the weightiest first-order reason) or negative (a reason not to act for a reason). The latter Raz terms exclusionary. An exclusionary reason provides a reason for not acting on the basis of a reason. Moreover, as Bankowski explains drawing on both Raz and Atiyah<sup>426</sup> "we treat this reason as conclusive because it is there, we do not need to inquire behind it." (1991, 103)

An exclusionary reason stands in for the background arguments that justify it, and moreover prevents recourse to those arguments. If Ann, to take Raz's example (p38), has decided not to make financial decisions when she is fatigued, her regarding that as a reason for disregarding other reasons for action is what makes it exclusionary. A particular financial case is not weighed up on its merits against the fatigue (conflict of first- and second- order reasons); the balancing is simply cancelled.

It is not as arbitrary as it may seem at first, that Raz asserts as a general principle of practical reasoning that exclusionary reasons always prevail (1990, p40). As Shiner put it, even a much less controversial principle like "one ought, all things considered, always to act for an undefeated reason" (1992, p7) would have the same effect given Raz's set-up of competition and defeasability of reasons. Raz then claims that the concept of an exclusionary reason is vital in distinguishing rules from other non-rule reasons (1990, 51) and that the exclusionary function is distinctive of, among others, roles (p196), legal rules (p144) and legal systems (p139). In all of these, balancing of first-order reasons is blocked.

This 'blocking' effect is of great value, it is greatly facilitative for practical reasoning. It insulates our decision-making from always needing to take on board all the considerations that inform all reasons. There are obvious advantages to such 'blocking'. Most significantly we can thereby entrench and prioritise the reasons that we value most; by having backed them with the formal trumping effect of the exclusionary, our decision-making is greatly facilitated. In the case of law, for example, the exclusionary effect allows the decision to be made at the level of formal reasoning ("because the law says so"), rather than the substantive level ("the reasons behind the law saying so.")

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<sup>425</sup> First published in 1975, now 2nd ed, 1990. All references to this edition

<sup>426</sup> Atiyah, 1986.

There are gains but there are losses too. Having entrenched the reason for action at the exclusionary level how easy is it to dis-entrench and revise it? Irrespectively of all else that has been said and written about exclusionary reasons, this question of revisability is the most intriguing and difficult one, and certainly the one most crucial to the present discussion. As we said, the exclusionary function is to entrench certain reasons for action at a level where first-order reasons cannot defeat them. The exclusionary reason elevates certain reasons over and above competition and also significantly stands in for those reasons. By raising certain first-order reasons over and above competition, the competing reasons are outweighed by kind. By standing in for the reasons it entrenches, these too are displaced from the balance of reasons at the exclusionary level. What does this mean? It means crucially that unlike first order reasons, second-order reasons can never be in conflict with the first order reasons they either exclude or entrench. The balancing process itself is displaced. How would one go about (or even think about) revising the exclusionary reason? Certainly not by re-surrecting first-order reasons. These, as we said are invisible at the exclusionary level, having either been excluded by kind or substituted (entrenched). Therefore, "inquiring behind the exclusionary reason", lifting the lid, as it were, to look at how the balance stands now, is not possible in a way that resurrects the initial (first-order) balance. Because, first, we would not know when to lift the lid. We can no longer see when a first-order reason increases its weight because the first order reasons cannot make their presence felt at the exclusionary level. But even conceding that, to assume that a first-order reason of increased weight now forces us to revise our exclusionary reason would be assuming that which the theory tells us is impossible. Because to allow that competition, would turn the second-order reason into a first-order one and would thus cancel out the novelty and heuristic value of Raz's schema. Instead, revisability of exclusionary reasons is a process with a rationality of its own, which has nothing to do with the now displaced first-order balancings. If Ann decides to waive her exclusionary reason of fatigue before a trivial financial decision, it is not (nor could it be) that new convincing first-order reasons have shown up; instead it is a balance of different (second-order) reasons, at the second-order level, that decides that the exclusionary function is not worth sticking to. ("I can make trivial decisions even when I'm tired" is a second-order waiver. The impossible first-second order competition is of the type "should I make favourable trivial investment x or am I too tired?")

To use a favourite example that I will visit again soon at greater length, marriage provides an exclusionary entrenched repertoire of reasons for action. Atiyah uses the example whereby the reasons that inform certain patterns of interaction between lovers become entrenched by marriage into rules that inform the marital interaction. Substantive reasons for action are temporarily, says Atiyah, "frozen" into formal rules that facilitate decision-making. But should these formal rules cease to mirror their underlying substantive reasons, they will

be revised in the light of the latter. There is, for Atiyah, a dialectic between formal and substantive. We allow that the substantive reasons for a decision are subsumed under formal exclusionary ones; the latter will inform our decision-making only insofar as the substantive reasons entrenched at the formal level remain significant. Shauer seconds the value of that dialectic "[i]nsofar as it is possible for an exclusionary reason to tell an agent to look just quickly, if possible, at the excluded first order reason to see if this is one of the cases in which the exclusion of that factor should be disregarded ..." (1991, 91) Bankowski renews this line of accounting for the dialectic, with a recourse to Fuller's distinction between the moralities of "duty" and "aspiration".<sup>427</sup> The legal rule fixes the substantive reason that is the site of aspiration at a certain formal minimum threshold of duty. But the substantive aspiration continues to inform the formal duty and will force it into revision (or new interpretations) should the aspiration no longer adequately underlie the duty. Of course, therefore, marriage provides rules for love. But in the absence of aspiration behind them those rules would be meaningless. No one has learnt how to love on the basis of rules, rules do not make love meaningful. And should they cease to mirror the aspiration they will become an empty shell in need of revision.

This is my query and my objection then: How will the signal - that revision is needed - be received at the exclusionary level given that first-order reasons no longer resound at that level, by the very definition of what it means for a reason to be exclusionary? Because, put simply, dealing at the formal level forbids recourse to the substantive level.<sup>428</sup> The formal-substantive dialectic is impossible. Raz stresses this again and again: valid exclusionary reasons defeat the first-order reasons within their exclusionary scope. But the defeat is not the upshot of their relative weighting: "the strength of the exclusionary reason is not put to the test in [conflicts with first order reasons]; it prevails in virtue of being a reason of higher order." (1990, 46) What would have driven us to revise the exclusionary reason, on the accounts of Atiyah, Schauer and Bankowski, would be an upset of the balance of first-order reasons; powerful counter-reasons would outweigh the entrenched ones. But the exclusionary level remains immune to such upsets because counter-vailing first order reasons cannot challenge exclusionary ones. In that, exclusionary reasons displace the balancing process itself. Revisability has been cut off from the concerns that informed the entrenchment of a reason as exclusionary in the first place.

This impossibility of a competition between reasons of different orders is not a matter of definitional fiat. There can be little doubt that Raz has described quite precisely how

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<sup>427</sup> Bankowski, 1991, *passim*, 1993, 49-51

<sup>428</sup> For an overview of some aspects of this interesting debate, see Edmundson, 1993, pp337ff. Edmundson says: "[Exclusionary reasons] cannot therefore straightforwardly conflict with a first order reason to act" (*ibid*)

exclusionary logic works by withdrawing rather than outweighing reasons. Unlike most of his critics I do not think that exclusionary reasons do not work; I rather think that they work too well. And that the flaws that critics attribute to the theory<sup>429</sup> as being unable to conceive of reasons on a continuum, are real problems of incommunicability and incommensurability of reasons in reality. For example: we resolve a moral dilemma and entrench our solution to the balancing at the formal exclusionary level as a legal rule. Let us take this exclusionary reason for action, this law, and inquire into its revisability. How do we decide that we need to go back to the first-order "raw moral judgement" (MacCormick, 1989), waive its exclusionary function and re-think it in the light of first-order reasons? Typically because we perceive a regulatory failure. And how is such a failure perceived? Because at the formal level a signal is received that the legal rule is not performing. But is this really an indication that the outweighed moral reasons are suddenly important again? Or could it be that new reasons have arisen, some of them specifically legal in nature, tied to the function and performance of law, in a word formal rather than substantive countervailing reasons? Laws may need to be revised because judges cannot adjudicate them (the example of proportionality, recently), executives cannot adequately implement them or supervise their implementation. Laws need to be revised because they create new unforeseen pathologies and are revised to respond to these, which revisions in turn may give rise to new pathologies and so on.<sup>430</sup> The argument that I oppose has to do with the alleged dialectic between formal and substantive; as I understand Raz's concept, formal reasons are not revised in the light of substantive reasons that they "stand in" for and exclude, but other reasons that are formal too. Revisability is all too often dictated by formal failures and in the direction that formal failures call for. At the individual level, too, how will I know that I need to rethink and revise, for example, my formal interest as a spouse? According to the logic of Atiyah, Schauer and Bankowski I will do it by suspending my role as a spouse - its exclusionary logic - and looking back to love, to see whether love dictates sticking to the exclusionary reason or not. But this is impossible for two

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<sup>429</sup> Perry, for example writes:

"The two modes of reasons that Raz distinguishes can thus be regarded, in effect, as the two extremes of a continuum; at one end action is to be assessed on the basis of a balance of reasons in which no reason has been assigned anything other than ordinary weight, while at the other end action is to be assessed by a balance of reasons some of which have been assigned, on the basis of second order reasons, a non-ordinary weight of zero. Between these two extremes lies an indefinitely large number of further possibilities, all of which are variations on the idea of a weighted balance of reasons." (1987, p223)

In this account, the specific nature of the exclusionary reason has disappeared, because Perry allows a reason to be assigned exclusionary function on the basis of substantive criteria. What this means is that there is always only a balance of substantive first order reasons amongst which certain of them, as weightier, displace others. This collapse of first- and second-order reasons into "variations of weighted balances of reasons" mis-reads what is specific about balances involving exclusionary reasons, where the assigning of a weight of zero is a formal property of reason, done by kind, not weight.

<sup>430</sup> On this see literature on "juridification". For an overview, Teubner (1987).

reasons. First because as spouse I may never perceive my interests threatened (until it's too late probably) because love does not make its failures known in a way that is seen to affect interests (see below). And more importantly because suspending the role even temporarily - looking behind the formal into the substantive - involves suspending also the very language of interests, duties rights and so on, the very language, that is, in which a failure would have registered at all. Such suspensions are not merely improbable, they are impossible, as is the dialectic of formal and substantive. It is at this point that the theory of exclusionary reasons would benefit from systems theory. The theoretical disagreements over revisability that at present remain insoluble<sup>431</sup> (and the final word on which Raz has postponed to a future date in both his "Facing Up"<sup>432</sup> and the postscript to his second edition of Practical Reason) would gain great leverage once it is understood with the help of systems theory that the variables that allow one to observe at the formal level are different and incompatible to those at the substantive level. Every role-taking is exclusionary and remains blind to every other. From the formal position of a specific role, one operates in a world that is exclusionary because as role-taker, for example, the spouse not only sees what s/he sees but also cannot see that s/he cannot see what s/he could have seen as lover. I will not say any more at this stage because we will return to love and marriage very soon.

I will not push this argument any further here however, because it will distract from points (1) & (2) that I would like to retain, and points (3) & (4) that I intend to prove:

1. That law, its rules and roles provide exclusionary reasons for action (to both the moral and political first-order reasons they entrench)
2. that exclusionary reasons are not revisable in the light of first-order reasons that they exclude
3. that as a direct consequence of (2), the containment thesis does not hold
4. that the exclusionary is the opposite of the reflexive

Let me merely recapitulate my argument about the revisability of exclusionary reasons and tie it in with my suggestion about the reflexive. This has immediate repercussions for the containment thesis. Were (legal) roles and rules as exclusionary able to allow for their own revisability in view of substantive moral and political concerns, if they could be revised in that light and their exclusionary function bracketed, diminished or dissolved, as the case may be, then containment is possible. Because that would mean that in the balance of reasons, the

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<sup>431</sup> Also Schauer

"The primary inconsistency appears to be in the way in which Raz takes exclusionary reasons as incapable of override ... He maintains that an uncanceled exclusionary reason will always prevail within its ambit." (1991, p89)

<sup>432</sup> Raz, 1989

second-order reason might be suspended momentarily and a glimpse allowed behind it to inquire whether the case at hand really requires the exclusionary function or whether the excluded considerations have now, for the case at hand and/or every future such case, become significant. In this way roles and rules that fix expectations in certain ways and prevent constant recourse back to the reasons for action they stand in for could be bracketed, the blocking effect suspended, the excluded, eliminated reasons rendered visible again. Were this possible, the containment thesis would have gained some mileage. If roles and rules are flexible in that way, then they only fix reasons under condition that there are no superior first order reasons why things shouldn't be thus fixed. Political reflection and questioning of roles and rules is not occluded or excluded in law by kind. The law is always open to weigh up the reasons thus put forward and to suspend or revise its own exclusionary categories. But this is impossible. Of course roles and rules are revised, the exclusionary function lifted in the process. But the reasons why we may revise an exclusionary reason are not the reasons that might have outweighed it in a conflict of first- and second-order reasons. Such conflicts are impossible by definition, by what it means for a reason to be exclusionary. The law does not contain the possibility of such a challenge. In being exclusionary it is not reflexive in the way that I will now argue politics is.

## II

### Routes into Reflexive Politics

Elements of political reflexivity are to be found throughout the body of political theory. I will pursue the argument about "reflexive politics", first of all, by relying on - but also criticising - theories that, I have found, contain elements of reflexivity. This section retraces those debts.

The theorists I will focus on are four: Cover, Lyotard, Unger and Luhmann. This choice of focus leaves out many others. William Connolly, for example, has dedicated much of his recent writings to attempting to secure a space for ambiguity in democratic politics so as to prevent political practice from reproducing discourses of control, perpetuating closure around stable patterns. (1987) Another of his recent books (1991) extends a more confident deconstructionist reading into the politics of identity. Connolly is of course not alone in his preoccupation with political texts. Michael Shapiro (1988) explores how, in several texts he analyses, fundamental assumptions are built into narrative structures so that the purported findings are already prefigured in the texts' discursive modalities. The first moment of reflexivity - that of upsetting settled meaning - is well captured in deconstruction.

Connolly's early work on "essentially contested concepts" is even more relevant to a thesis of reflexive politics. The main idea here is that concepts are not (what Lyotard would call) "rigid designators" but are themselves politically negotiable,<sup>433</sup> and thus are aspects of the reality they help shape. The central thesis of the book is insightful. Connolly says "to examine and revise the terms of political discourse is not a prelude to politics but a dimension of politics itself." (p3) But this promise of a reflexive theory of politics is then more or less abandoned by Connolly. He takes his insight for granted rather than reflecting on it. He channels his efforts, instead, into probing the conventions governing the dominant concepts of our political discourse. There lie the limits of the value of his theory to the reflexive thesis.

In many ways the reflexive thesis is a thesis about politics unbound (or "absolute politics").<sup>434</sup> It can accommodate all challenges to existing political patterns that tend to

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<sup>433</sup> "Meaningfulness is constantly negotiated and is not just a simple communication of pre-existing meanings" (Brigham, 1978, intro pi)

<sup>434</sup> See Pizzorno (1987) for an attempt to define the features of "absolute politics". He says: "Behind the idea of politics having boundaries, and of these dilating and contracting, it is not hard to discover the image of a state of affairs - and the hope of or terror of it - where no boundaries at all are set around the practice of political commitment and the exercise of political will. Everything social would then be placed *sub specie politicae*, interpreted through politics and seen as transformable by politics" (p27)



normalise differences, but more importantly, can accommodate politics that claim new boundaries and new militance and lay claim to new domains of the uncontested. Two elements have been mentioned so far and they will become, as re-stated in what follows, essential elements of the reflexive thesis. They are the contingency of possible political meanings and the notion that politics sets the context within which politics is possible. I take these as the two pillars of the reflexive thesis. To begin with we will draw support for both from existing theories and then attempt a re-statement from a systems-theoretical perspective.

### Cover: Reflexivity and Anarchy

In the fourth thesis against republicanism (above, ch3, s5), it was argued that it is a priori, and thus anti-political according to the reflexive thesis, to view law as the community's definitive narrative. The republicans' assumption that law is constitutive of the texture of our communities, the language that articulates or contains political understandings and voices commitment, is thoroughly question-begging. Robert Cover's influential writings, paradoxically appealed to by the republicans themselves as a departure, anticipate a convincing critique of the containment thesis, while his anarchist strivings provide a tempting lead into the reflexive.

"We inhabit a nomos - a normative universe," begins Cover. The nomos is normative, it is a universe and it is particular. It is normative because it is the domain of "right and wrong, of lawful and unlawful, of valid and void" (1983, 4). It is a universe in that we inhabit the world of meaning in the same way as we inhabit the physical world. Discourse plays the key role here for Cover. The nomos exists as discourse. Discourse creates "history and destiny, beginning and end, explanation and purpose." (p5) Discourse cannot be private, it requires the community. For Cover, "the scope of the community of discourse defines the scope of the universe that is the nomos." (Kahn, 1989, 58). At the heart of the universe lies particularity. For Cover, a particular community's discourse is a narrative that produces a meaningful history, offering "an explanation or purpose" of the social life the community has found itself leading and to have led. In the future tense, this rationalisation projects meaning into future possible trajectories.

However interesting this all is, none of it is yet particularly novel, nor is it very far from what the republicans themselves claim. Their talk of a fund of possible meanings is tied to particular communities, they too borrow terms like universe of meaning and are attuned to

the vocabulary of historical narratives. The novelty of Cover's work and the decisive breaking point with republicanism is the anarchist moment. Cover says: "the nomos that I have described requires no state." (p11)

Cover's nomos is no state law, his community maps onto no citizenry. This underlies the inspiration of his work, and is the reason why he introduces his rather elaborate distinctions between the "jurisgenic" (remember Michelman) and the "jurispathic", the "paideic" universe of the "nomos" and the violence of the "imperial". For Cover, law is a "resource of signification" (p8) but as a resource it is not yet a nomos, a community is not yet consolidable around it.<sup>435</sup> In a strange way the point is not to create law but to limit it. By limiting it a community articulates its own particular nomos. What the republicans do is understand the process as an integration, not a limiting. For them various nomoi are integrated as communities negotiate the meaning of state law. The citizenry becomes a community in the sharing of state law-as-nomos that integrates and thus contains the variety of particular nomoi. But this turns Cover's argument into its opposite, turns the "paideic" into the "imperialistic", the nomos into state law, and in the process destroys the anarchist lynchpin of the theory. What the republicans would claim is integration destroys what was constitutive about the way the nomos upheld a community (the "paideic" function). In litigating constitutive differences, the "jurisgenic" turns "jurispathic". Litigation is "imperial" control of the anarchy of legal meaning. The fragile community exists in articulating its nomos, and, significantly, is created and dissolved at every moment of social life because the nomos that constitutes it and is constituted by it is dynamic, it exists in time. The infinitely delicate process of the production and reproduction of moral life is destroyed in the republican retelling of Cover's arguments. What is destroyed is the reflexive moment, that, in Cover, is tied to the anarchist moment, and to which we now turn.

"The narratives that create and reveal the patterns of commitment, resistance and understanding ... are radically uncontrolled," says Cover (p17). Litigating narratives does not integrate them but suppresses their wealth of possibilities. The courts' authority, he says,<sup>436</sup> comes from a unique power to deny other meanings. "By exercising its superior brute force ... the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities." (p44). Law is the violence of the "jurispathic". The spontaneous orders of the diverse nomoi, the reflexive diversity, cannot survive its passage into state law. In Cover there is a disjunction between state law and nomos where the republicans see a convergence. (Cover employs the word law for nomos, not state law, and

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<sup>435</sup> Luhmann would express this in terms of loose and strict coupling, 1986e, 208-9

<sup>436</sup> He stresses this particularly in 1986, 1601

this creates a mild confusion.)<sup>437</sup> Cover's reflexive "hermeneutic of principle" is the moment of the coming about of community around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally: and with no measure of authority, force, persuasion and violence capable of upholding it externally.

This recourse to Cover has been important for a number of reasons. First because the usurpation of his argument needs to be resisted; the republicans' unanimous allusion to him, quite strikingly, downplays the driving force of his argument. The republicans have heavily drawn on the inventory of his terms and relied on his formulations. This proximity brings out the irony. The value of Cover's theory for a theory of reflexive politics is the anarchist moment. The disjunction he describes between the anarchy of community and the function of law is evidence of the impossibility of containment of the former in the latter, ironically the very thing republicans appeal to Cover in order to establish.

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<sup>437</sup> Tushnet says: Cover is [...] thoroughgoing in his anarchism. His argument includes the premises that law-creation is community-building and that law-creation involves violence. He fails to discuss the inference that follows from these premises: community-building involves violence too. (1988, p155) There is no doubt that community-building may well involve violence, but Tushnet's criticism is unwarranted here. Cover uses the term law for nomos, not state-law, which, by Cover's very definition, is not violence. The rather obvious "failure" Tushnet is identifying is the republicans'. Their celebrated debt to Cover, elsewhere superficial, here becomes self-undermining.

## Lyotard: Reflexivity as the Threat of the Differend

Lyotard ties his account of the political with his notion of the differend and defines politics as "the threat of the differend." (1988, 190) We will revisit briefly his analysis of meaning-in-linkage and the differend as what resists this, and relate the political-as-differend with containment, on the one hand, with reflexivity on the other.

Central to Lyotard's account of politics in both (1986) and in (1988) is the notion of linkage. The meaning of a sentence, Lyotard has explained (above 4.5), only comes about in linkage with other event-sentences that precede it and absorb it into a genre. Meaning is in linkage and possibilities of linkage are provided in and as genres. A genre is attached to a "goal", it is teleologically driven, and thus invites certain linkages of sentences in view of that goal. The eventhood or singularity of the sentence is destroyed in this absorption. The differend appears in Lyotard's work as the unspeakable resistance, that which cannot be addressed in itself by us competent speakers, who are always-already employing genres.

I take it from Lyotard that this is the point at which real politics begins, in standing back, before the genre, to capture the eventhood of the sentence, at that point at which the different, incongruous, heterogenous is not yet rendered the same, congruent, homogenous. The task of politics is to uncover the logic that homogenises, the logic of absorption. Because, says Lyotard, referring to Heidegger,

"[E]very sentence is in principle what is at stake in a differend between genres of discourse. The differend proceeds from the question, which accompanies any sentence, of how to link onto it ... There are differends because, or like, there is Ereignis. But that's forgotten as much as possible: genres of discourse are modes of forgetting the occurrence, they fill the void between the sentences ... " (1988, 188)

The task that Lyotard sets for himself is that of making politics reflexive in a way that would allow the differend to surface. The first step is to incorporate the disruptive moment as essential to politics itself:

"There is no politics if there is not ... a questioning of existing institutions, a project to improve them, to make them more just. This means that all politics implies the prescription of doing something else than what is." (1986, 23)

There is disruption here but it does not yet go deep enough; Lyotard is here still talking about prescriptions, about rationalising genres. In Just Gaming, Lyotard describes

politics as the formulation and pursuit of prescriptions with no recourse to a metalanguage that could settle differences between prescriptions. The political, like the ethical and the aesthetic neither admit a metalanguage above them nor are they themselves metalanguages. All three are realms of indeterminate judgement. The idea of Justice becomes the "multiplicity of justices" and the "justice of their multiplicity." (1986, 100) <sup>438</sup>

With The Differend, Lyotard is able to enrich and qualify his ideal of the political, through recourse to the central category of the differend:

"Were politics a genre, and were that genre to pretend [purport?] to that supreme status, its vanity would be quickly revealed. Politics however is the threat of the differend. It is not a genre it is the multiplicity of genres, the diversity of ends, and par excellence, the question of linkage. It plunges into the emptiness where "it happens that ... " It is, if you will, the state of language but it is not a language. Politics consists in the fact that language is not a language, but sentences, or that Being is not Being, but There is's. It is tantamount to being that is not. It is one of its names." (1988, 190)

If Lyotard founds his notion of the political on the idea of disruption, it is because he seeks a politics that can resist its confinement to a determined game. Having developed the connection between genre, linkage and the differend, he can now make more concrete the logic of disruption. His theory of politics needs to be attuned to and become attentive to the possibility of resistance to what and how things become negotiated in litigation. So politics now becomes the art of differends, and the possibilities of disruption are oriented to what is communicable as commensurable and what is suppressed as incommensurable within the communicative processes and the consequent limitations of linkage possibilities. In the process, the uncovering of the differend becomes the privileged site of politics (or philosophical politics as Lyotard occasionally terms it.) Accompanying every prescription is the awareness that things could be otherwise; but more than that, accompanying every observation or, more closely to Lyotard,<sup>439</sup> every representation is the awareness of what is suppressed. Politics is caught up in that necessary and impossible dilemma that we have to "represent yet must not represent", because to state what the case is and what must be done testifies to the suppressed differend. Politics is the openness to the differend. Thinking politically involves our constant placing of what politics means at risk. The latter is precisely what I take reflexive politics to

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<sup>438</sup> Sam Weber, predictably to some extent, warns that Lyotard runs the risk here of superimposing the meta-prescription "be plural" to politics and doing precisely what his own ideal of agonistics disallows (1986) Also, Nancy argues that as an idea of plurality, justice is still brought under a unifying moment. (1985, pp47-8)

<sup>439</sup> See his 1983

mean. But I will turn to systems theory to provide the best defence of the thesis, because, while Lyotard's formulation of the thesis is most powerful, he himself pulls the ground from underneath any possibility to achieve it. Why? Because to articulate politics always already means having suppressed the differend. Politics is always only a potentiality; to observe and state what is political is always already anti-political.<sup>440</sup>

Lyotard's politics as an art of differends becomes the very impossibility of containment of politics in law. His challenge has not gone unanswered. It is Seyla Benhabib that most directly undertakes to refute Lyotard on behalf of the republicans and in favour of the containment thesis.

For Benhabib "it is imperative that the politics of the differend not be settled beyond and at the margins of democratic politics" (1994, p2) There is no reason, she claims, to doubt that the constitutional framework adequately provides the processes that will contain our democratic deliberation and negotiation of political statements. If Lyotard cannot see this it is because he has paid insufficient attention to the rational foundation of the democratic form of government. She accuses him of reading political phenomena through "a limit condition: an extraordinary and foundational moment." (p5) This reading she attributes to "a general fascination with limit situations and extremes." Benhabib continues, quoting Richard Wolin: "[This] is an interest in transposing the fundamental experiences of aesthetic modernity - shock, disruption, experiential immediacy ... - to the plane of everyday life." (ibid) But there is something "remarkably brief, impatient, almost staccato" about Lyotard's "limit situations" argues Benhabib. "The premise of the absolute heterogeneity and incommensurability of discourses is never argued for; it is simply posited ... It is a mood of deconstruction, destabilization, rupture and fracture ... Lyotard never distinguishes between incommensurability, heterogeneity, incompatibility and untranslatableity ...

Incommensurability is the central epistemic premise of Lyotard's philosophy of language as well as politics, and also its weakest," says Benhabib. (fn 17) Caught in that "mood", she concludes, "Lyotard disregards the institutional mechanisms whereby constitutional traditions enable democracies to correct, to limit and to ameliorate ... the arbitrary formation of normatives." (p17)

This last formulation is a moment of high republicanism, a powerful restatement of the containment thesis. Benhabib is driven by the "imperative" to contain "the politics of the differend" within "democratic politics." (p3) She goes on to elaborate a theory of republican politics, wherein the deliberative processes of the public sphere "let the differend appear, and which do not oppress and stifle it." "Must such politics be located ... at the margins, at the limits and extremes of the process alone?" she asks. She answers in the negative and pursues

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<sup>440</sup> In a similar vein, but in relation to justice, Nancy (1985) describes Lyotard's notion of as one that cannot itself be phrased, cannot be "brought to sentence"

a republican theory of strong democracy<sup>441</sup> to answer Lyotard's politics. Enough has been said already about the republican containment thesis to merit any further comment on Benhabib's analysis here. <sup>442</sup>

I think that while Benhabib falls into precisely the same mistakes as the other republicans in her prescriptions for containment, she is incidentally right about one thing, and this leads to my own doubts about the value of Lyotard's account as a theory of reflexive politics. It concerns the incommensurability thesis. Whatever the teli that differentiate genres from each other, Lyotard does not convincingly answer why it is that they establish incommunicability between regimes of sentences and genres of discourse. But even supposing that they do, why are moral, political and legal claims driven by different teli (and what are they)? So while Benhabib's argument is neither very original nor convincing, she is right in quering the incommunicability thesis.

The reason for seeking to ground a theory of reflexive politics in Luhmann's rather than Lyotard's theory has, to begin with, to do with the often vague and unhelpful rendering of the question of incommensurability. Where in Luhmann the differentiation of systems is structurally grounded, in Lyotard the differentiation of genres appears haphazard. Where Luhmann's systems have specific structural possibilities of observation and structural blindspots, Lyotard's analysis of genre-specific communication may just as appropriately be talked about in the softer terms of facilitation and hindrance. While their accounts of meaning in linkage appear very close, in Luhmann the specific logic of linkage is more thoroughly worked out. And where Luhmann accounts for differentiation on the basis of functional imperatives, Lyotard is again caught out without a differentiating principle that would make his theory sociologically interesting.

But throughout all this, there is an even more important reason for the recourse to Luhmann. Lyotard's "philosophical" reflexive politics can only always remain a negation of linkage. His political statement can never be brought to sentence. Because to be articulated it must link up and therefore litigate the differend. The reflexive statement must remain tentative, unsaid, if it is to be true to the contingency of the political. Politics is the struggle of differends, and, by definition, differends must resist becoming reduced to a commensurable order, because that would imply that they have already been litigated over, straightjacketed to a specific order of linkage that alone allows communicability. As an art of differends,

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<sup>441</sup> The references to "strong democracy" here and throughout are to Benjamin Barber (1984)

<sup>442</sup> Incidentally only, it is because the republicans do not have a theory about structural-institutional limitations on possible deliberation, and cannot see the distinction between inertia and involution, that they do not also see the threat that "limit situations" pose to their theory.

Lyotard's politics are always disrupting its own possibilities, his reflexive politics always in the negative, a statement only in the non-statement. In Luhmann we will seek the possibility of a statement that is stated, but stated with an eye on its own contingency.



### Unger: Reflexivity as Negative Capability

Unger's alludes to reflexivity in discussing "the situation and the task" of social theory (1987a). Unger takes issue with the "institutional" and "structural fetishism" of "deep structure theory", the unshakable assumption that "structures are structures". Structures, on this view, fix what can be understood as conflict into inflexible patters. As "formative contexts" they form routines of conflict. In deep structure theory the distinction between the context that forms the routine and the routinised conflict itself is rigid and allows neither reciprocity, nor any form of dialectic relationship. Unger queries this, as well as what results from it: that political conflict is channeled into either the routine activity that takes the context for granted or becomes a conflict over the context itself. It is narrow and disabling to present politics as the mutually exclusive possibilities of revolution or conservative tinkering.

Unger's solution to this false dilemma is to loosen the distinction between context and routine. Deep theory has no room for the very real possibility of "revisability of the context from within" (1987a, 12ff). He groups the various possible strategies of disentanglement of the formative contexts of social life as negative capability<sup>443</sup> and concludes that given "the range of forms of empowerment, a cumulative move toward greater revisability is possible." (1987a, 156). Formative contexts are replaceable piece-by-piece (1987a, 157). "The fighting that goes on within a stabilized social framework is only a more truncated version of broader and more intense struggles about the framework." (1987a, 161) "We may [thus] be able to imagine ourselves more fully as the context-bound yet context-resistant and context-revising agents we really are." (1987a, 200)

All this is directly relevant to the distinction between inertia and involution, mentioned previously (in chapter 3, s8). It is because Unger is submerging the distinction that his "disentrenching" politics cannot do the work he wants them to. Let us see more gradually why this is. Unger likens the "more truncated" conflicts within, with conflicts about the context, he juxtaposes context-bound, -resistant and -revising. How could this be? The answer lies in the logic of piece-by-piece disentanglement, where "the means [themselves] of stabilization generate opportunities for destabilization." This is not unfamiliar, it underlies the logic of deviationist doctrine that plays up "opportunities" of deviant reconstruction from within the body itself of legal dogmatics, the "means of stabilization." After all, stresses Unger, "to conceive of the ideal, ... is to conceive it from the standpoint of variation."

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<sup>443</sup> "All the varieties of empowerment seem to be connected in one way or another with the mastery the concept of disentanglement describes. I call these varieties of empowerment "negative capability" (1987b, 279)

(1987a, 43)<sup>444</sup> But this is the story of countering inertia, is it not? Variation involves varying certain variables, it is a movement away from the fixed, only in terms of which it is a movement, a variation. Shifting variables involves keeping others constant; Unger says this too: "[R]evisions typically destabilize some parts of the established framework while strengthening others." (1987a, 158) But by conceding this, Unger is conceding too much. Variation makes sense only in terms of respecting the identity of the whole, an identity that is re-instated with each variation. What is impossible is that "in the contest between the incongruous insight and the established context, the context may go under." (1987a, p20, my emph.) Surely not. Because what is incongruous, even, just as what is a variation, is that given the context. The contextual reduction of possible states are constitutive of the meaning of the incongruity. Were they not, what appears incongruous would not even register as such. The context does not go under, it remains there resistant as involution, to make sense of incongruity, challenge resistance, conflict, contested and re-instated at the same time. Of course things change as incongruities show up. But none of these yet allow for reflexive revisions, they allow only systemic revisions, revisions that are, in some deep-structural way, context-bound. Unger's eloquent statement that "a truth [may be revealed] in the very fields that had no room for it" (a, p20) is fundamentally misleading, not because the field conceals the truth, but because a field organises and undergirds a certain access to truth; and what cannot be seen cannot be seen. A context cannot accommodate context-breaking activity.

The reflexive thesis that I suggest both draws from and argues against Unger's prescriptions for utopian politics. I have argued that Unger's emancipatory thesis is untenable because his politics sooner or later stumble on the institutional threshold. Resistance to the context cannot be context-bound. The terms of closure cannot be resisted, since, in Luhmann's terms, it is that closure that allows cognitive openness, and thus also Unger's "cognitive access to one another." I have argued this above and will say nothing more on it just now. Unger himself would not be too unhappy in principle that from a systems-theoretical perspective his argument here appears unconvincing. Systems theory exhibits all the features he has attributed to "deep-structure" theory which he vehemently rejects in favour of his own "super-theory". The difference between the two, as was said, turns on their respective attitudes toward the existence of institutional frameworks that stand apart from routine activities of social life and shape them. Systems-theory posits deep seated constraints and developmental laws that clearly delineate the formative from the formed and sees conflict as possible only in variation from existing formative structures that reinstate the

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<sup>444</sup> That something is from the point of view of how it could be different is of course a central assumption of systems-theoretical structural observation. But variation patterns are guided by the system's constitutive reductions.

formative context even as they challenge it. In fact they are only acknowledged as challenges, as conflicts, through the "deep seated" assumptions they are meant to challenge. Unger deeply opposes this circumscription; for him the formed conflict may subvert the formative framework, and he occasionally even talks of turning the formative structure into "a structure of no structure." (1987a, 46)<sup>445</sup>

There is a small obscurity in Unger's account of the exact nature of formative contexts that may be worth exploring. Unger sometimes talks of formative contexts in a way that defies a one-to-one mapping with systems. While his discussion of solidarity rights, immanent critique etc are all confined to the legal system, his allusion to formative contexts is often an allusion to inter-systemic complexes of institutional assumptions, combining legal, political and economic arrangements. With this distinction in mind, Unger would be able to distinguish, with some precision, when a routine conflict will not merely immunise the context-system from instability, but shake the context-complex into instability. Self-immunisation only occurs at the systemic level where the constitutive reductions will re-align and turn all conflict into self-conducive routine. But one system's conflict may well destabilise another, as for example the legal system and its dealings with environmental politics.<sup>446</sup> No meta-system will appease the tension here, no meta-structure will ensure stability. The formative context of the public sphere may, in this latter case, suffer the disruption and be unable to pre-ordain its evolution. In this case conflict will have become context-transforming. But to make this argument Unger needs to have drawn the distinction first, between contexts. Unger's rather vague and haphazard "sometimes" would benefit from some careful systems-theoretical analysis here.

Despite the qualification, the "reflexivity" of Unger's Politics remains problematical.

On the positive side, his theory has reflexive aspirations and his account of politics is that it is reflexive. For Unger "it's all politics" because society is an artifact and all that is social is contingent, challengeable, changeable. There is no aspect of social arrangements not open to revision. Even the definitions of what can be changed and the strategies we employ to effect change are in turn open to political scrutiny. "Negative capability" underlies his radical project, as method of disentanglement of whatever context becomes vested with false necessity. He proclaims the radical contingency of human experience and action. To

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<sup>445</sup> "Unger's structure-denying structures represent malleable or "plastic" constraints; but we should not confuse them with enabling constraints. His structures are, instead, self-subverting constraints. Enabling constraints increase our freedom and flexibility only if they bind us firmly in a particular sphere of activity. In contrast, Unger's structure-denying structures increase our freedom by providing a looser hold on the activities they themselves govern." (Yack, 1988, p1968)

<sup>446</sup> See Luhmann, 1986e

understand society is to embrace that contingency, that Unger once most insightfully describes as "seeing the settled from the side of the unsettled." (This we will soon see could be taken as the guiding distinction of reflexive politics.) In all this lies reflexivity, of which Unger's is a powerful and important re-statement. His theory aims to keep "the context held up to light and treated for what it is: a context rather than a natural order." His view of a political society is one in which "people neither treat the conditional as unconditional nor fall to their knees as idolaters of the social world they inhabit." (pp 21-22) He seeks "a society less hostage to itself." (a, p45) This oscillation between context-bound (the conditional) and context-challenging (refusing to be idolaters) may present a paradox: if all activity is contextual can all contexts be questioned? Unger's work can be seen as an attempt to expose this paradox as merely apparent. Because, according to Unger, all contexts can be questioned, disrupted, even overturned by activity that is both reflexive and contextual. It is at this point that Unger's theory ceases to be valuable. I have argued against this possibility and treat the paradox as a real one. My suggestion is for a politics that is reflexive in a different way. <sup>447</sup>

My dispute with Unger is that in proclaiming contingency across the board he has lost sight of what makes reflexivity possible. There is deep-structural necessity in all facets of social life and at the same time there is extreme contingency. Not because as per Unger constraints are falsely necessary. But because what one systemic mapping of reality compels one way another allows another. There is, contra Unger, extreme rigidity of contextual conditions. Contingencies are fixed by systems but systemic contingencies compete and for each system cancel each other out. Reflexivity involves stepping out of the closure and through second order observation quering the terms of closure and the shape of contingency. Contingencies are fixed by systems but in the absence of meta-systems and privileged sites of observation, fixed contingencies appear contingent to second-order observation. That is what makes contingency an "eigenvalue" of our society, as Luhmann has recently put it. (1992a) That, I believe, is how reflexive politics would be stated from the point of view of systems theory. To understand systems theory as critical theory in this way, we will need to probe the dynamics of second-order observation. We will turn to Luhmann again to argue both with him and against him for a theory of reflexive politics that draws on the possibilities of second-order observation.

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<sup>447</sup> To all this, I suspect, Unger would say: by suggesting that the only challenge to the context can come from outside the context, you are reverting to the false necessity of revisionism or revolution. Given how systems-theory re-shuffles the coordinates of what counts as in and what out of the context, and given the limits of what may be challenged from within, this may not be that interesting an objection. What is interesting is how Unger's reflexive thesis may be re-stated from a systems-theoretical perspective.

### III Luhmann and Reflexivity

Niklas Luhmann's writings may seem an unlikely support to a theory of reflexive politics and indeed to attempt to establish him as critical theorist flies in the face of all the conventional assumptions in sociological theory today. His writings appear deeply incompatible with utopian theorizing. Where Unger proclaims theory's deep commitment to breaking through the "compulsive routines" that prevent us from seeing society as an artifact, Luhmann advances an unnecessary<sup>448</sup> contradistinction: "If we presuppose society as it is the only thing we can do is to conserve it." (1988a, 28). There is little room for a break from political necessity here, let alone a radical break carrying the utopian vision of reflexivity. To some extent this argument is warranted, and to that extent my argument will be a critique of Luhmann's account of the political system. But it also from within the theory of autopoiesis that I will argue that things could be seen differently. There is, therefore, throughout the argument a double move: to draw on Luhmann and yet to confront his conclusions. The recourse to him here stands and falls on establishing this critical internal perspective.

Luhmann's most consistent account of the political system can be found in his Political Theory in the Welfare State (1990a). Here Luhmann traces the evolution of the political system and presents an account of what marks its current features in the present historical phase of a functionally differentiated society. The crux of his account is that the coding of power as *Macht/Unmacht* (holding/not holding power or, government/ governed), that establishes the political system, received, under the democratic party-political pattern, a supercoding in terms of a Government/Opposition distinction. The codification was bifurcated at the top. This secondary (super-)coding historically acquired primacy over the original coding to the extent of rendering the original 'governed' a parasitic third. (Every coding is binary and cannot account for third values). The Government/Opposition schema is the present historical constellation of the coding of the political system. From a difference between those who ruled and those who were ruled, the coding has shifted to a difference between those who are in government and those who seek to be, a situation further programmed ( I use the term in the technical theoretical sense it has in autopoietic theory, see above) by the structures of party politics and occasions of competition. The antithesis schema Government/Opposition is the contingency space around which the political system is structured. The governed of the initial distinction have shifted to a position of third value that,

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<sup>448</sup> The allusion is to Marx's 11th thesis on Feuerbach.

as public opinion,<sup>449</sup> allows the system to "asymmetricize" itself. As we have seen already, asymmetry is necessary to self-referential systems if they are to avoid tautologous operation. Complete self-referentiality precludes any capacity of external reference. If the system were unable to receive any stimulus from the environment it would become redundant; it would have no outward reach, nothing to permit it to get started, nothing to read as environment. In order to activate its categories (and apply its coding) it needs to sense environmental perturbations (stimuli), it is to set up a mechanism of reference towards the environment. To "asymmetricize" is to acquire such sensitivity. Tautologous self-referentiality is refracted, interrupted (*unterbrochen*) because through public opinion the system is able to establish the necessary reference to the environment (the necessary externalization) (1990a, 45, 183). Observation of public opinion replaces any direct observation of the environment that autopoietically closed systems are not capable of. Autopoietic systems operate by projecting expectations and then reading their fulfilment or disappointment in environmental responses. Public opinion fulfils just that function for the political system. Public opinion functions as a matrix that reflects back to the political system demands to which the latter then responds. Opinion polls and electoral results measure the success of those responses. The political system "sees" itself in the context it has itself set up as environment. Popular sovereignty, the cornerstone of constitutionalism, has never been so radically recast and so thoroughly debased. The sovereign electorate carries no will other than that, which in the institutional sites set up in official politics, "carries itself".

Having established that function for public opinion, democracy becomes, for Luhmann, the capacity of the political system to observe itself (1990a, 105). This follows unproblematically from the analysis above, if democracy is seen as providing the institutional vessel for public opinion. Indeed democracy voices that public opinion by providing the institutional sites (elections) and institutional means (rights of participation, freedom of the press to criticise the government etc) of citizens' actions. Public opinion is institutionalised and reflects the message to the political system; to use Luhmann's metaphor, it holds up the mirror<sup>450</sup> for the political system's self-observation: "Politics can only glimpse itself in the mirror of public opinion, embedded in the artificially chosen context of its own possibilities

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<sup>449</sup> Luhmann's analysis is in fact more complex than this (see his essay 'Political Theory in the Welfare State' (ch 2 of the book, 1990)). Here, the political system itself is internally differentiated into politics, governmental institutions and the public (citizenry, media, associations). These subsystems come to no direct contact and simply constitute environments for one another. This analysis is important because it allows us to see where this 'third value' we have been talking of, public opinion, is located precisely. It constitutes an internal environment for politics.

<sup>450</sup> For the mirror metaphor see Luhmann, 1990a, pp 176, 179, 216.

of movement" (1990a, 216) By reading in the environment a response to projected expectations (the success of a governmental program, the success of an anti-government strike) the political system does more than simply evolve through a linking of real operations - it observes itself in the process. We can see this by re-emphasizing the connection mentioned earlier between operation (a), observation (b) and self-observation (c). The political system submits the environment it observes (b) to real operations (a). In the process it is able to observe itself (c) (indicate itself) in those real operations, in the distinctions it employs to observe the environment. The environment (of political expectations and political action) is read through the construction of a medium in which the system reflects its own unity and identity. <sup>451</sup>

The inevitable conclusion that Luhmann's analysis leads us to is that the political intelligence of democracy - its sensitivity - is determined by and circumscribed by what the code of government/opposition can make visible. Only what affects and modifies the prospects of the government or opposition acquires political relevance. What can be politically observed is opened up and at the same time delimited by the conditioning difference. Possible movement, new directions to be envisaged are thereby also circumscribed.<sup>452</sup> The political system's (self- and other-) observation is semanticised by the Government/Opposition distinction, where public opinion provides the matrix for political reflection. Societal reactions are channelled as stimuli (in the sense described) and no break with this semantics can be envisaged because the political system cannot react to what it cannot see, to what it cannot give form.

Where does this leave the possibility of reflexive politics? Underlying the latter is a concern about what can and cannot be done politically, what can and cannot be challenged and changed. Reflexive politics proceeds on the premise that political action and political self-determination is a real possibility, not hedged in by what appears as natural, obvious or necessary. It consequently allows a real possibility to contest what is political, to contest what is politically possible and to contest the terms themselves in which these questions are

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<sup>451</sup> We can recast all this in the language of "re-entry". We saw (above, n8) that "re-entry" is the introduction of the system/environment distinction back into the system; the system is thereby capable of self-observation, of reflecting, that is, its own identity by distinguishing itself from the environment. With no external reference open to the autopoietic system, the operation is of course radically constructivist: the context in which the system situates its operation is artificial. The system reads environmental complexity and pressure in terms of public opinion, a reduction conducive to its code that allows it to (build up and) activate its categories to deal with it.

<sup>452</sup> "The attraction of attention, political selection and thematization of interests can be regulated only within the political system itself ... Whatever can become politically relevant results from a connection with what already possesses political relevance [the recursive linking of operations]. Whatever counts politically reproduces itself... politics conditions its own possibilities - and apparently becomes sensible [sensitive] thereby to what its environment offers or requires ... It combines sensibility to certain questions and total indifference towards everything else." (Luhmann, 1990a, pp39-40)

contested. In this sense party-political democratic self-observation becomes the limiting condition; it circumscribes political communication to certain forms. The system's self-observation cannot transcend the conceptual space opened up by democracy's constitutive difference. The question for reflexive politics then becomes: can political discourse break from this limiting condition and where will it seek the purchase point for such a task? We saw that Luhmann painted a bleak picture in response: the conceptual space for political action is mapped out by the political system on the basis of the code; the alignment with this semantics is necessary. If we take this at face value, then the possibility of transcending the present political condition is already precluded since the contrast schema of the political code controls what is politically visible. Reflexive politics loses its defining feature if it is to be channeled into a dichotomy conducive to the perpetuation of existing schemata, if it is to lapse, that is, into a "text" in which the political system will read a stimulus that will allow it to gear itself. The political actor's self-determination and the impetus of politics to break with constraint are countered at the root.

Once again the political language of New Social Movements provides an interesting example of reflexivity in at least the following sense: issues are now being pursued as political that were previously perceived as natural, as non-political (environmental pollution and with it economic growth, etc) and with them have emerged new forms of political mobilization, of assuming political identity, of locating the claim in a context of conflict, etc. New social movements are collective actors whose repertoires of action and whose conflicts do not fit the existing channels of political organisation. In this framework we will ask again, what it is that leads Luhmann to dismiss the political language of movements and consequently compels us into a restrictive framework of (means and objectives of) political action?

In Ecological Communication Luhmann discards even the efforts of the most moderate green pressure groups as ineffective. On the basis of his account of the differentiation in modern societies, Luhmann precludes the possibility that pressing ecological concerns, as expressed by these groups, can trigger any effective response on the part of the sub-systems. The political message cannot be picked up by the political, legal or economic subsystems because it finds no point of congruence with the semantics of functional subsystems that are geared by specific codings of communication. The discourse of movements either stimulates idiosyncratically drawn answers in the subsystems, or creates "noise" too intense to be handled by them, thus leading to dysfunctionalities. The criterion of success is to cause "resonance" in the political sub-system of society. On the basis of their inability to address the problems in system-specific ways, the political message of movements is deemed unsuccessful. Ultimately, the reason New Social Movements fail is because they ignore functional differentiation by claiming the need to handle everything politically.



For Luhmann, who denies any primacy of the political sub-system, this "expansive" understanding of politics may even become dangerous. It is true that traditionally it was in the political system that the ability to represent society and to decide on behalf of society, was located. The historical transition from stratification to functional differentiation has changed all that. In the present historical condition no sub-system can be replaced or represented by any other and society is left without a centre, where political would identify with societal deliberation and where society would work out its self-determination.<sup>453</sup> Functional sub-systems have made it impossible for society to maintain a discourse at its centre: to maintain, that is, a "centering comprehension of the whole in self-knowledge".

An attempt to reclaim primacy for the political is bound to fail in a world that has lost this site for "Vernunft" - the privileged site for self-understanding or for collective rationality (in the Habermasian vein). Such a privileged locus is forever undermined by the irreconcilability of differences which, as codes, allow differing system accounts of reality. Any space for political praxis as envisaged by the movements has dispersed amidst this competition of accounts of reality and "expansive politics" are deemed unsuccessful, ridiculed and discarded by Luhmann repeatedly as defying that dispersal. "Time and time again," we are told, "political theory - from Hegel through Treitschke to Leo Strauss and Hannah Arendt - has tried to counter this diagnosis [the impossibility of the representation of the whole within itself] and to conceive politics as the guiding centre for everything that occurs in and with it" (1990a, 32). "[T]he long standing premise of a kind of supremacy of politics over society, views de-politization as a misdirection and requires a kind of re-politization, either through participation or, where necessary, through violence.<sup>454</sup> The weakness of this concept ... lies ... above all in the lack of an adequate theory of society." (1990a, 63)<sup>455</sup> that could account for the fact that the "unity of society no longer appears within society". The contention is an alarming one, for the critique of society must be carried out within society. In view of the political system's obvious inability to voice that critique, and with alternative politics disarmed, Luhmann is left with one of two options:

to ascribe societal crises to the overloading of the political system and to attempt a correction in terms of performance of the system,<sup>456</sup> or,

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<sup>453</sup> "Like Nicholas of Cusa's god, society is omnipresent in modern society, but nowhere in a particular, privileged way" (Luhmann, 1986a, 47)

Also: "There is no specifiable standpoint left from which the whole [of society] can be accurately observed" (Luhmann, 1984, 630)

<sup>454</sup> This of course is not Arendt's view. For her revolution and war are in the "domain of violence" which is anti-political to the extent that it rules. This is also Offe's view, below.

<sup>455</sup> Also Luhmann, 1990a, pp102-103, pp235ff

<sup>456</sup> "There are few bases for being able to radically change whatever society one is living in. There are

to follow his line of argument to its bitter conclusion and to concede that while political rationality may have become more urgent, it has also become less likely (Luhmann, 1984, p.645)

I suggest a simple formula to express my internal critical stance to Luhmann's account. Luhmann raises an objection against the notion that "politics is everything" and raises it in a way that occludes that there is a second, different notion at stake: that "everything is politics". The latter is the idea, expounded by Unger and many others before him, that society in all its aspects is an artifact open to revision. The first notion, or so Luhmann claims, is that republican "imperialist" position in political theory that claims that all social issues can be handled politically. It is this position that Luhmann directs his attack to. But he does this through a comprehensive rebuttal that rejects too much having addressed too little. It is the idea that "everything is politics" that I want to rescue from Luhmann's treatment of the political system, and attempt to ground the "reflexivity" of this notion, possibly in spite of Luhmann, systems-theoretically.

To rebut the "imperialist" claim that everything can be handled politically, Luhmann points to the condition of dispersed episteme that accompanies functional differentiation.<sup>457</sup> Societies, he argues against the republican tradition, have ceased to be politically constituted systems. Expansive politics presupposes a societal apex or centre and this centre has dispersed, today, amongst functionally differentiated, autopoietic systems. Therefore, with no archimedean point left outside sub-systems, there is no vantage point from which that expansive political/societal understanding can be articulated.<sup>458 459</sup> Luhmann maintains that

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many bases for making better use of its possibilities" (Luhmann, 1986a, p48)

<sup>457</sup> It is in this light that we can now assess Luhmann's appeal not to attempt what he calls "de-differentiation". He has shown it to be both unsuccessful and dangerous. Unsuccessful because political demands in divergent political language that does not respect the political system's encodement, cannot, as a result be picked up by the political system (they do not resound). Consequently they appear as simple negation of the political system. In this latter sense they are also dangerous; not because they could actually bring about "de-differentiation", but simply because, as they intensify, they may de-stabilize social structures and lead to societal breakdowns. But could it be also that the claim "do not de-differentiate" is fallible from an "internal point of view". Because how are we to understand the source of this normative claim? As Reiner Grundmann has argued, this threat of societal breakdown can only be perceived by society as its own catastrophe. "Luhmann, the sociologist, seems tempted to take the standpoint of society. But if he were to, he would be attempting something which, according to his theory, is impossible" (1990, p40). Society cannot produce true self-descriptions at the comprehensive level. Every such attempt to articulate a moral or political claim at that level, as a self-reflexion of society, is ideological. Luhmann has himself pulled away any ground from underneath his claim against 'de-differentiation'.

<sup>458</sup> One could query here Luhmann's use of the premise of functional differentiation Luhmann's use of it as an a priori that filters all political argument. The disclaimer that emphasises its contingent nature as well as the critical potential that inheres in that contingency, is unconvincing. It is claimed contingent because historical, an evolutionary phase that may be overcome. What may be overcome is not necessary, therefore challengeable. Yet, when the contingent functional premise is challenged, the

in our present condition of dispersed episteme, the political actor is left with no purchase point from which to articulate an overall political 'logos'. I argue for a political understanding that transcends the means that democratic party-political communication provides for self-reflexion and yet does not seek its purchase point in transcending irreconcilable system differences. I argue for opening up the code, itself, of political communication to political questioning. My approach to Luhmann is thus both critical and internal. Critical because Luhmann discards the possibility of reflexive politics on the basis of answering a different question. Internal because I attempt to ground the possibility of the argument for "reflexive politics" in Luhmann's own writings.

The argument for reflexive politics does not seek to ground political praxis on an intersystemic contact, on any rationality that transcends subrationalities. It is the argument of this thesis that an expansive understanding of politics need not be couched in the potential of such transcendence. Instead, from within the fundamental assumptions of systems theory, a claim can be made to uphold the possibility for such politics. To this effect I will draw on the main theoretical body of systems theory and more precisely on the following as are relevant to politics: (a) on observations and blindspots, (b) on levels of observation, (c) on the notion of the rejection value, (d) on the notion of contingency and (e) on Luhmann's discussion of love in his excellent Liebe als Passion.

The next final section then, seeks to articulate all that has been said so far in this chapter around the notion of reflexive politics, a politics that is reflexive in that it cannot be contained in law's exclusionary language, whose radical contingency is the expression of our freedom as its possibilities are endless because self-referentially determined: what is political and what is politically possible becomes a political question.

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challenge is either buttressed on (system-) logical grounds (the movement can be nothing but unsuccessful in pursuing a demand) and it is deemed socially dangerous or destructive. It is hard to see where the alleged contingency opens up the critical space, unless we are meant to understand it as solely within but not about the functional premise.

<sup>459</sup> A vast amount of critique is focused in answering these conclusions of his, not least because Luhmann's writings owe much of their influence to the reaction they have triggered in the Frankfurt camp. In this confrontation, the antithesis is cast as system/lifeworld, autopoietic closure/ collective rationality: the debate between Luhmann and Habermas can be understood as respectively denying and asserting the possibility of communication occurring across the boundaries of system rationality. Whereas for Habermas, communicative rationality brings together claims from across society, for Luhmann, such a potential is countered by the semantic closure of autopoietic systems.

## IV On Love, Marriage and Politics

Overshadowed by the momentous arguments of the Storrs lectures, Ackerman's analogy between citizenship and marriage has gone almost unnoticed. The extract has attracted little or no attention in the accumulating literature on civic republicanism. The oversight is regrettable. The analogy is ingenious; it fits surprisingly well at various levels of abstraction; it illustrates and familiarises the weighty claims. Indeed Ackerman could not have drawn the symmetry with more insight. However, in its ingenuity lies its danger; it highlights all too convincingly the deep paradox of the civic republican containment thesis, namely that of leaving politics behind in the name of politics.

Imagine, writes Ackerman, a place where the legal institution of marriage was unknown; imagine the couple's agonizing over their decision to live together and their struggle to communicate to themselves and to others the special meanings they attached to their relationship. The legal institution of marriage provides a symbolic medium that "immeasurably enhances the ongoing effort at communication." "It provides a symbolic system which ... can give special meaning to a form of interaction and thereby constitute it as a special kind of community, distinct from the ordinary relations of everyday personal existence." (1984, 1042, my emph.)

This is all that Ackerman says about marriage and he is quick to point out the analogy with politics: "Constitutional dualism provides a similar symbolic system in the public realm." As in the case of marriage, citizenship is a form of community first constituted in law, first constituted as legal. It is constituted in the sharing of a symbolic medium that provides political meanings that allow Americans to see themselves as citizens rather than private individuals (ibid). It is this assimilation of citizenship to marriage as the enhancement of lower-tier politics and 'ordinary personal relations' respectively, through the medium of law, that makes this analogy so fruitful a departure into the impossible dialectic between containment and reflexivity.

### The 'facilitative' side of marriage

That marriage makes a difference is not in dispute. Once institutionalized in this form, the union of the two partners is taken up as such for legal purposes and economic transactions, establishing assumptions of common parenthood, or assumptions behind notions like 'constructive trust', obligations of support (and alimony), re-aligning priorities of

inheritance, succession e t c . I will not dispute this, not so much because it is self-evidently true, but because it is irrelevant to both Ackerman's argument and mine. Both our arguments are about the sense of identity in community that makes a difference. With Ackerman, I will argue that marriage does make such a difference: in providing the partners with a whole new reservoir of possibilities associated with the roles of husband and wife; and in reflecting back to them, in the way of mirror, a picture of what they stand for in their interrelationship that in turn allows them to re-adjust sentiments, assumptions and expectations of behaviour.

We will explore the difference that marriage makes more systematically. What is introduced with institutionalization is a cluster of expectations of behaviour associated with the role of spouse. Ackerman is right that it is a 'new' picture. It is also a rather rigid and inflexible picture. This is not to say that everybody understands marriage in the same way and expects the same things. But to some extent at least the institution functions as a context that sets the parameters of what can be expected of each other within the relationship, establishing core and penumbra and marking out deviations as such. However critically the institution is approached, the forms into which behaviour and role (and the related expectations) are cast and frozen cannot all be challenged at once. Some must be taken on board if only to make sense of what is challenged each time; to map out the critical potential that the institution can release and accommodate.

There is in all this a substantive 'facilitative' potential. The union of the partners does not have to be problematized, appealed to and confirmed at every corner of everyday interaction. Externally, toward third parties, it means that the spouses do not have to act out their love at all times; their decision to be married stands in for that. More importantly, to the partners themselves, it means that every decision that involves them both, from a financial decision to the choice of film they disagree about, does not become a question of the existence of love. Marriage provides an exclusionary reason that prevents this kind of problematisation.

In what follows I will explore how the concept of an exclusionary reason ties into and illuminates the love-marriage dialectic. Furthermore, I will explore how precisely it fulfills the aforementioned 'facilitative' function and what is sacrificed in the process.

Before this can be pursued, the section to follow will take us one step back in the argument, to trace the difference and incompatibility of love and marriage.<sup>460</sup> Indeed the

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<sup>460</sup> My analysis in this section is heavily indebted to N Luhmann's excellent study Liebe als Passion, Frankfurt: Suhrkamp, 1982. Luhmann however does not aim to contra-distinguish love to marriage and is careful to historicise the development of the semantics of love. In that sense my argument does his injustice. I have cited all direct debts, so page references to Luhmann, unless otherwise indicated, are to this work.

argument from exclusionary reasons can only be made if the following two points are first proven:

- a) that love and marriage present the partners with different sets of reasons to act (otherwise the one could not be exclusionary for the other in the first place) and further,
- b) that these sets of reasons are incompatible with one another.

At the outset I need to anticipate a number of very crucial objections as to the approach I intend to take:

i) Not for a moment am I suggesting that love and marriage cannot co-exist or indeed anything on the lines that "marriage kills love." That is why the "experience of marriage" gives us very poor purchase into the contrast that appears in both Ackerman's analogy and my argument; it is undoubtedly the case that the "experience of marriage" is usually informed by love. The counter-position I am suggesting treats marriage and love as symbolic systems both availing languages to talk about the intimate relationship. In contrasting them I am suggesting that they provide incompatible symbolic media in dealing with and communicate about the consolidating community between the partners. I am also arguing that they do not combine into any more comprehensive form and that neither carries the other onto higher ground.

ii) A second objection could be that, unlike Ackerman, I am employing an a priori impoverished concept of marriage. This is not so, I am employing a legal one. In doing so (as is also the case for objection (i) above) I am being true to Ackerman. I am not over-reading the legal premise into his theory premise. He is saying that the legal insitutionalisation of intimacy brings about the difference that makes a difference. It is the entry into the language of law - into marriage in the case of love, into constitutional politics in the case of politics - that Ackerman claims "provides us with the missing language."

iii) Finally it is not the case that I am employing an over-idealised concept of love. It is perfectly true that love crystallises into conventions (see n. 11 below) that remove its romantic edge. However the potential to retrieve that edge and question convention in the name of love suffices to legitimate the special argument I make about love.

### The Incompatibilities of Love and Marriage

In Madame de la Fayette's tribute to love,<sup>461</sup> her heroine the Princesse de Cleves refuses to marry because she has loved too much. That she had loved a man "[qu'elle] a cru si different du reste des hommes, qu[elle se] trouve comme les autres femmes, etant si eloignee de leur ressembler". To protect the unique, unprecedented moment of love from trivialization, she will refuse to be united in marriage. This motive, Luhmann suggests, is a motive of love, and "love finds the motives for decisions in itself, not in marriage. Its claim to complete individualized uniqueness can only be expressed and registered in the extra-ordinary and only in negation, in renunciation." (1982, 124, my trans.)

The example points to a radical divergence between love and marriage.<sup>462</sup> We will trace the incompatibilities by distinguishing for analytical reasons, within each of the settings of love and marriage, areas and operational concepts that can be contrasted. This break-up into more elementary categories is fictitious I hasten to add. Although methodologically useful it is unsatisfactory from one substantive point of view. It does injustice to the discourse of love by severing the interdependence of these areas, an interdependence that is constitutive and at the basis of love's self-referentiality. It is this latter perhaps that throws into sharp relief the difference to marriage, in which these areas are clearly delineated. This however remains to be shown.

1) A first difference can be formulated as a question of attribution. In love, positions of harmony and conflict can be attributed to the person that is loved, in marriage to behaviour or role. Roles are mediating structures that allow conflict to be accommodated at the level of what is expected of one institutionally : 'a husband ought not to behave so', 'mutual trust is the basis of marriage'. Marriage accommodates the attribution of behavior to roles and reproduces expectations that pertain to institutional role. It furnishes positions of conflict and harmony that are institutionally pre-programmed. It attributes action and responsibility to these institutional self-descriptions. On the basis of this it produces expectations, the fulfilment and disappointment of which allows further expectations to be projected, informed by new positions of readjustment of the structures.

No such mediating structures are operative in the relationship of love. Attribution can only be directed to the person, and that means the person as lover. No external measure of

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<sup>461</sup> Madame de la Fayette, *La Princesse de Cleves*, quoted in Luhmann, p124, n5.

<sup>462</sup> Such snapshot accounts of the semantics of love, peculiar to the time and the artistic form, may be thought unsuitable for sweeping generalizations. Luhmann is careful to distance his own exploration of the semantics of intimacy by historicizing his account of the forms and 'cultural norms' by which emotions were felt. I have a legitimate reason for disregarding such subtlety. As Luhmann himself concedes, in the semantics of love today, distinctions and symbols from the past are operationalized anew, re-embedded and radicalized; and in the process, love, as never before, folds into a self-referentiality of its own, uncoupled from any direct control that would dictate the conditions of entering and developing the loving relationship. (1982, p201 and ch 15 passim).

disappointment or fulfilment can be derived from role. Every action of the beloved is judged in terms of its contribution to the enhancement of love and thus every assessment has to take on board the whole disposition of that person; no intermediate level attributions, then, no avoiding the ultimate questions.

2) A second point of divergence is relative to how the relationship is thematised in marriage and love. Marriage operates a cluster of rights, and interests fulfill a double role of being both vested in those rights as well as determining how those rights are to be upheld, weighed or traded. As a legal relationship, marriage can only conceptualize the relationship in terms of those categories. The partners' relationship to one another is understood in those terms. Relative positions are fixed not least by bargaining in the shadow of divorce.<sup>463</sup> Sexuality is thematized into marriage as a right, in the light of the invisibility (until recently in certain jurisdictions) of rape in marriage, or the grounding of a reason for divorce (in certain jurisdictions) in the case of repeated refusal of sexual intercourse. There is enough evidence in all this to avoid going into rights of access to economic finances, right of support and maintenance, rights to and of access to offspring, etc.

The relationship of love is not thematised in a similar way. Interests are nonsensical concepts here or, if we *have* to speak in their terms, it is only by stretching them beyond recognition that we can identify an interest in the enhancement of love. Relative positions are not fixed through interests because sacrifice (of an interest) is conducive to love for the partner performing it; the loss is then a gain as it is conducive to love in love's self-referential cycle. Also, unlike marriage, love allows no bargaining positions under the threat of termination, because such a threat to stop loving is an indication that love has already evaporated, and therefore carries no bargaining power; to take the threat seriously already presupposes accepting that the beloved no longer loves. The terms 'right' and 'interest' lose their co-ordinates and may as well be abandoned, for, in Luhmann's telling phrase, "interests are impossible in love because both one's profits and one's losses are enjoyed". (1982, 83)

3) Proceeding from the premise that identities are not fixed in a transcendental way, but are relational, we can formulate another important difference in the construction of identity in

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<sup>463</sup> There are obvious analogies with "limit situations" in politics (Benhabib, 1994, 17) and constitutional politics (crises of constitutional continuity - see Carl Schmitt here among others - and the question of sedition above) that I have discussed in their own right, outwith this analogy. But the "in the shadow of divorce" argument gives us a fine opportunity to address how the modalities of time vary between reasons advanced from the divorce perspective and those from love. In the first case one argues from the point of view of the future pathology or end as to what constitutes a valid present reason, in the second one argues from the present with a view to a future that is always open, always tending to future expansion. The difference in time modalities can be designated as that between the present/future and the future/present.



marriage and love. In marriage, identity is legal personality, a pivotal point for the attribution of rights and duties and the precondition for operationalising them. The legal relationship is formed along the personality/rights axis, that defines both what can be done in marriage and how the subjects stand towards one another.

In love, relational identity is so cast as to be absorbed into the relationship in a way that uncouples it from any external premise. As Luhmann has argued not only the beloved's action but also the beloved's experience serves as the horizon for the lover's experience and action.<sup>464</sup> The world makes sense to the lover in terms of the beloved's experience of it. This reliance on the partner as the mediator between the self and the world<sup>465</sup> radicalises the relational aspect of the construction of identity in a way that is not true for marriage. Experience of the world means experience in terms of sharing it, and as everything acquires relevance for the person in terms of it enhancing love, identity must be conceived as dynamic, as growing through love.

4) One can extend the analysis of rights to include the incompatibility of love with duty. Whereas the performance of duty is only the flip-side of rights and thus inherent to marriage, nothing could be further from love than to act towards the beloved as one would perform a duty. Also, duties are performed in compliance to rules and love provides none,<sup>466</sup> for it is the relationship itself that places demands, and those demands defy the duty pattern because they can only be identified through love.

Stretching this point further, one can maintain that love cannot be contracted into, even in the form of marriage. Here we have an acute incompatibility. The maxim 'pacta sunt servanda' that imbues the contract with permanence turns love into what it should defy if it is

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<sup>464</sup> Luhmann, 1982, p18, ch2 passim and ps 26ff, 219ff

<sup>465</sup> Of Nadja, Breton says: "Even while I am close to her, I am closer to the things that are close to her" (p104). Nadja herself becomes a sign for shifts of places and things; of Paris where she shifts from quarter to quarter with Breton, and of objects: Nadja's glove, her clothes. What is important is not that these are sites that mediate the intimacy but that they become meaningful through the intimacy they mediate; the world acquires meaning because the beloved inhabits it, and its objects become signs of that love, events increasingly over-invested with meaning as artifices of love.

<sup>466</sup> One can employ a softer term than 'rules' to claim the opposite: that love is full of conventions. Such conventions operate to provide visible indications of love and remove the constant recourse to the deep-level questions. Conventions provide such criteria of 'correct' loving behaviour. However, after the lover has brought the beloved flowers for the fifth consecutive anniversary, the latter may turn and say: "flowers again! you do not love me any more". The convention may be questioned in the name of love. This self-reflexive move on the part of love, its ultimate appeal to itself, shows that the convention holds no power in love, other than a short relief, that breaks down when it is questioned. Normative expectations from rules (the ones operative in marriage) do not 'learn' in this way. It is in view of this, that I have made no references to the operative conventions in love and that is why, therefore, my essay is sociologically so 'thin'. My interest has been to contrast love and marriage at the conceptual ('philosophical') level.

not to vanish: a duty. With this point we are already well within the boundaries of the question of time.

5) Love and marriage operate with different time horizons. Time itself may be abstracted and made uniform, even conceived along a linear pattern, but if we are to give due importance to the social construction of time and the plurality of 'Temporalgestalten' of our society we need to "disconnect time from chronology".<sup>467</sup> In our case we need to seek the time that is particular to love and marriage. Suspended between beginning and end, love controls its own horizon. Love exists only in the 'not yet', ("Die Liebe existiert nur im noch nicht" (1982, 89 0), one can never have loved enough - love lies in that promise of future fulfilment, its actual fulfilment signals its end.<sup>468</sup> This can be expressed in many ways: in systems-theoretical terms it means that love's temporal modality is the present future; if we follow Husserl in his definition of the horizon as that which is never touched, never surpassed but helps define a situation, love is its own horizon. Love punctuates its time<sup>469</sup> and controls its time; what shows the latter to be especially true is the impossibility of binding love in the time-span of marriage. By its very nature, love exists as the possibility of its enhancement and exposes itself to its own corrosion. Binding it externally, attempting to institutionalise permanence, achieves nothing but a semblance of permanence which is intolerable to love. Indeed feigning permanence becomes itself a criterion for distinguishing between true and false love.

6) Marriage is about imbuing the relationship with permanence, countering the instability of love. At the risk of simplifying things slightly, one can say that to some extent marriage is based on repetition, unchangeability, and thematizes change as a disturbance, a threat that must be overcome and restored.

On the other hand, love thrives on change, its existence over time is dynamic it requires "die Formen zu wechseln und immer Neues zu verzehren",<sup>470</sup> (1982, 90-1). Its

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<sup>467</sup> In 1976, p135. For more on N Luhmann's analysis of time see 1980, ps 235-300, and his chapter 'Struktur und Zeit' in 1984, ps 377-488. Note the proximity of this approach to time, with Castoriadis' collapse of time into its future horizon: 'a etre'. 'Time is', he says, in the sense of it 'being towards'. (1975, ps293ff)

<sup>468</sup> This gives love its specifically episodic character, in the systems-theoretical sense of episodic - as something that prepares for its own end, as Sean Smith notes in his 'The Complexities of Complex Equality', (unpublished MS)

<sup>469</sup> In Nadja for example, very little ostensibly happens, sometimes nothing at all, yet the lover-narrator continuously brings events to our attention, momentous events capable of changing his life. These events only come about as he over-invests what happens with meaning. Without love there would have been no punctuation of the continuum, nothing to break or interrupt the flanerie in Paris or the early morning (non-)happenings at the Quai aux Fleurs (in L'Amour Fou) (See also the brute/institutional fact "ontological" discussion earlier on what is "carved out" as occurrence)

<sup>470</sup> "to change forms, and always to consume something new"

structures project enhancement, intensification. In contrast to marriage, immobility is likely to be thematized as indifference, repetition as reluctance to unfold love further, to exceed the limit, which in turn signals the absence of love. Because "staying is nowhere."<sup>471</sup>

7) Similarly, spontaneity and chance play a very different role in love and marriage. In one sense chance radicalises the improbabilities on which love relied; introducing chance into what sparks off, maintains and diminishes love, folds love back into an ultimate self-referentiality: no causal input from social structures, no dependence whatsoever on the outside.<sup>472</sup> There is no reason to love other than that one loves, no reason such as position or wealth can account for its birth and maintenance, no reason for its evaporation other than that one does not love any more. Love's self-referentiality is radicalised through chance<sup>473</sup> and expressed in spontaneity: love's expression cannot be pre-programmed because it would not be true to the sharing of the moment - spontaneity lies in verbalising and acting out the improbable that is sparked off in the intensity of the intercourse and is true to the extent that it is not premeditated.

Marriage, on the other hand, firmly located in the legal system, uses structures to play down chance and envisages contingency in specific ways. It projects expectations of behaviour conducive to its self-descriptions (its operative categories of legal personality) and modifies them only to reach a new state of order, to which new deviations will again be disturbances. In brief, the institution of marriage cannot accommodate chance and spontaneity but must continuously translate them into what are its own possibilities of perception and movement.

I have gone to some length to illustrate the difference and incompatibility of the mappings of intimacy provided by love and marriage. Systems theory can give us new purchase to the question of incompatibility. Intimacy between two partners is structurally

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<sup>471</sup> "Wie der Pfeil die Sehne besteht, um gesammelt im Absprung  
mehr zu sein als er selbst. Denn Bleiben ist nirgends"  
Rilke, Duineser Elegien, 8

<sup>472</sup> It was pointed out to me by David Garland that it is not chance that lovers attribute their relationship to but fate, making accidents appear as necessities, coincidences as destiny, as events pre-programmed by fate. This is indeed a striking feature of the semantics of love. In Luhmann's analysis, the closure through chance of love that made it 'absolute in and of itself (in sich selbst verabsolutiert)' created the paradoxical reference to chance as "necessity,... as fate, or even ... as freedom of the will" (1982, p181)

<sup>473</sup> This openness to risk is most prominent in Nadja. The submission of love to risk, to danger or to endless possibility, (or to both as in the book's final chapter's footnoted incident), is elevated here to nothing less than the condition of a love that is because it is in risk, a love that - as always tentative (never yet accomplished) - demands more risk, and love that absorbs all risk by defining what risk means self-referentially.

coupled into both the systems of law and love. However what this means for either of the systems is radically different. In each case intimacy is subjected to the difference that makes a difference: for law its relevance to legal and illegal action, to love its relevance to enhancing/not-enhancing love. This means that love instills occurrences of communication between the partners with information value (as signs of love) on the basis of its own distinction, geared by structures which determine what and under what terms is assigned to what part of the distinction. The same is true of law. Here too we have structures (conditional and goal programs) and values that decide what registers as information as well as how this information contributes to deeming something legal or illegal. Marriage should be understood at this level of programming of the legal system. The closure of the discourse around its code accounts for the incompatibility of the mappings of intimacy from love and law.

I hasten to add that the list is indicative of areas of difference, not exhaustive; it could be extended to include differences in the construction of motive, justification, etc. With Ackerman, I reject a weaker reading of his analogy to the effect that the semantics of love and marriage do not offer different answers to (a) how the partners understand their relationship, (b) how the partners understand themselves through their relationship. Too many highly differentiated assumptions are employed for this to be true (above 1-7) and these assumptions work at the deep level of the constitution of identity, each projecting a form of community that allows identity to be shaped in specific and incompatible ways.

But Ackerman argues that marriage enhances love's potential, whereas I would like to argue that it hedges it in and impoverishes it.

I intend to pick up Ackerman's argument again at this point, to show why this is the case, so I must reiterate its main thrust: he is saying that law provides us with the missing language, the missing symbols that will accommodate a heightened form of intimacy and community. In a sense he is reversing Bourdieu's argument, that "le champ juridique contribue au maintien de l'ordre symbolique"; instead of 'symbolic violence' in the legal discourse's channeling effect,<sup>474</sup> he sees symbolic empowerment. I will argue that he can only say that because he cannot see the exclusionary function of law. This is the argument of the next, final, section on love and marriage that draws threads from previous sections to construct an argument that has been so far made only in smaller ways. To summarise: I have attempted to show that marriage and love present (i) different and (ii) incompatible mappings of the intimate relationship. I will now (iii) advance the argument about the exclusionary function of marriage and (iv) show that this function is latent and what results this latency has. I will conclude with an argument against Ackerman's optimistic view of the institutionalization of community and extend it in the next section from intimacy to politics.

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<sup>474</sup> Legal reason constituting the "forme par excellence de la violence symbolique legitime" in Bourdieu, 1986, p3

### Exclusionary Reasons and the Community of Marriage

As we have already seen the definition of an exclusionary reason is that it provides a (formal) reason for not acting on the basis of a (substantive, first-order) reason. What is the relevance of this for love and marriage? Due to the incompatibility of how the intimate relationship is envisaged by the two, one mapping can only be employed at the expense of the other. Entrenched at the formal level, reasons pertaining to rules and roles of marriage become divorced from reasons of love. On the exclusionary platform marriage presents its own exclusionary balance of reasons. Love no longer resounds here. To read and debate a relationship in terms of marriage works to occlude what can be said about it in terms of love. We have traced their incompatibility in their formative assumptions regarding identity, attribution, modes of action, time, change, the role of chance, spontaneity and order in each. Every reason from marriage is exclusionary to a reason from love. In the overall picture, this means that the balance of reasons informed by love is replaced - by kind, not weight - by a balance of reasons informed by marriage and ultimately, thus, sanctioned by law. The exclusionary function consists in this then: what brings one set of assumptions to the fore at the same time submerges the other.

Atiyah, as we saw, used the love/marriage schema too. Substantive reasons for action are temporarily, says Atiyah, "frozen" into formal rules that facilitate decision-making. But should these formal rules cease to mirror their underlying substantive reasons, they will be revised in the light of the latter. That was, for Atiyah, the dialectic between formal and substantive as expressed in marriage.

My objection to this was that no signal could ever pierce the exclusionary veil to make the reason for revision of the exclusionary function felt. This was my revisability argument. We can see what this means exactly now: how will I know that I need to rethink and revise my formal interest as a spouse? According to the logic of Atiyah (Schauer and Bankowski) I will do it by suspending my role as a spouse - its exclusionary logic - and looking back to love, to see whether love dictates sticking to the exclusionary reason or not. But this is impossible for two reasons. Because as spouse I may never perceive my interests threatened because love does not make its failures known in a way that is seen to affect interests; interests are nonsensical concepts in love. And because suspending the role even temporarily - looking behind marriage to love - involves suspending also the very language of marriage and its language interests, duties, rights, motives and so on, the very language, that is, in which a failure would have registered and in terms of which it is a failure. From the formal position of a specific role, one operates in a world that is exclusionary because as role-taker

the spouse not only sees what s/he sees but also cannot see that s/he cannot see what s/he could have seen as lover.

Cast in the vocabulary of exclusionary reasons, both what is gained and what is lost by employing the "symbolic system" of marriage can be described more precisely.

As to the 'facilitative' side first: it is couched in the exclusionary function - not every decision relevant to the relationship has to be problematized on the basis of the relationship of love; not everything has to be either informed by the latter or refer back to the latter. Marriage projects in place of the excluded, its own balance of reasons particular to the institution, associated with expectations of behaviour pertaining to role. As was pointed out above, every reason from role or duty, pertaining to marriage, is exclusionary of a reason from love. What performance is reasonably expected from spouses? This question acquires primacy in marriage and marginalises all others. And externally, towards third parties, conforming to this set of reasons removes from the spouse the burden to prove that s/he is acting out of love.

Marriage is about creating secure expectations in intimate relationships; its function to inject some measure of security into love's inherent instability. In what sense this is achieved has already been mentioned; it prevents every trivial disagreement within the marital exchange from turning into a question that engages the foundations of love. The facilitation here lies in unburdening the partners from the anxiety that their love is always at stake, or the complexity that would result from their tracing every slightest motive back to love (the complexity, more accurately of involving the world in every move). The foundations 'need not be thought about',<sup>475</sup> because marriage provides for middle-range, exclusionary, reasons for not making recourse to the reasons from love. One can pick at random from the list of alternatives that was previously analysed. Expectations from role replace expectations from the beloved. Not everything has to be thematized on the enhancement/corrosion axis of Love, but can be less painfully attributed to expectations from role and performance of duty. Love's unfulfilled nature and the instability that comes from its need to develop by devouring new forms can be replaced by stability that stems from fulfilment of expectations from role. Even the lover's burden of being spontaneous, of always having to seek the new, is reduced. Unlike love with its dynamic nature, marriage does not stagnate at the absence of change. Instead, repetition creates order and allows only diversions from the pattern to appear as disturbances that register as risks. Here we have a complete reversal, for what could be more abhorrent to the lovers than the existence of such order that signals the end of spontaneity?

What is given up is the flip-side of what is gained; this is the sacrifice that the exclusionary function calls for. In the absence of exclusionary reasons no verification external to the relationship of love, no pretence of middle-range reasons could stand in the way of

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<sup>475</sup> See Bankowski, 1993

constant and deep re-evaluation of the relationship. The institution places a wooden hand on love. It denies love the freedom to refer to everything, to problematize everything and to refer everything back to itself. Semblances of marital stability prevent thematizing possible stagnation at the level of love. The replacement of reasons from love with middle-range reasons from role may unburden anxiety, but for the partner who loves such recourse on the part of the beloved may become intolerable. It may even serve to increase complexity if the recourse to exclusionary reasons from role on the part of the beloved, is evaluated by the lover as hesitation to act from reasons from love.

The provision of a different - formal - level at which intimacy may be semanticized in marriage, at the expense of love's semantics of intimacy, has been shown to be exclusionary to the latter. In the new balance of reasons that furnishes the partners' positions there are considerations that need not be referred back to, reasons for action that are overruled (more accurately displaced or outweighed by kind); falling back on them may even become suspect from the vantage point of marriage. What is overruled need not be thought about. When should not thinking about it yield to thinking about it? The question cannot be asked. That was my earlier argument about the revisability of exclusionary reasons: the excluded reasons cannot pierce the exclusionary veil. The argument about reflexivity proceeds on the premise that there is great value in thinking through what "need not be thought about". Ackerman's analogy is important in highlighting how the republican containment thesis has lost sight of this, and how it imposes this loss in insight, this loss in reflexivity, onto politics.

My final point is that this function remains latent, in that marriage presents its semantics, its codifications, descriptions and structures to make sense of the fluidity of love as necessary. The existence of a different semantics and their appropriateness never becomes a problem for law, because it does not possess the reflexive structure to accommodate such questions. The exclusionary reason stands in for the reasons that fall within its ambit and moreover prevents recourse to them. By presenting its own codification as necessary, law downplays its contingency, and thus its exclusion of a competing codification of love is never accounted for.<sup>476</sup>

A great deal more can be said about what is distorted and sacrificed in the presence of the exclusionary reason. I will abandon this inquiry at this point because enough has been said to set the focal question in context. It is the question whether marriage enhances community between the lovers. This is the driving force of Ackerman's argument as he conceives of marriage as first "giving meaning to a special form of interaction", as the moment of

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<sup>476</sup> Only an observer outside the system (second-order observation) can account for the contingency of this first-order observation (see Foerster, Heinz von, 1981)

transcending "everyday ... ordinary ... existence", into which he collapses ordinary love, and of "thereby constituting a special kind of community". My question to Ackerman is whether what was given up as ordinary love, excluded by what is now meaningful as community in the semantics of marriage, does not in fact contain the essence of what was being sought.

Why? We have already seen that love brings everything to bear on its own horizon. Everything is thematized according to what it contributes to love. Nothing is taken up a priori, not the nature of the bond, not the existence of the bond. The very nature of love, that of problematizing everything against its horizon, precludes all a prioris.<sup>477</sup> Love is uncovered, instantiated, rediscovered in every question, every moment of 'ordinary' interaction. On the contrary, marriage is about blocking this continual reference back to the source. It provides institutional symbols that can be checked against institutional assumptions, inhering in its structures and programs. In this sense, marriage is about introducing a prioris, introducing reasons 'not to think about it'. Bearing in mind that love and marriage both semanticize, ie give meaning and substance to the bond between the partners, and therefore both make sense of what it means for them to be-in-community, Ackerman must face the question, Which semantics will best do the job? He opts for marriage as the moment that empowers the bond. The trouble is that marriage prevents recourse to the deep interpretative ground and the bringing to bear of the world on the interpretative question of the existence of community. This is because marriage does not have the means to inquire into this deep premise of the existence of community; the latter's existence works as a pre-condition for the development of the semantics of marriage, and in that it is a blindspot. The structures of those semantics can only ask questions about fulfilment or disappointment of expectations from roles, as if the answers to this always-already settle the question of love and community founded on love. Marriage provides answers in the name of love, and in that "as if" we see the story of duplication played out again, as we saw it played out in conflict previously. And as we said there, what is duplicated is not contained. But here in love, (as in politics below) there is more at stake than duplication. Because what the containment in law displaces are those very interpretative questions that turn love (like politics) reflexive: turn them upon themselves to ask what they are really about in a way that at once challenges and realises them. But by inserting law as empowering that which love like politics are uniquely suited for, Ackerman displaces the interpretative questions with exclusionary ones. His analysis takes on board community as an a priori by removing from community (love) the ultimate question of what community is (what does love entail); by removing the understanding of what is love, from love. This is how Ackerman creates a paradox for himself in his appeal to marriage as an enhanced community of love: 'leave love behind in the name of love'. Unlike a paradox that

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<sup>477</sup> Except one that is; that not everything needs to be thus problematized. Each system, Luhmann tells us, confers exclusivity to its own claim to reality.



can be creatively unfolded, this is an oxymoron.

### Back to Politics

In a strange way I have been talking about politics all along. This is due to no small measure to the power of Ackerman's analogy that draws the symmetry between marriage and citizenship with such precision. I trust that the connections with the analysis of love are obvious enough. All I have said can be carried into this context if the terms are changed: spouse for citizen, marriage for citizenship, love for politics. Then Ackerman's 'ordinary politics' like ordinary love, and 'constitutional politics' like marriage will be seen to avail (i) different, (ii) incompatible and (iii) exclusionary templates for 'semanticizing' the political and the quest for community. In politics, as in love, my intention is to turn Ackerman's example against him, in order to show that what he celebrates as emancipating in fact impoverishes by channelling politics and occluding its possibilities.

As in the case of marriage, Ackerman's constitutional politics purports a transcendence of ordinary politics by offering us the language of law. Again, this is, ultimately, an argument about the enhancement of community. The constitutive moment for the community is, again, envisaged in crossing the threshold into institutionalization. Ackerman is right in claiming, as he did for marriage, that constitutional politics provides us with a language that will furnish a debate, confrontation and eventually, definition of our political identities (1984, 1072). The trouble is that it is an exclusionary 'language' and its danger lies in that it cannot account for its exclusionary function. The conceptual arsenal is not innocent. It is charged with assumptions of identity and of forms of action that can accommodate that identity. Constitutional politics avails a cluster of categories to make politics possible, and there are other different, incompatible templates excluded. As is the case in marriage, in constitutional law too there are forms of action that pertain to roles. Their containment at that level is evidenced particularly when limits of rights are allegedly transcended and thus expectations from institutional structures are stretched. The 'freedoms' in the Constitutions are such structures, and instances of speech, protest, privacy, equality of protection cannot escape that containment in those structures, not least by being characterized as instances from a pool of such exclusive alternatives (of 'this and not another right'). We have learnt from the New Social Movements, especially feminism, the coercion that inheres in forcing social action into this template, of universalizing social problems and practices through these categories (see ch 3 above). What I am saying is that whatever answer we may want to give to this question, we must confront it as a political question against the horizon of community and we are prevented from seeing it as such if we take on board citizenship as

already containing the answer to community. If we take it on board as exclusionary context it circumscribes our possibilities of vision. But the civic republicans are happy to live with this impoverishment of the 'political', because they are all too busy waving the flag for institutions.<sup>478</sup> They consequently don't see that and while these possibilities of vision are pre-programmed at the level of structure, the limits of those conditioning structures are not visible. What other forms of assuming identity and pursuing politics are occluded from the legal screen cannot be accounted for. The exclusion remains latent, "not thinking about it" becomes unyielding. This is the emasculatory effect that Ackerman cannot see. Why emasculatory? Because the essence of politics lies in the freedom not only to contest issues but also to contest the terms in which these issues are contested. This means essentially the freedom to expose the necessary as contingent, which in this context means, to uncover the latent exclusionary function that lies in universalising politics through categories like citizenship.

The argument carries through to the republican aspiration to contain community in law. Like marriage, citizenship takes community on board as an a priori. For the republicans community is there by virtue of the State that circumferes political space. This circumference also provides the exclusionary reason for 'not thinking about it', in the interpretative way, for giving up politicisation of the question. Civic republicanism, by relying on an empowered citizenship, already smuggles community into its premise only to retrieve it at the end of a long course of rhetorical exaggeration. If community is always already in citizenship, we, as citizens, have already taken on board the existence and nature of the communal bond. But the civic republican identification of community with national citizenry is external, not interpretative and therefore not political.<sup>479</sup>

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<sup>478</sup> It is interesting to contrast Ackerman's zealous celebration of the moment of constitutional politics which "invests a certain aspect of the personality [of private citizens] with heightened significance", as they "say to one another 'This time, we really mean it!'" (1984, 1041), with Luhmann's more cautious approach to the function of public opinion (in 1990, chs 2 & 8.) According to Luhmann, public opinion operates as a mirror for the political system, providing answers (affirmation or disappointment) to expectations projected by it. Ackerman's constitutional moments of popular mobilization are for Luhmann occasions when societal noise forces a variation in the pattern of expectations to be projected, and assures in this way a return to Order.

<sup>479</sup> I am not of course saying that the self-description of community can never assume the national description. We have ample evidence of the power of nationalism to provide the site for communal identity. It may even be the case that recently nationalism has been providing the entry point 'par excellence' into the public sphere. This means that the communal narrative crystallizes around national descriptions that absorb other distinctions that might have informed identity, e.g. class, race or gender distinctions, generation gaps etc. All this is conducive to my argument as long as nationalism remains an operative self-description internal to the community, which means a) that it is not externally imposed through law onto all subjects that fulfill the requirements of the legal title 'citizen', and b) that it is limited to the people that find it an adequate description of their being-in-community. To be political the self-description must remain interpretative, which means leaving open the question of which difference makes the difference to the shaping of identity.

In citizenship, as in marriage, community is institutionally brought into existence and the question whether it exists, the task of retrieving it in an interpretative way at every step is left behind. In its continuous questioning of its fulfilment, love substantiated the communal bond, fed questions that constantly brought community to self-conscious realization. One cannot sever the intimate dialectic between community and love as one cannot sever it between community and politics by imposing law as the mediator. If one is to give politics due significance by bringing everything to bear on politics (in the manner outlined previously), one has to take the ultimate step back and ask the real question about community: locate in community the understanding of what constitutes community. Radicalising the question in this way, releasing the variables from legally fixed positions, will create a shifting pattern of communities constellating around understandings that, for the time, seem adequate to hold together people-in-community. To politicize the question of community is an act of faith in freedom and instability is a small price to pay.

To reiterate:

1) Constitutional politics envisages an ultimate link between political identity and legal capacity in the form of citizenship. Other ways of asking political questions, assuming identity, assuming positions of conflict (e.g. class conflict), are precluded at this junction of identity and institution. The cluster of legal categories prescribing the possible form of political expectations, motives, justifications, roles, conflictual patterns, stakes etc precludes other templates for asking the same questions. These political templates are precluded at the exclusionary level, not contained.

2) The exclusionary function operates to keep the precluded possibilities latent. It tells us not to think about alternative forms of politics. It prevents a reflexive structure from coming about that would allow what was submerged to surface. The legal concepts for pursuing politics are vested with a kind of (false) necessity. There is a direct line that runs from the exclusionary function (through preserving latency) to the ideological function. Ideology circumscribes political imagination by presenting false necessities.

If politics is understood at the most abstract level as reflexive, as the possibility to question everything against a horizon of other possibilities, then the republican concentration on citizenship as the only outlet of the political can only be political emasculation. Why? Because every exclusionary form, by precluding alternatives and blocking interpretative questions, is a negation of political possibility.

My purpose in this final chapter has been to suggest elements of a theory of politics,

in a way that makes reflexivity its defining feature. My discussion of love above was aimed at tapping the seam of a reflexivity trapped and depleted by legal institutionalization. The reason why a discussion of love is so appropriate here is because both politics and love pivot on the reflexive moment or, what amounts to the same thing in this case, are totally self-referential. Only by loving can one know love's demands; what is politics is always politically contestable.

In the second section of this chapter I attempted to extract elements of reflexive politics from a number of theorists. What I will try to do is to integrate certain of those insights, and by drawing once again primarily from Luhmann, build upon this discussion of love in order to tentatively bring a theory of reflexive politics "to sentence".<sup>480</sup>

My thesis is that a truly emancipatory concept of politics pivots on the reflexive potential that would allow any exclusion to be reflected. The difficult question, as we shall see, is what makes this pivot possible? But I have little doubt that to do politics justice we must conceive of it at this, most abstract level; any step towards the concrete must then be thought of as the embracing of a political option, a form. If we do not accede to this we are conspiring to the poverty of politics. And we will have to invent a different word to refer back to the more abstract category that was hedged in when we decided to define politics as "this and not that", to refer back, that is, to the projected unity that made this distinction possible because meaningful. Any other tentative definition of politics that does not embrace this self-reflection cannot logically exhaust what politics is about, however broad that definition, be that participating in power, the totality of actions undertaken with a view to determining the future of society (Unger), or the conflictual self-reproduction of society (Touraine).<sup>481</sup> Because in each case it is a perfectly legitimate political question to ask "Why action?", "why participation?", or "why conflictual?" and politically question one definitional option against the background of other possibilities.

My suggestion is to understand politics as incorporating that self-reflexive, self-referential moment of referring everything back to its own possibilities. At this most abstract level politics self-referentially refers everything back to this deep premise (in the way that love self-referentially referred everything back to its own enhancement). Every exclusionary form will then appear as a negation of political possibility, not an enhancement as Ackerman would have us believe.

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<sup>480</sup> The allusion is to Lyotard; see above ch 5 s 2

<sup>481</sup> In ch 4 s 2 we came across a debate over the designation of political speech. Explicitly or implicitly, political, there, alluded to the uses and allocation of governmental power. In Luhmann as we saw, the political was semanticised by the government/opposition distinction. Other broader understandings of the political involve the designation of something as political a) on the basis of the site for action: parliaments, elections etc, b) on the basis of the level of controversy created and c) political as public. (See Maier, 1987) All these definitions are vulnerable to the reflexive question.

Before I take to systems theory one last time to draw theoretical backing for the reflexive thesis, let me discard the sceptic's challenge. Why resort, the sceptic asks, to a definition of politics as reflexive and why is it, in turn, not restrictive to define politics in this way? Why does this definition, as is apparently the case for every definition, not hedge in what can be understood as politics and thus not fall into its own trap?

With the skeptic I have no dispute. To the sceptic I would respond: we are asking the same question; when you ask "why reflexive?" your question too is the reflexive one.

**Contingency as Eigen-value of Politics**  
**[Reflexivity as second-order Observation]**

In Luhmann's discussion of the political system, democracy as foil for the guiding distinction allowed for the system's self-observation. The scope of political variability was thereby delimited, the scope of what could change "arrested" in that depiction. This means more than that the system sanctions a certain order of affairs. What is at stake here is meaning, the possibility that something registers as politically meaningful. For Luhmann, the Government/Opposition distinction opens up the contingency space in politics in the sense of delimiting what can be done politically in terms of operations. In terms of observation it allows not simply an understanding of how things are but also a glimpse of how things could be different (the opposition could come to power). It is in that limiting way that the conceptual space of political possibility is semanticised. In the mirror that democracy holds up to observe itself, it sees itself by setting itself in context, i.e. by seeing "over its shoulder" its other-reference. What it cannot see is that it is holding up the mirror, the act itself of self-observation.

But an observer can shift to a level where the political system's act of self-observation can in turn be observed. Luhmann calls this observation of observation a second-order observation. A different system now sees the initial, observing system and its environment. It is crucial for second-order observation that the observed is itself an observer.<sup>482</sup> This "system that observes other systems has other possibilities." (1986e 23) "It can observe the horizons of the observed system so that what they exclude becomes evident." (ibid). "[I]n this way," says Luhmann, "an observer can see that the observed system cannot see that it is unable to see what it cannot see. This insight marks the real epistemic gain second-order cybernetics has to offer." (1990a 139)

What this means is that the political system's self-observation can in turn be set in context. At this level the parameters of that observation may be problematized. In (1990a) Luhmann reserves this task for political theory.<sup>483</sup> With the initial distinction the discourse

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<sup>482</sup> See (1991a 225-6) Systems, that is, perceive each other all the time without automatically becoming second-order observers. They only become that when what one system - say law - thematises another's - say the economy - way of observing, say people as profit maximizers. It is obvious in this context why theory is the second-order observer par excellence.

<sup>483</sup> The role that Luhmann reserves for political theory is relevant to the performance of the political system. A social subsystem can be seen in relation to itself, to other sub-systems and to society. The latter two relations can be seen in terms of performance and function respectively. The function of the political system is the production of collectively binding decisions (1990a, pp73ff). Performance is the attribution of binding decisions to other subsystems where they require them. To this end the political system employs its means, particularly law. Problems of performance appear as "juridification".

was structured, the political system semanticised. The meta-language of theory involves stepping back from the initial distinction and in turn setting that in the context of a further distinction. "One can distinguish the very distinction that one had begun with and use it to generate theory." (1990a 168) Reflection involves reflecting also on the distinction that set the coordinates of what was meaningful to the system. What constituted a blindspot for the system can now be observed at the meta-level of theory. As second-order observation, political theory can now inquire into what was meaningful to the self-observing system and what was invisible to that self-observation. At this level latent possibilities may be uncovered that the system's operative difference could not bring to light.<sup>484</sup> This does not mean that second-order observation introduces the archimedean point - the view from nowhere. Luhmann stresses that "second-order observation is not objectively better knowledge but only a different knowledge." (1986e 25) Moreover, it is a basic assumption of systems' theory that the system's cognition is based on a (guiding) distinction that the system cannot at once operate and query. The distinction opens up the system's conceptual space but at the same time constitutes its blindspot. Blindspots cannot be avoided at any level of observation. However at the second level (political theory) the distinction that opens up first level observation (political system) can be observed. On the basis of the political system's blindspot, a query can be articulated at the level of theory over the terms of self-observation, the terms of inclusion and exclusion of politically significant communication. My suggestion is to locate the possibility of reflexive politics on the premise that every political conceptualisation can be recast from the point of view of a different difference.<sup>485</sup> That,

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Juridification and the regulatory crisis of the welfare state is a theme that has attracted great attention in current social and legal theory. Habermas, for example, treats it as a case of colonization, whereby fora of community are shot through by regulation and control, substituting communicative for instrumental rationality. For Luhmann the problem presents itself as one of performance of the legal system. The Welfare State continuously expands to include new themes and treat new problems that arise in the family, at work, at school. Problems that occur in other sub-systems are automatically delegated to the Welfare State as political problems, not least through demands for welfare returns. But "the political system's possibilities of planning and acting are inadequate for such a broadly extended area of demands" (p102). Regulatory crises thus arise as the political system employs its medium, law, to effectuate the Welfare State and overloads its medium's natural capacity to perform that function. In other words, regulatory crises appear when the limits of what can be handled adequately by law are overstepped. Political theory is then introduced at a meta-level of the political system in order to enable it to reflect on exactly the question of its limits. The question to be answered would then specifically be, what themes should be taken up as problems of the political system (problematized as such) and what themes should be pushed back to other social contexts/sub-systems. Political theory is thus introduced by Luhmann to control the (Welfare State) explosion of politicisable themes by reflecting on where the threshold of politicised themes should be set.

<sup>484</sup> "If a system is able to discover new "inviolable levels" that serve to deparadoxise its identity, semantic systems deemed necessary may become contingent." (1990a 138-9)

<sup>485</sup> Luhmann ascribes the contingency of the social world to his discussion of functional differentiation. Functionally induced reductions of social complexity compete as contingency. Luhmann says : "die Universalität der Kontingenz an die Spezifikation der Funktionssysteme

therefore, political conflict that is "preprogrammed by the contrast set of the political code" can now be politicized. I suggest this contingency of possible departures as the founding principle of reflexive politics.<sup>486 487</sup>

My main suggestion for a foundation of reflexive politics lies thus in exploiting the possibilities of second-order observation; leaving open the question of which difference makes a difference in politics is a most decisive step in the direction of reflexivity.<sup>488</sup> This approach involves the possibility to challenge the guiding difference of the political system. The question thus turns on the 'criteriality' of the political code, on the appropriateness of the specific encodement of the political discourse; in that sense Luhmann's concept of a 'rejection value' is crucially relevant here.<sup>489</sup> To put it briefly, a rejection value is a third value that can

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gebunden ist." And "In diesem Sinne ist das Beobachten zweiter Ordnung mit seiner Semantik, seinen Eigenwerten der Kontingenz, methodologisch gesprochen, eine Intervenierende Variable, die erklärt, dass die Gesellschaft in eine an Funktionen orientierter Differenzierungsform übergehen kann." (1992a, 114, 119)

<sup>486</sup> Luhmann defines as contingent that which is neither impossible nor necessary 1984, 152. For the problems of defining the term through two negations, see 1992a pp96ff.

<sup>487</sup> In a previous paper (1991) I had attempted to establish a connection between first and second-observation, such as would allow the political system (first-order) to "learn from political theory. How was political theory to 'resonate' at the level of the political system?

"Whether we remember it or not", Luhmann assures us, it has been done before. Theoretical concepts such as the "Constitutional State, the Social [Welfare] State have been introduced into the political system with the help of theory". "In this sense the creation of the modern State was accompanied by a political theory that reflected its development, reacted to its problems and offered solutions of a legal or institutonal kind." (1990a, 25). This of course is in line with Luhmann's more general position that codes are more than mere abstractions, and that contexts shift and re-embed guiding distinctions. Political reflection at the meta-level of political theory has, therefore, I argued, been fed into politics before, shifting the political system's capacity to address and thematize political questions. It is called to perform this function again for the Welfare State. Luhmann affirms, I argued, the possibility of this transition from theory to system. In effect, the introduction of this meta-level into politics, I concluded, carries an enabling impetus greater than that acknowledged or intended by Luhmann: it carries a critique into the terms of political discourse.

I hesitate to follow this as a possible - or at least not incompatible with systems-theory- route. On the one hand I think, now, that this connection between levels of observation flies in the face of too much of systems theory. There cannot be an adequate feedback, recursive or not, between levels of observation. On the other hand, Luhmann recently seems to re-affirm the possibility, by treating theory not as a different system, but at the level of system's programming. "The entire system [can] operate at the level of second order observation, and only secondarily is observation of the first order activated once again ..." And "[I]n the case of self-observation of the second order [the observing system] can be the system itself." (1991a, 220, 225). I will leave the question open because given the contingency of guiding distinctions around which worlds of political action build up, a notion of reflexive politics need not seek its internal leverage from such a connection between levels of observation.

<sup>488</sup> In systems theory, contingency is tied to second-order observation. "Alles wird kontingent, wenn das, was beobachtet wird, davon abhängt, wer beobachtet wird" (1992a, 100)

<sup>489</sup> Luhmann takes the concept from G Gunther (See Luhmann, 1986a, sections V, VII and n13). To



be introduced into the system at the level of its code. The rejection value does not negate the values of the binary coding itself (the code is a contrast set anyway) but it negates the need "for the [binary distinction] as the basis of choice". "The very choice is rejected." A rejection value bears on the question of the criteriality of the code and does not itself enter any question of evaluation on the basis of the code. It thus builds a reflexive structure into the system itself, "adapting [ the system ] to being three-valued and giving it the possibility of throwing out its own code" (1986a, 187).

Even if such "reflexive excess" (produced by three-valuedness) is a "logical dream" for the legal system (1986a, 189), it can be well envisaged for the political system. Where for the legal system it would create an unbearable "reflexive excess", for the political system it would significantly enhance its reflexivity, by (re-)introducing a complexity that is selective - a repertoire of possible departures from the assumed guiding difference. It can be maintained that Luhmann himself permits this in his discussion of political theory. When Luhmann brings political theory to bear on the question of the performance of the political system, he is telling the story of the rejection value. Political theory is introduced to ask the question whether a social problem should be taken up politically (or whether it should be pushed off to other sub-systems). This is a specific case of three-valuedness turned into a binary choice through a double decision, the preliminary one carrying the rejection value ("should the political code apply to this problem, or not?"). Only if the rejection value were to be turned into an acceptance value (at the level of theory) would the 'political' question be asked (at the level of system).<sup>490</sup>

There is one problem with subscribing to the rejection value formula in this context. The challenge to settled departures, to the "distinctions assumed in politics" is iconoclastic. The challenge is re-active, the dominant image still holds defiance captive. Applied to describe how people experience political meanings, the rejection-value formula would thus cover only the problematic of a certain form of action (extra-parliamentary) that is specifically directed against the political system, against parliamentary democracy. By bringing the question of alternative politics to bear on rejection or acceptance of the code, it again locates the code at the centre of choice, unable to account for those politics that side-step it entirely. As negation of the rejected encodement of politics, alternative politics

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take a simple example. The use of one system code operates as a rejection value for all other codes. Once a true/false code is opted for, given the incompatibility of encodements, the criteriality of all other codes is precluded. In the above sense, rejection values are congruent with the differentiation of autopoietic systems. Problems begin to arise when the rejection value is introduced not as the privileging of one system coding over another but internally within one and the same system, "adapting it to being three-valued, and giving it the possibility of throwing out its own code" (1986a, p24). Luhmann undertakes a complex analysis of this possibility with regard to the legal system and concludes that rejection values would require a degree of differentiation of levels that is unrealistic in the legal systems of the present day.

<sup>490</sup> Luhmann himself does not connect his discussion of political theory with the rejection value.

on this account preserves the representation space within which the choice is made. Luhmann allows this bias to become the founding principle of protest,<sup>491</sup> and does not see that all resistance is not by opposition but also by difference.

A reflexive understanding of politics, I argued, involves probing the limits of closure of politics with the help of other significant distinctions. What does this really mean? And, what matters most, how could it translate into a theory of political action that can carry a challenge into the naturelessness and apparent closure with which politics seem vested - a closure which republicanism helps perpetuate by celebrating what is stale as new and what is limiting as empowering.

The political system precipitates action in the sense of marking out what it is possible or expectable<sup>492</sup> to do politically. Human potential for action is organised by the system as the latter defines what are the issues to be pursued, the means to be employed, even the identities to be assumed. These central insights have already been well covered in previous chapters and will not be further explored here.

However, if we take the potential of the radical contingency of politics seriously, new opportunities for political action suggest themselves. These opportunities were previously precluded by the encodement of the political system, that defined for itself what was politically at stake. But positions can be assumed in defiance of the system's allocation of political roles and a new freedom for the actor to locate problems and undertake actions can be established. "The distinction [necessary/contingent]," says Luhmann, "can be utilized in such a way that an observation can interpret as artificial and contingent what the system itself assumes to be natural and necessary. For example, an observer may examine how a system creates the impression of its self-determinations being natural, necessary and lacking functional alternatives." (1988a 139) The guiding distinction of politics can be set in context, and new distinctions, articulated at the level of second-order observation can shake received assumptions, inform political understanding and gear political action.

We can test this re-shaping of the political discourse by replacing the Government /Opposition distinction by a different one, e.g. that of dominating/dominated. This would be

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<sup>491</sup> This, his earlier position in (1986e) is tempered in his more recent analysis of protest movements in (1991a). Here he says: "The form of protest remains a form that presupposes the other side that is to react to the protest. The collapse of this difference entails the collapse of the protest." (1991a, 126) To the extent only that this difference refers to "the very institutions from which [the protest] is taking exception" (ibid), the difference again becomes an opposition to the political system itself. In my eyes Luhmann remains ambiguous on this point.

<sup>492</sup> On expectations see ch. 3, s. 1, 2.

re-invoking Carl Schmitt's friend/foe distinction as the ultima ratio of politics.<sup>493</sup> There is evidence that the social problematic of politics has, to an extent, shifted back to such schemata. The old critique of domination may have been displaced but is not redundant.<sup>494</sup> As exploitation assumes new forms and is seen to affect new subjects (the urban subproletariat, immigrant workers, women), new sites of domination have appeared and new forces have risen to counter them.<sup>495</sup> In the process new constituencies become political. Alternative discourses are operative in the political mobilisation of groups whose political understandings are not aligned to that of the political system. Issues became political not because they resonated in the political system and were taken up as regulatory problems; economic growth, corporate control over pricing and investment, the managerial asphyxiating of the labour process, were already politically contested outside the sphere of resonance - the internally constructed sphere - of politics. The definition of value, the reconstruction of language, the commodification of ownership and association in the a-political marketplace, are all tackled politically. The development of multinational corporations has given rise to demands for their democratic control pursued by movements and initiatives outside the nation states. Civic initiatives (in eastern Europe and elsewhere) attempt to restore the public political space both beyond the reach of the state and across state boundaries.<sup>496</sup> New social movements level their challenge to institutional politics. Existing channels of political participation and organisation cannot accommodate their conflicts. Institutional confinement gives way to institutional breakdown that releases political forces. The tension between confinement and breakdown is evidenced in many organisational forms: in trade unions, where, even today, the Confederation Francaise Democratique du Travail entertains an

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<sup>493</sup> C Schmitt, 1976

<sup>494</sup> Luhmann maintains that with the transition from stratification to functional differentiation, the critique of arbitrariness and despotism was made redundant.

<sup>495</sup> "There is a plurality of subjects of resistance, each the product of highly differentiated social processes and exemplifying its own discrete and peculiar rationality. Their opacity and incommensurability is such that there is no privileged position from which their reactions can be predicted and channeled, least of all the institutions of parliamentary democracy. Subterranean political groupings engage in a form of guerrilla warfare against the state ... they become visible only infrequently and unexpectedly, and their relationship to the state is one of 'reciprocal incitation and struggle; less of a face to face confrontation which paralyses both sides than a permanent provocation.' [Foucault]" (Barron, 1990, 122-3)

<sup>496</sup> "The Nation-State has been replaced from above by a tightly interdependent system of transnational relationships and subdivided from below into a multiplicity of partial governments, defined both by their own systems of representation and decision-making and by an ensemble of interwoven organisations which combine inextricably the public and the private" Melucci A (1988, p257)

ambiguous position between class action and reformist action.<sup>497</sup> We encounter it again in the erratic behaviour of radical and 'green' parties in Italy and Germany that, at the outset at least, attempted to reconcile within themselves the radical irreconcilability between movement and institution (exhibited clearly in the confrontation between the reformist and fundamentalist wings of the party). We see the tension most vividly in the "autogestionnaire" currents of the Polish Solidarity movement and their demand for control of the productive process, co-opted tragically by the union itself in the latter's attempt to further what Maurice Glasman has called the West's promise of market Leninism.<sup>498</sup> Groups organise locally, self-help groups are set up. Urban guerillas and anarchists take up violence, their language is political nonetheless. The discourses of all the above re-activate conflicts that remain latent in the political system's registering of conflict. This is a very different kind of politics from that which attempts to bring social problems under the Welfare State umbrella, and it is a weakness of Luhmann's - a most indicative one in fact - to treat these as demands towards the State to "handle everything politically" (1990a, 101).

In an article written some ten years ago,<sup>499</sup> Claus Offe sought to address the question of the expanding boundaries of the political, as was evidenced by the emergence of new political actors and forms of political action. A new paradigm was emerging as these non-institutional collectivities, pursuing aims at the boundaries and margins of the democratic process politicised themes hitherto perceived as part of the natural order of the world, or at least of lacking a political, contestable side. And as the unquestionable became questioned, the boundaries of the political were released to constellate again around new balances and contingencies. It is perhaps paradoxical that in this situation of politics unbound, Offe attempts to fix a definition of political action. He says: "A minimum requirement for employing the word political for a mode of action is that the actor make some explicit claim that the means of action can be recognized as legitimate and the ends of action can become binding for the larger community. Only social movements that share both these characteristics have a political quality ... Two interesting limiting cases, represented by new religious sects and by terrorism, are thus not included." (p69) What justifies this disqualification? "Terrorist groups," continues Offe, "cannot expect their violent means to be recognized as legitimate and rightful by the wider community. On the other hand, their objectives are quite conventionally (if absurdly and unrealistically) political. They consist - to take the aims of,

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<sup>497</sup>Jean-Louis Moynot, confederal secretary of the CGT and member of the communist party, urged in his writings that the party neither ignore nor take over the new social protest but try to push them beyond corporatist formulations. Similar appeals not to stifle the political dynamism of class and autogestionnaire action, were heard by the radical labour lawyers in Germany in the thirties (Fraenkel) and Otto-Kahn Freund in Britain .

<sup>498</sup> See Glasman's excellent (1994)

<sup>499</sup> C Offe (1985)

say, the RAF or the Brigade Rosse - of an anti-imperialist revolutionary war, the outcomes of which would clearly be binding upon the entire community in quite an elementare way" (p70)

The answer to Offe brings us neatly back to the argument for reflexive politics. From this point of view one would begin to argue not for a different distribution of legitimacy between means and ends, but for a politics that includes a debate about that distribution. It is part of the reflexivity argument that distributions like the above cannot remain outside politics. To fix the boundaries of possible politics meta-politically, as Offe does, is itself a silencing of politics.

Obviously activities that defy the encodement of politics at the same time create stimuli and responses to governments and oppositions. Yet such discourse talks past the political system's encodement of the political universe. The political impetus is carried elsewhere, and to attempt to read it all by driving it through the party political system may have Luhmann overtaken by the course of events, left observing a redundant politics. "Resistance to government is actually or potentially everywhere, and yet nowhere in particular," writes Anne Barron (1990, 122, my emph) drawing on Foucault and Deleuze. Is not the "nowhere in particular" a sign of an inability to register resistance? Is the "everywhere and yet nowhere in particular" a sign that the political action under observation is falling through the conceptual net we are employing? Notice the levels of resistance here: the political system itself registers resistance as support for the opposition; introducing the rejection value it acquires the ability to register resistance as iconoclastic, as its own rejection; but we need to be able to account politically for politics that resist both these reductions. Luhmann's account of politics and the normative position that underlies it is very inhibiting here. How are we for instance to understand Luhmann's deeply paradoxical worry "whether [in the face of a rapidly changing political landscape of "reviving regionalism, experimenting with self-help groups etc" ] a function system for politics differentiated as democracy can carry out the process of adjustment when, at the same time, it is its victim"? (1990a, 33) Luhmann's paradoxical question about democracy is whether it can include its own alternatives; he cannot say yes, he must concede the blindspot here. What he is left with, then, is a politics semanticised in spite of the political code. What conclusions are we to draw about the system that while disclosing political possibility can at the same time be superseded politically? There is a logical impasse here and it stems from the way Luhmann describes the encodement of the political system. The only way out of this impasse is to see these competing semantics as themselves the site of political struggle, ie accept as political the struggle over the meaning of politics. This requires systems theory to embrace the reflexivity thesis. Without the guiding assumption of the contingency of possible departures that explains the incommunicability of politics, we cannot perceive what is at stake; only by allowing contingent, mutually cross-cutting and under-cutting, political guiding distinctions

will we be able to understand why political struggle has become this war "without battlelines, with neither confrontation nor retreat, without battles, even: pure strategy" (Deleuze and Guattari 1988, 353).

Luhmann's theory of second-order observation allows us to see how autopoietic theory can account for the very real effects and impact that non-institutional politics carry; how it can account for a political discourse that can be heard in spite of the political system. More than two decades ago, as if anticipating a politics beyond the limits of governmentality, Luhmann wrote that the basic concepts of a discipline that is willing to face up to the assumptions of a contingent world must be able to deal with the problem that "neither concepts nor the world can be treated simply as given ... Their suitability [was to be judged] from the point of view of grasping and reducing the contingency of possible worlds." (1971, 21-2) From the point of view of emancipatory politics it is here that lies the value of systems theory. The assumption of a given or natural state of the world is shaken, replaced by a picture of competing mappings that grasp the world in its radical contingency. And unlike so much of post-modern theory, the acknowledgement of contingency goes hand in hand with an adequate theory of the mechanisms and logics of closure that, as reductions on that vast contingency, compel meaning into specific templates. The acknowledgment of contingency and the theory of systemic reductions allows a theory of politics that can probe the logic of closure and challenge what appears as natural and given because it now has the keys to what closes options and what underlies necessities.

Luhmann's pre-occupation with the contingency of the world resituates politics as lever of social life. His theory of the possibilities of second-order observation and, more generally, the consequent freedom of possible departures is the first step to turning politics reflexive. Of course every departure, as guiding difference, then reduces possibilities and only thus allows for meaning. Every challenge needs to draw a boundary to acquire form and in that hedges in what could be visible as challenge otherwise. A meaningful challenge is always already a reduction. But reflexivity lies in the possibility to step back and question that reduction and the universe it has mapped out. Reflexivity is the switching of levels of observation, the freedom of choice of the guiding distinction. It is the in-built resistance to any external constraint of what is politically possible. In second-order observation inheres the potential to query the casting of the terms of self-observation and to 'de-naturalise' what the system itself perceives as necessary. There inheres the capacity to unlock political discourse from its compulsion into specific forms.<sup>500</sup> To acknowledge that action that sidesteps the institutional paradigm may be as faithful to politics as action that takes it up is. To allow us to

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<sup>500</sup> For a defence of reflexivity as rationalization see Eder, (1993) who alludes to Habermas. Eder writes: "Reduced to its procedural form, the ultimate ground of the rationality of modernity is that we can choose our symbolic orders, that we are not stuck with any one type of rationality, and that we can at any time abandon what we have ceased to accept rationally. (p34)

act on our ability to act. And to celebrate the radical contingency of possible departures as that which is specific and significant to politics, therefore to elevate contingency in the position of the "eigen-value" of politics.<sup>501</sup>

Towards the end of his "Political Theory of the Welfare State" Luhmann asks two "basic questions": "All self-observation depends on the assertion of differences. Events can be experienced and processed as information only on the basis of differences. Therefore the basic questions are: which differences can be assumed in politics and can they be assumed in agreement?" (p105) I aim to do no more than to establish that this is itself a political question. To establish that the choice of difference that opens up political self-observation neither is nor should be a pre-political choice. The nature of politics as reflexive is situated here.

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<sup>501</sup> The allusion is to Luhmann's recent paper "Kontingenz als Eigenwert der modernen Gesellschaft." (In 1992a)

## VI

### Politics 'as Passion'

#### Reflexivity as Self-Reference

If contingency, as it inheres in second-order observation, is the one pillar of reflexive politics, self-reference is the other. It is not surprising that I will seek to establish what it means for politics to be self-referential from within systems-theory; but I will attempt this analysis in a way that is novel in two respects. I will talk about self-reference in a way that makes politics self-referential as only love is. And second, I will treat self-reference not as a limiting condition for politics, as that which underpins its closure, but as the liberating moment, as that which allows its reflexivity. Both these arguments are internally linked and mutually constitutive.

Why is this second step, this theory of self-reference, a necessary complement to what has already been described as significant to reflexive politics, i.e. its contingency? In a nutshell, and I will explain this, it is because if contingency is what underlies reflexivity, reflexivity is what defines politics. I have so far dealt only with the first leg of this assertion. Dealing with the second explains why reflexive politics is not merely an alternative, but a better understanding of politics. This is not to say that this question has not been addressed at all; to treat politics as reflexive allowed us above to capture as what they are, i.e. as political, alternative forms of politics that would otherwise have been invisible. My purpose in adding self-reference as a second step towards a theory of reflexive politics is to elevate reflexivity into the defining feature of politics.

Like love, politics is completely self-referential (this allusion to Liebe als Passion is what justifies the title of this section as "Politics as Passion".) In the section on love and marriage we explored what this self-reference meant. What it means to love someone can only be articulated from the viewpoint of s/he who loves, and in the mirror of what it means not to love. No range of middle-range, formal, exclusionary reasons can relieve the complexity of love, the complexity of referring to everything, and referring everything back to itself. Love brings the world to bear on the interpretative question of its own existence, since reasons only become meaningful against the horizon of what it means to love. Note how interesting this is regarding freedom. Nowhere as much as in love is it as obvious that freedom is something that holds between people. And as love absorbs freedom, for the lover what it means to be free is paradoxically tied to the dependencies that love creates.

An understanding of politics needs to be founded on such a self-reference. Like the question of what is love cannot be removed from love, the question of what is politics cannot



be removed from politics. By being reflexive, politics refers everything back to its own possibilities. Just as love thematises everything on its enhancement/corrosion axis (love's guiding distinction) and thus self-referentially refers everything back to its own enhancement, so does politics. Something acquires meaning politically in that "it could be otherwise". To view something politically is to view the settled in the mirror of the unsettled, it is to view something in the light of its contingency. Because politicising means relativising givens in the light of alternatives. This is self-referential in the way love is in that what gives something its political meaning is its placing against the horizon of the enhancement of politics (like what made something a sign of love was its placing against the horizon of the enhancement of love.) So like love, politics refers everything back to its own potential of enhancement and only thus makes it political. And in this drive to self-enhancement politics propels itself on, bringing the world, increasingly more of it, within the ambit of political possibility. Conversely, every form, every option taken, every reduction made, brackets out alternatives and is thus, in as far as it does not acknowledge itself as artifact, a negation of political possibility.

Another way of stating the self-referentiality of love and politics is by employing the notion of "horizon" and the dialectic between what is conditioned and what is unconditional. As horizon, the unconditional serves to situate the conditioned; at the same time every state of the conditioned alludes to, points to, transcends to the unconditioned. The conditioned becomes meaningful against its horizon, in the mirror of the unconditioned. On the other hand the unconditioned itself, as horizon, can never be determined save as conditioned. The reflexivity of both love and politics need to be seen as expressed in that dialectic between conditioned and unconditioned. What is important is that they need to be defined as the form of the distinction: both sides need to be kept constantly in sight. Love is not the conditioned moment alluding to the unconditional, the finite moment that becomes meaningful in alluding to the infinite. The meaning of love is not captured by the conditioned, enclosed in the modalities of the finite. Love is the distinction itself of the conditioned and the unconditional. Love is its own horizon. Love is meaningful in the mirror of the "not yet" (one can never have loved enough) - its actual fulfilment, its circumscription in the finite, signals its end. Love crystallises in a pattern only by keeping an eye open to the revisability that alone allows it to be alive and flourish. To call "love" the crystallised pattern ignores that what makes it possible as love is that it is at once held and suspended. Politics, too, is the finite and the infinite, the actual and the possible, both at once visible. An actual state of affairs becomes political once it becomes possible otherwise. Reflexive politics actualises both references at once because it sees one state of affairs in the mirror of alternatives and only then deems it political. This constant setting options in further contexts underpins and defines reflexive politics : its only requirement (not vulnerable to the skeptic, as we saw) is that one remains free to contest and that the terms in which one contests remain contestable. The conditioned

and the unconditional are both present in this formulation of politics. Something is political only in the mirror of the existence of alternatives (in the mirror of the "not yet", or rather in the mirror of its revisability); what crystallises as an option in politics is only political in the mirror of alternatives not taken (in the further mirror that the constellation of those sets of alternatives are not fixed, etc.) That is how reflexivity works out its definition of politics through self-reference.

## Conclusion

In an intriguing lecture presented at the 1989 IVR World Congress in Edinburgh, Jan Broekman made a case for the revolutionary. He explained that we could never understand the denunciation of the Law voiced by revolutionaries, because we have lost the means of access to their message. "When we read their texts we are already legal subjects. And we do not know what type of denunciation would have classified and qualified us legally, if we were not readers but revolutionaries. We do not know." (1989, 329) The legal person as 'performative' lends itself to our understanding of the revolutionary in such a way that the revolutionary's text is forever subverted under the legal categories we employ to interpret it. The revolutionary meaning is thus removed from view. As legal persons we could not understand revolutionary action otherwise than from the point of view of its other - Order - which is to say we cannot understand it at all.

Republicanism claims to be a theory about how to contain the political moment in law, and in containing it to empower it. Through systems theory I have attempted to show that this is impossible. I have shown how containment impoverishes the political by inserting a *prioris* at the sites of contestation. And I have shown how it renders invisible what it purports to accommodate. Even as merely a test case, sedition disproves containment; the revolutionary, subversive utterance cannot be captured in law except as seditious, to become, as the law links to the political and purports to "carry" politics, the sign of the abolition of politics as such.

Political praxis, then, cannot remain legal action, but must become symbolic struggle against the very manipulation of its horizon, against the institutional that claims to be meta-political. It must create a rift in the dominant definition of the political, re seize the reflexive power and contest all that presents itself as given, the terms in which the political is fought out, the immunizations and the precluded and repressed possibilities. In all, it must challenge the kind of domination implicit in the legal form and its limits in the way it circumscribes political praxis and freedom.

My suggestion for a reflexive politics pivots on contingency and self-reference. It is a re-statement of politics as freedom. Because contingency is about the freedom to contest what politics is about and self-reference is the freedom to contest the terms in which that question is contested. Nothing can hedge in freedom in the name of politics. Like the distinction between freedom to love and love, that between freedom and politics collapses as it is drawn. Love and politics absorb freedom and elevate it to their constitutive moment. And at the same time they imbue it with those - reflexive - dependencies that establish freedom as a relation

between people, in the intimate and public domain respectively.<sup>502</sup>

Reflexive politics is an invitation to resist the closure that law inflicts on the realm of politics and which prevents its constitutive contingency from surfacing. Republicanism, as a variation on the old theme, renews the attempt to establish law as the centrepiece of politics. But however re-stated, the old is too old. We must resist the forms that hold the social future captive to the social present. We need to politicise and make contestable the present state of politics and we need to act upon our ability to act. No necessity compels us to close politics to the future, and without that closure - to reverse Luhmann's prediction - the future might begin.<sup>503</sup>

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<sup>502</sup> There is another way of integrating the two moments of reflexive politics. The first involved reflexivity as the freedom to choose what politics is about. The second involved reflexivity as self-reference: what politics is about is a political question. Politics absorbs freedom in defining it against - or even as - its horizon: and yet what makes politics possible as self-referential is the freedom that inheres in reflexivity in the first sense, of the contingency of possible departures.

<sup>503</sup> Luhmann, 1976

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