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THE QUEST FOR RADICAL TRANSFORMATION AND THE LIMITS AND LIMITATIONS OF LAW

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CONTENTS

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SUMMARY

At the heart of this thesis lies the urgency of radical transformation. The dawn of constitutionalism in South Africa in 1994 and finally in 1996 is predominantly conceived of as heralding the birth of a new nation and concomitantly the birth of a new South Africa. In this sense constitutionalism in South Africa is regarded as representing a fundamental break with the past characterised by colonialism and apartheid. The idea of a fundamental break with the past correlates with the idea of newness and in South Africa this idea of newness has given rise to a ubiquitous spirit of constitutional optimism. However this constitutional optimism has itself become a terrain of contestation.

The contestation generally relates to how best to interpret and conceive of the Constitution so as to enable the attainment of its objectives. This contestation can roughly be categorised as being between variants of liberal approaches to law and other genres of critique, notably transformative approaches to law. These genres of critique are naturally critical towards liberal formalist/positivist approaches to law.

In this thesis, I impute Christodoulidis's notion of republicanism to all approaches that see in law and constitutionalism the possibility for (radical) transformation. In this sense I argue against legal and constitutional reflexivity. Following a systems theoretical approach, I critique both liberal/formalist/positivist approaches and also genres of critique that optimistically defer the reconstruction and renewal of South Africa through legal and constitutional means. I suggest that because of the inability of systems to steer one another, the suggestion that law can steer the economy and politics is bound to fail. I further suggest that law and constitutionalism, being products of Enlightenment's modernity are more likely to serve the fundamental coordinates of colonialism and apartheid as opposed to the eradication of colonialism and apartheid in all their manifestations.

CHAPTER ONE: INTRODUCTION

1.1. Introduction

The purpose of this thesis is to explore the "limits of law" and accordingly constitutionalism in the attainment of radical transformation in South Africa.[1] The notion of the "limits of law" refers to the idea that the very essence of law as a phenomenon has limits that are structural and systemic. In this sense, and precisely because of these limits, the idea of relying on law and constitutionalism to resolve the legacies of colonialism and apartheid appears suspect. My approach to the notion of constitutionalism is not, borrowing from Karin van Marle, "technicist or legalistic" but rather looks at constitutionalism as a "philosophy of the post-apartheid constitutional ideal."[2] This thesis therefore seeks to explore the relationship between law, constitutionalism and radical transformation and the incapacity thus far of law and constitutionalism to bring about radical transformation in South Africa.

In proximity to the notion of the "limits of the law" is the notion of "the limitations of law". The notion of "the limitations of law" refers to an approach that sees law, notwithstanding its limitations, as having the capacity to transform society. The "limitations of law" approach broadly argues that law, looked at differently from mainstream formalist and positivist understandings, does possess the capacity to bring about transformation. This thesis therefore makes a deliberate distinction between the two notions of the limits and limitations of law by exploring both notions so as to posit that, notwithstanding the important critical contributions the limitations approaches make, perhaps law should fundamentally be seen as having limits as opposed to limitations.

I argue throughout this thesis that the notion of the limits and limitations of law and constitutionalism respectively have not been sufficiently theorised in South African jurisprudence, with a few exceptions.[3] This, I argue, is largely due to the fact that in

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[1] I unpack the notion of radical transformation in Chapter 2.

[2] K van Marle "The Spectacle of Post-Apartheid Constitutionalism" (2007) 16 Griffiths Law Review 412.

[3] Van Marle being one of the notable scholars to have dealt with the notion of the "limits of law" to bring about change, See K van Marle "'Meeting the World Halfway'-The Limits of Legal Transformation" (2004) 16 Florida Journal of International Law & Van Marle (n 2 above); T Madlingozi "The Constitutional Court, Court

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the first instance there has been insufficient theorisation on the capacity of law and constitutionalism to bring about radical transformation, particularly within the context of a country ravaged by centuries of colonialism and apartheid. I suggest that the notion of "the radical" as an epithet to transformation has jurisprudentially received scant attention. Current constitutional arrangements are generally taken for granted as enablers for radical transformation. In this sense the point of departure becomes constitutionalism as opposed to (radical) transformation. In terms of this approach, constitutionalism must give content to (radical) transformation as opposed to (radical) transformation either giving content to constitutionalism[4] or (radical) transformation dictating the type of institutional arrangements best suited to resolve the problems bequeathed by colonialism and apartheid. In this sense, radical transformation is unable to escape constitutional definition, or put differently, radical transformation stands to be legally determined and thus contingent on the interpretative vagaries of judicial determinations.

I suggest that the "incarceration" of radical transformation within the *weltanschauung* of constitutionalism may have the effect of forcefully creating only one form of reality – legal reality. I therefore agree with Van Marle when she states that "the choice of constitutional supremacy underscores law and supports a certain form of legal politics that holds the danger of overtaking politics as a form of resistance."[5] In this sense, ontology becomes legally and constitutionally defined and a "Lyotardian terror" of "censorship and the removal of the position from which to challenge it"[6] is radically inflicted. The notion of radical transformation is also unable to escape this "terror". It is forced to observe itself legally and constitutionally and meet legal relevance for it to register. The "limits of law" and legal reality are thrust upon radical transformation and

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Watchers and the Commons: A Reply to Professor Michelman on Constitutional Dialogue, 'Interpretative Charity' and The Citizenry as Sangomas", Available at: www.constitutionalcourtreview.co.za; S Sibanda (n 182 below); Van der Walt (n 159 below); Botha (n 175 below); Lenta (n 1066 below).

[4] I am conscious of, and agree with Van Marle's notion of "constitutionalism as critique" which she describes as "an approach to the constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general" (K van Marle "Transformative Constitutionalism As/And Critique" (2009) 2 Stellenbosch Law Review 288. In this sense, the point and the end of departure ceases to be the Constitution but constitutionalism itself becomes informed by radical politics, this notwithstanding the fact that from a systems theoretical approach, the constitution and law can only do so much.

[5] Van Marle (note 2 above) 412.

[6] See E Christodoulidis "Litigating Dangerous Politics" (1994) 6 Journal of Human Justice.

I will suggest that this immediately undercuts the radical aspect of transformation, if not the notion of transformation too.

1.2. Research question

Despite the advent of constitutionalism and democratisation more than twenty years ago, South Africa continues to be characterised by a state of perennial bifurcation. This state of perennial bifurcation inheres in the parallel existence of an ostensibly transformative constitution[7] on the one hand and a deeply unequal society characterised by racialised poverty, unemployment and historical injustices on the other. According to the African National Congress' (ANC), which is currently the governing party in the country:

> South Africa represents the most acute manifestation of most of the social fault-lines that define humanity's current challenges: race, class, gender and geographical location. Income inequality and inequitable distribution of assets are at their most intense. Poverty and unparalleled opulence live cheek by jowl.[8]

The South African National Planning Commission Diagnostic Overview (the report) also states that "the historical disadvantages continue to have adverse effect on tens of millions of citizens".[9] The report further alludes to the fact that millions of South Africans continue to suffer exclusion reflected in high levels of poverty and inequality.[10] Widespread poverty and extreme inequality persist[11] despite the fact that the preamble to the South African Constitution (the Constitution) states that the Constitution is adopted: to "heal the divisions of the past, and establish a society based on democratic values, social justice and fundamental human rights." The preamble further states as

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[7] I use the notion of transformative constitutionalism in the same manner as used by Karl Klare (See K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 South African Journal of Human Rights).
[8] Strategy and Tactics of the African National Congress: Discussion Document (2017), Available at: www.anc.org.za
[9] National Planning Commission: Diagnostic Overview (2011) 5, available at:
 http://www.gov.za/sites/www.gov.za/files/npc_diagnostic_overview.pdf
[10] National Planning Commission (n 9 above) 7.
[11] National Planning Commission (n 9 above) 8.

one of its aims the improvement of the quality of life of all its citizens and to free the potential of each person. The question therefore is why is it that despite the ostensibly progressive and normative aspirations contained in the Constitution, the attainment of radical transformation continues to be elusive.

The dominant narrative for the absence of radical transformation is succinctly captured by Thiven Reddy who states that failure to bring about transformation is normally attributed to "a black government that is not providing the requisite leadership and delivery, the heaven it promised."[12] In this sense, what is required to induce (radical) transformation is a bold political leadership that is bereft of corruption and other forms of malfeasance. According to this narrative, the panacea is good governance – good governance as prescribed in the Constitution. The good governance paradigm is also manifest in the ANC's strategy and tactics which makes the following prognosis:

> Addressing the root causes of these social challenges is in the national interest. It requires leadership in a broad front of all social sectors, to give hope through practical action and to galvanise society into active citizenship. The twin impulses of legitimate societal leadership and active citizenry will feed on each other to propel society to greater heights.[13]

The other equally dominant narrative that has emerged since Karl Klare's "Legal Culture and Transformative Constitutionalism"[14] is that whilst the Constitution is both progressive and transformative, it equally requires a change in legal culture to ensure a progressive and transformative interpretation of the goals contained in the Constitution.

In terms of the two dominant narratives, transformation, with or without its radical epithet, either requires "good politics" and/or progressive interpretation of the

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[12] T Reddy *South Africa, Settler Colonialism and the Failures of Liberal Democracy* (2016) 13.
[13] Strategy and Tactics of the African National Congress (n 8 above).
[14] Klare (n 7 above).

Constitution. Embedded in these two logics of "good politics" and progressive interpretation of the Constitution is an *a priori* assumption that either politics can steer law or that law can steer other systems so that either one or both of the "steerings" can bring about the much needed (radical) transformation. I suggest that what is conspicuously absent in the two logics of the dominant narratives referred to is a prior question which needs to be asked before we delve into the virtues of constitutionalism and "good politics". This question should strive to achieve two things: firstly, the question should seek a deeper understanding of why the ostensibly good intentions of the Constitution have consistently remained just that – good intentions. Secondly, and propelled by the inability of the ostensibly good intentions of the Constitution, the question should then be whether it is cogent to resolve centuries of colonialism and apartheid through legal and constitutional means. It is precisely the relationship, or the absence thereof, between constitutionalism and radical transformation that animates this thesis.

Therefore the main research question of this thesis is whether constitutionalism has the capacity to bring about the much needed radical transformation in South Africa. Why has the promise of the Constitution to bring about radical transformation not been fulfilled? I suggest that radical transformation should be conceived of as a project of decolonisation and decolonisation should be conceived of as the logical outcome of radical transformation. I expound on the latter below. I will focus on two possible explanations why the promise of the Constitution to bring about radical transformation has not been fulfilled: the one is an argument that law as a system has limits and is thus incapable to bring about radical change; the other is that the constitutional project in South Africa suffers from limitations that stand in the way of radical transformation. The argument that law as a system has limits and is thus incapable to bring about radical transformation militates against the deployment of law to attain radical transformation. This is because the structural limits of law occasioned by law's autopoietic closure force law to observe societal complexity as only legal or illegal. On the other hand, the argument that the constitutional project in South Africa suffers from limitations that stand in the way of radical transformation suggests that if law were to be released from, amongst other things, its positivist and formalist stranglehold, its capacity to bring about radical transformation may be realised.

1.3. Theoretical approach

I deploy Niklas Luhmann's systems theoretical approach together with "genres of critique"[15] to explore the two cognates of the limits and limitations of law and constitutionalism in bringing about radical transformation in South Africa. The systems theoretical approach is deployed to explore the postulation that law and constitutionalism have structural limits that always prevent radical transformation. Although I rely on the insights of Luhmann's systems theoretical approach, and make reference to some of Luhmann's original work, my focus is narrowed to how Luhmann's systems theoretical approach has been received, interpreted and developed by other scholars.[16] In relation to the notion of the "limitations of law" and constitutionalism, I draw on "genres of critique", specifically the American Critical Legal Studies (CLS), Critical Race Theory (CRT) and poststructuralist approaches to law as part of a critical engagement with dominant understandings[17] of law and constitutionalism. As with the systems theoretical approach, although I rely mostly on the insights of Friedrich Nietzsche, Michel Foucault and Jacques Derrida as a starting point in explicating the notion of the limitations of law, and make reference to some of their original work, my focus in this thesis is on how their works have been received, interpreted and developed by other scholars.

In a nutshell, I draw on both the systems theoretical approach and "genres of critique" to critically evaluate the relationship between radical transformation and constitutionalism. However, in the final analysis I suggest that the systems theoretical

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[15] I borrow the notion of "genres of critique" from Karin van Marle and Stewart Motha to refer to American critical legal studies and the poststructuralist inspired "Euro-British CLS", See K van Marle and S Motha (eds) *Genres of Critique* (2013) for a general discussion on the notion of "genres of critique" and the influence of these of these genres in South Africa.

[16] According to Marc Hanna, Luhmann has written seventy-five books and over five-hundred articles in his life time. He has authored about nine monographs on the subject of law. However, there are very few books on the subject of law that have thus far been translated into English, his major works on law being *A Sociological Theory of Law* in 1985 and *Law as a Social System* published in English in 2014 (M Hanna "Luhmann's Other Book on Law: Observations on the Reception of Niklas Luhmann's A Sociological Theory of Law" (2013/2014) 19). For a further discussion on Luhmann's ouvre and his reception in the English speaking world, including the paucity of translation of his work into English see P Zumbansen "Law as a Social System, by Niklas Luhmann" (2006) 15.3 Social and Legal Studies.

[17] By dominant understandings of law I refer in particular to formalist and positivist approaches which are broadly characterised by the separation of law from morals and politics and the belief in the autonomy and scientificity of law.

approach, by virtue of its radical break with traditional modes of analysis,[18] is better able to explain why, within the context of South Africa, the existence of an ostensibly progressive and transformative constitutionalism has hitherto not been able to resolve the legacy of colonialism and apartheid.

I also endeavour to give content to the notion of radical transformation. I propose that the notion of radical transformation should not be engaged abstractly but should be unpacked because its protean character is capable of unleashing multiple interpretations. For a Marxist inspired approach, radical transformation may inhere in the attainment of socialism and for a decolonial approach, radical transformation may inhere in the dismantling of all forms of colonialities, be they coloniality of knowledge, coloniality of power or coloniality of being. Informed by the protean character of the notion of radical transformation, and further informed by the colonial and apartheid history of South Africa, I then suggest that radical transformation, conceived of as decolonisation, does contain in it the capacity to resolve the intractable problems of colonialism and apartheid in South Africa.

However, the notion of decolonisation as constituting radical transformation still contains elements of abstractness and still remains protean, although it constitutes a step forward in unpacking what should constitute radical transformation. To mitigate against the protean character of decolonisation, I draw on the insights of decolonial and postcolonial approaches to decolonisation to the extent that they are relevant to the South African situation. This I do for purposes of enhancing the content of what should constitute a decolonisation project in South Africa. In the end, I take the notion of decolonisation as justly representative of radical transformation in South Africa. Put differently, I suggest that radical transformation should be conceived of as a project of decolonisation and decolonisation should be conceived of as the logical outcome of radical transformation.

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[18] I discuss the systems theoretical approach's radical break with traditional mode of analysis in chapter 3.

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The potential radicalism of decolonial and postcolonial approaches inheres, I suggest, in their suspended celebration of the end of apartheid as constitutive of liberation and in particular decolonial approaches' careful delineation of the difference between emancipation and liberation.[19] My intention is not to reconcile the two approaches but rather to draw on the insights of both decolonial and postcolonial approaches to the extent that they assist in enhancing the notion of radical transformation and what it should entail. I eschew, where it is practically possible, the schisms that tend to characterise the two approaches.[20]

In a nutshell, my theoretical approach is two pronged. Firstly, I suggest that decolonisation should be the outcome of radical transformation and I further draw on the insights of both decolonial and postcolonial approaches to give content to the notion of decolonisation. Secondly, I deploy the systems theoretical approach to explore the "limits of law" on the one hand and "genres of critique" to explore the "limitations of law" on the other.

There is, however, a possible antithesis that emerges in attempting to work with both the systems theoretical approach on the one hand and decolonial and postcolonial approaches on the other. If the content of radical transformation must be informed by decolonial and postcolonial approaches, what then becomes of Luhmann's systems theory which, using both theories' insistence on shifting "the geography of knowledge" (or what Walter Mignolo calls the "decolonial epistemic shift),[21] can be geographically located within Europe and specifically Germany.[22] In other words, is it not a

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[19] The difference between emancipation and liberation is explained by Mignolo to the effect that emancipation is a discourse of European Enlightenment and is a common word in liberal and Marxist discourses. Liberation on the other hand refers to political, economic and epistemological decolonisation, See W Mignolo "Delinking: The Rhetoric of Modernity, the Logic of Coloniality and the Grammar of Decoloniality" (2007) 21 Cultural Studies 454.

[20] I deal with the relationship between decolonial and postcolonial theories under 2.2 below and it is under 2.2 that these schisms are explicated.

[21] I discuss the notion of "epistemic shifts" in chapter two.

[22] Luhmann was born in Hamburg, Germany in 1927, studied in Germany, largely taught in Germany and his theoretical endeavours were largely influenced by Gregory Bateson, Ernst von Glaerfield, Heinz von Foerster and his debates with the Frankfurt School, particularly Jürgen Habermas. In this sense his context is Germany until the 1970 and 1980s when he broke with the European tradition and appropriated the ideas of Chilean constructivist evolutionary biologists Humberto Maturana and Francisco Varela, See p121-124 in Hans-Georg Moeller's *The Radical Luhmann* (2012).

contradiction to employ the systems theoretical approach as part of a decolonising project? This potential contradiction becomes even more pronounced if we take cognisance of Ramon Grosfoguel's view that the legacy of nineteenth-century liberalism remains the division of the economic, political, cultural and social as autonomous arenas.[23]

Grosfoguel's view looks, at face value, to be a clear antithesis of Luhmann's systems theory, which is anchored on functional differentiation[24] and presupposes the division of society in a capitalist society into closed autonomous subsystems of the economy, law, religion and politics. In reference to Immanuel Wallerstein, Grosfoguel states that the "construction of these 'autonomous' arenas and their materialisation in separate knowledge domains such as the different disciplines in the humanities are a pernicious result of liberalism as a geo-culture of the modern world system."[25] I will suggest in chapter three that it may be that Luhmann's system theoretical approach merely describes the capitalist system as it currently is and functions as, what Andreas Fischer-Lescano calls a "descriptive form of inquiry"[26] and that Luhmann's "sociology is geared to understanding society, not to change it."[27] Luhmann's notions of normative closure and cognitive openness will be critical in this engagement. I therefore deploy, on the one hand, decolonial and postcolonial approaches to theorise other systems of society and on the other I deploy the systems theoretical approach to theorise legal phenomena as a way of exploring the relationship between radical transformation and law and constitutionalism.

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[23] R Grosfoguel (2011) "Decolonising Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Modernity" (2011) 1 Journal of Peripheral Cultural Production of the Luso-Hispanic World 17.

[24] I discuss the notion of functional differentiation in chapter 3.

[25] Wallerstein (1991) in R Grosfoguel "Decolonising Post-Colonial Studies and Paradigms of Political-Economy: Transmodernity, Decolonial Thinking, and Global Modernity" (2011) 1 Journal of Peripheral Cultural Production of the Luso-Hispanic World 17.

[26] Fischer-Lescano "Critical Systems Theory" (2012) 38 Philosophy and Social Criticism 3.

[27] E Christodoulidis "A Case for Reflexive Politics: Challenging Luhmann's Account of the Political System" (1991) 20 Economy and Society 381.

1.4. Overview of chapters

In chapter two I explore competing notions of radical transformation in South Africa. I narrow down these competing notions into the ANC's (and its ally, the South African Communist Party's (SACP)) notion of the National Democratic Revolution (NDR) and decolonial and postcolonial approaches. I conclude the discussion by suggesting, borrowing from Sabelo Ndlovu-Gatsheni, that "genuine decolonisation requires a broader and radical transformation of economic, gender, spiritual, epistemic, linguistic, sexual and racial hierarchies imposed on Africa from outside."[28]

In other words, I argue that the idea of the NDR, whilst progressive in character,[29] falls short of challenging the "insularity of historical narratives and historiographical traditions emanating from Europe."[30] Not only is the notion of the NDR unable to resolve its very reason for existence, namely the creation of a non-racial, non-sexist, democratic and prosperous South Africa, but the very fact of its silence or scant reference to, for instance, the disruption of coloniality, implies its inadvertent complicity with colonialism. I argue that because the notion of the NDR ultimately rests on and relies on political power, it is, following the systems theoretical approach, oblivious to the "powerless power"[31] of political power and the non-centrality of political power in a functionally differentiated society.

In chapter three I deploy the systems theoretical approach to explore whether radical transformation in South Africa can be attained within the confines of law and constitutionalism. I suggest in this chapter, borrowing from Emilios Christodoulidis, that "Luhmann's writings today represent, even according to his acutest critics, a work

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[28] S J Ndlovu-Gatsheni "The Idea of the African National Congress, Democratic Paradox and the Stubborn Spectre of Coloniality" in B Ngcaweni (ed) *The Future We Choose: Emerging Perspectives on the Centenary of the ANC* (2014).
[29] I use the notion of "progressive" to denote approaches that are traditionally regarded as being on the Left of the political divide but also approaches that being on the Left, have as their core political programme the emancipation and/or liberation of the oppressed, "the subaltern" and those who historically and currently continue to be exploited and excluded. These approaches are broadly animated by change and the dismantling of the status quo.
[30] G Bhambra "Postcolonial and Decolonial Dialogues" (2014) 17 Postcolonial Studies 115.
[31] I borrow the notion of "powerless power" from Moeller (n 22 above) 88-104.

incomparable in insight and power of conceptualization."[32] Luhmann's radical departure from "stratification"[33] to functional differentiation assists in understanding why South Africa continues to struggle to overcome poverty, unemployment and inequalities through legal and constitutional means. I suggest that this can be cogently attributed to, following on Luhmann's "insight and power of conceptualisation", the fact that in functionally differentiated societies, the absence of a hierarchy of systems presupposes the near impossibility of any one system steering other systems. The idea of transformation, let alone radical transformation, through legal and constitutional means becomes even more suspect from the systems theoretical prism. In the end the purpose of deploying the systems theoretical approach is to expose the "limits of law".

In chapters four and five I deal with what I have referred to as "genres of critique". In chapter four I focus on CLS and CRT by exploring their epistemological similarities and their ostensible differences, particularly as it relates to CRT's critique of CLS's notion of "rights" as being scant on race and the lived experience of the oppressed. The question in chapter four therefore becomes whether CLS and CRT possess the capacity to advance the project of radical transformation in South Africa. In other words, can these genres stand up to the dictates of decolonisation.

In chapter five I explore poststructuralism's exposure of the historical character of knowledge and truth and their intrinsic relationship with law. I posit, based on poststructuralist approaches to law, that law as intrinsically bound with the western metaphysical tradition should be looked at as also contingent and therefore not objective and neutral. I further explore the notion of "deconstruction" and its approach to justice. I also explore the notion of "mutual paranoia" between poststructuralism and systems theory by explicating the possible points of convergence and divergence between poststructuralism and the systems theoretical approach. I conclude the

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[32] Christodoulidis (n 27 above) 381.
[33] By stratification I refer to approaches that analyse society from a class perspective.

chapter by exploring the implications of deconstruction and the systems theoretical approach on the "limits and limitations of law".

In a nutshell, I suggest that the "genres of critique" discussed in chapter four and five, whilst critical of western metaphysical approaches to law and undoubtedly radical enough as critiques, constitute an antithesis to the systems theoretical approach due to their faith in transformation through legal and constitutional means. For instance, according to Drucilla Cornell, deconstruction means that law is inevitably open to transformation[34] and that fidelity to deconstruction means that even a constitution regarded as the best is capable of being interpreted in the name of justice.[35] This is an indication of, for instance, poststructuralism's cautious optimism about the possibilities of law and thus its approach to see the limitations as opposed to the "limits of law". The vexing question of whether the project of radical transformation of the South African society can be successfully negotiated by and within a legal and constitutional project therefore constitutes the crux of the entire thesis.

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[34] D Cornell "The Violence of the Masquerade: Law Dressed up as Justice" (1989-1990) 11 Cardozo L. Rev. 1061.
[35] Cornell (n 34 above) 1061.

CHAPTER TWO: THEORISING RADICAL TRANSFORMATION

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2.1. Introduction

In this chapter I attempt to give content to the notion of radical transformation in South Africa, a notion that I suggest is scantly theorised in South African jurisprudence.[36] This is based on the fact that the overarching question of this thesis is whether radical transformation can be achieved within the current project of constitutionalism and the law. Most importantly, I suggest that a discussion on "the limits and limitations of law" must be preceded by the identification of what constitutes radical transformation precisely because it is upon the explication of the notion of radical transformation that we will be able to evaluate whether law and constitutionalism are wholly or partly capable or incapable of ensuring the attainment of radical transformation. My approach is that the content of radical transformation in South Africa must be informed by and be in the quest for decolonisation. I explore, for purposes of giving content to the notion of decolonisation, three approaches that lay claim to the notion of radical transformation and decolonisation, namely the ANC's national democratic revolution (NDR), and decolonial and postcolonial approaches to the notion of decolonisation.

In part one of this chapter I explore the ANC's theory of the NDR as an approach that lays claim to the notion of radical transformation in order to examine the extent to which this approach is feasible in ensuring radical transformation. The ANC has undoubtedly been a major figure in the struggle for liberation in South Africa. Informed by this uncontroversial fact, the first part of this chapter relating to the content of radical transformation explores the ANC's notion of NDR as an approach to radical transformation. This is an approach which in the final analysis seeks to ensure the realisation of the goals contained in the Freedom Charter. This is mainly because the struggle for liberation in South Africa, particularly by the ANC, has for the longest time been understood as the pursuit of the NDR. Furthermore, transformation in South

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[36] By scant theorisation I refer to dominant instances where the jurisprudential landscape is focused more on the notion of transformative constitutionalism based on the assumption that the notion of "transformative" inherently constitutes "radical". I deal with the limitation of transformative constitutional and its conceptual "deradicalised" moment in chapter two and further its limits from the systems theoretical approach point of view in chapter three. Suffice that I broadly argue that from the systems theoretical approach, law can only observe the legality or illegality of every matter that comes before it, including transformation. I therefore argue that because law can only create legal reality, the reality of (radical) transformation becomes legal reality and therefore subjected to the lawful/unlawful code of law. I advance this argument in chapter three.

Africa today is understood by the ruling ANC as being guided by the theory of the NDR. In a way, it could be said that, at least in theory, South Africa is living and breathing the ANC's NDR and its quest to attain a national democratic society.

In part two of this chapter I explore the two notions that also deal with how we think about colonialism and apartheid, and therefore decolonisation, namely decolonial and postcolonial approaches. According to Ndlovu-Gatsheni, affirmatively quoting Grosfoguel, "one of the most powerful myths of the twentieth century was the notion that the elimination of colonial administration amounted to the decolonisation of the world."[37] I agree with Ndlovu-Gatsheni's statement that in South Africa, "apartheid existed as both colonialism (direct administrative domination) and coloniality (visible socio-political-economic engineering of radical difference) simultaneously."[38] In this sense, the end of formal and administrative apartheid does not automatically presuppose the end of coloniality.

In part three of this chapter I critically evaluate the implications of the NDR when juxtaposed with decolonial and postcolonial approaches in relation to radical transformation. I suggest in this part that the NDR, although seeking to address aspects of colonialism and apartheid, fails to adequately deal in particular with the notion of coloniality. In this sense, the absence of theoretical rigour by the NDR in relation to the notion of coloniality potentially undercuts its radicalism and its approach to decolonisation becomes insufficient.

In part four of this chapter I explore the idea of attaining radical transformation within the context of constitutionalism. In other words, is it possible and plausible to deploy constitutionalism as a means to radical transformation in a country ravaged by centuries of colonialism and apartheid. The question that I explore in this part is whether it is possible for constitutionalism to subvert the project of radical transformation.

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[37] Grosfoguel (2007) quoted in Ndlovu-Gatsheni (n 28 above) 199.
[38] Ndlovu-Gatsheni (n 28 above) 206.

In part five of this chapter I continue with the idea of attaining radical transformation within the context of constitutionalism. However my focus in this part is on the notion of transformative constitutionalism. The notion of transformative constitutionalism was introduced into South African jurisprudence by Karl Klare and has since become a centrifugal paradigm to constitutionalism discourse.[39] I therefore critically evaluate whether the introduction of transformative constitutionalism as an approach to (radical) transformation is capable of creating possibilities for (radical) transformation.

According to Reddy, the struggle for emancipation and liberation in South Africa has historically been characterised by many different and opposing world views, ranging from African Nationalism, Christian liberalism, clandestinity, technocracy, communist popular Frontism, Western Marxism, Indigenous working class radicalism and an incipient Black Consciousness.[40] Alan Emery weaves Reddy's characterisation into two versions: the decolonisation versus the deracialisation of the state and society.[41] The implication of Emery's characterisation is that radical transformation in South Africa has historically been defined or described either in terms of decolonisation broadly or deracialisation.[42] It is precisely due to this historical contestation that I critically re-examine them so as to finally suggest a renewed call for decolonisation as most apt to resolve the intractable problems engendered by centuries of colonialism and apartheid.

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[39] Klare (n 7 above).

[40] Reddy (n 12 above) 126.

[41] A Emery "Class and Race Domination and Transformation in South Africa" (2008) 34 *Critical Sociology* 410.

[42] The ANC and the SACP speak about the creation of a 'nation democratic society" (with the SACP viewing this as an ongoing forward march to socialism) and not the creation of decolonised society. I argue that the semantics in this case do matter as they speak to what constitutes the core of either the project of decolonisation or the project of creating a national democratic society. These semantic difference further speak to whether in the end a particular approach leads to constitutionalism or not.

2.2. Radical transformation and competing notions of decolonisation
2.2.1. The ANC, the NDR, radical transformation and decolonisation

The ANC has consistently described its strategic objective as the transformation of South Africa into a united, non-racial, non-sexist, democratic and prosperous society.[43] The ANC further describes its immediate task as that of deracialising society.[44] The point of departure for both the ANC and its alliance partners, particularly the South African Communist Party (SACP), is that there is a symbiosis between political oppression and the apartheid capitalist system.[45] This, according to the ANC, is due to the fact that "the specific route which capitalism took in South Africa has led to the creation of a virtually inseparable bond between capitalist exploitation and race domination."[46] Therefore the ANC describes the main content of the NDR as "the liberation of Africans in particular and blacks in general from political and socio-economic bondage. It means uplifting the quality of life of all South Africans, especially the poor, the majority of whom are African and female."[47] Amongst pertinent factors the ANC makes in relation to the NDR is that "fundamental to the destruction of apartheid is the eradication of apartheid production relations" and that a national democratic society "requires deracialisation of ownership and control of wealth, management and the professions".[48] The logical question therefore becomes what is deracialisation and what is its content. Pallo Jordan elaborates on the notion of deracialisation in the following manner:

> National oppression … found expression in the palpable form of a number of economic, social and developmental indicators – such as poverty and underdevelopment, the low levels of literacy and numeracy among the oppressed communities, their low access to clean water, the non-availability of electricity, their food consumption, their invariably poor state of their health, their low levels of skills, the generally unsafe environment in

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[43] See ANC's Strategy and Tactics Document of 1994 and the Constitution of the ANC.
[44] J Netshitenzhe *Umrabulo* (1996) 1-3, Available at: www.anc.org/docs/umrabulo/1996/umrabulo
[45] Strategy and Tactics of the ANC: "Building a National Democratic Society-Revised Draft" (2007) 3, Available at: www.anc.org.za/content/strategy
[46] J Slovo "South African Working Class and the National Democratic Revolution" (1988), Available at: www.marxists.org/subject/africa/slovo/1998/national-democratic-revolution.htm
[47] Strategy and Tactics of the ANC (n 45 above) 1.
[48] Strategy and Tactics of the ANC (n 45 above) 2.

which these communities lived etc. Thus the uprooting of national oppression required, amongst other things, the correction of precisely these conditions. In the view of our movement the content of freedom and democracy would be the radical transformation of South African society so as to create an expanding floor of economic and social rights for the oppressed majority.[49]

A pamphlet authored by Joe Slovo titled the "South African Working Class and the National Democratic Revolution" is regarded as seminal in relation to the notion of the NDR.[50] According to Slovo, making reference to the SACP constitution, the main content of the national democratic revolution is

> the national liberation of the African people in particular and the black people in general, the destruction of the economic and political power of the racist ruling class, the establishment of one united states of people's power in which the working class will be the dominant force and which will move uninterruptedly towards social emancipation and the total abolition of exploitation of man by man.[51]

Slovo's view is that the Freedom Charter constitutes a constellation of the immediate aspiration of the oppressed people and that although the Freedom Charter is not a socialist programme, it provides the basis "for an uninterrupted advance to a socialist future."[52] Slovo suggests that the NDR is to be given concrete expression in the Freedom Charter, this notwithstanding the fact that the Freedom Charter is not a socialist programme but a means towards a socialist South Africa. In this sense, radical transformation within the context of a particular phase of the national democratic revolution entails the attainment of ideals embodied in the Freedom

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[49] P Jordan "The National Question in Post 1994 South Africa" (1997), Available at: Available at: www.marxists.org./subjects/Africa/anc/1997/national question.htm. What is interesting is that according to Jordan, radical transformation must find expression in law or as he states "in an expanding floor of economic and social rights for the oppressed majority." I will suggest in chapter four that the predication of radical transformation on rights by the ANC, may be direct a consequence of its theory of the national democratic revolution.

[50] Joe Slovo was the Secretary General of the South African Communist Party (since 1984), the Umkhonto We Sizwe's Chief of Staff and member of the ANC's National Executive Committee's working committee (NWC), Available at: www.sacp.org.za/main.php?ID=2310

[51] Slovo (n 46 above) 3.

[52] Slovo (n 46 above) 4.

Charter. There therefore seem to be congruence between the ANC and the SACP that radical transformation in the immediate future does not entail the attainment of socialism. Slovo himself states that "neither the SACP nor ANC nor any of their authoritative spokespersons have advanced socialism as the immediate objective."[53]

The nub of Slovo's argument is that within the context of a South Africa afflicted by both racial domination and class exploitation, a proper approach for the working class in alliance with other dominated classes is to focus on the immediacy of racial or national domination without negating class struggle. This is so because black people are oppressed and dominated as a race and class. However the fact of focusing on the attainment of the ideals contained in the Freedom Charter as part of the immediacy of dealing with racial domination should, according to Slovo, not create an impression that the struggle is about bourgeois' democracy. This is because according to Slovo, in South Africa it is the bourgeois who have been in power and it is them who have denied the extension of rights to the racially dominated majority. Slovo suggests that due to the peculiarities of the South African situation "the present phase of our revolution contains elements of both national and social emancipation; it is not the classic bourgeois-democratic revolution nor is it yet the socialist revolution."[54] Slovo proceeds to assert that the goals of the Freedom Charter, "though not necessarily socialist, do nonetheless 'have a socialist flavour'".[55]

The foregoing perspectives on the NDR by the ANC and the SACP are indicative of the fact that there seem to be, at least at a minimum, a form of convergence between the ANC and the SACP as to what constitutes the immediate objective of the NDR – the attainment of the goals contained in the Freedom Charter. The said perspectives are further indicative of how the ANC and the SACP intend to deal with centuries of colonialism and apartheid. This immediate objective is essentially about resolving the issue of racial domination. Alan Emery correctly captures it in the following manner:

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[53] Slovo (n 46 above) 16.
[54] Slovo (n 46 above) 16.
[55] Slovo (n 46 above) 16.

> The ANC is the vehicle of two liberation projects: a class liberation project embodied most clearly in its alliance with the SACP and the goals of revolutionary socialism; and the national liberation goals of deracialization of the state and society. In the context of globalisation and the hegemony of neo-liberal economic policies, the ANC retreated from more radical goals associated with revolutionary socialism which proposed ending the problem of inequality per se. ANC leaders believed it was no longer ideologically possible to attack the system of inequality generation-capitalism itself.[56]

It is an uncontroversial fact that at the moment, the deracialisation project both at an intersubjective level and at the level of ownership of the means of production has been grossly unsuccessful. Although an argument could be cogently advanced to the effect that some form of transformation has occurred in South Africa, a fact that stubbornly remains is that radical transformation in South Africa has thus far continued to be elusive. I suggest that the reasons normally advanced for the failures of radical transformation, such as the unsuitability of liberal democracy and liberal constitutionalism, absence of good governance and corruption, although possessing an element of verity , have come to constitute some form of a shibboleth. I suggest, as I elaborate in chapter three, that in the final analysis the inability to pursue a radically transformative project may be due, largely, to the embedded progressivism and historicist[57] character of the NDR and secondly, its inevitable morphing into constitutional politics[58], and most importantly, its overestimation of the power of political power. In other words, I argue that the NDR is itself a project of modernity which has to pursue another modernity project in the form of constitutionalism. Informed by a systems theoretical approach, I will argue that in the final analysis the main problem, as I see it, is that any programme that is predicated on the assumption

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[56] Emery (n 41 above) 422.

[57] I discuss the notion of historicism under 3.6.1.1.

[58] Sampie Terreblanche ascribes the failure of transformation in South Africa to the ANC's "ideological somersaulting" and the ANC's embracing of American ideologies of "neo-liberal globalism" and "market fundamentalism" during the period of transformation (I discuss this in detail in 2.3.2. below). Although I agree with the notion of ideological somersaulting by the ANC, I do not think this explanation goes far enough in locating the failures of transformation in South Africa. I suggest that, over and above my critique of the ANC's NDR, the critical moment comes in/around 1988 when ANC adopted a set of Constitutional Principles. It is at this moment that the ANC began to envision the reconstruction of South Africa through legal and constitutional means (see 2.3.2. where I discuss the ANC and its turn to legality).

of a particular system steering another system is likely to fail. In terms of the systems theoretical approach, in a functionally differentiated society systems are incapable of steering other systems.[59] For now I suggest that another weakness with the NDR is its scant attention to cogent issues raised by decolonial and postcolonial approaches.

2.2.2. Decolonial and postcolonial approaches to decolonisation

According to Emma Lowman and Lucy Mayblin, decolonial and postcolonial approaches have in recent years been dominant in how we think about decolonisation.[60] For Gurminder Bhambra, the postcolonial approach is an intellectual movement associated with the ideas of, amongst others, Edward Said, Homi Bhabha and Gayatri Spivak. Postcolonial approaches call for dramatic changes in academic thinking and the negation of a theorising about colonialism that posits colonialism as only being about states and borders but more about cultural and epistemic legacies of colonialism.[61] The ubiquity of the cultural within postcolonial approaches is observed by Bhambra and Grosfoguel who respectively state that postcolonial approaches have had a tendency to remain within the purview of the cultural[62] and are further characterised by their emphasis on colonial culture.[63]

Decolonial approaches on the other hand are associated with the ideas of, amongst others, Annibal Quijano and Walter Mignolo and are strongly linked with world systems theory, the development and underdevelopment theory and the Frankfurt School of social theory.[64] The notion of coloniality is fundamental to decolonial approaches. Conceptually, coloniality gained currency in the late 1970s and early 1980s as the brainchild of Annibal Quijano.[65] The notion of coloniality then morphed into the "modernity/coloniality" research project wherein "decoloniality became the common

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[59] I discuss the notion of functional differentiation in chapter three.
[60] E Lowman & L Mayblin (eds) "Theorising the Postcolonial, Decolonising Theory" (2011) 19 Social and Political Thought 4.
[61] Lowman & Mayblin (n 60 above) 4.
[62] Bhambra (n 30 above) 115.
[63] Grosfoguel (n 23 above) 16.
[64] Bhambra (n 30 above) 115.
[65] Mignolo (n 19 above) 451.

expression paired with the concept of coloniality and the extension of coloniality of power (economic and political) to coloniality of knowledge and of being (gender, sexuality, subjectivity and knowledge)."[66] According to Arturo Escobar, one of the defining characters of the modernity/coloniality project is, amongst others, the fact that it locates the origins of modernity with the conquest of the Americas and the control of the Atlantic after 1492 and that it insists that colonialism, post-colonialism and imperialism are constitutive of modernity.[67] In short, the modernity/coloniality project insists that there can be no modernity without coloniality and that the epistemic force of local histories must be taken seriously.[68] One of the leading decolonial thinkers, Nelson Maldonado Torres comprehensively defines coloniality in the following manner:

> Coloniality is different from colonialism. Colonialism denotes a political and economic relation in which sovereignty of a nation or a people rests on the power of another nation, which makes such nation an empire. Coloniality, instead, refers to long standing patterns of power that emerged as a result of colonialism, but that define culture, labour, inter-subjective relations, and knowledge production well beyond the strict limits of colonial administrations. Thus coloniality survives colonialism. It is maintained alive in books, in the criteria for academic performance, in cultural patterns, in common sense, in the self-image of peoples, in aspirations of self, and so many other aspects of our modern experience. In a way, as modern subjects we breathe coloniality all the time and every day. [69]

Torres, based on the above description of coloniality, makes a distinction between coloniality of power, coloniality of knowledge and coloniality of being, a distinction which Gatsheni-Ndlovu calls the very premises of decoloniality.[70] Coloniality of power refers to the interrelation among modern forms of exploitation and domination; coloniality of knowledge refers to the impact of colonisation of different areas of

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[66] Mignolo (n 19 above) 451.
[67] A Escobar "Beyond the Third World: Imperial Globality, Global Coloniality, and Anti-Globalisation Social Movements" (2004) 25 Third World Quarterly 11.
[68] Escobar (n 67 above) 11.
[69] N Maldonado-Torres "On the Coloniality of Being: Contributions to the Development of a Concept" (2007) 21 Cultural Studies 243.
[70] S Ndlovu-Gatsheni "Why Decoloniality in the 21st Century" (2013) 48 The Thinker 11.

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knowledge production; coloniality of being refers to the lived experience of colonisation and its impact on language; and coloniality of power and knowledge then engenders the coloniality of being.[71] Coloniality, according to Ndlovu-Gatsheni, "is the name of the darker side of modernity that needs to be unmasked because it exists as an embedded logic that enforces control, domination, and exploitation disguised in the language of salvation, progress, modernisation, and being good for everyone."[72]

Decolonial approaches tend to, owing to Enrique Dussel and his *Philosophy of Liberation*[73], differentiate between liberation and emancipation.[74] According to Mignolo, borrowing from Dussel, "liberation referred to two different and interrelated struggles: political and economic decolonisation and epistemological decolonisation."[75] The choice of liberation as opposed to emancipation is also based on geo-political choices. But the real question is whether it matters whether the notion of emancipation is used or whether the notion of liberation is used because it could be argued that both notions cover the interests of all the oppressed people throughout the world. I address the conceptual distinctions below.

According to Bhambra both decolonial and postcolonial approaches have traditionally had disciplinary differences, geographic differences and differences in terms of historical periods of analysis. In terms of historical periods of analysis, where postcolonial approaches largely refer to the nineteenth and twentieth centuries as a starting point of analysis, decolonial approaches start with the earlier European incursions of the Americas from the fifteenth century onwards.[76]

Mignolo makes a number of conceptual distinctions. He makes a distinction between decolonisation and decoloniality, between decoloniality and postcoloniality and between emancipation and liberation. According to Mignolo, postcolonial approaches

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[71] Maldonado-Torres (n 69 above) 242.
[72] Ndlovu-Gatsheni (n 70 above) 13.
[73] E Dussel *Philosophy of Liberation* (1985).
[74] Mignolo (n 19 above) 454.
[75] Mignolo (n 19 above) 454.
[76] Bhambra (n 30 above) 115.

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and decolonial approaches differ in that postcolonial approaches are epistemologically reliant on poststructural approaches whereas decolonial approaches constitute a project of "delinking".[77] Decolonial "delinking" refers to epistemic shifts which creates space for other epistemologies, principles of knowledge and as a result, other forms of economy, politics, and ethics.[78] Epistemic shift works by firstly exposing the partiality and limitations of the theo and ego politics of knowledge and exposing the concealed complicity between the rhetoric of modernity and the logic of coloniality.[79] This rhetoric of modernity functions through the imposition of Christianity, civilisation and market democracy as salvation.[80] But this salvation conceals the logic of coloniality precisely because of the centrality of coloniality to modernity which makes "the rhetoric of modernity and the logic of coloniality as two sides of the same coin."[81]

Therefore Mignolo's idea of radical transformation inheres in his proposed project of delinking. According to Mignolo this form of delinking as "epistemic de-colonisation runs parallel to Amin's delinking."[82] Mignolo's delinking is the "delinking from the rhetoric of modernity and the logic of coloniality."[83] The notion of delinking for Mignolo means "to change the terms of the conversation"[84], to challenge "the hegemonic ideas of what knowledge and understanding are and consequently what economy, ethics and philosophy, technology and organisation of society should be."[85]

Achille Mbembe has critiqued decolonial approaches as problematic in that they tend to erect geography or places as an absolute calculus of knowledge by promoting an

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[77] Mignolo (n 19 above) 452.
[78] Mignolo (n 19 above) 453.
[79] Mignolo (n 19 above) 485.
[80] Mignolo (n 19 above) 463.
[81] Mignolo (n 19 above) 463.
[82] Mignolo (n 19 above) 453. Here Mignolo is making reference to Samir Amin who has argued about the historical limits of countries in the periphery. Amin argues that on one hand countries in the periphery clash with "dominant imperialism (quite simply because any policy social progress at the periphery is incompatible with the demands of worldwide expansion of capital), yet remain incapable of taking this conflict to its logical conclusion, which is delinking" (S Amin "The Issue of Democracy in Contemporary Third World" in D Held (ed) *Prospects for Democracy* (1993) 68).
[83] Mignolo (n 19 above) 463.
[84] Mignolo (n 19 above) 463.
[85] Mignolo (n 19 above) 463.

ideology of difference; that these approaches are fixated with "autochthony"[86]; and that they tend to equate identity with race and geography.[87] I suggest that Mbembe's critique of decolonial approaches is based on what he thinks is their "essentialism" and "metaphysics of difference (nativism)" and their privileging of victimhood.[88]

Both decolonial and postcolonial approaches challenge European historical narratives and historiographical traditions and endeavour to demonstrate the parochial character of endogenous European origins of modernity and the deep connection between modernity and colonialism, empire and enslavement.[89] According to Lowman and Mayblin "both postcolonial and decolonial thought problematise the universalising claims which have characterised European Western philosophy from Enlightenment period onwards."[90] In a nutshell, the two approaches fundamentally try to demonstrate the fact that universalism is provincial (European) and ethnocentric and the fact that colonialism is constitutive of modernity. Mbembe's critique of decolonial approaches is in proximity's to Slavoj Žižek's critique of Mignolo's delinking approach. In his *Trouble in Paradise: From the End of History to the End of Capitalism,* Žižek urges us "not to succumb to the non-reflective anti-Eurocentrism which can sometimes serve as the ideological cover for the rejection of what is worth fighting for in the European legacy."[91]

I suggest that the schism above between decolonial and postcolonial approaches is reflective of a "siblings rivalry" occasioned by a deep seated longing for self-affirmation that is historically conscious, that seeks to redefine the very ontology and epistemologies of the oppressed, exploited and excluded. Embedded in this kind of self-affirmation is firstly a belief that colonialism and apartheid were exerted geographically and racially. In this sense, the oppressed, exploited and excluded are a "constructed" people, constructed as "the other" and in opposition to the oppressor.

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[86] I interpret Mbembe to refer to a form of nativism characterised by ethnocentrism.
[87] A Mbembe "Ways of Seeing: Beyond the New Nativism. Introduction" (2001) 44 African Studies Review 2.
[88] A Mbembe "African Modes of Self-Writing" (2002) 14 Public Culture 239-245.
[89] Bhambra (n 30 above) 115.
[90] Lowman & Mayblin (n 60 above) 4.
[91] S Žižek *Trouble in Paradise: From the End of History to the End of Capitalism* (2014) 161.

In other words, the very being of being African is the sort of being that was imposed and to be African today is to be a constructed other. This is the reason why the notion of coloniality, that is, the coloniality of power, knowledge and being, is foremost in decolonial approaches. On the other hand, I see Mbembe as also warning against an easy acceptance of victimhood and Žižek cautioning us against epistemological "autochthony".

2.2.3 Implications of the NDR, decolonial and postcolonial conversations on radical transformation in South Africa (within the context of constitutionalism)

I suggest that the ANC's NDR gives priority to deracialisation, although it appreciates that black people were also oppressed as a class. According to Emery, "struggles for deracialisation became hegemonic under the rubric of a civic nationalism embodied in the African National Congress (ANC)'s demand for non-racialism."[92] Emery provides the reasons for the ANC's gravitation from being a movement fighting for decolonisation to a movement fighting for deracialisation. Emery states as follows:

> In the context of globalisation and the hegemony of neoliberal economic policies, the ANC retreated from more radical goals associated with revolutionary socialism which proposed ending the problem of inequality *per se*. ANC leaders believed it was no longer ideologically possible to attack the system of inequality generation – capitalism itself. Under strong pressure to deliver to the liberated black publics which supported it in the liberation struggle and in the general elections, the ANC focused instead on the narrower problem of racialised inequality.[93]

The lingering question is: if radical transformation within the context of the NDR and the Freedom Charter presupposes deracialisation, what happens after deracialisation. For Gatsheni-Ndlovu, "apartheid existed as both colonialism (direct administrative domination) and coloniality (visible socio-political-economic engineering of radical

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[92] Emery (n 41 above) 410.
[93] Emery (n 41 above) 422.

difference) simultaneously."[94] In this sense, apartheid embodied both colonialism and coloniality[95] and this presupposes that apartheid was characterised by the three elements of coloniality of power, coloniality of knowledge and coloniality of being. In this sense, the privileging of deracialisation seem only capable of addressing only racial aspects of colonialism thus leaving the broader problematic of coloniality untouched in a manner that fails to go beyond building a multi-racial society. In the privileging of deracialisation, according to Gatsheni-Ndlovu, the NDR approach gets caught up in managing coloniality.[96] According to Gatsheni-Ndlovu, the elimination of colonial administrations does not amount to decolonisation. "Genuine decolonisation requires a broader and radical transformation of economic, gender, spiritual, epistemic, linguistic, sexual and racial hierarchies imposed on Africa from the outside."[97]

It therefore appears that the NDR approach, which arguably informs the current conceptualisation and trajectory of the South African scene is more in tandem with the notion of emancipation as advanced by Mignolo. As stated earlier, according to Mignolo, liberation refers to two different but interrelated struggles for, on the one hand, political and economic decolonisation and epistemological decolonisation on the other.[98] Anything short of this amounts to emancipation which according Mignolo is a concept historically used to argue for the freedom of the new social class and the fact that as a conceptual discourse of the European Enlightenment, it presupposes and proposes changes within a system that do not question the logic of coloniality.[99] Mignolo explains the notion of emancipation in the following manner:

> The concept and the idea of 'emancipation' in the eighteenth century, was based on three 'major' historical experiences: the Glorious Revolution of 1668 in England, the independence of the colonists in America from the emerging British Empire in 1776;

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[94] Ndlovu-Gatsheni (n 28 above) 206.
[95] Ndlovu-Gatsheni (n 28 above) 206.
[96] Ndlovu-Gatsheni (n 28 above) 208.
[97] Ndlovu-Gatsheni (n 28 above) 208.
[98] Mignolo (n 19 above) 454.
[99] Mignolo (n 19 above) 455.

and the French Revolution in 1789. In every historical account, the three initial historical moments were successful in achieving the meaning of emancipation.[100]

I therefore suggest that to the extent that the NDR's immediate task is the deracialisation of society, it leaves the notion of coloniality unattended and this has the effect of attenuating its radical character. To the extent that the NDR's other objectives are the attainment of the goals enunciated in the Freedom Charter, it still leaves the notion of coloniality unattended. This, I argue, is based on the fact that the Freedom Charter is essentially a political document that is predicated on (human) "rights". The problem of human rights as a product of modernity is addressed by Mignolo who argues that in the first place "the idea of the human and the idea of rights both separately and in conjunction have been invented by the humanists of the European Renaissance."[101] Mignolo expands on the invention on the idea of rights in the following manner:

> The question of rights is properly a question of the modern/colonial world and not of ancient Rome; and even less ancient Greece. The question of rights was inaugurated by and of historical foundation of modern colonialism; by the initial moment of imperial/colonial expansion of the Western World and the 'spread' of the ideal of being Christian, the ideal man and – by the eighteenth century – the idea of citizen and democracy.[102]

What comes out of Mignolo's historical assertions is that the notion of rights is not natural, but an invention of "modernity/coloniality" and in the same way that colonialism was undertaken under the rubric of a civilising mission, the idea of rights, whilst providing a purview to fight against injustice, also perpetuates the same injustice. The critical question that Mignolo poses is "how is it that human relations became 'enclosed' in relation to rights and not in other terms."[103]

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[100] Mignolo (n 19 above) 455.
[101] W Mignolo "Who speaks for the 'Human' in Human Rights?" (2009) 5.1 Hispanic Issues Online 8.
[102] Mignolo (n 101 above) 10.
[103] Mignolo (n 101 above) 20.

I summarise my argument on the NDR in the following manner: To the extent that the NDR is largely predicated on the attainment of the goals (which are essentially rights based) in the Freedom Charter; to the extent that the goals in the Freedom Charter are rights based; to the extent that these rights are predicated on the notion of the human as a "creation of the philosophical and anthropological categories of Western thought and based on epistemic and ontological difference"[104], the NDR falls short of addressing the notion of coloniality. I suggest that the logical conclusion of the NDR and the Freedom Charter has had to, inevitably, result in the adoption of constitutionalism in South Africa – a constitutionalism which Van Marle correctly calls "an enlightenment project" and thus a discourse that "embraces the light of the Western world"[105] and therefore likely to "continue legacies of colonialism and apartheid under new guises."[106] I also tentatively contend that the logical outcome of the above discussions is the possibility that in actual fact radical transformation is immanently post-capitalist. Having cast doubt on the possibility of radical transformation using the NDR as a vehicle, the next logical question, partly dealt with, relates to the possibility of attaining radical transformation within a constitutional project.

2.3. Radical transformation as a constitutional project

In this part I provide a historical contextualisation of transformation in South Africa with particular reference to the historical context of South African legalism and the formation of South African legal culture, the year 1986 as the beginning of the end of the old and lastly the dawn of constitutionalism in South Africa. As prolegomenon to the discussion on transformation, I begin with a juxtaposition of the formation of legal culture in South Africa with the needs of colonialism and apartheid.

Secondly, I deal with the significance of the international balance of forces, in particular the impact that the waning influence of the Soviet Union and the emerging unipolar international situation has had on the ANC (and the ruling Nationalist apartheid

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[104] Mignolo (n 101 above) 17.
[105] Van Marle (n 2 above) 414.
[106] Van Marle (n 2 above) 412.

regime) in its ultimate acceptance of the terms and conditions of the new democratic dispensation. Thirdly, I deal with the dawn of constitutionalism and the politics of transition and what I suggest led to the jurifidication of the politics of transition and why the ANC somersaulted from its ostensibly initial "radical" posture and understanding of people's power towards liberal democratic constitutionalism.[107] Fourthly, I explore the idea of constitutionalism in South Africa as a subversion of decolonisation precisely because in terms of constitutional supremacy, the project of decolonisation has no choice but to do the impossible – unfold within constitutional arrangements. I then critically analyse the notion of transformative constitutionalism and academic commentary on it and suggest its incompatibility with radical transformation.

2.3.1. Formation of South African legal culture[108]

The development of legal culture in South Africa takes place within the context of oppression, exploitation and racism against the African majority. According to Martin Chanock, the formation of legal culture should be seen from the prism of state-making, state-making in the context of constituting a Union after the destructive Anglo-Boer War.[109] It was during this period of state-making that "the institutions, patterns and habits of South Africa's law became established."[110] The style and forms of law established in this period survived well into the 1980s.[111] The development of the South African State must itself be seen within the context of colonialism.[112]

A South African legal culture begins to take shape, albeit in nascent forms, in the period after 1902. The development of legal culture takes place simultaneously with the development of the South African State. The period of State making after 1902

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[107] I use the notion of radical as an internal understanding of what the ANC itself understood to be its attitude to transformation.
[108] Chanock describes legal culture as consisting of "a set of assumptions, a way of doing things, a repertoire of language, of legal forms and institutional practices", See M Chanock *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001) 23.
[109] Chanock (n 108 above) 24.
[110] Chanock (n 108 above) 27.
[111] Chanock (n 108 above) 27.
[112] Chanock (n 108 above) 30.

was characterised by major political revolts such as the Zulu Rebellion of 1906, the Transvaal strikes by workers of 1905-07, 1913-1914 and 1918, the 1915 Afrikaner republican revolt, the need for maintaining white rule over the black majority and the 1910 Union of South Africa.[113] This was the vortex within which legal culture took root.

Prior to independence in 1910, South Africa was constituted by four colonies belonging to the British Empire and these colonies applied British law, albeit to varying degrees.[114] The influence of British legal practices both in terms of doctrine and the organisation of courts and procedures was thus enormous in this period of State formation and legal culture.[115] This remains the case, be it in terms of language or statute and judgments.[116] In short British legalism is central to understanding the formation of legal culture in South Africa. The rule of law concept was central to the colonial state and white rule and continues to be central to the making of the new South Africa – buttressed by the era of global constitutionalism.[117] The rule of law in South Africa can be traced to the role of British colonialism and imperialism in South Africa.[118] The nature of British legal profession was pivotal on how law imagined in South Africa in early period of the nascent South African State.[119] How law was viewed was influenced by the ideology of formalism.[120]

It is evident from the above thus far that the early development of South African legalism was premised on British legalism. This was British legalism anchored to the ideology of formalism. The combination of a weak state in the aftermath of 1902 and political and racial conflicts that prevailed resulted in the production of judges divorced from politics and the embedding of a formalist approach to rights and interpretation within the legal culture.[121]

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[113] Chanock (n 108 above) 30.
[114] Chanock (n 108 above) 30.
[115] Chanock (n 108 above) 32.
[116] Chanock (n 108 above) 32.
[117] Chanock (n 108 above) 513.
[118] Chanock (n 108 above) 470.
[119] Chanock (n 108 above) 239.
[120] Chanock (n 108 above) 239.
[121] Chanock (n 108 above) 515.

Chanock's analysis is that the rule of law concept was central to the colonial state and white rule and continues to be central to the making of the new South Africa – buttressed by the era of global constitutionalism. I suggest that "as it had been nearly a century earlier, South Africa was colonised in the 1990's by a new kind of internationally sanctioned state: this time not the "Westminster system" but "the Constitutional state".[122] Modernity as the heart of colonialism has thus continued unabated into the "new" constitutional order. The events that led to this continuation in post-apartheid South Africa are now explored in detail.

2.3.2. A historico-political context of post-apartheid jurisprudence

Sampie Terreblanche puts 1986 as a turning point in the history of the world and in particular South Africa.[123] According to Terreblanche, there were four events whose constellation makes 1986 a turning point. These four events were the explosion at Chernobyl nuclear power plant in the Soviet Union on 26 April 1986; the comprehensive State of emergency declared by the apartheid government on 12 June 1986; the enactment of the Comprehensive Anti-Apartheid Act by the American Congress in early October 1986 and the Summit Conference that took place between President Ronald Reagan of the United States and President Mikhail Gorbachev on 11-12 October near Reykjavic in Iceland. [124]

The significance of the Chernobyl nuclear explosion disaster lay in the fact that it propelled Mikhael Gorbachev (the then recently elected General Secretary of the Communist Party of the Soviet Union elected in 1985) to the realisation of how backward the Soviet Union had become and the importance of beginning to cooperate with the Western world.[125] The imposition of the State of Emergency in South Africa with its concomitant ruthlessness signalled the fact that the apartheid government had lost control, including in townships and since then the apartheid regime came under

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[122] Chanock (n 108 above) quoted in Van Marle (n 2 above) 415.
[123] S Terreblanche *Lost in Transformation* (2012) 8.
[124] Terreblanche (n 123 above) 9.
[125] Terreblanche (n 123 above) 10.

intense pressure internally and internationally to negotiate with the ANC.[126] The United States Comprehensive Anti-Apartheid Act 1986 was the harbinger for the foreign campaign to institute sanctions, boycotts and disinvestment policies against apartheid South Africa.

Corporate South Africa was intensely affected by these sanctions and it became clear that the apartheid regime and policy had to be dismantled. The white business community became vocal in calling for change in South Africa.[127] The Chernobyl disaster and the Reykjavik meeting in 1986 confirmed to Gorbachev that the Soviet Union lagged behind the United States militarily and economically.[128] The events of Chernobyl and Reykjavic led to the dwindling of the Soviet Union's material support to the ANC's military struggle and the subsequent pressure on the ANC by the Soviet Union to seek a negotiated settlement with the apartheid regime.[129] In *The ANC: A View From Moscow[130]*, Vladimir Shubin confirms Gorbachev's emphasis on the need for regional conflicts to be settled politically.[131] According to Heinz Klug, by the time Oliver Tambo, then the President of the ANC, met Gorbachev, it was clear that internal turmoil in the Soviet Union was likely to result in reduced material support for the ANC.[132]

In short, the significance of 1986 is that it was in the same year that Moscow put pressure on the ANC to seek a negotiated settlement and Washington also pressured the apartheid government to do the same.[133] Shubin however provides a slight

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[126] Terreblanche (n 123 above) 11.
[127] Terreblanche (n 123 above) 12.
[128] Terreblanche (n 123 above) 12.
[129] Terreblanche (n 123 above) 13.
[130] V Shubin *The ANC: A View from Moscow* (2008).
[131] Shubin (n 130 above) 232. According to Shubin, giving a personal account, "at a dinner in honour of the Angolan President Jose Eduardo dos Santos in May 1986, Gorbachev declared that 'there exists a reasonable and realistic alternative to bloodshed, tension and confrontation in Southern Africa. It presupposes an end to aggression against Angola and other liberated States, the speedy granting of Namibia of Independence, not fictitious independence, as the USA and the RSA would like-and finally, the liquidation of the inhuman apartheid system'", Shubin (n 130 above) 233.
[132] H Klug *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2002) 78.
[133] Terreblanche (n 123 above) 114. The pressure on the Nationalist Apartheid regime is further evidenced by a series of visits in 1986 by the Commonwealth Eminent Persons Group (EPG) in the first half of 1986 (Also see Klug (n 132 above) 72). According to Shubin, how the EPG came about is that "the South African situation was extensively discussed at the Commonwealth summit held in the Bahamas in October 1985. Both here

variation to events of 1986 as presented by Terreblanche. According to Shubin, already by 1985 it was widely accepted by almost all, including the West, that the end of apartheid was imminent and apartheid would not survive. However:

> The question was: what would replace it? And what kind of arrangement? Pretoria and the Western governments were still hoping to find some moderate elements in the liberation movement that could be counterpoised to the radical Lusaka leadership.[134]

For instance, as Shubin states, the aim of the leaders of business interacting with the ANC in 1985 was to transform the ANC into a moderate force in order to achieve a moderate solution.[135]

It therefore appears that at least from 1985, there existed an agreement in principle about the inevitability of the demise of apartheid. The events of 1986 as described above simply gave impetus to the existing realisation. The main concern of the parties, in particular the apartheid regime and its Western backers, was the direction that a new dispensation would take both in terms of ideological posture and political configuration of a new government. It is also clear that since the commencement of informal and formal interaction between corporate South Africa and the ANC, and later apartheid government representatives with the ANC representatives, the aim had always been to find a "moderate" solution to the South African question.

As Terreblanche puts it, despite business's acceptance of the inevitability of the demise of apartheid and the centrality of the ANC, business nonetheless wanted to ensure that the ANC abandons its socialist orientation and the ANC is discouraged

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(Moscow) and within the European Economic Community, British Prime Minister Margaret Thatcher held out against the imposition of sanctions against Pretoria. A compromise of sorts was found in the creation of a special Eminent Persons Group, the intention of which was to attempt mediation between the South African government and the liberation movement.", Shubin (n 130 above) (2008) 230.

[134] Shubin (n 130 above) 231.

[135] Shubin (n 130 above) 229.

from pursuing "populist" policies. Terreblanche captures the conundrum faced by white corporate in the following manner:

> The business sector … was confronted with difficult impediments: first, how to convince the ANC to abandon its socialist orientation; second how to prevent the ANC from becoming a populist government inclined towards massive redistribution spending; third, how to ensure that capitalist corporations would remain in a dominant position vis-à-vis the new politico-economic system."[136]

It is these concerns and fears from white corporate power and the apartheid regime that would consume the discussions during transitional negotiations and would finally influence the posture and character of the new South African constitutional dispensation.

2.3.3. The dawn of constitutionalism

Terreblanche argues that between 1990 and 1996, the ANC made serious ideological somersaults from its initial socialist orientation and transformative approach and embraced American ideologies of "neo-liberal globalism" and "market fundamentalism".[137] The 1990s were characterised by secret meetings between some of the leadership of the ANC, including the American and British Pressure Groups, and the leadership of the Mineral-Energy-Complex (MEC).[138] From 1993 South Africa was governed by the Transitional Executive Committee (TEC) comprising of eight members of the National Party government and the eight members of the ANC leadership core.[139] "The TEC decided that South Africa needed a loan of $85 million from the International Monetary Fund (IMF) to assist the country over a balance of payment difficulties. Before the IMF granted the loan to South Africa it requested the TEC to sign a document about the economy policy of the future government."[140]

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[136] Terreblanche (n 123 above) 59.
[137] Terreblanche (n 123 above) 63.
[138] Terreblanche (n 123 above) 63.
[139] Terreblanche (n 123 above) 64.
[140] Terreblanche (n 123 above) 64.

Terreblanche states that it is this very document that was essentially the harbinger to the Growth, Employment and Redistribution policy (GEAR) of 1996. It is this document that committed the future ANC government to the ideologies of neo-liberalism and market fundamentalism.

This is the context within which the first interim Constitution of 1993 and the final Constitution were drafted. The ANC's "somersault" during transition is attributed by Terreblanche to secret negotiations that ensued between the leadership of the ANC and white business in South Africa, including coercion by Western governments, international institutions and global corporations.[141] The latter is probably due to the fact that since the implosion of the Soviet Union in 1991, it became an international *fait accompli* that any country that wanted to survive and prosper had to follow the American economic model of "anti-statism", deregulation, privatisation, fiscal austerity, market fundamentalism and free trade[142] and the then emerging ubiquitous constitutionalism.

The critical question therefore is why and what caused a turn to constitutionalism and what led to the "juridification of South Africa's democratic transition."[143] This question is based on the fact that around mid-1985, the major political players in South Africa were ill-disposed to the notion of constitutionalism.[144] An appreciation of the historical positions of the major players before transition is relevant as a precursor to the understanding of the embrace of constitutionalism by the major players.

Klug's view is that the unlikelihood of the turn to democratic constitutionalism in the 1980s was based on the fact that most in the ANC, and in accordance with the ANC's policy statements, held a particular understanding of the notion of "people's power".[145] People's power was understood in terms of democratic centralism, which would justify

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[141] Terreblanche (n 123 above) 64.
[142] Terreblanche (n 123 above) 65.
[143] The notion of juridification of transition is used by Klug to characterise the nature of South Africa's transition, see Klug (n 132 above) 72.
[144] Klug (n 132 above) 71.
[145] Klug (n 132 above) 72.

state socialism and a one party State which was prevalent amongst most of the ANC's allies.[146] There were also others in the ANC who understood the notion of people's power as being consistent with an unrestrained parliamentary sovereignty and majoritarian democracy.[147]

Klug lists a number of factors that led to the ANC's turn to constitutionalism and fundamental rights protected in the Bill of Rights. Amongst them was a result of discussions of the Constitutional Committee of the ANC held in Zambia in 1987.[148] However the acceptance of fundamental rights in the Bill of Rights was, according to Klug, a strategy deployed by the ANC to attenuate the argument of group and minority rights advanced mainly by the apartheid regime.[149] Secondly, as a response to the bloody mutiny at the ANC's Quatro Camp, the ANC saw it fit to introduce an internal Code of Conduct based on acceptable international principles.[150] It is this that according to Klug introduced the concept of legality into the ANC future approach.[151]

In October 1987, in a document titled "Statement on Negotiations", the ANC stated that it accepted the inclusion of an entrenched Bill of Rights that would safeguard individual rights in the new Constitution.[152] This was followed by the ANC's publication in 1988 of a set of Constitutional Principles.[153] All these, including the Harare Declaration, which contained minimum principles for a post-apartheid constitution that was in sync with the dictates on the international community[154] were at that point regarded by the ANC as a "strategic counterweight" against the insistence on the protection of minority rights by the apartheid regime.[155]

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[146] Klug (n 132 above) 72.
[147] Klug (n 132 above) 72.
[148] Klug (n 132 above) 77.
[149] Klug (n 132 above) 77.
[150] Klug (n 132 above) 77.
[151] Klug (n 132 above) 77.
[152] Klug (n 132 above) 79.
[153] Klug (n 132 above) 80.
[154] Klug (n 132 above) 80.
[155] Klug (n 132 above) 80.

It is critical to note that both the ANC's Harare Declaration and the Constitutional Guidelines were also informed by the need to pacify and a result of acquiescence occasioned by the prevailing ubiquitous international consensus on what constitutes democratic constitutional norms.[156] Klug puts it in the following manner:

> Publication of the Constitutional Guidelines for a Democratic South Africa on the mid-1988 thus marked an initial shift away from unrestrained legislative authority in the perspective of South African liberation movement. By publicly committing itself to the adoption of a bill of rights enforceable through the courts, the ANC assured fellow South Africans and the world of its commitment to the introduction of judicial review.[157]

The nature of the South African transition has had deep impact on how the future of law in South Africa was imagined[158] and how it is currently conceptualised. André Van der Walt mentions two competing versions that dominated debates during the process of dismantling apartheid in South Africa.[159] The first version insisted that transformation would best be served by the re-establishment and re-affirmation of the scientificity and objectivity of law to ensure that law is purged of its pernicious political influences.[160] This view held that law and politics should not be mixed. The problem of law, according to this view, was that "apartheid was an ill-conceived political ideology that only tainted law superficially and this could be fixed by the excision of apartheid laws from the legal system."[161] Once this is done, the new laws would be able to recover their "innate flexibility and adaptability … to function properly and beneficially in the politically and economically transformed society."[162] This view is premised on the assumption that the problem with the legal system during apartheid was not so much the legal system itself but apartheid politics which contaminated the legal system. Based on this assumption, the solution is to scrap apartheid laws and

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[156] Klug (n 132 above) 80.
[157] Klug (n 132 above) 81.
[158] Chanock (n 108 above) 523.
[159] See A J Van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 Fundamina.
[160] Van der Walt (n 159 above) 6.
[161] Van der Walt (n 159 above) 6.
[162] Van der Walt (n 159 above) 6.

their political baggage but retain the "intellectual and moral superiority of the (purified) Roman Dutch law tradition."[163]

In this sense, the problem with South Africa was its politics and not so much its laws as law was also a victim of apartheid. According to Van der Walt, inherent in this view is the idea that transformation itself is capable of changing law incrementally in accordance with the inner logic of law.[164] It is this "Dworkinian" approach to "law as integrity" that is critiqued by Christodoulidis in the "'End of History' Jurisprudence: Dworkin in South Africa" in which Dworkin "calls us again and again to be true to the practice not our own politics."[165] Christodoulidis argues that *law as integrity[166]* leaves the fundamental iniquity (of apartheid) entrenched because a respect for the rule of law, demanded by the notion of law as integrity, within the context of the historical embeddedness of apartheid in law, leaves the fundamental iniquity entrenched. Christodoulidis states that:

> The impossibility of redemption that haunts Mabo[167], like the incursion of evil principles that infect the common law of South Africa even after the repeal of the laws apartheid, points to how unyielding the law is to such total revisions, particularly under integrity that demands fidelity to the past. Integrity … calls for the fidelity to what has become entrenched as institutional record.[168]

Christodoulidis concludes by stating that South Africa should resist to be captured by integrity particularly "when in the very act of binding us together it also binds us to the practices we abhor and the past we renounce".[169]

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[163] Van der Walt (n 159 above) 6.
[164] Van der Walt (n 159 above) 7.
[165] E Christodoulidis "'End of History' Jurisprudence: Dworkin in South Africa" (2004) 2004 Acta Juridica 74.
[166] Law as integrity at its basic means "treat like cases alike", see Christodoulidis (n 165 above) 64.
[167] The Mabo v The State of Queensland (No 2) 1992 175 CLR 1 is an Austrian case that dealt with and overturned the doctrine of terra nullius (that land belongs to no one) by recognising the traditional rights of the Merian people to their Islands in the Eastern Torres Straits, Available at: http://aiatsis.gov.au/publications/products/case-summary-mabo-v-queensland
[168] Christodoulidis (n 165 above) 75.
[169] Christodoulidis (n 165 above) 78.

The second version under the rubric of legal culture questions the notion of change by way of incremental and interstitial developments. This version's premise is that meaningful transformation requires significant and visible changes in the existing distribution of wealth and privilege and points out that the incremental judicial process of interstitial development may well be too slow and protracted.[170]

I suggest that the first version stated by Van der Walt was influenced by pervasive formalist and positivist jurisprudential approaches dominant during apartheid. With reference to Dennis Davis and Hugh Corder, Van Marle states that the jurisprudential debates of the 1980s in South Africa were based on an "uncritical scientific approach to law" which had at its centre the separation of law and the two cognates of politics and the political.[171] The scientific approach and its inevitable separation of law and morality, particularly within the context and application of apartheid meant that the "suitability or correctness of a rule"[172] did not guide adjudication. The essence of the scientific approach is that the validity of a rule is not judged at the bar of morality. Irma Kroeze, quoting John Austin, states that "the science of jurisprudence is concerned with positive laws, or laws strictly so called, as considered without regard to the goodness or badness."[173]

I now turn to the post-apartheid "liminal moment"[174] as a direct consequence of the historical context and the posture of the politics of transition. Having dealt with issues of historical injustice and legalism and legal culture as having contributed to each other's subsistence, and having ushered in a new dispensation which purported to rectify the legacy of colonialism and apartheid, the question that the second section grapples with is: can all these be dealt with and achieved within and by law and

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[170] Van der Walt (n 159 above) 6-9.
[171] Van Marle & Motha (n 15 above) 21.
[172] Van Marle & Motha (n 15 above) 22.
[173] Austin (1832) quoted in J I Kroeze "Legal Positivism" in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 64.
[174] I view post-apartheid South Africa as liminal in the sense that it is still "becoming" and I use the notion of "becoming" in the sense used by Van Marle when she states that "post-apartheid … can be referred to as that which 'hints at the intersection of the transitional and the apparently enduring'", See K van Marle "Reflections on Post-Apartheid Being and Becoming in the Aftermath of Amnesty: Du Toit v Minister of Safety and Security" Constitutional Court Review (2010) 3.

constitutionalism. I suggest in the section that follows that in an attempt to resolve the question of whether the legacy of colonialism and apartheid can be resolved within a constitutional project, we have seen an eruption of metaphors such as the constitution as a bridge, and other adjectival phrases such as transformative constitutionalism.[175] The next section explores whether the radical transformative can be accommodated within the confines of the law and constitutionalism.

2.3.4. The constitutional project and the subversion of decolonisation?

The adoption of the 1996 Constitution in South Africa represents the consecration of the notion of constitutionalism[176] with its antecedent principles of constitutional supremacy, the rule of law and separation of powers. The predominantly unquestioned notion of constitutionalism presupposed that henceforth the intractable problems of colonialism and apartheid were to be addressed by and within a legal and constitutional project. In this sense, law, and constitutionalism as the law's highest expression, would henceforth have the task of redressing the past injustices that were entrenched and perpetuated by law under colonialism and apartheid. The belief that the adoption of constitutionalism as an overarching project would address the legacies of colonialism and apartheid is largely based on the assumption that constitutionalism is a vessel for politics.

Inherent in the notion of constitutionalism in South Africa is the assumption that law and constitutionalism are best suited to bring about radical transformation. Embodied in the assumption that law and constitutionalism are best suited to bring about radical transformation is the fact that radical transformation is a legal and constitutional issue.

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[175] See H Botha "Metaphoric reasoning and transformative constitutionalism (part 2)" (2003) 1 TydSkrif vir die Suid-Afrikaanse Reg (TSAR).

[176] The essence of constitutionalism is that government must derive its powers from a written constitution and that its powers must be limited to those powers enumerated in a written constitution, See I Currie & J de Waal *The Bill Of Rights Handbook* (2005) 8. I use ideology in Hunt's sense "as a constituent of the unconscious in which social relations are lived" and in this sense having the "power and ability to connect and combine diverse mental elements (concepts, ideas etc.) into combinations that influence and structure the perception and cognition of social elements", See A Hunt "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" in S Easton (ed) *Marx and Law* (2008) 148. Accordingly, ideology is important as a legitimating force and thus its ability to reproduce prevailing social relations.

In terms of section 2 of the Constitution, the Constitution is the supreme law of the Republic and all law or conduct inconsistent with it is invalid. I suggest that the effect of section 2 of the Constitution is that there is nothing outside of the Constitution. In this sense radical transformation must and can only be achieved within the framework of constitutionalism. The net result is that decolonisation must, according to this logic, unfold within the framework and logic of constitutionalism.

Moving from a similar prism, Van Marle and Motha correctly state that decolonisation in South Africa has been turned into a constitutional project.[177] According to Van Marle and Motha, post-apartheid legal discourse in South Africa is characterised by the juridicalisation of political demands of class, race, gender etc. and the importation of constitutional supremacy.[178]

The adoption of constitutionalism in South Africa within the context of a country ravaged by centuries of colonialism and apartheid necessarily begs the question whether the resolution of colonialism and apartheid which were legally and constitutionally sanctioned can be successfully resolved by turning them into a constitutional project predicated on the interpretative practices of judges.[179]

The resolution of colonialism and apartheid within a constitutional project can be recast in the final analysis, borrowing from Van Marle and Motha, as an issue of pessimism versus optimism. Van Marle and Motha state that the responses to the new legal and political order can broadly be divided into "those that are mainly optimistic about the constitutional project and support liberal politics and the notions of rights, and those that are sceptical about this project and liberalism."[180] Without pre-empting the discussions in chapter three on the systems theoretical approach, and the containment thesis respectively, I hazard the suggestion that the divide between the pessimists and optimists referred to above becomes slightly complicated when regard is had to the

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[177] Van Marle & Motha (n 15 above) 18.
[178] Van Marle & Motha (n 15 above) 18-19.
[179] Van Marle & Motha (n 15 above) 18-19.
[180] Van Marle & Motha (n 15 above) 23.

fact that in certain instances the pessimists and the optimists are agreed that law in the final analysis can be used as an instrument of transformation. They both agree on the capacity and necessity of the subject, which is law, but differ on how best to instrumentalise law.

I will suggest, using Luhmann's systems theoretical approach and its further development by Christodoulidis in the form of the containment thesis, that pessimists, mostly relying on either CLS or poststructuralist approaches, inherently in the final analysis do agree with the optimists' faith in the potential of law. The divide between the pessimists and optimists is further complicated by the introduction in South Africa of the notion of transformative constitutionalism in that: firstly, it is a notion that has been appropriated by both sides of the divide either to recast it in a purely "realist view of social engineering, upliftment and reparation" or "to an explicit recasting of Klare's project in liberal terms" or "critical engagements with the impossibility of true transformation."[181] I proceed to explore the notion of transformative constitutionalism from its optimist and pessimist angles within the context of and in relation to radical transformation.

2.4. Radical transformation and transformative constitutionalism

The notion of transformative constitutionalism in South Africa has arguably assumed paean status as the prism within which to enter the South African jurisprudential landscape. According to Sanele Sibanda, the notion of transformative constitutionalism has attained a "near hallowed status as the descriptor of the current project of constitutionalism."[182] It was bequeathed to South African jurisprudence by Klare's "Legal Culture and Transformative Constitutionalism".[183] According to Klare, transformative constitutionalism entails

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[181] Van Marle & Motha (n 15 above) 24.
[182] S Sibanda "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism, and the Struggle to Eradicate Poverty" in S Liebenberg & G Quinot (eds) (2012) *Law and Poverty* 45.
[183] Klare (n 7 above) 150.

a long term project of constitutional enactment, interpretation and enforcement … to transforming a country's political social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.[184]

2.4.1. The republican/optimist moment of transformative constitutionalism in South Africa

2.4.1.1. Transformative constitutionalism as instrumentalism[185]

I use the notion of "constitutional optimists" or "constitutional optimism" in the same manner as used by Christodoulidis to refer to approaches to constitutionalism that are characterised by a belief in constitutional reflexivity. I use the notion of constitutional reflexivity to denote approaches to constitutionalism that view a constitution as a vessel for politics. Christodoulidis calls these approaches "republicanism" and I will use the notion of "constitutional optimism" interchangeably with the notion of "republicanism"[186] as I consider them to be both characterised by the belief in constitutional reflexivity.

According to Elsa Van Huyssteen there are competing notions of transformative constitutionalism.[187] This view is buttressed by the former Chief Justice of the Constitutional Court, Pius Langa, who has maintained that transformation is a contested concept and it is difficult to have one understanding of transformative

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[184] Klare (n 7 above) 150.
[185] I borrow the notion of "instrumentalism" from Van Marle and I use it to mean approaches to transformative constitutionalism that view the constitution as a "transformative-thing -in –itself", that is, a sort of an *a priory* transformative document, although they may differ on how to apply to this already transformative document. These approaches usually start with the constitution and end with the constitution, see Van Marle (n 4 above) 294 & 296 on the use of the notion of "instrumentalism".
[186] Christodoulidis uses the concept of republicanism in almost all his works to refer to the belief in legal and constitutional reflexivity.
[187] E Van Huyssteen "The Constitutional Court and the Redistribution of Power in South Africa" (2010) 59 African Studies 245.

constitutionalism.[188] Langa nevertheless affirmatively quotes Catherine Albertyn and Beth Goldblatt's understanding of transformative Constitutionalism as requiring

> a complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships[189]

Langa views transformation as a social and economic revolution that must establish a truly equal society and concomitant provision of basic socio-economic rights.[190] The Constitution for Langa is supposed to ensure that power is equally redistributed and race and gender inequalities are resolved. The full human potential can be reached within the project of constitutionalism. In this sense ontology is constitutionally determined.

The transformative character of South African constitutionalism is carried further by Solange Rosa who argues that without question, the South African Constitution is without a doubt transformative. Rosa argues that it is widely acknowledged that the South African Constitution is a progressive and transformative instrument.[191] Rosa asserts that because of the fact that socio-economic rights are justiciable, courts can therefore monitor "the State's progressive realisation of its constitutional obligations to the poor, ultimately holding the state to account."[192] In the final analysis, Rosa argues that the allowance that the Constitution makes for parliamentary democracy is

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[188] P Langa "Transformative Constitutionalism" (2006) 3 Stellenbosch Law Review 351.
[189] Albertyn & Goldblatt (1998) quoted in Langa (n 188 above) 352.
[190] Langa (n 188 above) 352-353.
[191] S Rosa "Transformative Constitutionalism in a Democratic Developmental State" in S Liebenberg & G Quinot (eds) (2012) *Law and Poverty* 101.
[192] Rosa (n 191 above) 103.

essentially as a transformative element "for the poor and the marginalised" and "necessary to facilitate the transformation of South African society."[193]

Marius Pieterse argues for a "social democratic" understanding of transformative constitutionalism. This social democratic understanding of transformative constitutionalism entails "the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a culture of justification for every exercise of power."[194] According to Pieterse, law and specifically the Constitution, were meant to address marginalisation, exploitation and oppression of black people. The Constitution was meant to ensure that the wrongs of the past are never repeated and the legacy of apartheid is eradicated.[195] Having defined the "social democratic" understanding of transformative constitutionalism, Pieterse presents transformative constitutionalism as being an anti-thesis of liberal constitutionalism.[196]

Accordingly, liberal constitutionalism has a tendency of depicting constitutions as an end in themselves, "fixed in time". On the other hand, according to Pieterse, transformative constitutionalism looks at constitutions as "historically self-conscious" and "embodying an as yet unrealised future ideal".[197] In this sense, transformative constitutionalism is a never ending process which includes dismantling the formal structures of apartheid, and the eradication of structures that reproduce inequalities.[198]

In a nutshell, although Pieterse does not describe his conception of a social-democratic order, one can infer that Pieterse's understands a social-democratic order to be characterised by "substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a culture of justification for

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[193] Rosa (n 191 above) 105.
[194] M Pieterse "What do we mean when we talk about Transformative Constitutionalism" (2005) 20 SAPR/PL 156.
[195] Pieterse (n 194 above) 157.
[196] Pieterse (n 194 above) 157.
[197] Pieterse (n 194 above) 157.
[198] Pieterse (n 194 above) 159.

every exercise of public power."[199] This is presumably why Pieterse calls for transformative constitutionalism with a social-democratic "flavour". Therefore for Pieterse, a "social-democratic transformative constitutionalism" has potential to address marginalisation, exploitation and oppression of black people and ensure that the wrongs of the past are never repeated and the legacy of apartheid is eradicated.[200] In this sense it is the Constitution that must reconstruct society, meaning that the politics of change are to be housed in the Constitution.

The protean character of the notion of transformative constitutionalism is further evidenced by Theunis Roux who, in his response to Klare's article, takes issue with Klare's submissions such as the constitution instantiating an "empowered model of democracy."[201] According to Roux, a lot of Klare's views are essentially "uncontentious" and self-evident to a conscientious South African lawyer.[202] Roux further takes issue with "Klare's presentation of the post-liberal reading of the Constitution as a possible reading different from other plausible readings."[203] Roux insists that the uncontentious character of the Constitution is such that even mainstream liberal interpretative methods can be used to read the Constitution in a transformative manner.[204]

The subtext of Roux's attack on Klare is Klare's apparent endeavour to impose a meta-narrative on constitutional interpretation. Roux accuses Klare of forcing liberal legalists to abandon their liberalism as a pre-condition of reading the Constitution transformatively.[205] Roux's conclusion is that there are other equally plausible interpretative methods that can equally give expression to the notion of transformative constitutionalism.[206]

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[199] Pieterse (n 194 above) 156.
[200] Pieterse (n 194 above) 157.
[201] T Roux "Transformative Constitutionalism and the Interpretation of the South African Constitution: Distinction without a Difference" (2009) 20 *Stellenbosch Law Review* 262.
[202] Roux (n 201 above) 262.
[203] Roux (n 201 above) 262.
[204] Roux (n 201 above) 266.
[205] Roux (n 201 above) 267.
[206] Roux (n 201 above) 270.

Roux critiques Klare for his anti-liberal approach while at the same time advocating liberalism. Hence Roux states that Klare's presuppositions and conclusions, not being penumbral, not being uncontentious, can also be arrived at by appropriating, for instance, Dworkin's theory of interpretation.[207] Roux states thus: "a judge pursuing a Dworkinian method of interpretation is more likely to be able to defend a progressive, caring communitarian interpretation of the Constitution."[208] Another way of looking at Roux's approach is that it exposes both the protean character of transformative constitutionalism and the perils of blending transformation with constitutionalism as Sibanda states below.

2.4.1.2. Constitutional optimism, minus legal culture

Legal culture as an impediment to transformative constitutionalism has enjoyed much attention and analysis. The discussions around transformative constitutionalism and legal culture can be captured by asking the following question: is it possible for transformative constitutionalism to prosper within a conservative legal culture. In other words can transformative constitutionalism, presumably steeped in progressivism, be able to utilise conservative instruments and methodologies to bring about transformation by law.[209] The legal culture argument would see the change in legal culture as entailing the solution towards the realisation of transformation in South Africa. However, this approach is still steeped in the idea of constitutional reflexivity, which, I suggest, fully situates it in the republican camp.

Klare has described legal culture as entailing "professional sensibilities, habits of mind and intellectual reflexes of judges, lawyers and legal academics."[210] From these Klare concludes that South African legal culture is largely conservative, "not in a political sense but in terms of traditions of analysis" and this creates a paradoxical situation

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[207] Roux (n 201 above) 273.
[208] Roux (n 201 above) 280.
[209] Van Marle (n 4 above) 290.
[210] Klare (n 7 above) quoted in Van Marle (n 4 above) 290.

wherein politically progressive lawyers and judges are steeped in legal conservatism.[211] This is because, according to Klare, there is no "necessary correlation between judicial style and interpretative method on the one hand and political ideology on the other."[212]

According to Van der Walt, what create tension between legal culture and transformation are neither historical sources of law nor how historical sources of law are interpreted. The tension between legal culture and transformation is created by entrenched attitudes relating to how we think about "what the law is, how it works and its function in the legal system and society."[213] In other words, our epistemological presuppositions about law are responsible for the tension between legal culture and transformation.

Dennis Davis states that notwithstanding the constitutional designs and the intentions of drafters, a political and legal culture in a particular society is more likely to sway a jurisprudential development of a country.[214] Davis describes legal culture as "professional rhetorical strategies … influenced by enduring political and ethical commitments, undertakings and assumptions about political and social life and justice as well as professional legal discourse, which labels any counter discourse as non-legal."[215] Legal culture, according to Davis, also refers to the interrelationship between law and politics and the manner in which the political is automatically seen to be imbricated in the legal principle.[216]

Davis cites the example of the Constitutional Court decision in the *Mazibuko v City of Johannesburg* (the Mazibuko case).[217] The *Mazibuko case* dealt with whether socio-

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[211] Klare (n 7 above) quoted in Van Marle (n 4 above) 290.
[212] Klare (n 7 above) quoted in Van Marle (n 4 above) 290.
[213] Van der Walt (n 159 above) 5-6.
[214] D Davis "Transformation: the Constitutional Promise and Reality" (2010) 26 South African Journal of Human Right 87.
[215] Davis (n 214 above) 100-101.
[216] Davis (n 214 above) 101.
[217] Mazibuko v City of Johannesburg (2010).

economic rights, in particular section 27(1) and (2)[218] enshrined in the Bill of Rights, contained a minimum core of right that the state was obliged to furnish, the content of which will be determined by the court. The Constitutional Court in this case rejected the notion of minimum core. Davis states that the decision in this case used "old style methodology" of reasonableness traditionally found in administrative law and "the more radical transformative possibilities of social and economic rights were placed upon a backburner … Traditional legal techniques, sourced in administrative law, came to the aid of the court in its election of the deference model."[219]

Sibanda, in "Not quite a rejoinder: Some Thoughts and Reflections on Michelman's 'Liberal Constitutionalism, Property Rights and the Assault on Poverty'", where he further unpacks the position he advanced before,[220] states that beyond the normal and usual limits of South Africa's conservative culture and the dominant formalist approach to law, the notion of transformative constitutionalism contains certain pitfalls that render it ill-suited to the eradication of poverty and bring about social and economic emancipation.[221] Sibanda characterises transformative constitutionalism as amounting to, in the final analysis, "a preferred approach to constitutional interpretation."[222]

Sibanda's proposal is that in order to overcome the pitfalls of transformative constitutionalism, the goals of transformation that demand reconstruction, redistribution and democratic popular participation must be explicitly entrenched as

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[218] Section 27(1) of the Constitution states that:
27(1) Everyone has the right to have access to-
 (a) health care services, including reproductive health care;
 (b) sufficient food and water; and
 (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
   (2) The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of this rights.
[219] Davis (n 214 above) 96-7.
[220] S Sibanda "Not quite a rejoinder: Some Thoughts and Reflections on Michelman's 'Liberal Constitutionalism, Property Rights and the Assault on Poverty'" (2013) 2 Stellenbosch Law Review. In this paper Sibanda develops the arguments he makes in Sibanda (n 182 above) 44.
[221] Sibanda (n 220 above) 331.
[222] Sibanda (n 220 above) 332.

constitutional provisions in the constitution.[223] Although Sibanda may be said to be correctly evincing the aporetic nature of trying to resolve critical issues of reconstruction and redistribution within a constitutionalism scheme, it could be opined that his proposal that these issues be entrenched in the Constitution inadvertently strengthen and legitimate the object of his critique. In other words, having cogently shown the contradictory character between transformation and liberal constitutionalism, he suddenly reverts back to constitutionalism as an arena to host highly political issues of reconstruction and redistribution. The concern here is that whilst critiquing liberalism's constitutionalism, Sibanda, in his quest for a solution, proposes containment – the sort of containment that enables the reconstruction and redistribution to be contained in the Constitution. A different reading, albeit with a similar containment conclusion, is that Sibanda's solution is that of radical constitutionalism, which once again reverts to instrumentalism which treats law as an empty frame into which new radical content is put in. If this be an alternative reading of Sibanda, it may be that such a reading firstly fails to (or give scant attention) analyse the structural limits of law as a phenomenon. Sibanda's approach therefore, instead of dealing with the aporia of law and transformation, confirms the existence of the aporia.

2.4.1.3. The dialogic moment: Botha[224]

Fundamental to Henk Botha's conceptualisation of transformative constitutionalism is its dialogic moment. For Botha, "the idea of rights as relationship and fundamental rights litigation as dialogue can enable more humane possibilities than the idea of rights as boundaries."[225] It is this dialogic moment[226] that although not uncritical of liberal approaches, ultimately holds to the view of constitutional reflexivity. Botha views the Constitution as seeking to uphold the rule of law without postulating a rigid division between law and politics.[227] Its version of fundamental human rights negates abstract

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[223] Sibanda (n 220 above) 332.
[224] For a discussion on the dialogic moment that I am referring to, see Botha (n 175 above).
[225] Botha (n 175 above) 34.
[226] I discuss the idea of the constitution as a dialogue in chapter 3.
[227] Botha (n 175 above) 20.

individualism. The Constitution for Botha represents a fundamental and decisive rupture with the past. It seeks to prevent the repetition of the past. Botha's notion of a decisive break can be compared to approaches which attribute the failure to address historical justice, as being due to the Constitution's legitimation of the past wrongs by constitutionalising injustice. In this sense the Constitution is not viewed as representing a fundamental break whilst its past is essentially carried on and represented in the Constitution. This notion of a fundamental break with the past is also addressed by Van Marle who states that "what is becoming more pertinent is that the major change in form has not been accompanied by a major change (or any change at that) in substance."[228] Moreover, if post-apartheid is viewed as an "intersection of the transitional and the apparently enduring"[229], then the notion of a fundamental break becomes suspect. Unless what Botha means is that the vision of the Constitution is that there must be a decisive break with the past, in which case we go back to Delport and Ramose on how can a version of the past contained in the Constitution represent a fundamental break with the past.

According to Botha, the transformative aspect of the Constitution inheres in the Constitution's commitment to the eradication of systemic or structural inequality. Delport would state to the contrary that the Constitution is in fact incapable of eradicating systemic and structural inequality precisely because of its inability to fundamentally break with the past by addressing the question of historical injustice and because of its "misdiagnosis of the question of justice as reconciliation instead of re-construction."[230]

It can be tentatively argued that Botha's submissions do contain a not so insignificant dose of republican moments. According to Botha, it is the Constitution that constructs humanness in South Africa. Whilst Botha is critical of the "liberal conception of the individual as someone who exists prior to any specific community"[231], I suggest that

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[228] Van Marle (n 174 above) 348.
[229] Van Marle (n 174 above) 351.
[230] T Delport "An Ethical (anti-) Constitutionalism? Transformation of the Transfigured Public" (2014) 46 Acta Academia 114.
[231] Botha (n 175 above) 24.

his resort to a "rights" approach that is manifest in his believe in "rights as dialogue"[232] has the effect of putting him back squarely within the liberal approach. Rights in this sense are shaped by political and legal discourse. Botha's republican moment becomes much more palpable when he states that "the constitutionalisation of rights needs not stifle democratic debate; it is rather, a way of facilitating and structuring debates over the reach and content of rights, the justifiability of official conduct, the kind of social relationships envisaged by the constitution and/or the bounds of the political community."[233] In this sense, just like republicanism, the hosting of the political is in the legal. I discuss and critique in detail some of the views above in chapter three dealing with the systems theoretic approach. For instance although Sibanda contends that it is not possible to achieve transformation within the context of liberalism, he is silent on whether law as a phenomenon is capable of bringing about transformation. The systems theoretical approach would however contend that law as a normatively closed and self-referential system is not capable of "steering" other systems.

2.4.1.4. The pessimists: Sibanda and Ramose: exogenous arguments

It is precisely Roux's liberal-democratic paradigm that Sibanda takes issue with. Sibanda's view is that the major pitfall of transformative constitutionalism is due to the fact that ultimately constitutionalism in South Africa is deeply imbedded within the liberal-democratic paradigm.[234] "The prevalence of a liberal democratic constitutional discourse – despite the best intentions of transformative constitutionalism has had the effect of defining the goods of constitutionalism in narrower terms … it is transformative constitutionalism's ostensible weddedness to liberal democratic constitutionalism that makes it ill-suited for achieving the social, economic and political vision it proclaims."[235]

Sibanda identifies two limits to transformative constitutionalism in South Africa, namely legal culture and the liberal-democratic paradigm. With reference to Klare, Sibanda

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[232] Botha (n 175 above) 24.
[233] Botha (n 175 above) 24.
[234] Sibanda (n 182 above) 44.
[235] Sibanda (n 182 above) 44.

states that the threat to transformative constitutionalism in South Africa is the "traditionalism and conservatism of South African legal culture."[236] Accordingly, the danger with this "inherentness" is that it may be "undermined by those who believe that political goals should not be pursued through adjudication."[237]

The second impediment that Sibanda identifies as an impediment to transformative constitutionalism is, as already partially stated, the liberal-democratic paradigm that transformative constitutionalism is ensconced in. Although Sibanda agrees with the notion of legal culture as an impediment, Sibanda goes further and states that the problem goes much further than legal culture. According to Sibanda, "in a constitution that structurally and institutionally accords with the basic tenets of liberal democratic constitutionalism (a few innovations notwithstanding), transformative constitutionalism would, in practical sense, only appear to be achievable through sustained and purposeful legal and judicial interpretation demanding shared consciousness."[238]

Ramose argues for a "post-conquest constitution that must deal with the "restoration of the title to territory and the reversion of unencumbered and unmodified sovereignty to the same quantum and degree as conquest."[239] Ramose's assertion is that the eradication of poverty in Africa cannot succeed unless the constitution is radically revised to ensure that *Ubuntu* as African philosophy becomes ubiquitous.[240] This constitution must be based on justice and justice according to Ramose is the unconditional return of land. In a nutshell Ramose's argument is that firstly, the paradigm of democratisation perpetuates decolonisation because by constitutionalising an injustice, injustice is transformed into justice. The point of departure must be the return of land outside the boundaries of constitutionalism. The second argument he makes is that, having dealt with the question of injustice, a new constitution must then put at its centre African Philosophy in the form of *Ubuntu*.

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[236] Sibanda (n 182 above) 46.
[237] Sibanda (n 182 above) 46-7.
[238] Sibanda (n 182 above) 51.
[239] M Ramose "I Conquer, Therefore I am the Sovereign, Constitutionalism, and Democracy in Zimbabwe and South Africa" in P H Coetzee & A J P Roux (eds) *Philosophy from Africa: A Text with Readings* (2003) 491.
[240] M Ramose "Philosophy and Africa's Struggle for Independence" (2006) 25 Politeia 15.

Ramose presents a cogent analysis relating to separation of justice and law. However, his argument that Ubuntu be a constitutional philosophy is susceptible to being labelled a form a radical republicanism in that once Ubuntu becomes a constitutional matter, it must be adjudicated upon. The perils of adjudication and its decisionist imperative will be discussed below, suffice to state the exclusionary and silencing aspects of adjudication.

Delport uses Dussel's notion of "the ethics of liberation" as entry to his critique of "all critical discourse that sees in the constitution enough legitimacy for the critical project."[241] In reference to Dussel, Delport states Dussel's three principles that constitute the fundamental part of an ethics of liberation. The three principles are the material principle, the formal principle and the principle of feasibility. The first principle, the material principle, relates to the production, reproduction and development of human life.[242] This first principle of production, reproduction and development of human life leads to the second principle, the formal principle of morality. The formal principle of morality (the formal moment of morality) "aims to bring into being political institutions that make possible the continuation of life."[243] In other words, the formal moral principle must apply the material principle, hence "the formal principle of morality should … be grounded in the material principle of ethics."[244] The third principle, the principle of feasibility, relates to what is technically possible within the framework of the other two principles. "If something is technically possible, but does it not produce, reproduce and develop human life …, then this is not feasible since it is un-ethical."[245]

Law and constitutionalism should then be judged in accordance with these three fundamental principles of the ethics of liberation. Based on the exposition of Dussel's three fundamental principles of the ethics of liberation, Delport then proceeds to critique the notion of constitutional supremacy. This he does by firstly applying the first principle and asking whether the Constitution ensures or is able to produce, reproduce

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[241] Delport (n 230 above) 118.
[242] Delport (n 230 above) 108.
[243] Delport (n 230 above) 108.
[244] Delport (n 230 above) 109.
[245] Delport (n 230 above) 110.

and develop human life. Delport answers this question in the negative due to the fact of the Constitution's singular focus on an unjust political system as opposed to colonial conquest and dispossession.[246] Delport's argument is similar to Ramose's view on the deep connection between land and justice in that they both believe that there is an indissoluble connection between land and life and that "to be landless is to be dead, since loss of land is equal to being cut from the means to stay alive."[247] In this sense, to the extent that the Constitution does not address the historical injustice of the return of the sovereign title to land, the Constitution does not assist in the production, reproduction and development of human life.

The second question on the formal morality principle, which is supposed to create conditions for the first principle is also answered in the negative by Delport because of the exclusion of the majority of the people by the ANC in the "formal moment of practical-discursive reason."[248] Based on the Constitution's failure to affirmatively deal with and satisfy the first two principles of the material and feasibility aspects of the ethics of liberation, Delport then concludes that due to this failure to satisfy fundamental part of the principles of the ethics of liberation, the Constitution is un-ethical. Furthermore, the notion of transformative constitutionalism, is according to Delport, an extension of an un-ethical project. "The project of transformative constitutionalism is an unethical project, since it accepts technical feasibility without reference to the material and formal principles related to this feasibility."[249]

Delport ultimately calls for "Utopian Constitutionalism". Utopian constitutionalism according to Delport starts with thinking "anti-constitutionally" or "supra-constitutionally", a sort of "negative imagination" that would create space for utopianism.[250] Utopia, as Delport explains, is the "ability to think and theorise about

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[246] Delport (n 230 above) 113.
[247] Ramose (n 239 above) 61.
[248] Delport (n 230 above) 115.
[249] Delport (n 230 above) 117.
[250] Delport (n 230 above) 118.

what is not possible".[251] Delport's critique is centred on the morality embedded in the Constitution. In this sense, all the Constitution requires is a different form of morality.

2.4.1.5. Van Marle's complex pessimism

I am mindful of Van Marle's characterisation of the taxonomy of transformative constitutionalism in South Africa as entailing two broad approaches, namely the instrumental functionalist and the critical approach.[252] In other words, I am mindful of the fact that the notion of transformative constitutionalism can constitute a critical approach in itself, that is, its instrumentality element. On the other hand it can also be employed as critique and when it is employed as a critique it becomes "an approach to the Constitution and law in general that is committed to transforming political, social, socio-economic and legal practices in such a way that … will radically alter existing assumptions about law, politics, economics and society in general."[253]

I therefore align myself with the view that although the notion of transformative constitutionalism is rooted in law[254], we should, with slight variation, heed Deleuze words to Negri when he says "what interests me isn't the law or laws (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence, ultimately, that creates law, and we mustn't go on leaving this to judges."[255] It is this understanding, according to Douzinas, of jurisprudence as "the prudence of juris, the phronesis of the law, its consciousness and conscience"[256] that animates the fact that the prudence of the law may not be in the law. This is in contradistinction to the approach to jurisprudence as the study or science of law which ultimately becomes legal philosophy and leads to an instrumentalist approach to transformative constitutionalism as being about how the constitution can be used as an instrument to transform society. The latter approach, which Douzinas calls

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[251] Delport (n 230 above) 111.
[252] Van Marle (n 4 above) 287.
[253] Van Marle (n 4 above) 287.
[254] Van Marle (n 4 above) 287.
[255] Van Marle (n 174 above) 347.
[256] C Douzinas "A Short History of the British Critical Legal Conference or, the Responsibility of the Critic" (2014) 25 Law Critique 188.

"ontological jurisprudence,[257] starts by asking "what is the law" and inevitably, within our context, proceeds, having asked what is the law, to then ask how can this law guide the transformation project.

Van Marle states that "although transformative constitutionalism by its very nature is a project rooted in law, I do not regard it as limited to law and legal enquiry."[258] The other way of saying what Van Marle states is to borrow from Douzinas who states that "understanding the law, its consciousness, cannot be separated from an exploration of law's justice or of an ideal law or equity at the bar of which law is always judged."[259]

Therefore an approach to transformative constitutionalism that views transformative constitutionalism as a holistic inside out to the broader project of transformation is considered a preferable approach. Its point of departure is to commence with the politics of transformation and allow a dialectical relationship between the politics of transformation and law, whilst having at the back of its mind the "limits of law".

If we agree with the fact that a critical approach to transformative constitutionalism is a better approach and can take us deeper, but deeper is the furthest it can take us[260], does this not mean that we are back at the acknowledgment of the unresolvable internal contradiction – the aporetic moment. I understand Van Marle to be saying that transformative constitutionalism can only take us so far precisely because of the "limits of law". However Van Marle qualifies her notion of the limits of the law in the following manner:

> I subsequently shifted to a more sceptical view about "the limits of the law" type argument to the extent that it allows for the continuation of the status quo; the possible, albeit unconscious, alliance between legal positivism and proclaiming the limits of law. This is also illustrated by Klare's argument on legal culture: a 'limits of the law' type

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[257] C Douzinas (n 256 above) 188.
[258] Van Marle (n 4 above) 288.
[259] Douzinas (n 256 above) 188.
[260] Van Marle (n 4 above) 287.

argument could come with a radical politics but a conservative approach to law that does not encourage constitutional transformation and development and could in fact prevent.[261]

In other words, according to Van Marle, whilst acknowledging the "limits of law", this acknowledgment should avoid the pitfalls of positivism which makes a distinction between law and morality, separates rights and duties that are legal and rights and duties that are moral.[262] According to Van Marle, viewed as a critique, transformative constitutionalism uses different external philosophical approaches to come to grips with the problems and limitations of law. I suggest that Van Marle's altered view on the "limits of law" type of argument may be due to the fact that an appropriate or preferable critical transformative approach must treat law also as an arena of struggle that is not simply a reflection of the economic base.

This approach would see the necessity of "holding on to both ends of the chain at the same time."[263] This approach does not offer a theory against law and thus throwing "the legal baby-out with capitalist bathwater."[264] It acknowledges that law can become an economic as well as a political tool.[265] This is not to suggest "a Kantian approach by framing politics as applied *Rechtslehre* (jurisprudence) by asking how the democratic idea can be updated under the conditions of globalisation."[266]

In the final analysis the practical issue, as I see it, is captured lucidly by Van Marle and Motha's simple yet potent question: how to engage critically with political and legal problems in South Africa as a pressing matter.[267] Bearing in mind the issues of colonialism and apartheid and their attendant practices of exploitation, oppression and dispossession, the question is asked again: Can the resolution of colonialism and

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[261] Van Marle (n 4 above) 294 at n 52 of Van Marle's article.
[262] Van Marle (n 4 above) 294 at n 52 of Van Marle's article.
[263] Hunt (n 176 above) 147.
[264] S Spitzer "Marxist Perspectives in the Sociology of Law" in S Easton (ed) *Marx and Law* (2008) 23.
[265] Spitzer (n 264 above) 24.
[266] Fischer-Lescano (n 26 above) 9.
[267] Van Marle & Motha (n 15 above) 18.

apartheid and their attendant exploitation, oppression and dispossession be successfully resolved by turning them into a constitutional project concerned with the interpretative practices of judges.[268]

Alternatively, as Van der Walt puts it, is there a contradiction between transformation and constitutionalism. This is because transformation entails and demands change whereas constitutionalism demands and entails stability and the maintenance of the status quo.[269] Van der Walt continues to ask: "Is a democratic constitution that seems to entrench existing privilege and power workable in a political, social and economic context that so palpably requires urgent and radical transformation."[270] Conversely, can a democratic constitution that so clearly demands and legitimises large-scale social transformation really deliver on its promises of stability and continuity?[271]

2.5. Conclusion

In this chapter I have suggested that to the extent that the ANC's NDR's main objective is the deracialisation of society and the realisation of the goals contained in the Freedom Charter, the notion of coloniality is left unattended. I have further suggested that the pursuit of the NDR within the context of constitutionalism, including transformative constitutionalism, may mean that the cultural and epistemic legacies of colonialism are left unattended. I suggest that constitutionalism, instead of creating a space for decolonisation tends to perpetuate not only colonialism but also coloniality. This conclusion is based on the deep connection between modernity and colonialism and I suggest that constitutionalism as a project of modernity is complicit with colonialism. I once more recall Van Marle's observation that "constitutionalism and human rights discourse are post-apartheid South Africa's embrace of the light of the Western world"[272] and that "the choice of constitutional supremacy underscores law

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[268] Van Marle & Motha (n 15 above) 18.
[269] Van der Walt (n 159 above) 4-5.
[270] Van der Walt (n 159 above) 5.
[271] Van der Walt (n 159 above) 5.
[272] Van Marle (n 2 above) 414.

and supports a certain form of legal politics that holds danger of overtaking politics as a form resistance."[273]

I have also tried to demonstrate how the politics of transition, starting from 1986 and gathering momentum between 1990 and 1996 have ensured the perpetuation of the project of modernity and thus complicity with the fundamental tenets of colonialism. The adoption of constitutionalism as a form of social organisation has meant that radical transformation can only unfold within the context of constitutionalism. I have also touched on transformative constitutionalism, which is largely an approach that deals with legal culture, as the dominant approach that seeks to realise transformation within constitutionalism. However, I suggest that transformative constitutionalism can only refer to transformation and not radical transformation. This is based on what I see as difficulties of realising radical transformation within law and constitutionalism. I take this argument further in chapter three on systems theoretical approach. In the interim, I take a dim view on the possibility of radical transformation unfolding within the context of constitutionalism for reasons that I advance in chapter three.

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[273] Van Marle (n 2 above) 411-12.

CHAPTER THREE: SYSTEMS THEORY AND THE LIMITS OF LAW AND CONSTITUTIONALISM

3.1. Introduction

The aim of this chapter is to critically explore the "limits of law" and accordingly constitutionalism towards the attainment of radical transformation in South Africa. The assumption is that law and thus the notion of constitutionalism as was taken up in South Africa has structural limits that always already prevent radical transformation. The notion of the "limits of law" presupposes that the very essence of law as a phenomenon has limits and these limits are structural. This chapter therefore explores, from a systems theoretical approach, the "limits of law" and constitutionalism and the implications of the "limits of law" and constitutionalism on the attainment of radical transformation in South Africa.

I use Niklas Luhmann's systems theoretical approach to analyse the "limits of law". I specifically rely on Hans-Georg Moeller's interpretation of Luhmann's social systems theory in general and Christodoulidis's application of Luhmann's approach to law and constitutionalism. Having traversed the exposition of Luhmann's social systems theory through the lens of Moeller and its application to law and constitutionalism through Christodoulidis, I deploy this approach to critically analyse what I suggest are the possible pitfalls of constitutionalism in general and transformative constitutionalism in particular with specific reference to South African constitutionalism. The argument I make is that the notion of transformative constitutionalism, following Christodoulidis's critique of republicanism, is unable to escape the structural limits of law and what Christodoulidis calls "the inertia of institutional imagination"[274] or "constitutional irresolution".[275] I suggest in the final analysis that from a systems theoretical prism, the possibilities of law and constitutionalism, including the adoption of a transformative approach to constitutionalism, are unlikely to succeed in ensuring the attainment of radical transformation in South Africa.

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[274] E Christodoulidis "The Inertia of Institutional Imagination: A Reply to Roberto Unger" (1996) 59 Modern Law Review 377-97.

[275] E Christodoulidis "Constitutional Irresolution: Law and the Framing of Society" European Law Journal (2003) 9 401-32.

In part one of this chapter I provide a brief exposition of Luhmann's social systems theory in general. In unpacking systems theory, I will however avoid a strict exposition-application schema but focus on certain systems theory concepts that are relevant to the main thrust of the chapter. In part two I explore autopoiesis and law. In part three I focus on the systems theory and republican approaches to constitutionalism. I conclude the chapter with an evaluation of the notion of transformative constitutionalism from a systems theory point of view.

Twentieth century legal theory has been characterised by a split between two view points, namely the *sociology of law*[276], which theorised law in terms of the relationship between legal and extra-legal variables and the *pure theory of law* with its specific focus on the internality of law.[277] The same split, it is submitted, continues to obstinately dominate legal theory in the 21st century. I suggest that the theory of legal autopoiesis assists in revealing the blanks on the legal phenomena "by identifying circular relations in law and society and investigating their internal dynamics and external interactions."[278]

3.2. Luhmann's social systems theory

3.2.1. Moeller on Luhmann's basic assertions

Although Niklas Luhmann has written on a variety of subjects, *A Sociological Theory of Law*[279] is his first major treatise on law to be translated into English. In this book Luhmann introduces the notions of, amongst others, cognitive and normative

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[276] According to Christodoulidis, the sociology of law approach, by virtue of its focus on the relationship between law and society, is not able to adequately expose the structural limits of law see E Christodoulidis (1998) *Law and Reflective Politics* (1998) xiii. See Luhmann (n 16 above) on the works by Luhmann.
[277] F Ewald (1987) "The Law of Law" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987*)* 39.
[278] G Teubner *Law as an Autopoietic System* (1993) 10.
[279] N Luhmann *A Sociological Theory of Law* (1985). This book was first published in German as *Rechtssoziologie* in 1972.

expectations[280], self-referential systems[281] and the nature of autopoietic systems.[282] Luhmann's *A Sociological Theory of Law* generally explores the development of law at a structural level and fundamentally deals with the positivisation of law due to functional differentiation occasioned by increasing societal complexity.[283] Luhmann's second major treatise on law to be translated into English is *Law as a Social System.*[284] *Law as a Social System* constitutes Luhmann's much more definitive application of systems theory to law. In their "Introduction" to Luhmann's *Law as a Social System*, Richard Nobles and David Schiff describe the book as "probably the most important, original and complete statement made about law in the second half of the twentieth century by a social theorist, a statement about the autopoiesis of law."[285] Related to Luhmann's theorisation of law is his theorisation of politics and politics' relationship to law. In *Political Theory in a Welfare State*[286], Luhmann makes a direct link between the evolution of the modern political system and law. For Luhmann, "the modern political system evolved in conjunction with, and dependent on, law."[287]

In *The Radical Luhmann*, Moeller succinctly explains and explores Luhmann's basic assertions.[288] According to Moeller, Luhmann's approach is that of a paradigm shift from philosophy to theory and he does this by sublating philosophy through theory.[289] Luhmann fundamentally breaks with the anthropocentric heritage of Western philosophy – that is the belief that human kind is the central and most important element of existence. In this sense, Luhmann denies the notion of the "human being"

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280 Luhmann (n 279 above) 31.
281 Luhmann (n 279 above) 281.
282 Luhmann (n 279 above) 282.
283 Hanna (n 16 above) 153.
284 N Luhmann *Law as a Social System* (2004). This book was originally published in German as *Das Recht der Gesellschaft* in 1993.
285 R Noble & D Schiff 'Introduction' in Luhmann (n 284 above) 1.
286 N Luhmann *Political Theory in the Welfare State* (1990). This book was originally published in German as *Politische Theorie im Wohlfahrtsstaat* in 1981.
287 Luhmann (n 286 above) 5.
288 Moeller (n 22 above).
289 Moeller (n 22 above) xi. By "sublating philosophy through theory" I understand Moeller to be suggesting that Luhmann negates philosophy by lifting theory to a higher level in a way that, whilst preserving elements of philosophy, Luhmann nonetheless overcomes it through theory. Put differently, Luhmann uses philosophy to subvert it through theory.

a central place in social theory.[290] Luhmann thus redescribes social reality by decentering human urgency.[291]

The denial of the centrality of the human urgency by Luhmann makes him what Moeller calls a "radical antihumanist". Luhmann declares that his theory must be understood as an attempt at a "transition towards radically anti-humanist, radically anti-regionalist, and a radically constructivist concept of society" by negating the common European philosophical heritage "that society consists of concrete human beings and relations between human beings."[292] Society, according to Luhmann, has never been human – the notion of the human being has always been theoretically problematic, and sociology based on humanist terms has always been misguided.[293]

It is critical to point that much as Luhmann is antihumanist, his theory neither implies nor denies the existence of human beings. Luhmann's anti-humanism only suggests that humans are as little in control of social functions as they are of, for instance, brain functions.[294] This in itself presupposes the inability of humans to intervene in society and steer society because "under the conditions of functional differentiation and operational closure, there is no institution, organisation, system, or group in society that can steer society as a whole. Systems steer themselves."[295] For instance, the political system can only irritate or perturb the legal system and the legal system can only perturb or irritate the economic system and as such "steering is always self-steering of systems".[296] This obviously is in contrast with the Western Enlightenment heritage that assumes that politics and political institutions, and law and legal institutions, are natural instruments that can be used by human beings to control, steer and guide society.[297]

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[290] Moeller (n 22 above) x.
[291] Moeller (n 22 above) 5.
[292] Moeller (n 22 above) 19.
[293] Moeller (n 22 above) 21.
[294] Moeller (n 22 above) 23.
[295] Moeller (n 22 above) 24.
[296] Moeller (n 22 above) 24.
[297] Moeller (n 22 above) 25.

Moeller proceeds to illustrate, using the system of politics as an example, that the notion of politics steering society is historically based on Plato's notion of the "philosopher King" who due to his superior wisdom is supposed to rule society. This is of course based on Plato's supposition that society is a unified whole.[298] Systems theory refutes the fact that society is based on unity but rather it insists that society is based on distinctions and differences. Systems theory refutes the Platonic notion of society based on universal reason and rationality. It argues that reason and rationality are "contingent or construction of a system."[299]

A valid question however arises relating to the non-centrality of human beings in society and the related human beings' inability to steer society. In other words, supposing that human beings cannot steer society, what then brings about social change? Put differently, what do we then attribute social change to? According to Chris Thornhill, "Luhmann argues that the rationality which triggers social change, even that which brings social improvement or 'progress', is not the reflexive rationality of concrete people, but the internal rationality of the systems of society."[300] Thornhill goes further to state that this rationality becomes manifest and effective as systems reduce and develop complexity in the process of their self-stabilisation. In this sense, "rationality is system rationality" [301] and the systems rationality is "an autopoietic self-reflection of a social system as it reacts to the complexity of its environment and greater adequate levels of internal complexity."[302]

In the final analysis Luhmann's approach should be understood as a functionalist approach, a less critical approach but a more radical approach. Moeller explains this claim by saying that the humanist approach of the radical left ultimately makes the radical left less radical precisely because they share this humanist pattern with the "rightist" or liberal thinkers whom they argue against. This shared humanist approach

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[298] Moeller (n 22 above) 25.
[299] Moeller (n 22 above) 25.
[300] C Thornhill "Niklas Luhmann's Political Theory: Politics after Metaphysics" in M King & C Thornhill (eds) *Luhmann on Law and Politics: Critical Applications* (2006) 78.
[301] Thornhill (n 300 above) 79.
[302] Thornhill (n 300 above) 79.

between the radical left and the rightist and liberal thinkers is rooted in the Enlightenment tradition of human rationality. Notions such as the creation of a more democratic and more equal and more just society can only be radical within the context of liberal political theory.[303] Social systems theory depart from a purely different angle: "Social systems theory does not deal with fabricating new hopes, new promises, or new utopias, but it is also not afraid of letting go of hopes that cannot been fulfilled, promises that have never been kept, and fairy-tale visions of a golden future."[304]

Systems theory does not engage in critique but rather pushes for a paradigm shift. This is in contrast to critical theory which typically decries that certain ideals have not yet been met and need another try. In departing from a humanist perspective which privileges human agency, critical theory accordingly serves the conservative project of finishing the yet unfinished project of Enlightenment.[305] Systems theory shatters some of the common-sense self-descriptions so that some of the previously unimagined possibilities of looking at the world can emerge.[306]

In the final analysis, Luhmann's theory is a theory about systems and not about the system itself. In this sense, Luhmann's theory is not a prescriptive theory but a descriptive theory.[307] Luhmann, according to Moeller, has "accused those who accused him of not offering any help or advice to society of betraying theoretical adequacy with their political agendas. Rather than telling society what to do and where to go, he intended to improve the adequacy of social theory by raising it above and beyond ideology."[308]

Luhmann further attempts a solution to the traditional problem of Western philosophy – which is the mind-body dualism by showing that there is a further dimension to this

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[303] Moeller (n 22 above) 30.
[304] Moeller (n 22 above) 31.
[305] Moeller (n 22 above) 31.
[306] Moeller (n 22 above) 31.
[307] Moeller (n 22 above) 35.
[308] Moeller (n 22 above) 37.

mind-body dualism in the form of communication.[309] In short, Luhmann's approach of "cognitive constructivism" reverses the relation between ontology and epistemology by insisting that reality is not the condition for experience but rather that cognitive functions can generate themselves autopoietically and thereby construct reality.[310]

3.2.2. Genesis of autopoietic theory

The progenitors of the theory of autopoiesis are the Chilean biologists, Humberto Maturana and Francisco Varela. Maturana and Varela developed the idea of biological systems as units that produce and reproduce their elements and as such being independent of their environments. These biologists defined an autopoietic system "as a system that produces and reproduces its own elements through their interaction."[311] Autopoiesis therefore refers to systems. Autopoietic systems are systems which reproduce themselves autopoietically. In short, the theory of autopoiesis, as theorised by Maturana and Varela, is used to describe "the self-reproduction of organic life – the production of living cells from living cells."[312]

The term "autopoiesis" was borrowed from biology and transposed into the social system by Luhmann in order to secure an understanding of social systems.[313] Luhmann transposed autopoiesis into the realm of the social by severing social autopoiesis from its biological genesis and identifying communication as the basic element of a social system and defining social systems not as groups of people but as systems of meaning.[314] Living systems produce and reproduce their elements and these elements are cells and social systems to produce and reproduce their elements and these elements are communications.

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[309] Moeller (n 22 above) xi.
[310] Moeller (n 22 above) xii.
[311] H Rottleuthner (1987) "Biological Metaphors in Legal Thought" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 114.
[312] S Veitch et al *Jurisprudence: Themes and Concepts* (2012) 278.
[313] Veitch et al (n 312 above) 278.
[314] M King "The 'Truth' About Autopoiesis" (1993) 20 Journal of Law and Society 219.

The defining character of an autopoietic system is that it is self- reproductive. This self-reproduction refers to how the system reproduces itself organisationally.[315] The organisation is defined as the manner in which components of the system are related so that they "constitute a composite unity as a unity of a particular kind."[316] According to Peter Kenneally, "the system is the unity of its organisation and its structure and for the system to count as autopoietic they must both be produced".[317] This self-reproduction is not static but dynamic and as result is not susceptible to decay. The system is organised in such a way that the turnover of its components create conditions for the replacement of the components by other identical components. In order for the turn-over to be constant and consistent and continue to have an identical pattern, the system must acquire the material for its replacement from outside the system,[318] what will later be called a system's cognitive openness.

However, the system's organisation remains unchanged, notwithstanding the fact that it has to acquire material for its regeneration from outside. In other words, the organisation of the system remains unchanged. The fact that the system remains unchanged throughout the process of self-reproduction despite the fact that it requires material from outside for its regeneration means that the system is organisationally closed with regard to its environment "but open in terms of energy and matter". [319] The system is thus characterised by the dialectic of closure and openness which I discuss in detail below. Suffice to state that Luhmann's dialectic of closure and openness is pivotal to his typology of systems: living systems which are characterised by self-reproduction of life (cells as elements of the living system), psychic systems which are characterised by consciousness as elements and social systems which are characterised by communications as elements.[320] The focus of this chapter is however on the social system and specifically on law as a social system.

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[315] P Kenneally "Talking about Autopoiesis" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 355.
[316] Kenneally (n 315 above) 356.
[317] Kenneally (n 315 above) 356.
[318] Kenneally (n 315 above) 356.
[319] Kenneally (n 315 above) 356.
[320] Veitch et al (n 312 above) 279.

3.3. Autopoiesis and law

3.3.1. Luhmann's basic assertions on law

Luhmann's approach is to first give account of society as a whole and then proceed to deal with law's place within society in terms of autopoiesis theory and whether law as a subsystem has the ability to influence other social subsystems.[321] John Patterson correctly states, notwithstanding Lumannn's view on the inability of law to engineer society, that there is traditionally something counterintuitive and perverse about Luhmann's view, particularly for a state of affairs which has traditionally viewed law as a tool for change.[322]

This is because Luhmann fundamentally rejects the claim that law has the capacity to improve society, control populations or engage in social engineering.[323] Luhmann's rejection of the capacity of law to improve society and engage in social engineering is in tandem with his rejection of the Enlightenment project which seeks to improve society through the deployment of human rationality.[324] According to King, Luhmann rejects the claim that human rationality is capable of solving social problems and refutes the "taken for granted world as the only reality or authoritative attribution of causes as having universal validity" and possess "a total scepticism concerning the ambitions of law and politics to regulate social behaviour in a reliable and predictable manner."[325] As a result Luhmann rejects the view of law as a force for progress in society or "an effective or potentially effective instrument for regulating and controlling events."[326] This, as stated earlier, is based on Luhmann's notion of normative closure of autopoietic systems and the fact that normative closure presupposes self-steering of systems. The normative closure of law and its resultant self-steering and therefore the inability of law to engineer, control and improve society has been slightly "tampered

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[321] J Patterson "Reflecting on Reflexive Law" in in M King & C Thornhill (eds) *Luhmann on Law and Politics*: *Critical Appraisals and Applications* (2006) 16.
[322] Patterson (n 321 above) 13.
[323] M King "What's the use of Luhmann's Theory" in M King & C Thornhill (eds) *Luhmann on Law and Politics*: Critical Appraisals and Applications (2006) 41.
[324] King (n 323 above) 41.
[325] King (n 323 above) 41.
[326] King (n 323 above) 42.

with" by Gunther Teubner and John Paterson. Both Teubner and Patterson have tried to further develop the notion of autopoietic law by coming up with the notion of reflexive law which will allow law to perform certain tasks that may allow law to improve society.[327]

3.3.2. Excursus: reflexive law

In *Law as an Autopoietic System*[328]*,* Teubner addresses the question of whether the autopoietic closure of law can be reconciled with the regulatory goals of a modern legal system. In other words, is law capable of responding to the needs of society despite its autopoietic closure? The argument by Teubner/Paterson referred to above is that it is possible for systems to be "semi-autonomous" precisely because "different systems have different degrees of closure.[329] Thus the notion of law's semi-autonomy or systems' different degrees of closure constitutes the nub of Paterson/Teubner's notion of reflexive law.[330] The notion of reflexive law in the final analysis suggests that "it is possible for law to become a better regulator of social behaviour by being merely reflexive."[331] In the debate between Paterson and King, King correctly states that the notion of reflexive law is an attempt to assimilate autopoiesis and thus fundamentally reconfiguring Luhmann's theoretical ideas. This assertion by King is based on the fact that fundamental to Luhmann's view of society is the fact that "events in society are random, arbitrary and contingent."[332] The question that the notion of reflexive law must contend with is how random and contingent permanent state of affairs get to be controlled and it is precisely this question that begins to render the notion of reflexive law a logical impossibility – at least from an autopoietic point of view. King aptly states as follows:

> Unfortunately, John Paterson wants it both ways. He wants to believe in a theory of autopoietic systems with all its contingency, its randomness – the possibility that things

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[327] See Patterson's description of Reflexive law in Patterson (n 321 above) 13.
[328] Teubner (n 278 above).
[329] King (n 323) 42.
[330] See Patterson (n 312 above) 20-35.
[331] King (n 323 above) 42.
[332] King (n 323 above) 43.

could always be different – while at the same time observing ways in which law might improve its performance through better relations with other systems. For him, the secret of better regulation or more effective control lies within law's own grasp and above all a grasp of how other systems see themselves.[333]

In a nutshell, proponents of reflexive law cannot on the one hand agree with the autopoietic closure of law and on the other hand regard law as reflexive. As King puts it again, while proponents of reflexive law

> may believe that they are applying a theory of closed systems of communication to solve problems in its environment, what emerges invariably is a personification of law, a law with human, and possibly also humane, attributes, and not Luhmann's law: that is, a law which can only see only what it can see, only understand what it can understand, only control what it can control, only regulate what it can regulate – all by applying its reductive, astringent , uncompromising code of lawful/unlawful.[334]

In the final analysis, reflexive law, instead of developing the notion of autopoietic law, becomes an antithesis of autopoietic law by turning the notion of autopoietic law on its head. In trying too hard to search for a way that law could still play a positive role in society, it becomes what Christodoulidis calls republicanism in the sense of it surreptitiously reintroducing reflexivity of law. Whilst agreeing with systems theory's descriptive approach, it nonetheless moves forward to prescribe and thus rendering itself a prescriptive approach at variance with systems theory. Finally its approach is an antithesis of Luhmann's radically anti-humanist approach to social theory. A much deeper exploration of legal autopoiesis may be helpful in disambiguating some of the possibly contradictory assertions embedded in reflexive law.

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[333] King (n 323 above) 43.
[334] King (n 323 above) 49.

3.3.3. The functioning of legal autopoiesis

Fundamental to the theory of legal autopoiesis is that the legal system is first and foremost regarded as a social system.[335] For the law to be autopoietic and thus autonomous, it must possess the three tiered relation of self-observation, self-constitution and self-reproduction. Self-observation refers to law's ability to "think" by making distinctions. It 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."[336] Law observes by making distinctions of what is law and what is not. Law achieves the making of distinctions, its observations, by reducing complexity. I explain the notion of "reduction of complexity" below.

Teubner states that, when we say that law is self-constituting we mean that legal rules assume a life of their own.[337] Legal rules begin to act as ends in themselves and no longer as legal means to social ends.[338] Self-reproduction of law refers to law's ability to produce and reproduce the elements of its system, which, as explained above, are communications. In a nutshell, and in the final analysis, for law to be autopoietic, it must firstly qualify as a self-referential system.[339] The question, in relation to Teubner's reflexive law, is, how can legal rules that assume a life of their own, are an end in themselves and are self-reproducing, be capable of being reflexive. According to King, "the essential component for an autopoietic system is then its capacity for self-organisation, for devising itself the rules which govern its own operations – Hart's secondary rules, that is, the rules which determine whether its own decisions are legal or illegal, rules governing the making of rules."[340]

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[335] N Luhmann, "The Unity of the Legal System" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 17.
[336] Veitch et al (n 312 above) 280.
[337] Teubner (n 278 above) 40.
[338] Teubner (n 278 above) 40.
[339] Teubner (n 278 above) 33.
[340] M King (n 323 above) 225.

3.3.3.1. Closure, openness and autonomy of the legal system

When it is said that law is an autopoietic system, it means that it is the law itself that determines what law is and what it is not[341] (for instance, the distinction between legal and illegal is legally determined. This constitutes the self-referentiality of law. For something to be legal, it must be so because a law says it is legal[342]). In other words, the source of law lies within law itself.[343] Law is autopoietic because it presupposes itself and reproduces itself.[344] The self-reproduction of law occurs through changes in law.[345] According to Teubner, central to the theory of legal autopoiesis is that the legal system is self-referential and circular. If a legal system is autopoietic, it means it is closed. Circularity means closure. Teubner states that the closure of the system is in contradistinction to the idea of law being adaptable and being able to shape and be shaped by the external environment.[346]

There is however a dialectic that the closed nature of the system introduces. This dialectic consists in the fact that the legal system, being a closed system, is also simultaneously an open system. Thus an autopoietically closed system presupposes an open system. Accordingly, "the more the legal system gains in operational closure and autonomy, the more it gains in openness towards social facts, political demands, social science theories and human needs."[347] The legal system is thus a combination of closure and openness.

But what does this closure and openness mean? The dialectic of closure and openness of the legal system is represented by the combination of normative (operational) closure and cognitive openness. According to Luhmann, the normative

[341] P Nerhot "The Fact of Law" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 312.

[342] G Teubner "Introduction to Autopoietic Law" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 3.

[343] Nerhot (n 341 above) 312.

[344] F Ost "Between Order and Disorder" in G Teubner (ed) *Autopoietic Law: A New Approach to Law and Society* (1987) 75.

[345] Luhmann (n 335 above) 17.

[346] Teubner (n 342 above) 2. To a larger extent, this confirmation of closure of the legal system confirms the impossibility of the notion of legal reflexivity advanced by Teubner himself.

[347] Teubner (n 342 above) 3.

closure means that only the legal system is able to bestow legally normative quality on its elements.[348] Differently put, normative/operational closure means the system is closed to the environment. Hubert Rottleuthner puts the issue of closure aptly. Accordingly, in the view of Rottleuthner, the notion of closure refers to the fact that:

> [T]here cannot be a naked transfer of moral conceptions or political goals into legal norms. Rather, there are procedural and jurisdictional legal norms that regulate the coming into existence of valid legal norms … This is called a method of closed validation.[349]

When it is said that the legal system is operationally closed, it means that the operations of the legal system reproduce the elements of the legal system. The system is closed because it is recursive, it is self-referential. The elements of the system reproduce the elements of the system through the interaction of the elements of the system.[350]

It is clear from above that legal autopoiesis essentially means that law as a system is closed. It is closed in the sense that its elements produce and reproduce its elements through the interaction of its elements. It is closed because it is self-referential, recursive and self-constituting. The elements of law validate themselves and self-justify. Law as a differentiated social subsystem presupposes and reproduces itself both in terms of its unity and boundaries.

Law as a communication system is nonetheless cognitively open in that it is able to respond to economic, scientific, political and other phenomena. "But it can only observe its environment in relation to own categories of evaluation and interpretation."[351] It observes its environment by using its own mechanisms of

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[348] Luhmann (n 335 above) 21.
[349] Rottleuthner (n 311 above) 118.
[350] Luhmann (n 335 above) 16.
[351] R Cotterell *The Sociology of Law: An Introduction* (1992) 67.

evaluation and interpretation. Thus when law observes cognitively, it does so by using its normatively closed categories, which are "centred specifically on the differentiation of right and wrong, legality and illegality. It adopts always its own normative criteria which in themselves owe nothing to its environment."[352] How law responds to its environment is, for instance, not on the basis of truth, efficiency or some other normative criteria, it is on the basis of whether something is right or wrong and thus legal or illegal.

The fact that law reproduces itself through the interaction of its elements means, according to autopoietic theory, that law is autonomous.[353] The view that law is autonomous is one of the most controversial aspects of autopoiesis. For instance, Richard Lempert has argued that "if law is to be autonomous in the sense of defining events in its own terms … it must be independent of society's other mechanisms of social control … its actions must be uncontrolled by the political branches of government … it must remain impervious to the ethical codes of surrounding society".[354]

Kenneally has however responded that how one conceptualises autonomy in autopoiesm depends on, or rather must depend on, whether one is talking about interaction or self-production.[355] This is because autopoietic theory focuses on self-production and not interaction *per se.* Autopoiesm does not focus on the content of the legal norm. It does not focus on the substance of laws. If a pressure group in society views abortion as murder and thus agitate for change of law permitting abortion and the group succeeds, Lempert above would see the autonomy of law as having diminished. An autopoiecist, like Kenneally, would however see the law as having changed because the law is always changing and in changing it reproduces itself.[356]

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[352] R Cotterell (n 351 above) 67.
[353] P Nerhot (n 341 above) 313.
[354] R Lempert "The Autonomy of the Law: Two versions compared" in G Teubner (ed) *Autopoietic Law* (1987) 157.
[355] Kenneally (n 315 above) 362
[356] Kenneally (n 315 above) 363.

In other words, the manner of its observation, using its binary code of lawful/unlawful does not change.

Legal autonomy means that law is operationally closed. Teubner, in line with his notion of reflexive law, calls for a subtle understanding of legal autonomy.[357] He calls for, as opposed to Luhmann, a degree of autonomy. According to Teubner, autonomy should be thought of as "the cumulative emergence of self-referential relationships which enables the entire system to reproduce itself under certain conditions."[358] The next logical question is what are these elements referred to.

3.4. Operations and observations

3.4.1. Operations as communications

Christodoulidis makes a distinction between operations and observations. Informed by Luhmann, Christodoulidis "identifies communication as the operation that reproduces the social system and designates society".[359] Society is accordingly nothing but a totality of communications.[360] In this sense, the operational element of a social system that reproduces itself and thus makes a social system autopoietic is communications and in our case, legal communications.

According to Luhmann, society is nothing else but a system of communications. Action is communication.[361] Communication is communicated through an act of information, communication and understanding.[362] It is thus a synthesis of information, utterance and understanding.[363] Communication is thus only possible as a self-referential

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[357] Teubner (n 342 above) 31.
[358] Teubner (n 342 above) 31.
[359] Christodoulidis (n 276 above) 74.
[360] Christodoulidis (n 276 above) 74.
[361] H Deggau "The Communicative Autonomy of the Legal System" in G Teubner (ed) *Autopoietic Law* (1987) 132.
[362] Deggau (n 361 above) 132.
[363] Christodoulidis (n 276 above) 76.

system.[364] It reproduces itself through further communication.[365] The essence of communication is selection.[366] This selection necessarily entails the reduction of complexity.[367]

The system dynamically exists as new communication links with the previous communication. There is always new communication due to the fact that communication is always incomplete.[368] It is always in anticipation of a response. The new is always linked with the previous, with the new soon to be the previous and the previous anticipating the new response. There is therefore an infinite expectation of the new. In between the previous communication and the new communication lies question of meaning. There is between the previous communication and the new communication, "a sense in which meaning is pending – because without memory and anticipation there can be no meaning."[369]

According to Christodoulidis:

> The operations of the social system are communications, understood as synthesis of information, communicative act and understanding. 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.[370]

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[364] Deggau (n 361 above) 132.
[365] Deggau (n 361 above) 132.
[366] Deggau (n 361 above) 132.
[367] Deggau (n 361 above) 133.
[368] Christodoulidis (n 276 above) 76.
[369] Christodoulidis (n 276 above) 77.
[370] Christodoulidis (n 276 above) 78.

According to King:

> Legal communications occur whenever people express themselves in terms of lawful/unlawful, legal/illegal, and whenever their communicative acts are directed towards claim making and claim defending. Yet law … deals in communications about rules and their application to events in the social world. It does not and cannot create, receive, or produce non-legal communications on, for example, a country's economic policy, medical treatment, moral values or family life. However, it does produce parallel legal communications on all these issues, and through this production they are transformed into legal statements.[371]

Cotterell states that legal communication is essentially characterised by the categories of right and wrong developed as legal categories of legal and illegal. In other words, "wrong" becomes the legal equivalent of "illegal" and "right" becomes the legal equivalent of "legal". A thing is wrong because it is illegal and it is right because it is legal. "All legal communications centre around and ultimately produce a binary output: yes/no decisions as to whether something is legal or illegal, right or wrong within the terms of law's own discourse."[372] In short, legal communication is characterised by its binary coding-legal/illegal. It is this very code that gives law its identity. The processing of all legal information must first come through this coding.[373]

3.4.2. Observation as reduction of complexity

I have already alluded to the fact that in terms of autopoiesis, society as a system is nothing but a totality of communications. Out of the broader societal system emerge a multiplicity of sub-systems, be they an economic sub-system, a political sub-system or a legal sub-system. Each of these subsystems develops "a selective and exclusive mapping of the world."[374] This process of selectivity and mapping of the world occurs

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[371] King (n 314 above) 219.
[372] Cotterell (n 351 above) 67.
[373] Veitch et al (n 312 above) 282.
[374] Christodoulidis (n 276 above) 84.

through the sub-system differentiating itself from society. This differentiation is called "the system/environment distinction".[375] A system therefore observes by making differentiation a "guiding difference".[376] "Semantic codes specify the difference, which form the basis for something to be received as information".[377] Therefore a pattern of difference lies at the basis of the system's observation. [378]

The system observes by reduction of complexity. The reduction of complexity by the system occurs when the system selects what must come into the system. The normative communication of other systems must, for instance "request permission" to enter into the legal system. But for them to obtain permission to enter into the legal system, they have to first be reconstructed as law, and therefore become law.[379] "Once reconstructed within law, [and having become law], philosophical, moral or religious statements become part of the meaning system of law, subject to its reproductive procedures and prevailing realities."[380] In this way law observes its environment by reducing complexity, by simplifying its environment. Put simply, the law says that if you want to use me for your purposes, you first have to seek permission from me and for me to give you permission to be part of me I have to change you into me. Once I have changed you into me, you lose your character. For other normative communication to enter into law, the law has to capture their souls.

The above exposition of the autopoiesis can be summed up in this manner: A social system is autopoietic in that it is self-referential because it produces and reproduces its own elements through the interaction of its elements. It is precisely because it is self-referentially recursive, that it is closed. The elements that are reproduced recursively are communications. Communications consists in information, utterance and understanding. Communication is recursive in that there is always a dynamic link between the previous communication and the new communication. In between these

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[375] Christodoulidis (n 276 above) 84.
[376] Christodoulidis (n 276 above) 82.
[377] Christodoulidis (n 276 above) 82.
[378] Christodoulidis (n 276 above) 82.
[379] King (n 314 above) 227.
[380] King (n 314 above) 227.

is the concept of meaning. Meaning occurs when the system differentiates itself from the environment. This process of differentiation is called observation. Observation is the process whereby the system distinguishes itself from noise (i.e. that which is not yet legal and thus not yet in the legal sub-system). It distinguishes itself by reducing complexity.

In light of the exposition on legal autopoiesis above, the next logical question for our purposes is therefore: what are the "limits of law" seen through the prism of autopoiesis. I suggest that firstly, the fact that law is self-constituting means that legal rules assume a life of their own and begin to act as end in themselves and no longer as legal means to social ends.[381] Secondly, the very fact that law is self-referential means that it is closed and the closure of the system is in contradistinction with the idea of law being adaptable and being able to shape and be shaped by the external environment.[382] Closure means that moral conceptions or political goals cannot simply, in a "naked" fashion, enter into legal norms. These have to be observed and be reduced by the binary code of legal or illegal, which means that their essence is now reduced into the essence of law and this occurs by the law using its own categories.

For instance, If we take radical transformation in South Africa to be a first and foremost a political project animated by given political, ethical and moral conceptions of our very being, and then proceed to attempt to realise them through legal and constitutional means, the systems theoretical approach would raise fundamental scepticism with such an approach. This scepticism is informed by the fact that the moment political, moral and ethical matters enter the legal system, the legal system immediately unleashes its way of making sense of meaning – that is how it observes any form of reality through its binary code of law/unlawful. There has however been an argument that the notion of lawful/unlawful binary code of the legal system is itself a social construct.[383] I understand the logical conclusion of this argument to be that the legal

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[381] Teubner (n 278 above) 40.
[382] Teubner (n 342 above) 2.
[383] The idea that the lawful/unlawful binary code is a social construct was advanced by Karl Klare at a debate in 2016 organised by the Department of Jurisprudence at the University of Pretoria. Although I run the risk of

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system's binary code, being a social construct, is capable of observing its environment in other forms other than through its lawful/unlawful code. Although deprived of the benefit of this view in a written form, I suggest that this view betrays firstly the notion of functional differentiation and secondly that the very *raison d'être* of law is to declare whether something was right (and therefore legal/lawful) or wrong (illegal/unlawful). Even if a decision by a judicial officer is animated by other reasons, the "decisionism" inherent in law is that a pronouncement must be made and such a pronouncement in the final analysis must be a declaration of lawfulness or unlawfulness. Furthermore, and as an example, in the event that a judicial officer makes a declaration of invalidity, for instance in regard to legislation, the consequence that is ultimately felt is that such legislation is unlawful. In a nutshell, if the lawful/unlawful binary code is a social construct, that is so because law itself is a social construct. In short, as I will suggest in detail later, if radical transformation becomes a subject of law, the law, using its binary code of lawful and unlawful, is forced to make a determination on firstly whether the radical aspect of transformation is lawful or unlawful and secondly whether the transformation aspect of the radical is lawful or unlawful. It can do no much and no less.

The "limits of law" also manifest in what Luhmann's calls "law as a reduction achievement"[384]. When law reduces complexity, it necessarily excludes certain meaning from legal discourse.[385] Christodoulidis captures the reductionist character of law in the following manner:

> Law as a reduction achievement represents only selectively and allows for conflict selectively, by setting thresholds of valid dissensus, the when and how possible conflict. In the process not only is much repressed but much is appropriated as well, as political conflicts are forced to meet the criteria of legal relevance. [386]

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misunderstanding Klare because his view was not reduced into a written form, I understood him to be disputing the idea that the legal system can only observe using the lawful/unlawful binary code.
[384] E Christodoulidis "The Aporia of Sovereignty: On the Representation of the People in Constitutional Discourse" (2001) 12 King's Law Journal 13.
[385] Christodoulidis (n 384 above) 13.
[386] Christodoulidis (n 384 above) 14.

The essence of law is that disputes must be resolved and consensus must be reached and for this to happen, a decision must be made. The "decisionist imperative" of law, which is its *sine qua non*, "is an abrupt curtailment of the process of reflection and dialogue".[387]

3.5. Systems theory, limits of law and constitutionalism

Christodoulidis contends that the predominant orientation among both the liberal and left-wing democrats towards constitutional theory, notwithstanding their nuanced variations, is that of viewing constitutionalism as a form of empowerment.[388] What binds constitutionalists is their sense of "constitutional optimism" expressed in their convergence on normative issues such as the need for "unity in political diversity" or a "shared constitutional identity" or "a common moral reading of the constitution".[389] The fulcrum of both the republicans and liberals is underpinned by "a shared legal/constitutional premise, seen on one case (liberal) as a safeguard from collective will, in the other (republicanism) as a springboard for collective praxis".[390] In short, they are all agreed that constitutionalism has the capacity to contain politics.

In terms of the systems theoretical approach, an approach that is characterised by constitutional optimism and thus constitutional reflexivity is an approach that fundamentally believes in a hierarchy of systems and the fact that systems can "steer" one another. This approach, as already stated, constitutes an antithesis to the systems theory. Christodoulidis deploys the notion of republicanism as an umbrella term to characterise all those who see in constitutionalism the ability to house and be a vessel for politics and he calls this approach the containment thesis that almost always creates "constitutional irresolution" due to the legal system's institutional inertia. And

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[387] Christodoulidis (n 384 above) 14.
[388] Christodoulidis (n 275 above) 404.
[389] Christodoulidis (n 275 above) 404.
[390] Christodoulidis (n 276 above) 9.

of course the republicanism comes in many complex variations and varying degrees. I proceed to look at these variations of republicanism.

3.5.1. Variations of republicanism according Christodoulidis

At a general level according to Christodoulidis, republicanism denotes theories that subscribe to a particular relationship between law and politics and this relates to "how political sovereignty finds expression in law."[391] Law, according to republicans, gives concrete expression to popular sovereignty.[392] It does this by lending sovereignty with constitutional provisions as "home for political deliberation."[393] There is therefore a "Dworkinian law as integrity" double connection of law to politics and the community. Republicanism is essentially about "empowerment of the political community through law."[394] This is the point of convergence between liberals and republicans, "both seek a home for political deliberation in a constitution."[395] Politics for republicanism should be "a site where communities strive for self-determination and the constitution should be the host of the political."[396] Law in this sense is not external to politics but a part of politics. In a nutshell, republicans do not agree with the notion that law and politics are "mutually opposing forces". They argue that a constitution provides for the possibility of politics and the substantiation of community."[397] It is this republican notion of the relationship between law, politics and the economy wherein law houses politics that Christodoulidis calls the containment thesis.

The nuances begin to emerge in that within the broader movement of republicanism[398], there are those who believe that a constitution can be used as an instrument for political deliberation and liberation and the liberal strand that believes on the other hand that a constitution should be recruited as a limit to political deliberation.

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[391] Christodoulidis (n 276 above) 10.
[392] Christodoulidis (n 276 above) 11.
[393] Christodoulidis (n 276 above) 10.
[394] Christodoulidis (n 276 above) 10.
[395] Christodoulidis (n 276 above) 10.
[396] Christodoulidis (n 276 above) 14.
[397] Christodoulidis (n 276 above) 116.
[398] I group all approaches that ultimately believe in legal and constitutional reflexivity under the umbrella of republicanism.

According to the first strand of republicans, active citizenship can be realised through law[399]. Republicans are diametrically opposed to the liberal's view that a constitution is simply an instrument that limits political bargaining.[400]

Politics, should, according to republicans, be a "site where communities strive for self-determination" and a constitution should be the locus of the political.[401] They believe in the politics of the law. In this sense republicans do not see a constitution as a mechanism for checks and balances external to politics.[402] Republicans do not view law as external to politics but as part of politics.

In a nutshell, republicans do not agree with the notion that law and politics are "mutually opposing forces."[403] They argue that a constitution provides the "possibility for politics and the substantiation of community."[404] In this sense, constitutionalism provides a space, possibility and opportunity for political emancipation. According to the containment thesis, law can effectively house politics. In the final analysis, republicanism professes political emancipation through law and in this inheres the crux of the containment thesis. In this sense, political engagement is better achieved through law.[405]

Christodoulidis is nonetheless alive to the nuances of republicanism. These nuances manifest themselves at an institutional level. In other words, the republicans, having agreed on the fundamentals, the fundamental being that law and the constitution is a vessel for politics, tend to differ about the appropriate constitutional forum that must house politics.[406] I now turn to deal with the different variations or strands of republicanism.

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[399] Christodoulidis (n 276 above) 11.
[400] Christodoulidis (n 276 above) 13.
[401] Christodoulidis (n 276 above) 14.
[402] Christodoulidis (n 276 above) 14.
[403] Christodoulidis (n 276 above) 16.
[404] Christodoulidis (n 276 above) 16
[405] Christodoulidis (n 384 above) 8.
[406] Christodoulidis (n 384 above) 8.

3.5.2. Variation 1: republicanism and liberal pluralism

The first variation by republicans[407] manifests itself as a critique of pluralists' conception of politics, a sort of a disintegration of pluralism. In this sense the republicans critique the pluralists' approach of viewing politics as a bargaining process where individual members of the community's interests battle for recognition and supremacy.[408] The republican opposition to liberal pluralists' view of politics is then used by republicans as an entry point towards constitutional theory and analysis. Instead, according to republicans, "politics is the site where communities strive for self-determination, and the constitution, claim the republicans, hosts the political process."[409]

Having critiqued the politics of pluralism and having engaged in a disintegrating critique, the republicans then move to the second stage of what Christodoulidis calls the reconstructive analysis.[410] The republican reconstructive stage involves bringing forth the law and proposing a different function of law.[411] The republican reconstructive stage results in the fundamental acknowledgment that it is a constitution that houses a community's politics and in that manner also promoting the community's participation, capacitation and emancipation.[412] Where liberal pluralists may have a quasi-Hobbesian conception of politics, where politics is about competition akin to the economic arena, characterised by partisanship and self-interest that must be made orderly by law, republicans view law and a constitution as a form of political discourse. Put differently, for republicans politics is a dialogic process and this dialogic process must find expression in the constitution.[413] The civic American conception of politics is politics as a "vision of political dialogue, in pursuit of the common good, under

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[407] This is the "politics as empowerment" strand of republicanism.
[408] Christodoulidis (n 276 above) 13.
[409] Christodoulidis (n 276 above) 14.
[410] Christodoulidis (n 384 above) 7.
[411] Christodoulidis (n 276 above) 7-8.
[412] Christodoulidis (n 276 above) 16.
[413] Christodoulidis (n 276 above) 16.

conditions of distance from self-interest that encourages diversity."[414] Christodoulidis calls this version of republican politics a version of communitarian theory.[415]

3.5.3. Variation 2: the location

According to Christodoulidis, Bruce Ackerman adopts a dualist approach to dissolve the counter-majoritarian dilemma by locating intermittent mobilisation politics during special moments that allow the citizenry to constitutionally redefine itself and the Supreme Court during long periods of constitutional normalcy.[416] It is noted here that Ackerman's dualist approach has proximity to some South African scholars who straddle between the importance of extra-constitutional activism and the centrality of transformative constitutionalism.[417] Cass Sustein, according to Christodoulidis, proposes a legislative body as a proper place to locate deliberative politics, however this body must be guarded by a strong Supreme Court to prevent legislators from pursuing "naked- interest".[418] Frank Michelman, according to Christodoulidis, on the other hand proposes the Supreme Court as the main vessel for deliberation. In the sense of Michelman, self-government for the people is done by the court on behalf of the people.[419]

3.5.4. Variation 3: constitutional pluralism and constitutional agonistics

According to Christodoulidis, constitutional optimists as constitutional inclusivists fall under "constitutional pluralism" as represented by Neil Walker and "Constitutional agonistics" as represented by James Tully.[420] Both Constitutional pluralists and constitutional agonistics are in sync about the malleability and accommodative character of constitutional arrangements. Constitutional pluralists are of the view that constitutional arrangements are necessarily inclusive and must be characterised by

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[414] Christodoulidi*s* (n 276 above*)* 42.
[415] Christodoulidi*s* (n 276 above) 42.
[416] Christodoulidis (n 276 above) 35.
[417] For an example of the "straddling" approach, See L du Plessis "Constituting dialogue and the dialogic constitution (or: Constitutionalism as culture of dialogue" (2010) 25 South African Public Law 684.
[418] Christodoulidis (n 276 above) 43.
[419] Christodoulidis (n 276 above) 45.
[420] Christodoulidis (n 275 above) 401-432.

"inclusive normative coherence."[421] Tully's idea of agonistic constitutionalism is to the effect that "constitutional democracies are always open to the democratic freedom of calling into question … the prevailing rules of law, principles of justice and practices of deliberation."[422] In this sense, the constitutionalism and democracy allow us to use freedom to test and question freedom.[423]

Notwithstanding, both constitutional pluralism and constitutional agonistics are all agreed that conflict, disagreement and order/disorder are better handled within constitutionalism or institutionally. This is because constitutionalism presupposes "the freedom to contest the terms in which constitutional freedoms are exercised."[424]

3.5.5. Critique of the variations

3.5.5.1. Law's depoliticisation of politics

The first general critique of the variations of constitutional optimism enunciated above relates their inability to appreciate law's depoliticisation of politics. According to Christodoulidis, law can neither advance nor contain the politics of civil society; law cannot advance the aspirations of the people; constitutional arrangements as organising principles frustrate the political; politics is reflexive and cannot be captured or contained by law 's exclusionary language "whose radical contingency[425] as the expression of our freedom is self-referentially determined: what is political and what is politically possible becomes a political question"[426]; Politics cannot be empowered by law, on the contrary, law disempowers politics.[427]

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[421] Walker (2002) quoted in Christodoulidis (n 275 above) 408.
[422] Christodoulidis (n 275 above) 411.
[423] Christodoulidis (n 275 above) 411.
[424] Christodoulidis (n 275 above) 411.
[425] I use the notion of "contingency" is used in the same sense as dependency.
[426] Christodoulidis (n 276 above) 255.
[427] Christodoulidis (n 276 above) xiv-xi.

In terms of the systems theoretical approach, the depletion and disempowerment of politics by law occurs because "political conflicts are forced to meet the criteria of legal relevance in order to be represented".[428] This is because law only allows certain conflicts to register and instead of containing such conflicts, law selectively privileges and suppresses some conflicts over others.[429] Thus the inability of law to contain politics manifests itself in law's conflation, severing, re-enacting and normalising the political conflict in a manner that diminishes and impoverishes the meaning of the political.[430] In this way "law dictates the terms of closure of the field of political possibility."[431]

In "Litigating Dangerous Politics", which deals with the role of law in fixing the boundaries of the political, Christodoulidis goes further to illustrate how law silences politics.[432] Christodoulidis asserts that there is "double silencing" of politics by law. The "first silencing" manifests itself in the form of censorship of certain political statements by law (the exclusionary aspect of law). The second form of silencing manifests itself in law's withdrawing of the possibility of challenging its first silencing (censorship). Relying on Lyotard's thesis in the *Post-Modern Condition*, Christodoulidis calls this double silencing law's "terror".[433]

Accordingly, in censoring political statements, the law forces collaboration and coerces consensus, a sort of an "adapt or else" context.[434] In forcing consensus the law simultaneously performs the second silencing, that of ensuring that "there are greater legitimating or judging narratives to which an aggrieved party can make recourse" and in this manner "the legal system makes intrusions into the political in terms of its own legitimacy."[435]

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[428] Christodoulidis (n 276 above) xvi.
[429] Christodoulidis (n 276 above) xvi.
[430] Christodoulidis (n 276 above) xvi.
[431] Christodoulidis (n 276 above) xvii.
[432] Christodoulidis (n 6 above).
[433] Christodoulidis (n 6 above) 27.
[434] Christodoulidis (n 6 above) 27.
[435] Christodoulidis (n 6 above) 37.

As stated earlier, Christodoulidis recruits Lyotard's concept of terror in Lyotard's *Postmodern Condition*[436] and the concept of *differend* in Lyotard's *The Differend*[437] in order to analyse law's intrusion into politics. Terror in this sense refers to the two-tier logic of exclusion and cover-up.[438] The *differend* is referred to as a case of two conflicting parties whose conflict "cannot be equitably resolved for lack of a rule of judgement applicable to both arguments … however applying a single rule of judgment to both in order to settle the *differend* would wrong one of them". [439] Christodoulidis uses the concept of terror to show the terror inflicted by the legal system on the *differend* so as to illustrate the damage wrought by law on politics. The concepts of *terror* and *differend* are used to show their similarity with Luhmann's argument about how law observes its environment.[440]

The foregoing is so because systems observe by making differentiation. The system differentiates by observing the environment. The system observes by reduction of complexity. The reduction occurs by the system selecting what must come into the system. Law reduces societal conflict as legal conflict. This reduction occurs through the process of self-observation which consists of law separating law from non-law.

Christodoulidis's views on law's depletion of politics, its ability to force conflicts to meet the criteria of legal relevance in order to be represented, is buttressed by Rottleuthner who makes reference to the impossibility of a naked transfer of moral conceptions or political goals into legal norms.[441] In this sense the "autopoiesis of law limits, to a considerable degree, the variability of legal functions. The autopoietic closure sets effective limits to the political instrumentalisation of law."[442]

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[436] Lyotard (1984) quoted in Christodoulidis (n 6 above) 6.
[437] Lyotard (1988) quoted in Christodoulidis (n 6 above) 6.
[438] Christodoulidis (n 6 above) 28.
[439] Christodoulidis (n 6 above) 28.
[440] Thus "turning the *differend* into litigation is the only natural way for the system to make sense of the world, the conversion of *differend* to litigation is indeed the reduction of complexity that allow observation of an environment", See Christodoulidis (n 6 above) 43.
[441] Rottleuthner (n 311 above) 118.
[442] Teubner (n 342) 4.

According to Christodoulidis, "the constitution constitutes and at the same time renders invisible the social coupling of law and politics."[443] In this sense "it is both enabling and occluding."[444] However, the constitution also creates a paradox. The paradox is that both law and politics are self-referential systems and therefore incapable of "commensurate synthesis".[445] On the other hand, constitutionalism tempers with societal mutation and thus making certain of the future. In Christodoulidis's words, "a future … under the constitution comes under significant control."[446] Constitutionalism is, according to Christodoulidis, a site for competing priorities. On the one hand modern society is defined by progress and furthermore, democracy is an unfinished business. Yet constitutionalism tempers with the progress aspect by making the future certain. By finalising the democratic project, the constitution makes final determinations. On the one hand progress needs controlled and lasting institutions required for this. Constitutionalism is thus an attempt to control these competing projects.[447] Thus, contrary to the republicans, the result of the latter is an "inevitable contradiction" that is characteristic of constitutionalism which is "the incommensurability to which it gives expression, the constructive misreadings it accommodates."[448]

Constitutionalism is the constitution of law and politics. The legal side of the constitution brings closure to political conflict by defining procedures for decision-making.[449] Political debates become determinate. "The constitutional moment allows a controlled orientation to the future by controlling change while keeping new law within the ambit of the constitutionality".[450] The legal side of the constitution allows and guarantees that the identity of the people not be politically challenged.[451] The consequences of the legal side of a constitution ensuring that the identity of the demos

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[443] Christodoulidis (n 384 above) 17.
[444] Christodoulidis (n 384 above) 17.
[445] Christodoulidis (n 384 above) 17.
[446] Christodoulidis (n 384 above) 18.
[447] Christodoulidis (n 384 above) 18.
[448] Christodoulidis (n 384 above) 18.
[449] Christodoulidis (n 384 above) 18.
[450] Christodoulidis (n 384 above) 18.
[451] Christodoulidis (n 384 above) 18.

is not politically challenged is that those who seek to challenge the identity of the demos find themselves outside of law, politics and society.[452]

In the final analysis, "constitutional politics is a compromised politics."[453] Constitutionalism pre-empts and curtails political change through its legal side.[454] "Constitutionality's clusters, its articulation of law and politics creates and perpetuates a *differend* in which all opposition to constitutional order, even that undertaken in the name of political emancipation, is cast as a compromise of sovereignty and a disempowerment."[455]

In a constitutional setting, political actors are politically disempowered when perceived as constitutional players. Politics become domesticated by law and is recast in law's image.[456] This is so partly because constitutional language is self-referential and this self-preferentiality does not accommodate certain political voices because of its "homogenising" logic of "we the people at the level of democratic politics and further at the level of "our law" in the courtroom.[457]

The postulation that law silences politics, that law depoliticises and depletes politics, that political actors are politically disempowered when perceived as constitutional player and that political conflicts must to meet the criteria of legal relevance becomes much more pronounced if cognisance is had to the case relating to the failure or reluctance to arrest President Omar Hassan Ahmad Al Bashir of Sudan in June 2015. The following are the brief facts of the case in the Supreme Court of Appeal in the case of *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* (the Al Bashir case).[458]

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[452] Christodoulidis (n 384 above) 18.
[453] Christodoulidis (n 384 above) 23.
[454] Christodoulidis (n 384 above) 23.
[455] E Christodoulidis "The objection that cannot be Heard: Communication and Legitimacy in the Courtroom" in A Duff et al (eds) *The Trial on Trial* Vol 1 (2004) 24.
[456] Christodoulidis (n 455 above) 198.
[457] Christodoulidis (n 455 above) 199.
[458] Minister of Justice and Constitutional Development v Southern African Litigation Centre (2016). At the time of writing, the matter was still to be considered by the Constitutional Court.

In this case the South African government was taken to court for its failure to arrest President Al Bashir. The Southern Africa Litigation Centre argued that South Africa as a signatory to the Rome Statute of the International Criminal Court (Rome Statute) was under the obligation to arrest and surrender President Al Bashir to the International Criminal Court (ICC) in terms of obligations under the Rome Statute and South Africa's Implementation of the of the Rome Statute of the International Criminal Court, Act 27 of 2002 (The Implementation Act).[459] The Implementation Act deals with mechanisms for co-operation between South Africa and the ICC on arrests and surrender of persons accused of international crimes such as war crimes, crimes against humanity and genocide. President Al Bashir stands accused by the ICC for these crimes and the ICC has issued warrants for his arrest. On the other hand, Sudan is not a signatory to the Rome Statute.[460]

The South African government refused to arrest President Al Bashir when he entered the Republic to attend the African Union Summit in June 2015. The initial reason given by the South African government for its failure to arrest President Al Bashir was that President Al Bashir enjoyed immunity from arrest. In the prior urgent application by the Southern Africa Litigation Centre in the North Gauteng High Court, the High Court had ordered the South African Government to prohibit Al Bashir from leaving the country until the application relating to arrest was finalised. President Al Bashir was nonetheless allowed to leave the Republic notwithstanding the High court order.

In the main, the issues before the court were, on behalf of the Southern Africa Litigation Centre, that "South Africa was obliged to give effect to the request by the ICC to enforce the two warrants for President Al Bashir's arrest and surrender to the ICC for prosecution in respect of the charges of war, crimes, genocide and crimes against humanity."[461] On the side of the South African government, the argument was that

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[459] In terms of section 231(4) "An International Agreement becomes law in the Republic when it is enacted into law by national legislation." The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is one such Act which was enacted to domesticate the Rome Statute into South African law.
[460] (n 458 above) Para 3.
[461] (n 458 above) Para 11.

South Africa as the host of the African union Summit in June 2015 had entered into an agreement with the African Union Commission and based on this agreement, President Al Bashir had been invited by the African Union to attend and not the South African government.[462]

In the final analysis, the issues in this case revolved around "whether a cabinet resolution coupled with a Ministerial Notice are capable of suspending this country's duty to arrest a head of State against whom the International Criminal Court (ICC) has issued arrest warrants for war crimes, crimes against humanity and genocide"[463], although the argument by the South African government in the end gravitated towards whether in terms of Customary International law, a head of State is immune from criminal and civil jurisdiction by another state.

In essence, the arguments by parties in the *Al Bashir case* revolved around section 32 of the Constitution, the laws on diplomatic immunity and customary international law. What the South African government could not state in court as the reason for not arresting Al Bashir was stated by the Deputy Minister of Foreign Affairs, Obed Bapela (Bapela). In a speech to the ANC Parliamentary Caucus, a speech which I view as representative of the position of the South African government on the Al Bashir matter, Bapela stated that "the ANC is of the view that the debate we … should rather have, is one about the challenges of achieving peace, justice and reconciliation."[464] Bapela went on to confirm President Bashir as one of the critical players in the resolution of conflict in Sudan and that "the Sudanese people therefore need him in Khartoum and not the Hague" and therefore the demand that South Africa must arrest President Al Bashir while he is attending an AU summit illustrates the contempt that some hold on Africa and Africans."[465] The continent, according to Bapela, "must be given space within which to resolve conflict."[466]

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[462] (n 458 above) Para 11.
[463] (n 458 above) Para 13.
[464] Available at: caucus.anc.org.za/show.ph?ID=4097
[465] See (n 464 above).
[466] See (n 464 above).

The significance of the *Al Bashir case* is on its succinct demonstration of firstly the general inability of systems to steer one another in that although the court (the legal system) was cognitively open to information from its environment, in that relied on information from the government to make sense of the situation, it remained normatively closed in that in the final analysis, notwithstanding politically reasoning from the South African government as to why it could not arrest Al Bashir, the courts had to make only one decision, whether the actions by the South African government were lawful or unlawful. Secondly, the *Al Bashir case* is indicative of the silencing of politics by law and most importantly, the fact that political conflicts must meet the criteria of legal relevance in order to be represented. The ANC in government is forced to use legal notions of customary international law and diplomatic immunity whereas the ANC outside of government advances the real reasons why Al Bashir was not arrested. The real reasons are the fact that the arrest of Al Bashir may jeopardise unfolding peace process in Sudan and that politically Al Bashir is pivotal to these processes. The fact of the centrality of Al Bashir to peace in Sudan fails to meet legal relevance because what is allowed to register in the legal system and meet legal relevance is only whether South Africa has an obligation to arrest Al Bashir under the Rome Statute and the Implementation Act. Law, as I suggest below under systems theoretical notion of double contingency, sets the contexts and reduces complexity and political players meet each other in the legal system as legal actors and not political players. I now turn to Christodoulidis's second critique of republicanism which is predicated on the notion of double contingency.

3.5.5.2. Double contingency and reflexive constitutionalism

The second general critique of the variations relates to the embedded logic of constitutional optimists which assumes that law and constitutionalism are innately reflexive. The fulcrum of constitutional optimists is that constitutional arrangements possess an innate institutional capacity to accommodate conflict, differences, and to facilitate contestation – in short, to be inclusive and agonistic. This, as indicated above,

is based on the supposed reflexive character of constitutionalism. However this optimism is quickly disrupted by the introduction of systems theory's notion of double contingency. In contradistinction, the systems theoretical approach would insist that not everything is contestable and not everything finds itself into legal categories. I briefly unpack, using Christodoulidis's understanding of Luhmann's notion of double contingency, why is it that law and constitutional arrangements, as institutional arrangements, do not allow for the wholesale freedom of contestability as claimed by constitutional optimists.

But first, a brief exposition of what the "theorem"[467] of double contingency entails is imperative. The notion of double contingency comes from Talcott Parsons.[468] For Parsons, the notion of double contingency could be deployed to understand "the possibility of social interaction and, by extension, of social order."[469] At its most elementary level double contingency essentially deals with what happens with two individuals at the moment of their encounter i.e. alter and ego:

> Double contingency draws attention to the potential hazard of conflict between individuals confronting each other face-to-face; on the other hand, it points toward accomplishments that could lead to cooperation and sharing. The doubly contingent situation is an unavoidable basic condition that generates a *problem* at a social level that requires a solution if social interaction and social order are to be possible. Parsons takes the view that the norms and values of a 'shared symbolic system' solve the basic *problem* of double contingency.[470]

In Parsonian terms, double contingency almost always presents an indeterminate situation. However, Luhmann reformulates the notion of double contingency and

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[467] I borrow the notion of a double contingency as "theorem" from Vanderstraeten in R Vanderstraeten "Parsons, Luhmann and the Theorem of Double Contingency" (2002) 2 Journal of Classical Sociology 77-92.
[468] See Vanderstraeten (n 467 above)   77-92 & Christodoulidis (n 275 above) 401-32. According to Vanderstraeten, "Talcott Parsons (1902-79) introduced the concept of double contingency in 1951 in the almost simultaneously appearing *Toward a General Theory of Action*, an anthology edited with Edward Shills, and *The Social System*", see Vanderstraeten (n 467 above) 78.
[469] Vanderstraeten (n 467 above) 78.
[470] Vanderstraeten (n 467 above) 79.

concludes that double contingency although valid theoretically, never actually occurs in real life. Whereas Parsons uses contingency in the sense of dependency – that is "the mutual dependency of ego's and alter's expectations and actions"[471], Luhmann reformulates the notion of contingency in the following manner:

> ego's action is not contingent while it depends on another actor, but while it presupposes a selection from a range of alternative options. The double contingent character of social interaction is, mutatis mutandis, a consequence not of mutual dependency of ego and alter, but of the confrontation of at least two autonomous systems that make their own selections in relation to one another.[472]

In his reading of Luhmann's reformulation of Parsons's double contingency, Christodoulidis states that "that which is required in order for people to interrelate their behaviour is that the complexity of the double indeterminacy be reduced."[473] Systems reduce double indeterminacy by "fixing a context".[474] In this sense, "systems … become constraints that facilitate meaning" and "communication is only possible through reductions which are in turn premised on system selectivity."[475]

From the point of view of law as a system, law reduces contingency by generalising expectations through institutionalisation.[476] By institutionalising expectations, law disciplines expectations so that not everything becomes contestable. In this sense, the freedom to contest freedom as advanced by constitutional optimists is ruptured by law's disciplining of expectations. In other words law's reduction of complexity solves the problem of double contingency. But in proximity to law's reduction of complexity is the exclusion of other meanings from legal discourse.[477] The contingent space, according to Christodoulidis, becomes fixed by law's reduction of complexity and this happens by the law, using its binary code, asking whether something is lawful or

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471 Vanderstraeten (n 467 above) 84.
472 Vanderstraeten (n 467 above) 84.
473 Christodoulidis (n 274 above) 385.
474 Christodoulidis (n 274 above) 385.
475 Christodoulidis (n 274 above) 385.
476 Christodoulidis (n 275 above) 413.
477 Christodoulidis (n 275 above) 414.

unlawful.[478] In this sense, "single uncertainty" replaces "double uncertainty" and this happens by the system "setting up of a context of disagreement".[479] Christodoulidis states as follows:

> To the extent that constitutional theorists, form Habermas to Tully, elevate law in the centrepiece of social deliberation, they do establish the possibility of meaningful argumentation in context, but at the cost of remaining reflexive over the contextual conditions. Legal argumentation as practical discourse is always already disciplined by the contextual conditions, therefore no longer reflexive about them.[480]

I suggest that the setting up of the context of disagreement is precisely what happens in the case of Al Bashir referred to above. In the *Al Bashir case*, the context in court ceases to be about peace in Sudan and Al Bashir's centrality to the peace process. The law in this case forces the context of the disagreement to be about South Africa's obligations under the Constitution and International law and not about the African Union and the South African government's initiatives to find a lasting resolution to the conflict in Sudan. This is because systems, including law, have their own autonomous logic due to the fact of systems' structural coupling.

3.5.5.3. Structural coupling and the improbability of constitutional reflexivity

The third critique of the variations specifically relates the notion of constitutional reflexivity. Constitutional reflexivity is based on the system theory's notion of structural coupling. Structural coupling is described as the instance where each system has its own autonomous logic that defies direct manipulation.[481] Structural coupling manifests itself in this way: there exists a systemic interaction at a cognitive level between the system and functional differentiation at a normative level.[482] Structural coupling means that the systems are operatively closed and cognitively open. This means that "the

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[478] Christodoulidis (n 275 above) 414.
[479] Christodoulidis (n 275 above) 414.
[480] Christodoulidis (n 275 above) 413-15.
[481] Christodoulidis (n 276 above) 98.
[482] J Priban "The Time of Constitution-Making: On the Differentiation of the Legal, Political and Moral Systems and Temporality of Constitutional Symbolism" (2006) 19 Ratio Juris 461.

structure of the system is determined by the system's own operations and no external operations can specify its internal development."[483] The interaction of systems is at the level of exchange of information (cognitive openness) which acts merely as "irritant". The system is only dependent on its environment at the level of gathering information i.e. cognitive dependence.[484]

However the coupling of systems does not in any way affect the internal operations of a system. Every communication between them therefore enhances the self-reference and operational closure of the system and "rules out any chance of hierarchy between functionally differentiated systems such as the economy, politics, law, morality and education."[485]

Traditional legal constitutional thinking understands a constitution to assume supremacy over politics. In this sense, politics is and must be subjected to the rule of law. According to Philippopoulos-Mihalopoulos, this dominant understanding of politics as being controlled by law is misleading because "it ignores the fundamental paradox of the constitutional operation, namely the circularity between the constitutional text and context".[486] A constitution belongs both to the systems of law and political and yet escapes both law and politics as a result of the environment (context) which creates circularity.[487]

For instance, the people (or the constituting demos) are required to produce a constitution and in turn the constitution constitutes the demos (the people). The constitution is the text and the constituting demos is the context and there is circularity between the text and context. This circularity, according to Philippopoulos-Mihalopoulos, is foundational to the constitutional paradox in that the source of the text, (that is the demos or what the author refers to as the demotic source) itself

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[483] Priban (n 482 above) 461.
[484] Priban (n 482 above) 461.
[485] Priban (n 482 above) 461.
[486] A Philippopoulos-Mihalopoulos *Niklas Luhmann: Law, Justice, Society* (2010) 142.
[487] Philippopoulos-Mihalopoulos (n 486 above) 142.

becomes the text. "Law becomes the text that cannot be observed without its context, the demotic source."[488] A constitution becomes a paradox that marries law and politics. It becomes both text and context simultaneously and yet separates them by restricting law's influence on politics and politics' influence on law.[489] Thus a constitution is neither at the service of law or at the service of politics exclusively but "simultaneously within and outside each of the two systems."[490]

The constitutional paradox is described by Philippopoulos-Mihalopoulos as when "the constitution restricts the mutual influence of law and politics, while at the same time increasing the possibilities of mutual evolution."[491] A constitution becomes normatively or operationally closed by limiting the "mutual influence" of law and politics. In a nutshell, there exists, according to Philippopoulos-Mihalopoulos, a dialectical relationship between law and politics. In this dialectical relationship, a constitution comes in to ensure that, notwithstanding this cognitive openness between law and politics, both law and politics remain normatively closed. The normative closure of both the two systems of law and politics assists the two systems to strengthen their cognitive openness, to ensure that they both benefit from each other's external perturbation into each other. Constitutionalism in this sense is thus a coupling of law and politics.

According to Priban, it is precisely because of the wrong belief in the hierarchical nature of systems in a functionally differentiated social system that make the belief that legislation is able to integrate society and limit political authority "over-ambitious".[492] "Legal decisions and normative framework do not stand above other spheres of our complex social life such as economics, education and ethics."[493]

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[488] Philippopoulos-Mihalopoulos (n 486 above) 143.
[489] Philippopoulos-Mihalopoulos (n 486 above) 143.
[490] Philippopoulos-Mihalopoulos (n 486 above) 143.
[491] Philippopoulos-Mihalopoulos (n 486 above) 144.
[492] Priban (n 482 above) 461.
[493] Priban (n 482 above) 461.

According to Priban, law and politics are two separate systems and "the rule of law makes it impossible to claim the supremacy of either politics or law."[494] Law and politics are thus functionally differentiated and contribute to one another without being hierarchical to one another.[495] This is because modern society is "hierarchical, divergent and polycontextural."[496] A constitution thus facilitates structural coupling of law and politics. A constitution allows law to limit and yet assists in the enforcement of political will. However, this does not mean that law can be reduced to the logic of power.[497]

It is important to note that if structural coupling is defied, society experiences juridification.[498] The theory of juridification here is not used quantitatively in the sense of legal "explosion" or "an inflation of laws"[499] but rather as "a process in which human conflicts are through formalisation, torn out of their living context and distorted by being subjected to legal processes."[500]

The central thesis of Christodoulidis is that if juridification is the expropriation of conflict, this expropriation of conflict is necessarily its depoliticisation.[501] In this sense expropriation becomes or is an equivalent of depoliticisation. Juridification is thus the re-enactment of conflict from law's point of view. The re-enactment of politics in law serves to deplete and distort conflict and therefore politics.[502]

3.5.5.4. Law's depoliticisation of conflict

The fourth critique of the variations is anchored on the variations' inability to appreciate the fact of law's depoliticisation of conflict. For Christodoulidis, depoliticisation of

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494 Priban (n 482 above) 460.
495 Priban (n 482 above) 460.
496 Priban (n 482 above) 460.
497 Priban (n 482 above) 462.
498 Christodoulidis (n 276 above) 98.
499 Teubner (n 278 above) 74.
500 Christodoulidis (n 276 above) 99.
501 Christodoulidis (n 276 above) 100.
502 Christodoulidis (n 276 above) 100.

politics by republicans starts the moment republicans depoliticise conflict. Christodoulids's critique of republicanism is mainly centred on republicanism's conceptualisation or lack thereof of conflict. It is recalled that the essence of the republican containment thesis is that politics as a dialogic moment finds expression in law, that "law is constitutive of the texture of our communities, the language that articulates or contains political understandings and voices commitment."[503] In this sense ordinary politics must always find expression in the institution of law. Accordingly, "constitutional politics provides us with a language that will furnish a debate, confrontation and eventually, definition of our political identities."[504] In this sense everything is politics. Christodoulidis's point of departure is that conflict is central to law. Law requires conflict to subsist and the absence of conflict reduces the relevance of law. Conflict is in this instance pivotal to the sustenance of law or as Christodoulidis puts it, conflict is essential to the system's maintenance in that it "provides the legal system with an occasion for 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."[505]

The critical question however is, what is Christodoulidis's conception of politics? As a point of departure, we recall that in terms of the systems theory, politics, like law and economics is a system itself. The question then is how does the political system encodes the political? In other words, how does the political system observe? For Luhmann, democracy is a type of politics, a way of doing politics and it achieves this by providing mechanisms for arriving at politically binding decisions, creating structures for the alteration between government and opposition and allowing for the giving of politics legitimacy.[506] Although political power is the ability to make binding decisions, this power, based on functional differentiation, is a "powerless power" in that it is not able to absorb all social power. For instance, although a government comes up with regulations for other systems, it is not government that has the power

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[503] Christodoulidis (n 276 above) 235.
[504] Christodoulidis (n 276 above) 270.
[505] Christodoulidis (n 276 above) 130.
[506] Moeller (n 22 above) 88.

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to declare people innocent or guilty but the courts and it is not government that makes people rich or poor but the economic system. In this Luhmannian sense, politics is thus not everything because in a functionally differentiated society there is no social centre and therefore no system has absolute power on other systems. In a functionally differentiated society, political power does not constitute the apex because while it is regulating it is at the same time being regulated and while it is limiting it is at the same time being limited by amongst others, legal power, economic power and media power.[507] There is, according to Luhmann, "no purchase point from which to articulate an overall political logos."[508]

Christodoulidis however challenges Luhmann's view of the political system albeit from within a similar theoretical *loci* – a sort of internal critique. Although Christodoulidis minimally agrees with Luhmann on the political system's coding as government/opposition, he nonetheless argues that the coding of government/opposition is too restrictive as other forms of "utopian" or "expansive" politics cannot be read by this code.[509] It is at this point that Christodoulidis argues for reflexive politics. In terms of reflexive politics what becomes political is politically contested. Christodoulidis calls for the introduction of political theory at a meta-level, in other words, the introduction of political theory as an observer that observes politics. For Christodoulidis, the introduction of political theory at a meta-level carries an enabling impetus greater than acknowledged or intended by Luhmann: it carries a critique into the terms of political discourse.[510] In this sense, it could be stated that Christodoulidis's version of reflexive politics is a call for the politicisation of politics. For Christodouldis, politics is and can be reflexive and this reflexivity can be facilitated by the introduction of political theory as a meta-level so that it is political theory that determines what is political. For Luhmann, politics as a system cannot be reflexive because it is autopoietically closed and can only observe through its binary code of government/ opposition. The implication of Luhmann and Christodoulidis's approaches is that where Luhmann has concluded that politics is autopoietically

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[507] Moeller (n 22 above) 90.
[508] Christodoulidis (n 276 above) 389.
[509] Christodoulidis (n 276 above) 255.
[510] Christodoulidis (n 27 above) 394

closed and unable to steer and change other systems, Christodoulidis's view is that the systems of politics is slightly different in that what is political can be determined at the level of political theory. In this sense, the government/opposition binary code can be transcended.

3.5.5.5. Conflict as politics and politics as conflict

The fifth critique of the variations relates to constitutional optimists' scant theorisation of the notion of conflict. According to Christodoulidis's interpretation of Luhmann, "we can speak of conflict …whenever, one participant in an interaction refuses to accept the choices or selections of another and communicates this refusal."[511] It is also recalled that conflict is itself necessarily a system on its own. It already becomes evident that conflict as a system can be observed by other systems as well, using their own codes. To recap, if conflict is observed by law, it is viewed from a legal/illegal binary code. In other words, the law would ask whether conflict is legal or illegal. If conflict is observed by politics, from Luhmann's system theoretical prism, it becomes government opposition conflict or governmentality conflict. Christodoulidis's reflexive politics would observe conflict in a way that says political conflict is what politics would regard as political conflict and what politics regards as qualifying to be conflict is a political question.

Therefore the consequences of the containment theory based on its approach "to adopt the legal system's perspective" is that only one form of conflict registers, which is conflict "as occasion" to the exclusion of conflict as a system.[512] "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."[513] The chief blind spot of the containment thesis is that by relying on law's observation optics, conflict in society is only read as conflict

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[511] Christodoulidis (n 276 above) 132.
[512] Christodoulidis (n 276 above) 138.
[513] Christodoulidis (n 276 above) 138.

around positions of law.[514] Political conflict becomes legal conflict. This approach excludes the political question which relates to the staging of conflict.[515]

It is recalled that law as system already has in-built co-ordinates about how conflict is to be resolved. In other words the law looks at a conflict from the perspective of rights, liberties, legal notions of harm, legal tests and legal presumptions to make sense of conflict i.e. "who can allege to have suffered harm, who counts as injured, why and when, as well as who enters the balance and what tilts the balance."[516] This is already a selective mechanism that excludes those things that are regarded as given to the debate over conflict itself. In other words an opportunity to agree on the nature of the disagreement so that there can be an agreement over the disagreement is lost because once a strategic or ideological decision for a matter to be resolved legally is taken, the already existing legal co-ordinates kick in.

The above is what already happens in a system such as South Africa's constitutional supremacy arrangement. Delport captures it lucidly: "the role of constitutional supremacy and a single-system-of-law principle is to make all actions and decisions fall within the already set-up parameters of the Constitution."[517] That which is essentially a political conflict is deferred. In this sense we have what Christodoulidis, borrowing from Lyotard, refers to as the "double silencing" of politics by law. The first silencing is of the censorship of certain political statements in law (its exclusionary dimension) and the second silencing is that of withdrawing in law the possibility of challenging this censorship.[518]

What Christodoulidis is essentially saying is captured by Chantal Mouffe who states that the specificity of the political is in its conflict/decision dimension.[519] In other words, the political is inherent in every dimension of human existence and is constitutive and

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[514] Christodoulidis (n 276 above) 138.
[515] Christodoulidis (n 276 above) 139.
[516] Christodoulidis (n 276 above) 139.
[517] Delport (n 230 above) 112.
[518] Christodoulidis (n 6 above) 27.
[519] C Mouffe *The Return of the Political (1993)* 2.

determines of our very ontology.[520] This is because every identity is relational in that "condition of every existence of every identity is the affirmation of a difference, the determination of another that is going to play the role of a constitutive outside."[521]

Law's depoliticisation of conflict and its obliviousness to history in the context of South Africa also finds expression in the case of *The Citizen v McBride*. In this case, like in the *Al Bashir case*, the law is unable to hear McBride's objection of being called a criminal when he understands himself to be a freedom fighter.

3.5.5.6. The Citizen v McBride: the objection that could not be heard

On the 14th June 1986, an Umkhonto we Sizwe (the ANC' military wing) cell under the command of Robert McBride (McBride), planted a bomb outside the *Why Not Magoo Bar (the Bar)* in Durban. Three people were fatally wounded and sixty-nine (69) were injured as a result of the explosion. The reason for the planting of the bomb was supposedly because the Bar was frequented by the majority of the Security Branch police.[522] According to the ANC submission to the Truth and Reconciliation Commission, "the operation was carried out during a time of extreme political upheaval in the country, which had culminated in the declaration of a nation-wide State of Emergency on June 12 (1986)."[523] The ANC goes further to state that "this attack was in line with the ANC's attempts to take the struggle out of the black ghettos into white areas: the *Why Not Bar* was targeted precisely because it was frequented by off-duty members of the Security Forces."[524] McBride was sentenced to death by the Natal Provincial Division in 1988 as result of the *Why Not Magoo* Bar bombing.

McBride appealed his sentence at the then Appellate Division (AD)[525]. The judgement was handed down on the 20 March 1988 by Corbett J with Viljoen JA, Hefer JA,

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[520] Mouffe (n 519 above) 3.
[521] Mouffe (n 519 above) 2.
[522] This information is available at: SA History.org
[523] First ANC submission to the TRC, Available at: www.justice.gov.za/trc/hrvt
[524] (n 523 above).
[525] S v McBride (1988).

Grosskopf JA and Vivier JJA concurring. According to the records of the AD, McBride was charged at Natal Provincial Division (the trial court) with three counts of murder, one attempted murder and one for contravening section 54(1) of the Internal Security Act 74 of 1982 dealing with terrorism. McBride and his co-accused pleaded not guilty. At the trial court, Judge Shearer had found McBride guilty of "furthering the achievement of the objects of the African National Congress, terrorism and murder."[526]

On appeal, the AD confirmed the trial court's imposition of a death penalty. The AD further made certain observation against McBride, including the fact that McBride had "joined the ANC and embarked upon a career of criminal violence"[527]; that McBride grew under horrific social conditions and his social upbringing under apartheid explain why McBride "joined the ANC and participated in its acts of terrorism, aimed mostly at inanimate targets"[528]; and that "political motive did not serve to extenuate a crime."[529] McBride was given a reprieve in 1991 and released from incarceration in 1992. He was granted amnesty by Truth and Reconciliation Commission in April 2001.

What comes out of the judgement, an issue that I will pursue later, is that the AD at that point regarded the ANC as a criminal organisation engaged in criminal violence, the ANC was a terrorist organisation and in its prosecution of the armed struggle, the ANC was involved in a criminal activity or put differently, the ANC's armed struggle constituted an act of criminality.

Having been released and granted amnesty McBride applied, in 2003, for the post of head of the metro police in the Ekurhuleni metropolitan municipality in the Gauteng Province. According to facts as narrated by the Constitutional Court, the Citizens newspaper, having been alerted to McBride's possible appointment as the head of the metro police, started publishing articles critical of McBride and his candidacy. The

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[526] (n 525 above) 4-5.
[527] (n 255 above) 21.
[528] (n 525 above) 49.
[529] (n 525 above) 51.

essence of the articles was that McBride is a murderer and criminal.[530] McBride then took the Citizen newspaper to court. The case commenced at the High Court and went right through to the Supreme Court of Appeal and ended at the Constitutional Court.

The legal question at the Constitutional Court was "whether amnesty once granted rendered the statement that Mr McBride is a murderer false".[531] Alternatively, as stated by the Constitutional Court, the principal issue was whether "it could properly be stated as a fact that Mr McBride was a murderer."[532] The Supreme Court of Appeal had upheld the trial court's findings that the statement that McBride is a murderer is false.[533] The Citizen contended that calling McBride a murderer and criminal constituted fair comment. McBride on the other hand contended that because he received amnesty, he could not be called a murderer. The Freedom of Expression Institute and South African National Editors Forum also joined the proceedings as *amicus curiae*. The two organisations argued against the finding of the Supreme Court of Appeal and contended that the Supreme Court of Appeal failed to take into account the impact of its decision on freedom of expression.[534] The proceedings were further joined by the families of the "Mamelodi Four" who were killed by the apartheid security police and Mr Mbasa Mxenge, the son of Griffiths and Victoria Mxenge who was assassinated by the apartheid secret police in 1981.

The two families argued that the Supreme Court of Appeal ruling "will have a significant effect on the ability to speak freely about the crimes committed against their family members and about the wrong doers who received amnesty."[535] The families also based their argument on freedom of expression. They contended that "the proper interpretation of the Reconciliation Act … is that the effect of amnesty is only on conviction and not on historical facts."[536] The Minister of Justice also made

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[530] The Citizen 1978 (Pty) Ltd and Others v McBride (2011).
[531] (n 530 above) Para 28.
[532] (n 530 above) Para 19.
[533] (n 530 above) Para 28.
[534] (n 530 above) Para 43.
[535] (n 530 above) Para 45.
[536] (n 530 above) Para 45.

submissions to the effect that once a person has been granted amnesty, they could no longer continue to be called a criminal.[537]

In its ruling, the Constitutional court stated as follows:

> Mr McBride's argument urges for a literal interpretation of section 20(10): the grant of amnesty expunges his conviction of murder 'for all purposes'. It is deemed not have taken place. It is as though he was never a criminal convicted of murder. It is as though the fact that he committed murder did not occur. In the formulation of the Supreme Court of Appeal, he is 'no longer considered to be a criminal in respect of the deeds committed by him.'[538]

At this point, the Constitutional Court then proceeds to invoke the *Du Toit case*[539]. In the *Du Toit case,* Du Toit was dismissed for the murder he committed during his service as a member of the South African Police Service but subsequently granted amnesty for the murders. Du Toit challenged his dismissal on the basis of the fact that he has since been granted amnesty and was therefore entitled to get his job back because the effect of the amnesty was that he could no longer be referred to as a murderer. In the *Du Toit case*, Justice Langa argued that "the grant of amnesty had only retrospective effect and not retroactive effect: amnesty had the effect of expunging the conviction and preventing in this way any consequences of the conviction that might have occurred after the date of amnesty, but amnesty did not affect any consequences of the conviction that might have arisen before the grant of amnesty."[540] In this case, the *McBride case*, the court, having affirmatively referred to the *Du Toit case*, proceeded to state that "Mr McBride's argument runs counter to the meaning and effect of *Du Toit*."[541]

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[537] (n 530 above) Para 48.
[538] (n 530 above) Para 57.
[539] Du Toit v Minister of Safety and Security 2010 1 SACR 1 (CC).
[540] Langa J in (n 540 above), quoted in Van Marle (n 174 above) 70.
[541] (n 530 above) Para 59.

The *McBride cases*, from the murder sentence to the constitutional court defamation case, are a clear indication of the "unhappy coexistence between legal and revolutionary idiom."[542] The cases reflect the dominant view which holds law to be innocent.[543] The McBride cases are also indicative of what the law excludes. This is the objection that could not be raised not merely because it is side-lined by official discourse but because the very possibility of raising it is structurally removed by the court room.[544] This is the instance where "the judge uproots the revolutionary utterance from its context and realigns it to conditions of the legal context."[545]

In the *McBride cases*, McBride plants a bomb because he is revolted by the apartheid system. He plants the bomb because he is engaged in a violent armed revolutionary struggle as a member of the Umkhonto we Sizwe. He is convicted by apartheid courts for "acts of criminality" and terrorism. When he gets to court, the fact that he was engaged in a revolutionary cause ceases to exist and gets subsumed by the legal context. McBride becomes a criminal because the law does not allow for a revolution. In this sense "what the law cannot hear is the political claim that terrorist goals are political."[546]

McBride is released from incarceration, he is granted amnesty and begins a life in constitutional state, a "new dispensation". However, McBride continues to be called a criminal and a murderer and by extension a "terrorist" since what made him a "criminal" in the first place was that he was a "terrorist". McBride then approaches the Constitutional Court for relief, believing that because the law has granted him amnesty, the law must also address the fact that he is still being called a criminal notwithstanding the law having "forgiven" him. But the Constitutional Court finds that McBride is still a criminal and murderer. What McBride does not realise in approaching the Court is that "reflexive political contestation as such cannot be accommodated in legal indeterminacy, because what is challengeable in law is simultaneously fixed by

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[542] Christodoulidis (n 455 above) 179.
[543] Christodoulidis (n 455 above) 180.
[544] Christodoulidis (n 455 above) 181.
[545] Christodoulidis (n 455 above) 181.
[546] Christodoulidis (n 6 above) 37.

concepts and assumptions."[547] Arriving at the Constitutional Court, the law has already fixed the context of what McBride can argue for or against. The law does not allow McBride to articulate the fact that he cannot be called a criminal or a murderer because he is a revolutionary who fought for freedom and his actions were of a revolutionary nature and not of a criminal nature. This in itself belies the republican claim that constitutionalism presupposes "the freedom to contest the terms in which constitutional freedoms are exercised".[548] The law only allows McBride to couch his grievance within "the ambit of what is meaningful by filtering communication through system-relevance established by the code."[549] McBride is therefore only able to state that he should not be called a murderer and a criminal because he has been granted amnesty, and not because his killings were in pursuit of freedom. He also can only phrase his grievance in the form of defamation. This is because the law and the Constitution do not recognise a revolution. The law would see a revolution as a threat to its existence and would either assimilate it by processing it into its own categories or relegate it into a redundancy or irrelevancy and therefore not as belonging to the law. "Reduction as simplification works to assimilate potential disruptive complexities into systemic patterns of processing it."[550]

The Mxenge family and the "Mamelodi Four", historically on the same side of the struggle for freedom with McBride are now pitted against McBride at the Constitutional Court. In the normal course of things both McBride and the two families would be on the same side in dealing with and responding to the perpetrators of the atrocities of apartheid. This is presumably because they all were oppressed by the system of apartheid, they all fought against apartheid and are all victims of apartheid. But they meet in court as two opposing sides. It is the legal principle that creates the conflict between them. The families are of the view that if the Constitutional Court finds that a person granted amnesty can no longer be called a criminal, this would deny them the ability to call criminals and murderers the people who, in defence of apartheid killed members of their families. On the other hand McBride insists that he cannot be called

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[547] Christodoulidis (n 274 above) 396.
[548] Christodoulidis (n 275 above) 411.
[549] Christodoulidis (n 274 above) 383.
[550] Christodoulidis (n 274 above) 387.

a criminal and a murderer because he has been granted amnesty. The law is called upon to answer only one question, and in fact, the law can only answer one question: can a person who has been granted amnesty be called a criminal and a murderer. The law can only answer one question because by its very "nature", the law abstracts from concrete parties and generalises expectations. The law has one rule for everyone and "this is due to the function law has in society of stabilising expectations, of controlling normativity, of guaranteeing that its expectations will not be discredited if disappointed."[551]

The above is precisely why in the final analysis the law can only answer whether one can be called a criminal or not a criminal. The law cannot deal with McBride issue by separately agreeing that in one instance McBride is a not a criminal because he was granted amnesty and on the other hand Du Toit is a criminal even though he was granted amnesty with the difference being that McBride was a revolutionary who fought against apartheid whereas Du Toit was part of the system that fought in defence of apartheid. I suggest that if the law were to cease to generalise expectations and begin to particularise expectations, it would in the process mutate into a phenomenon that is not law.

3.6. Systems theory, radical transformation and transformative constitutionalism

In "The Inertia of Institutional Imagination", Christodoulidis succinctly puts the relation between law and transformation in the following words:

> If law does harbour transformative opportunities it is because there are limits to law's institutional imagination that take the form of reductions which, at a deep level, cannot but remain in place … law cannot but foreclose broader political conflict and, in the last

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[551] Christodoulidis (n 274 above) 386.

instance, assimilate transformative opportunity to its own self-maintenance and assimilate the disruptive to its own controlled evolution.[552]

My analysis of Christodoulidis's assertion is that the supposed transformative opportunities offered by law are always already legal opportunities. These opportunities are always already opportunities limited by institutional inertia. They are opportunities of law, for law and by law. The very fact that they present themselves as opportunities is based on what Luhmann calls law's reduction achievement. They are opportunities that arise after the law has reduced complexity and has consequently excluded that which is not relevant to it – other politics. Christodoulidis states that it is precisely law's reduction of complexity, its ability to exude conflict as resolvable and its ability to bring conflict to finality "that give constitutionalism its specific legal nature and institutional achievement."[553]

The next logical question for transformative constitutionalism is whether it is capable of escaping or wrestling itself away from the clutches of law's institutional inertia. This is so because I suggest that in the final analysis, embedded in the logic of transformative constitutionalism is constitutional optimism and thus a belief in constitutional and legal reflexivity. I now turn to the oft-quoted conceptualisations of transformative constitutionalism and analyse them from a systems theoretical prism. I argue that almost all of these understandings of transformative constitutionalism rely on the logic of constitutional reflexivity – the kind of reflexivity that a systems theoretical approach would take issue with. I restate what some of the protagonists of transformative constitutionalism state (without repeating all that was stated above on the section on transformative constitutionalism) and thereafter hazard a general summation of what constitutes the golden thread and essence of transformative constitutionalism.

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[552] Christodoulidis (n 274 above) 378.
[553] Christodoulidis (n 275 above) 414.

As stated earlier, for Klare transformative constitutionalism entails

> a long term project of constitutional enactment, interpretation and enforcement … to transforming a country's political social institutions and power relations in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law.[554]

It is about ensuring the

> redistribution of power and resources along egalitarian lines. The challenge of achieving equality within this transformation project involves the eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality. It also entails the development of opportunities which allow people to realise their full human potential within positive social relationships.[555]

Transformative constitutionalism must ensure "the achievement of substantive equality and social justice, the infiltration of human rights norms into private relationships and the fostering of a culture of justification for every exercise of power."[556]

In hazarding a summation of the essence of transformative constitutionalism based on the above, I suggest the following: transformative constitutionalism entails large scale social change and the content of this social change entails redistribution of power and resources so as to achieve substantive equality and social justice. This envisaged transformation must however be grounded in law and ensue within constitutional arrangements.

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[554] Klare (n 7 above) 150.
[555] Langa (n 188 above) 352.
[556] Pieterse (n 194 above) 156.

Based on the above statement, the measure of success of transformative constitutionalism would be its ability to ensure that power is redistributed in an egalitarian manner; domination and material disadvantage based on race, gender and class are eradicated. In this sense, power and resource must be equally shared and material disadvantage must not be based on race or put differently a disadvantages must be equally carried. All these must of course occur within constitutional arrangements. The sharing of power, the distribution of resources and the sharing of disadvantages must be constitutionally achieved – hence section 2 of the Constitution which states that the Constitution is the supreme law of the Republic and law or conduct inconsistent with it is invalid.

The above statement is a confirmation of the fact that, particularly within the context of South Africa, material resources are extremely contested. The history of South Africa is such that the majority of its citizens happen to be those who are mostly disadvantaged and less resourced. The minority, which is mainly white, is the more advantaged and well resourced. Inevitably, those with resources would naturally want to keep their resources and those who have no resources would naturally want these resources to be "redistributed". Therefore in the final analysis, any contestation over resources can only be between those who own the resources and are reluctant to give them up (which may result in sharing of disadvantages according to the statement above) and those who are in need of the resources and are not able to access them because those who own them are reluctant to give them up.

Transformative constitutionalism in this sense becomes a solution for ensuring that this contestation is (re)solved by and within constitutional arrangements and in an orderly manner facilitated by and within the constitutional arrangements. In this manner of transformative constitutionalism, "the constitutional arrangement stabilise objectively valid expectations and the absorption of uncertainty occurs at the level of the setting up of a context of disagreement."[557] At face value, this approach looks

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[557] Christodoulidis (n 275 above) 414.

sensible in that the setting for contestation has been fixed and any person who contests an issue is aware and agreed with the setting for a disagreement.

I suggest that embedded in the logic of transformative constitutionalism is constitutional optimism (republicanism), the assumption that systems can "steer" other systems, politics can find expression in law, and generally the belief, which is constitutionalism's overriding logic, in constitutional reflexivity. I now turn to subject the notion of transformative constitutionalism to a system theoretical critique, informed by our understanding of what constitutes radical transformation.

3.6.1. The problem with the location of transformation within constitutionalism and transformative constitutionalism discourse as modernity

3.6.1.1. Locating the transformative within constitutionalism

The location of the transformative within constitutionalism seems to suggest, as Van Marle states, the reconstruction of South Africa as a legal project.[558] In this sense transformation as a project of reconstruction ought to unfold within the purview of constitutional arrangements. This further presupposes the ubiquity of legality and the rule of law[559] and the fact that the lived experience becomes a legal and constitutional experience. Before proceeding on the location, the fundamental question is what is it that must be transformed.

I have already, in chapter two, alluded to the fact that according to the ANC, the immediate task is that of deracialising society[560] and this "requires deracialisation of ownership and control of wealth, management and the professions".[561] This deracialisation, according to the ANC, must unfold within a "rights" context. To partially restate the ANC's Jordan, "in the view of our movement the content of freedom and

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[558] Van Marle (n 2 above) 413.
[559] Van Marle (n 2 above) 415.
[560] Netshitenzhe (n 44 above).
[561] Strategy and Tactics of the ANC (n 45 above) 3.

democracy would be the radical transformation of South African society so as to create an expanding floor of economic and social rights for the oppressed majority."[562] It is this very approach to transformation that led the ANC's embrace of constitutionalism as stated earlier. There are glaring similarities between what the ANC envisages transforming and dominant view of transformative constitutionalism stated above. Both these views are agreed that the reconstruction of the State must unfold through legal means. But most importantly and for our purposes, both views on the reconstruction or transformation of the South African society take a modernity and thus a "historicist" approach to reconstruction. This approach finds concrete expression in firstly locating reconstruction and transformation within constitutionalism and believing that constitutionalism is the enabler of transformation.

Chakrabarty, in his introduction to *Provincialising Europe: Postcolonial Thought and Historical Difference*[563] states that modernity is constituted by the two main ideas of historicism and the idea of the political.[564] It was the notion of historicism – that is the idea of looking at history as a unity in a linear progression – that gave birth to the ideology of progress and development since the 19th century and it is this idea of progress that enabled European domination of the world.[565] It is historicism that gave modernity and capitalism a global character.[566] According to Chakrabarty, from historicism we also have the notion of historical time meaning the idea that with time and proper institutional arrangements, the developing countries will be able to reach the levels of development already attained in Europe – the idea of "first in Europe and the elsewhere" approach.[567] In this sense "we were all headed for the same destination … but some people were to arrive earlier than others. That was what historicist consciousness was: a recommendation to the colonised to wait."[568]

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[562] Jordan (n 49 above).

[563] D Chakrabarty *Provincialising Europe: Postcolonial Thought and Historical Difference* (2000).

[564] Chakrabarty (n 563 above) 6.

[565] Chakrabarty (n 563 above) 7.

[566] Chakrabarty (n 563 above) 7.

[567] Chakrabarty (n 563 above) 7.

[568] Chakrabarty (n 563 above) 8.

This leads to my suggestion of transformation as a modernity project. It is precisely modernity historicism that leads Reddy to state that South African discourse on transformation is rooted in the modernity paradigm.[569] By modernity discourse in South Africa, Reddy refers to a linear narrative which refers to a movement from colonialism to apartheid to democracy.[570] This is a movement of progress, an "endpoint" which "broadly embraces growth in economics and politics (in terms of the post-World War II obsession with political development and liberal democracy) and a society regulated by law."[571]

In locating and conceptualising transformation within a constitutional project and thus attempting to reconstruct South Africa by means of and within constitutional arrangements, South Africa has embraced the Enlightenment project, because as Van Marle states, "constitutionalism and human rights discourse are post-apartheid South Africa's embrace of the light of the Western World."[572] Van Marle's view is given a fillip by Ndlovu-Gatsheni who also states that the ANC's notion of codifying basic rights and using these rights as the basis for a thoroughgoing transformation "within the context of an orderly, democratic and legal framework reveals its complacent view of coloniality and neo-apartheid."[573] This, applying Ndlovu-Gatsheni's insight, is based on the fact that transformative constitutionalism fails to recognise that apartheid existed both as "colonialism (direct administrative domination) and coloniality (visible socio-political-economic engineering of radical difference) simultaneously."[574] From a decolonial perspective, the location of "the transformative" within constitutionalism is not capable of addressing coloniality. This is because a rights based approach to constitutionalism is itself a project of modernity and thus a perpetuation of coloniality. It is precisely this that leads Van Marle to state that "colonialism in the form of international human rights and constitutionalism, as well as legal formalism and

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[569] Reddy (n 12 above) 41.
[570] Reddy (n 12 above) 42.
[571] Reddy (n 12 above) 45.
[572] Van Marle (n 2 above) 414.
[573] Ndlovu-Gatsheni (n 28 above) 209.
[574] Ndlovu-Gatsheni (n 28 above) 206.

positivism, local narratives, ordinary lives"[575] continues to stubbornly subsist in South Africa.

I therefore suggest that transformative constitutionalism, looked at from postcolonial lenses, is wholly imbricated within and constitutes a thoroughgoing project of modernity. Looked at from the prism of decolonial theory, transformative constitutionalism perpetuates coloniality in that by it being imbricated within the project of modernity, it is unable to solve the triad of coloniality of power, coloniality of knowledge and coloniality of being. I further suggest that modernity/coloniality character of the notion of transformative constitutionalism and the concomitant improbability of radical transformation being attained within and by law is better captured by the systems theoretical approach. In other words, whereas postcolonial and decolonial approaches are able to assist in clarifying why radical transformation cannot be achieved within current constitutional arrangements, the systems theory as a radically anti-modernity theoretical approach tells us why law and constitutional arrangements are not suitable vehicles for radical transformation.

I suggest that transformative constitutionalism is wholly imbricated in republicanism because its overriding logic rests on constitutional reflexivity. If we apply the systems theoretical approach to law, we arrive at the conclusion that law and (transformative) constitutionalism cannot solve the modernity/coloniality not only because law and constitutionalism are products of modernity/colonialism, but also because of the limits and structural/institutional inertia of the phenomenon of law. Where republicans see double contingency and radical indeterminacy in law and law's ability to "accommodate political challenge", Van Marle, in reference to Christoudoulidis, is suspicious of this republican view. Van Marle states that Christodoulidis is very critical

> towards the attempt of critical scholars (like Karl Klare) to disrupt the legal system's tendency of assimilation and rationalisation by seeking deviations and contradictions as intellectual and political opportunities by drawing from the system itself. Reflecting

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[575] Van Marle (n 2 above) 423.

on the ideals of transformative constitutionalism and human rights, one must ask whether we are attributing more to law's capacity than we should.[576]

I suggest that the republican character of transformative constitutionalism manifests itself more in the socio-economic rights jurisprudence in South Africa. Socio-economic rights jurisprudence, I contend, tends to attribute more to the law's capacity than the law is able to carry. I now turn to discuss socio-economic rights jurisprudence as an instance where there is an attempt, and hope, of the ability of the law to meaningfully transform South Africa. In the process I subject socio-economic rights jurisprudence to the systems theoretical approach.

3.6.1.2. Socio-economic rights litigation, adjudication and transformative constitutionalism

At a concrete and practical level, the notion of transformative constitutionalism must necessarily find concrete expression in (socio-economic) litigation and ultimately adjudication. The discourse and narrative on socio-economic rights in South Africa, both in terms of scholarship and adjudication, has largely centred around the effectiveness of the enforcement of socio economic rights and on the institutional relationship between courts and other branches of government in the implementation of socio-economic rights.[577] Danie Brand categorises the discourse and narrative on socio-economic rights into the "representation-enforcing" and the "socio-economic rights and adjudication as a strategic tool" approaches.[578] The "representation-enforcing" approach views socio-economic rights litigation as a leverage to providing impoverished people with access to basic material resources whereas the "socio-

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[576] Van Marle (n 2 above) 419.
[577] See D Brand "Courts, Socio-economic rights and Transformative Politics" (2009) LLD Dissertation 31, Available at: http://scholar.sun.ac.za ; D Brand "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa"(2011) 3 Stellenbosch Law Review; Van Huyssteen (n 187 above) ; J Dugard "Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice" (2008) 24 South African Journal of Human Rights.
[578] Brand (2009) (n 577 above) 37.

economic rights" as a tool views socio-economic rights litigation as a strategic tool for transformation.[579]

The common thread between the two approaches is that they "both see litigation and adjudication around socio-economic rights as supportive in some way of transformative politics."[580] I suggest that the "representation-enforcing approach" stated above would see socio-economic rights litigation as a tactic whereas the "socio-economic rights and adjudication as a strategic tool" approach would, evidently, view socio-economic rights litigation as a strategy. In short "representation-enforcing approach" sees socio-economic rights litigation, as a means to an end whereas the "socio-economic rights and adjudication as a strategic tool" would view socio-economic rights litigation as an end in itself.

However, because both view litigation and adjudication on socio-economic rights as representative of transformative politics, their analysis of socio-economic rights is necessarily structured around litigation. I suggest that because their discourse is structured around the possibility of resolving socio-economic issues through litigation, whether from a tactical or strategic point of view, these two approaches are always forced to and must inherently ask the question whether courts are advancing socio-economic transformation or not. In other words, because their point of departure on socio-economic transformation is juridical, they become locked into asking whether or why courts are sufficiently advancing socio-economic transformation or whether they are not and if they are not, they are, for instance, likely to blame the inability or unwillingness of courts on, amongst others, legal culture. Academic commentary on socio-economic rights jurisprudence provides evidence for the latter suggestion.

Jackie Dugard has been very critical of the judiciary's inability, or "failure" as she states, to "advance transformative justice in critical systemic ways."[581] Dugard basis

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[579] Brand (2009) (n 577 above) 39.
[580] Brand (2009) (n 577 above) 39.
[581] Dugard (n 577 above) 214.

her conclusion of the courts' failure to advance transformative justice on the fact that "the judiciary is one of the critical institutions of the post-apartheid order"[582] and it therefore must "play a much more decisive role in social and economic transformation."[583]   This "decisive role in social and economic transformation" must amongst other things, find expression in the courts' rejection of the "reasonableness standard of review" approach and its embracing of the "violations-related standard (including a minimum core content approach)."[584] For instance, in the view of Dugard, in both the *Grootboom*[585] and the *TAC*[586] *cases*, the Constitutional court failed to articulate the minimum core concept, in Grootboom on the right to housing and in the TAC on the right to health.[587]

Brand has critiqued the judiciary, particularly the Constitutional Court, of being overly captured by the notion of judicial deference when it comes to socio-economic litigation and has suggested that "the strategy of deference amounts to a failure in the democracy-related aspect of the transformative duty on courts."[588] The notion of judicial deference comes into sharp focus in the Grootboom case where Justice Yacoob states as follows:

> The right delineated in section 26(1) is the right of 'access to adequate housing' as distinct from the right to adequate housing encapsulated in the Covenant.[589] This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself … The State must create the conditions for access to adequate housing for

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[582] Dugard (n 577 above) 238.
[583] Dugard (n 577 above) 238.
[584] Dugard (n 577 above) 236.
[585] Government of the Republic of South Africa and Others v Grootboom and Others (2001).
[586] Minister of Health v Treatment Action Campaign (2002).
[587] K Young "Conceptualising Minimalism in Socio-Economic Rights" (2008) 1 ESR Review: Economic and Social Rights in South Africa 6-11.
[588] Brand (2011) (n 577 above) 624.
[589] Here Justice Yacoob refers to the International Covenant on Economic Social and Cultural Rights.

people at all economic levels in our society. State policy dealing with housing must therefore tale account of different economic levels in our society.[590]

The above statement by Justice Yacoob is representative of an instance where a court defers to the Executive by disengaging from a pronouncement on the minimum core content of what the right to access housing entails, at least at a minimum. In this instance, the Constitutional Court leaves the determination of what constitutes access to the Executive. The Constitutional Court, in an act of deference, refuses to establish the minimum core content of what access to housing should entail. It is this very approach that has come under severe criticism.

Wilson and Dugard observe that the South African constitutional court's jurisprudence thus far has not adequately responded to the needs of the poor, despite its commitment to transformative constitutionalism and as a result it has failed to explore its transformative potential in the elimination of structural inequality and disadvantage.[591] According to Wilson and Dugard, the problem with the court's approach is that it has failed to look at poverty as a transgression of legal norms.[592] "The interests poor people seek to vindicate through litigation have not been meaningfully addressed in the court's socio-economic rights jurisprudence" – because the court is often of the view that issues of poverty must be defined and enforced through democratic popular choices.[593] In this sense the court has failed to acknowledge that it is precisely in this arena that poor people are marginalised by bureaucratic process. Furthermore, the court has not sufficiently realised that it is the dominant economic paradigm that also excludes people by tolerating high levels of unemployment. Most importantly, much as the court is not expected to "alter the balance of economic forces that sustains structural disadvantage, it is at least expected to, by virtue of its institutional location, enable the poor to articulate and

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[590] (n 585 above) Para 38.
[591] J Dugard and S Wilson "Taking Poverty Seriously: The South African Constitutional Court and Socio-Economic Rights" in S Liebenberg & G Quinot (eds) (2012) *Law and Poverty* 223.
[592] Dugard & Wilson (n 591 above) 223.
[593] Dugard & Wilson (n 591 above) 223.

assert their entitlements to the basic social goals."[594]The courts must listen to poor litigants.[595]

What Wilson and Dugard are stating is exactly what Brand means about the discourse and narrative on socio-economic rights in South Africa been largely centred around the effectiveness of the enforcement of socio economic rights and on the institutional relationship between courts and other branches of government in the implementation of socio-economic rights. It is also what Christodoulidis would call the sharpest moment of republicanism and the "litigation of dangerous politics". The systems theory suggests the impossibility of politics "steering" law.

In a nutshell, the discourse around socio-economic rights and jurisprudence is largely based on what should constitute a "viable approach to adjudicating socio-economic rights."[596] This discourse inevitably morphs into theories of adjudication, for instance whether courts should adopt a reasonableness review approach or the minimum core content approach. An equally plausible question of whether socio-economic rights jurisprudence is a viable approach is least asked. I propose that the viability of the notion of socio-economic rights, that is, the notion that transformation will find expression in socio-economic rights, should constitute the crux of the question. It should not be a foregone conclusion that socio-economic rights have the capacity to bring about the much needed transformation, but for a proper adjudicatory approach. Christoudoulidis has attempted to deal with this matter in an iconoclastic manner by bringing to the fore contradictions between the logic of capital and the protection of social rights.

In "The Political Economy of European Social Rights"[597], Christodoulidis and Marco Goldini ask why, despite the 2008 economic crisis, the paradigm of legal protection of

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[594] Dugard & Wilson (n 591 above) 223.
[595] Dugard & Wilson (n 591 above) 223.
[596] See D Bilchitz "Does Sandra Liebenberg's new book provide a viable approach to adjudicating socio-economic rights" (2011) 27 South African Journal of Human Rights.
[597] E Christodoulidis & M Goldini "The Political Economy of European Social Rights" (2016), Available at: https://www.academia.edu/30815819

social rights has actually continued to gain momentum.[598] The two scholars then conclude unequivocally that the 2008 economic downturn and the fact of capitalist relations of production have meant that "social rights constitutionalism has been all but defeated."[599] The imposition of austerity measures, unemployment and homelessness that followed the aftermath of the 2008 economic downturn, despite social rights protection in most countries, including South Africa, can only presuppose the near impossibility of full capability of the protection of social rights within a social arrangement of the hegemony of the market. Christodoulidis and Goldini proceed to state the incongruity between social rights protection on one hand and the entrenched property and negative rights on the other because "under conditions of liberal economic arrangements, capitalist control over social resources trumps redistributive demands of social justice."[600]

Building on Christodoulidis and Goldini's assertion of the incongruous moment between the logic of capital and the protection of social rights and the resultant inevitable trumping of social rights by and due to the nature liberal capitalist arrangements, it becomes imperative to pose the following question to the advocates of transformative constitutionalism and the protection of socio-economic rights through litigation and adjudication: In a society based on the capitalist relations of production, who controls the resources, or put differently, who controls the means of production.

According to Terreblanche, in all "neoliberal capitalist countries"[601] the poor have gotten poorer since the early 1980s, while the rich have gotten richer."[602] Terreblanche proceeds to state that "in South Africa-before 1994 and after 1994 – the politico-economic systems in place were such that the capitalist/corporatist side always dominated the political side."[603] Today South Africa has one of the highest *Gini-Coeffient* in the World. In 2016 to the World Bank reported that, "South Africa remains

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[598] Christodoulidis & Goldini (n 597 above) 1.
[599] Christodoulidis & Goldini (n 597 above) 1.
[600] Christodoulidis & Goldini (n 597 above) 3.
[601] Terreblanche (n 123 above) 108.
[602] Terreblanche (n 123 above) 108.
[603] Terreblanche (n 123 above) 109.

a dual economy with one of the highest inequality rates in the world, perpetuating inequality and exclusion."[604] The income Gini which ranges from 0.66 to 0.70 "makes South Africa one of the most consistently unequal countries in the World."[605] It has been correctly stated that:

> South Africa's social and welfare policy framework has not achieved real economic transformation, wealth redistribution or the eradication of poverty. State transfers merely help the poor to live from hand to mouth. Post-apartheid macro-economic policies have yielded only limited economic growth while resulting in significant job losses and rising inequality.[606]

It is therefore clear that South Africa's problems of poverty, unemployment and inequality (or the PIU)[607] are still rampant. The PIU problem in South Africa happens in an economy thoroughly immersed in a neoliberal capitalist trajectory where ownership of the economy is still racially skewed in favour of the minority white population. The obstinacy of the PIU problem also occurs in the context of a country where socio-economic matters are entrenched in the Bill of Rights and thus justiciable. The logical question therefore is why is it that the PIU problem has not been resolved years after their enactment into the Bill of Rights. Protagonists of transformative constitutionalism and socio-economic rights would argue on whether the problem is the court's failure to pronounce on the minimum core content or on whether the issue be dealt with at the level of reasonable review test. However, the system's theoretical approach would amongst others, look at the problem as an instance where "political economy undergirds social rights constitutionalism"[608] and that the problem almost always becomes that of social rights yielding to the logic of the market as Christodoulidis would insist.

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[604] Available at: www.**worldbank**.org/en/country/**southafrica**/overview (2016).
[605] (n 604 above).
[606] Mosoetsa (2011), quoted in Terreblanche (n 123 above) 105.
[607] The PIU acronym is used by Terreblanche to refer to Poverty Inequalities and Unemployment, See Terreblanche (n 123 above) 101.
[608] Christodoulidis & Goldini (n 597 above)

In his critique of Hannah Arendt, in a paper titled "Depoliticising Poverty: Arendt in South Africa", Christodoulidis questions Arendt's distinction between the social and the political and argues that such a theorisation of the political constitutes the denial of the political. Christodoulidis argues that there are severe limits to the extent to which social rights jurisprudence can secure material gains to the South African people and these limits are to a larger extent based on the entrenchment of the social/political divide that is constitutionally entrenched.[609] This is because the end result of the social/political divide results in the separation of social equality from political equality. This distinction is a result of the bourgeoisie logic of the public sphere which "celebrates political empowerment on the back of an indifference to social conditions of engagement, and collapses any notion of equality as adequate to the promotion of dignity."[610]

The nub of Christodoulidis's cautionary approach on the transformative potential of the socio-economic rights litigation and adjudication or social rights constitutionalism is that it almost always ends up yielding to the market. The first yielding is due to the conceptual schisms that the constitution draws between the economic, the political and the social.[611] For instance, the market logic of supply and demand presupposes the maintenance and need of a certain element of unemployment as structural and no constitutional right to work will ever remedy this[612] (and if I may add, no constitutional right to health, housing can remedy this).In other words, it is not in the interest of the logic of capital for everyone at any given point to be employed (although it may be in its interest for everyone to be employable). Therefore there may exist an antithesis between the capitalist logic of supply and demand equilibrium and a constitutionally entrenched right to work. This is the first instance where social rights constitutionalism yields to the dictates of the market. This is so precisely because of the inability of systems to influence each other, minus "pertubations" and "irritations".

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[609] E Christodoulidis "Depoliticising Poverty: Arendt in South Africa" (2012) in S Liebenberg & G Quinot (eds) (2012) Law and Poverty 74.
[610] Christodoulidis (n 609 above) 74.
[611] Christodoulidis (n 609 above) 74.
[612] Christodoulidis (n 609 above) 74.

The second yielding of transformative social rights to the market relates both to the political Right and Left's insistence on functional differentiation. The right insists that keeping the economic, the political and the social separate is necessary because all these functional areas have their internal logic and political intervention into the economic or a social intervention into the economic sphere will distort the economic. The other, the left, agree with this form of functional differentiation because they argue that spherical intervention will mean the injustices of a particular sphere will spill into another sphere.[613] However Christodoulidis states that this argument of exclusive spherical competence does not allow for meaningful public life and social justice and does not allow for the possibility of the political pursuit of the economic objectives in the name of social goals.

The third yielding is that under conditions of privatised or semi-privatised provisions of the basic necessities of life, political intervention becomes counterproductive due to the increased costs by the private sector (of doing business) and the result is likely to be capital's flight to more cheaper and productive areas due to capital's incessant drive to maximise profit.[614]

I interpret Christodoulidis as suggesting that the notions of socio-economic rights litigation and adjudication create a collision course between the logic of capital and political interventions. Applying the system's theoretic approach, I suggest that in a functionally differentiated society the economic system has a particular way of viewing political incursion into its (economic) system and political or social incursion into the economic sphere results in the economic disciplining the political. These are the perils of socio-economic litigation and adjudication.

Socio-economic litigation, under the rubric of transformative constitutionalism assumes that the "socio-economic" as political issues can find resolution in law. My argument is that political issues can indeed be "determined" and "decided" by law.

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[613] Christodoulidis (n 609 above) 76.
[614] Christodoulidis (n 609 above) 77.

However the determination and decision of socio-economic issues as political issues can only be on the basis of law's binary code – the lawful/unlawful code.

3.7. Conclusion

The essence of the systems theoretical approach is that it "de-anthropologizes" the description of society and in that way shifts from anthropocentric views of society. [615] The human is de-centred and human beings cease to be the centre of society. This approach, as stated earlier, does not presuppose the non-existence of human beings, but rather the fact that if society is looked at from the point of functional differentiation as opposed to stratification, we see systems as opposed to class only. Functional differentiation of society allows for the dissolution of the ostensibly hierarchical constitution of society. The rejection of the notion of hierarchy also leads to the understanding of the inability of systems to steer one another. I have indicated that this inability to steer is a result of the closure of systems.

Law, like other autopoietic social systems, is a closed system. Autopoiesis of law firmly rests on this fundamental postulation. The autopoietic closure of law sets effective limits on the political instrumentalisation of law. If law is a closed system, then its adaptability and its ability to shape the external environment is limited.

The systems theoretical approach suggests the impossibility of politics subsisting peacefully in law. This is because for politics to subsist peacefully in law, it has to be observed by law and its complexity be reduced, thus becoming law and therefore ceasing to be politics but law. I have pointed out the impossibility of naked transfer of moral conceptions or political goals into the legal system. This is not to suggest that law only deals with law. If this were the case, then law would only be normatively or operationally closed and that would be the end. Hence it is also said that the law is also cognitively open.

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[615] Moeller (n 22 above) 5.

The cognitive openness of law presupposes that law is able to deal with other systems of a political and economic nature. These other systems however enter as facts or information – as cognition. The law uses them to reason. However, law's cognition of the cognitive is achieved by law using its own categories of evaluation and interpretation. When law cognises, it essentially asks itself one question: is the cognitive legal or illegal. If the cognitive is illegal, it is wrong and if it is legal, it is right. Hence there exists a legal right and a legal wrong. This means that in instances where society is juridified and in instances where politics is observed by law[616], the political is forcefully subjected to the coding of the law.

The effects of subjecting or deferring the reconstruction of South Africa to the legal system and expecting transformative results, no less radical transformation, to unfold within the confines of law are evident in the socio-economic jurisprudence and the cases outlined above. More importantly, the effect of bestowing transformation to the legal system is more evident in the persistent problems of unemployment, inequalities and unemployment. I suggest that while the dominant narrative on the inability to radically transform South Africa is mainly attributed to corruption, racism, state incapacity, amongst others, and that there is merit to some of these factors, the discourse on the prescription is analytically suspect. I have mentioned in the preceding chapters that the weakness in this analytic is that it puts the human in the centre of society, at least from the systems theoretical approach and secondly the weakness of this analytic is that it gives scant attention to questions raised by decolonial and postcolonial approaches. In this sense, the intrinsic relationship between modernity and colonialism is given scant reference and the effect is that solutions to very intractable problems afflicting South Africa have the effect of perpetuating the very problems that are intended to be resolved. For instance, to subject transformation to a "rights" discourse may not be useful in reconstructing a country such as South Africa. This becomes a sure case for how not to radically transform. In the next chapter, I recast the "limits of law" into the limitations of law. I ask in the next chapter whether

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[616] Teubner refers to Nonet and Selznick's (1978) proposal that civil disobedience be dealt with according to a political paradigm, that it be treated as a project of political negotiation as opposed to being dealt with in terms of legal criteria, See Teubner (n 278 above) 109.

other critical approaches are not able to inject a slight fillip on the possibility that law and constitutionalism, released from their throttling embrace with formalism and positivism, and liberal legalism, may just be able to bring about the much needed radical transformation in South Africa. In other words, what are the possibilities that if law were to be guided by justice, law would be able to bring about justice – the justice outside of legal justice.

CHAPTER FOUR: RADICAL TRANSFORMATION, CRITICAL LEGAL STUDIES, AND CRITICAL RACE THEORY: ATTEMPTING TO TRANSCEND THE LIMITS OF LAW?

"'Enlightenment is born of fear': The belief in reason's power to explain the world and the assumption that law can regulate our lives are psychological defences against the horrors of chaotic existence. Humanity is faced with multiplicity of psychological, social and environmental forces, which make life without external guidance and support a bewildering prospect"[617]

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[617] C Douzinas & A Gearey *Critical Jurisprudence: The Political Philosophy of Justice* (2005) 44.

4.1. Introduction

The focus of this chapter is on the "limitations of law". The assumption in this chapter is that law has the potential to bring about transformation, but for its limitations. In other words it is possible to think about law differently and it is possible for law to be "reimagined, reconfigured and rescued"[618] from the stranglehold of formalist and positivist modernity/Enlightenment approaches. In short thinking about law differently entails the possibility of it being at the service of transformation. I do not use the notion of the "limitations of law" as an antithesis to the "limits of law", but rather as another version of characterising the problems of law, in particular the problems with modern conceptions of law. I do however, using the systems theoretical approach, later mount a critique of the limitations thesis, this notwithstanding some very valuable insights of approaches falling under the rubric of the "limitations of law".

As I have already indicated, the notion of limitations is used to describe a moment when the law, conceived of and applied differently, or reimagined differently, contains attributes that carry in them the possibilities to bring about transformation. I however commence firstly with a disambiguation of the limitations thesis. In other words, when critical genres refer to or suggest that law has limitations, what it is that they concretely refer to. How does the notion of limitations manifest itself? What is it that not only needs to be ruptured in law but also be imbued in law so as to ignite in it the possibilities of a more just humane existence? Or is such an endeavour impossible?

I suggest, following Costas Douzinas and Adam Gearey, that the penury of jurisprudence is the cause and effect of what constitutes the limitations of law.[619] The poverty of philosophy finds its most concrete expression in the notions of formalism and positivism, themselves products of modernity. Modern jurisprudence's desire to discover the final truth about law and in law has historically resulted in creative machinations to give concrete expression to this search for the final truth about law.

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[618] See M Constable "Genealogy and Jurisprudence: Nietzsche, Nihilism and the Social Scientification of Law" (1994) 19 Law & Social Inquiry 585.
[619] Douzinas & Gearey (n 617 above) 4.

The notions of formalism, positivism and hermeneutics are some of the more pronounced approaches that continue to embody the idea of the final truth about the law.

The essence of positivism as an approach to law lies in its separation of law from morals. This approach is itself predicated on a particular partisan world view, which as is in the nature of positivism, claims this partisan and "provincial" view to be objective, scientific and universal. The nub of positivism is that it views law as solving society's irreconcilable differences[620], hence law is accordingly objective and scientific and should therefore be separated from the subjectivity of morals. The "achievement" of positivism is that is that it "depersonalises"[621] power because law has to be seen as objective. It is precisely because of this notion of objectivity that the notion of the rule of law becomes unproblematic and uncontroversial, almost natural.

The rule of law becomes unproblematic and uncontroversial because the law that rules is objective and scientific and therefore not malleable to personal subjective feelings of a judge.[622] These approaches further lead to other antecedents of the rule of law such as the notion of precedents so that once the truth about law has been pronounced, it cannot be altered. In this sense, to alter a pronouncement that has already been made would be tantamount to tempering with the objectivity and truth of the law. Whether we talk of the "literal interpretation" of the law or the "purposive interpretation" of the law, all remain the same because both literal and purposive seek to confirm what is true about law.

I suggest that the current jurisprudential "fad" in South Africa relating to the notion of purposive interpretation is in actual fact an application of the hermeneutical approach. A hermeneutical approach would insist that in fact law itself, far from being separate to morals, is the reservoir of morals. In this sense law is a further articulation of morals

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[620] Douzinas & Gearey (n 617 above) 7.
[621] Douzinas & Gearey (n 617 above) 7.
[622] Douzinas & Gearey (n 617 above) 7.

– the morals that we the people have decided must govern us. Therefore we ought to, according to the hermeneutics approach, use law to interpret law because law is the repository of our morals. This approach is much alive in the post-apartheid constitutional dispensation in South Africa. The predominant view in South Africa is that the Constitution is the embodiment of the wishes of the people; it constitutes how we the people have agreed to be governed. In this sense, our norms are articulated in the prevailing constitutional arrangements. Our norms being captured in the constitution as law immediately presuppose their objectivity and scientific soundness.

I suggest that the effect of the hermeneutical approach is to present "the law as a perfect narrative of a community at peace with itself."[623] Because morals constitute the law, they cease to be subjective and relative and begin to have an aura of scientific soundness, objectivity and truth. The consequence of a hermeneutical approach on South African constitutional arrangements is to make these purely historical arrangements assume a scientific and objective status that is unquestionable as it truly represents how things should really be. It is precisely the recognition of the perils of positivism and a hermeneutics approach to transformation that are exposed by the critical genres that I discuss below.

I take as unproblematic the fact that the three genres of critique, namely CLS, CRT and the poststructuralist inspired Critical Legal Conference (CLC)[624] are the three critical approaches that are, to larger and varying extents, animated by the possibility of thinking differently about law.

I argue that CLS, CRT and CLC have a positive contribution to make in the analysis of the phenomenon of law and the relationship between law and justice (CLC) and the relationship between law and other social phenomenon such as the relationship between law and politics, law and ideology, the indeterminacy of law and the essence

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[623] Douzinas & Gearey (n 617 above) 8
[624] I provisionally, for convenience purposes, use the label CLC which I will discard later and appropriate the poststructuralism to denote a particular approach to engaging with the law.

of the notion of "rights" (CLS and CRT). I align myself with Alan Hunt when he states that critical legal approaches[625] try to show law in its negative and positive characteristics. In this sense, in the view of Hunt, critical legal studies recognises "the attractiveness of the role of law and its aspiration to rational and consensual social ordering, but at the same time we insist that in societies exhibiting socio-economic inequality, the espousal of the rule of law buttresses and legitimates those inequalities."[626]

In order to situate critical legal studies, part one of this chapter maps the genealogy of the critical project from the initial Marxist instrumentalist approaches or the so-called economic-determinist (or reductionist) approach, to the structuralist and capital logic schools, until the emergence of CLS, CRT and finally the poststructuralist CLC. The point is to delineate the lineage of critical legal studies so as to show the different parts of a whole and its continuity and change. Part two of the chapter focuses on CLS and part three on the interaction between CLS and CRT.

4.2. Critical approaches in general

Douzinas divides critical approaches into three phases. The first phases reflect a Marxist sociological theory which treated law as a superstructural phenomenon that is determined by the base (the economic structure).[627] In terms of this approach, law is

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[625] Here Hunt uses Critical Legal Studies to refer to the genres of critique I have outlined. See A Hunt & P Fitzpatrick (eds) Critical *Legal Studies* (1987).

[626] Hunt in Hunt & Fitzpatrick (n 625 above) 11.

[627] Of interest here, in parenthesis, is a letter written by Friedrich Engels to J. Bloch on the 21st September 1890. It is useful to quote the letter in length: Engels states the following in the letter: "According to the materialistic conception of history, the production and reproduction of real life constitutes in the *last instance* the determining factor of history. Neither Marx nor I ever maintained more. Now when someone comes along and distorts this to mean that the economic factor is the *sole* determining factor, he is converting the former proposition into a meaningless, abstract and absurd phrase. The economic situation is the basis but the various factors of the superstructure-the political forms of class struggle and its results-constitutions etc., established by victorious classes after hard won battles - legal forms, and even the reflexes of all these real struggles in the brain of the participants, political, juridical, philosophical theories, religious conceptions and their further development into systematic dogmas - all these exercise an influence upon the course of historical struggles, and in many cases determine for the most part their form. There is reciprocity between all these factors." F Engels "Engels to J Bloch: In Berlin" 2/4, Available at: www.marxists.org

taken to reflect class interests.[628] In this sense the critique of law becomes the critique of the class content of law.[629] Law is seen as reproducing class domination and exploitation. This phase was characterised by its rejection of law and the future end of law. Douzinas characterises this phase as being a genre of critique that was external to the law and as being either tendentially professional or existentially and politically an outsider to the law.[630]

The first phase approach views all social phenomena as reducible or derived from the economic sphere.[631] According to Steven Spitzer, this approach essentially offered "a theory against the law" as opposed to a theory of law.[632] Bob Jessop calls the approach identified by Douzinas above the traditional Marxist-Leninist approach and further states that "this approach usually sees law as an automatic or a guided reflection of the economic base in the sphere of private law and treats public law as a coercive instrument of political class domination manipulated by the dominant class."[633] Hugh Collins further calls the approach crude materialism.[634] In terms of crude materialism "law was a reflection of the economic base; the form and content of laws corresponded to the dominant mode of production."[635] This approach is mainly based on what is referred to as historical materialism. The theory of historical materialism "argues that legal phenomena are essentially superstructural, dependent for their form and content upon determining forces emanating from economic basis of society."[636]

The traditional Marxist-Leninist approach referred to above came under increasing criticism in the late 1960.[637] Douzinas identifies this as the second phase of critique. This second phase of critique is associated with the structuralism of Claude Levi-

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[628] C Douzinas et al *Post Modern Jurisprudence: The Law of Text in the Texts of law* (1991) 9.
[629] Douzinas (n 628 above) 9.
[630] Douzinas (n 628 above) 10.
[631] Spitzer (n 264 above) 21.
[632] Spitzer (n 264 above) 21.
[633] B Jessop "On Recent Marxist Theories of Law, State and Juridico-Political Ideology" in S Easton (ed) *Marx and Law* (2008) 172.
[634] H Collins *Marxism and Law* (1992) 23.
[635] Collins (n 634 above) 23.
[636] Collins (n 634 above) 22.
[637] Jessop (n 633 above) 175.

Strauss, Louis Althusser, Nicos Poulantzas and Evgeny Pashukanis.[638] The culmination of this criticism was the emergence of the capital logic school in West Germany, the Althusserian structuralism in France and the "reappropriation" of Gramsci in Italy.[639] The nub of structuralism is the concept of "relative autonomy"[640] of law which is associated with the French Marxist, Althusser.[641]

Althusserian structuralism, according to Spitzer, posited that law is relatively autonomous and should be conceived of as independent of the economic system but also dependent in some sense.[642] Poulantzas refined this approach as it ultimately tended to revert to economism in that the economic or material base is said to be the ultimate determinant of law. Poulantzas's version is that law is not simply an ideological apparatus as it does offer some respite, albeit illusory, to the dominated class.[643] In this sense rights granted are in an important sense illusory but of assistance nonetheless.[644] According to Spitzer, the Poulantzas approach led to Karl Klare's "constitutive theory" which shifted the emphasis "from law as an abstract and objectified structure to the notion of law-making as praxis: the view that law represents a form of expressive social practice while the community participates in shaping moral, allocative and adjudicatory text of social life."[645] Still in the second phase, Pashukanis claimed homology between the commodity form and the legal form. The legal form was a reflection of the commodity form.[646] Douzinas states that the second phase

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[638] C Douzinas *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (1994) 10.

[639] Jessop (n 633 above) 172. The capital logic school insists that there is homology between law and the state on the one hand and the nature of capitalist commodity production on the other, See C Miéville B*etween Equal Rights: A Marxist Theory of International Law* (2004) 122.

[640] Relative autonomy of law is a theory of law which rejects both the instrumentalist or reductionist approach to law which denies that the order possesses any autonomy and a formalist approach to law which insists on the absolute and unqualified autonomy from society (see D I Balbus "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy of Law'" in S Easton *Marx and Law* (2008) 124).

[641] Spitzer (n 264 above) 25. For a discussion on Althusser and structuralism, "variants" of structuralism and the application of structuralism to mathematics logic, biology, philosophy of science, linguistics and sociology and the juxtaposition of structuralism and Marxism, See A Assiter "Althusser and Structuralism" (1984) 35 British Journal of Sociology.

[642] Spitzer (n 264 above) 25.

[643] Spitzer (n 264 above) 26.

[644] Spitzer (n 264 above) 26.

[645] Spitzer (n 264 above) 27.

[646] Douzinas (n 638 above) 10. The progenitor of the commodity form theory of law is Pashukanis. Pashukanis was the Soviet legal Scholar and author of *The General Theory of Law and Marxism*. "Pashukanis's argument in a nutshell was that law is a historically limited form of regulation peculiar to class societies, peaking under capitalism and destined to fade away with the elimination of socio-economic classes and class conflict ... *The*

differed from the first phase in that the first phase focused on the content of a law whereas the second phase typified by Pashukanis focused on the form of law.[647] This second phase is characterised mostly by CLS and drew heavily from, inter alia, Althusser and Poulantzas.[648]

The third and final phase, according to Douzinas, sees the emergence of a realisation that critical legal studies must nonetheless teach and transmit law. A paradox rears its head. Critical legal studies was now caught in the dilemma where it had to teach law and simultaneously critique or denounce law. "It may preach an escape from law but must also recognise … that escape is impossible … our language, institutional practice and scholarship inevitably belong to the tradition while at the same time seeking its decomposition."[649] This double bind of belonging and estrangement led to the appreciation of ethics and justice – the third phase. The third phase was out of the recognition that critical legal studies must provide a space for diversity to ensure the inclusion of the excluded. This third phase has been variously termed deconstruction, textualist, poststructuralist or post-Marxist.[650]

CLS was followed by the formation of CLC in Britain in 1984.[651] Since its first meeting in 1985 at the University of Kent, it has taken place annually without interruption.[652] The CLC can be divided into two main categories: critique tradition as represented by Alan Hunt, Roger Cotterell and Edward Palmer (E P) Thompson. The critique tradition draws heavily from Marxism and Frankfurt Critical Social Theory. The second tradition of CLC is poststructuralism represented by, amongst others, Paul Hirst, Costas Douzinas and Ronnie Warrington. However both the critique tradition and the

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General Theory of Law is best known for its elaboration of the commodity exchange theory of law which traced the modern legal form not directly from class interest, but rather to the elemental logic operative in capitalism itself … he describes the theory as the kernel of an historical materialist approach to the rise and evolution of the legal form", Available at: www.marxists.org, also see K Kearney "A Marxist Perspective on Jurisprudence" (2008) 3/7, Available at: www.wsws.org/en/articles/2008/11/pash-n26.html

[647] Douzinas (n 264 above) 11.
[648] Douzinas (n 638 above) 12.
[649] Douzinas (n 638 above) 13.
[650] Douzinas (n 638 above) 14.
[651] Hunt & Fitzpatrick (n 625 above) 1.
[652] Douzinas (n 256 above) 189.

poststructuralist tradition are bound by the opposition to "the dominant orthodoxies in legal scholarship and in agreement around the commitment to the necessity and possibilities of social transformation."[653] In the final analysis, and according to Douzinas, "a variety of critical schools, such as postmodernism, phenomology, postcolonialism, critical race, Feminism, queer theory, art theory and history, ethics of otherness, the ontology of plural singularity, the critique of biopolitics and post politics have been pioneered in the CLC creating a new and stronger link between theory and practice."[654]

Despite the differences, Helen Stacy sees the following as the normative similarities of critical discourses. They all argue that law creates its legitimacy through the reiteration of its basis of legitimacy through the narrative of consistency (precedent) or through the narrative of justice and equity.[655] They all argue that the legal language is used to inscribe legitimacy to justice. Finally some critical scholars argue that the ethical aspirations of modern liberalism remain persuasive – aspirations such as democracy, justice and equity are still in order. [656]

4.3. Critical legal studies[657]

CLS was born in the early 1976 out of a realisation of the need to consolidate geographically disparate and yet common prisms on American legal scholarship. It was formally founded in 1977.[658] Its leading members at formation included scholars

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[653] Hunt & Fitzpatrick (n 625 above) 2.

[654] Douzinas (n 256 above) 189-90.

[655] H Stacy Postmodernism *and Law: Jurisprudence in a Fragmenting World* (2001) 11.

[656] Stacy (n 655 above) 11.

[657] Critical Legal Studies in this instance refers to American Critical Legal Studies.

[658] A Hutchinson & P J Monahan "Law, Politics and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stanford Law Review 199.   Tushnet refers to his meeting with David Trubek in the early 1976 who informed him about his meeting with Duncan Kennedy and their realisation of the same but disparate commonality with a number of academics who needed to be organised. Tushnet proceeds to state that he was then made responsible to organise a Steering Committee relating to formation of the CLS movement in America. He states that "even at the start there was some sense that a relatively formal structure was needed to provide location for the academic activities that Trubek referred to and we developed a list of a Steering Committee members to put on the letterhead." Critical legal studies thus

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such as Peter Gabel, Morton Horwitz, Duncan Kennedy, Karl Klare, Mark Tushnet and Roberto Unger.[659] CLS is a "progeny"[660] of American Realism and American historiography.[661]

According to Tushnet, American Realism's approach was that judges, legislators, and lawyers must always look at the "social interests at issue in a particular controversy."[662] This is called the policy approach: lawyers must promote human freedom and material well-being as the basis for their decisions; and lawyers and judges should employ a method of legal analysis which balances interests to arrive at an appropriate decision.[663]

A major strand in US CLS writing on legal reasoning draws from legal realism. Legal Realism had earlier "expressed scepticism about both the possibility and desirability of deciding cases by interpreting words."[664] Another argument by the American Realists was that there cannot be a chasm between public and private law rules because "the private rules of contract, property and tort were not qualitatively different from the public rules of environmental, administrative or civil rights law … both were not natural and neutral … both had distributive consequences … both were politically contentious."[665] CLS appropriates these insights and pushes them further. For instance, Duncan Kennedy "formalises and generalises the realist project as a set of tensions and oppositions rather than as a coherent whole."[666]

According to Robert Gordon, the problem with Legal Realism was its Liberal-Reformist character.[667] Gordon puts both Legal Realism and the Formalist tradition under one

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originates in the United States in the late 1970s as a result of the work produced by the conference on Critical Legal Studies in the USA, See M Tushnet *Collected Essays in Law: Legal Scholarship and Education* (2008) 37.

[659] Hutchinson & Monahan (n 658 above) 200.
[660] Van Marle & Motha (n 15 above) 20.
[661] Tushnet (n 658 above) 507.
[662] Tushnet (n 658 above) 507.
[663] Tushnet (n 658 above) 507.
[664] J Boyle (ed) *Critical Legal Studies* (1992) xv.
[665] Boyle (n 664 above) xv.
[666] Boyle (n 664 above) xvi.
[667] R Gordon (1992) "Critical Legal Histories" in Boyle (n 664 above) n18 at 102.

umbrella of what he calls "evolutionary functionalism" because both, while they have worked out "contrasting visions of what social development consists of and how law has adapted to that development", have not disturbed "the fundamental assumption of progressive adaptation that they hold in common."[668] Both Legal Realism and the Formalist tradition believe that law always is or at least ought to functionally adopt to evolving social needs due to the "liberal idea of law as the neutral arbiter of social conflict."[669] This liberal aspect of realism is also observed by Patrick Monahan and Allan Hutchinson both of whom observe that "while the Realists accepted indeterminacy of legal reasoning, they remained firmly committed to liberalism."[670] The Realists insisted on the separation between law and morality.[671] This constitutes the liberal side of Realism. Gordon however captures what Hutchinson and Monahan call the "palace revolution" by Realists within the nonetheless liberal tradition in this manner:

> Realist functionalism has unquestionably been politically progressive and intellectually liberating force; it has moved us away from the occasionally useful but ultimate sterile studies of technical forms evolving in a cultural vacuum and from the idea that lawyers and judges are and will always and automatically do the most possible good through complacent inattention to the society they live. Its empirical investigations of the law 'in action' have exploded forever the formalist fantasy that a universal scheme of neutral, general rules controls equally and impersonally the discretion of class and faction of civil society.[672]

According to Tushnet, the first task of the newly formed CLS, building upon the work of American Realism, was to develop the indeterminacy thesis.[673] The indeterminacy thesis posited that "within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances."[674] The indeterminacy

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[668] Gordon (n 667 above) 102.
[669] Gordon (n 667 above) 104.
[670] Hutchinson & Monahan (n 658 above) 204.
[671] Hutchinson & Monahan (n 658 above) 205.
[672] Gordon (n 667 above) 105.
[673] Tushnet (n 658 above) 38.
[674] Tushnet (n 658 above) 28.

thesis later led to "more sophisticated deconstruction techniques."[675] The second, at earlier formation, developed by CLS and notably Duncan Kennedy was the critique of the sociology of law associated with the work of Karl Marx and Marx Weber.[676] Later on, "the critique of sociology of law directed attention to problems of ideology and consciousness."[677] The critique of law then led to the theory of alienation in the legal system as propounded by the cultural-radical strand within CLS.[678] According to the alienation theory, the experience of law is both alienating and oppressive.[679] According to Tushnet, "all these themes converged in the programmatic statement that law is politics, all the way down."[680] In a nutshell the two central predicates of CLS are the indeterminacy thesis and that law is politics.[681]

Writing in 1984, Hutchinson and Monahan state that the focus of CLS has been largely on the concept of indeterminacy – that legal reasoning is indeterminate and secondly on legal consciousness – "that judicial decisions are heavily conditioned by a pervasive ideology".[682] The authors capture the essence of CLS as: its obsession with judicial functions; denial of rational determinacy of legal reasoning (the argument being that law is indeterminate); law is politics dressed in legal garb; law must be understood in an historical context; law is ideology; and legal rules have no objective content. [683]

There are nonetheless variations within CLS. Tushnet divides CLS into the "initial" CLS position and the "dominant" position.[684] The "initial" position dealt with the relationship between legal rules and power and argued that "the legal system is tilted

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[675] Tushnet (n 658 above) 28.
[676] Tushnet (n 658 above) 39.
[677] Tushnet (n 658 above) 39.
[678] Tushnet (n 658 above) 40.
[679] Therefore "for many of the oppressed, the experience of law is both liberating and alienating and liberating, sometimes simultaneously and sometimes in succession", See Tushnet (n 658 above) 41.

[680] Tushnet (n 658 above) 40. According to Tushnet "law was seen by CLS as a form of human activity in which political conflicts were worked out in ways that contributed to the stability of the social order (legitimation)", Tushnet (n 658 above) 40.
[681] Tushnet (n 658 above) xii.
[682] Hutchinson & Monahan (n 658 above) 200.
[683] Hutchinson & Monahan (n 658 above) 206.
[684] Tushnet (n 658 above) 13.

in favour of capitalism ("the tilt thesis").[685] On the other hand the "dominant" position stressed that if legal rules are indeterminate; it means that they can be tilted into any position.[686] The "dominant" position further rejects the notion that the legal system as a whole serves the interests of capitalism.[687] The "dominant" position's final argument is that "the legal system in fact has little direct impact on the maintenance of capitalism."[688] The response to the "dominant" position has been a reformation by the "initial position" to the effect that "agreeing that tilt could not be found systematically in the rules of the legal system … it is located in the construction of the categories used to organise legal thought."[689]

The variations are further evident in the fact that CLS, according to Hutchinson and Monahan, draws from diverse theories such as Jürgen Habermas, Antonio Gramsci, Herbert Marcuse and Karl Mannheim. Hunt makes the same observation and concludes that "the theoretical inspiration and roots that inform their writings reveals a remarkably wide trawl of twentieth century radical and revisionist scholarship"[690] informed by scholars as diverse as Habermas, Jean-Paul Satre, Marcuse, Jean Piaget, Sigmund Freud, Levi-Strause, György Lukács, Gramsci, Althusser, Poulantzas and Foucault.[691] It is an eclectic movement.

For instance, there exists a large segment of CLS that forms part of the revisionist wing of Marxism.[692] "These members remain faithful to the central premises of Marx's thoughts, especially to the view that the material conditions of life are the engine of social history."[693] In essence the "revisionists" adhere to the basis/superstructure topography. On the other hand, "non-revisionists" such as Duncan Kennedy and Roberto Unger do not subscribe to the basis-superstructure notion. They are of the view that "contemporary legal doctrine must be understood as an endless series of ad

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[685] Tushnet (n 658 above) 13.
[686] Tushnet (n 658 above) 13.
[687] Tushnet (n 658 above) 13.
[688] Tushnet (n 658 above) 13.
[689] Tushnet (n 658 above) 14.
[690] Hunt & Fitzpatrick (n 625 above) 4.
[691] Hunt & Fitzpatrick (n 625 above) 3.
[692] Hutchinson & Monahan (n 658 above) 225.
[693] Hutchinson & Monahan (n 658 above) 225.

hoc, fragile compromises between contradictory ideals".[694] In a nutshell, the two camps differ on the issue of contingency. For the "revisionist", law as a super-structural phenomenon is contingent on the material basis of capitalism. For the "non-revisionist", matters of legal consciousness must be dealt with at the level of consciousness.

Notwithstanding CLS's eclecticism, it has according to Hunt, been greatly influenced by the theoretical prism of Unger which is largely based on "dichotomies, antimonies and dualities".[695] "Unger provides a general theoretical critique of liberalism."[696] He provides a coherent critique of liberalism that most CLS scholars are indebted to.[697] "Ungerian theory is invoked as inspirational source", says Hunt in reference to CLS because his "critique of liberalism … resonates with some of the major themes of the critical writers' engagement with the prevailing orthodoxy in legal scholarship".[698]

According to Hunt, CLS's commonality is its point of departure – critique. Its point of departure is the critique of liberal legalism.[699] The essence or the central features of liberal legalism, which is largely predicated on modernity's metaphysical traditions, are its steadfast belief in legal autonomy, the rule of law and the objectivity of legal/adjudicatory process, what is referred to as orthodox legal scholarship.[700] Thus the critique of liberal legalism "constitutes one of the major points of unification of critical legal studies."[701] At the core of the critique of liberal legalism is liberalism's claim that societal conflict can be resolved by objective rules facilitated by procedural justice[702] and as result "law is put forward as the answer to the irreconcilability of

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[694] Hunt & Fitzpatrick (n 625 above) 26.
[695] Hunt & Fitzpatrick (n 625 above) 7.
[696] Hunt & Fitzpatrick (n 625 above) 7.
[697] Hunt & Fitzpatrick (n 625 above) 7.
[698] Hunt & Fitzpatrick (n 625 above) 7.
[699] Hunt & Fitzpatrick (n 625 above) 4.
[700] Hunt & Fitzpatrick (n 625 above) 5.
[701] Hunt & Fitzpatrick (n 625 above) 5.
[702] Hunt & Fitzpatrick (n 625 above) 5.

values and as the most perfect embodiment human reason."[703] CLS's core concern has been mainly with "hegemony, legitimacy, domination and consciousness."[704]

However a well organised account of CLS is provided by Pierre Schlag.[705] Schlag divides CLS into its historical formation, main intellectual contributions, intellectual origins, CLS politics, the attacks on CLS and the legacy of the CLS. In terms of its historical formation, Schlag characterises it as a once upon a time "an intellectual current, an academic movement, a professional identity and a loosely knit organisation" that distrusted institutional authority and rejected orthodoxy in legal scholarship. [706] It was an organisation that had a loose and elusive character, a "kind of deconstruction in action."[707]

In terms of its main intellectual contributions, CLS is characterised by its anti-theoretical stance which included arguments relating contradiction, indeterminacy, legitimation, false necessity and law is politics.[708] Kennedy and Unger advanced the fact that "law was riven with contradictory rules, policies and incapable of resolution."[709] Precisely because of its contradictory nature, law was therefore indeterminate. "If contradiction was a pervasive character of legal materials and of legal thought, then neither could suffice to yield a determinate answer."[710]

In proximate relation to the indeterminacy thesis was Unger's theory of false necessity. In terms of this thesis, "legal thought presented an entire apologetic apparatus that made present social and political arrangements seem necessary, when in fact they were socially contingent."[711] The fact that law is pervasively contradictory,

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[703] Douzinas (n 256 above) 188.
[704] Hunt & Fitzpatrick (n 625 above) 9.
[705] P Schlag "Critical Legal Studies" (2009) The Oxford International Encyclopaedia of Legal History 295.
[706] Schlag (n 705 above) 295.
[707] Schlag (n 705 above) 295.
[708] Schlag (n 705 above) 296.
[709] Schlag (n 705 above) 296.
[710] Schlag (n 705 above) 296.
[711] Schlag (n 705 above) 296.

indeterminate and socially contingent leads CLS to conclude that law is politics.[712] For CLS, politics is a "protean notion" that may at any given time refer to policy choices, power struggle, ideology etc.[713]

In relation to its intellectual origins, as a form of thought, CLS is, according to Schlag, an eclectic movement that draws intellectual inspiration from a wide trawl that includes the structuralism of Claude Levi-Strauss (that legal doctrine is a stereo-typed pattern of contradictory imperatives); the existentialism of Jean-Paul Satre (irreducible personal freedom and political responsibility of the judge at the side of a legal decision); the Marxism of Lukács (the politically and intellectually arrested state of American thought could be understood in terms of reification; Marx Weber's social theory (American law and legal thought as a form of legitimation); Antonio Gramsci's hegemony; Jacques Derrida's notion of dangerous supplements, *différance* (indeterminacy of legal doctrine and legal theory); Foucault's analysis of law in terms of power/knowledge.[714] According to Schlag, the Frankfurt School i.e. Marcuse, Max Horkheiheimer, Theodor Adorno, Walter Benjamin had little influence on CLS.[715]

In relation to legal thought, CLS thinkers heavily borrowed, albeit eclectically, from the preceding American realists school. They borrowed heavily from Robert Hale (every private property should be seen as a form public regulation and also as deprivation); and Felix Cohen (legal doctrine is a reified form of legal reasoning and obfuscates a judge's political and policy choices).[716] In terms of its politics, CLS's focus was on local politics informed by the belief that the law school had a conservative effect on idealistic leftist students who entered the law school. The other aspect of its politics was to try and show that law is indeed politics and therefore the approach was to try and overtly politicise law. [717]

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[712] Schlag (n 705 above) 296.
[713] Schlag (n 705 above) 296.
[714] Schlag (n 705 above) 297.
[715] Schlag (n 705 above) 297.
[716] Schlag (n 705 above) 297.
[717] Schlag (n 705 above) 298.

4.3.1. Limitations of law in terms of CLS: law as ideology and the critique of rights

As a point of departure, CLS rejects meta-theories in relation to its approach to law. CLS's rejection of totalising theories concomitantly presupposes that CLS itself cannot be viewed from a singular and particular totalising theory of law. It would therefore be perilous to search or create an overarching CLS approach to law. I however suggest that there are two main concepts that demonstrate, according to CLS, the limitations of law. These are the postulations by CLS that law is ideology and CLS's critique of rights.

4.3.1.1. Law and/as Ideology according to CLS

Gordon enumerates the variations present in CLS on the notion of law and/as ideology. The first view is that law serves as a means of organising the ruling class on one hand whilst at the same time coercing and cheating the working class.[718] The second view is that the ruling class uses law to induce consent by masking its rule in widely shared utopian norms such as free contract, private property and free speech.[719] The claim here is that in a class society, all these ideals are actually deployed by ruling class for its benefit.[720] The third view is that the ruling class itself is oblivious to ideology and really believes that law is indeed just and when it acts in accordance with law, it acts in accordance with justice.[721] The fourth view rejects the class domination characterisation of law and believes that law is relatively autonomous. It is a contested terrain and an arena of class struggle.[722] In the discussion that follows, Hunt reduces the different approaches above into the "form determination" approach and the "concrete determination" approach. As it will be seen, the differences are mainly based on the fact that one approach's prism is the form of

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[718] Gordon (n 667 above) 129.
[719] Gordon (n 667 above) 129.
[720] Gordon (n 667 above) 129.
[721] Gordon (n 667 above) 130.
[722] Gordon (n 667 above) 130-31.

law (it looks at law from an external point point) and the other approach's prism is the content of the law (it focuses is on legal doctrines or the internality of law).

In "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law", Hunt offers a lucid account of amongst others, CLS approaches on the subject of law and ideology.[723] It is precisely because of its in depth analysis of the question of law and ideology (and its extensive treatment on law and ideology within the CLS space) that I explore Hunt's paper in detail.

According to Hunt, critical to CLS and legal ideology is: "how is it that those who are systematically disadvantaged by the existing order nevertheless accept the legitimacy of the institutions and values which perpetuate their insubordination."[724] The literature on law and ideology within CLS employs different labels, ranging from "the ideology of law", the ideological dimensions of law", or "law and ideology" and is further characterised by different conceptions of ideology and the applications of such conceptions.[725]

In his attempt to situate ideology, this prior to offering an account of CLS on ideology and law, Hunt commences by stating that ideology should not be properly perceived as a form of consciousness but "as a constituent of the unconscious in which social relations are lived."[726] Ideology should therefore be defined in its "power and ability to connect and combine diverse mental elements (concepts, ideas etc.) into combinations that influence and structure the perception and cognition of social elements."[727] In other words, for ideology to be ideology, it must cease to be ideology and simply be the ways things are – natural.

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[723] Gordon (n 667 above) 130-31.
[724] Hunt & Fitzpatrick (n 625 above) 11.
[725] Hunt (n 176 above) 144.
[726] Hunt (n 176 above) 148.
[727] Hunt (n 176 above) 148.

Accordingly, ideology is important as a legitimating force and thus its ability to reproduce prevailing social relations.[728] Ideology, in the manner of Antonio Gramsci, "cements" society and has a "particular function of cohesion."[729] With reference to Poulantzas, Hunts states that "the juridico-political ideology is the dominant region within the dominant ideology within the capitalist mode of production and as a result in capitalist societies law fulfils the key function of every dominant ideology, namely, that of cementing together social formation under the aegis of the dominant class."[730]

The discussions relating to law and ideology have in the main taken the "reflection theory of ideology"[731] as a dominant motif. Hunt categorises CLS's positions on law and ideology into two positions, namely the "concrete determination" and the "form determination".[732] Those aligned with the "concrete determination" argue that "the ideological content of law is largely manifest in the content of specific laws, whether judicial rules or specific legislative enactments."[733] The main CLS scholars aligned to the "concrete determination" include David Kairys, Horwitz, Tushnet and Klare.[734] These scholars' approach tends to focus more on specific statute or a series of cases in order to demonstrate the ideological content of these specific statutes or cases. According to Kairys, "the law, though indeterminate, political and conservative, and though it functions to legitimate existing social and power relations, is a major terrain for political struggle that has, on occasion, yielded or encoded great gains and simply cannot be ignored by any serious progressive trend or movement."[735] Kairys further states that, and in an apparent reference to the "form determination" and its pessimism of law, "we do not, as some progressive approaches have in the past, dismiss law as a sham or subterfuge; our criticism takes seriously the law's doctrines, principles, methods and promises."[736] Another evidence of "concrete determination" is evinced by Klare, albeit within the context of critical labour law. Klare states that critical labour

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[728] Hunt (n 176 above) 149.
[729] Hunt (n 176 above) 149.
[730] Poulantzas (1978) 88 quoted in Hunt (n 176 above) 149.
[731] Hunt (n 176 above) 152.
[732] Hunt (n 176 above) 154.
[733] Hunt (n 176 above) 154.
[734] Hunt (n 176 above) 155.
[735] D Kairys "Introduction" in D Kairys (ed) The *Politics of Law: A Progressive Critique* (1998) 16.
[736] Kairys (n 735 above) 16.

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law argues that "collective bargaining law articulates an ideology that aims to legitimate and justify unnecessary and destructive hierarchy and domination in the workplace" and that collective bargaining has become "a set of managerial and legal arrangements that reinforce this hierarchy and domination."[737] In his other work Klare speaks about the aim being to "sketch ways of understanding law and legal processes and in particular, to develop a more critical and transformative conception of labour law and its practices."[738] In accordance with this approach, law is full of possibilities, once its imbrication in the liberal ideology is exposed and excised.

Those aligned to "form determination" see "in the form of law the key to law's ideological role."[739] The main CLS Scholar mentioned by Hunt is Peter Gabel whose main approach and focus is on a general theoretical level. The "form determination" approach typically "deny that the bourgeois form of law can contribute much, apart from defence, to struggles against the capitalist order."[740] Gabel, whose approach in Hunt's view, falls within the "form determination" position, argues in "Reification in Legal Reasoning" that the judge is the legitimating voice of capital.[741] Gabel employs the concept of reification to demonstrate the conservative character of law and the manner in which law is used to legitimise the status quo.[742] The subject that legitimates is, according to Gabel, the judge who in his adjudicatory function has "an unconscious legitimating intention."[743]

Based on the foregoing, I suggest that the "concrete determination" evinces a significant dose of optimism in the ability of law to be transformative.   The "concrete determination" approach is that there exists hope within the existing doctrines, so long as sufficient critique is mounted out so as to expose the limits of liberal legalism and develop a more transformative and emancipatory approach towards law.

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[737] K Klare "Labour Law as Ideology: Toward a New Historiography of Collective Bargaining Law" (1981) 4 Industrial Relations Law Journal 452.
[738] Klare (n 7 above) 540.
[739] Hunt (n 176 above) 155.
[740] Hunt (n 176 above) 155.
[741] P Gabel "Reification in Legal Reasoning" in J Boyle (ed) *Critical Legal Studies* (1993) 26.
[742] Gabel (n 741 above) 30.
[743] Gabel (n 741 above) 30.

Reification according to Gabel means that the social world is presupposed as an epistemological *a priori*. In this sense a point of departure is true and this truth of a point of departure is then used to prove or confirm its truth. In other words, reification works by confirming the truth of its subject in the beginning and anything done in relation to the subject is geared to confirming the truth in relation to the subject. The subject as result becomes transcendental. Thus legitimation occurs through the process of reification. According to Gabel, reification is occurring when law as an historically contingent social form

> is transformed into a timeless fact about the world … through our use of normal sentences, we collectively fail to recognise that the thing before us was fashioned by human labour in order to perform a social function under historically determinate material conditions; instead through the repression that the reification of the concept forces on our awareness, we give ourselves the impression that this function is simply what the thing does.[744]

Gabel's focus on the external totality of the legal phenomena situates him in the "form determination" category. In a nutshell, CLS's studies on ideology can, with caution, be divided into "empirical" versus "theoretical". However Hunt is cautious to end with this "simple empirical versus theoretical level" as some CLS scholars such as Klare are able to vacillate between the empirical and the theoretical.[745]

In the final analysis CLS takes law to be an ideological apparatus, whether in concrete terms or in terms of its form. Thus legal ideology contributes to the reproduction of human subordination.[746] The legitimation thesis involves the suggestion that legal ideology is transferred from its arena of production to the level of everyday life. In other

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[744] Gabel (n 741 above) 29.
[745] Hunt & Fitzpatrick (n 625 above) 11.
[746] Hunt & Fitzpatrick (n 625 above) 11.

words the legitimation thesis theorises that legal ideology is transmitted from its "specialist arenas of legal discourse" into popular "consciousness".[747]

I make a number of observations relating to CLS and its approach to the notion of the "limitations of law". CLS can be divided into the "concrete and form determinations" in relation to ideology and law and into the" revisionist" and "non-revisionist" approaches in relation to its approach to law in general. The "concrete determination" approach to ideology is essentially in line with "non-revisionist" approach and the "form determination" approach is in line with the "revisionist approach". At the heart of the debate is broadly whether law is capable of being mobilised for the advantage of subordinated.[748] However the debate manifests itself as the issue of whether "one can precisely define the nature of the relationship between conditions of life and the realm of politics and consciousness, and more particularly, the structure and substance of legal doctrine."[749] It is according to Hunt, a tussle between the empirical approach and the theoretical approach.[750]

The "form determination" approach as the "revisionist" approach asserts that "the material conditions are the engines of social history."[751] In this sense, the basis determines the superstructure. As stated before, Gabel is the chief protagonist of this approach who, according to Hutchinson and Monahan, believes in the congruence between social reality and legal consciousness.[752] Gabel is also identified by Hunt as forming part of those in the CLS who approach law as a Form (the form of law) in that their analysis of law is external and does not go into the analysis of doctrine and thus "deny that the bourgeois form of law can contribute much, apart from defence, to struggles against the capitalist order."[753]   In this sense, the bourgeois form of law constitutes an impediment to radical transformation and possesses no capacity to

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[747] Hunt & Fitzpatrick (n 625 above) 12.
[748] Hunt (n 176 above) 155.
[749] Hutchinson and Monahan (n 658 above) 219-220.
[750] Hunt (n 176 above) 155. However, Hunt states that this categorisation should not be regarded as neat since some Scholars such as Klare can fall on either side in certain instances, Hunt (n 176 above) 155.
[751] Hutchinson & Monahan (n 658 above) 221.
[752] Hutchinson & Monahan (n 658 above) 219-23.
[753] Hunt (n 176 above) 155.

serve the oppressed because its *raison d'être* is to serve capitalism. Law in this sense is not capable of being transformative, let alone radically transform. In a nutshell, those identified by Hutchinson and Monahan as revisionists are identified by Hunt as "form determinists" and are united by their pessimism regarding the law's ability to deliver radical transformation. They cite the fact that each period in economic history generates "ideological imagery" that justify social hierarchies and divisions and that lawyers and judges align themselves with the logic of a prevailing economic mode and thereby legitimising such economic mode.[754]

Kennedy can also be situated within the "concrete determination" or the "non-revisionist" strand. Kennedy's approach is that of fundamental contradiction between self and other. In other words modern legal thought is characterised by conflict between individualism and altruism as an insoluble conflict and law is a result of the need to deal with this insolubility.[755] "The fundamental contradiction that relations with others are both necessary to and incompatible with our freedom … is not only an aspect but the essence of every problem."[756] The fundamental contradiction informs how and why Kennedy views legal doctrine not in terms of the evolution of the economic base but in terms of "endless conflict between opposing and unassimilable world views" and modern legal thought denies this contradiction.[757] Liberal legal doctrine must therefore be viewed as a series of ad hoc compromises.[758]

In the final analysis, the "concrete determination" perspective views "legal outcomes as the direct result of struggles that depend on the balance of forces involved."[759] Hence this strand of CLS is not against the law but harbours faith in the law as a possible tool that can be used for progressive purposes. It takes doctrine seriously.[760] This approach is an antithesis of the "form determination" approach which tends to

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[754] Hutchinson & Monahan (n 658 above) 223.
[755] Hutchinson & Monahan (n 658 above) 224.
[756] Hunt & Fitzpatrick (n 625 above) 20.
[757] Hutchinson & Monahan (n 658 above) 226.
[758] Hutchinson & Monahan (n 658 above) 226.
[759] Hunt (n 176 above) 155.
[760] Hunt & P Fitzpatrick (n 625 above) 12.

have a dim view on the capacity of law to be used for progressive purposes.[761] According to Kairys, CLS does not, in tandem with other progressive approaches "dismiss law as a sham or subterfuge; our criticism takes seriously the law's doctrines, principles, methods and promises."[762] And furthermore, as Klare states, critical approaches are about sketching ways of understanding law and legal processes so as be able to develop critical and transformative conceptions of law and its practice.[763]

Informed by the foregoing, I suggest that the "form determination/revisionist" strand of CLS is closer to the approach that sees law as beset by limits, although it does so from a socio-legal approach. However, in contradistinction with a system's theoretical approach, its analysis of society is from the view of stratification as opposed to systems theory's functional differentiation approach. In other words, precisely and necessarily because of the link and congruence between capitalism and law, it then follows that if capitalism is a problematic to radical transformation, then law by association is also a problematic to radical transformation. This is because capitalism ushers in a form of law that constitutes capitalism's derivative. The logical conclusion of this is that the end of capitalism becomes the end of the form of law. In this sense it is not really necessary to focus on doctrine because content of the form of law is dependent of the form of law. The structural limits of capitalism become the structural limits of law according to the "form determination/revisionist" approach of CLS.

The "form determination" would, within the context of South Africa's constitutional arrangements, as a point of departure, argue that "law and legal relations are reflective of the social relations which constitute a particular society."[764] Secondly, the "form

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[761] See Hunt (n 740 above) on the "concrete determination" view.

[762] Kairys (n 735 above) 16.

[763] K Klare "Critical Theory and Labour Law" in Kairys D (ed) *The Politics of Law: A Progressive Critique* (1998) 540.

[764] See B S Chimni *International Law and World Order: A Critique of Contemporary Approaches* (1993) 218 for what I argue is the traditional approach. The traditional approach referred to above has come under trenchant critique as being insufficient to explain a number of issues. In *The Capitalist State*, Jessop rejects the traditional approach as a form of economic determinism. According to Jessop, economic determinism "implies that the economic base is ultimately (if not immediately) self-sufficient and that its spontaneous development is the sole determinant of social evolution … it is possible for political action to alter the economic base and/or the nature of class relations", See B Jessop *The Capitalist State* (1982) 11. The traditional approach has also come under fire from Hugh Collins, who refers to it as crude materialism. According to Collins, crude materialism

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determination" would insist that the limitations (or even the limits) of law and constitutionalism in bringing about radical transformation are fundamentally based on the capitalist relations of production and not so much on the deferring of the reconstruction in South Africa to legal and constitutional devices. This would be based on the fact that constitutional arrangements as the ideology of capitalist relations of production are merely reflective of the material base which is capitalism. Therefore, in terms of this approach, the attainment of radical transformation requires the dismantling of the system of capitalism.

On the other hand the "concrete determination/non-revisionist" approach is much more optimistic about the possibilities of law to bring about (radical) transformation. The job of critical scholars according to this approach is to expose the contradictions of liberal legalism, defeat the dominance of this approach and ensure that legal doctrine (because it is also indeterminate) is interpreted for the benefit of the subordinated. In other words, legal doctrine must be reformed. In terms of this approach, law does not have limits but limitations that can be overcome depending on the balance of forces. Law is politics and politics is always a contested terrain – which makes law a contested terrain because law is politics. Law is indeterminate and interpretation can go either way. Legal rules have no objective content, their content is contingent. In the final analysis, the approach here is that first the limitations of law must be exposed followed by a battle for dominance for the content of law. The logical conclusion of this approach is Klare's notion of transformative constitutionalism and its focus on legal culture wherein the impediments to transformation in South Africa are largely due to a conservative legal culture that, were it to be changed, the objectives enshrined in the Constitution would come to fruition.

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analysis of law cannot among other things such as why marriage for instance, being outside the process of production, is determined by the economic base. "In a nutshell, crude materialism ultimately fails to explain ... how rules prohibiting rape or physical assault imitate some parts of the production relations or how a modern statute designed to penalise and deter the pollution of rivers is a reflection of the base", See Collins (n 634 above) 25. Spitzer buttresses the foregoing by stating that "the tendency to reduce all legal phenomena to the economic base has retarded the development of Marxist sociology of law", See Spitzer (n 264 above) 23.

4.3.1.2. Kennedy and the critique of rights

Kennedy states that the CLS critique of rights is anchored on the left modernism/postmodernism (left/mpm).Kennedy commences by describing what he calls liberal sub-discourses of rights which are "liberal constitutionalism", "fancy reconstruction rights" and "popular political language of rights" that are anchored on identity.[765] Liberal constitutionality forms part of the liberal ideology which seeks legal reform through courts.[766] Fancy theory of Ronald Dworkin, Bruce Ackerman, Frank Michelman, Martha Minow, Drucilla Cornell and Patricia Williams supports specific liberal positions and is already an insider or represented in legal discourse.[767] Popular discourse of rights is distinguished by its identity/rights rhetoric and argues for the recognition of specific rights by the legal system.[768]

These three liberal sub-discourses of rights have faith in the potential of rights discourse and transformative potential of rights based litigation "against legislative and administrative regimes that denied those rights."[769] According to Kennedy, the "fancy theories" and their conceptualisation of equality "does not involve the demand for equality in the distribution of income or wealth between social classes, regions, or communities, but rather equal protection for individual members of previously subordinated social groups."[770] In other words, theirs is to be included in the system, notwithstanding the system's inherent inequalities.

The dominant discourse of rights in America, says Kennedy, moves from the presupposition that appeals to rights are preferable because rights cannot be reduced to mere value judgments.[771] This presupposition that rights cannot be reduced to value judgments and therefore cannot be subjective, is based on the belief that rights have

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[765] D Kennedy 'The Critique of Rights in Critical Legal Studies ' (2002) 179, Available at: www.duncankennedy.net
[766] Kennedy (n 765 above) 180.
[767] Kennedy (n 765 above) 180.
[768] Kennedy (n 765 above) 180.
[769] Kennedy (n 765 above) 182.
[770] Kennedy (n 765 above) 182.
[771] Kennedy (n 765 above) 184.

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two crucial properties. The first property is that rights are universal because they derive from the needs and values that everyone shares or ought to share.[772] In this sense, no person would have a problem with having rights. Rights in this sense are universal because they are objective and these rights are objective because they are universal. Once a right has been derived from universal needs or values, it is understood to be possible to have a relatively objective, rational, determinate discussion on how such a right ought to be instantiated in social and legal rules.[773]

This approach, according to Kennedy, presupposes that rights have inside and outside qualities in that they exist before the law and inside of the law. "The outside thing is something that a person has even if the legal order doesn't recognise it or even if "exercising it is illegal."[774] Kennedy suggests that the dominant discourse of rights in America, at least from an ontological point of view, is anchored on the presupposition that "being" in itself presupposes a multiplicity of rights, whether law recognises them or not. In this sense, "being" is reduced to a multiplicity of rights. The second property that inheres in rights is that rights are "factoid".[775] This means that once there has been an acknowledgement of a right, it follows that such right must be respected, observed and fulfilled.

According to Kennedy, the approach that the universalisation of rights and the "factoid" property of rights, having presupposed that rights are objective in and of themselves, then proceeds to claim that rights therefore transcend partisanship and represent political beliefs and commitments that transcend the left/right divide. In other words, the claim of universality and "factoid" qualities of rights becomes a preamble to concluding that forms of ideological and political posture cannot have a bearing on the notion of rights. It therefore does not matter who you are or what you believe in, a right is a right and is not amenable to the vagaries of ideology.

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[772] Kennedy (n 765 above) 180.
[773] Kennedy (n 765 above) 185.
[774] Kennedy (n 765 above) 186.
[775] Kennedy (n 765 above) 185.

Having analysed the dominant rights discourse in America, Kennedy proceeds with his critique of this rights discourse by stating, as an example, that "the right your opponent is asserting will often be defined in such a way that you can appeal to the very same right on the other side."[776] In this sense a right will always have simultaneously cogent descending and ascending qualities, what Kennedy calls "two plausible but contradictory claims of rights reasoning, one proceeding from the plaintiff's right and the other from the defendant's."[777] When faced with this "sometimes a judge more or less arbitrarily endorses one side over the other; sometimes she throws in the towel and balances."[778] When this happens, the judge inevitably has to resort to policy which in turn makes the resolution open to ideological influence.[779] I infer from Kennedy that in essence legal indeterminacy means that in an attempt by a judge to resolve a conflict, a resort to policy and therefore ideological persuasion becomes inevitable. This further means, according to Kennedy, that legal reasoning is essentially manipulable.

It is the notion of rights and their centrality to transformation that constitutes the source of fundamental difference between CRT and CLS. Where Kennedy is disparaging about the ability of rights to bring about change, CRT invokes race and history to insist that it is only when one becomes oblivious to the history of racial oppression and the positive role that rights and rights litigation played in the amelioration of black oppression, that one dismisses rights at one's peril.

4.3.1.3. The relevance of CLS

The last conference held by CLS was in 1994.[780] In this conference, the Marxist strand within CLS had complained of being marginalised by the new critique of difference.[781] They staged a walkout. Writing in 2005, Tushnet states that conventional wisdom is

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[776] Kennedy (n 765 above) 198.
[777] Kennedy (n 765 above) 198.
[778] Kennedy (n 765 above) 198.
[779] Kennedy (n 765 above) 198.
[780] Douzinas (n 256 above) 193.
[781] Douzinas (n 256 above) 193.

that CLS is no more, this due to Duncan Kennedy's pronouncement that CLS is "dead, dead, dead!".[782] According to Tushnet, "the Conference on Critical Legal Studies, which held meetings from mid-1970s to the late 1980s, no longer exists."[783] Tushnet qualifies the death of CLS with the proviso that its death pertains more to the fact that "there is now no organised venue within which everyone who identifies himself or herself as critical legal scholar can come together."[784] Nonetheless, according to Tushnet, one of the founders of CLS, the ideas and ideals of CLS continue to stubbornly flow. Tushnet gives an example of the continued existence and relevance of CRT.[785]

Tushnet attributes the death of CLS to the fact that "major components of critical legal studies have become the common sense of the legal academy, acknowledged to be accurate by many who would never think of identifying themselves as critical scholars."[786] If an attempt is made at "deconstructing" Tushnet statement, it may roughly be suggested Tushnet attributes "the death" of CLS to its success in that the disappearance of CLS is mainly due to the fact that it has successfully achieved the strategic goal of its project. Put differently, in accordance with Tushnet, CLS died because it has successfully achieved its mission. Not only has CLS achieved its mission, it continues to be relevant, according to Tushnet. For instance, in Tushnet's view, the claim that law is indeterminate and that law is politics should continue to make CLS relevant particularly due to the "inadequacy of merely liberal legal theories in the face of a probably long era of conservative dominance."[787] An attempt at resurgence was made in the 2000s but "it was no longer as critical legal studies but as law and humanities" but as Douzinas states, "law and Humanities cannot fully replace critical legal studies."[788]

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[782] M Tushnet "Survey Article: Critical Legal Theory (without Modifiers) in the Unites States" (2005) 13 Journal of Political Philosophy 99.
[783] Tushnet (n 782 above) 99.
[784] Tushnet (n 782 above) 99.
[785] Tushnet (n 782 above) 99.
[786] Tushnet (n 782 above) 100.
[787] Tushnet (n 782 above) 111.
[788] Douzinas (n 256 above) 193.

In the mid-1980s there emerged in the United States another strand of critique referred to as Critical Race Theory (CRT). The 1986 and 1987 CLS conferences was the period of alignment and departures and constitutes the final step in the preliminary development of CRT as a distinctively progressive critique of legal discourse on race.[789] The emergence of CRT was due to the growing dissatisfaction among scholars of "color" in the United States about CLS's inability to put race at the centre. According to Crenshaw, CLS's approach to law was too general and a-contextual as it did not give primacy or enough attention to racial domination.[790] In fact, it is this very inability of CLS to incorporate a critique of racial power in its analysis that to a larger extent led to the emergence of CRT.[791]

4.4. CRT and CLS on law

4.4.1. General CRT approach

In *Critical Race Theory: The Key Writings that formed the Movement*[792] Kimberlé Crenshaw and others state that the need to provide counter narratives to dominant mainstream legal discourse was one of the chief reasons for the formation of CRT. CRT theorists wanted to expose the imbrication of the twin factors of race and power in law in a clear antithesis to both the liberal and conservative views of racism as being an aberration and law as being apolitical, neutral and objective. The view from CRT was that racism, existing across the social plane, was also imbricated in law and law played a central role in the subsistence of racism. Crenshaw states that the central mission of CRT is to critically examine and expose the bond between law and racial power and to change it.[793] CRT challenges the conception of racism as "an intentional, albeit irrational, deviation by a conscious wrongdoer from otherwise neutral, rational and just ways of distributing jobs, prestige and wealth."[794]

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[789] K Crenshaw et al *Critical Race Theory: The Key Writings that formed the Movement* (1995) xxvi.
[790] Crenshaw et al (n 789 above) 108.
[791] Crenshaw et al (n 789 above) xxiii.
[792] Crenshaw et al (n 789 above).
[793] Crenshaw et al (n 789 above) xiii.
[794] Crenshaw et al (n 789 above) xiii.

4.4.2. CRT critique of CLS

CRT and CLS's conceptualisation and critique of law is fundamentally similar. Both CRT and CLS believe that law is politics and that legal rules are indeterminate and that legal consciousness is used in the reproduction of power. According to Crenshaw, CLS scholars do offer an analysis that assists in the understanding the limitations of the transformative potential of law.[795] However, CRT scholars are of the view that useful as this analysis maybe, CLS nonetheless fails to understand the particularity of black experience. Crenshaw states that "while these scholars claim that their project is concerned with domination, few have made more than a token effort to address racial domination specifically, and their work does not seem to be grounded in the reality of the racially oppressed."[796] The "race crits" insist that race and racism function as central pillars of hegemonic power.[797]

The points of divergence between CRT and CLS are therefore mainly on what CRT calls CLS's racialism and on CLS's critique of rights. CLS's racialism is explained as "theoretical accounts of racial power that explain legal and political decisions which are adverse to people of "color" as mere reflections of underlying white interests."[798] This approach, according to CRT, was akin to crude instrumental Marxism which saw law as a mere reflection of the interests of the capitalist class.[799] The critique of CLS's racialism can be said to be directed at the "revisionist" strand of CLS which, as stated above, believes that "the material conditions are the engines of social history"[800] and therefore the basis determines the superstructure. In this sense, the bourgeoisie form of law possesses no transformative potential except to serve the needs of capitalism. The revisionist strand of CLS has since had to contend with the "constitutive strand" of CLS which argues that law has constitutive force in that legal institutions actually construct the very social interests and relations that cruder instrumentalist accounts of

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[795] Crenshaw et al (n 789 above) 110.
[796] Crenshaw et al (n 789 above) 110.
[797] Crenshaw et al (n 789 above) xxiii.
[798] Crenshaw et al (n 789 above) xxiv.
[799] See paragraph 4.2., For a discussion on the notions of "crude" and "instrumental" Marxist approaches to law.
[800] Hutchinson & Monahan (n 658 above) 221.

law thought it merely regulates.[801] The "constitutive strand" therefore turns the Marxist base-superstructure topography upside down. It is on the basis of the contention that law has constitutive force that CRT began to conceive of law of its project as based on uncovering how law constructed race[802] as opposed to law being a reflection of race. The CRT argument is that although it agrees that race is a social construct, race in a racialised society was real and has a material dimension to it and it is law that produces and sustains it.[803] The second major point of divergence between CRT and CLS relates to CLS's critique of rights and the notion of indeterminacy.

4.4.3. CRT's and critique of rights

The methodological point of departure for CRT, as articulated by Mari Matsuda, is that CRT combines critique of law with a hopeful positive and aspirational vision of law as part of the experience of people of colour, what Matsuda calls "a strategy of appropriation and transformation".[804] Matsuda states as follows:

> Applying the double consciousness concept to rights rhetoric allows us to see that the victim of racism can have a mainstream consciousness of the Bill of Rights as well as a victim's consciousness. The two viewpoints can combine powerfully to create a radical constitutionalism.[805]

Matsuda's argument is that law "has the capacity to be troped and appropriated so as to draw transformative power out of the dry wells of ordinary discourse."[806] Using the approach of "Looking to the Bottom"[807], Matsuda seem to be arguing that it is possible

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[801] Crenshaw et al (n 789 above) xxv.
[802] Crenshaw et al (n 789 above) xxv.
[803] Crenshaw et al (n 789 above) xxvi.
[804] M Matsuda "Looking from the Bottom: Critical Legal Studies and Reparations" in Crenshaw et al (n 789 above) 65.
[805] Matsuda (n 804 above) 65.
[806] Matsuda (n 804 above) 65.
[807] The notion of "looking from the bottom, according to Matsuda, involves looking at issues from the perspective of the victim, See (n 804 above) 65.

as a person of "color" to believe in law's determinacy and law's indeterminacy simultaneously. The following is illustrative of the latter point:

> How can anyone believe both of the following statement? (1) I have a right to participate equally in society with any other person; (2) Rights are whatever people in power say they are. One of the primary lessons CLS can learn from the experience of the bottom is that one can believe in both of those statements simultaneously, and that it may well be necessary to do so.[808]

Matsuda seems to suggest that the lived experience of oppression propels the oppressed to have faith and hope in the notion of rights in that these rights can and must be interpreted in such a way that they become weapons for the destruction of oppression itself. Matsuda argues for the "non-white tradition of constitutional experience interpretation" which "draws on the experience of oppression and racism and looks at the constitution as text of liberation." [809]

In a nutshell, although in agreement with CLS on the notion of legal indeterminacy, CRT nonetheless insists that from the lived experience of people of "color", rights and their exercise thereof on the part of people of "color" have a transformative and empowering dimension.[810] The centrality of rights discourse is important to CRT for historical reasons. In other words, for a people who have historically been denied rights, their ability to have and exercise rights is significant.[811]

The logic that CRT uses in its critique of CLS relating the notion of rights becomes slightly confusing if cognisance of history is had. In other words, if CRT rejects CLS's rights discourse and yet acknowledges the challenges of the fickle nature of a rights approach as experienced by civil rights movement in America, there is potential that CRT arguments on emancipatory potential of rights may be rendered feeble. For

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[808] Matsuda (n 804 above) 66.
[809] Matsuda (n 804 above) 67.
[810] Crenshaw et al (n 789 above) xxiii.
[811] Crenshaw et al (n 789 above) xxiv.

instance, CRT acknowledges that, amongst others, victory secured in the *Brown v Board Education* and other civil rights gains made came under increasing attack in the 1970s. Crenshaw states that "by the late seventies, traditional civil rights lawyers found themselves fighting, and losing, rear-guard attacks on the limited victories they had just achieved in the prior decade, particularly with respect to affirmative action."[812] If political victories were won and lost, using the medium of rights, this may confirm CLS view that rights discourse may not be a reliable tool in emancipatory projects.

4.5. CLS, CRT and radical transformation in South Africa

The problematic of poverty, inequalities and unemployment (PIU) in South Africa has already been alluded to. In addition, it is an uncontroversial fact in South Africa that the PIU problem manifests itself within the categories of race, gender and class. In other words, the PIU in South Africa is racialised, it is gendered and "classed". The adoption of constitutionalism and the Bill of Rights, which includes socio-economic rights, is generally regarded as one significant way of addressing the PIU problem. The notion of transformative constitutionalism is regarded as the most appropriate manner of conceiving of the Constitution to enable the realisation of the goals of the Constitution. In fact, it could be added, the notion of constitutional supremacy entails the inevitability of the PIU problem being addressed only from a constitutional perspective. Because the Constitution is a rights based document, in the sense that any enforcement of an interest must correlate and thus find expression in one or more rights in the constitution, the racialised, gendered and classed PIU problem becomes locked in within the realm of constitutional rights.

If radical transformation is understood as decolonisation, what then becomes the implication of the application of CLS and CRT to the South African situation? I suggest that CLS and CRT offer valuable insights in debunking the current hegemonic hold of formalism in South African legal discourse and further in imbuing the spirit of caution to those who may view transformative constitutionalism as a panacea to amongst

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[812] Crenshaw et al (n 789 above) xvii.

other things, the PIU problem. However, we should be alive to Douzinas and Gearey's call that in the final analysis, CLS is a political movement without politics, a movement much more concerned with "critique of judicial institutions and reasoning."[813] Douzinas and Gearey further caution us that the fact that CLS is concerned with "trashing" and finds comfort in showing "the inconsistencies and contradictions of liberal legal theory"[814] reduces CLS in to a restricted jurisprudence not able to expose the "deep structures of power".[815] The question I ask later in the conclusion of this part is whether in the final analysis CLS, and even CRT, can be of assistance in the quest for decolonisation in South Africa.

In the meantime, the question is: what is it that CLS and CRT offer to the resolution of the South African problem? According to Van Marle, "the main tenets of CLS critique of rights and liberal theory are the exposure of indeterminacy, the fundamental contradiction, false consciousness, and reification of rights through the method of trashing."[816] To this CLS then concludes that law is politics. As stated earlier, CRT and CLS conceptualisation and critique of law is fundamentally similar. Both CRT and CLS believe that law is politics and that legal rules are indeterminate and that legal consciousness is used in the reproduction of power. The difference between CRT and CLS is the moment of race and its lack of emphasis by CLS and CLS's scant reference to the actual lived experience of the oppressed. Based on the similarities of both CLS and CRT, which fundamentally coalesce around the fact that law is politics and based on the fact that the main grievance of CRT is the lack of emphasis by CLS on the fact of race and the lived experience of the oppressed, oppression by law, I deem it prudent to discuss the question of what is that CLS and CRT offer to the South African problem under the two broader themes of Law is politics (CLS) and law is politics that is racialised (CRT) through academic commentary and case law.

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[813] Douzinas & Gearey (n 617 above) 240.
[814] Douzinas & Gearey (n 617 above) 241.
[815] Douzinas & Gearey (n 617 above) 241.
[816] K van Marle "Reflections on teaching critical race theory as South African Universities/Law Faculties" (2001) 86 Stellenbosch Law Review.

4.5.1. The politics of law and racial politics of law in South Africa: Barnard, Walker, Solidarity and Afriforum's inversion of constitutional rights

Afriforum styles itself as a non-governmental organisation formed with the purpose of protecting minority rights.[817] In reality, Afriforum is widely regarded as a group that has as its primary intention the defence of the interests of white South Africans, particularly Afrikaner interests.[818] Solidarity proudly describes itself as an organisation dating back to 1902 with 110 years of experience in South Africa's labour market formed with purpose of protecting its members in work place.[819] In its existence it has been known as the Mine Workers Union (MWU) until it finally changed to Solidarity in 2002.[820] However in reality the history and current posture of Solidarity belies its ostensibly neutral posture. Historically, the MWU was an affiliate of the South African Confederation of Labour (SACLA), a white only Confederation of Unions that "supported the retention and expansion of job reservation and continued denial of labour rights for Africans."[821] MWU itself was a racist white supremacist organisation of white semi-skilled workers committed to job reservation for white workers.[822]

Both Solidarity and Afriforum describe themselves in the following manner: "AfriForum is an independent civil rights initiative which protects your rights outside the workplace. Solidarity is a trade union that protects your rights within the workplace. Solidarity and AfriForum are both part of the Solidarity Movement."[823] In reality Solidarity and Afriforum are part of a coterie of white organisations that have seized in the Constitution an opportunity to subvert its ostensibly "transformative" character and use the very same Constitution to frustrate its transformative goals. This opportunity, as I will indicate below, is always possible precisely because of the indeterminate and pliable character of legal rules. I suggest that within the context of South Africa, this

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[817] Available at: https://www.afriforum.co.za/oor-ons/oor-afriforum
[818] S Matthews "Shifting White Identities in South Africa: White Africanness and the Struggle for Racial Justice" (2012) 16 Phronimon at 114.
[819] Available at: https://www.solidariteit.co.za/en/
[820] (n 819 above).
[821] M Mariotti & D Van Zyl-Hermann "Policy, Practice and Perception: Reconsidering the efficiency and Meaning of Statutory Job Reservation in South Africa, 1956-1979" 2014 (2) Economic History of Developing Regions 215.
[822] Mariotti & Van Zyl (n 821 above) 216.
[823] See https://www.afriforum.co.za

opportunity is always alive, particularly in instances where a decision is taken to reconstruct and transform a country through legal and constitutional means.

These organisations have consistently resorted to court to challenge what are ostensibly transformative measures. This is usually done under the rubric of amongst others, constitutional protection of cultural, religious and linguistic communities[824] and equal rights protection.[825] In this sense, the stratagem of Afriforum and Solidarity has been to appropriate relevant constitutional provisions and I argue, use these constitutional provisions against themselves. In other words, both Afriforum and Solidarity can arguably be said to be using potentially transformative provisions of the Constitution to retard their transformative potential by arguing that this very constitutional provisions must also protect their rights. Joel Modiri suggests that:

> In South Africa, the 'white backlash' against non-racial democracy comes in the form of language and cultural rights politics, claims of unfair discrimination or reverse racism against whites, the appropriation of minority rights issues, purportedly principled calls for equal opportunity, colour-blindness and merit, dismissive and accusatory discourses which disarm the charge of racism … Also the main arguments put forward by the white backlash politics relies heavily on the constitution, the principle of non-racialism … and rests primarily on the beliefs in formal legal equality.[826]

Therefore the reason for choosing Afriforum cases is firstly to demonstrate how acts of racism and racial prejudice are able to find solace in constitutional arrangements in that it is possible to use the constitution to advance the very antithesis of the constitution. Secondly Afriforum cases are able to succinctly demonstrate the indeterminacy of legal rules and the constitution, in particular the indeterminacy of rights contained in the constitution. Thirdly the Afriforum and Solidarity cases demonstrate how the ostensibly neutral character of law can serve to reinforce, sustain

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[824] Section 32 of the Constitution of South Africa.
[825] Section 9 of the Constitution of South Africa.
[826] J Modiri "Towards a '(post -) apartheid Critical Race Jurisprudence" (2012) 27 SAPL 254.

and in many instances conceal power that comes with racism. [827] The following cases also demonstrate how in most instances what is initially a measure to address inequalities become contested and blamed as the creation or perpetuation of inequalities – a sort of an inversion of the other.

4.5.2. Politics through Rights: City Council of Pretoria v Walker[828] and South African Police Service v Solidarity Obo Barnard[829]

4.5.2.1. City Council of Pretoria v Walker

This case was decided in 2008 under the 1993 Interim Constitution. The case involves a dispute between the City Council of Pretoria (The Council) and Mr Walker (Walker) regarding Walker's refusal to pay for municipal services. The brief facts of the case are that the Council charged differential levies between residents of Mamelodi and Attredgeville (new Pretoria) and residents of nearby residents of the formerly white suburbs (old Pretoria). The residents of the old Pretoria were being charged a flat rate and this flat rate was lower than the old Pretoria rates. The effect was that residents of the old Pretoria subsidised residents of the new Pretoria. Furthermore, enforcement for non-payment of services by the Council was only limited to residents of the old Pretoria. Walker, a white resident from the old Pretoria objected to the differential levy payment and selective enforcement for non-payment by the Council. Walker based his objection on unfair discrimination based on race. The High Court held that the Council's actions amounted to discrimination based on race and that the Council has failed to establish in terms of section 8(4) of the Constitution that the discrimination by the Council against residents of the old Pretoria was fair. This, according to the High Court, was unconstitutional.

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[827] Although I do not pass judgment on the African National Congress Women's League, I find their statement issued on the 2nd February 2017 powerful and relevant to the relationship between power and racism. In this press statement the African National Congress Women's League states that "The arrogance portrays by Afrikaner right wing organisations is perpetuated by their financial muscles built through the apartheid system that benefitted the minority", Available at: http://womensleague.anc.org.za/show.php?id=12156
[828] City Council of Pretoria v Walker (1998).
[829] South African Police Service v Solidarity Obo Barnard (2014).

The case then morphs from race and gets observed by the law as being in the final analysis about equal treatment. Walker uses the notion of the right to equality and concludes that the actions of Council violate this right and this violation constitutes unfair discrimination based on race. In this instance Walker uses what Kennedy calls the "factoid" property of rights in that once there has been an acknowledgement of a right, it follows that such right must be respected, observed and fulfilled.

The Constitutional Court in the *Walker case* couched Walker's objection to Council's actions in the following manner: "The central issue here is whether the use by the Council of the differential tariffs in the recovery of service charges and the selective enforcement of debt recovery, in the circumstances of this case, amount to a breach of the equality provision in the interim constitution."[830] The Constitutional Court then held that in relation to the issue of cross-subsidation, Walker was indirectly discriminated on the basis of race but the discrimination was fair. In relation to Council's selective recovery of debts, the Constitutional Court held that Council's policy was an invasion of Walker's dignity and therefore the discrimination was unfair.

4.5.2.2. South African Police Service v Solidarity Obo Barnard[831]

This case revolved around the National Commissioner of Police's refusal to promote a white employee, Ms Barnard (Barnard). As in the case of Walker, the nub of the case is on the relationship between race and equality. In this case Barnard claimed that she was overlooked for promotion because she was a white person and this to amounted to discrimination against her by the South African Police Service.[832] Barnard further claimed that the discrimination was unfair and could not be justified on affirmative action or on the fact that the discrimination was fair. The Labour Appeal Court had

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[830] (n 828 above) Para 11.
[831] (n 829 above).
[832] Section 9 (3) of the Constitution states that "The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race" Section 9 (5) states that "Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

held earlier that issues relating to restitution should not be dealt with under the rubric of the right to equality as this may frustrate the constitutional imperative of addressing inequitable representation in the work place. [833] The Supreme Court of Appeal had disagreed with the Labour Appeal Court because in its view, the decision not to appoint Ms Barnard constituted unfair discrimination on the impermissible ground of race.

In his Constitutional Court judgment, Justice Moseneke states, amongst others, as his preliminary points, that the Constitution has a "transformative mission and … hopes to have us re-imagine power relations within society."[834] Justice Moseneke further states that "our quest to achieve equality must occur within the discipline of our Constitution."[835] The Constitutional Court then agreed with the Labour Appeal Court that *Barnard's case* does not satisfy unfair discrimination based on race. In a separate concurring judgment, Justice Cameron states that:

> We should be careful not to allow race to become the only decisive factor in employment decisions. For this may suggest the invidious and usually false inference that the person who gets the job has done so not because of merit but only because of race. Over-rigidity therefore risks disadvantaging not only those who are not selected for a job, but also those who are.[836] Race, in other words, is still a vitally important measure of disadvantage, but in planning our future we should bear in mind the risk of concentrating excessively on it. To achieve the magnificent breadth of the Constitution's promise of full equality and freedom from disadvantage, we must foresee a time when we look beyond race.[837]

4.5.2.3. A critique of Walker and Barnard

The *Walker and Barnard cases* above are essentially about racial inequalities wrought by centuries of apartheid and colonialism and the aftermath attempts for a resolution

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[833] (n 829 above) Para 44.
[834] (n 829 above) Para 29.
[835] (n 829 above) Para 30.
[836] (n 829 above) Para 80.
[837] (n 829 above) Para 81.

through constitutional means. The resolution through constitutional means takes a "rights" approach within the context of equality. Walker takes advantage of law's inability to remember and law's indeterminacy to assert and protect ill-gotten white privilege and I argue, he succeeds.

From a CLS perspective, Walker's stratagem is to appropriate the two "crucial properties" of rights, namely the "universal" aspect of rights and the "factoid" aspect of rights in order to mount an attack on what is ostensibly a transformative measure by the Council in order to protect what is essentially historical privilege. According to Kennedy, rights are universal "in the sense that they derive from needs or values or preferences that every person shares or ought to share. For this reason, everyone does or ought to agree that they are desirable."[838] The "factoid" character of rights inheres in that "once you acknowledge the existence of the right, then you have to agree that its observance requires x, y, and z."[839]

Walker recasts what is arguably a racist argument in the universal language of equality and he achieves this by deploying the "factoid" character of rights that allows people to make their claims as claims of reason rather than preference or in this case, prejudice.[840] The Council is also forced to respond from a "rights" perspective and argue that equality also include measures that although discriminatory are fair as they are measures designed to protect or advance people previously disadvantaged by unfair discrimination. The indeterminacy moment then rears its head – what happens is the collision between right and right. The indeterminacy inheres in that it is possible for a white racist person to assert the right to equality (by not being discriminated upon) "with just as much subjective sense of entitlement as a black demanding" the same right to equality which requires that unequal treatment on the side of the white racist person be carried out. These are the indeterminacies and thus the perils of a rights approach to transformation and redress. This is why CLS insists that law is politics precisely because of the ability to enmesh pre-legal interests into rights.

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[838] Kennedy (n 765 above) 185.
[839] Kennedy (n 765 above) 185.
[840] See Kennedy (n 765 above) on the notion of "factoid" character of rights.

The judgment of the Constitutional Court in the *Walker case* is indicative of the perils of a rights approach referred to above. Notwithstanding that the Constitutional court found that the discrimination was fair, the court finds that Walker was indirectly discriminated against on the basis of race. Of course what the court cannot do is to state that the very essence of the dispute is based on the racist nature of Walker's objection to the Council's measures. This, I suggest, is based on the universalistic property of law in that law is unable to observe the power behind racism.

On the other hand, CRT would look to the *Barnard case* in order to vindicate the fact that a "rights" approach can be useful to advance the course of the formally oppressed. CRT would base its argument on Justice Moseneke's pronouncement that Constitution has a "transformative mission and … hopes to have us re-imagine power relations within society",[841] hence Barnard could not be said to have be discriminated against. CRT would agree that whilst we need to acknowledge the indeterminacy of rights, we however need to adopt a strategy of "appropriation and transformation" and that is exactly what Justice Moseneke did in the *Barnard case*. In other words, *Barnard's case* would be a clear indication, in Matsuda's view, of "radical constitutionalism".[842] Justice Moseneke in this instance shows a "non-white tradition of constitutional experience interpretation"[843], a form of interpretation that drew on the experience of oppression and racism that took the constitution as a text of liberation.[844] CRT would also take solace from the case of *City of Tshwane Metropolitan Municipality v Afriforum and Another (Council and Afriforum case)*[845] discussed above.

4.5.2.4. Council and Afriforum case

The *Council and Afriforum* case dealt with a restraining order granted in favour of Afriforum against the Council to prevent Council from removing old street names in

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[841] See (n 835 above).
[842] See Matsuda (n 804 above) on the notion of radical transformation.
[843] See Matsuda (n 804 above).
[844] See Matsuda (n 804 above).
[845] City of Tshwane Metropolitan Municipality v Afriforum and Another (2016).

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Pretoria and restore the ones already removed. The Council had approached the Constitutional Court to appeal against a High Court interim order restraining Council from removing old street names. The essence of the objection by Afriforum to the removal of the old street names was that these old names were "an integral part of an irreplaceable and much cherished history, heritage and culture of the Afrikaner people."[846] As a result the removal of the old names contravened the right of the Afrikaners to full enjoyment of their cultural rights provided for in section 31 of the Constitution.[847] In its judgment the Constitutional court dealt with some of the requirements of the interim interdict, namely a *prima facie* right, irreparable harm and balance of convenience. Justice Mogoeng held that Afriforum did establish a *prima facie* case in the form of section 31 of the Constitution.

In terms of irreparable harm, Justice Mogoeng held that in *Afriforum case*, irreparable harm related to Afriforum's exposure to "a gradual loss of place or sense of belonging and association with the direct environment /living space."[848] With regards to irreparable harm, Justice Mogoeng found Afriforum to be "highly insensitive to the sense of belonging of other cultural groups" and that Afriforum "does not seem to have much regard for the centuries-old deprivation of "a sense of place and a sense of belonging" that black people have had to endure.[849] Justice Mogoeng's judgment seem to fit into Matsuda's argument that law "has the capacity to be troped and appropriated so as to draw transformative power out of the dry wells of ordinary discourse."[850]

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[846] (n 845 above) Para 47.
[847] Section 31 states:
Cultural, Religious and Linguistic communities
31 (1) Persons belonging to a cultural, religious or linguistic Community may not be denied the right, with other members of the community-
      (a) to enjoy their culture, practise their religion and use their language; and
      (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society
  (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of the Rights.
[848] (n 845 above) Para 57.
[849] (n 845 above) Para 58.
[850] Matsuda (n 804 above) 65.

In this case Justice Mogoeng draws from the history of black oppression in South Africa and uses this history to give content to the Constitution by dismissing Afriforum's cultural rights argument as being "insensitive" and lopsided. Justice Mogoeng holds that Pretoria does not belong to Afrikaners and white South Africans only but belongs to all and that "the emotional harm that Afriforum relies on is grounded on a one-sided notion of a sense of belonging. "Whatever harm Afriforum would suffer as a result of not granting the interim order, would be significantly neutralised by an equally important sense of belonging of the previously disregarded."[851] However, CLS would look to the case of *Afriforum v Malema*[852] to caution the CRT approach by demonstrating the perils of a relying on rights and adjudication and the perils of rights indeterminacy and overall the politics of law.

4.5.2.5. Afriforum v Malema

At issue in this case was the objection by Afriforum against Malema relating to Malema's singing of the song "Shoot the Boer/Farmer". Afriforum's objection to Malema was based on the fact that the utterances contained in the song materially translated into a call for Afrikaans Farmers, White Afrikaners and White people in general to be either shunned or be killed. Afriforum alleged that "the objectionable utterances caused and/or perpetuated systemic disadvantage to Afrikaners and Afrikaans Farmers at the very least and further undermined the human dignity of those targeted thereby and also adversely affected the enjoyment of rights and freedoms of Afrikaners and Afrikaans Farmers."[853] Malema on the other hand claimed that the words "were intended to symbolise the destruction of white oppression … rather than to indicate the literal intention to shoot 'ibhunu' (the Farmers and the Boer)."[854]

Judge Larmont acknowledged that the song in question was part of the struggle songs sung by the ANC in its gatherings "as part of the heritage and history of the struggle against white oppression experienced by the oppressed majority namely black people

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[851] (n 846 above) Para 64.
[852] Afriforum and Another v Malema and Others (2011).
[853] (n 852 above) Para 50.
[854] (n 852 above) Para 54.

at the hands of the apartheid regime and colonial regimes prior to that."[855] Judge Larmont concluded by holding that if the singing of the song was "acceptable at a point in time", times have changed.[856] According to the judge, the dawn of constitutionalism meant that the song now constituted hate speech and is at variance with the new constitutional dispensation. This is because, according to Judge Larmont, "the regime was destroyed at the time of the transformation of the country into a democracy. It is no more."[857] The words of the song were thus found by Judge Larmont to be "derogatory, dehumanising and hurtful."[858] The judge went further to state that "pursuant to the agreements which established the modern, democratic South African nation and the laws which were promulgated pursuant to those agreements, the enemy has become the friend, the brother."[859]

4.5.2.6. Critical Analysis: Malema and Afriforum

As indicated above, from a CLS perspective, the *Afriforum v Malema case* is indicative of the perils of a "rights" reliance. The *Afriforum v Malema case*, read together with the decision in City *of Tshwane v Afriforum* demonstrate the problems with the notions of the "universality" and "factoid" characteristics of rights and thus the indeterminacy of rights. This assertion is based on the fact that in the *City of Tshwane v Afriforum case* Afriforum uses constitutional rights to object to the City of Tshwane's decision to change street names because they are offensive to the formerly oppressed by insisting that those names represent culture and heritage for the Afrikaners. Yet in the *Malema case,* Afriforum disputes the argument by Malema and the ANC that the song "Shoot the Boer/Farmer" represents the struggle history and heritage. In other words, transformation that relies on a "rights" approach is almost always in a perilous moment because the generality and abstract nature of rights is such that one two opposing claims can use one right or a genre of rights for two antithetical purposes. Whereas the Constitutional Court in the *City of Tshwane v Afriforum* found that the changing of the streets was transformational and not offensive, in the *Afriforum v Malema case,*

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[855] (n 852 above) Para 59.
[856] (n 852 above) Para 59.
[857] (n 852 above) Para 105.
[858] (n 852 above) Para 107.
[859] (n 852 above) Para 108.

the Equality Court found that the singing of the song by Malema and everyone was offensive, notwithstanding the claim that the song also represented struggle heritage.

At the centre of all these cases is the issue of race and law. The *Afriforum case* demonstrates the fact that the principles of equality and universality as foundational principles to liberal legality are inextricably intertwined with racism.[860] This view by Peter Fitzpatrick constitutes an antithesis to Matsuda and other CRT members' view that "law has the capacity to be troped and appropriated so as to draw transformative power out of the dry wells of ordinary discourse."[861] In a nutshell, a CLS approach to the above mentioned cases would conclude that transformation's success through law is contingent precisely because of the indeterminacy of rights and the fact that law is politics. On the other hand a CRT approach would look to cases such as *City of Tshwane v Afriforum* to assert the possibility of using a rights to advance the course of the oppressed. However, the issue of contingency refuses to disappear. It is precisely because of this circularity in argument between CLS and CRT that I find both approaches, though valuable, not sufficient in theorising the "limits of law". I turn to systems theoretical approach to demonstrate the shortcomings of the both CLS and CRT.

4.6. Systems theory, CLS and CRT: a critique of critiques

In a nutshell, the basic assumptions of CLS can roughly be summarised as the fact that law is pervasively contradictory, indeterminate, and socially contingent.[862] It is because of the contradictory, indeterminate and socially contingent character of law that CLS concludes that law is politics.[863] Law is politics because of CLS protean characterisation of politics as anything including "policy choice, power struggle, ideology, interest group policies, and Foucauldian power/knowledge."[864] On the other hand, although both CRT and CLS believe that law is politics and that legal rules are

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[860] P Fitzpatrick "Racism and the Innocence of Law" (1987) 14 Journal of Law and Society 119.
[861] Matsuda (n 804 above) 65.
[862] Schlag (n 705 above) 295.
[863] Schlag (n 705 above) 295.
[864] Schlag (n 705 above) 296.

indeterminate and that legal consciousness is used in the reproduction of power, CRT puts more emphasis on the racial dimension of law and on the importance of rights to the oppressed. As already indicated, in the aforementioned cases, CLS is likely to point to the perils of reliance on "rights" whereas CRT is likely to appeal to the importance of rights to the oppressed and at the same time point out, particularly in the *Afriforum v Malema case* and the *Walker case*, how law produces and sustains race in a racialised society.[865] However in the final analysis both are disenchanted with law as it is currently narrowly construed. Put differently, both are disenchanted with liberal legalism and its claim to objectivity and neutrality. Both are of the view that "things could be otherwise" and that law has limitations.

Systems theoretical approach immediately presents itself as the antithesis of the CRT and CLS's overarching view that law is politics and therefore has limitations. Systems theoretical approach would view law and politics as only dependent on each other as environments and not as similar or interchangeable. Law and politics as systems are normatively closed yet cognitively open. Furthermore, Luhmann fundamentally rejects the claim that law has the capacity to improve society, control populations or engage in social engineering.[866] Embedded in the notion that law is politics is the belief in the possibility of pursuing radical politics through law.[867] In fact, it could be argued that also embedded in the notion of indeterminacy is the "plasticity" and "imaginative" character for law.[868] I suggest that the two notions of indeterminacy and "law is politics" are constitutive of legal reflexivity.

The CLS and CRT's notions of indeterminacy and therefore "law is politics" suggest in the final analysis the ability of systems to steer each other and therefore the possibility that:

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[865] The enduring critique of CLS by CRT is based on the "decentering" of race as an object of analysis by CLS.
[866] See King (n 323 above).
[867] Christodoulidis (n 274 above) 377.
[868] Christodoulidis (n 274 above) 387.

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. Reflexive political contestation as such cannot be accommodated in legal indeterminacy, because what is challengeable in law is simultaneously fixed by concepts and assumptions that give rise to indeterminacies in the first place … what is context-bound is not context resistant, what is thus fixed is not reflexive.[869]

In relation to the cases referred to above, I suggest that far from seeing the cases as instances that demonstrate the fact that law is politics, or the fact that rights are indeterminate, or the fact that law sustains and reproduces racism, the cases should be seen as instances where "legal argumentation as practical discourse is always already disciplined by the contextual conditions, therefore no longer reflexive about them."[870] The law in the *Walker case* is not able "to hear the political claim" that Walker wants to maintain his historical privilege. This is because the law has already set up a context and that context is the right to equality. This is because the system of law "restricts on its terms the ambit of what is meaningful by filtering communication through system-relevance established by the code."[871]

In the *Barnard case*, what comes before court are the notions of the right to equal protection of law and right not to be discriminated against on the basis of race. In the *Afriforum cases* what ultimately comes before court are the right to cultural practices and the right not to be discriminated against based on race. In these cases, the notion of reflexivity as imagined by CLS and CRT, is already an impossibility because law "restricts the modes in which the world can be talked about."[872] When the parties meet in court, they meet already as legal roles players with the context, in this instances of equality and other rights, already set. Because the law sets context, it becomes "a reduction from other possible political discourse."[873] In this sense the political claim

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[869] Christodoulidis (n 274 above) 396.
[870] Christodoulidis (n 275 above) 415.
[871] Christodoulidis (n 274 above) 383.
[872] Christodoulidis (n 274 above) 383.
[873] Christodoulidis (n 274 above) 382.

that cannot be heard in court is that *Afriforum cases* are not necessarily about equality and non-discrimination but about the obstinate desire to retain colonial and apartheid acquired privileges.

The systems theoretical approach conceptualises law as a system of meaning which uses its binary code of lawful/unlawful to produce meaning. For communication from other systems to make sense to the legal system, the legal system must first reconstruct such communication into legal communication using its binary code. The reconstruction by the legal system of other systems' communications inevitably leads to exclusions and distortions of the meaning of these communications. Law's reconstruction of other systems' communication into legal communication constitutes law's reduction of complexity. In this sense the complexities of the world are reduced and simplified by law's binary code. This is precisely what is meant by law's fixing of the context. The fixing of the context is achieved by the elimination of indeterminacy so that the role players in a legal setting always encounter each other as legal actors.

The implication of law's reduction of complexity, its setting of the context and its elimination of indeterminacy due to its institutional form is evident in the cases discussed above. In the Afriforum cases, the Walker case and the Barnard case, the issues are fundamentally about the legacy of colonialism and apartheid. It is the impact of racial discrimination that looms large and attempts to fix this impact legally within a constitutionalism. However within constitutionalism, all conflicts in the final analysis are subject to the rule of law. When these conflicts are subjected to the rule of law, the legal context sets in and observes these conflicts as either legal/illegal. Statements that are deemed not to fall within the legal purview are either excluded or distorted. In these cases what becomes contested and contestable is not, for instance, a possible racist agenda being pursued or the desire to hold on to apartheid privileges, but whether the right to equality is being infringed upon. If the context is equality before law, a counter argument must also be advanced within the context of equality before the law by justifying that actions taken are not at variance with the notion of equality. In this sense, the politics of power that are inextricably bound with race can only be

advanced within the context of the right to equality as it happened in the cases referred to above.

4.7. Conclusion

I have suggested that both CLS and CRT are agreed that law is indeterminate but this indeterminacy should not presuppose legal nihilism. However the variations within CLS slightly complicates matters due to their differences relating to, for instance the notion of law as ideology. This difference is attributable to the eclectic nature of CLS. On the other hand, notwithstanding its agreement with CLS on a number of theoretical postures, CRT nonetheless is discontent with CLS's scant reference to the lived experiences of black people. This discontent leads to CRT's rejection of the CLS's critique of rights. For CLS, rights not only have historical significance but constitute an important symbolic essence particularly for black people who were denied these rights at some point. For CRT and most in CLS, law, remains a tool that can be used for transformative purposes.

In the final analysis, both CLS and CRT agree on one fundamental aspect which is that law is politics all the way. This suggests that law should be seen as a contested terrain. The politics that sways law should be exposed so as to ensure that law plays its progressive role in society. On the other hand, I have suggested that this view is in direct contrast with systems theoretical approach which moves from a class analysis to a functional differentiation analysis. Society, according to systems theoretical approach, should be analysed from a systems prism. In this sense, law cannot and should not be conflated with politics as politics is not law but a system on its own and politics is also a system on its own. I suggest that although both CRT and CLS greatly assist in denaturalising the phenomenon of law as contingent, they both fall short of ultimately explaining why law has hitherto been incapable of delivering transformation when called upon to do so, particularly in South Africa.

CHAPTER FIVE: POSTSTRUCTURALISM, LAW AND THE QUEST FOR RADICAL TRANSFORMATION IN SOUTH AFRICA

We cannot survive without the justice of the law but we cannot live without the hope of another justice[874]

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[874] Douzinas and Gearey (n 617 above) 36

5.1. Introduction

In this chapter I explore poststructuralism as another "genre of critique" and ask whether or to what extent poststructuralist approaches to law are capable of advancing the project of radical transformation in South Africa. The assumption is that law has limitations that always already prevent radical transformation. The notion of justice takes centre stage in this chapter. I specifically explore the relationship between law and justice from a poststructuralist prism so as to analyse the implications of this relationship to radical transformation in South Africa. Radical transformation in this context is justice and the question then, as posed by Douzinas, is how do we move from law to justice?[875] Put differently, how can justice be liberated from law and yet be part of law? In the final analysis, the central question that I explore is whether poststructuralist approaches to law have the capacity to advance the course of radical transformation. In this context I suggest that radical transformation be conceived of as ultimately about justice.

In part one of this chapter I briefly discuss the shift from the pre-modern era to the era of modernity as a precursor to a discussion on modernity and jurisprudence. In part two I explore the relationship between law and modernity and in particular jurisprudence's predisposition to dealing with ontological enquiries about law.[876] In part three I briefly discuss the conceptual relationship between postmodernism, poststructuralism and deconstruction. This is followed in part four by a discussion on poststructuralist approaches to law. Linked to the discussion on poststructuralist approaches to law, I discuss the notion of deconstruction as a radical approach to justice in part five. In part six I evaluate the notion of deconstruction and systems theoretical approach by discussing both the possible points of convergence and divergence between the two approaches.

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[875] Douzinas and Gearey (n 617 above) 41.
[876] By ontological enquires about law I refer to an approaches that seek to answer the question: "what is law".

5.2. Modernity

According to Nikolai Wenzel, roughly around the 17th century, modernity replaced "the pre-modern appeal to faith with an appeal to reason."[877] The appeal to reason as the *leit motif* of reason has had implication on the hitherto political theory and the manner of everyday life. Wenzel affirmatively quotes David Harvey[878] on the purpose of the modernity project as:

> [T]o use the accumulation of knowledge generated by many individuals working freely and creatively for the pursuit of human emancipation and the enrichment of daily life. The scientific domination of nature promised freedom form scarcity, want, and the arbitrariness of natural calamity. The development of rational modes of social organisation and rational modes of thought promised liberation from irrationalities of myth, religious superstition, release from the arbitrary use of power as well as from the dark side of our human natures. Only through such a project could the universal, eternal, and the immutable qualities of all humanity be revealed.[879]

The resultant shift to modernity was a secular movement that tried to demystify and desacralize knowledge and social organisation.[880] Nonetheless, this transition from the pre-modern to the modern did not completely disrupt the pre-modern notion of transcendentalism. [881] There was nonetheless what Andreas Huyssen calls "a noticeable shift in sensibility, practices and discourse formation"[882] that was palpably and qualitatively different from the previous pre-modern period. Enlightenment came to be a fusion of God and Reason.[883] The implication is that the period of modernity is characterised by the coexistence of God and reason and this coexistence induces modernity to claim transcendental rationality. It is this metaphysical rationality of Enlightenment modernity that was to become the subject of postmodernist critique.

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[877] N Wenzel "Postmodernism and its Discontents: Wither Constitutionalism after God and Reason?" (2008) 4. New Perspective on Political Economy 162.

[878] Harvey (1989).

[879] Harvey (n 878 above) in Wenzel (n 877 above) 162.

[880] Harvey (n 879 above) in Wenzel (n 877 above) 164.

[881] Wenzel (n 877 above) 164.

[882] A Huyssen "Mapping the Postmodern" (1984) 33 New German Critique 8.

[883] Wenzel (n 877 above) 164.

The epistemological limitations of modernity were brought to bear mainly by the horrors of the Second World War. According to Ian Ward, Nazism and the horrors of the holocaust at Auschwitz provided impetus for philosophical prisms which rejected metanarratives.[884] Nazism therefore "represented the attempt finally to realise the dream which lies at the foundation of modernism, a homogeneous utopia of white, able, wealthy, industrious Europeans."[885] Wenzel, in agreement with the fact that the horrors of the second world war were central in providing impetus to theoretical concerns with modernity's epistemological departure point, and affirmatively quoting Robert Pippin, states that:

> The great self-confidence and progressivism characteristic of the modern enterprise and especially what seemed its nineteenth-century fruition, all looked even more difficult to accept after the historical horrors of the twentieth century. The fact that art, intellectual pursuits, the development of the natural sciences, many branches of scholarship flourished in close spatial, temporal proximity to massacre and death camps has raised for many doubts about not only modernity's self-assurances, but about all of Western Culture, has raised the issue: why did humanistic traditions and models of conduct prove so fragile a barrier against political bestiality. [886]

The Second World War and its consequences were seen by the burgeoning postmodernism as intrinsic to modernity. Where the others see colonialism, fascism, genocide, environmental destructions and other challenges of the modernity project as aberrations and poverty amongst others, postmodernism views these as intrinsic and as causal effects of the project of modernity.[887]

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[884] I Ward *Introduction to Critical Legal Theory* (2004) 164.
[885] Ward (n 884 above) 164.
[886] Pippin (1999) quoted in Wenzel (n 877 above) 166.
[887] Wenzel (n 877 above) 167.

5.3. Modern jurisprudence

Historically, modern jurisprudence has always been concerned with the question: "what is law".[888] The need to find a totalising answer on what is law or its meaning has always been greater in modern jurisprudence as evidenced by the three schools of naturalism, positivism and the contextual theories of law.[889] Modern jurisprudence's reason for focusing on ontological enquiries about law is, according to Douzinas, to ensure that in the final analysis, law is separated from non-law so that law is not contaminated by non-law.[890] According to Douzinas, the legality of modernity is defined by the exclusion of ethics and morality from law.[891] It is characterised by the claim of law's purity and the "de-ethicalisation of law" and the "banning of morality from law.[892]

Modern jurisprudence makes a distinction between law and morality. Law is accordingly objective, neutral and its procedures technical and its personnel neutral.[893] Morality on the other hand is subjective and relative. Law, being objective and neutral must therefore be insulated from morality's subjectivity and relativity to ensure that the exercise of power is impersonal and "guarantees subjection of citizens and the state officials to the dispassionate requirements of the rules of rules as opposed to the rule of men."[894] Modern jurisprudence is thus characterised by its propensity to make final pronouncements on the truth about law.[895] Modern jurisprudence is also characterised by internal and external approaches. The internal theory focuses on theorising about the argumentation process and reasoning by judges and lawyers.[896] The external theories are characterised by the sociology of law and Marxist approaches and they typically look at the external factors that shape the law.[897]

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[888] Douzinas et al (n 628 above) 18.
[889] Douzinas et al (n 628 above) 19.
[890] Douzinas & Gearey (n 617 above) 15.
[891] Douzinas et al (n 638 above) 16.
[892] Douzinas et al (n 638 above) 17.
[893] Douzinas et al (n 638 above) 17.
[894] Douzinas et al (n 638 above) 17-18.
[895] Douzinas & Gearey (n 617 above) 5.
[896] Douzinas & Gearey (n 617 above) 5.
[897] Douzinas & Gearey (n 617 above) 5

Within the internal theories, legal positivism has been the most dominant. Legal positivism is characterised by its endeavour to separate fact and value, moral principles and legal principles.[898] The main proponents of legal positivism have been Hans Kelsen and Herbert Hart – "the two towering influences of continental and American Jurisprudence."[899] Kelsen propounded "the pure theory of law" as a "discourse of truth about norms" and Herbert Hart's "concept of Law" touted the separation of law from morality.[900] The positivist epistemology moves from the prism that society is constitutive of irreconcilable values and then proceed to employ law as the only forum capable of managing these irreconcilable societal values. Law must neither be contaminated or nor take cognisant of extrinsic or non-legal factors because this may result in loss of legitimacy for law.[901]

The inadequacies of the strict and unadulterated positivism led to emergence of, amongst others, hermeneutics. Hermeneutics as a supplement to strict positivism argues that much as law is a system of rules, it was also in addition "a huge depository of values and principles."[902] This leads to the reappropriation and rearticulation of law as being at one with morals. The implication however was that henceforth law became synonymous with morality. Law became both an embodiment and articulation of morality. "The interpretative scholars assert that the law is all morality and that juridical interpretation implies or leads an ethics of legal reading."[903] This, I suggest, implies amongst others, that if one questions the law, one is at the same time questioning morals – societal morals. The hermeneutics return of law as morals closes off the law to any doubts and excludes those that are not captured or accommodated by these morals – or laws. It surreptitiously and by sleight of hand returns law to its position as the final truth. "Power relations and practices proliferate and penetrate deeply into the

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[898] Douzinas & Gearey (n 617 above) 6
[899] Douzinas & Gearey (n 617 above) 6
[900] Douzinas & Gearey (n 617 above) 6
[901] Douzinas & Gearey (n 617 above) 7
[902] Douzinas & Gearey (n 617 above) 7
[903] Douzinas & Gearey (n 617 above) 8

social, often taking loose and variable legal form … power relations are law if and when they successfully attach to themselves the predicate 'legal'."[904]

It is precisely modern jurisprudence that becomes the target of poststructuralist approaches to law. As I expound below, the target of poststructuralism is not so much the law as it is the modern conceptions of law. As Douzinas asserts above, poststructuralist jurisprudence displays the highest possible fidelity to the letter of the law. It employs deconstruction as a critique of modern jurisprudence.

5.4. Relationship between postmodernism, poststructuralism and deconstruction

A brief clarification of the concepts of postmodernism, poststructuralism and deconstruction is imperative. Jane Caplan states that "postmodernism, poststructuralism and deconstruction are not interchangeable synonyms."[905] Their use and descriptions by different scholars may in certain instances cause exasperation. For instance Hans Bertens views postmodernism as meaning many things at once with the effect being that there are many postmodernisms with the common denominator being that "they all seek to transcend what they see as self-imposed limitations of modernism."[906] Postmodernism is then drawn in a poststructuralist orbit in the 1970 and is associated with Ronald Barthes, Jacques Derrida and Michel Foucault, Jacques Lacan, Gilles Deleuze and Felix Guattari.[907] According to Bertens, the translation of Jean-Francois Lyotard's *The Postmodern Condition* in 1984 (originally published in 1979) represents a merger between American postmodernism and French postructuralism.[908] In this sense at some point, according to Bertens, there was in the beginning a geographical separation and later a geographical merger between American Postmodernism and French Poststructuralism.

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[904] Douzinas & Gearey (n 617 above) 9.
[905] J Caplan "Postmodernism, Poststructuralism and Deconstruction: Notes for Historians" (2008) Available at: https://doi.org/10.1017/s0008938900020483 261.
[906] H Bertens *The Idea of the Postmodern History* (1995) 5.
[907] Bertens (n 906 above) 5.
[908] Bertens (n 906 above) 5-6.

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For Huyssen, poststructuralism is a discourse of and a theory about modernism.[909] Postmodernism and poststructuralism are for Huyssen not identical and not homologous.[910] For Ben Agger, there is no clear definition between postmodernism and poststructuralism precisely because of their aversion to "clear positivist definitions and categories."[911] There is according to Agger, a "substantial overlap between Poststructuralism and Postmodernism."[912] However for Agger "Poststructuralism (Derrida, the French Feminists) is a theory of knowledge and language, whereas postmodernism (Foucault, Barthes, Lyotard, Baudrillard) is a theory of society, culture and history."[913] I suggest that Agger's taxonomy is circuitous and does not go far enough because an argument could be that what constitutes a theory of knowledge and language is as much a theory of society, culture and history.

According to Hunt, postmodernism has two distinguishable aspects. As a general approach, postmodernism "is a critique of the rationalism of enlightenment thought."[914] In its specific aspects it can be "grouped together under the label poststructuralism"[915] which is mainly a reaction to "structuralist thought, Marxism in particular and more generally to the European socialist thought."[916] According to Hunt, the poststructuralist aspect of postmodernism became latent when it moved into the English speaking intellectual world where it was merged with "the more generalised anti-enlightenment mood."[917] Notwithstanding, a distinctive feature, according to Hunt, of postmodernism is its rejection of metanarratives or totalisations. Postmodernism, and postructuralism are approaches that are inherently suspicious of total strategies and instead they prefer localism.[918]

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[909] Huyssen (n 882 above) 38.
[910] Huyssen (n 882 above) 37.
[911] B Agger "Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance" (1991) 17 Annual Review of Sociology.
[912] Agger (n 911 above) 112.
[913] Agger (n 911 above) 112.
[914] A Hunt "The Big Fear: Law Confronts Postmodernism" (1990) 35 *McGill Law Journal* Hunt 514.
[915] Hunt (n 914 above) 515.
[916] Hunt (n 914 above) 515.
[917] Hunt (n 914 above) 515.
[918] Hunt (n 914 above) 533.

Postmodernism can, according to Bertens, refer to many things simultaneously. Fundamentally, it refers "to a complex of antimodernist artistic strategies which emerged in the 1950s and developed momentum in the course of the 1960s."[919] When it takes on a socio-political streak and merging with poststructuralism in the 1970s, it is characterised by its rejection of "the empirical idea that language can represent reality that the world is accessible to us through language because its objects are mirrored in the language we use."[920]

Postmodernists acceptance of Derrida's exposure means that it then began to follow the poststructuralist idea that language constitutes the world as opposed to reflecting it and that "knowledge is therefore always distorted by language, that is, by the historical circumstances and the specific environment in which it arise."[921] Knowledge in this sense is contingent. Postmodernism also accepts Lacan's psychoanalysis "which sees the subject as constructed in language."[922]

In a nutshell, Bertens categorises two moments of what he calls poststructuralist postmodernism. The first moment of poststructuralist postmodernism occurs in the later 1970's and early 1980s under the influence of Derrida and Barthes "and is linguistic, that is, textual, in its orientation." This is the poststructuralist deconstructionist moment of postmodernism. The second poststructuralist moment takes root in the 1980s under the influence of Foucault and to a lesser extent Lacan. Notwithstanding its affinity with Derrida's deconstructionist postmodernism, Foucault's postmodernism puts emphasis on the dynamic of power, and how the subject is constituted. Bertens puts it aptly in the following manner:

> From the perspective of this postmodernism, knowledge, which had once seemed neutral and objective to the positivist and emancipatory to the left, is inevitably bound

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[919] Bertens (n 906 above) 5.
[920] Bertens (n 906 above) 6.
[921] Bertens (n 906 above) 6.
[922] Bertens (n 906 above) 6.

up with power and thus suspect. Although it does not necessarily follow Foucault in his extreme epistemological scepticism, which virtually equates knowledge with power and thus reduces it to the effect of a social relation or structure, it fully accepts that knowledge, and language *tout court*, have become inseparable from power.[923]

It is an almost impossible task to summarise what constitutes postmodernism. For instance Agger splits postmodernism into apologetic and critical versions.[924] Bertens states that the common denominator of postmodernists is that in the final analysis they reject "totalising grand narratives" and modernity's search for timeless representational truths.[925]

According to Douzinas, postmodern theory critiques large scale totalising theories. Its approach is about small provisional stories – localised approaches. Postmodernism gives attention to the excluded and the repressed dialects and prises open closed systems and meanings.[926] It challenges the finality of meaning. "Meaning is never closed. In every complex text or discourse, there is always the possibility of telling things otherwise … the text is never closed or united."[927] In contradistinction with critical modern jurisprudence which includes Marxism and Structuralism amongst others, deconstruction and grammatology[928] critique traditional jurisprudence without importing external ideology or theory.[929] For Douzinas, poststructuralist jurisprudence "displays the highest possible fidelity to the letter of the law."[930] A postmodern critique of law "challenges the white male order of the world and its claim to present a timeless universal rationality" and exposes this white rationality as suffering from an infection of authority "that works by declaring the reason, race or sex of the other invalid by fiat."[931]

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[923] Bertens (n 906 above) 7.
[924] Agger (n 911 above) 116.
[925] Agger (n 911 above) 116.
[926] Douzinas et al (n 628 above) x.
[927] Douzinas et al (n 628 above) xi.
[928] See chapter two of J Derrida *Of Grammatology* (1974), Available at www.marxists.org.reference/subject/philosophy/works/fr/derrida.htm
[929] Douzinas et al (n 628 above) xi.
[930] Douzinas et al (n 628 above) xi.
[931] Douzinas et al (n 628 above) xii.

Jane Caplan commences her discussion on postmodernism, poststructuralism and deconstruction by stating that to be "post" presupposes some form of critical engagement with the concept that comes after the "post". For instance, Caplan states that to be a "poststructuralist is not to just have said no to structuralism, but in a crucial sense to have worked with and through the suppositions of structuralism … as a means of exposing the theory's own blind spots or deficiencies."[932] Postmodernism according to Caplan denotes two things: it is firstly a loose body of thought and secondly it is a historical description of an age – an epochal description.[933] Poststructuralism on the other hand is a theory and an intellectual practice that traces its genealogy to an engagement with structuralism.[934] Caplan states that from its origin as Ferdinand Saussure's theory of linguistics to application to social and human sciences by Levi-Strauss and Althusser, structuralism initially argued that language and cultural systems represent systems of meaning as opposed to "direct transactions with reality."[935]

The poststructuralism of Barthes, Derrida and Foucault, Caplan states, refuted the notion of "fixed meanings" and knowable truths.[936] "The refusal of totalisation and binarism, the affirmation of decentering and multiplicity – these are the familiar and central themes of poststructuralist thought, and the core of its commitment to openness."[937]Deconstruction then becomes, according to Caplan, a variant of poststructuralism associated with "Barthes, Foucault, Lacan, Baudrillard or Kristeva."[938] With deconstruction communication always displaces meaning such that meaning is always beyond the reach of knowledge.[939] In the final analysis, the three notions of postmodernism, poststructuralism and deconstruction are related in that deconstruction should be viewed as a variant of poststructuralism and poststructuralism as a constituent of postmodernism. Informed by Caplan's description

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[932] Caplan (n 905 above) 262.
[933] Caplan (n 905 above) 263.
[934] Caplan (n 905 above) 263.
[935] Caplan (n 905 above) 265.
[936] Caplan (n 905 above) 266.
[937] Caplan (n 905 above) 266.
[938] Caplan (n 905 above) 267.
[939] Caplan (n 905 above) 267.

of poststructuralism as a variant of postmodernism that challenges notions of fixed meanings and final and objective knowable truths, I will, where it is practically possible, make use of the notion to the poststructuralism.

5.5. Poststructuralist approaches to law

In this part of the thesis I rely mainly on Douzinas and Gearey[940] to unpack postructuralism's approach to law. Epistemologically, poststructuralism is a reaction inflicted by exhaustion with metaphysics' search for the final truth which will then usher in "the end of history". As Douzinas and Gearey state, it was classical Greece that inaugurated metaphysics. [941] Classical Greece, notably Plato, inaugurated the notion of the existence of a world beyond senses, the stuff of the transcendental where phenomena was reduced to "phantasm".[942] Having diagnosed phenomena as an apparition, Plato's classical Greece then concluded that it is the world of ideas that ought to constitute true reality so that ideas were then given primacy over phenomena or the actual material reality.[943] Thus began the western tradition of metaphysics that would later unleash the discontent of poststructuralism.

Shifting from Plato we have Immanuel Kant who saw critique as setting limitations to speculative reasoning so that there are issues that must remain off-limit to knowledge because they do not belong in the Kingdom of knowledge. In this sense, truth as the only one truth must not be soiled by non-truths.

Karl Marx on the other hand predicted that the internal inherent contradictions of capitalism will lead to the withering away of the state and the ushering in of a classless communist society and further suggested that the basis determines the superstructure. The metaphysics of pre-modernity and of modernity was thus characterised by either the privileging of ideas over the material or of the material over ideas. Materialism and

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[940] Douzinas & Gearey (n 617 above).
[941] Douzinas & Gearey (n 617 above) 44.
[942] Douzinas & Gearey (n 617 above) 44.
[943] Douzinas & Gearey (n 617 above) 44.

idealism are according to Douzinas two properties of metaphycism because both "follow their own internal logic and build propositions from the necessary interconnections between their founding."[944] Inevitably the metaphysical approach leads to the privileging of unity over plurality and sameness over difference and the result is that "the temporality of becoming … is erased and turned into permanence."[945]

Friedrich Nietzsche was among the first to enter the scene and sought to disrupt the metaphysics way by "Killing God" and "drinking up the sea" and thereby destroying origin.[946] For instance, in his 1886 work titled *Beyond Good and Evil*, Nietzsche, amongst other things, questions "the innocence of truth".[947] Where Kant's view was that law comes from reason – the reason that took the place of God and the King, Nietzsche's genealogy questioned reason's values. If reason's value is to find truth, Nietzsche's approach was to rupture this value of reason by showing that life is a seesaw and that bodies, consciousness and self are made in the interstices of instability, confrontation and pluralities.[948] In other words to disrupt the notion of truth is to undermine truth's essential properties which are stability and absence of contradictions. Nietzsche disrupts the metaphysical notion that creates a merger between truth and law in such a way that the disruption of the notion of truth is equally the disruption of law's truth. How we can appreciate modern law as a form of secular theology is to see it, like Nietzsche, "as bound up with certain metaphysics."[949]

After Nietzsche's disruptions, the baton was passed to Michel Foucault.[950] Applying a genealogical approach, Foucault rejects historicist approaches and argues against the idea that history can be characterised as a linear evolutionary progress where that which was historically undesirable is progressively replaced by that which represents

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[944] Douzinas & Gearey (n 617 above) 44.
[945] Douzinas & Gearey (n 617 above) 47.
[946] Douzinas & Gearey (n 617 above) 48, for some of Nietzsche's discussion on the notions of metaphysics and truth see F Nietzsche *Beyond Good and Evil* (1886), Available at: https://www.marxists.org/reference/archive/nietzsche/index.htm
[947] F Nietzsche (note 946 above) https://www.marxists.org/reference/archive/nietzsche/1886/beyondgood-evil/ch02.htm
[948] Douzinas & Gearey (n 617 above) 51.
[949] Douzinas & Gearey (n 617 above) 53.
[950] For a discussion on Foucault and law, See G Turkel "Michel Foucault: Law, Power and Knowledge" (1990) 17 Journal of Law and Society.

true human desires. Embedded in the notion of historicism is the notion of the "end of history". Historicism conceals the dark side of development and the fact progress and development has historically occurred hand in glove with oppression and exploitation, colonisation and apartheid and injustice. It conceals the fact that the very progress and development has historically occurred at the expense of the excluded. What Nietzsche and Foucault demonstrate is the contingency of knowledge[951] and the contingency of truth. "In the Foucauldian genealogy, modern man is the product of a contingent and unstable combination of a multiplicity of forces and knowledges, of discourses and practices."[952] In this sense of Foucault, in the view of Douzinas and Gearey, the notion of the rule of law is "a contingent, the outcome of a succession of competing types of domination, all of which back their law with violence."[953]

According to Douzinas and Gearey, Foucault's modern subject is a result of the constellation of power/knowledge/law which finds concrete expression in schools, workshops and factory floors – the disciplinary technologies which serve the functional needs of the economic, military administrative system of power.[954] For Foucault:

> Rather than a consistent systems of norms, the modern legal system resembles an experimental machine full of parts that came from elsewhere, strange couplings, chance relations, cogs and levers that aren't connected, that don't work, and yet somehow produce judgements, prisoners, sanctions and so on."[955]

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[951] In his interview with D Trombadori which took place at the end of 1978 Foucault states the following about his theory of knowledge: "I use the word "savoir" ["knowledge"] while drawing a distinction between it and the word "connaissance" ["knowledge"]. I see "savoir" as a process by which the subject undergoes modification through the very things that one knows [connaît], or rather, in the course of the work that one does in order to know. It is what enables one both to modify the subject and to construct the object. Connaissance is the work that makes it possible to multiply the knowable objects, to manifest their intelligibility, to understand their rationality, while maintaining the fixity of the inquiring subject." Quoted in D Faubion (ed) *Michel Foucault: Power essential works of Foucault 1954-1984* (1994) 3 256.

[952] Douzinas & Gearey (n 617 above) 55.

[953] Douzinas & Gearey (n 617 above) 57.

[954] Douzinas & Gearey (n 617 above) 57.

[955] Douzinas & Gearey (n 617 above) 57.

In the Foucauldian approach, whereas modernity instituted legal rights, constitutions and the rule of law, whereas it instituted freedom and equality to protect the individual against the machinery of the state – these very rights and freedoms are in turn the source of a disciplining power and its legitimation and a form of "a much deeper penetration of power into the social and individual body."[956] Following on Douzinas and Gearey's interpretation of Foucault, I suggest that the underside of constitutionalism, civil liberties and the rule of law is that these very bodies ostensibly being protected are protected under the rubric of coercion. In this sense protection and coercion are two sides of the same coin. In other words, where I have rights that are constitutionally protected, these very rights are actually a form of disciplining and coercion because firstly I am in no position to refuse them and secondly how I exercise these rights is already predetermined.

The implication is that law as power instantiates me. The rights given to me are imposed rights. Law and power controls the context. This Christodoulidis, borrowing from Lyotard, has called "terror".[957] Christodoulidis describes terror as the moment where law expels certain statements and yet withdraw the ability to the challenge the exclusion.[958] "The essence of terror thus exists in the combination of exclusion and cover up, where the latter is expressed through the inability to challenge the exclusion … the player is forced to consent not because he has been refuted, but because his ability to participate has been threatened."[959]

In the final analysis, "the object of the Foucauldian analysis is this complex construct of power/knowledge."[960] The salient factors that come out of the discussion above on Foucault's poststructuralism, as influenced by Nietzsche, are that firstly truth is contingent and that truth itself forms part of the history of discourse.[961] In other words the notion of truth has a history. This implies the rejection of the notion of timeless

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[956] Douzinas & Gearey (n 617 above) 58.
[957] Christodoulidis (n 6 above) 27.
[958] Christodoulidis (n 6 above) 27.
[959] Christodoulidis (n 6 above) 36.
[960] Douzinas & Gearey (n 617 above) 57.
[961] Faubion (n 951 above) 253.

transcendental truth. Foucault himself states that "the subject of knowledge itself has a history; the relation of the subject to the object; or, more clearly, truth itself has a history."[962] I suggest that to say that truth has a history is to imply that truth is contingent and to say that truth is contingent is to import an element of subjectivity into the notion of truth and once the subjective element of truth has comfortably nestled into the notion of truth, the objectivity of truth is displaced and the contingency of truth is exposed.

Secondly, there is relationship between law, truth and knowledge. The relationship between truth and law inheres in that juridical forms are "the main mode of truth seeking" in accordance with the Kantian Critique.[963] In a nutshell, the relationship between power, knowledge and law is captured by Douzinas and Gearey in the following manner:

> Law itself is a contingent outcome of a succession of competing types of domination, all of which back their law with violence. The post medieval world based domination on the absolute power of the sovereign over his subjects. This was replaced by a regime of disciplining and 'bio-power' in which power in close collaboration with knowledge and law is exercised on the body. This power/knowledge/law construct creates the modern individual as both free and subjected.[964]

5.6. Deconstruction as a radical approach to justice

A deconstructivist approach to justice aims to protect justice from the law. It must ensure that justice remains the conscience of law, a bar from which law must subject itself. Jurisprudentially, deconstruction exposes deficiencies of law's attempt to do justice**.**[965] Deconstruction "uncovers the politics which underpin philosophy, and by

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[962] Faubion (n 951 above) 2.
[963] Douzinas & Gearey (n 617 above) 56.
[964] Douzinas & Gearey (n 617 above) 57.
[965] B Matthews "Why Deconstruction is Beneficial" (2000) 4 Flinders Journal of Law Reform 117.

concentrating on language, seeks to reveal how this politics is secreted away."[966] In this section, I argue for an approach which views deconstruction as a political and ethical project in the same manner as I see the ethical as the political. In other words a deconstructivist approach to justice should be viewed as a political approach to justice, the kind of approach that does not see the justice in as the only and final justice.

According to Jaco Barnard-Naude, contrary to popular accounts, it was Martin Heidegger who in describing the third basic component of phenomology in *The Basic Problems of Phenomology*[967] first used the word 'deconstruction'.[968] Derrida, according to Barnard Naude appropriated the concept of 'deconstruction' but distinguished it from the Heideggerian *destruksion* and from Nietzsche's 'demolition'.[969] Deconstruction, according to Barnard-Naude, does not deny or refute the metaphysical tradition, but rather it goes beyond it by exposing the limits of the metaphysical tradition and related contradictions and inconsistencies.[970]

According to Stacy, Derrida uses the term deconstruction to explore "the meaning of the text", the text being "that which is written and spoken, and also the unwritten assumptions that accompany any interpretation of the text."[971] Derrida, states Stacy, employs deconstruction to expose the hidden meaning in a language – the text. In this sense, every communication is mediated by the receiver. In other words, it is the receiver who gives communication meaning. The meaning of a text is also defined by what it excludes.[972] An author's text is but one form of his or her interpretation of the text.[973] An author's text is reinterpreted by a reader or a listener and the author does not have finality over meaning of text. His or her interpretation of what he or she has

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[966] Ward (n 884 above) 167; Also see J Derrida "Force of Law: the 'The Mystical Foundation of Authority'" (1990) 11 Cardozo Law Review. According to Douzinas and Gearey, it is in the 'Force of Law that Derrida turns to political philosophy and jurisprudence, See Douzinas & Gearey (n 617 above).

[967] Heidegger (1982) quoted in J Barnard-Naude "Deconstruction is What Happens" (2011) 22 *Stellenbosch Law Review* 162.

[968] Barnard-Naude (n 967 above) 162.

[969] Barnard-Naude (n 967 above) 162.

[970] Barnard-Naude (n 967 above) 163.

[971] Stacy (n 655 above) 84.

[972] Stacy (n 655 above) 84.

[973] Stacy (n 655 above) 84.

written is but one of many possible interpretations that include the reader's interpretation. The search for meaning should therefore not be reduced to the goal of searching for the truth.

"Deconstruction is thus never oriented to ascertaining the truth of the meaning of a text, but an endless review of meaning."[974] There can never be a "core-meaning" of a text. To search for the core-meaning would be "logocentric", that is, western metaphysical philosophical tradition's search for the truth.[975] A logocentric approach asks for the meaning of justice so that justice is finally and universally defined so as to establish one unitary, coherent, common understanding and agreement over the meaning of justice. The western metaphysical tradition preoccupies itself with what is "true", what is "right", in a nutshell "what is".[976] The "what is" question inevitably ends up with the question of "therefore what is not". In this sense, if the question, which preoccupies the western metaphysical tradition, is "what is law", inevitably the correlation is "what is not law". This then presupposes that issues that are regarded as not law are automatically excluded as not belonging to law. In a nutshell the question of "what is law" becomes a surreptitious stratagem to maintain the purity of law by separating law from politics and law from ethics so that issues that ostensibly do not belong within the realm of law remain outside of the law.

Deconstruction is also regarded by others as a series of techniques and analytical tools "invented" by Jacques Derrida and others to analyse literary and philosophical texts in relation to philosophical claims about the nature of language and meaning.[977] There is nonetheless disagreements in relation to treating deconstruction as a mere "technique" or analytical tool". For instance Schlag disagrees with Balkin's treatment of treating deconstruction as merely an analytical tool as flying in the face of Derrida's overtly political stated views. According to Schlag, Derrida has stated that "Deconstruction as such is reducible to neither a method nor an analysis."[978]

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[974] Stacy (n 655 above) 85.
[975] Stacy (n 655 above) 88.
[976] Stacy (n 655 above) 85.
[977] J Balkin "Deconstruction's Legal Career" (2005-2006) 27 Cardozo Law 719.
[978] P Schlag "A Brief Survey of Deconstruction" (2005-2006) 27 Cardozo Law Review 747.

Schlag offers a trenchant critique to Balkin's understanding of Derrida's deconstruction. Where Balkin views deconstruction as a "rhetorical technique"[979] that is used for amongst others, "critique of contract law", to expose "legal justification"[980], Schlag's approach is the antithesis. Schlag argues that to reduce deconstruction to a technique is to "subordinate deconstruction within a logocentric architecture" and that Balkin's views on deconstruction are symptomatic of "the stereotyped infrastructure and operations of American legal thought" and empty deconstruction of its radicalism.[981] Henceforth, deconstruction was not be a mere "philosophical orientation" or a "rhetorical technique" that is used for "critique of contract law", to expose "legal justification."[982]

According to Stacy, in its political colours, the function of deconstruction is to remain open to the other that is excluded in class terms or in gender or race terms.[983] Derrida calls this desire for opening up for the excluded other *différance. Différance* is about exploring the "otherness" and "the ways in which texts leave out or suppress alternative significations."[984] *Différance* is about the retrieval of aspects of "the omitted other" by the so-called objective or dominant interpretation.[985] As Cornellia Vismann states, "deconstruction dramatizes exclusions, brings them to an extreme and confronts the law with that which is not justice in the realm of laws in order to give rise to the excluded."[986] I suggest that an approach that seeks to expose and bring to bear forms of marginalisation and exclusions can only be radically political. This obviously would be in contradistinction with an approach which sees deconstruction purely a technique of interpretation which almost always belongs within the architecture of logocentricism.

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[979] Balkin (n 977 above) 722.
[980] Balkin (n 977 above) 725.
[981] Schlag (n 978 above) 747-48.
[982] Balkin (n 977 above) 722 &725.
[983] Stacy (n 655 above) 88.
[984] Stacy (n 655 above) 88.
[985] Stacy (n 655 above) 88.
[986] C Vismann "Derrida, Philosopher of the Law" (2005) 6 German Law Journal 7.

Schlag's views above are buttressed by Douzinas who states that "the political imperative of poststructuralism is to remain critical and oppositionist, and to challenge any orthodoxy that a complacent and affirmative poststructuralism may wish to reimpose. If law is politics by other means, a deconstructive reading of law means other politics."[987] According to Douzinas, the political project of poststructuralism is the creation of a theory of justice while eschewing all totalising techniques.[988] The approach by Balkin above is indicative of approaches that whilst ostensibly agreeing with a deconstructivist approach, nonetheless drain it of its radicalism and its innate character as a political project.

In a nutshell, I see poststructuralism's deconstruction as a radical political programme that has been successful, at least theoretically, in both disrupting and rupturing the undisturbed forward march of the western metaphysical tradition that thrived on its imposition of a geographically parochial version of the human. From Nietzsche's destruction of "the origin" and his substitution of origin with "invention", to Foucault's revelation of the contingency of knowledge and truth and to Derrida's deconstruction as justice, the "other" as equally valid has become a validity. In this sense traditional legal thinking with its tendency to separate the object from the subject; to separate law from society; to think of law as autonomous; to believe in the stability of meaning, that is, the epistemological prism embedded in modern conception of law, has ceased to be a self-executing validity. In the context of South Africa, poststructuralism allows us to theorise the contingency of our constitutional arrangements, to point out the possible surreptitious metaphysics of constitutionalism and most importantly to denaturalise social arrangements inaugurated by constitutionalism and to confidently state that "other" ways of organising society are possible.

5.6.1. Deconstruction as justice

Law is generally thought to exist and to be enforced in the name of justice. However, according to Douzinas, law's internal justice, or legal justice, is but one aspect of

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[987] Douzinas et al (n 628 above) xiii.
[988] Douzinas et al (n 628 above) 7.

justice.[989] A different conception of justice, that is, a "political philosophy of justice", is what I am predominantly concerned with – that is justice as an infinite political project. This is the political project of poststructuralism as the creation of the theory of justice which simultaneously eschews totalisation. It is the deconstruction that exposes dominant beliefs as ideological and contingent. It is deconstruction at its most political which results in being open to the other that is excluded due to race and class.

Deconstruction is animated by the question of justice. Of course it could be argued that all other schools, critical, modern, critical modern and so forth are all concerned and animated by the question of justice. As I state below, the difference with deconstruction, according to Douzinas, is that justice must judge law and for it to do so, it must be, as it should be, separate from the law. Douzinas states that "understanding the law, its consciousness, cannot be separated from an exploration of law's justice or of an ideal law or equity at the bar of which law is always judged."[990] Law rests on justice. Fundamental to deconstruction is justice. The most potent forms of poststructuralism train their assault on the idea of justice.[991] This is achieved by poststructuralism deconstructing "the metanarrative by which those with power seek to prescribe or write the conditions by which the rest of us should lead our lives."[992]

Whereas the broader critical movement has concerned itself with extra-legal interests that the law serves and the fact that issues of class, race and gender find concrete expression in the law which claims to be neutral, deconstruction on the hand goes "beyond that well established critique in order to explore two crucial relationships that have determined the life of the institution [law]: that between law and force and that between law and justice."[993]

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[989] Douzinas & Gearey (n 617 above) 75.
[990] Douzinas (n 256 above) 188.
[991] Ward (n 884 above) 163.
[992] Ward (n 884 above) 156.
[993] C Douzinas "Violence, Justice, Deconstruction" (2005) 6 German Law Journal 171-72.

Reflecting on Derrida's "The Force of Law"[994], Douzinas shows Derrida's separation and yet his intertwining of the relation between law and force on one hand and law and justice on the other. The relationship between law and force inheres in that there is no law or there cannot be law if it is not capable (or potentially capable) of enforcement by the police, army and prisons to deter people from violating it.[995] Law has to protect itself. "This violence that follows the law routinely and forms the background against which interpretation can work is called by the philosopher, prophet and flaneur Walter Benjamin's law preserving."[996] The law accordingly preserves or conserves itself by means of violence. The law-preserving or conserving nature through the violence of enforceability by police and prisons ensures law's permanence.[997] Another type of violence is the violence of language's justice which occurs when particularity is reduced to sameness by law.[998]

Force does not only conserve or preserve itself, it "institutes and founds law."[999] For instance, most societies' constitutions are preceded by revolutionary violence which get retrospectively legitimised in their constitutions – "these founding documents will carry in themselves the violence of their foundation."[1000] Douzinas goes further to state that "these repetitions of the traumatic genesis of the new law are reinterpreted as demands of legality and the original violence is consigned to oblivion."[1001] Derrida, according to Douzinas, insists that the violence that founds law and the violence that preserves law are intertwined. In other words, in the beginning there was violence and in the end there is violence. This is merely because the "contemporary acts of legal conservation and interpretation repeat and re-establish the new laws."[1002] The violence referred to is always said to be exercised in the name of justice.

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[994] Derrida (1990) in Douzinas (n 993 above) 171-72.
[995] Douzinas (n 993 above) 171-72.
[996] Douzinas (n 993 above) 171-72.
[997] According to Douzinas, legal interpretations and judgments at every level are characterised by violence. "The architecture of the court room and the choreography of the trial process converge to restrain and subdue the defendant, Douzinas (n 993 above) 173.
[998] Douzinas (n 993 above) 174.
[999] Douzinas (n 993 above) 175.
[1000] Douzinas (n 993 above) 175.
[1001] Douzinas (n 993 above) 175.
[1002] Douzinas (n 993 above) 175.

On the relationship between law and justice Douzinas states that "a postmodernist theory of justice allows otherness to survive and to become a theoretical space through which to criticise the operations of the law's ceaseless repetitions."[1003] poststructuralism as deconstruction is the justice of ethics – the giving of their concrete materiality.[1004] Ethics must, according to Douzinas, be a concern for lawyers. The return to ethics is the return to politics. It is submitted, following Douzinas, that the return to ethics of law is the return to the politics of law. It is about the entrance of the "other", "the stranger, the outsider, the alien or underprivileged who needs law."[1005] In other words, ethics must judge the law. In this sense, when ethics judge the law in the court of ethics, it must ask the law whether law was able to respond to the "unique and singular demands of the person" who came before it. If law is able to respond affirmatively by stating that yes indeed it was able to respond to the unique and the singular demand and eschewed generalisation of the singular and the unique, then ethics will say that law was just in that instance. Law would have done justice, this notwithstanding the aporia of justice – that is the unattainability of justice.

Justice is done when law becomes ethical by responding to the singular and the unique before it, when law acknowledges difference – because it is by acknowledging difference, singularity and uniqueness that law is able to respond to the repressed, oppressed and the excluded. This is because "each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee completely."[1006] It is "this openness to the concrete materiality of the other" that "enables postmodern ethics and justice to resist the totalising influence of politics and law."[1007]

The rule of law is predicated upon the separation of law from morality and ethics. The rule of law reduces or relegates ethics to the private realm because according to the rule of law, ethics are subjective. In terms of the rule of law, law must be insulated

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[1003] Douzinas et al (n 638 above) 24.
[1004] Douzinas et al (n 638 above) 24.
[1005] Douzinas et al (n 638 above) 22.
[1006] Douzinas et al (n 638 above) 23.
[1007] Douzinas et al (n 638 above) 23.

from ethico-political considerations so as to make the exercise of power impersonal and ensure that citizens are equally subjected to the dispassionate rules of rules.[1008] The rule of law, which is essentially a concrete manifestation and expression of the separation of law from morality and ethics, evacuates ethics from justice. "Justice … loses its ethical character and becomes a device for the legitimation and celebration of the law … As no generally acceptable criteria of justice exist, justice becomes restricted to the mere manageable domain of legal procedure."[1009]

On the contrary, deconstruction as a political project demands that justice be grounded in ethics – "the ethical turn to the other."[1010] Justice is the recognition of otherness's uniqueness and irreducible particularity. However justice cannot be defined in advance – because such would be tantamount to the search for the ultimate truth. The ethics of justice are about recognition of otherness. Douzinas however points to the fact of asymmetry between justice and injustice. Injustice can be felt, it can be recognised. But not so with justice.[1011]

Douzinas goes further to identify two types of justices. The first type of justice is legal justice "which is internal to the law and operates when the law meets its own standards and procedures."[1012] The second form of justice is based on Emmanuel Levinas's conception which is about the fact "that justice exists in relation to the other person."[1013] Its point of departure is that the other is never fully present. "As a result, while I have to be just to the other as a finite being with specific demands and desires, I can never be fully just, because the infinity of the other makes the giving of justice impossible."[1014]

[1008] Douzinas & Gearey (n 617 above) 27.
[1009] Douzinas & Gearey (n 617 above) 27.
[1010] Douzinas & Gearey (n 617 above) 27.
[1011] Douzinas & Gearey (n 617 above) 27.
[1012] Douzinas & Gearey (n 617 above) 75.
[1013] Douzinas & Gearey (n 617 above) 75.
[1014] Douzinas & Gearey (n 617 above) 75.

The problem with this is due to the misconception of justice as finite and the finity of justice suggests the undeconstructibility of justice – the end of justice. Douzinas is of the view that due to the infinity of the other or the permanent incompleteness of the other, and this never "fully representable", means that "while I have to be just to the other as a finite being with specific demands and desires, I can never be fully just because the infinity of the other makes the giving of justice impossible."[1015] The only pivot of justice is the respect for singularity of the other, the respect for uniqueness in the encounter with the singular others.[1016]

According to Drucilla Cornell, deconstruction means that law is inevitably open to transformation.[1017] Fidelity to deconstruction means that even a constitution regarded as the best is capable of being interpreted in the name of justice.[1018] In this sense deconstruction opens up possibilities of justice. "The deconstructibility of law is what allows for the possibility of justice."[1019] Deconstruction cannot be divorced from the idea of justice. A law is constructed in the name of justice. To the extent that deconstruction is justice, it cannot therefore not be value-laden.

In *The Philosophy of the Limit*, Cornell redescribes Derrida's theory of deconstruction as the "philosophy of the limit". According to Cornell, "the philosophy of the limit … exposes the philosophical fallacy of legal positivism by showing us the moment of ethical alterity inherent in any purportedly self-enclosed system."[1020] For Cornell, ethical alterity is the transformative possibility present in the act of legal interpretation.[1021]

Cornell refers to what she calls the (1) law of law (the good) ;(2) the right or the moral law of the self-legislating subject; and (3) the principles inherent in the existing legal

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[1015] Douzinas (n 993 above) 177.
[1016] Douzinas & Gearey (n 617 above) 75.
[1017] D Cornell "The Violence of the Masquerade: Law Dressed Up as Justice" (1989-1990) 11 *Cardozo Law Review* 1059.
[1018] Cornell (n 1017 above) 1059.
[1019] Cornell (n 1017 above) 1061.
[1020] D Cornell *The Philosophy of the Limit* (1992) 93.
[1021] Cornell (n 1020 above) 93.

subject.[1022] The "good" (law of law) is the universal which is necessary for all subjects. Thus "the good is the disruption of ontology that continuously re-opens the way beyond what "is" … it is precisely the projection of a horizon of the "good" within the nomos of any given legal system …. that is essential for the possibility of legal interpretation."[1023] The "good", according to Cornell, is crucial for the possibility of legal interpretation.[1024] Law should be run as an instrument of "good", a "good" that must not be defined or prescribed because to describe it would be unfaithful to "good" itself and justice.[1025] "Good" as law is thus indeterminate. In essence Cornell suggests that we continuously transfer and transform the "good" in law. Possibilities abound if we strive to embed the "good" in law. The law of the self-legislating cannot hope to replace the law of law (the good) "because the self cannot overcome the contradictory impulses that rend it apart."[1026] According to Cornell, "legal positivism argues that legal systems are self-enclosed hierarchies that generate their own elements and procedures as part of the mechanism of perpetuation of the system."[1027]

Cornell states that the word deconstruction does not fully capture Derrida's concerns with law-hence the renaming of deconstruction to philosophy of the limit.[1028] Deconstruction, reconceptualised and rearticulated as a philosophy of the limit would not agree that philosophy is an "unreconstructible litter".[1029] Secondly, reconceptualised and rearticulated as philosophy of the limit, deconstruction would not suggest that reality is interpretation throughout.[1030] Deconstruction does not entail radical indeterminacy of meaning and the impossibility of ethical judgment.[1031] In this sense deconstruction does not entail ethical scepticism. Justice, according to Cornell, must not be defined as this would collapse a description into a prescription.[1032] Justice

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[1022] Cornell (n 1020 above) 93.
[1023] Cornell (n 1020 above) 93.
[1024] Cornell (n 1020 above) 93.
[1025] Cornell (n 1020 above) 93.
[1026] Cornell (n 1020 above) 103.
[1027] Cornell (n 1020 above) 101.
[1028] Cornell (n 1020 above) 1.
[1029] Cornell (n 1020 above) 1.
[1030] Cornell (n 1020 above) 1.
[1031] Cornell (n 1020 above) 63.
[1032] Cornell (n 1017 above) 1060.

is in this sense a prescription and not a description. However, justice is aporia[1033] in that although it must be universal, its universality must be particular.

In "Rethinking Legal Ideals after Reconstruction"[1034], Cornell deals with accusations that due to the fact that law and legal and moral ideals are deconstructible, this necessarily presupposes that deconstruction is tantamount to nihilism. Cornell's argument is that deconstruction, as a philosophy of the limit, creates and protects "the possibility of radical legal transformation."[1035] Cornell defends both Walter Benjamin and Derrida's attitudes to the question of violence. She speaks to Benjamin's concern of law conserving violence as opposed to law conserving justice.[1036] Cornell further defends Derrida's "The Force of Law" as essentially about "the possibility of justice."[1037] Deconstruction is justice at the moment it shows the uncrossable divide between law and justice.[1038] Deconstruction is justice as it protects justice from law by demonstrating that justice is separate from the law. Deconstruction protects justice from the violence of the law. It is "a force of justice against law."[1039]

Deconstruction in its quest of protecting justice from law, identifies two myths: the myth of legality and the myth of legal culture. The law legitimises itself by consistently reverting back to the myth of the "intent of the founding fathers" and the claim of the "full readability of the text."[1040] Derrida, according to Cornell, challenges these two myths in the name of justice.[1041]

Cornell's approach, particularly in *The Philosophy of the Limit*, has however come under fire from Jacques de Ville.[1042] De Ville's main argument is that Cornell's

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[1033] Cornell (n 1017 above) 1060.
[1034] D Cornell "Rethinking Legal Ideals After Deconstruction" in A Sarat *Law's Madness* (2006), Available at: https://www.press.umich.edu/pdf/0472113291-ch5.pdf
[1035] Cornell (n 1034 above) 149.
[1036] Cornell (n 1034 above) 150.
[1037] Cornell (n 1034 above) 150.
[1038] Cornell (n 1034 above) 150.
[1039] Cornell (n 1034 above) 162.
[1040] Cornell (n 1034 above) 152.
[1041] Cornell (n 1034 above) 158.
[1042] J de Ville "Deconstruction and Law: Derrida, Levinas and Cornell" (2007) 25 Windsor Y.B. Access Just.

translation of Derrida in *The Philosophy of the Limit* and her other works has had the effect of "taming" Derrida. "Instead of leading to the radical transformation of law and society, Cornell … gives support to an understanding of the relation between law and justice that is unlikely to have this effect."[1043] According to De Ville, Cornell's argument in *The Philosophy of the Limit* is deconstruction can be used as an approach to legal decision making.[1044] Amongst the critique by De Ville on Cornell is Cornell's fusion of Emmanuel Levinas and Derrida which results in Cornell's model for judicial decision-making: "the judge owes a responsibility to the parties that come to court … and not the legal system."[1045]

This model, according to De Ville, leaves Cornell with a dilemma of who is "the other" because for Cornell every litigant is the "the other".[1046] In criminal proceedings, every accused is "the other". This is because in litigation, particularly in civil proceedings, both litigants are "the other" and therefore the question almost always inevitably arises as to who of the two or more parties is "the other".[1047] Here De Ville is critical of Cornell's translation of Levinas's "other" into law as not truly representative of Derrida but only a representation of Levinas. In short, De Ville objects to Cornell's misappropriation of Derrida, cross-fertilising Derrida with Levinas in order to come up with a model of judicial making that depoliticises "the other".

According to De Ville:

> The ethical relation and its relation to law conceived as such, also leaves us with something close to relativism. If every person involved in a court case is a potential other who has to be recognised and whose perspective should ideally be respected, it is safer to ignore 'the Good' and focus on the law and that towards which it should strive.[1048]

[1043] De Ville (n 1042 above) 35.
[1044] De Ville (n 1042 above) 35.
[1045] De Ville (n 1042 above) 36.
[1046] De Ville (n 1042 above) 36.
[1047] De Ville (n 1042 above) 39.
[1048] De Ville (n 1042 above) 37.

I suggest that the subtext of De Ville's objection to Cornell is largely based on De Ville's conclusion that Cornell's approach to deconstruction is as technique instead of being a political project. This is largely based on De Ville's accusation that Cornell depoliticises ethics by abstracting the "other" without infusing "the other" with politics. Contrary to De Ville, I understand Cornell when making to reference to "other" to be making an a priori assumption that the other she is referring to is already under the rubric of the political. This is "the other" who not only is the outsider and the stranger, but "the other" who is colonised, exploited, oppressed and marginalised. After all, it is Cornell who states that deconstruction does not entail radical indeterminacy of meaning and the impossibility of ethical judgment[1049] and this means that deconstruction is not a technique at service of conservatives and forces of progress. If "the other" of Cornell were the abstract other, who could be a racist right wing, that would certainly presuppose a radical indeterminacy of the notion of "other" which would mean the depoliticised other.

I also understand Cornell to be speaking about justice. The question is who needs justice. Again I understand Cornell to be saying that the other who needs justice is the other who is marginalised. It is Cornell who after all states that deconstruction, as a philosophy of the limit, creates and protects "the possibility of radical legal transformation."[1050]

5.6.2. Poststructuralism, deconstruction and the limitations of law

Poststructuralism fundamentally challenges and critiques modern jurisprudence's way of thinking about the law. Modern jurisprudence thinks about law as an objective and neutral phenomenon driven by procedures that are technical and judges that are neutral. Law in this sense is neutral and objective whereas morals are relative and subjective. Poststructuralism does not revolt against law, but against the metaphysical

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[1049] Cornell (n 1020 above) 63.
[1050] Cornell (n 1020 above) 63.

tradition of modern jurisprudence.[1051] For poststructuralism, the problematic is the epistemological prism of modernity.

Thus modern philosophical approaches create limitations for law. Approached from the angle of Douzinas and Cornell and their analysis of Derrida on law, the limitations of law are essentially modernity's treatment of law and justice as synonymous. Douzinas theorises about justice as being about law's consciousness towards uniqueness, singularity and particularity to the other who is excluded, silenced, repressed and oppressed. In this sense the justice of poststructuralism is ethics – it must be ethical. For law to transcend its limitations, it must be separated from justice. This separation is done in order to protect justice and not in order to protect law. In a way, it could be stated that a poststructuralist attitude towards law is that there must be the rule of justice as opposed to the rule of law. Justice and not law must reign supreme for if justice were to reign supreme this would necessarily mean that ethics also reign supreme and this would further mean that law, guided by justice, is able to appreciate difference.

However in 2014 Douzinas returns with a rethink of the ethical turn. Douzinas states that the reconnection of morality and law, of ethics and law was precipitated by the hermeneutics school, itself resuscitated by the fall of communism in 1989. It was in this period that the morality of law "replaced old honest positivism."[1052] Henceforth all law was moral.[1053] "The feverish moralism of the period turned ethics into a terrain of struggle by developing neo-Kantian theories of morality and justice."[1054] Critics at this period maintained that there are essentially two kinds of justice (as stated earlier), internal justice and external justice. Internal justice related to the ability of law to hold itself to its promise. But justice proper, both inside and outside the law judges the law on the basis of the "transcendent other".[1055] Singularity, particularity, uniqueness and

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[1051] There is some congruence between poststructuralism and the systems theoretical approach against this revolt against metaphysics.
[1052] Douzinas (n 993 above) 192.
[1053] Douzinas (n 993 above) 192.
[1054] Douzinas (n 993 above) 192.
[1055] Douzinas (n 993 above) 193.

difference become the transcendental ideals that are used to judge the justice of law. Most importantly however, Douzinas pessimistically, and slightly in a regrettable mode, states that "the emergence of the 'other' as a key critical position was an admission of defeat"[1056] on the side of the critics. Douzinas states that:

> With hindsight this explicit and extravagant turn to morality was perhaps too big a concession to the dominant ideology of the time. It did not always avoid a slide into moralism and left critics exposed to accusations of hypocrisy. More importantly the turn to morals re-introduced an emphasis on the individual and her treatment, a direction that critical theory has consistently resisted.[1057]

Douzinas posits a new turn – a turn to a politics of resistance. The turn to a politics of resistance acknowledges that "law is no longer the form, instrument or restraint of power but has started becoming an integral part of its operation."[1058] Law has, more and more, come to represent force and issues of efficiency, and has more and more evacuated its normative weight and value.[1059]

5.6.3. Deconstruction as justice and transformative constitutionalism: conflation of law with justice

I have already suggested that embedded in the notion of transformative constitutionalism is the assumption that the intractable problems of colonialism and apartheid will henceforth be resolved by and within law and constitutionalism. I contend that transformative constitutionalism presupposes that justice as justice is forced to anchor itself within the purview of law and justice. The forceful subsumption of justice out of the law leaves us only with legal justice. This, I suggest, is the consequence of the attempt to realise justice through legal and constitutional means. The result is that justice becomes guided by law as opposed to law guiding justice. I

[1056] Douzinas (n 993 above) 193.
[1057] Douzinas (n 993 above) 193.
[1058] Douzinas (n 256 above) 194.
[1059] Douzinas (n 256 above) 195.

take cue from Douzinas that justice must judge law and for it to do so, it must be, as it should be, separate from the law. Douzinas states that "understanding the law, its consciousness, cannot be separated from an exploration of law's justice or of an ideal law or equity at the bar of which law is always judged."[1060] Law rests on justice. The claim that is being made, that transformative constitutionalism is complicit with the conflation of law and justice must be preceded by the question of how and why is transformative constitutionalism complicit with the conflation of law and justice.

I have already indicated that colonialism and apartheid, together with their attendant practices of systemic exploitation, dispossession, racial domination and oppression best capture the history of South Africa. All these were accompanied by a thorough process of epistemic violence. The proponents of transformative constitutionalism assert that colonialism, apartheid and their concomitant practices of exploitation, dispossession, racial discrimination and oppression can best be dealt with by embarking on "a long term project of constitutional enactment, interpretation and enforcement in order to transform the country's political social institutions and power relations."[1061] So long as we adhere to a large-scale social change through non-violent political processes grounded in law, progress is inevitable.[1062] Therefore transformative constitutionalism, bar the impediments of legal culture, should be a linear march towards progress. In this sense, if injustice is a result of colonialism and apartheid, then transformation, read and understood as justice, would be found in law and constitutionalism. The concern with this approach is its unbridled reliance on adjudicatory process.

The essence of transformative constitutionalism is that social change must be through a non-violent process grounded in law, in the view of Klare. This essentially presupposes that it is the rule of law that must guide and enable change. Douzinas, in addressing the questions of justice, ethics and morality states that the rule of law is predicated upon the separation of law from morality and ethics. The rule of law reduces

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[1060] Douzinas (n 256 above) 188.
[1061] Klare (n 7 above) 150.
[1062] Klare (n 7 above) 150.

or relegates ethics to the private realm because according to the rule of law, ethics are subjective. In terms of the rule of law, law must be insulated from the ethico-political considerations so as to make the exercise of power impersonal and ensure that citizens are equally subjected to the dispassionate rules of rule.[1063]

Douzinas proceeds to state that the essence of the rule of law is its evacuation of ethics from justice. "Justice … loses its ethical character and becomes a device for the legitimation and celebration of the law … as generally acceptable criteria of justice exists, justice becomes restricted to the manageable domain of legal procedure."[1064] Justice is the recognition of otherness's uniqueness and irreducible particularity. However, justice cannot be defined in advance – because such would be tantamount to the search for the ultimate truth. The ethics of justice are about recognition of otherness.

The idea of law as justice and justice as law is a product of the Enlightenment tradition and modernity. Approached through the optical analytics of Douzinas and Cornell and their analysis of Derrida on law, the limitation of law is modernity's treatment of law and justice as synonymous, an approach that is similar to the dominant approach within the notion of transformative constitutionalism. Douzinas theorises about justice as being about law's consciousness towards uniqueness, singularity and particularity to the other who is excluded, silenced, repressed and oppressed. In this sense the justice of poststructuralism is ethics – it must be ethical.

Patrick Lenta applies Michel Foucault, Jean-Francois Lyotard and Jacques Derrida's insights on law and justice and how their insights can be applied to post-apartheid South Africa.[1065] In relation to Foucault, Lenta affirmatively states Foucault's view to the effect that the legal system as conceived by Enlightenment has failed to live up to

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[1063] Douzinas & Gearey (n 617 above) 27.
[1064] Douzinas & Gearey (n 617 above) 27.
[1065] P Lenta "Just Gaming? The Case for Postmodernism in South African Legal Theory" (2001) 17 South African Journal of Human Rights 87.

its emancipatory pretensions.[1066] This is because the modern legal system, although apparently humane, is actually a coercive product of Enlightenment gone awry.[1067] The ideas of modernity such as forward progress, "for instance the idea that South African law, by its adoption of a Bill of Rights and the judiciary's self-professed quest for humanitarian values, is becoming increasingly humane and less coercive" – is challenged by Lenta.[1068]

A Foucauldian reading challenges the idea of progressivism. A Foucauldian reading would show that while South Africa's transition from apartheid to liberal democracy seems like political progress, it is in fact a smokescreen for repression and discipline.[1069] This is because law's concepts and categories such as "reasonableness" exclude and turn concrete individuals into legal subjects. "As the law ascribes fixed and repeatable identities and expectations to those brought before it, it necessarily negates the singularity of the other."[1070]

Lenta appropriates Lyotard's insights to demonstrate how legal discourse denies the victim of apartheid the words in which to express their grievance.[1071] Lyotard's notion of *differend* is about the one who cannot be heard because the legal concepts and categories do not recognise him or her. In this sense, justice of the law has the effect of excluding the *differend*. In relation to Derrida, Lenta appropriates deconstruction to suggest that the South African Constitution can be said to be the moment where law and justice converge "in an impossible attempt to translate the infinity of justice into the finity of law."[1072]

Mogobe Ramose, traces the genesis of the conflation of justice with law to the period of South Africa's transition. According to Ramose, the transition to democracy in South

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[1066] Lenta (n 1065 above) 87.
[1067] Lenta (n 1065 above) 87.
[1068] Lenta (n 1065 above) 87.
[1069] Lenta (n 1065 above) 188.
[1070] Lenta (n 1065 above) 192.
[1071] Lenta (n 1065 above) 192.
[1072] Lenta (n 1065 above) 197.

Africa was characterised by two paradigms, namely the paradigm of decolonisation and the paradigm of democracy.[1073] The paradigm of decolonisation necessarily involves the restoration of the title of territory and sovereignty over it.[1074] It also includes restitution. "It would bring the conqueror to renounce in principle and expressly the title to South African territory and sovereignty over it."[1075] The decolonisation paradigm is in contradistinction with the democratisation paradigm. This is because the democratisation paradigm "proceeds from the premise that given the evolutionary character of constitutionalism in South Africa, the major weakness of the 1983 constitution consists in the exclusion of the indigenous conquered people."[1076] In this sense, the democratisation paradigm posits that the problem is solved if the constitution includes the previously excluded.

It should be noted, in parenthesis, that Ramose's thesis on the two paradigms of democratisation and decolonisation and the subsequent victory of the democratisation paradigm are consistent with Klug's thesis on the "juridification of the politics of transition"[1077], Terreblanche's observation of ideological "somersaults" by the ANC during the transitional period[1078] and Van Der Walt's characterisation of one strand that argued, during transition, that transformation would best be served by the re-establishment and re-affirmation of the scientific soundness and objectivity of law to ensure that law is purged of its pernicious political influences.[1079] These views lend credence to Ramose's assertion of the victory of the democratisation paradigm. The net effect of the victory of the democratisation paradigm was that, according to Ramose, injustice was turned into justice. This is because, for Ramose, justice inheres in the restoration of the title to territory and sovereignty over it. This is based on the fact the right to life is inextricably linked with the right to land. Land is most fundamental in the sense that "it is the basis for and precedes all other human rights."[1080]

[1073] Ramose (n 239 above) 486.
[1074] Ramose (n 239 above) 486.
[1075] Ramose (n 239 above) 486.
[1076] Ramose (n 239 above) 487.
[1077] Klug (n 132 above) 72.
[1078] Terreblanche (n 123 above) 64.
[1079] Van der Walt (n 159 above) 6.
[1080] Ramose (n 239 above) 486.

Therefore, in Ramose's view, the issue of land and its restoration is a matter of justice. Justice, in the context of South Africa, demands the return of land to the indigenous conquered people. The failure to resolve the issue of conquest, of land and its return, prior to constitutionalisation means that "the right of conquest" over indigenous people has now acquired the status of a juristic fact."[1081] Ramose insists that malevolent injury cannot or should not translate into a right for this is tantamount to transforming injustice into justice.[1082] "A right cannot arise from a wrong … a claim to territorial title which originates in an illegal act is invalid."[1083]

In this sense, it could be argued that the current constitutional dispensation therefore excludes justice, seen as the second order observer. Having had their sovereignty destroyed through conquest, this conquest was further buttressed by the legal prohibition upon the conquered so that they never ever are able to revive their claim to territorial title and sovereignty over it[1084], a sort of Lyotardian double silencing. "In this way the universe of the juristic fact excludes, discards and ignores a matter of natural and fundamental justice."[1085]

In the final analysis, Ramose makes a distinction between what he considers to be natural or fundamental justice and justice according to law. Accordingly "what people hold to be natural or fundamental justice does not coincide with justice according to law."[1086] The failure to deal with poverty is attributed by Ramose to the fact that "decolonisation was the continuation of the original injustice of colonisation by the subtle imposition of the Western liberal-democratic model."[1087] Accordingly, the eradication of poverty in South Africa cannot succeed unless the Constitution is radically revised to ensure that Ubuntu as African philosophy becomes ubiquitous. The

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[1081] Ramose (n 239 above) 470.
[1082] Ramose (n 239 above) 470.
[1083] Ramose (n 239 above) 471.
[1084] Ramose (n 239 above) 486.
[1085] Ramose (n 239 above) 486.
[1086] Ramose (n 239 above) 463.
[1087] Ramose (n 240 above) 10.

Constitution must be based on justice and justice is according to Ramose, the return of land.

According to Lenta, the current conception of law and justice in South Africa is arguably misconceived and inadequate to the task of providing a just justice.[1088] The conflation of law and justice presents further problems. According to Van Marle, law is not capable of recognising or remembering and imagining the past and the future. Law fails to "recognise the particularity of an event and reverts to generalisations and universal time."[1089] Law's rule bound nature, judgements and its focus on calculation exclude the particular and "closes the door of the law".[1090] Van Marle states that a deconstructive approach to legal interpretation is more attentive to difference and particularity.[1091] It is able to usher in "multiple notions of truth and fluidity to meaning".[1092] It is capable of realising what Snyman calls "the audibility of suffering".[1093]

Van Marle uses the example of TRC and its legalistic approach to point out that "law, in its relation to time and space, to the past, the future and the particularity of the moment or event, fails to follow an approach other than that which its institutional form necessitates."[1094] It is apt at this point to quote Snyman's quotation of Aryeh Neier of the Human Rights Watch who states as follows:

> Firstly, as civilised society we must recognise the worth and dignity of those victimised by abuses of the past. If we fail to confront what happened to them, in a sense we

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[1088] Lenta (n 1065 above) 182.
[1089] K van Marle "Law's Time, Particularity and Slowness" (2003) 2 *South African Journal of Human Rights* 13.
[1090] Van Marle (n 1089 above) 14.
[1091] Van Marle (n 1089 above) 25.
[1092] Van Marle (n 1089 above) 25.
[1093] J Snyman "Thoughts on dealing with the legacies of radically unjust political behaviour" in W B Le Roux & K van Marle (eds) *Law, Memory, and the Legacy of Apartheid: Ten Years after AZAPO v President of South Africa* (2007) 3.
[1094] Van Marle (n 1089 above) 24.

argue that those people do not matter, that only the future is of importance. We also perpetuate, even compound their victimisation.[1095]

In the final analysis, a poststructuralist approach suggests that justice should be separate and protected from law. The incalculability of justice cannot be captured within the Universalist pretensions of law and its decisionist imperative. "In other words that means that it is impossible to capture justice within systems."[1096] In this sense, transformative constitutionalism, particularly if viewed from a poststructuralist point of view, inadvertently results in the conflation of law and justice.

5.7. Deconstruction versus systems theory

In this part of the chapter I evaluate and explicate possible points of convergence and divergence between deconstruction and systems theory. I use the words "possible convergence and possible divergence" deliberately in order to reflect the possibility of what Teubner calls "mutual paranoia" between systems theory and deconstruction.[1097] I make an observation below of instances where what appears at face value to be a clear cut antithesis between deconstruction and systems theory is sometimes nullified by a similar conclusion reached by deconstruction and systems theory. In other words, is there a possibility of an "autopoietic deconstruction" and a "deconstruction of systems"? Is there a possibility that when deconstruction "deconstructs" systems, it does so autopoietically and when systems theory observes deconstruction, it is at the same time deconstructing. The answer to the foregoing is contingent on an analysis of possible areas of divergence and convergence of both systems theoretical approach and deconstruction.

I have in chapter three alluded to the view that according to Luhmann, modern society is characterised by functional differentiation with people fragmented into roles within

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[1095] Snyman (n 1093 above) 6.
[1096] Van Marle (n 1089 above) 26.
[1097] G Teubner "Economics of Gift-Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann" (2001) 18 Theory, Culture & Society 29.

social subsystems. "In this schema, people … become living systems which exist as bodies and bodily parts, and as psychic systems, which produce meaning through consciousness. Society on the other hand, consists of interdependent social systems which make sense of the environment through communications."[1098] Put differently, self-referential systems according to Luhmann comprise of living systems, psychic systems and social systems. Luhmann's focus is on social systems. Social systems comprise of interactions, organisations and society.[1099] Interactions, organisations and society all use communications as their medium of existence. However, for society the only communications that are regarded as meaningful are the communications that are acknowledged by society's subsystems such as law, politics, science and art.[1100]

Put differently, society, for Luhmann, consists of, and only of, everything that is recognised as a communication by one or more of its subsystems.[1101] In this sense, for communication to be recognised as meaningful it must be the sort of communication that is either recognised by law, politics or religion. If such communication does not fall within or is not recognised by one or more of these functionally differentiated subsystems, it cannot be referred to as meaningful communication.[1102] "Nothing in society's environment can become part of society until it has been communicated, that is, until it has meaning for society, that is for one or more of society's communicative subsystems."[1103]

Derrida's main concern is with questions relating to "finite and temporal emergence, as opposed to stable and infinite presence of existence."[1104] Deconstruction is concerned with that which is not constructed by the text, in other words, that which is excluded by the text.[1105] *Différance* is the kernel of deconstruction. Cornell describes *différance* as being about the fact that truth is a temporal concept, that "it is only

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[1098] M King & C Thornhill *Niklas Luhmann's Theory of Politics and Law* (2003) 7.
[1099] King & Thornhill (n 1098 above) 7.
[1100] King & Thornhill (n 1098 above) 7.
[1101] King & Thornhill (n 1098 above) 7.
[1102] King & Thornhill (n 1098 above) 7.
[1103] King & Thornhill (n 1098 above) 7.
[1104] Veitch et al (n 312 above) 175.
[1105] Veitch et al (n 312 above) 177.

represented in time" and that "there can be no all-encompassing ontology which claims to tell us the truth of all."[1106] Derrida's concern is to deconstruct the world constructed by language.[1107] In the final analysis deconstruction can roughly and broadly be summed up as an anti-logocentrism approach that disrupts the truth of the ancients, the "western philosophical tradition's search for universal answers"[1108] and the search for the final meaning – for meaning is contingent.

I suggest that in the context of South Africa, constitutionalism has been inaugurated as our "universal answer". Section 2 of the Constitution makes, not just any law, but also any form of conduct invalid if it does not conform to the constitution. Section 2 of the Constitution essentially inaugurates constitutional democracy such that ontological being becomes constitutional. In other words, our very existence is constitutional existence or put differently, subjectivities are forced to be constitutional. Constitutionalism as a form of "discursive formation" and the institutional and normative conditions that gave life to constitutionalism have their roots in Europe during struggle by the bourgeois against absolutism.[1109] "Capitalism's need for predictability, calculability and security of property rights and transactions constituted the material base of law."[1110] This was achieved by conceptualising a particular form of state arranged in a particular way (i.e. limited state, separation powers and the rule of law).[1111] In this sense constitutionalism should be seen as a product of modernity and therefore a product of the western philosophical tradition's search for universal answers.

5.7.1. On possible convergence

Cornell's view is that there exists some form of affinity between systems theory and deconstruction. This affinity between deconstruction and systems theory inheres in

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[1106] Cornell (n 1020 above) 128.
[1107] Veitch et al (n 312 above) 176-77.
[1108] Stacy (n 655 above) 85.
[1109] N L Mahao "The Constitutional State in the Developing World in the Age of Globalisation: From Limited Government to Minimum Democracy" (2008) 12 Law, Democracy and Development 3.
[1110] Mahao (n 1109 above) 3.
[1111] Mahao (n 1109 above) 5.

that both rely on an antihumanist methodology.[1112] In other words both deconstruction and systems theory reject the traditional transcendental notion of humanity and the human condition comprising of a universal moral core as metaphysical. Both Luhmann and Derrida, states Cornell, agree that temporalisation of being is an antithesis of the "fully knowable" or "the claim to fullness of a given reality."[1113] The metaphysical claim to "fullness" is precisely what Nietzsche critiqued by arguing that no identity is ever fixed and stable. Furthermore embedded in any claim to fullness is the idea of one form of final and single truth and this is belied by Foucault's cogent assertion about the fact that truth itself has a history and thus contingent. This is to say that both Luhmann and Derrida reject logocentricism.

Luhmann's anti-humanism is a logical outcome of his antithetical stance towards theories that reduce society into a collection of individuals, each with unobservable singular consciousness.[1114] For Luhmann, the focus should be on communications, which are observable, as opposed to thoughts or consciousness which are not. Luhmann is of the view that theories or "isms" such as liberalism or socialism, correct as they may be in some instances, are inadequate as prisms for social analysis.[1115] This is due to the fact that in almost all instances, the point of departure of these theories is informed by a particular conclusion on the nature of human beings.[1116] In essence Luhmann eschews what Andreas Philippopoulos-Mihalopoulos calls the "ontological metaphysics questions of "being" "in the sense of both human existence and static identity".[1117]

Both Derrida and Luhmann reject attempts to ground law on the concept of justice.[1118] They agree that legal and economic institutions are based on paradoxes and antimonies and not on rational principles; the platitudinal critique of law as being based on ideology and power or law as the expression of economic or political interests (a

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[1112] Cornell (n 1020 above) 116.
[1113] Cornell (n 1020 above) 128.
[1114] King & Thornhill (n 1098 above) 4.
[1115] King & Thornhill (n 1098 above) 4.
[1116] King & Thornhill (n 1098 above) 4.
[1117] Philippopoulos-Mihalopoulos (n 486 above) 68.
[1118] Teubner (n 1097 above) 29.

view held by most American CLS) is rejected by both Luhmann and Derrida as superficial (instead Luhmann and Derrida see law "as caught in the paradoxes of its own self-referentiality")[1119]; Teubner states that both theories share "post-metaphysical, post-dialectical and poststructuralist characters."[1120] Deconstruction and systems theory share similar conceptual prisms such as Derrida's "*différance* and systems' "difference-creating cascades of distinctions in various contexts (observation); deconstruction's "iteration" and systems' "recursive self-application[1121]; deconstruction's "presence/absence" and systems' "inclusion/exclusion of systems' distinctions"; deconstruction's "supplement" and systems' "blind spot distinctions[1122]; and deconstruction's "foundations of violence" and systems' "arbitrary beginning of autopoiesis".[1123] In short, both agree that meaning is constituted by traces in that a present meaning is always a "palimpsest".[1124] "Meaning thus never has any solid purchase in any present reality. It is the product of spectral events of differing, deferring, tracing and supplementation."[1125] The notion and the search of "a core meaning" is rejected precisely because of the contingency of both the notions of truth and knowledge.

What Teubner suggests is that there are epistemological similarities between systems theory and deconstruction. The epistemological similarities relate to how meaning

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[1119] Teubner (n 1097 above) 31.

[1120] G Teubner "The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy" (1997) 31 Law and Society Review 766.

[1121] Iteration refers to the fact that communication systems need to continuously refer back to past communications "in order to make a decision on (a) whether the utterance (act, gesture and so on) has meaning within its terms and is not mere noise and (b) what the meaning might be", See King & Thornhill (n 1098 above) 17. A sign can act as a sign only if it can be repeated … Each repetition differentiates spatially and defers temporally. The first and the second usage of a sign, sentence, or text are separate and occur at two different points in time. Repetition is the absolute prerequisite for the sign's function, the production of meaning. The system is closed because it is recursive, it is self-referential. The elements of the system reproduce the elements of the system through the interaction of the elements of the system, See Douzinas & Gearey (n 617 above) 6.

[1122] Supplements and blind spots essentially refer to deparadoxification wherein the system attempts to conceal the paradox. Supplementarity means the "paradoxical coexistence of both supplement and supplant, namely the addition and a replacement. Reference or invocation to the external becomes a supplement, See Cornell (n 1020 above) 128.

[1123] Teubner (n 1120 above) 766.

[1124] The concept of "palimpsest is borrowed from Van Marle & Motha's characterisation of post-apartheid critique as standing in the guise of a palimpsest which they then define as "a surface on which the original writing has been erased to make way for new writing, but upon which traces of the old writing remain visible", See Van Marle & Motha (n 15 above) 25.

[1125] Veitch et al (n 312 above) 179.

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comes about (it must be noted that law is a meaning processing system. It is a meaning related and producing system as it has as its elements communication).

I provide a few examples to further illuminate Teubner's view above on the similarities between deconstruction and systems theory. Firstly, Derrida's concept of *différance* denotes the fact that signs, words and images are characterised by the double dynamic of differentiation and postponement, or put differently, signs, words and images acquire (temporary) meaning by differing and differentiation – a sort of a palimpsest.[1126] The meaning of a sign is result of its difference with another sign. Douzinas and Gearey put it in this manner:

> To become itself, the sign must take a detour through all other signs from which it is distinguished. This spatial distinction is accompanied by a temporal deferral. The sign or signs must leave the present and sink into the past to let the next sign present itself, so that the now past sign can acquire its identity through its differentiation from the present one. Derrida has called this process of necessary spatial and temporal differentiation *différance.[1127]*

In the concept of *différance*, every element of a system is constituted through the traces of all others."[1128] Precisely because the meaning of one sign is contingent on the existence of another sign, the meaning of any one sign is always deferred or postponed.[1129] "The meaning of any one signifier only comes to the fore once other signifiers have also been at play."[1130] In this sense the fact of differentiation carries within its womb the inevitability of deferring.

It is because of this differentiation and differing that meaning is never at any given point fully present and final. It is always becoming, always transient and always

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[1126] Veitch et al (n 312 above) 178.
[1127] Douzinas & Gearey (n 617 above) 63.
[1128] Douzinas & Gearey (n 617 above) 64.
[1129] Veitch et al (n 312 above) 178.
[1130] Veitch et al (n 312 above) 178.

contingent. *Différance* is about the fact that interpretation of meaning is unstable and contingent.[1131] It illuminates the instability of meaning. "Individuals interpretation of meaning and reality and the legal and philosophical positions resulting from them, derive not from independent fixed truth but from a web of interdependent contingent interpretations".[1132]

In a nutshell, *différance* functions in two ways: differing and deferring. In relation to the differing aspect, interpretations of meaning differ by making distinctions and distinguishing a meaning of a word from another.[1133] In relation to the deferring aspect, interpretations defer by having an interval in meaning – by reserving meaning and thereby postponing meaning.[1134] This essentially temporalizes meaning which means that because meaning is temporal, it cannot be transcendental and this further suggests that ultimately meaning is always becoming. This therefore negates the notion of a final meaning. Put differently:

> This sense of difference denies the relationship of meaning to presence, thereby cracking the Platonic core of Western metaphysics: 'the relationship to the present, the reference to a present reality, to a being is deferred because differentiality makes elements signify meaning by referring to the past and the future meanings in shifting and centreless network of meaning.[1135]

In the final analysis, "in the philosophy of difference, every element of a system is constituted through the traces of all others."[1136] Luhmann, in possible agreement with Derrida's *différance*, refers to the fact that "all cognition ultimately consists in distinguishing".[1137] Any act of cognition must first start with a distinction, including communication.[1138] For instance, "if the selection is on the basis of what constitutes

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[1131] Matthews (n 965 above) 105.
[1132] Matthews (n 965 above) 110.
[1133] Matthews (n 965 above) 110.
[1134] Matthews (n 965 above) 111.
[1135] Matthews (n 965 above) 111.
[1136] Douzinas & Gearey (n 617 above) 63.
[1137] Christodoulidis (n 275 above) 78.
[1138] King & Thornhill (n 1098 above) 12.

law, it is law which becomes the marked space and non-law which becomes the unmarked space."[1139] A rule cannot be simultaneously a law and a non-law.[1140] "Every distinction reproduces the difference between the marked and unmarked space".[1141] For Christodoulidis, systems theory is ultimately about "*perpetuum mobile* of difference-making".[1142]

The parallels between Derrida's *différance* and systems' difference creating cascades of distinctions are already apparent. For a sign

> to become itself, the sign must take a detour through all other signs from which it is distinguished. This spatial distinction is accompanied by a temporal deferral. The sign or signs must leave the present and sink into the past to let the next sign present itself, so that the now past sign can acquire its identity through its differentiation from the present one.[1143]

For systems theory, the distinction-indication-re-entry allows the system to establish its boundaries.[1144] In a nutshell, Derrida's *différance* could be said to have the same objective with Luhmann's observation. In the final analysis, both, I suggest, entail the fact that meaning comes about through the act of differentiation. Cornell defines *différance* as being about the fact that truth is a temporal concept, that "it is only represented in time" and "there can be no all-encompassing ontology which claims to tell us the truth of all."[1145]

In terms of systems theory, a social system is autopoietic in that it is self-referential because it produces and reproduces its own elements through the interaction of its elements. Communication is recursive in that there is always a dynamic link between

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[1139] King & Thornhill (n 1098 above) 12.
[1140] King & Thornhill (n 1098 above) 12.
[1141] King & Thornhill (n 1098 above) 13.
[1142] Christodoulidis (n 275 above) 78.
[1143] Douzinas & Gearey (n 617 above) 63.
[1144] Christodoulidis (n 275 above) 78.
[1145] Cornell (n 1020 above) 128.

the previous communication and the new communication. In between these is the concept of meaning. Meaning occurs when the system differentiates itself from the environment.

The foregoing may explain why Teubner sees the relationship between systems theory and deconstruction as characterised by "a dynamic of mutual persecution" and "reciprocal fears" and this resulting in "deconstructive moves and systemic counter-moves". [1146] Teubner employs the notion of "paranoia" to define the relationship between systems theory and deconstruction.[1147] Autopoietic systems are "Jacques Derrida's nightmare, the gift of justice as Niklas Luhmann's redemption".[1148] Paranoia is defined as a mental illness in which a person may wrongly believe that other are trying to harm them and or a fear or suspicion of other people when there is no evidence or reason for this.[1149] Thus far the use of paranoia to define the relationship between systems theory and deconstruction by Teubner seem to suggest that in actual fact, deconstruction and systems theory's differences require a much more complex analysis.

5.7.2. On possible divergence

Cornell critiques systems theory on at least two levels, namely systems theory approach to law as autonomous and normatively closed and ultimately the systems theory's implications for the concept of justice. In relation to the concept of autonomy, Cornell firstly compares autopoiesis and legal positivism. Cornell states that what separates Luhmann from traditional positivist is that in terms of Luhmann's systems theory, the norms of law are not found outside, such as the legislature but are to be found in the "already-in-place legal system".[1150] According to Cornell's understanding of Luhmann, "norms, then are purely internal creations, serving the self-generated

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[1146] Teubner (n 1097 above) 9.
[1147] Teubner (n 1097 above) 30.
[1148] Teubner (n 1097 above) 30.
[1149] See A S Hornby *Oxford Advanced Leaner's Dictionary of Current English* (2010) (8th edition)
[1150] Cornell (n 1020 above) 124.

needs of the system without corresponding "similar" items in the environment."[1151] In this sense the difference between legal positivism and systems theory is that in terms of systems theory norms are generated internally and historically they have no beginning "except an always renewed reconstruction of the past"[1152] in circular and recursive manner. On the other hand positivists although agreeing with systems theory on the notion of the autonomy of law, nonetheless argue that law is a depository of morals and this is due to the fact that the legislature would have considered and incorporated moral values in a statute. We should not however forget Teubner's notion of reflexive law which constitutes a slight variation in that the notion of reflexive law introduces the idea of relative autonomy of law wherein law in certain instances is capable of being used as an instrument for the betterment of society.

Cornell further argues that notwithstanding the fact that law in a modern, functionally differentiated society is autonomous according to Luhmann, such autonomy cannot be identified with justice. Thus the autonomy of law in terms of systems theory does not presuppose justice because justice cannot be reduced to pre-given norms of any legal system.[1153]

Cornell's critique of Luhmann is based amongst others, on the systems theory notion of normative closure. There are a number of ways in which systems can be said to be closed. In the first instance, and by way of example, a legal system does not and cannot be said to produce scientific findings. This is the function of the subsystem of science. A political subsystem cannot be said to produce findings on what constitutes good art.[1154] Systems can therefore be said to be closed in the sense that they can produce in accordance with their internal operations, including their binary codes. The second sense of closure is in that the legal system needs to continuously refer back to itself to clarify whether something is legal. "Only law can answer legal questions … the legal system is able to achieve this operation because it has constructed within its

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[1151] Cornell (n 1020 above) 124.
[1152] Cornell (n 1020 above) 124.
[1153] Cornell (n 1020 above) 116.
[1154] King & Thornhill (n 1098 above) 26.

communications a prior definition of its own identity which it now applies to all new information in its environment."[1155]

According to Cornell, autopoietic closure privileges the present. It creates one reality thereby excluding the possibility of a different future. In this sense Cornell is of the view that normative closure merges law and justice, making law synonymous with justice[1156], a proposition that is antithetical to deconstruction which separates and protects law from justice. Normative closure makes law to presuppose justice as part of the systems' deparadoxification.[1157]

It is Cornell's latter claim relating to law presupposing justice as part of the systems deparadoxification that invites sharp focus. I draw on Philippopoulos-Mihalopoulos's lucid treatment of the relation between law, justice, paradox and deparadoxification from a Luhmannian point of view.[1158]

According to Philippopoulos-Mihalopoulos, justice projects the legal system as unified.[1159] The legal system describes itself as justice – it uses the norm of justice to describe itself.[1160] "The system itself has to define justice in such a way that makes it clear that justice must prevail and that the system identifies with it as an idea, principle or value."[1161] In this sense what is lawful is just and what is unlawful unjust.[1162] However critical in all these, what Philippopoulos-Mihalopoulos calls the first "the radical coup of autopoiesis", is the ability of justice to be inside and outside of the system at the same time.[1163] The legal system accepts justice as a *sine qua non*. "Justice is the final word for the legal system."[1164] Justice is the *telos* of the legal

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[1155] King & Thornhill (n 1098 above) 26-7.
[1156] Cornell (n 1020 above) 123.
[1157] Cornell (n 1020 above) 123.
[1158] Philippopoulos-Mihalopoulos (n 486 above).
[1159] Philippopoulos-Mihalopoulos (n 486 above) 90.
[1160] Philippopoulos-Mihalopoulos (n 486 above) 91.
[1161] Philippopoulos-Mihalopoulos (n 486 above) 91.
[1162] Philippopoulos-Mihalopoulos (n 486 above) 91.
[1163] Philippopoulos-Mihalopoulos (n 486 above) 91.
[1164] Philippopoulos-Mihalopoulos (n 486 above) 92.

system, its ostensible reason for existence. This is how the legal system looks at itself as a first order observer. This, I argue, is precisely in line with all strands of republicanism. Embedded in republicanism is an *a priori* assumption in the capacity of law and constitutionalism to be just because, in the view of republicanism, law is synonymous with justice, so long as law is interpreted in a manner that eschews positivist approaches. The notion of transformative constitutionalism in South Africa suffers from a similar blind-spot in that, bar a change in legal culture, the law should have the capacity to bring about justice. However, Ramose, as I suggest below, has disagreed with the notion of present constitutional arrangements as capable of bringing about justice because the choice of democratisation over decolonisation in South Africa has constitutionalised injustice.

Therefore for Philippopoulos-Mihalopoulos, justice is not the end but the beginning of a legal decision. "For the legal system and its self-description, justice is not applied to a legal decision; rather it is inevitable for a decision to be just."[1165] Justice is the second observer who may see a legal decision as unjust. But the law, as the first observer thinks of itself as fundamentally and inevitably just.

The second "radical coup of autopoiesis" for justice is, according to Philippopoulos-Mihalopoulos, the fact that justice "cannot be found in any one system."[1166] Justice is fragmented into many epithets such as moral justice, economic justice, political justice and juridical justice.[1167] In relation to juridical justice, Philippopoulos-Mihalopoulos states that "justice is to be found through law and in spite of law. Law has to blind-spot justice in order for justice to remain a normative imperative within and contingency outside."[1168] In other words within law, justice constitutes a norm but this very internal norm of justice inside law is also contingent on the outside. This is what Luhmann, according to Philippopoulos-Mihalopoulos, refers to when he says justice is contingent and this presupposes that law may or may not be just – depending on who is the observer. If the observer is the law, justice is inevitably present and intrinsically part of

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[1165] Philippopoulos-Mihalopoulos (n 486 above) 92.
[1166] Philippopoulos-Mihalopoulos (n 486 above) 93.
[1167] Philippopoulos-Mihalopoulos (n 486 above) 93.
[1168] Philippopoulos-Mihalopoulos (n 486 above) 94.

law. If it is second order observation, it is possible for the law to be unjust. The system defines justice in such a way that justice must inherently prevail in a legal decision. Returning once again to republicanism and in particular the transformative constitutionalism project in South Africa, I suggest that the weakness with republicanism, is its disregard of the many epithets of justice as stated by Philippopoulos-Mihalopoulos above. The republican view is that economic justice may for instance co-exist with juridical justice. However it is my contention, from the systems theoretical view that precisely because of the inability of systems to steer one another, it is not possible for the economic justice to find comfort in the law as juridical justice. The law can only dispense juridical justice. If juridical justice, once dispensed, is observed by other secondary observers as having dispensed justice, that would be so because the legal system was simply doing its job of dispensing juridical justice and not because its intention was to dispense of any other justice – because it is not capable.

On the other hand I recall that according to Derrida, law is not justice and in fact, justice must be protected from law. Cornell states that "in the definition of justice as aporia, the philosophy of the limit protects the divide between law and justice and protects justice from being encompassed by whatever convention described as the good of the community."[1169] For Derrida justice is "unattainable yet worth pursuing."[1170] For Luhmann, "there is no such distinction between law and justice. Justice is either fully attainable (through law) or fully unattainable."[1171] For Luhmann, once a legal decision is made, which according to law is in anyway just, the law has done its job of being just.[1172] In other words, law as the first observer always believes that its decision is just. It is up to justice as the second observer to make a determination as to whether the decision by law was just or not. "While Derrida allows the returning of injustice to haunt the law from the inside, Luhmann considers it done and qualified in the context

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[1169] Cornell (n 1020 above) 118.
[1170] Philippopoulos-Mihalopoulos (n 486 above) 94.
[1171] Philippopoulos-Mihalopoulos (n 486 above) 94.
[1172] Philippopoulos-Mihalopoulos (n 486 above) 95.

of temporalisation that allows the return, not of injustice but of a mutable, contingent, fleeting law."[1173]

It is on the issue of justice that Teubner's "mutual paranoia" thesis between deconstruction and systems theory rears its head again. In dealing with justice Derrida speaks from the prism of justice whereas Luhmann moves from the prism of law.[1174] Derrida externalises justice and it is this external justice that must serve as the *telos* of law, law's consciousness. Whereas law for Derrida is the place where justice gets negotiated, for Luhmann the relationship between law and justice is characterised by circularity in that law needs justice (hence it defines itself in terms of justice) and justice needs law. "The fact that the struggle to reach justice never ceases is because justice can only be reached and not reached through law."[1175]

Another way of looking at the intersection of law and justice is to engage in a process of hypothetical elimination and hypothetical addition. With hypothetical elimination, justice is hypothetically excised from the law. The question then becomes what is left of law once justice is excised from the law. I suggest that from both a deconstruction and systems theoretical prisms, the absence of justice in law collapses the notion of law. This is because law sees its very existence as predicated upon the notion of justice. In other words, law sees its very reason for existence as the giving of justice. This is because justice constitutes the super-norm giving rise to other sub-norms such as equality and dignity.[1176] Law needs justice to conceal the paradox, to have a reason for existence. In this sense, "justice is nothing but the execution of legal operations."[1177]

Michel Rosenfeld makes a distinction between justice according to the law and justice against or beyond law. Justice according to law occurs when a person is treated in

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[1173] Philippopoulos-Mihalopoulos (n 486 above) 95.
[1174] Philippopoulos-Mihalopoulos (n 486 above) 95.
[1175] Philippopoulos-Mihalopoulos (n 486 above) 96.
[1176] Philippopoulos-Mihalopoulos (n 486 above) 90.
[1177] Philippopoulos-Mihalopoulos (n 486 above) 97.

conformity with the law and justice against the law occurs when a law is unjust.[1178] However in order to determine whether law is just or unjust, reliance is placed on criterion outside of law such as ethics and religion.[1179] Rosenfeld then concludes that law is not capable of achieving full circularity as envisaged by autopoiesis because it cannot fully escape "the normative grasp of justice beyond the law" and is partly permeated by extra-legal norms that inform that kind of justice."[1180] For instance, the legitimacy of pure procedural justice, being justice according to the law, depends on extra-legal norms, being justice beyond the law. Rosenfeld gives an example of contract law. An unlimited freedom of contract would be unjust because the weak will be exploited by the powerful. As a result, legislation would be enacted to state minimum conditions for working such as the number of hours and a minimum wage. "The minimum wage/maximum hours laws would not be just in themselves, but only in reference to some expression of justice beyond the law which would itself have to be legitimated in terms of adherence to certain extra-legal norms; for example, it's unethical or contrary to religious dogma to exploit people."[1181]

I recall Luhmann, according to whom the system "deparadoxifies" itself by concealing the paradox. It conceals the paradox by behaving in such a manner that it hides self-reference. It hides self-reference by "the invocation of universal truths, consensual values or reason which appear to endow the system, its operations and its communications with the quality of meaning."[1182]

I further recall the view that for law to be law it must be lawful, that illegality is based on legality in that there can be no illegality in the absence of legality, and that which becomes unconstitutional is based on constitutionality. These are the paradoxes of self-reference. For a legal decision to escape the paradox i.e. that a legal decision is illegal because it is not legal, reliance must instead be placed on whether a legal

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[1178] M Rosenfeld "Autopoiesis and Justice" (1991-1992) 12 Cardozo Law Review 1681.
[1179] Rosenfeld (n 1178 above) 1681.
[1180] Rosenfeld (n 1178 above) 1686.
[1181] Rosenfeld (n 1178 above) 1694.
[1182] King & Thornhill (n 1098 above) 22.

decision is right or wrong because it upsets universal morality or natural law.[1183] "Deparadoxification means the invention of new distinctions which do not deny the paradox but displace it temporarily and thus relieve it of its paralysing power."[1184] For Cornell, when the system deparadoxifies itself, it in the process, creates sameness between law and justice.

Although both Derrida and Luhmann agree that "there is no real normative origin from which all values can be retrieved", Derrida, according to Cornell, nonetheless argues against the fact that the absence of normative origin can be displaced by the logic of recursivity.[1185] "Deconstruction challenges the possibility that the lawyer or judge can be identified with the mere instrument for replication of the system."[1186] Deconstruction rejects the idea that lawyers are engaged in a recursive discourse. Cornell argues that far from lawyers and judges being instruments of replication, judges in interpreting, also invent.[1187] I suggest that it is this very logic that leads to the conclusion about transformative possibilities of constitutionalism in South Africa.

Charles Larmore agrees with Cornell about the fact that legal interpretation not only involves discovery, but invention as well and the fact that in applying legal norms, judges are capable of looking beyond existing norms.[1188] "No social role, no norms of social interaction, could long survive if it is spelled out at once and for all, in advance and in full detail, just what it required in every imaginable case."[1189] Larmore agrees with Cornell that every social norm has a "built-in application flexibility" but insists that this flexibility is however mediated by the criteria of relevance.[1190] It is the legal system itself that is the criteria for relevance. "It is the legal system itself which provides for the criteria of relevance for distinguishing permissible from impermissible

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[1183] King & Thornhill (n 1098 above) 22.
[1184] King & Thornhill (n 1098 above) 22.
[1185] Cornell (n 1020 above) 131.
[1186] Cornell (n 1020 above) 121.
[1187] Cornell (n 1020 above) 121.
[1188] C Larmore "Law, Morality and Autopoiesis in Niklas Luhmann: Comment on Drucilla Cornell's Time, Deconstruction, and the Challenge to Legal Positivism: A Call for Judicial Responsibility" (1991-1992) 13 Cardozo Law Review 1619.
[1189] Larmore (n 1188 above) 1619.
[1190] Larmore (n 1188 above) 1620.

extrapolations and applications."[1191] The "criteria of relevance" that Larmore refers to is also referred to by Christodoulidis as the law's setting up of context and this setting of context or Larmore's "criteria of relevance" constitutes a disavowal of the notion of the ""built-in application flexibility" of law and legal rules. I find Christodoulidis and Larmore's approaches more cogent, particularly if we were to apply their approach to post-apartheid constitutionalism, including some of the case decided in the post-apartheid era. The *Afriforum v Malema*, the *McBride* and *the Al Bashir cases* referred to above are indications of how certain objections and some speeches which would have been considered to be informed by the fight for liberation in South Africa could not meet the criteria for relevance because the law would have already set up the context.

According to Larmore, Cornell's oppositional posture against Luhmann is based on her belief that Luhmann's theory suggests that "the modern legal system has differentiated itself from considerations of morality and justice."[1192] However Larmore counters Cornell's approach by suggesting that it does not follow that autopoiesis is necessarily a rejection of the fact that law does not have moral content.[1193] The fact of constitutional norms such as equity and also the fact that people are always ready to oblige the law is based on the belief in the moral content of the law.

In the final analysis, Cornell argues that deconstruction allows for transformation whereas Luhmann's systems theory allows for evolution within the system by the system and for the system.[1194] Cornell states that "in a specific sense, systems theory does not allow for radical transformation precisely because the system must rely on the distinction between internal and external, if it is to remain a system. Derrida … does not appeal to external norms to legitimate the system."[1195] Teubner on the other hand argues that deconstruction is not adequately radical and critical. Deconstruction, according to Teubner, is caught in the infinite demands of transcendentalism,

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[1191] Larmore (n 1188 above) 1620.
[1192] Larmore (n 1188 above) 1621.
[1193] Larmore (n 1188 above) 1622.
[1194] Cornell (n 1020 above) 142.
[1195] Cornell (n 1020 above) 142.

friendship and democracy – concepts that remain "forever indecipherable".[1196] I may add in parenthesis, borrowing from Christodoulidis that Luhmann's "sociology is geared to understanding society, not changing it."[1197]

Deconstruction, according to Luhmann, is a form of "cultural diversity".[1198] "The deconstruction of our metaphysical tradition pursued by Nietzsche, Heidegger and Derrida can be seen as part of a much larger movement that loosens the binding force of tradition and replaces it with diversity."[1199] Luhmann argues that deconstruction, viewed from an historical angle, "seems to be the end of history, history consuming itself".[1200] From a systems' prism, deconstruction complains about a lost tradition and in the process of complaining about this lost tradition, it becomes by this complaint dependent upon this tradition for its complaint.[1201] Luhmann states that deconstruction has a narrow span of attention. It transforms differences into differences the moment it encounters differences.[1202]

Teubner is of the view that deconstruction intentionally uses obscure and language and refuses to reveal its theoretical presuppositions.[1203] "While deconstruction refuses to define a specific method or determine a guiding theoretical intention, systemism stylises itself as an orderly theory cultivating conceptual precision and elaborating systemic theory constructs."[1204]

Teubner is of the view that deconstruction cannot lay claim to novelty because deconstruction is in anyway what happens in that, for instance, meaning is always multidimensional. According to Teubner, historical developments are the ones responsible for bringing paradoxes onto the fore. "These development create the

[1196] Teubner (n 1120 above) 763.
[1197] Christodoulidis (n 27 above) 381
[1198] N Luhmann "Deconstruction as Second-Order Observing" (1993) 24 New Literary History 763.
[1199] Luhmann (n 1198 above) 778.
[1200] Luhmann (n 1198 above) 780.
[1201] Luhmann (n 1198 above) 767.
[1202] Luhmann (n 1198 above) 767.
[1203] Teubner (n 1120 above) 763.
[1204] Teubner (n 1120 above) 764.

structural conditions so that at a certain historical moment, law's foundations are suddenly seen as paradoxical, among other but by no means excluding deconstructivists."[1205] This view by Teubner suggests that things deconstruct themselves anyway. In other words contradictions contradict and these contradictions sharpen at a given historical moment. And when they sharpen, they reveal themselves. Therefore it does not require a deconstructivist singularly to note these contradictions. Hence "deconstruction is what happens". These paradoxes of law could have been revealed at any time in legal history and they have actually been; however they had been concealed in socially accepted hierarchical relations. They come to the fore only under certain historical configurations when the ways of concealing them lose plausibility. In a nutshell, Teubner is of the view that antimonies, paradoxes, dualities and the aporia of law are not a result of the ingenuity of poststructuralism, but rather due to the hard-core social reality that make law's paradoxes visible.[1206]

5.8. Implications of deconstruction and systems theory on the limits and limitations of law thesis

I have suggested in chapter three dealing with the systems theoretical approach to law that the fact that law is self-constituting means that legal rules assume a life of their own and begin to act as end in themselves and no longer as legal means to social ends.[1207] Closure presupposes that moral conceptions or political goals cannot simply, in a "naked" fashion, enter into legal norms. These have to be observed and be reduced by the binary code of legal or illegal, which means that their essence is now reduced into the essence of law and this occurs by the law using its own binary code of legal and illegal. With reference to Christodoulidis's application of systems theory, I recall that the depletion and disempowerment of politics by law occurs because "political conflicts are forced to meet the criteria of legal relevance in order to be represented".[1208] This is because law only allows certain conflicts to register and

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[1205] Teubner (n 1120 above) 771.
[1206] Teubner (n 1120 above) 771.
[1207] Teubner (n 78 above) 40.
[1208] Christodoulidis (n 276 above) xvi.

instead of containing such conflicts, law selectively privileges and suppress some conflicts over others.[1209]

In chapter four dealing with CLS I indicated, following Hunt and Douzinas, that CLS views law both in its negative and positive characteristics and that law's failures can possibly be attributed to dominant approaches to law.[1210] The essence of CLS is therefore that it is possible and necessary to think about law differently. However for this to happen, the dominant formalist/positivist western metaphysical tradition should be rejected.

Informed by the notion of deconstruction and the systems theoretical approach, the first tentative implication is that if phenomena cannot be fully knowable then the legal phenomenon should be indeterminate precisely because it is contingent. If the thesis against "fully knowable" presupposes indeterminacy, the question from systems theoretical approach then becomes: what about the notion of circularity, because circularity and closure presuppose pre-given norms that are already in existence in the system. If the system is characterised by circularity and closure, does this not mean that the judge and the lawyer are instruments for the replication of the system.

Put differently, how can "a thing" be circular and closed yet indeterminate? Christodoulidis answers the notion of indeterminacy by arguing that "there is a reduction in law from possible expectations and, with the same token, there is immunisation from challenge."[1211] This is because

reduction as simplification works to assimilate potential disruptive complexities into systemic patterns of processing it. This (immunisation or reduction) achievement, while

[1209] Christodoulidis (n 276 above) xvi.
[1210] Douzinas & Geary (n 617 above) 6.
[1211] Christodoulidis (n 274 above) 387.

facilitative in many ways, has its costs, a cost for the spontaneous, 'plastic' and imaginative, a cost for reflexivity, for thinking things through.[1212]

I suggest that the legal system's reduction achievement inflicts a cost for reflexivity and as such disrupts the possibility of indeterminacy. This is a clear rejection of the notion of indeterminacy. For instance, where CLS states that law is politics and therefore indeterminate, systems theoretical approach insists that law and politics as systems are separate and observe each other in terms of their government/opposition (Politics) and lawful/unlawful (law). With the reflexivity of the law being culled by law's reduction of complexity, the notion of indeterminacy becomes redundant.

It is the notions of law's closure's and circularity and by implication law's unreflexivity that have led Cornell to conclude that systems theoretical approach to law is not suitable for transformation of society by law.[1213] This conclusion by Cornell is ostensibly because of the normative closure of the system, its circularity and the fact that the legal system allows no naked entrance of norms from other systems into the legal system. In fact Cornell explicitly states that "autopoietic closure privileges the present."[1214] Cornell's view is that the systems theory privileges the "is" as opposed to the "ought".[1215] When Cornell states that law from a systems prism does not allow for transformation, it may be that she is actually correct. However Cornell may be correct to the extent that that is how the systems theory looks at the law. This is because it is the intention of the systems theory to prove exactly that – that law cannot be used for transformational purposes because of its paradox which create law's structural limits. It may be that Cornell collapses description into prescription. In other words, it may be that the systems theory does not aspire to be a theory of transformation but rather seeks to define reality – the reality of law as autopoietic and as incapable of transformation.

1212 Christodoulidis (n 274 above) 387.
1213 Cornell (n 1020 above) 85.
1214 Cornell (n 1020 above) 130.
1215 Cornell (n 1020 above) 132.

I return to the question of justice. Rosenfeld for instance speaks about internal and external justice. According to Rosenfeld, justice according to law occurs when a person is treated in conformity with the law (internal) and justice against the law occurs when law is called unjust (external).[1216] At face value, Rosenfeld's taxonomy of justice appears to be similar to Luhmann's characterisation of justice in that Luhmann, as interpreted by Philippopoulos-Mihalopoulos, also refers to justices with epithets.[1217]

However Luhmann's conception of justice seems to be much more nuanced. The subtlety in Luhmann's conception of justice inheres in that although he speaks of justices with epithets, he seem to be referring to one justice and not many justices. Therefore there seem to be, according to the systems theoretical approach, one justice that gets observed differently by different subsystems when it "crosses" into these other subsystems. This is the justice that is able to be inside and outside of the system at the same time.[1218] It is the justice that "cannot be found in any one system."[1219] In this sense, justice becomes a floating norm, capable of being appropriated by different systems to justify themselves and appropriated by different systems as a tool for their internal operations.

The implication of the above is that from a deconstruction prism, there are two forms of justice which are legal justice and the justice that is outside of the law that observes law's justice. On the other hand Luhmann deals with the notion of justice differently. According to Moeller:

> Luhmann does not believe that the "idea of justice" is a subject worthy of investigation. For him … justice is a 'contingency formula' (*Kontingenzformel*) that is produced within the legal system. On the basis of this formula, the legal system can operate endlessly. It can declare things that were once neither legal nor illegal, smoking in houses, for instance, to become legal in some cases and illegal in others. These

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[1216] Rosenfeld (n 1178 above) 1681.
[1217] Philippopoulos-Mihalopoulos (n 486 above) 93.
[1218] Philippopoulos-Mihalopoulos (n 486 above) 91.
[1219] Philippopoulos-Mihalopoulos (n 486 above) 93.

laws can changed again in the future. At the same time, these operations in the legal system allow other systems in its environment to produce "resonance" in their own ways.[1220]

5.9. Conclusion

In the final analysis, and as stated earlier by Teubner, it may tentatively be concluded that there exists "a dynamic of mutual persecutions" and "reciprocal fears" between autopoiesis and deconstruction which results in "deconstructive moves and systems counter-moves."[1221] This dynamic between deconstruction and systems theory can be reduced into whether law can be used as an instrument of transformation or whether law serves as an impediment that frustrates transformation. Cornell would argue that deconstruction means that law is inevitably open to transformation;[1222] that fidelity to deconstruction means that even a constitution regarded as the best is capable of being interpreted in the name of justice.[1223] In this sense deconstruction opens up possibilities of justice and therefore transformation. "The deconstructibility of law is what allows for the possibility of justice."[1224]

Deconstruction cannot be divorced from the idea of justice. On the one hand, for Christodoulidis the political is the *telos*[1225] and if law observes by reduction of complexity, by using exclusionary modes of observation, by refusing to accept any other justice, despite "its intention to transform"[1226], transformation which is inevitably political, suffers. To put it in technical systems theoretical terms, the law cannot observe the political because if we intend to use the law to transform the political and the economic, the political and the economic must be observed and their complexity reduced by binary code of lawful/unlawful of the law. Put differently, if law generalises

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[1220] Moeller (n 22 above) 134.
[1221] Teubner (n 1097 above) 29.
[1222] Cornell (n 1017 above) 1059.
[1223] Cornell (n 1017 above) 1059.
[1224] Cornell (n 1017 above) 1061.
[1225] Van Marle & Motha (n 15 above) 21.
[1226] Van Marle (n 3 above) 651.

and "reduces the complexity of the particular"[1227], what then become of its ability to transform. On the other hand, if meaning is contingent (and thus indeterminate), does this not provide space for the law to be appropriated for transformative purposes, once we have, for instance dealt with the issue of legal culture.

[1227] Van Marle (n 3 above) 655.

CHAPTER 6: CONCLUSION

One is always caught in the endless seesaw, a dance between the justice of the institution that must be mobilised despite its limitations to protect the powerless, and the dream of higher justice which will found the good city and transcend the injustices of the present.[1228]

No social organisation is a 'given' – it is a cultural construction, where ideas have gone into action. Overtime, these ideas take a solid form, and the sheer contingency of the events that have constituted the order become forgotten.[1229]

[1228] Douzinas & Gearey (n 617 above) 36.
[1229] Douzinas & Gearey (n 617 above) 40.

I have suggested, through the entire thesis, the uneasiness that confounds radical transformation when it is enunciated from the *loci* of law and constitutionalism. Furthermore, I have suggested that radical transformation should be (re)conceptualised as essentially a decolonisation project, and that the insights of both decolonial and postcolonial approaches enhance the notion of decolonisation in South Africa. I argue that approaches which seek to realise radical transformation in South Africa through law and constitutional means may achieve, to some extent, transformation. However, this transformation would still be short of radical transformation. Put differently, if the terms and conditions, and the co-ordinates of radical transformation remain anchored within "rationalist and anthropocentric theories" predicated on the Enlightenment project, radical transformation, as an urgent call, would continue to be elusive.

I have therefore suggested in chapter two the incompatibility of radical transformation with the notion of constitutionalism in South Africa. I have contended that if we read radical transformation as decolonisation, and if the content of decolonisation is amongst other things, the resolution of coloniality and the rejection of the dark sides of modernity, it may not be possible to attain their resolution within the confines of constitutionalism, irrespective of the resort to notions such as transformative constitutionalism.

In chapter three, I have relied on the systems theoretical approach to demonstrate why the notion of radical transformation sits uncomfortably with the notion of law and (transformative) constitutionalism. I have contended that if society is viewed as functionally differentiated and comprised of closed or autopoietic systems that are heterarchical, it becomes difficult to countenance the notion of law steering other systems. In this instance what inheres is the inability of law as one of the other autopoietic systems to claim an Archimedean point from where it could have a vantage point to observe and steer other systems. The implication of this is that attempts to use law as an anchor for transformation are unlikely to succeed. Law as an autopoietic system is characterised by closure and how it reduces complexity in its observation of the environment. For instance, the imminent legislative attempts in South Africa to

criminalise racism are unlikely to succeed if racism is not properly located. In other words, to defer the resolution of racism to the legal system would only be useful to the extent that a particular individual's act of racism is declared lawful or unlawful. The law's declaration of lawful/unlawful based on its code would not be able to resolve, for instance, the other invisible racisms that find expression structurally and culturally.

Having explored the "limits of the law", I have attempted in chapter four and five to nonetheless explore whether other critical approaches to law are equally capable of offering other cogent views on the capacity of law and constitutionalism to bring about radical transformation in South Africa. These are approaches that mainly argue that law has limitations as opposed to limits. The significance of these "critical genres" is that they demonstrate the historical contingency of law, the metaphysics of law, the ideological character of law, the perils of a singular reliance on rights, the relationship between rights and race and the importance of rights to the lived experience of the oppressed and finally a deconstructive approach to explore the possibilities of law being able to look at the other in his/her uniqueness and singularity. The notion of justice as political justice may assist to guide law towards the attainment of radical transformation (radical transformation as an ongoing project that is always becoming).

My contention is that although these "genres of critique" are of unquestionable significance and do assist in identifying the "limitations of law", their blind-spot persists due to their non-attention to the notion of functional differentiation. The autopoietic closure of law and law's reduction of complexity expressed in its lawful/unlawful coding inflicts deep limits in the ability of law to be used for transformative purposes. If law is a closed system, its adaptability and its ability to shape the external environment is limited.

The autopoietic closure of law should however not lead to a nihilistic conclusion about law. It should be construed as an appreciation of the fact that law encompasses simple and structural inertias. The simple inertia of law presupposes that the system of law requires "special efforts" to disrupt its tendency to stabilise expectations and "stretch

its imagination".[1230] The "genres of critique" and their attempts at deconstructing the law, exposing the ideological and contingent character of law and exposing the complicity between law and racism should serve as some of the "special efforts" that can be deployed to disrupt law's simple inertia. In the context of South Africa, the notion of transformative constitutionalism, which is mainly geared towards changing an obstructionist legal culture, can serve as a "special effort" towards ameliorating injustices that cannot be seen or are excluded and distorted by the inertias of the legal system. However, these "special efforts" can only bring about some form of amelioration because in the final analysis they are forced to confront the legal system's structural inertia. Structural inertia presupposes that "challenges to the structure can only be accommodated by the structure."[1231] The distinctive quality of law is ultimately its narrowing down of the contingencies of outcomes[1232] and the setting of context which excludes other possible valid contexts. This is precisely why, for instance, calls for the decolonisation of law, while they may qualify as "special efforts", have to ultimately settle with the fact that even decolonised law cannot escape the structural inertia of law.

I suggest that in the final analysis, the attainment of radical transformation may hinge on the reimagining of the political so that the current "perceptual threshold of the political system"[1233] is fundamentally changed. The call for the reimagining of the political is necessarily a call for radical politics and this a call that is eminently post-capitalist and should attempt to exceed and surpass the claims of modernity and western civilisation."[1234] In a way, radical politics is about the determination of what is political and within the context of law, to "identify a spectrum of political interventions in relation to law, rather than under its auspices."[1235]

[1230] Christodoulidis (n 274 above) 389
[1231] Christodoulidis (n 274 above) 391
[1232] Christodoulidis (n 274 above) 392
[1233] Christodoulidis (n 27 above) 394
[1234] L Ghandi *Postcolonial Theory: A Critical Introduction* (1998) 20.
[1235] E Christodoulidis "Strategies of Rupture" (2008), Available at Available at: www.forensic-architecture.org/.../CHRISTODOULIDIS-Emilios.-Strategies-of-Ruptur 21.

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