

**RETHINKING TIME, ETHICS AND JUSTICE: A JURISPRUDENTIAL  
PERSPECTIVE**

**by**

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## SUMMARY OF ARGUMENT

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This study contends that time, narrative and justice cannot be separated from one another. One always demands that the other two also be considered. If we accept that law should be held accountable to a higher ethical standard, then law's relationship with time and narrative is also important. Good law can only exist through a responsible and active engagement with this challenge.

Unfortunately it is not in law's interest to honour its responsibility, and the legal system as described by Niklas Luhmann is not interested in justice. Law's only aims are to be legitimate and to ensure its own continued perpetuation. These aims are in threatened when law is required to appeal to norms outside of itself.

Thus law has developed certain mechanisms in order to shirk this responsibility: It draws boundaries between itself and its environment; it removes its operations from human reality; it undermines human identity and agency (intention and causality) by reducing it in complexity and meaning; and finally it protects itself through building up its own unreal and false complexity.

Law is able to do this by turning its back on its relationship with time (and by extension, narrative). Time is stripped of duration and reduced to a succession of presents. This has two effects: firstly human identity and agency becomes meaningless and secondly, moral or ethical judgment becomes impossible. By cutting the knot instead of trying to unravel it, law avoids its responsibility to be moral.

One way of stepping up to the challenge of justice, time and law is through Ricoeur's narrative time. Human beings and larger social entities all have narrative and temporal duration and location. It recognises that humans have an identity that can not be divorced from time and narrative. This structure also gives necessary context and meaning to actions, and allows us to make moral judgments.

### **Keywords:**

Time, Narrative, Systems theory, Autopoiesis, Justice, Ethics.

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# CHAPTER ONE

## INTRODUCTION

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### **1 Thesis statement**

In this study I want to investigate law's relationship and engagement with justice and ethics. This is undoubtedly a vast and complicated relationship. For this reason the study is focusing on specific aspects that seem to be inseparable from justice, namely ethics and time. Without considering time our understanding of human identity and the causation of our actions as agents cannot be nuanced and complete. If we accept that good law can only exist through an active engagement with justice, then law's relationship with these aspects of time also need to be engaged.

Unfortunately it is not in the interest of law to honour this responsibility. Law has developed into a system whose interest is constant self preservation (or re-affirmation) and to this end, the legitimisation of its processes. As an autopoietic, self-referential and symbolic system, law's institutional form has chosen to deal with complexity by reaching a level of abstraction where it is shaping society instead of vice versa. One angle vulnerable for deconstruction is the system's institutional relationship with time. Its notion of time is a rigid and presentist one with a disregard for human narrative through memory and anticipation. If law can be sensitised towards a narrative time a more particular understanding of truth can be communicated, and human complexity can be accessed through a richer vocabulary than the binary legal/illegal of the autopoietic system. By exploring such an understanding of time, new ethical possibilities become apparent and law can then be open to questions of justice.

### **2 Assumptions**

This study has certain assumptions and takes certain theoretical positions as a starting point. The most important of these is that the description of law as an autopoietic

social system by Niklas Luhmann is a fairly accurate, albeit not necessarily a desirable, account of what modern law has become. In its truthfulness it only serves to highlight law's shortcomings. These inadequacies are numerous. The ones that are relevant in this case, and which will be scrutinised involve law's relationship with time and the far-reaching effects it ultimately has on how we perceive the nature of justice in law.

I assume that law has a narrow engagement with time, one that is presentist instead of being temporally neutral. An autopoietic system has little use for accessing the past through memory or projecting itself beyond the immediate future. This is because such a legal order is not interested in engaging with justice or ethics, and rejecting temporal neutrality allows law to evade such considerations. The narrative time of Paul Ricoeur is presented as an alternative approach towards time that places the ethical relationship between humans central to our experience. If autopoietic systems can open themselves up to this approach it can become unafraid of external norms and allow itself to access complexity in a more ethical manner.

### **3 Research questions**

The theoretical basis of the research is undoubtedly a broad one and will therefore only focus on specific aspects thereof. The specific questions that will be investigated are as follow:

- What are the motivations and consequences of law's self-conscious act of boundary-drawing, and how does it affect law's relationship with time?
- How does law deal with complexity?
- What are the implications of this on law's understanding of human identity?
- What are the implications for human agency or causality?

## 4 Background

In the article *Law's Time, Particularity and Slowness*<sup>1</sup> Van Marle states that law has an “obsession with linear and chronological time and accordingly a rigid approach to events and more importantly to the various versions, particular experiences and telling of the events.”<sup>2</sup> She goes further to eventually state that through the Truth and Reconciliation Committee hearings, law has exposed its failure to accommodate plurality in stories, of the past and future. Eventually she comes to the conclusion that

[L]aw, in its relation to time, to the past, the future and the particularity of the moment or the event, fails to follow an approach other than that which its own institutional form necessitates.<sup>3</sup>

It is this predicament of law that I would like to examine further. While the article contends that a linear, chronological understanding of time is narrow and constricting, and favours a slower, more particular approach, I feel further investigation into the matter is warranted. What are the theoretical foundations of law's time? What is the impact of time on the relationship between law and justice? Is there an ethical imperative to deal with time differently than we have thus far?

As has been stated the legal theory of Luhmann lies central in understanding the time of law. In having to deal with the unprecedented demands that modern society has placed on the system, law's solution has been one of increasing instrumentalisation and higher abstraction. This has led to law becoming a general symbolic medium, increasingly separated from the human reality which it regulates.<sup>4</sup> Luhmann describes law as an autopoietic system. In other words, for this symbolic system to achieve a sense of authority and legitimacy, it uses internal vocabulary and operations to achieve recursive, normative closure. Legal norms are found within a self-generating system of communication, with its own mechanisms of justification, hence its autopoietic nature.<sup>5</sup> Münch describes autopoiesis as consisting of “a definition, a tautology, and a contradiction.”<sup>6</sup> He explains these three keywords further:

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<sup>1</sup> K van Marle *Law's time, particularity and slowness* (2003) 239.

<sup>2</sup> Ibid 244.

<sup>3</sup> Ibid 250.

<sup>4</sup> R Münch *The law as a medium of communication* (1992) 1655.

<sup>5</sup> Ibid.

<sup>6</sup> Münch R *Autopoiesis by definition* (1992) 1465.



Definition – A system is defined by autopoiesis; Tautology – A system exists as long as autopoiesis occurs; and Contradiction – A system is self-transcending (in its observations) and non-self-transcending (in its operations). Because an observation is itself an operation, however, the contradiction remains.<sup>7</sup>

Law is necessarily a system of information processing. The system as it is, is incapable of truly inputting new information or ideas. Any new ideas can only be assimilated once cast within the pre-existing vocabulary and structures of law. Law's self-referential attempts at legitimising itself ultimately contribute to its illegitimacy. The system is controlled by the hands of an exclusive social estate, whose own lives and realities (no doubt also shaped by their own legal educational and professional experiences) dictate the prescriptive and normative definitions of law.<sup>8</sup> This results in law being able to only give output of new ideas in a very limited manner, namely the binary code of "legal" or "illegal", disregarding the plural nature of societal reality.

This removal of law from reality, the growing reliance on its own autopoiesis for legitimacy, carries inherent dangers. This continual abstraction of the symbolic increases the reliance on positivism for self-justification. According to Münch, this happens in four ways:

1. The more law becomes politicised, the more it becomes an object of conflict. When this occurs, more alternatives are suggested and become apparent.
2. The broader the application of law has become (for example human rights), the more people are affected by law. The more people use the law, the more interpretations arise, as well as a realisation that what one considers to be the law is not often how it is applied in practice.
3. Another result of broader application is that wider spectrums of social strata become apparent to law, reflecting more of the deviations found within reality.
4. Greater intellectual discourse on the subject and nature of law illuminates the gaps between law and reality.

Through these mentioned processes, law is alienated from the actions of reality. The result is that law becomes a framework in which these actions can be discussed, but

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<sup>7</sup> Ibid.

<sup>8</sup> Ibid 1468.

cannot determine the actual course of action. In other words it refers to reality without reflecting it. The implication of this is that law progressively loses more and more of its “reality content,” becoming more detached and thus gaining a greater freedom to shape reality. It has shifted away from a linguistic discourse toward a speechless coordination of legally controlled action. In being separated from reality, it can communicate a reality that does not exist.<sup>9</sup>

This recursivity leads to the system being incapable of integrating new ideas. Something not defined by law does not exist in a legal sense. This illustrates how detached the legal system is from reality itself. Münch suggests that

Law and reality can only be identical if the life-world is rigid, with little situational variation, little social change, firmly embedded structures for groups and systems of authority, and a limited scope of communication.<sup>10</sup>

I propose that the reverse can also be true; that law can reflect reality if law can allow itself to become *less* rigid, with *more* variation and a broader scope of communication. It is a system with limited memory, a fundamental aspect for accessing knowledge. This higher level of abstraction and symbolism means that law is not removed from human reality, but because of the monolithic role it plays in the personal and grand human narrative, instead becomes a system that *shapes* human reality. To preserve the system, history becomes neutralised to the point where it no longer has any normative implications.<sup>11</sup> Information is currently only processed with reference to its own veracity. Once a broader concept of time is employed, information can be processed and judged as it has been experienced “in this way and only this way.”<sup>12</sup> Instead of information being stripped of individuality in favour of the vocabulary of the system, it becomes defined by its uniqueness from other events. In this way law gains the potential to expand itself beyond the autopoietic illusion of growth. Without a past, the possibility and imagination to project different futures are lost. Falling outside of the present time of law, possibilities of new ethical horizons are lost within the system’s recursivity. Normativity or the “ought-to-be” cannot exist only within the present.

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<sup>9</sup> Münch (n 4 above) 1657.

<sup>10</sup> Ibid

<sup>11</sup> Cornell D *The relevance of time to the relationship between the philosophy of the limit and systems theory* (1992) 1599.

<sup>12</sup> Ibid 1601.

As stated above, law's autopoietic nature makes memory problematic. This is because memory can only be understood with reference to time. Law's time, as we have seen, is severely limiting. Once the barriers of law's time is breached, its vocabulary and operators are incapable of processing new information, exposing the inability of law to deal with reality, as well as its own self-styled source of authority. The beast has grown fat on its ability to manipulate reality, but soon starves when subjected to the authenticity of the human narrative.

When law is reduced to a medium of communication, it loses its self-evident justification, and needs a new method of legitimising itself. One way of doing this can be through narrative. As a form of communication, the universality of law increases. Becoming a universal medium, it cannot claim to encompass reality but contains only symbolic content.

According to Derrida's conception of *Différance*, truth can only be represented in spaced time. There simply cannot be an all-encompassing ontology which claims to hold true for all that exists.<sup>13</sup> *Différance* temporises truth, understanding that truth can only exist at a point in time, with reference to past and future. Reality cannot exist without truth, and what can be said for one in this case can be said for the other. Therefore the autopoietic system, with no reference to past or future is simply incapable of reflecting reality. In this sense, the major obstacle between an abstracted law and a law that is truly engaged in human endeavour is the current (non)conception of time.<sup>14</sup>

Derrida's own ideas on law and justice are also interesting in this debate. He states that in law, justice is a promise of the future. This is clearly not possible within the aforementioned legal system. He continues that "justice is to refuse to accept as valid the system's own attempts at de-paradoxicalisation."<sup>15</sup> Clearly memory is vital in judging cases but further than that, judges have to "remember the future" as well. If narrative can be brought to the forefront, law will allow itself to incorporate the voice of the Other, which for Derrida is vital for a system to be able to regard the system as just.

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<sup>13</sup> Ibid 1593.

<sup>14</sup> Ibid 1586.

<sup>15</sup> Ibid 1596.

One possible answer to this unreflective mode toward time and ethics is narrative time. Our perceptions and experience of time has an effect on our notion of truth. A less tensed, relationist approach holds many advantages over law's current tensed, absolute and realist approach. A court case presents a unique space in time, especially during the judgement. As Ricoeur says in *Time and Narrative*, the present is the time of action, the time for the arrangement of new sequences and arrangements of things. A moment "framed by experience and the horizon of expectations."<sup>16</sup>

Narrative is a structure that allows the depiction of actions in their human context. Using narrative to investigate a court case, we can clearly see that time is not absolute. Although public, it is also interpersonal. Though narrative a case tells us about the collection of actions of a collection of people, where the particularity of each player has to be appreciated. A linear concept of the narrative and its time disregards plurality. As Ricoeur argues, humans form their identities through narrative – their own stories of their actions and the value judgements they make on those. Yet every person's identity intersects in the space of the narrative identities of others. It is through these interactions, and the actions that they inspire, that ethical judgements about a person can be made.

Thus, once we can move beyond law's institutionalised time in favour of new notions, we allow the linear narrative to "breathe," to take on a more encompassing character, where we can come closer to truth and justice.

To keep this study from becoming lost in abstraction, the *Afri-forum v Malema*<sup>17</sup> case has been chosen to "ground" the application of the theories discussed. In this case the Equality Court had to decide whether the singing of the lyrics of an established struggle song by politician and ANC Youth League leader Julius Malema at various political gatherings during 2010 constituted hate speech. The historical background of the case is obviously important, and essentially the case was a communicative event that had to determine how we should shape our future conduct in light of its historic meaning.

The case serves as an example of where narrative could go and where law simply cannot in order to access the complexity. As part of the problem the judge assessed

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<sup>16</sup> P Ricoeur *Time and Narrative* (1984) 52.

<sup>17</sup> *Afriforum and another v Malema and others* 2010 20968/2010 (EC) (Unreported) par 59.

that, “the re-adjustment of society required individuals of the groups to reprogram themselves and their conduct” and that this tension is increased because “individuals transform at different rates.”<sup>18</sup> It is this sensitivity to context and human volition by Lamont J that has to be highlighted in a study of time, narrative and ethics.

Such a narrative stretches further, not merely to the facts of a case but also to the legal end-point where actions are interpreted and thus judged. Law also acts upon other characters in the narrative. According to Ricoeur, the ability to act upon a narrative, places a burden or responsibility of care to act ethically. Thus as a player within a narrative, law has a responsibility to act ethically too. Through narrative (and metaphor) law allows for the creative potential of language to come to the fore, and fulfils its ethical obligation toward a broader understanding and inevitably justice. By embracing narrative time, new plots and characters are created, and therefore more meaning.

The need for plurality and particularity becomes apparent when one understands the judgement of a past event within the light of its specific parts, and a specific part in terms of the whole event. All interpretation is a process of guessing and validating. The meaning of a specific part is guessed in lieu of the whole, as well as the other way around. The relative importance of each part is also open to interpretation. Within this “guessing game,” even if guided by apparently immovable legal principles, no claim to a definitive outcome can be made. Thus the validation of an interpretation is not the same as to verify empirically (as many lawyers would like to believe). Therefore the analysis of a past event in a legal case is at heart an argumentative discipline.

In allowing for narrative time, law has to make all actions intelligible by intersecting personal or “lived” time with historical time. It is only through narrative that expression can be given to both understandings of time. It is in narrative that agents act and others are affected by these actions. It is at this stage that individuals intersect as well, and create second-order stories i.e. the narrative of a group.

The notion of narrative within law is not as abstract as might first appear. A narrative has by virtue of its characters and their actions an ethical dimension. Narrative calls

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<sup>18</sup> Ibid.

for the evaluation of its characters. It asks for judgement to be made on the responsiveness of a character, or its failure to respond to others. In this same vein, keeping in mind that the law itself is a character within the grander narrative, it frames an ethical responsibility for law to respond to other characters as well.

When narrative time is adopted, we can see that the personal identity becomes a narrative identity. Identity thus only makes sense in relation to its involvement with other identities. Because of that it places an ethical (or legal) obligation on an agent to respond with care, keeping in mind the biological, societal and psychological constraints that make up such a character. Despite this, the ethical evaluation of an agent's response to others remains the most important. Within the narrative structure, the free will of an agent is not questioned.

## 5 Conclusion

Haverkamp claims that a critique of a system is made possible because of the rhetoric it employs.<sup>19</sup> Through this study, I hope to more clearly delineate the nature of legal autopoiesis and the extent in which it shapes reality. One way of deconstructing the autopoietic system would be to identify how it works with time in shaping our reality, and how different concepts of time, especially narrative time, can change the result of law's interaction with human reality. The boundaries that law draws in its attempt to deal with complexities leave us with hollow shells containing little meaning. If legal time allows for greater plurality, surely law will become a fairer, more just system.

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<sup>19</sup> A Haverkamp *Rhetoric, law And the poetics of memory* (1992).

## CHAPTER TWO

# THE IRRESPONSIBILITY OF AUTOPOIETIC LAW

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### 1 Introduction

This chapter aims at problematising autopoietic legal systems theory. While it remains a marvellously meticulous description and abstract conceptualisation of the workings of a legal system, its logic has certain consequences that do not sit well, namely that it is a conservative and positivistic description. I contend that such a legal system has only two closely-linked goals: legitimacy and self-preservation. This runs in contrast to general expectation that the goal of law should be justice. When a legal system relies on its own autopoiesis to preserve itself, striving toward a standard not set by itself instead becomes a threat.

Law is able to protect itself from the challenge set by justice by undermining the role that time plays. Just like a coil in a knot, time is essential in order to understand justice. With no temporality human identity and action cannot be understood or ethically judged. When law manages to trivialise the role of time, it in effect becomes able to ignore the *aporia* of justice and all other external norms.

In order to evade this responsibility law has developed methods to logically justify its disengagement with reality. The first of these is through the self-definition exercised through boundary drawing. If law has the final say on what it is and isn't, it can externalise any norm that poses a threat to it. This boundary becomes the location of a filter that reduces external complexity and once it makes it through, it becomes steeped in legal complexity, removing it from reality in yet another degree. Through autopoiesis law is able to regenerate itself whilst ignoring the call for justice. Autopoiesis itself relies on deradicalising time through the severing of the past and present.

This very presentism fails law when it needs to deal with its subjects. Human beings and their actions have inherently ethical dimensions, which can only exist in the presence of time. Presentism however makes legal systems unable to access the true

nature of human beings and their actions and consequently their ethical dimensions. It attaches legal designations in order to make sense of it, pulling it further away from its original context and meaning. Humans and their actions are portrayed as being in the service of autopoietic systems rather than the other way around.

After the working of autopoietic legal systems and the mechanisms it employs in order to evade justice have been discussed, a deconstructivist critique of autopoiesis and its relationship with time is explored. Law's use of modal temporalities that favour the present is criticised, and a broader understanding of time allows law to have a memory of the past and the future. This immediately places a sense of responsibility upon law and its servants, and a call to engage with the challenge set by justice, time and narrative.

## 2 How autopoiesis comes into being

Is an autopoietic description of law always true? How does autopoiesis enter into law, and is it an inherent and inescapable feature? The specific characteristics and details of legal systems differ in different times and places. Do legal systems have the ability to be radically different, or does law have a number of universal properties?

There are two obvious stances toward this question. The classical answer is that there are certain timeless, even constitutive properties shared by all legal systems.<sup>20</sup> The question then rather becomes what these properties are. The non-classical point of view holds that nothing in law is fixed and that fundamentally, anything in law can change. In this model, time has a much bigger impact.<sup>21</sup>

It has been suggested that some legal universals do exist, and can be made more obvious by distinguishing between the formal and material aspects of law. The most primary of the universals are the notions of *obligation*, *prohibition* and *permission*.<sup>22</sup> Without obligation and prohibition it would be difficult to imagine something that resembles our understanding of law.

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<sup>20</sup> R Alexy 'Law, Discourse, Time' in J Bjarup & M Blegvad (eds) *Time, law, and society* (1995) 101.

<sup>21</sup> Ibid 102.

<sup>22</sup> Ibid.



With time all legal systems develop and mature. All legal systems eventually reach a stage where public and private legal powers become enclosed. It is usually at this stage that a law system become autopoietic and self-referential.<sup>23</sup> This has important complications for law and time. At this point the law can only be changed according to the laws concerning how to change the law. These legal norms pertaining to the legality of new legal norms becomes the first formal legal universal. The second shared formal universal is law's claim to correctness. These claims themselves are purely formal despite some substantial justification. Legal decisions are acts of will despite proclaiming material legal justification.

How do we account for the particular elements of legal systems that are not shared universally? If everyone agreed exactly on how the law should be, the legal system's job would be to enforce what everybody already knows.<sup>24</sup> Since there are no absolute answers on the good, and mankind has limited knowledge and limited time, opposing points of view on the law can rationally be held. According to Kant the civil state came to be exactly because of the divide between practical knowledge and enforcement.<sup>25</sup>

The problem with institutionalising law is that contested norms move from discursive possibility to legal necessity. In the case of *stare decisis*, legal norms are mechanically applied. This gesture is not only law's claim for its own correctness, but time itself becomes a reason for legal decision.<sup>26</sup> Ironically it is not a radical engagement with time, but a denial of the temporal distance between cases. The truth and correct decisions are compromised for legal certainty, which is in itself is essential for law's self-referential logic that it needs for legitimacy.

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<sup>23</sup> Ibid.

<sup>24</sup> Ibid 108.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 109.

### 3 Shirking responsibility: the three ways in which law mutes the call of justice

#### 3.1 Drawing boundaries

A discussion on the problematisation of the legal system as described by Luhmann cannot begin without discussing its most central concept, that of autopoiesis, or self-reproduction. The etymology of the word has an Aristotelean origin. *Praxis* is something that is done for its own end, its purpose being in itself. Such actions are satisfying in themselves without needing to yield some sort of result. Leisure activities or philosophical reflection would qualify because to do them makes sense on its own.<sup>27</sup> The opposite of this is *poiesis* which is an activity that produces some result apart from itself, a means to an end.<sup>28</sup> Thus *autopoiesis* means that law is a product of its own activity, having its origin in itself and perpetually producing itself further. Francisco Varela calls this the Münchhausen-effect: systems can grab their own hair and pull themselves out of the swamp.<sup>29</sup>

It is for this reason that we cannot speak of “input” in law. Not only does law produce itself, but it also produces its own reality. It is able to do this through drawing a line between itself and its environment, which only law itself decides where it lies. It is the final arbiter on what it considers a part of itself and what is not. All systems do this, but this does not mean there is a single real environment in which all systems roam. Each system creates its own environment existing only in relation to itself. Once this boundary has been drawn, the next step is to typify everything in the environment as “difference” from the legal system.<sup>30</sup> This replaces the concept of a unified world – the only unity is inside the boundaries of the system. This is why we speak of law’s operational closure. Varela says: “The results of systemic operations are once more systemic operations”.<sup>31</sup> This allows law the complete autonomy of being able to discard any notion of input.

So law interacts with its environment strictly on its own terms through specially-created operations. This means that environmental information (problematically

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<sup>27</sup> HG Moeller *Luhmann explained: from souls to systems* (2006) 12.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid 13.

<sup>30</sup> Ibid 14.

<sup>31</sup> Ibid.

typified by law as difference) is translated into legal vocabulary – meaning a loss of complexity – which is built up again in legal complexity.<sup>32</sup> The effect can be likened to the shape of an hour glass, where complexity is vastly reduced as it crosses the boundary or the thinnest part of the hourglass. The “irritations” posed by difference allows law to produce internally its own information of what occurs external to itself.

This self-reference and boundary-drawing allows the legal system a very high degree of self-abstraction. As we have seen with the Münchhausen-effect, self-reference means that the system uses its own elements and operations in order to constitute its own elements and operations. In order to do this the system needs information. It is able to obtain this information through setting itself apart through boundary-drawing, from describing and delineating itself as separate from its environment. This allows it to orientate itself in such a way that it can create information for itself. While it is true that it can create connections and relations within, it cannot do the same with what lies outside of it. As we will see, this operative closure and reduction of complexity has effects on what law can know about personal identity and the potential for agency from said identities. Is it possible to open these boundaries to force law to engage with the complexity of reality and human experience?

This kind of autonomous self-reference would be impossible without some concept of self. The very reproduction of the system lies in the management of the difference between the self and its environment. This management takes the form of systemic operations that are specially created to deal with this kind of complexity. They can be so particular that they become immune to measurement or judgment from other systems, what Luhmann calls “black boxes”.<sup>33</sup> The implication is that law becomes immune to other communicative systems such as justice, which becomes considered as inadequate to judge or communicate on matters regarding law. What we are dealing with here is a logical sleight-of-hand on the part of the legal system. Law has the autonomy to draw boundaries, itself deciding what it is and is not. In this way it decides not to make other systems such as justice a part of itself. It makes it seem like a matter of pure logic that it should not engage with justice or any real-world concept of what good law should be. It effectively neutralises value-judgment, rebutting any criticism with “you might be right, but what you are talking about is not law”.

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<sup>32</sup> Ibid 17.

<sup>33</sup> N Luhmann *Social systems* (1995) 14.

Luhmann himself states that the object of studying systems theory is to find the difference between systems and their environment.<sup>34</sup> Systems (and self-reference) only make sense through its contrast with its environment. As we have said, it is in a system's interest to differentiate itself, for "boundary maintenance is system maintenance."<sup>35</sup> One way in which this is achieved is through external attribution of the environment by the system, in which elements of the environment are attributed certain qualities, meanings and importance.

Systems also have internal spaces in which sub-systems are found. It is very important to keep the internal conceptually completely separate from the environment external of the system. The sub-systems within the internal environment have complex relations and interactions that occur within a hierarchical structure. This hierarchy is in itself a specialised kind of differentiation which assists in the observation and judgment of the system.

We cannot only look at how law regulates the complexity between itself and its environment. Certain boundaries are also present inside the system, and also play a role in regulating internal complexity. If law refuses to engage with narrative time and justice by "not letting it in", we must also determine how it denies this engagement internally. An important distinction in this regard is that of element and relation. Just like systems cannot exist without environment, elements cannot exist without relations. Luhmann stresses that this difference creates a unity, the mere presence of difference being constitutive. The internal complexity of systems can be understood in either the depiction of subsystems as just described, or in the form of elements and relations. I quote the example from *Social Systems*:

In the former, rooms compose a house; in the latter, cinderblocks, beams, nails, and so forth do. The first kind of decomposition is carried out as a theory of system differentiation. The other ends up in a theory of system complexity.<sup>36</sup>

Elements emerge from the "top down" rather than from the "ground up". Elements only exist for the system that employs them and only exist for the sake of the system. This is essential to the concept of autopoiesis. An important implication is that

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<sup>34</sup> Ibid 16.

<sup>35</sup> Ibid 17.

<sup>36</sup> Ibid 21.

seemingly simple systems can employ rather complex elements, meaning that complexity can easily adapt to its current environment.

Not only elements are regulated but their relations as well, and this is done through what is called conditioning. This means that a relation between elements is reached when certain conditions are met (or not met). These conditions can take many forms from inclusion and exclusion to denumeration.

Systems are if nothing else, a method of structuring complexity. At a certain point of complexity, it should become impossible for every element of a system to have a relation with every other element. Complex elements cause subsequent complexity in each higher tier of the system, meaning that complexity becomes necessary for system formation, internalising and making it a matter of self-reference. For systems complexity in this sense means having to make choices and thus taking risks. Although the degree of difference can vary, it is a rule that systems can never be more complex than their environments. In other words a system will necessarily shed some of the complexity when receiving information from its environment. This relationship however is one that continually increases complexity reciprocally over time, creating a kind of co-evolution.

One can only speak of lesser or a reduction in complexity if the framework of an element and its relations is reconstructed by a second nexus containing less relations. As Luhmann writes:

Only complexity can reduce complexity. This can occur either in a system's external or in its internal relations. Such reduction explains how a myth, constrained by the possibilities of oral narration, can preserve the world and the situational orientation of a tribe.<sup>37</sup>

A second way of describing complexity is through indeterminacy or lack of information. When there is a lack of information a system has to accurately describe its environment or itself. These situations are then typified as anxiety, uncertainty, risk or an excuse. Thus systems cannot grasp their own complexity but yet is capable of problematising it. Here Luhmann makes reference to Kant, in that unity must be synthesized from plurality. The exception is that in this case the subject is replaced

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<sup>37</sup> Ibid 26.

with a self-referential system. Thus all unity within the system must be produced by itself and cannot be drawn from its environment. This of course begs the question “why not?” Again it boils down to an unwillingness of law to engage with its environment and norms outside of itself. It carries an inherent challenge to the boundaries drawn by law, and the challenge to legitimacy that goes together with it.

It becomes clear that there is a certain agenda coupled with boundary-drawing. When such lines are drawn, elements must either form part of the system or of its environment. Relations on the other hand can cross such boundaries. Boundaries can separate events while causal effects can cross over. The selection mechanism of boundaries on what passes through and what doesn't necessarily lead to a reduction in complexity. This is always the case when information moves from environment to a system (or from system to system) even if the receiving system does have the mechanisms and vocabulary necessary to process the received information. These selective relations make systems indeterminable to one another, which in turn has given rise to communication systems (such as law) in order to regulate this indeterminability. Boundaries not only separate systems from environment but also from other systems. Sometimes environments are merely treated as another system. Again the meaning of these boundaries is defined internally through self-reference. All contact with environments and systems external to itself are mediated through its own levels of reality.<sup>38</sup>

As much as systems have to adapt to their environment they must adapt to their own complexity. Once the basic elements have been established mechanisms have to come into being to correct behaviour that deviates from dominant elements. This process, as well as the one of selection found in complex systems such as law, cannot be ascribed to acting agents or subjects. In fact Luhmann describes such a selection as “subjectless”.<sup>39</sup> Such adjustments come naturally from necessity, pragmatism and natural selection. It can thus be said that a self-referential system adapts to their own complexity through selection.

The above has implications for the self-referentiality, reflexivity or autopoietic nature of systems. This autopoiesis is not located within the subject or human consciousness

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<sup>38</sup> Ibid 31.

<sup>39</sup> Ibid 32.

but is instead found in the object world. Self-reference means that the unity of an element, relation, process or subsystem is only for the system itself. This suggests that system unity does not occur naturally but has to be produced, and only makes sense through reference to other parts. A system can be said to be self-referential if it creates the elements that make up its own unity. This self-constitution is referenced continuously allowing for the system to always reproduce itself. This means that such a system is a closed one, allowing no other forms of processing in their self-determination. Therefore systems have no need for consciousness.

Another important feature of systems is the abandoning of the idea of unilateral control. No part of a system can control other parts without itself being controlled. Thus all actions of control must anticipate counter-control.<sup>40</sup> This is balanced by self-observation, of handling distinctions such as the distinction between system and environment, helping the system to delineate and define itself. In this manner self-observation becomes important to the autopoietic process, for elements must be reproduced as part of the system and not as anything else. Meaning within operations is only in reference to the system, leaving it to the connecting operation to reproduce meaning through internal and external reference.<sup>41</sup>

Self-reference presupposes the principle of “multiple constitution”. Within systems one finds dialogue between two or more divergent elements that need to function together to create unity. While different or even opposing, one cannot disregard or split either when speaking of the system, despite their individuality. Their difference must not necessarily be understood as conflicting, for they can easily be complementary functions of a different kind. Multiple constitutions necessitates the simplification of communication. Communication is by definition a two-way street. It can only be said to be true communication if the communication from one party somehow changes the state of the other. In this sense communication is a means of limitation in the sense that one has to make one’s own state subject to another. Through communication, complexity is thus reduced through a selection process of which relationships to maintain and which to discard. Put differently, a surplus of possibilities needs to be abandoned.<sup>42</sup> What we have is the practical result of the

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<sup>40</sup> Ibid 36.

<sup>41</sup> Ibid 38.

<sup>42</sup> Ibid 39.

reduction of complexity: fewer possibilities and fewer futures. While this will always be true to some extent, the thought that this is a largely avoidable consequence of law's non-engagement with narrative time and justice sits uncomfortably. The horizons of past and future are made smaller and insignificant, leaving a limited and legal outcome.

The classic debate between whether law has either a positivistic or a natural nature is one that primarily concerns itself with the legitimacy of law. Luhmann asserts that law has a positivistic nature, claiming that if positive law needs to be legitimised by another system such as morality or justice, it only makes positive law vulnerable to resistance, labelling such theories as "extreme".<sup>43</sup> He does however ask the question of whether it needs further legitimisation than Bentham's theory and its descendants.<sup>44</sup>

Having said this, he recognises that positivism is theoretically inadequate.<sup>45</sup> The natural law or rational law argument states that if positive law is validated by decision, the decisions can be arbitrary if backed by coercive power. Luhmann refuses to accept that law is made arbitrarily. He states that the distinction is rather one of changeable and unchangeable law: natural theories appeal to a level of unchangeable law, whilst positivism deals with changeable law. If the positivist changes law to suit particular circumstances it is to his mind exactly what makes law non-arbitrary.<sup>46</sup> The unchangeable nature of law has been removed from some order outside of law and has manifested in constitutions, and thus natural law can be removed from the legal equation. In this light Luhmann decides that a truer, more contemporary distinction to positive law is morality, or for our purposes justice.<sup>47</sup> He states however that this distinction "does nothing for legal theory – apart from, of course, providing confirmation that law is positive law and that it can also be assessed morally (without immediate legal effects)."<sup>48</sup>

This statement is however not as insignificant as Luhmann seems to believe. I agree with the sentiment that describing positive law as unjust doesn't make it less law. The discussion however can simply end there. By looking at law through the lens of

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<sup>43</sup> N Luhmann *Law as a system* (2004) 76.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 77.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.



justice, value judgments can be made as to whether we are looking at good or bad law. Instead of law disregarding its responsibility to engage with being “good” as measured from outside its boundary, it could at best attempt to incorporate these norms (although the norms will undoubtedly assume a legal character) or more drastically an “invasion” of justice across the self-drawn boundary of law. It is simply too convenient to say “that’s law, and we cannot apply extra-legal norms to the system”. It is a symptom of the great abstract legal system assuming a hierarchical position above human reality, instead of being subservient to it.

It is important to establish in this case what exactly is meant by positivistic law. In this case it means law as a social system, as a union of operations that communicate using a specific form of legal communication.<sup>49</sup> This means that the basic distinction becomes not one of norms or of values, but of system and environment. This implies a break from law as structures toward operations. While structures are important for providing the frame upon which operations “hang”, only operations give law identity and meaning. What remains is the question of how operations create the distinction between system and environment, and how it recognises which operations belongs to its system and which do not.<sup>50</sup> Per definition to be able to speak of “law” these operations have to be operations of the legal system itself, signifying law’s operative closure.<sup>51</sup>

The degree of closure in a system towards its environment is important. The second law of entropy states that systems which are closed to their environments lose energy and eventually dissolve.<sup>52</sup> Thus exchange with the environment is necessary for a system to maintain energy – or in this case information – to increase its own complexity and self-preservation.<sup>53</sup> In fact operative closure is vital for a system to increase its own complexity.

Luhmann explains that operative closure doesn’t mean isolation from the environment. He appeals to common sense, highlighting the causal links between system and environment. He states that being open to matter or energy does not

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<sup>49</sup> Ibid 78.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid 79.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid.

preclude closure toward informational or semantic closure.<sup>54</sup> When a system defines its object from its causal relationship with its environment, only then does it close its operations to its environment.

The same rules apply to observations on the system, whether these observations are from inside or outside the system. Observations themselves are also operations.<sup>55</sup> The observer can distinguish between constant structures and eventual operations as if they were objects in motion and thus observe structural changes.<sup>56</sup> Thus the observer observes a system that is temporally limited but connected to the temporal limitations he himself is bound to.

Law is made up of its structures and operations. There is no material difference between the two.<sup>57</sup> We cannot assume that norms and communications are made up of different qualities. In law even communication serves to produce and maintain structure. An autopoietic system always does whatever it does for the first and the last time. All seeming repetition is an artificial fixation on structure, structures which owe their existence to operations. While the distinctions between the two can be identified by an observer, Luhmann insists that they cannot be separated operatively.<sup>58</sup> By serving as both operations is the very thing that gives autopoietic systems unity.

These operations (of only the particular system) create structures without external factors. In other words “[o]nly the law itself can say what law is”.<sup>59</sup> Operations require structures to define themselves by recursively referring to other operations. Thus autopoiesis is not only the production of operations by other operations but also the confirmation of structures through operation, giving law its self-determined structure.<sup>60</sup>

Operations exist in order to create difference.<sup>61</sup> Something changes after an operation. A legal action is taken, or a decision is made, and from this point something leaves the environment and enters the legal system. This is a factual event regardless of

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<sup>54</sup> Ibid 80.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid 84.

<sup>58</sup> Ibid 85.

<sup>59</sup> Luhmann (n 33 above) 85.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

whether it is observed,<sup>62</sup> or how it is described. One such observational operation that is important to law is the observation of the distance between law and injustice. Observations are intricately tied to self-observation. One can only observe if one keeps a distance between oneself and one's observation instruments, their "distinctions and designations",<sup>63</sup> and not confuse it with the object of observation. The exact same is true for self-reference. When observing any indication of the self becomes distinct from the self. When one distinguishes one always references oneself. The two concepts cannot be kept apart, and are conceptually identical.<sup>64</sup> Law is also bound in self-observation, and its observational operations are able to reintroduce and reproduce differences between it and its environment. In this way it can sever itself from external references in its environment and moderate all reference as self-reference.<sup>65</sup>

This self reference carries, as I have discussed, certain implications. Law can draw boundaries between itself and systems or norms that challenge its authority. This makes it immune to external questioning of its own logic. By building up its own complexity it becomes internally consistent yet removed from human reality. Boundaries achieve this by allowing law to define anything and everything only in its own vocabulary, even the very nature of human identity and action. In the next section we will look at how law reduces the complexity of human identity in order to avoid just engagement with those who it is ultimately meant to serve.

### **3.2 Denying identity**

The way in which a Luhmannian description of legal systems deals with human identity is problematic. In this section the theoretical underpinnings of identity will be examined, in order to set up a comparison with an alternative, namely the narrative identity posed by Ricoeur. The aim is to show that identity is dealt with in a reductive manner which has the effect of disempowering the potential of human beings to not

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<sup>62</sup> This observation is in itself an operation of a system, creating difference in it. Many operations have concurrent self-observation built in too.

<sup>63</sup> Luhmann (n 43 above) 87.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

only affect change, but even more importantly of reducing humans to a level where their existence doesn't demand the law to deal with them wholly or justly.

Systems theory is based on the premise that society is in fact not human, but at most (and only in part) a *collection* of humans.<sup>66</sup> It is a break from earlier anthropocentric descriptions of society. Instead society is regarded as the interaction within and between a myriad of systems. When a person buys something, votes in an election, or watches the TV news it is not considered by systems theory as human communication but as economic, political or media communication. This underlies one of the most basic and discouraging premises of systems theory: "human beings do not and cannot communicate – only communication can".<sup>67</sup> Society ceases to be understood in terms of its members but rather in terms of its events. Humans are regarded as an important external *sine qua non* to communication but are not essential to the internal element of communication, holding that we cannot connect to other human beings but only to their communication.<sup>68</sup> Law is a social system of communication too, with other important systems in its environment.

For Luhmann human beings seem to be made up of many different systems, namely the system of the body (a biological system), mind (a psychic system), as well as various different communicative systems. While individuality lies in the psychic system it is not seen as enjoying any sort of primacy above the rest as in much of traditional philosophy, and in fact there is no hierarchy regarding these systems.<sup>69</sup> A person can be divided into a body, a mind or a communicator, and cannot theoretically be regarded as a unified *human being*. This concept denies the complex nature of a person.<sup>70</sup>

The systems of mind and society are dependent on one another, or structurally coupled. With the assistance of language and communication they have co-evolved, a relationship leads to a certain understanding of human individuality. Individuality and identity is comprised of a combination of psychic and social systems and express themselves in both these spheres.<sup>71</sup> In the psychic system, identity comes to fruition

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<sup>66</sup> Moeller (n 27 above) 5.

<sup>67</sup> Ibid 6.

<sup>68</sup> Ibid 9.

<sup>69</sup> Ibid 10.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid 83.

through self-socialisation. In social systems the individuality of persons as part of society is an important self-description of society's own idea of itself. Technically speaking both systems make their complexity available for the construction of the other.<sup>72</sup> As much as each mind is its own system it is informed by the social and cultural information that is available. At the same time social or communicative systems however have developed the concept of a person or individual in order to establish parties involved in communication. Social systems need to classify persons as such in order to bestow upon them roles and expectations (such as a "mother" or an "accused"). Such individuality bestowed upon a person is highly variable depending on the system in question, the circumstances and the time. Such labels are thus specific semantic designations reflecting certain structural conditions in a society at a specific point in time.<sup>73</sup> Individuality is thus not considered a substantial quality of human existence but simply a product of the language of psychic and social systems. Luhmann states that there is no object that corresponds with the term "human being", and that words such as "person" or "agent" are simply certain roles taken up within communication.<sup>74</sup>

Identity is also tied up with which spheres or structures a person is looking at. The most basic social unit is the nuclear family, where one is tagged with the first of such societal labels such as "brother" or even "the one who fetches the newspaper". It is here where a person is first conferred with individuality and is the first instance where someone becomes socialised. Yet even in this context individuality is not understood as uniqueness but as indivisibility and the occupation of a social status.<sup>75</sup> For Luhmann to speak of a unique subject with its own relationship with the world, places a person outside and independent of society. This is needed because the social roles a person can occupy are varied and often changes. Having external individuality allows entering and leaving societal roles.<sup>76</sup>

Luhmann has problems with constructing human beings as wholly realised and unique. For him granting everyone with some kind of uniqueness makes it by its very definition non-unique. He argues that such uniqueness is still determined by society.

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<sup>72</sup> Ibid.

<sup>73</sup> Ibid 85.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid 86.

<sup>76</sup> Ibid 88.

The terms in which individuality is described is still one of being or not being certain things, for even in saying you are not something you are still orienting yourself in relation to that. Again we see the binary logic in which Luhmann likes to think: you either are something or not, and nothing in between. Another problem is that in social engagement one assumes different personas, or at least different aspects of oneself through division.<sup>77</sup> This is something that is recognised by modern psychology.<sup>78</sup> Luhmann claims that in light of being unable to fulfil the lofty claims of individuality as made by early modern philosophers such as Kant humans have fallen into an attempt at individuality that boils down to the “copied existence” of fashion and trends.<sup>79</sup> This problem is then not one of the human condition but rather one of mind-communication. The subject’s background, interests and career – his or her social features – become the social identification of the person. One becomes an individual through engaging in social systems.

Another point he makes is that in pre-modern times identity was at least partly made up of difference and exclusion. Moeller uses the example of the ancient Greeks, who differentiated between themselves and Barbarians, namely everyone else. In contemporary society this is not true anymore. Subjectivity requires that nothing can be excluded and all of humanity is neutral to difference. Moeller then asks the question, what am I if we are all Greeks?<sup>80</sup> Human identity is not seen as a complex narrative where each individual has their own history and motivations and goals. If I am not a barbarian, I am a Greek. Luhmann problematises this through what he calls the difference-neutrality of human rights – ultimate freedom of making one’s own choices, of no right or wrong way, and the disregard for factual difference – as the “true” fundamentalism of our time. He describes universal subjectivity and human dignity as meaningless.<sup>81</sup> The ultimate meaning of systems theory is that any difference or inequality can only be applied to a subject by the system itself. It is true that law only recognises the difference that it imparts itself, but isn’t this true for all discriminatory operations of law? Instead of laying the blame at the feet of the human rights discourse, I contend that this is no different from all the other binary decisions and designations that the law makes. That is the unavoidable expression of

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<sup>77</sup> Ibid 89.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 93.

<sup>81</sup> Ibid 94.

autopoiesis. That I consider this symptom a problem of law should be clear. But unlike Luhmann I will not blame the “fundamentalism” of human rights discourse, but the operative closure of law itself. The whole point of arguing for narrative time is in order to open law to particularities and designations prior to itself.

Luhmann has tried to address Kant’s problem of human cognition: how can cognition know something about an object outside itself? How can the *cogito* be possible without being able to observe it from a reality external to it? This same question is posed to systems theory, which makes the assertion that systems are only able to produce information because its environment doesn’t interfere with it through its operational closure, and he applies this same formula to the *cogito*.<sup>82</sup> In this sense reality is only ever a constructed and interpreted reality. Much as systems operate through drawing boundaries and creating difference, so too does consciousness. Thus difference is not a problem for *cogito* but is in fact a precondition for it. The subject/object distinction is thus replaced by the difference between system and environment.<sup>83</sup>

The result is that cognition as such is not only a biological trait but also one of psychic and communicative systems. It is in essence an operation, establishing itself through autopoiesis. Cognition is thus already an empirical process without the need for *a priori* structure. A result of this is that the *cogito* can be given a single definitive definition because it is always evolving.<sup>84</sup>

The inability to have a world that can be commonly observed means the death of the subject for Luhmann. Autopoiesis becomes the foundation of action and cognition.<sup>85</sup> Identity and agency is removed from human beings, denying their narrative identity and their right to fulfil their narratives justly. Again we witness the unwillingness of law to deal with humans as persons with a past and a future, with projects, goals, motivations and ambitions. When identity becomes neutralised in this way, it becomes impossible to make ethical or just judgments. Identity is reduced to a legally communicated identity that becomes removed and immune to anything outside of legal logic.

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<sup>82</sup> Ibid 167.

<sup>83</sup> Ibid 170.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

The narrative identity is however not the only part of human beings that is reduced by autopoiesis. Narrative action or causality is also given a false and alien complexity, as we will see in the next section.

### 3.3 Decontextualising causality

All social / communicative action takes place within an autopoietic system. Therefore a human agent cannot speak of “acting”. All such actions take place within the system and by the system, while human agents find themselves in the environment of a social system. As we have seen, human action has been typified as the result of communication, and not *vice versa*.<sup>86</sup> The result is a total placement of psychic individuality outside of the sphere of social systems.

The separation of a system and its environment has an effect on causality, the boundary bisecting causal connections. That is why it is important to understand how causality is spread over system and environment. Systems can produce some (but not all) causes necessary for effects under the control of said system. This selection of “some but not all” implies decision-making and thus retention. Over time a collection of beneficial and productive causes accrue and as it grows, gain more influence over its environment as well as its own evolution and self-preservation. In this manner causality becomes an organisation of self-reference, distributing causation across the system and its environment.

Systems have a particular way of dealing with information. Information can be defined as either an internal or external event that enters the system and makes selections regarding the state of a system. In other words this happens when a difference comes into contact with the self-referential operations. Once this happens certain causal future outcomes come into being, through operation (or even disoperation) of the system. This branching out of possible futures lends self-determination to the system. These different ways of conducting and affecting itself can be stored and recalled. These “branches” enter the system when difference occurs, making information possible without affecting the course this information of difference will run. After these possibilities have manifested a system can recall it and

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<sup>86</sup> Ibid 97.



use its own past as its own causal basis, removing it from the causation of the environment without fixing or predetermining its own internal causality. Again this is what grants it self-determinacy and immunity from the causal laws of its environment. Such demands are merely internalised as difference from which point itself can decide what the causal implications are. In this manner improbable (or even improper) futures and effects can be logically explained, or as Luhmann says “[t]hey presuppose themselves as the production of their self-production.”<sup>87</sup>

The implication is that the true weight and nuanced character of human action is reduced in complexity, dragged across the boundary into the legal system, and described in ways that do not reflect it accurately. Human action is removed from the hands of its agents and become of the legal system, with its motivations and goals being replaced by those that the system designates it with. It is difficult to imagine how justice can be done if actions can only be expressed legally, and not in their true narrative context. Law is not concerned with truly engaging with time which necessarily makes a just engagement with action or causation impossible. While this can still lead to just results in some (or even many) cases, they cannot be because of convincing ethical or reasoning or motivation. They will remain hollow symbols without the content of justice.

#### **4 The problematic consequences of systems theory**

As I have just shown, an autopoietic legal system has a specific manner of evading its responsibility of engaging with time, justice and narrative. The most important ways in which it shirks such responsibility is through the drawing of boundaries and retracting from the world, which allows it to change its own understanding (and eventually even our understanding) of who and what we are, and how we can act and effect the world. Since we have seen the manner in which autopoietic systems operate, let us look at the effects thereof.

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<sup>87</sup> Ibid 41.

## 4.1 Justice

Operations are what give the autopoietic legal system its unity and are necessary to distinguish between law and its environment. It is an instantaneous self-reference, referencing law as law and not as part of anything else.<sup>88</sup> The temporal sequence in which this happens makes it difficult to grasp because each instant operation follows on another, affirming law instant-by-instant in an operational loop of self-reference.

However, this repetitive self-reference has to happen in constantly changing circumstances and the only way it can achieve this is through generalisation.<sup>89</sup> This requires that the recursive operations needs to constantly be made as general, aerodynamic and “light” as possible, as well as be constantly confirmed. The first action gives them a certain character, and the second proves their applicability to different situations. In the words of Luhmann this imparts “a meaningful core of actuality with a host of references to other possibilities”.<sup>90</sup> These references are all internal, referring to particular legal texts and giving them validity. This gives the system some kind of “experience” in imparting meaning. A similar case is the one of observation that must create distinction in order to find the object of its observation, making the observation itself illusive to designation. Thus an observer is always caught in a paradox, as “the unity of something that must function as different”.<sup>91</sup>

Thus law has to deal with the paradox of treating binary states as a unity.<sup>92</sup> One of the most important of these binary designations is the one of legal/illegal. For Luhmann decisions of law can always be reduced to such a binary, with the help of

[T]he massed forces of legal theory appear on the scene to clarify which criteria apply to the distinction between the right and wrong allocations of legal values. In this way one arrives at a theoretically systematized positive law, which is based on rules and principles – and one can be satisfied with that. The traditional question of the justice of law thus loses all practical meaning. It cannot be added as a third value alongside legal and illegal [...] As a result, issues relating to the justice of law are

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<sup>88</sup> Ibid 211.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid 212.

<sup>92</sup> Ibid.

treated purely as a question of ethics, as questions only about the foundations of law in the medium of morality. And one tries hard to find a place for ethics in law.<sup>93</sup>

Luhmann's problem with justice is that it is left for ethics to contemplate, only to be handed back to law with an expectation to somehow incorporate it.<sup>94</sup> These moral values can only be incorporated by taking on a new and legal character, again making it part of the legal system and removing its moral or ethical dimensions. For him, it does not make sense that legal norms or rules should have "reasons".<sup>95</sup>

Justice must then be located elsewhere within legal theory. The validity of legal norms circulate inside the system, linking operations and being recalled for future use, justice is concerned with a self-description of the system. This brings us back to the problem of observation and description's binary paradox.<sup>96</sup> This is complicated by the fact that theories of justice have a normative nature. While the theory of justice might well be what bridges the chasm between natural and positivistic theories of law, law cannot describe itself through justice whilst at the same time saying what it means, for that would mean designating its own operations outside of its own system.<sup>97</sup> Luhmann regards justice as being limited by distinction, a self-referential observation and not an operation, not a theory but "disappointment-ridden norms".<sup>98</sup> Autopoietic operations simply cannot be just in themselves.

In this light Luhmann understands justice as a formula for contingency in law.<sup>99</sup> He compares this with other such formulas, such as scarcity in economics or limited learning ability in education.<sup>100</sup> Again this idea of justice is removed from any natural law theories, and he makes the statement that nature is in no way just and any concept of order is a mere result of evolution.<sup>101</sup> Thus justice is not rooted in nature, but in assumptions of the self-specification of the formula. Such formulas are circular giving them a self-instilled character. Their function is to distinguish the difference between determinacy and indeterminacy and give historical reasons for doing so. Given that determinacy and indeterminacy are another example of a paradox in unity, and justice

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid 213.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid 214.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

(as a formula) has to resolve this paradox.<sup>102</sup> Justice is itself a norm and not a criterion for selection. Luhmann does not want it to be understood as a formula for development, an indication of the direction in which law must expand.<sup>103</sup> The equivalent would be to say that economics must develop in the direction of less scarcity, something impossible. The relationship between law and justice is thus complicated: on the one hand law's structures and operations are expected to be just (otherwise the intra-referencing unity – of which justice is part – would be lost), while on the other it doesn't follow that a operation is just merely because it constitutes part of the system.<sup>104</sup>

Thus justice carries the duty of having to deconstruct the paradox of difference-in-union through defining one aspect thereof without defining the other, thus co-opting difference.<sup>105</sup> Justice is then further linked to the idea that it must be consistent in its decisions, further complicated by the reduced complexity of law and its decisions. Complex environmental problems need to be stripped-down to legal essentials in order to be decided in a consistent manner.<sup>106</sup>

Social systems such as law and politics often employ moral discourse.<sup>107</sup> Systemically speaking law does not need the moral system to communicate effectively. The legal/illegal binary is not the same as the good/evil or justice/injustice binary of justice. Luhmann feels that when ethical discourse enters into social systems it is usually an indication that something has gone wrong, and disasters such as wars, revolutions or oppressive states are imminent, being justified by moral rhetoric.<sup>108</sup> He thus understands ethics not as a system of imperatives or distribution of the good, but as a non moral theory of society, or what he calls “negative ethics”.<sup>109</sup>

Luhmann recognises that modernity's difference-neutrality has created a need for a common moral code that isn't tied with a single religion or cultural point of view. This has become the role of philosophical ethics, which as a discipline attempts to

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<sup>102</sup> Ibid 216.

<sup>103</sup> Ibid 217.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid 218.

<sup>106</sup> Ibid 220.

<sup>107</sup> This is meant in a general, non-technical manner and should not be confused with moral *communication*.

<sup>108</sup> Moeller (n 27 above) 109.

<sup>109</sup> Ibid.

find rational reasons for moral behaviour. On final analysis he finds that rational ethics has failed in its project, and that two centuries after Kant there is still no generally agreed-upon source or rationale for moral behaviour.<sup>110</sup> Ethics cannot find a reason for morality, but it can be a “reflective theory of morality”, of how it functions in society. For Luhmann thus, the origin of morality is unimportant and should merely be understood as a social phenomenon that can be studied as a social system. For him morality deals with the binary of esteem/disesteem in the sphere of social esteem, or acceptance of a person by society as an agent of communication.<sup>111</sup>

He further holds that while the communications of different systems are amoral, all systems are able to add moral communication to their codes. Since it is not a basic code of other systems such as law, it can be applied to it. According to him it is impossible for a person to engage in moral discourse without identifying oneself with the positive “esteem” side of the coin, and thus one brings one’s own self-esteem to the table.<sup>112</sup> The polarising communication of morality is what can lead to force and conflict. In this manner moral communication in fact becomes dangerous, moving Luhmann to speak of an ethical theory that would “warn of morality”.<sup>113</sup> Even if morality could be a good thing, there could be a case of “too much of a good thing” that can break down healthy communication.

Unfortunately at the end of the day Luhmann’s “moral theory” is a limited one. It can only comment on observations of the functioning of ethics in communication without delving into moral *praxis*. Even in these observations morality is seen as something that can be tolerated in small doses but that fuller engagement necessarily leads to the drawing of a line in the sand and eventual conflict. Through understanding law as autopoietic, justice and ethics become alien to it, and its very standing to comment on law is called into question. Instead it becomes typified as dangerous and as a threat to legal order. This of course is dangerous for law’s continued existence, and explains why it is unwilling to give too much weight to ethical discourse.

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<sup>110</sup> Ibid 111.

<sup>111</sup> Ibid.

<sup>112</sup> Ibid 113.

<sup>113</sup> Ibid.

## 4.2 Time

A system is operatively closed if it relies on its own existing operations to create new operations for itself, thus reproducing itself. It has to assume its own existence to reproduce itself, using only itself.<sup>114</sup> The question that logically follows though, is on what grounds are normative programmes formed? The stability, duration and validity of norms have their origin in a secondary phenomenon.<sup>115</sup> It has to be established to what extent law is independent in its autopoiesis, whether it can withstand structural changes. This question is answered from moment to moment.

Again, all operations perform only in the present, and everything that happens is happening at the same time. The past and future are only relevant to the degree that it is important to the present. Structures are only in use in the present. The system employs these structures to move from operation to operation at the same time.<sup>116</sup>

Temporally speaking operations are “events”. They have no temporal length and inject the present with multiple possible futures which, through decision-making, disappear (bar one) just as quickly. This infinitely small<sup>117</sup> temporal dimension means that they cannot be altered.<sup>118</sup> It is this limited engagement with time that is problematic with much of autopoietic legal theories. This refusal to engage radically and responsibly with time has, as we have said, repercussion for both narrative and justice. When law conveniently makes time a nonfactor, it effectively neutralises concerns over narrative and justice too, for they need time to “work”. If we want better law, a slower and more complex relationship with time needs to be established.

One of the effects of the autopoietic system is the “radical temporalisation of the concept of the element”. The elements composing a system have no duration and must therefore be constantly reproduced by the system, allowing the systems to move into the realm of action.<sup>119</sup> Luhmann insists that this is not a matter of replacing defunct parts or adapting to its environment. Instead it is:

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<sup>114</sup> Ibid 81.

<sup>115</sup> Ibid 82.

<sup>116</sup> Ibid.

<sup>117</sup> “Infinitely small” in the same sense as the infinitely small present, where the past and future cut off each “side” of the present ad infinitum.

<sup>118</sup> Although the temporal duration in which they can be *observed* seems to be bigger.

<sup>119</sup> See Section 3.3 of this Chapter with regard to consequences autopoiesis has for time and action within a system.

[A] matter of a peculiar constraint on autonomy arising from the fact that the system would simply cease to exist in any, even the most favourable, environment if it did not equip the momentary elements that compose it with the capacity for connection, that is, with meaning, and thus reproduce them.

Regarding the question of openness in the face of operational closure there is a degree of outside influence from the system's environment and the self-reference isn't absolute. At the same time it is also true that for a system to function its environment needs to be structured. Arbitrary environmental information cannot be received and processed by a system.

A social system, like everything else, is temporally located. With time comes change: changes to the environment and changes to the system itself. Luhmann states that “[s]ystems are especially sensitive to change, and therefore for some systems time exists as an aggregate designation for all change.”<sup>120</sup> Even simple relationships such as the one between complexity and selection imply duration of time, even being the impetus for the function of selection. Any event has future consequences and can thus not be seen as an isolated snapshot. This is true for selection itself as it lies in the future, then the present and eventually the past. Selection employs time to locate itself within an already temporalised environment. Selection being the dynamic of complexity, it can be said that all complex systems are required to adapt themselves and their operations to time.

Much like difference, change is typified as a problem for systems. Some changes are reversible, others are not. Even reversibility costs expenditure of time, resources and new irreversibility that comes into being. The great exception of course is that time is not reversible. Luhmann emphasises that time is presented as chronological, with only the moving present being experienced (or the classic A-theory of time). He gives this as the reason to why systems should be understood in such a linearly ordered manner. Systems depend on this model to explain their evolutionary development.

Since complexity differs between a system and its environment they become unsynchronised with one another, and the system must develop mechanisms to control this disparity. These mechanisms cannot perform instantly but take time to operate.

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<sup>120</sup> Luhmann (n 33 above) 41.

Thus certain “time shifts” between system and environment are created.<sup>121</sup> Systems that want to account for such time shifts need determinate structural conditions and have to limit internal interdependency, which directly affects autopoiesis and complexity. Distinguishing “structure” and “process” as “atemporal” and “temporal” is too simple. Rather the divergence lies in that structure and process reconstructs difference (as received from the environment) between reversibility and irreversibility in, as Luhmann claims, an irreversible construction of time.<sup>122</sup>

Structures open choices and possibilities. Structures can be changed, destroyed or reconstructed. In this manner it displays the reversibility of time. Processes on the other hand deal with events and their consequences that cannot be undone, and therefore say something for the surging irreversibility of time. Both structures and procedures work with selectivity by narrowing down choices that the system ultimately needs to decide upon. Structures do this by reducing the complexity of the difference or problem by deciding with which of its internal elements it is connected and which parts are most suited to deal with the difference (thus limiting the future selection and decisions that can be taken in a specific case). Processes on the other hand take specific selections, make new ones, and continue that process. Selections build upon one another temporally, making previous selection premises for new ones.<sup>123</sup> This shows how both structures and processes have different manners of selection making when dealing with difference while at the same time having dissimilar relationships with time. A system can thus decide which of its elements it assigns to these methods of selecting, thus controlling its own autopoiesis through aligning itself with certain differences and adjusting itself according to them.

Systems also engage with time in the sense of wanting to save time, or to operate more speedily. It has various mechanisms for doing so. The first such method is a sort of memory employed by systems. A system can store successful (or unsuccessful) experiences for later use. These memories are abstracted to suit new differences when they occur. Time in this case becomes a “whenever”.<sup>124</sup> Selections with certain possibilities or results are stored and are accessed when they become useful again.

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<sup>121</sup> Ibid 43.

<sup>122</sup> Ibid 44.

<sup>123</sup> Ibid 45.

<sup>124</sup> Ibid.



Second there is also the function of “speed”, namely mechanisms that are faster than the normal processes, employed when certain conditions are met.

Finally, a social system such as law is also capable of presenting its complexity in a meaningful form. It does this by actualising something which is not actual at that moment in time (with the risk of remembering or anticipating incorrectly being present). As Luhmann writes:

The construction of such possibilities produces as a frame condition an aggregate idea of time, an interpretation of irreversibility in the sense of the difference between past and future and an exploitation of the present to integrate discrepancies that are grasped temporally. The classical title for this, *prudentia* [...] also signified that there are strict limitations on the correct uses of this potential for actualising what is not actual.<sup>125</sup>

He then employs the example of the two hedgehogs racing a hare, with a hedgehog each showing up only at the starting and ending point of the race. The hedgehogs display *prudentia*, communicating selectively with one another, while the hare can merely speed up its processes and run faster.<sup>126</sup>

As we have seen, systems create distance between itself and its environment (*inter alia* through boundary-formation) to gain greater temporal autonomy, allowing itself to employ its unique temporal dimensions to deal with problems of its own complexity and importantly, to increase its own complexity. Luhmann calls this the “temporalization of complexity”.<sup>127</sup> This is a mechanism used by systems to adapt to the irreversibility of time.<sup>128</sup> By reducing the temporal duration of its elements a system can join in the irreversibility of time. By copying it the system can connect elements that have passed away or are still coming into being. It becomes a way of the system to join in the irreversibility of time.

Temporality often forces systems to order the connections between its elements. Both internal and external temporal demands require this of the system. This requires an abstraction of the structures involved, as well a temporalisation of its elements, subject to time’s irreversibility. This requires constant fluctuation in the system’s

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<sup>125</sup> Ibid 46.

<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid 47.

relational models, meaning elements must continuously connect to something different. Actualisation requires these new connections, forcing such systems to constantly adapt and make new compatible elements, connections and structures.<sup>129</sup>

Through temporalising its elements, a system temporalises its complexity. Elements themselves have short life-spans or like actions have no duration at all. This in itself doesn't destabilise the unity of a system; a system is stable with reference to itself, not its elements (this lack of foundation is exactly what makes a system autopoietic).<sup>130</sup>

Having said this, systems still exist through its elements and subsequent events. Temporalisation however creates interdependence between the coming-into-being and the disappearance of elements. Temporalised complexity in fact depends on the passing away (or disintegration) of elements. The passing of elements creates vacuums for new elements (new relations that can or indeed need to be made), as well as the "raw materials" for such elements, in the form of certain mechanisms. This process of passing and replacement needs to be fast to allow for constant self-observation, and to maintain the system's capacity for discrimination. A well-functioning system is one that effectively manages this interdependence of passing and coming-into-being.<sup>131</sup> Seen like this, reproduction is an ever-present problem for systems with temporalised complexity.

Returning to the concept of law that "pulls itself from the swamp by its own hair" the legal system, with temporalised complexity, have properties that are not rooted in their underlying levels of reality. They have to constantly regenerate their elements, keeping their temporal duration as short as possible, creating a balancing act of stability and instability, determinacy and indeterminacy. These opposing features are found in each element concurrently: while determinate in its temporal actuality, it is indeterminate in its connectivity.<sup>132</sup> A system dynamically changing in this manner must have sensitivity to its environment to decide on its internal connecting states in

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid 48.

<sup>131</sup> Luhmann takes time to point out that this characteristic of systems must not be understood in the same manner as a return to equilibrium found in nature, of returning to a stable state. It is not a static but a dynamic stability, concerned not with balance but with constant renewal of the system. Through this systems display entropy that needs to be managed.

<sup>132</sup> Luhmann (n 33 above) 49.

order to preserve its self-preservation. In Luhmann's opinion this inner "irritability" of the system makes it more open to (self-selected) aspects of the environment.<sup>133</sup>

If temporalisation is a condition for self-referentiality, temporality must be built into self-reference. "Not only is the system restless, but its own restlessness allows it no rest".<sup>134</sup> Yet if it can be said that this entropy is built into systems, are there limits to this destabilisation? In other words, can a system destabilise itself to a point of no return leading to a self-imposed self-destruction? Luhmann's answer is that a system references its environment in order to gauge whether its elements have become estranged from said environment. This makes the changes communicable with other systems that have their own instabilities.

Temporalisation is a condition for complex high-level systems formation.<sup>135</sup> The dynamic environment in which it operates is also important for managing the system's complexity. Philippopoulos-Mihalopoulos recognises that Luhmann's engagement with time owes much to Heidegger, and that this means that at the same time it is both complex and old-fashioned.<sup>136</sup> As we have seen all operations within a system are temporalised in the sense that it makes a distinction between past and future. It affects the effect an operation can have through temporal limitation. Law has its own internal time separate from that of its environment, meaning that we have to deal with two temporalities. While it is intuitively important that law must be mindful of the time external to it, it can only be realised within the system.<sup>137</sup> The result is that law can only recognise its own time of its operations. The Greek terms of *chronos* for the time of the environment and *kairos* for the internal system time can be used. What ends up happening is that it is expected that the *kairos* be subsumed within the world's *chronos* while still holding on to its own individual character, a sort of box-within-a-box.

The legal system needs the asymmetry or difference in time in order to solve new problems through the creation and application of new norms, challenging the system to create its own complexity. Time brings about change and law has to deal with this change. Thus once again we can say that systemic complexity is enhanced through

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<sup>133</sup> Ibid 50.

<sup>134</sup> Ibid.

<sup>135</sup> Ibid 52.

<sup>136</sup> A Phillipopoulos-Mihalopoulos *Niklas Luhmann law, justice, society* (2006) 136.

<sup>137</sup> Ibid.

infinitely short – temporally speaking – events.<sup>138</sup> The duration of an operation is however what gives a system temporal duration, making law an unstable sum of instant durations. This is exactly the nature of autopoiesis, of building on a foundation that is not there. Law uses its internal time with its own memory and foresight to make decisions and apply norms with little regard to the time of its environment.<sup>139</sup> Law has a temporal autonomy that is distinct.

Different systems need to be synchronised somehow though; otherwise it would lose contact with the environment. It is in this sense that “everything happens simultaneously”.<sup>140</sup> It is the present now in which memory and foresight occur, and Luhmann echoes Husserl in that it is always qualified by the past and the future. All processes of the system cannot however happen in a single *now*, and successive presents are required. In this sense the law cuts temporality into present instants. Thus any communication between systems can only happen simultaneously, creating circular recursive causality, where a single stage is both a cause and an effect.<sup>141</sup>

Earlier I discussed the difference between internal and external time. This concept of internal/external is clearly also one that is important for systems. The system temporalises itself differently from the time found outside of it. It needs to typify time as a moving present in a typical A-theory model. This leaves little space for memory or projection. Even though a system has some kind of “memory” for remembering successful operations, it is not a true memory.<sup>142</sup> In the terminology of Kant, if time is *a priori* and pure sensible intuition, how can hypothetical scenarios be argued (which is no doubt an important method for arguing real situations) if the system doesn’t possess any sort of imagination in order to connect understanding and sensibility?

Structures are only real when they exist in the present and link communicative events, and norms when they are quoted (explicitly or implicitly), and expectations when they are expressed through communication.<sup>143</sup> “Therefore, the system has an immense capacity for adaptation by simply forgetting, by not reusing expectations with their

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<sup>138</sup> Ibid 138.

<sup>139</sup> Ibid 139.

<sup>140</sup> Ibid 140.

<sup>141</sup> Ibid 142.

<sup>142</sup> See Chapter 4 Section 3 for an in-depth discussion on legal memory

<sup>143</sup> Phillippopoulos-Mihalopoulos (n 136 above) 142.

structuring effects.”<sup>144</sup> This is true to the extreme, to a point where Luhmann even calls the invention of writing a “nuisance” for law. Through writing law is confronted with its past and with its memory. Forgetting is more difficult and norms can be quoted wrongly. Thus law developed methods to curb the power of writing and to manage this forgetting. First jurisprudence was developed in order to handle legal texts in case of irritancies, and second specific norm changes as a functional equivalent of forgetting.<sup>145</sup> Despite this the effect of writing on law’s disposition toward forgetfulness has not changed the basic structures of law. Law is still actualised through its operations, and everything that happens, happens at the same time.

Naturally the legal system, especially the type described here, cannot be said to possess Being. There is some implication for law’s time however. The finitude of Being, it being projected towards its own eventual end, is the very thing that lends gravity to its decisions. It is exactly here that the ethical dimension of decisions becomes important. In a system obsessed only with recreating itself not only to perpetuity but from one instant to the next, where do ethical considerations enter? The system is self-obsessed to the level of never being able to develop a sense of Care, and actively seeks to keep its environment at the arms-length level of “vorhanden”, a world that sits passively around it without engaging with it. This is comparable with what Heidegger refers to as the “levelling off” of ordinary time where Care becomes dulled through an endless series of interchangeable presents.

If we cannot assume that internal time is drawn from external time, but that the latter is some kind of common ground from a myriad of internal temporalities, the implication becomes a devastating one. A dominant social system such as law possesses the power to eventually substitute the temporal order of its environment with that of its own. It is too great a force to be typified as the “box-within-a-box” of external time. Instead of being oriented towards the future, even human time or the time of real Being, becomes the presentism of law.

Thus there exists an internal time that is at best unsynchronised with external time, and at worst has the power to shape external time to its own will. This is an

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid 83.

unavoidable result of its insistence on its own boundaries. One of the big effects of this is that it needs time to become irreversible, for it cannot undo its own processes. It is a mechanism employed to increase its own complexity while at the same time reducing the complexity of its environment to higher and higher abstraction.

That the time of systems (not only that of law) has power over the lived world is not a far-fetched idea. Through modern technology we live in a world where physical space has shrunk to the level of the global village and the resulting shared world-wide present. The shared present is one that social systems thrive upon. When the temporal order becomes lost like this, the meaning provided and contextualised by time is also lost. The past has become lost and is subsumed into the present, making reference and re contextualisation impossible because it has lost its ability to be of the past. Yet even the present itself is bereft of meaning, because through “archive-fever” the present becomes lived as the object of future memory, despite the future having lost its original meaning.

It is a fact that this engagement of time is necessary for self-reference and autopoiesis. The problem is exactly that: it becomes the *only* function of time. By stripping time of its duration, it loses its ability and necessity for ethical activity. It enjoys temporal autonomy through not applying its environment’s time to itself and could even, as I have suggested, turn “autonomy” into “dictating” and change the way external time is seen. The change brought about by the time of the environment becomes a problem of difference and irritation, a threat to the system’s continued existence.

This returns us to the question of whether law can ever give us answers to moral problems. An attempt has been made in recent history to deal with large-scale injustice in a quasi-judicial fashion. Yet even when law has attempted to do this, it creates a state-memory, with some things being remembered and others being forgotten. The public sphere seems to be trapped by the constraints of “averageness”.

The symptoms of law’s failing to deal with time responsibly are thus clear. Time becomes typified as a difference and a problem that law needs to neutralise. In order to minimise the threat to itself, and to reassure its continued existence, law succeeds in reducing time into an infinitely small instant event. The results of this are obvious: without time there can be no ethics or justice. Time is employed in the service of law,

instead of the other, more ethical way around. This is a consequence of autopoiesis. In the next section, we will look at a critique of autopoietic legal systems.

## 5 A deconstructivist critique of legal time

Despite often being an accurate and undoubtedly important description of how the legal system operates, it is not free from very substantial critique. Luhmann has been criticised regarding his theories that they offer little more than a different or even “scientific” type of conservatism or positivism.<sup>146</sup> As shown in previous chapters he disregards natural law and legal rationalism with almost open contempt, writing such theories off as childish and theoretically insincere.

Another problem is what Habermas called Luhmann’s “antimoralism”.<sup>147</sup> Instead of being the apparatus to gauge and judge law, it has become something that polarises, and inevitably leads to conflict. The criticism of this polarising effect is difficult to understand in the light of Luhmann’s own scathing attack on the “fundamentalism” of human rights, of being blind to a difference that has not been placed upon by law itself. What would be gained by creating labels *a priori* to law such as race or class is unclear.

Understanding law as an autopoietic system poses several problems, especially regarding the way in which it deals with time. Even if law can accurately be described using the theories of Luhmann, it only makes its deficiencies that much clearer. It is removed from ethics and justice, and the relationship with time lies central to this. This is despite the legal system’s attempts to “de-paradoxicalise” its binary values.<sup>148</sup> The privilege of the present in such a system needs to be deconstructed to make space for different judgments other than the mere legal/illegal.

The way that time is typified by a system, in order to reproduce themselves, “define the past and the future as modifications or horizons of the present.”<sup>149</sup> The system needs the present in order for its communications and operations to function, and in

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<sup>146</sup> Moeller (n 27 above) 189.

<sup>147</sup> Ibid 189.

<sup>148</sup> D Cornell *The philosophy of the limit* (1992) 116.

<sup>149</sup> Ibid 117.

fact for its own constitution as a system that protects expectations. According to Cornell the rigidity of legal positivism excludes possibilities and imaginings of a different future when it is left unchallenged.<sup>150</sup> Just as Ricoeur sees distance (or even self-distance) as a requirement for moral judgment, she sees justice as an *aporia*.<sup>151</sup> These constructs are closer to one another despite the obvious initial differences. She speaks of the “uncrossable limit”<sup>152</sup> between law and justice, and the use of space as a metaphor is in my opinion a significant one. Investigating this limit inevitably brings us back to an irresolvable paradox. Justice and morality both refuse to be folded into law, refusing to make itself subject to the system’s project of deparadoxicalisation.<sup>153</sup> It is nothing less than an ethical resistance to positivism.

This distance is important when looking at the daily application of the law, in the concrete way that law evolves and reconstitutes itself through interpretation and decisions. Interpretation has elements of discovery and invention that it cannot be separated from.<sup>154</sup> For this to function though, as Cornell points out, a judge or legal practitioner has a “responsibility toward memory”.<sup>155</sup> This cannot be the memory of the system, one that recycles operations as long as they are useful for its reconstruction and discarding those that aren’t. This is not a memory for the sake of autopoietic survival. It is memory recalling because it is ethically compelled to, because ethics demands temporal sensitivity and that legal norms as they have been applied up until now cannot be reconciled with justice or the good. Invention on the other hand occurs when the past cannot give answers to the present, and an imagination of the future, projections of the future good of the *nomos*,<sup>156</sup> is needed to come to new ethical decisions in the present. Thus a judge has to be supremely sensitive to time in both the memory of the past and imagination of the future, two things a system can only possess in very limited quantity, to bring law closer to justice. In short, justice cannot be without time.

This projection is obviously different from recalling memory or teleological fulfilment of history. There can be no teleological unfolding because the future is not

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<sup>150</sup> Ibid.

<sup>151</sup> Ibid 118.

<sup>152</sup> Ibid.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid.



a filled potential that possesses the power to somehow bring itself into being.<sup>157</sup> It is thoroughly of the future. This projection however must always be limited by considerations of justice, and legal practitioners have a responsibility for what the law becomes.<sup>158</sup> Regarding this Derrida talks about judges having to “remember” the future and why time is important in interpretation and the responsibility that comes with it.

Without this, legal decision-making is trapped in the logic of recursivity. Despite cognitive openness, norms are closed. Normative closure becomes established and “law” becomes confused with “justice”, making established norms “natural” and contributing to the system’s deparadoxicalisation.<sup>159</sup> <sup>160</sup> These norms are generated purely within in the system without correspondence to the external environment. There is no past but only continual reconstruction of the past. This is the essence of autopoiesis.<sup>161</sup> Memory is reduced to legal memory, merely remembering past norms and not an active engagement with the past. The validity of these norms is found by folding law back into itself. Without this recursivity there is no normative closure and no self-maintaining legal system.<sup>162</sup>

When dealing with time, autopoietic law needs to understand even the past and future in relation to a certain present, also known as temporal modalities. Thus any event X lies in the future of event Y and the past of event Z.<sup>163</sup> Even if we speak of “the future’s future” or similarly qualified temporalities, one will notice that it can never be done without the reference returning back to the current present. There is thus a clear favouring of the present as our only gateway to access other temporal locations. In this sense the future can never really come into being. It will always only be “the

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<sup>157</sup> See Chapter 3 Section 5.4 for Ricoeur’s stance on the teleological unfolding of time.

<sup>158</sup> Cornell (n 148 above) 120.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid 123.

<sup>161</sup> Ibid 124.

<sup>162</sup> Ibid 121.

<sup>163</sup> At first this reminds one of the B-theory of time in which no present is favoured ontologically but only lies in relation (past or future) to other presents. Upon closer consideration it however becomes clear that temporal modalities used in this sense is a much less radical approach. Where B-theory illustrates the equality of all time, Luhmann’s temporal modalities are exactly the opposite, stressing the absolute favouring of the present, even if it lies behind or ahead of other “presents”. This is what is meant in the earlier statement that for systems time is just a “succession of presents”.

present future” and the “future present”.<sup>164</sup> It is thus clear that there is no place in Luhmann for a radical imagination of the future.

On the other hand this also leaves little place for history. History has little to no normative implication to our present or future, or what he calls the neutralisation of history.<sup>165</sup> The present can never consider what the “ought to be” of the past (or the future) could be.<sup>166</sup>

Luhmann regards time as a reality created through social interpretation in order to differentiate between past and future.<sup>167</sup> Modern society cannot recall an “origin event” for time, no doubt brought by in part by increasing secularisation.<sup>168</sup> This leads to the “nontemporal extension of time”, because the past is too complex to reproduce and the future has not yet come to be. The almost infinite complexity of chronology thus requires temporal modalities. This in turn implies temporal reflexivity.<sup>169</sup> The past and the future can only be understood from the perspective of the present; all temporal structures must be horizons of it. In fact, systemic communication demands that there can only be a present. Actors can only interact because there is a shared present.<sup>170</sup> Even more, without this a system would not be able to maintain its identity.<sup>171</sup> The system needs to be separate from its environment, and cannot share its time. Therefore this difference “produces temporality” unique to the system. It is a constitutive force, because without it the boundary between system and environment cannot be upheld, and thus challenges the existence of the system.

Thus norms can only be understood in the present of the legal system. It can never develop norms from outside of this, both temporally and with regard to its environment. It is this very mode of temporalisation that justifies the positivism of law.<sup>172</sup>

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<sup>164</sup> Cornell (n 148 above) 127.

<sup>165</sup> Ibid.

<sup>166</sup> Ibid.

<sup>167</sup> Ibid 124.

<sup>168</sup> See Chapter 3 Section 7 for Ricoeur’s stance on the loss of society’s “origin event”.

<sup>169</sup> Cornell (n 148 above) 125.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Ibid 128.

Cornell claims that this positivism can be countered by using Derrida's philosophy to show that modal forms do not necessarily have to be based in the present.<sup>173</sup> We have to remember Heidegger's concept of Being and how it places temporal finitude on human action and existence and its mode of being oriented towards its own future and ultimate end. Derrida recognises the radical potential of such a time. Derrida uses the concept of *Différance*, or the truth that being is represented in time.<sup>174</sup> *Différance* temporises. It breaks up reality, since reality is only presented at intervals, losing any sense of continuity between present. This is very much the same as described by Luhmann. Reality thus needs space to present itself, which implies time.<sup>175</sup> For Luhmann this means a present that integrates the past and the present. In the case of Derrida however it is different. Each successive present is connected to the "not yet" of the future and by implication this makes it the "not yet" of the past. It becomes the present through the very relation of what it is not. This "not yet" has constitutive power.<sup>176</sup> This sets Derrida against Luhmann's assertion that the future cannot begin.<sup>177</sup>

Derrida also speaks of the loss of origin, but again it is fundamentally different from what Luhmann means. While for the latter it is a modern effect of secularisation and the vastness of trying to understand time scientifically, Derrida sees the origin as the constitution of temporality and as the point of the "never has been" that evades us no matter how far we go back chronologically.<sup>178</sup> This becomes the central difference: for Derrida the present is forever postponed, because it carries a trace of the "never has been" that cannot be understood as a modal form of the present. The present can only be the constitutive force of the "not yet" of the "never has been", of the future and the past.<sup>179</sup> It is this very notion of the future that breaks the claustrophobic limits of the present.

Both thinkers agree that there is no origin in law in which legal norms are found. For Luhmann this lack of origin has been replaced by autopoiesis, while Derrida still claims some historical origin (even if we can't find them) from which norms

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<sup>173</sup> Ibid.

<sup>174</sup> Ibid.

<sup>175</sup> Ibid 129.

<sup>176</sup> Ibid 129.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid 130.

developed.<sup>180</sup> There must be a founding moment of violence which was replaced with a norm foundation through the “Master Rule of Recognition”.<sup>181</sup>

For Derrida there are three forms in which Justice presents itself as the *aporia* that refuses to take part in the deparadoxicalisation of law. The first one is the chasm between *épokhe* and rule, namely that if the law is mere calculation then it cannot self-legitimate because there is no appeal to norm.<sup>182</sup> Each new decision must at the same time uphold the law while at the same time be independent enough to change it, for each case requires unique interpretation. Without that there cannot be said to be a just, free or responsible judge. So judges are caught in a paradox of being autonomous whilst still operating within the confines of the law.<sup>183</sup> Justice will always be caught in this paradox.

The second *aporia* states that a judgment is an interpretation that lies within the first *aporia*.<sup>184</sup> Either a judgment follows a rule, meaning it cannot be just in-and-of-itself, or it has made a rule which falls into the same category. If it wasn't so it would be mere calculation.

The third *aporia* is found in the fact that each case requires a new judgment, taken in the present moment. The justice (if any) in this decision exists only as “*the projection of the horizon of an ideal*”.<sup>185</sup> The horizon is the space that shows the limits of progress. Thus justice is an ideal, a projection toward a future temporal space, and not in the present. Thus it requires a temporal sensitivity that strives farther than the autopoietic present and instant justification. The privileging of the present denies the radical “what if...” that law could possess.

At the end of the day the basic attempt is to establish whether there truly is a system of law such as what Luhmann describes with its rigid separation of morality, or whether it is a construct that can be challenged and changed. Is this reflected in reality, and can it be changed?

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<sup>180</sup> Ibid 131.

<sup>181</sup> Ibid 132.

<sup>182</sup> Ibid 133.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid 134.

<sup>185</sup> Ibid.

Luhmann does not deny that the law can change. He does however stipulate that it can only happen through internal norms, on the system's own terms.<sup>186</sup> It needs to uphold its boundaries, the distinction between internal and external, for the confirmation of its own existence. This hampers radical change. Derrida's philosophy challenges systems theory in three important ways according to Cornell.<sup>187</sup> First is the deconstruction of the rigid boundary between the internal and external. Second what sprouts from this is that through this drawing of boundaries, an external realm is necessarily invoked. The third and most important for this case is the deconstruction of the privileged present.<sup>188</sup> Luhmann and Derrida have different ways of engaging the Other, and that difference depends greatly on different perceptions of time.<sup>189</sup> For Cornell the time of ethics is not different from the time of system maintenance.<sup>190</sup> Both are ways in which humans engage with the Other. Luhmann treats humans as another of the legal system, but law should answer to humans, not the other way around. While the theory can describe the maintenance of the system it cannot account for its ethical and just relations. As we have seen with Derrida's three *aporias*, that is exactly the shortcoming of law and where the law ends.<sup>191</sup> It makes the present and all other modalities of time too vast for law to usurp it for the sake of its own identity. It is the very un-deconstructability of justice that makes law deconstructible.<sup>192</sup>

Law claims legitimacy, particularly through the norms of morality, ethics and justice. These are all things Luhmann claims lie external to it, and law can only lay claim to internal norms. By this we must deduce that the claim to legitimacy is either false, or can these things actually be located internally for legal norms? At the very heart of this question lies the matter of legal positivism. However we have seen that positivism can be challenged using time.<sup>193</sup> Any interpretation from the past is nothing more than a projection of the "ought-to-be" of the future. Thus we have to ensure, because we understand time in a moral light, that legal interpretation is again a discovery and

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<sup>186</sup> Ibid 140.

<sup>187</sup> Ibid 142.

<sup>188</sup> Ibid.

<sup>189</sup> Ibid 143.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid 145.

<sup>193</sup> Ibid 146.

invention which imparts responsibility, and not the mere cherry-picking of operations that allows law to perpetuate itself.

## 6 Conclusion

We expect law to give us just solutions to our problems, to be “good law”. Justice itself however cannot be without temporal duration, or more specifically narrative time. The legal system has however, through ensuring its continued existence and legitimacy through autopoiesis, found it contrary to its aims to engage with justice and narrative time.

The legal system has found effective ways of making itself immune to the demands of justice and time. The first such instrument is through boundary-drawing and self-definition. Law has achieved a level of autonomy where only it has become the arbiter of what it is and what not. Whatever it doesn't consider as part of itself, importantly in this instance ethics and justice, it can draw a boundary and place it externally to itself. It then becomes an all-too-easy logical exercise to deplore consideration of justice as not the prerogative of law. This boundary then acts as a funnel through which external complexity can be reduced and translated into a purely legal construct, which is then internally built up with legal complexity.

This reduction of complexity manifests itself in other important ways. One of these is through the law's construction of human identity. Human identity becomes reduced to nearly a point of non-existence with regard to law, by removing the temporal dimension that constitutes identity. In fact humans cannot even communicate: they are mere preconditions, senders and receiver for communication, but never agents of communication themselves. The individuality of humans is disregarded. The defence of “what am I if we are all Greeks?” simply does not persuade. Luhmann criticises society for being blind to distinctions *a priori* of law, but accepting designations imparted by the system. This however is not a mistake of identity, but the very problem of law that I am arguing against. It is not that broader society is blind to distinctions, it is law that is unable to deal with the complexity, except in cases where it has made such designations and distinctions of its own.

Another result of this autonomy and boundary-drawing, and one that is linked with identity is the effect autopoiesis has on human action or causation. Again it becomes stripped of much of its temporality. Acts become regarded as consisting of the shortest temporal time possible. Yet these actions are not even considered as being carried out by humans themselves, but instead only communication can act. Once these actions have crossed the boundary into the legal realm, they are recast into the mould of legal systemic designations, and lose their complexity and true meaning.

It is thus clear that the presentism of the legal system has far-reaching implications. It becomes the basis for its positivism, and has found ways of protecting itself from anything that doesn't suit its self-description. By denying a radical engagement with time, it is able to shrug off its duty towards justice. Memory of the past and future can be ignored. Good law cannot be possible if law can only self-refer internally. This presentist positivism can be challenged by a more expansive theory of time, identity and causation. In the next chapter I will present such a theory in the narrative time as described by Paul Ricoeur.

## CHAPTER THREE

# NARRATIVE TIME AS AN ETHICAL APPROACH

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### 1 Introduction

In the previous chapter we saw how autopoietic legal systems came into being, and then used various operations and mechanisms in order to isolate itself from its responsibility to engage with justice. It does this through drawing boundaries which allow it to strip identity and action from much of its true complexity. This loss of complexity is indeed a loss, and results in law not being able to deal with nuanced reality in a satisfactory fashion. The reason law is able to do this is because at its foundation lies certain assumptions about the nature of time that does not reflect reality.

In this chapter it is suggested that the presentism of law can be challenged by narrative time. Narrative time dispels the possibility of presentism in favour of temporal sensitivity. When the correct temporal context is considered, the boundaries of law cannot help but break and allow fuller conceptions of identity and action through. When law is forced to deal with the totality that narrative time presents, it can no longer claim that justice or ethics are norms beyond law.

First we will look at what kind of knowledge narrative can have that law or philosophy doesn't, especially knowledge regarding time. It is believed that narrative does indeed possess a knowledge of truth and human experience that has not quite been expressed in law or even philosophy.

We then continue to look at what exactly is meant with narrative time. The question of the location of time, whether internal or external and what that means for law, is asked. We see how narrative time is a mode of understanding our lives that explains not only who we are but also what we do, and the reasons we have for doing them. It also gives us a framework to judge and gain self-knowledge that allows us to develop further as ethical beings. We see that it is a mode that cannot allow for the presentism found in law. The sources, reasons and shortcomings of presentism are also discussed.



One theoretical base for presentism, namely chronology, is also discussed and shown to run in a way that is not entirely parallel with human experience.

In the previous chapter two important areas that were stripped of complexity when crossing from the environment to law were highlighted, namely identity and causality. In this chapter we will see if they can be redeemed by narrative time, and whether they can remain intact when law is more sensitive to a fuller understanding of time. Is it true that human beings are mere agents of communication who cannot act themselves? Hopefully narrative time can show that human beings are much more complex, and that their actions are filled with meaning beyond that of initiating or receiving communication.

After that prudence and temporal neutrality is discussed in the light of ethics. Traditional utilitarian considerations are compared to considerations of time. The true role of time in ethics and justice is discussed, and the implications for law are elaborated upon.

Finally the theme of law and memory from the previous chapter is recalled. Memory and the past becomes an object of human care and is important for imparting significance to our actions. The symbolic time of law is presented, and how the past becomes a method for interpreting the future. The paradox of a communal memory is also discussed.

## **2 Knowledge from narrative**

Both philosophy and narrative have investigated the nature of time and that each has a great deal of knowledge regarding it. It is only natural that narrative should have knowledge about time that philosophy doesn't (and of course vice versa). This begs the question, what exactly does narrative know about time that philosophy (and law) doesn't?

When approaching narrative, it is important to make the distinction between "what do I know?" and "what does the narrative know?"<sup>194</sup> This is not the same as asking "what does the narrator know?" These are two different things, and the narrative itself can

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<sup>194</sup> M Currie *About time: narrative, fiction and the philosophy of time* (2007) 107.

contain knowledge that the narrator does not, or at least does not communicate. This is Ricoeur's distinction between "narratives about time" and "narratives of time". Is it necessarily always better to know *about* something rather than *of* something? According to Currie, "of" carries a great epistemological function "filled with hints of unspoken knowledge."<sup>195</sup> This unspoken characteristic distinguishes narrative and characterises its non-philosophical and non-legal mode of knowledge. Barthes captures the spirit of this when he writes "organized or systematic knowledge is crude, life is subtle, and it is for the correction of this disparity that literature matters to us."<sup>196</sup>

Narrative can have insight "accidental" insights, similar to what Derrida refers to as the "call of the Other".<sup>197</sup> It is a kind of knowledge that lies beyond the limits of language. For him there lies a "secret" at the heart of narrative, unknown to both the narrator and the characters or agents within the narrative. This secret is the possibility that agents have in the black space of their mere narrative phenomenon, or the "possibility of non-truth in which every possibility of truth is held."<sup>198</sup> This knowledge about human experience that narrative, and by implication time, can hold regarding human existence is important and can inform a legal system that has isolated itself from this knowledge.

### 3 What is narrative time?

In the previous chapter we saw how law is able to avoid its responsibility of a just engagement with time. By drawing boundaries and relying on self-reference, law is able to make justice and time alien to law. I suggest that the autopoietic nature of law can be challenged through Paul Ricoeur's concept of narrative time. Narrative time is essential in understanding not only justice but also human identity and the causes and effects of our actions. It illustrates that time is essential for truly understanding much of our environment, and that a constructive engagement with narrative time should go a long way in addressing the deficiencies of autopoietic legal systems.

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<sup>195</sup> Ibid 110.

<sup>196</sup> Ibid.

<sup>197</sup> Ibid 124.

<sup>198</sup> Ibid 135.

Before we can fully investigate narrative time, we need to determine what the nature of time itself is. Whether one thinks of time as either internal or external, paradoxes are inherent in both views. Ricoeur asks whether external time would still exist if human consciousness could somehow be subtracted from it. If one was to remove consciousness from the time of nature, one cannot claim that physical phenomena would continue, because who would know it? Aristotle also claimed that time must exist because things age and die.<sup>199</sup> To Ricoeur this cannot be verified unless human consciousness is somehow “smuggled in.”

Ricoeur also disagrees with Heidegger’s characterisation of external time as a fall into in-authenticity as an arbitrary distinction and the “making present” as a figment of his imagination and a false morality. He also further disagrees that in-authentication starts with man dating the object-world. According to Ricoeur man saw himself in relation to time even before the advent of calendars by observing the change from night to day and the changing of the seasons.<sup>200</sup> What we call “now” refers to a time of consciousness that is linked to repetition that regularly occurs independent from itself. A swinging pendulum is not in itself a measure of time. It is only through the connection of a lived “now” that makes it serve as a clock, leading to calendrical time.<sup>201</sup>

In essence Ricoeur feels that Heidegger’s account of temporality fails to deal with the gap between consciousness and the object-world.<sup>202</sup> Not satisfied with facing the paradox of either a universe with an external time oblivious to human consciousness nor a human consciousness that understands time without reference to the object-world, Heidegger carries elements of external time into Being and then calls them a series of forgettings in the movement towards within-timeness. Ricoeur feels that Being’s “ahead-of-itself” inherently carries an element of datability, which inevitably falls into ordinary time.<sup>203</sup>

The reason that Heidegger is able to avoid the paradox between internal and external time is that the idea of Care being derived from being-toward-death is so striking, that he is able to move from internal time to external time and straight to within-

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<sup>199</sup> Ibid 20.

<sup>200</sup> Ibid 28.

<sup>201</sup> Ibid 75.

<sup>202</sup> Ibid 28.

<sup>203</sup> Ibid.

timeness.<sup>204</sup> Finally Ricoeur criticises the theory because the notion of being-toward-death is not a universal human experience, but that its one that carries specific cultural and religious attitudes towards the idea of death.<sup>205</sup>

For Ricoeur it is impossible to make sense of the threefold present (one carrying all three of the tenses) or of internal time without reference to external time. Understanding the present as a mere “series of now” within a past-present-future frame is merely a repetition of the ordinary concept of time.<sup>206</sup> The question needs to be asked whether consciousness is even at all the correct frame of reference to use when thinking of time. This is the reason why Ricoeur suggests that time should rather be discussed within the framework of narrative, and where the internal/external *aporia* can be explored.<sup>207</sup>

The opposition between internal and external time seems simple to Ricoeur, and he suggests that we move away from this obsession. External time is a noumenon that we have no direct access to.<sup>208</sup> Both internal and external time is only understood through the experience of the consciousness. Thus it follows that when humans talk of the *aporia* between internal and external time, it is not the same as the actual difference between phenomenological time and cosmological time. External time is experienced and distinguished from internal time through our observation of clocks (in which a special kind of authority has been vested), creating a kind of co-dependence between the two.<sup>209</sup>

### 3.1 The structure of narrative time

Narrative is a common feature of all human beings, and is in fact a kind of “universal language”.<sup>210</sup> It also shares an obvious and important bond with language itself. Language has a certain set of rules, a structural system, commonly referred to as “grammar”. Narrative lies within grammar, and dissecting narrative itself one can find

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<sup>204</sup> Ibid 29.

<sup>205</sup> Ibid.

<sup>206</sup> Ibid 71.

<sup>207</sup> See Chapter 3 for a detailed discussion on narrative time.

<sup>208</sup> Currie (n 194 above) 77.

<sup>209</sup> Ibid 78.

<sup>210</sup> WC Dowling *Ricoeur on time and narrative: an introduction to temps et récit* (2011) 37.

a “grammar of narrative” as well.<sup>211</sup> This is not Ricoeur’s project. In his opinion searching for the inner machinations of narrative leads one to lose sight of the teleological meaning of the whole, in the same way that learning the rules of a sport does not explain to one the meaning of it.<sup>212</sup> Put in other terms, one misses the *telos* of narrative causality as it occurs in narrative time. Unlike other works on narrative theory, Ricoeur does not focus on mankind’s ability to tell stories; instead he deals with narrative’s ability to shape human beings and the societies they live in.<sup>213</sup>

First we must establish what Ricoeur means (and doesn’t mean) when he speaks of narrative. An example of this is in his critique of Greimas’ explanation of narrative action. According to the latter, the agent within a narrative has three possible motivations: desire (the agent wants something), communication (the agent has been told to do something), third a pragmatic relation or consideration moves him to action.<sup>214</sup> The option to act upon these motivations always presents itself in binary opposition. To Ricoeur even this level of narrative investigation and reasoning is inadequate. It is merely describing quests, simple and immediate reasons for acting. It loses sight of the *telos* of a narrative and its action.<sup>215</sup> It is still at the level of understanding the rules of narrative without paying attention to its goal or purpose, including those of everyday people that find themselves within narratives.

Claude Bremond claimed that within narrative, there always has to be an acting agent and a sufferer, the one who is affected by the actions of the agent. An agent wants something but encounters opposition. He takes action and achieves what he wants. This understanding maintains the progressive contingency of “what will happen?” as well as a retroactive necessity (“it was inevitable”).<sup>216</sup> Ricoeur praises Bremond in that he opens up the possibility for ethical judgment of people within a narrative. Unfortunately knowing all the roles that these people can take still doesn’t give us a plot. For that to happen the initial usurping society must be turned into a desirable one; a society of illegitimate power should be transformed into a society of justice.<sup>217</sup>

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<sup>211</sup> Ibid 39.

<sup>212</sup> Ibid 40.

<sup>213</sup> Ibid 37.

<sup>214</sup> Ibid 42.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid 43.

<sup>217</sup> Ibid 45.

For Ricoeur narrative does not belong to the present or the past, as proposed by other authors. It is of neither of these, but rather belongs to a third time. This “third time” has its origin in two things: the disproportionate duration of narrative and how it is communicated, and second the forward-straining tension of its teleological movement.<sup>218</sup> Stories or events themselves exist independently of narrative communication. Yet when it is narrated, the time-dimension becomes “folded”, with diverse temporal durations prioritised and communicated differently. In doing this, different events are granted different levels of significance. This represents a break with linear time, turning it instead into a time of human concern or preoccupation.<sup>219</sup> When narrative time becomes one of concern, ethical considerations and significance come to supersede mere causal succession. These two narrative levels are at tension with one another, creating the *telos* of the narrative as a result.<sup>220</sup> This functions in the same manner as the difference between “narrated time” (in which agents need to make decisions and act) and the “time of narration” (the teleological *totum simul* view of the narrator) in that it allows for ethical judgments to be made.

Thus it can be claimed that narrative time has two levels of knowledge<sup>221</sup> and through this we can imagine a just society coming into being. Narrative time not only carries a temporal dimension but also an ethical one, and the *telos* of narrative only makes sense when viewed through both of these lenses.<sup>222</sup> Ultimately getting rid of an agent’s bad acts or a bad society is the *telos* itself. Narrative time is thus not a mere temporal mode but a mode of ethical experience. In the end it allows for even a third level of knowledge – *anagnorisis* – where agents within the narrative, as well as the receiver of the narrative experience a moment of true understanding of themselves and others, or in Ricoeur’s own words: “to emerge from ourselves, to know what another person sees of a universe which is not the same as our own.”<sup>223</sup>

This lies in sharp contrast, as we have observed, with the fears and ambitions of legal systems. First there is no concept of teleological resolution of acts to be found within the operation of law. Neither the individual nor society is meant to reach the level of *anagnorisis* – law must simply process its function in a way that reconstitutes itself.

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<sup>218</sup> Ibid 46.

<sup>219</sup> Ibid 48.

<sup>220</sup> Ibid.

<sup>221</sup> Ibid.

<sup>222</sup> Ibid 50.

<sup>223</sup> Ibid 52.

When this presentist notion of time is opened to narrative time, law cannot help but become engaged with the call of justice. Narrative time simply doesn't allow the shirking of such responsibility. Yet critics will point out that time is inescapably linear, and that the moving present of A-theory time is only natural. This is not such a natural assumption as it first appears to be. In the next section we will see that the chronology of time is not as clear cut as autopoietic systems purport it to be and that human consciousness and reflection is not as dependent on it as it seems.

### 3.2 Presentism

In A-theory of time, it is argued that the present is the only tense that exists. Yet even the present has duration and therefore a past and a future. Using the razor of the past and future, the present is always to be divided to the point of being infinitely small, or even to the point of not existing at all. The very duration of its non-existence consigns it to non-existence.<sup>224</sup>

Yet Currie argues that the present does have certain metaphysical qualities.<sup>225</sup> Accordingly, there are three different experiences of the present particular to modern society: time-space compression, accelerated re-contextualisation, and “archive fever.”<sup>226</sup> These three phenomena contribute to contemporary experience of time which aids the favouring of the present found in autopoietic legal systems. These experiences contribute to the normalisation of this particular mode of engagement with time and leaves little space for the temporal duration needed to ethically engage with identity and action.

The first of these is time-space compressions, a result of the modern world in which travel and telecommunication has grown in massive leaps, changes our experience of time.<sup>227</sup> Time horizons around the globe have shrunk to the point where the present is all that exists. From the moment the first satellite photos were taken of the entire earth, the concept of a shared spatial frame for all mankind became apparent. It permanently banished the idea that spatial separation meant temporal difference. This

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<sup>224</sup> Currie (n 194 above) 8.

<sup>225</sup> Ibid.

<sup>226</sup> Ibid 9.

<sup>227</sup> Ibid.

expansion of the present has also been instrumental in the growth of multinational capitalism, and in fact forms part of its entire underlying logic. This has led to social systems (which obviously includes the law) to lose its ability to retain the past.<sup>228</sup>

This extension of the present reminds us of Lacan's schizophrenia. When the temporal order is lost, the linear organisation of meaning in time becomes lost. The result is confusion in the co-presence of meanings.<sup>229</sup> Postmodernism claims that originality is impossible and that past ideas merely become re-contextualised.<sup>230</sup> A contemporary example would be how the fashions of the early 1990's are becoming fashionable again in the early 2010's. The difference however is that the result of accelerated re-contextualisation is now present, meaning that the cycles in-between have shrunk infinitely, until no temporal distance exists anymore. Re-contextualisation cannot carry irony or any other value anymore. The past cannot be referenced, and no progress of past ideas can be formulated. The capitalist expansion of the present doesn't only affect the past; especially in the sector of consumer-technology products are being released as already obsolete and with a certain shelf-life. In this way the future is also made present.<sup>231</sup>

The third modern phenomenon affecting our experience of the present is what Currie calls "archive-fever."<sup>232</sup> Through portable digital devices and social networking, frenzied recording of the present has taken hold. The present itself is consigned to the past by living it as the object of a future memory. Every present experience is seen through the lens of the story that can be told after the fact. The effects of this are however much more far-reaching. Not only does archiving record the present, but it gives it constitutive properties. Derrida describes this process:

[T]he archive as printing, writing, prosthesis, or hypomnesic technique in general is not only the place for stocking and for conserving an archivable content *of the past* which would exist in any case, such as, without the archive, one still believes it was or will have been. No, the technical structure of the *archiving* archive also determines the structure of the *archivable* content even in its very coming into existence and in

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<sup>228</sup> Ibid.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid 10.

<sup>231</sup> Ibid 11.

<sup>232</sup> Ibid.



its relationship to the future. The archivization produces as much as it records the event. This is also our political experience of the so-called news media.<sup>233</sup>

Derrida's example of the news media is an effective example: somehow people refuse to believe a news event has happened unless it has been recorded and archived. The news reel of an event in fact grants it its very existence and veracity.

Is it however desirable to regard the present in such a way? According to Husserl the present is infinitely small. Even in the example of hearing a musical note, consciousness structures it a series of retentions and protentions.<sup>234</sup> This means that the present is never really present, but is inextricably connected to past and memory.

For Heidegger and Derrida the present has a future-orientation. An imagined future structures the present. In this way the present can not be seen as a result of the past, but as the foundation of the future. This forms the basis of archive fever.<sup>235</sup> Derrida regards the "supplement" as having conceptual priority over the "origin," much like Heidegger. There is often a counter-logic that makes the supplement the origin instead of the original way around. This is again illustrated in the example of the news story, that the archiving of an event in fact constitutes it as real. This affects the present in the sense that a future memory in fact becomes a causal agent of the present, instead of *vice versa*.<sup>236</sup> The present imparts spatial and temporal features on an individual. Can we then claim that the future is ontologically different from the past and present?

To rid time and the present of its egocentricity we have no choice but to regard past, present and future as ontologically equal. Law as a system depends on the favouring of the present, which is an error caused by the psychological experience of time. In the previous chapter we have seen how, together with the ability to draw boundaries, this kind of engagement with time has allowed law to justify its denial of human identity and action. When time is engaged with responsibly as in narrative time these take on an ethical and just dimension and would allow for better law. For this reason we will now look at how narrative time can redeem identity and causation from what it has become under autopoietic legal systems.

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<sup>233</sup> J Derrida *Archive fever: a Freudian impression* (1998) 17, as quoted by M Currie (See n 194 above) 11.

<sup>234</sup> M Currie (n 194 above) 12.

<sup>235</sup> Ibid 12.

<sup>236</sup> Ibid 13.

### 3.3 The false premise of chronology

Ricoeur states that in essence the philosophy of time's central question will always revolve around bridging the *aporia* between internal and external time. A natural secondary question that arises is the matter of the chronology of time. Even in narratives where prolepsis and analepsis is employed, the receiver of the narrative still makes sense of the events using chronology. Can it be that any rejection of chronology is in fact a reaffirmation of it? In this regard Currie states that

Rejecting chronological time is one thing, any refusal of a substitute is another. New times can only be configured in terms of new norms of temporal organizations that are still perceived as temporal.<sup>237</sup>

One of the “new times” that can be configured is through narrative. Narrative can break away from real time but not from this process of configuration. Ricoeur argues that this process occurs most strongly during mimesis, and especially during mimesis<sub>2</sub>. Even in a narrative different temporal locations and events are ordered in Aristotle's emplotment. This emplotment takes place within a hermeneutic circle of events, and narrative is used to alter the concept of real time, making this new time part of the narrative's world of action.

This circle of pre-figuration, configuration and re-figuration is comprehensible within the framework of mimesis, as well as a kind of reversed mimesis. The narrative comes to reflect the world of action, but in doing this it produces a reversed mimesis in which the world of action becomes influenced by the narrative. Again we return to the Derridean reciprocity, in the sense that narrative's temporality both reflect and produce the temporality of the current reality.

It is through the rejection of chronology that the present can be filled with self-distance over the past as well as the future retrospect of the present and near future. Seen in this light, abandoning chronology has serious, important and indeed essential results.

The narration of our own ethical (or unethical) actions, even the narration that takes place in court, is necessarily always concerned with time and self-distance. The narration creates a divide between the narrator and his narrated self and this divide

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<sup>237</sup> Ibid 93.

becomes filled with temporal and ethical self-distance. This is the only way in which judgment, even self-judgment, can be made. Both the acts of memory and prediction are essential for understanding reality, including understanding ethics or justice. It follows that the social system of justice simply cannot exist within a presentist notion of time. As much as it is in the interest of the self-regenerating legal system to abandon time, it is impossible for justice to exist in the same conditions. The result is that law makes justice systemically incompatible with itself, the implications of which have been proven in the past and undoubtedly will surface again if its warnings are ignored.

## 4 Identity

[M]an is in his actions and practice, as well as in his fictions, essentially a story-telling animal. That means I can only answer the question “what am I to do” if I can answer the prior question of “what story or stories do I find myself a part?”<sup>238</sup>

Just like language, symbol and metaphor, narrative is inseparable from the concept of human community.<sup>239</sup> Even further than that, the Other is only made understandable through an analogy of the self. Narrative impacts all spheres of the self. The three most important levels for this discussion is the personal or private sphere, the political or public identity and last the ethical identity that encircles both spheres. In the following section I will discuss the role narrative has to play in each.

### 4.1 Personal identity

As we have seen, the legal system is one that manipulates time in order to further its own interest. Law’s answers to questions of legitimacy and morality are those of objectifying and heterogeneity. Through narrative the phenomenon of subjectivity can be reclaimed, and time can be made more particular in order to open law up to greater particularity. The concept of narrative time however, is dependent on understanding the narrative individual first. As MacIntyre writes:

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<sup>238</sup> A MacIntyre *After Virtue* (2007) 216.

<sup>239</sup> Dowling (n 210 above) 37.

I am never able to seek for the good or exercise the virtues only qua individual... we all approach our own circumstances as bearers of a particular social identity. I am someone's son or daughter, a citizen of this or that city. I belong to this clan, that tribe, this nation. Hence, what is good for me has to be good for someone who inhabits these roles. I inherit from the past of my family, my city, my tribe, my nation a variety of debts, inheritances, expectations and obligations. These constitute the given of my life, my moral starting point. This is, in part, what gives my life its moral particularity.<sup>240</sup>

Narrative impacts personal identity in at least three important ways.<sup>241</sup> It allows for the individual to see himself as a coherent temporal identity as a person and an acting agent. Second through expressing ideals of rejecting evil and striving towards the good life, narrative allows us to build an ethical identity. Last it lays the foundation for social societies with ideals and ideologies that are always in tension. Although ethical laws such as the categorical imperative are non-narrative, the application of it in service of the good life is necessarily narrative.<sup>242</sup>

An important aspect of *Time and Narrative* is how to bridge the *aporia* between imagination's internal time and the object world's external time. As we have seen, this gap can be filled by a third narrative time. Narratives about the same person can however conflict, and the narrative must therefore be claimed by someone.<sup>243</sup> How is the self claimed in the third time?

Ricoeur asserts that the self can be conceived of in two ways. The *idem* is the unchanging aspects of the self, while *ipse* carries no notion of fixedness, but rather the changing self in time.<sup>244</sup> Understood like this the self is not only describable in the first person, but also in the second and third, and all three have to be taken into consideration.

Looking at how language identifies the self, there seems to be three possible modes. The first is a definite description. An example of this would be "the ANCYL leader that was brought to court for singing defamatory songs in 2010". This normally

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<sup>240</sup> Ibid 220.

<sup>241</sup> P Kemp "Narrative Ethics and Moral Law in Ricoeur" in *Paul Ricoeur and Contemporary Moral Thought* Wall, Schweiker & Hall (eds) Routledge (2002) 33.

<sup>242</sup> Ibid 34.

<sup>243</sup> Ibid.

<sup>244</sup> D Rasmussen "Narrative Identity and the Self" in Cohen & Nash (eds) *Ricoeur as another: the ethics of subjectivity* (2002) 59.

functions through naming a certain class or set, and qualifying a specific individual from that class. The second mode is proper nouns or names such as “Julius Malema”. In this case the person is identified without reference to other categories. The third mode is ordinary language employing words of time and place and pronouns to single out a person.<sup>245</sup>

Persons are bodies that can identify itself and others through speech, but of course language can only refer to persons or the self, not constitute it. Individual selves have both physical and mental particularities assigned to it, and these particularities have some form of narrative continuation or “sameness”. These particularities can of course be described as they appear in a third person, but they can also be assigned to and by the first person or as Ricoeur describes the distinction, something *observed* and something *felt*. This poses a problem: if the self can ascribe particularities to itself in constituting itself, how can we defend the self from being constituted through the same act of description by others?<sup>246</sup> Upon contemplation it becomes clear that the self has a special relationship with its own speech. Even in language this takes shape in the word “I”. Speech itself is in fact an individual act in the world of actions. This contrasts sharply with Luhmann’s claim that “human beings do not and cannot communicate – only communication can”. In narrative time we find communication reclaimed by the agents of the communication. Identity is formed through the act of communicating instead of humans being subservient to a communicative system. Seen like this communication takes on a much more important role, and is suddenly opened up for judgment on norms outside of the given system it functions in, namely norms such as justice.

One mistake that Ricoeur feels is made too often, with clear implications for law, is the rigid separation between “action” and “motivation”.<sup>247</sup> When the *what* of an action is apparent, the question as to *why* often follows. As an alternative a more phenomenological understanding of action would allow for a more nuanced understanding where the reasons for motivation, cause and effect are more intertwined to the point where they can even be teleologically understood.<sup>248</sup> Both motivations and causes can be ascribed to the same agent or self. When such an enquiry has been

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<sup>245</sup> D Pellauer *Ricoeur for the perplexed* (2007) 93.

<sup>246</sup> *Ibid* 94.

<sup>247</sup> *Ibid* 95.

<sup>248</sup> *Ibid*.

made, an act is imputed to self, a process that repeats daily in courts. It needs to be remembered however that the agent or self to whom we are imputing acts and effects also has a history and a special relationship with time. The temporal existence of the self is essential for understanding personal identity, and time and history is essential when making ethical judgments of individuals and their actions.

It is at this level that the distinction between die static *ipse*-identity and the fluctuating *idem*-identity becomes important. There is of course a permanence that applies to selfhood. Character or the “set of distinctive marks which permit the re-identification of a human individual as being the same”<sup>249</sup> is proof of this. Another example is one of a promise, where its utterance ties a person (both in time and action) to its fulfilment. Between these two poles, between identity and sameness, is where Ricoeur emphasises narrative identity lies. Since narrative can never be ethically neutral, this also becomes the first terrain in which ethical judgments can be made. Narrative turns the *ipse* into a dynamic identity over time. Not only do agents find themselves in plots but are in fact plots in themselves. Individuals are constituted of the same dialectic that occurs in the emplotment of action.<sup>250</sup>

In such a narrative identity, does the agent have to remain the same self over a long temporal stretch? The fact that another can gain or suffer under the actions of an agent makes this question important, if for no other reason than an ethical one.<sup>251</sup> It is exactly because of this that an agent or another can become an object of moral imputation or description.

Ricoeur imagines three tiers in what he calls his “little ethics”, moving from a teleological level to a deontological one, and eventually a practical level.<sup>252</sup> The first stage he calls “ethics”, the aim of the good life with and for others with just institutions. This intention needs to be unfolded through concrete acts, and eventually different acts being drawn together into a narrative whole. Narrative performs the function of imparting identity. This narrative identity requires the other to realise itself, an obvious manifestation being that of the self’s duty toward others. This other does not exclude institutions such as law. For institutions to be just they have to act

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<sup>249</sup> P Ricoeur *Oneself as Another* (1993) 119

<sup>250</sup> Pellauer (n 245 above) 101.

<sup>251</sup> Ibid 102.

<sup>252</sup> Ibid.

further than mere procedural formulations and utilitarian considerations. This of course is unfortunately exactly the manner in which the law operates.

Ethical intentions and moral obligations eventually need to be applied to practical problems. As Ricoeur writes:

This passage from general maxims of action to moral judgment in situation requires, in our opinion, simply the reawakening of the resources of singularity inherent in the aim of the true life.<sup>253</sup>

This stage may (and probably will) involve conflict and as he notes, tragedy. This may lead to disillusionment or to catharsis and self-knowledge. Either way it contributes to recognition of the self. Again this lies in contrast with Luhmann's stance on the dividing effects of ethics. While both admit that conflict is often inevitable Luhmann wants to shy away from its destructive effects, while Ricoeur sees it as necessary for the establishment of even clearer identity.

Beyond the rules of procedure a vast amount of options on the distribution of the good are available, creating the politics of conflict.<sup>254</sup> The key is however not to preserve coherence in the way that legal reasoning does but to construct it. An ethics of communication needs to be established in order to revise what we understand as ethical argument under current autopoietic thinking.

## **4.2 Political identity**

In the same way that individuals need origin-stories and narrative to employ their lives, so do social, public or political entities.<sup>255</sup> Broadly speaking there are shared concepts and "social imaginations" of what the good life entails. Through ideology social cohesion and the public project is fortified, and through utopia it is challenged and modified. Ricoeur insists that the tension between these two is important for social progress.<sup>256</sup>

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<sup>253</sup> Ricoeur (n 249 above) 240

<sup>254</sup> Ibid 106.

<sup>255</sup> Kemp (n 241 above) 37.

<sup>256</sup> Ibid.

When speaking of political identity, especially when regarding narrative, there are several issues that arise. To accept a political identity is to accept a set of normative claims that one hasn't determined for oneself.<sup>257</sup> A part of this is the delineation of political boundaries, of an "us" and "them". The other problem is that this identity needs to perpetuate itself constantly through gaining new members. The problem with these issues is that they either ask for individual autonomy to be discarded or for a denouncement of the common humanity that individuals share.<sup>258</sup> By looking at Ricoeur's opinions on personal identity we might find solutions to the problems of the political.

As we have said, narrative bridges the *aporia* between the *idem*- and *ipse*-identities. It further allows us to understand ourselves as distinct individuals within human communities. Narrative also allows for the initiating and following through of (political) projects. These narratives allow for evaluation, but can also be subject to evaluation.<sup>259</sup> These evaluations then give rise to "considered convictions" that influence further thoughts and actions.<sup>260</sup> However these convictions and narratives are imperfect and partial. There is discrimination on what is included and excluded and the weight of emphasis given to a particular aspect. It is for this reason that such convictions can always be the subject of further reflection and criticism. Dramatically changing one's convictions is a reaffirmation of the *idem/ipse* gap.<sup>261</sup>

Political society expects its members to identify themselves with their practices, institutions and objectives. This identification by a person affects his *idem*-identity, essentially a denouncement of the individual self. This has far-reaching normative effects, especially in how political society perpetuates itself by expecting its members to recruit newcomers.<sup>262</sup> This process itself is dependent on narratives, and ones that are susceptible to the same criticisms and flaws that we have mentioned. Political narratives however have two further flaws: they claim exclusive right to a certain territory as a homeland, and that their own society should endure in perpetuity, a

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<sup>257</sup> BP Dauenhauer "Ricoeur and Political Identity" in Joy (ed) *Paul Ricoeur and Narrative* (1997) 129.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid 131.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> Ibid 132.



claim that is stronger than that of other political communities. This is why Ricoeur calls political communities both ideological and utopian.<sup>263</sup>

The impact of the narrative political society on the *idem*-identity of the individual can be seen in the two opposite events of an individual's life, namely their birth and death.<sup>264</sup> When an individual is born (or thrown in the words of Heidegger) they are an agent capable of action, of either taking up the political society's projects or undermining them. Society thus walks the tight-rope act of trying to educate the individual to be supportive of its projects (and feel obligated to perpetuate it) without disregarding individualism and initiative. Death marks the end of the Being's projects, including the Ricoeurian project of self-maintenance.<sup>265</sup> For the political entity however the death of an individual does not mark the end of projects, but the mere succession from them to a new generation of members in pursuit of a common project.

This paints a rather unsettling picture of political society. Yet political participation is inevitable and even preferable in the human experience. Thus there must be defensible political societies. According to Dauenhauer there are two criteria for a good political society: the society must be self-aware that it is always under threat of degeneration and can always improve and that there can be a plurality of good political identities.<sup>266</sup> When these elements are present members are free to engage critically with the political and their *ipse*-identity is respected. This requires that the political narratives become aware of the finitude of the society it promotes. These narratives need to admit that they often intrude on other political societies. The converse result is obvious: no political society can claim immunity from this intrusion.<sup>267</sup> Lastly, a society has to admit that it can become politically obsolete, and no claim to being indispensable into perpetuity can be made. In this state the members of a political community are able to engage with their *ipse*-identity and constantly re-evaluate and readjust their political projects.

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<sup>263</sup> Ibid.

<sup>264</sup> Ibid 133.

<sup>265</sup> Ibid.

<sup>266</sup> Ibid 135.

<sup>267</sup> Ibid.

### 4.3 Ethical identity

It is clear that the abovementioned spheres of identity are in conflict with one another, the individualism of the one against the collectivism of the other. Already in this conflict there is room for ethical evaluation. Narrative never allows for any situation to be ethically neutral. At this point a person, normally the agent who claims the narrative, needs to make an ethical decision. For Ricoeur, this is also the point where narrative identity needs to give way to a non-narrative component in order for the agent to be an acting subject.<sup>268</sup>

Does this imply that there are *a priori* non-narrative ethical claims that are superimposed onto narrative?<sup>269</sup> Or does it mean that once a narrative ends there are ethical responsibilities that need to be fulfilled? As we have seen, identity consists of both *idem* and *ipse* elements, selfhood and sameness. This sameness is maintained by imagining and striving towards the good life. Of course, this good life is imagined in a narrative form. It is also through narrative form that ethical experience and instruction is related. Ethics exist because of the “refiguration of action by the narrative”.<sup>270</sup>

We can thus see that narrative time opens identity to a realm where it needs to always re-evaluate and re-affirm itself. This is because identity is important and has a role to play in the functioning of society. The temporal length that is inherent in narrative allows for ethical judgments to be made of what individuals do. Law, by disengaging from time, strips identity of this ethical character and thus denies its own responsibility toward justice. Understanding humans as narrative creatures shows sensitivity to our temporal existence and demands that law treats its subjects justly.

## 5 Causality

We saw in the previous chapter that autopoietic legal systems strip action and causation of complexity the moment it crosses the boundary from environment into law. Very complex human motivation and behaviour is de-contextualised and simply given legal designations that imply and lead to a preset of legal outcomes. Again part

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<sup>268</sup> Kemp (n 241 above) 35.

<sup>269</sup> Ibid.

<sup>270</sup> Ricoeur (n 249 above) 164.

of the problem is that law seems unwilling to put action and causality in a sufficiently broad temporal frame, stripping human action from much of its complexity and nuance.

An important element for understanding causality in narrative time is the idea of mimesis. Mimesis in this sense means “imitation”.<sup>271</sup> Like the famous saying of “art imitates life,” narrative relies on the imitation of mimesis. For Ricoeur there are three levels of mimesis, which he calls Mimesis<sub>1</sub>, Mimesis<sub>2</sub> and Mimesis<sub>3</sub>.<sup>272</sup>

### 5.1 Mimesis<sub>1</sub>

All of communication and society is governed by signs and symbols. To make sense of these signs, we need a structure of understanding and experience that is somehow pre-narrative and “pre-understanding”. This is what Mimesis<sub>1</sub> is.<sup>273</sup> Action is after all not only movement, but also intrinsically coupled with motives and goals. This pre-narrative knowledge confers a degree of readability onto human action and provides the context in which it can be interpreted. Law forms part of this cultural and symbolic order. Mimesis<sub>1</sub> grants us the ability to read and understand the rituals of law, and the beliefs and values that it exercises.

Narrative structures human actions so that it can have causality. Without narrative human actions would be no more than “one thing after another.” In other words, narrative lends causality to human action through “emplotment.”<sup>274</sup> This emplotment can only occur and is grounded within Mimesis<sub>1</sub>’s pre-understanding of the world of signs and actions.

### 5.2 Mimesis<sub>2</sub>

The next level of mimesis is that which gives us the logic of narrative causality. Aristotle saw narrative causality much like the traditional plot of a work of fiction: something that has a beginning, middle and end. Ricoeur on the other hand sees

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<sup>271</sup> Dowling (n 210 above) 2.

<sup>272</sup> Ibid 3.

<sup>273</sup> Ibid 3.

<sup>274</sup> Ibid 7.

narrative causality less linear, as a spatial and temporal structure: a “chain of causal implications that must be traversed in time.”<sup>275</sup> Action only makes sense within its spatiotemporal context. Only then can different actions be seen in unison.

It is also important to mention that the actors of a narrative always act with imperfect knowledge of their situation. Despite this Aristotle believes that the outcome of action is always teleologically inevitable, despite being unforeseeable by its actors. Ricoeur insists that human action has to be seen in *totum simul* as a timeless whole, being told both forwards and backwards. Even in the middle of a plot when the outcome is unclear it is accepted that there is an ending that is understandable in the context of the whole. In other words, when looking at a plot “backwards” from an *ex post facto* position, it is clear that it always formed part of coherent union.<sup>276</sup>

This creates a double temporality, namely the forward temporality of the events as they happen, as well as the backward temporality of reflection upon the past. This coherent union created by the double temporality creates the possibility of moral and ethical evaluation that is impossible in the “sequence of now” of the presentism found in autopoietic legal systems thinking.

### 5.3 Mimesis<sub>3</sub>

It has been established that mimesis<sub>1</sub> allows us to make sense and contextualise human action in a pre-narrative phase, and that mimesis<sub>2</sub> allows for narrative temporal structures to be judged. When we find ourselves in the space of moral judgement, can we safely assume that the intellect judges a “pure” version of the narrative time? Surely factors such as culture, language and time itself have an influence on the interpretation of human plots?

Mimesis<sub>3</sub> represents this “refiguration,”<sup>277</sup> when the reality of the narrative time in question is reconciled with the prejudice of the observer on its route to total comprehension. An encounter with narrative is necessarily a struggle between two different spheres of reality, that of the narrative itself and that of the person judging it.

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<sup>275</sup> Ibid 8.

<sup>276</sup> Ibid 9.

<sup>277</sup> Ibid 14.

The narrative becomes a formal projection within the reality of the person encountering it.<sup>278</sup> The process of following a narrative at this level is, however, unavoidably a temporal one itself. Narrative would serve no purpose if its judge did not share the imperfect knowledge of the actors. The entire exercise loses its point if the judge had complete clarification of events from the outset. That is why mimesis<sub>3</sub> is a process of re-figuration: the cognitive process from “not-knowing” to clarity exposes a new reality that was not apparent at first.<sup>279</sup>

This movement from mimesis<sub>1</sub> through to mimesis<sub>3</sub> – from pre-narrative knowledge of communities to the individual change brought about by narrative experience – is an important one. It is true that narrative abstracts human action to some level, but ultimately it is human action itself that is abstracted in a way that is necessary for human reflection on the past. An autopoietic legal system is in itself already abstract, translating human action into a “machine code.” In other words, it is a level of abstraction removed from that of narrative.

#### 5.4 Redeeming causality

For Kant, time is an essential part of the human *cogito*: I think, thus I am active. I exist and my existence can only be defined as the existence of the passive I in time. Time becomes a component of the *cogito*, a form of inner tuition, whereas space becomes outer tuition. This makes space, time and *cogito* interrelated.<sup>280</sup> This means that there are two time-structures: a subjective, active and *ex ante*-time, and an objective, passive, *ex post*-time. This is problematic for law, since law produces only a “subject structure” that keeps apart the subject in its active and passive formulations. According to Kant, human beings are intelligible in action, and sensible in effects. The subject is intelligible making it a cause of action. Since time is not a condition of things in themselves, the acting subject doesn’t fall under any of the conditions of time. This means that the intelligible subject has to be free from all influences of sensibility. In jurisprudence this “anatomy of pure reason” has been developed into

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<sup>278</sup> Ibid.

<sup>279</sup> It needs to be stressed that this “new” reality is not truly new as such. It is a reality that has existed already, but only now becomes apparent to a person. Ricoeur calls this “anagnorisis.” *Anagnorisis* can be understood as the point where *telos* and the *totum simul* converge.

<sup>280</sup> K Nousiainen ‘Time of law – time of experience’ in Bjarup J & Blegvad M (eds) *Time, law and society* (1995) 29.

the doctrine of causality, imparting agency on legal subjects, and allowing law to judge them.

Man has the ability to imagine his present as the object of a future memory, also called “prolepsis.” The ultimate reason for prolepsis is for consciousness to create a temporal self-distance from where it can look back on its current present from the future. In this way the future can act as a causal agent for the present. When a sportsman imagines a future where he wins an Olympic medal, it spurs him on to train harder in the present.<sup>281</sup> Can we think about this as some sort of reversed time or causation?

Again we have to look at Derrida’s notion of supplementarity, where instead of adding on to an event, the temporal structure in fact produces it.<sup>282</sup> The word “produces” is implicated in causality. Can a later event really cause an earlier one? The answer is that the second event’s posteriority is imagined and not real. The anticipation of the later event in fact does cause the primary event. In the language of law this has been labelled as “intention.”

This break created between internal and external time opens itself up to deconstruction. Ricoeur recognises this, and again believes that narrative is the structure best-suited toward exploring these Husserlian protentions and real futures (to the agreement of Derrida’s remembering of the future).<sup>283</sup> While science is restricted to the noumenology of external time, philosophy is restricted to the phenomenology of internal time. The fact that consciousness cannot remove itself from the object-world is the reason why supplementarity has to think about phenomenological and noumenological time together. I am not arguing that external time can go backwards and actually produces events in the past. Protentions are merely projected futures. However internal time is the only way consciousness can experience time, and therefore these ideas have to carry some weight.

Derrida’s supplementarity is based in phenomenology. In creating his concept of “Différance” he borrows Husserl’s structure of the present as a thatched structure of

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<sup>281</sup> Another example is when a person unwittingly sits on a drawing pin. His first reaction is “pain” and upon closer investigation discovers the pin. If not for the pain, the pin would never have been discovered, and in a mental process the order is reversed to create a causal link. Yet the truth remains that the pain was the production of the cause.

<sup>282</sup> Currie (n 194 above) 7.

<sup>283</sup> Ibid 76.

protections and retentions and that the present is always divided by the past and the future. In this manner the present is similar to a sign in the sense that it is constituted by its relationship with other signs together with which it forms a system.<sup>284</sup> The present is itself nothing but a crossed structure of the past and the future.

It remains true that these theories do not offer a contradiction to the one-directionality of time. While there is an *aporia* between internal and external time, the direction of each is not in contestation. If we agree with Kant that *noumena* (or things in themselves) are unavailable to consciousness the real nature of time is irrelevant to us, since we can only deal with the phenomenon.<sup>285</sup> The anachronicity of internal time is only understood in contrast to external time.<sup>286</sup>

Kant also saw the birth of Newtonian causality as the death of mental and teleological causality, stemming from an archaic folk psychology. For Ricoeur the kind of causality rooted in action stands in the same relation to cultural reality as material causality does to the physical universe.<sup>287</sup> While material causality derives its authority from nomenclological generalisations, and the causality of culture draws its authority from narrative, which itself is rooted in the pre-narrative structure of real action. Treating human action in relation to historical truths is a scientific history, and not philosophically sound.<sup>288</sup>

Humans are born into a world that is already filled with meaning, moving in cultures that are complex systems of values and beliefs. Within these cultures complex structures such as politics, religion and indeed law is formed. These structures or systems become autonomous powers that can mould individual will and action, in what becomes an “objectification of life.”<sup>289</sup>

When humans try to understand the circumstances and causal links of a set of facts, we reconstruct our own experiences within the temporal place and circumstances of the given facts. The problem with this is that motivation and intention of those judged cannot be transposed.<sup>290</sup> Law attempts to circumvent this through speculative

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<sup>284</sup> Ibid 75.

<sup>285</sup> Ibid.

<sup>286</sup> Ibid.

<sup>287</sup> Dowling (n 210 above) 54.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid 56.

deduction, imparting the prejudices and experiences of the legal officer onto the characters in the facts. Ricoeur critiques the introduction of physical causality into human volition. Law confuses *if X then Y* with *X caused Y*. It also often neglects “non-individual social forces” such as economy, culture etc.<sup>291</sup> Human action does not only have a causal motivation, but a teleological one as well. The reductive and “small” actions with which law busies itself needs to be placed in a larger temporality for teleological understanding.

Legal interpretation reduces concrete situations into abstract legal oppositions.<sup>292</sup> The autopoeitic translation of information disregards the narrative of an event and turns it into competing abstract rule-sets. Judgments in themselves have *a posteriori* viewpoint, and rarely attempts to overcome the temporal distance to see the facts from the original *a priori* view. Through the employment of narrative time law has no choice but to engage ethically and justly with time action and causation. While boundary formation allows law to ignore the full complexity of human identity and action, narrative time makes it impossible to deal with them any other way. Narrative time could open legal boundaries to the complexity of its environment instead of its own artificial complexity. In the next section we will see the broader theoretical underpinnings of narrative time and how it works.

## 6 Ethics, justice and temporal neutrality

The concepts with which law works are often linked to justice and ethics. However, it is clear that the legal engagement with the problems set by these norms differs from their true ethical and temporal aspects.<sup>293</sup> The moral limitations of the law often require quasi-legal or outright ethical reasoning to reach better solutions.

Ethical theory has spent a lot of time discussing how the good or the bad should be distributed across people in making ethical decisions. The creed “the greatest good for the greatest amount of people” of utilitarianism is one famous example of this. Another proposed view, showing in practice how narrative time is important to

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<sup>291</sup> Ibid.

<sup>292</sup> Nousiainen (n 280 above) 26.

<sup>293</sup> J Přibáň *Legal symbolism: on law, time and European identity* (2007) 49.



considerations of ethics and justice, is to think of this as the distribution of the good or bad over time.

When time is considered in ethical decision-making, an appeal should be made to temporal neutrality (as opposed to law's presentism). All temporal parts of a person's life should be regarded as equal, and experiencing pleasure in the present should not have preference to pleasure in another temporal part of one's life.<sup>294</sup> The concept sacrificing a small good in the present in exchange for a greater good later is universally lauded as prudent.

It can be said that temporal neutrality is in fact a normative requirement for prudence.<sup>295</sup> We are also capable of making temporally neutral judgments of other people's actions, if we have concern for their well-being. This is important in that it imparts impartiality to our judgment of others.

Despite this being true, decision-making is often marred by bias toward the present, despite the temporal location of the good, all other things being equal, has no intrinsic significance (the case is of course different where the temporal location has an effect on the quality of the good). This bias toward the present seems to be connected to the idea of the present lived as a future memory. Another factor that can give precedence (not an unjustified bias) to the present is where the future good is subject to too many variables and risks, and its actualisation becomes an unlikely prediction.<sup>296</sup> A future good can rationally be dismissed on its improbability.

It seems that prudence becomes a theory of the reasons an agent has for acting the way he does. This is aligned much closer to the teleological narrative understanding of identity and action than current legal designations of intention. A distinction has to be made between the kinds of reasons that influence an agent's decisions.<sup>297</sup> Objective reasons are the choices the agent would make if he had perfect knowledge of his situation to achieve the best possible outcome. Their subjective reasons are the reasons that move them to act despite this action not being the "best" choice they could've made. These reasons are influenced by culture and beliefs, the narrative that

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<sup>294</sup> D Brink 'Prospects for Temporal Neutrality' in C Callender (ed) *The Oxford handbook of the philosophy of time* (2011) 353.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid 356.

<sup>297</sup> Ibid.

an agent finds him or herself a part of.<sup>298</sup> These subjective reasons are unimportant, but do carry some weight. Impartial bystanders often laud someone who acted in accordance with their own values, even when they are not shared by the bystanders. On the other hand, objective reasons often come into play much later, when a person retrospectively judges his or her own conduct, after some temporal distance has been made. Even in prospective decision-making, through our subjectivity we try to find the best course of action objectively. Thus it can be said that objective reasoning has some theoretical primacy.<sup>299</sup>

There is a third way in which temporal neutrality justifies differential treatment of the tenses. People cannot help but see their own lives as part of a grander narrative structure.<sup>300</sup> A preference exists for lives that had the bad in its early part but ended as good, as opposed to lives that started out good but ended badly. Does this bias affect temporal neutrality? It seems that this kind of preference is based on a notion of the value of a life that is different from pure temporal bias.

So it seems that the now-for-later sacrifice of prudence is a central part of rationality. Rawls agrees with this, and even goes further by saying that temporal bias “is ethically indefensible.”<sup>301</sup> As we have said, this is true given that all other variables are the same. Thus temporal neutrality has rational and intuitive support, and it gives us a justification to make sacrifices. The rationale for this is that these sacrifices will be compensated in the future.

Prudence is tense-neutral in the same manner that utilitarianism is person-neutral. As I have discussed earlier, tense neutrality makes sense given that all tenses are ontologically equal. The person-neutrality of utilitarianism is less defensible, since we cannot accept person-neutrality as a given. The particularities of persons (an element not inherent in tense) are ignored and people are seen as the same. Prudence side-steps this issue because the sacrifice and reward accrues to the same person, something not inherent in utilitarianism. The balancing of the good within a single life is acceptable, not the balance of good across lives. So it can be said that prudence is

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<sup>298</sup> Ibid.

<sup>299</sup> Ibid 357.

<sup>300</sup> Ibid.

<sup>301</sup> J Rawls *A Theory of Justice* (1971) as quoted by D Brink ‘Prospects for temporal neutrality’ in C Callender (ed) *The Oxford handbook of the philosophy of time* (2011) 358.

tense-neutral but agent-specific.<sup>302</sup> Person-neutrality does not ensure that sacrifice and benefit vests in the same person.

Is the rationale that sacrifice and benefit accrue to the same person defensible? Can an agent's "personhood" be stretched over time like that? For John Locke, personal identity is vested in psychological continuity.<sup>303</sup> The actions of a person at one stage of his life can conceivably have an effect on his life 10 years later. It is this connection and continuity that gives a person concern over their future. Yet this psychological connectedness diminishes over a longer period of time – for example, the same person that worries over their life 10 years from now, would worry much less about where they will be in 50 years. However, this state of affairs is not considered as a flaw of prudence or temporal neutrality.

Does the person-particularity of prudence withstand the case of a person who has a major shift in values or ideals? The same person might not consider a sacrifice as "worth it" by the time that the benefits of the sacrifice accrue to him. This of course could not qualify as a break in psychological continuity, and it still remains the same person. It is worth remembering that prudence has regard for the objective reasons that we do things.<sup>304</sup> Thus in this case the original prudent sacrifice cannot retroactively be regarded as immoral or unethical.

These conflicts or changing of values can take two logical forms. In the first case, ideals that were once valuable are not held in regard later in life. The other (and probably more common) possibility is that values that were once not important are held highly at a later time. In cases like the demands of prudence are clear. The agent should base their acts on the better of the ideals.<sup>305</sup> Again, prudence mainly requires that the objectively best option should be followed, and doesn't demand neutrality between different sets of ideals. The worth or value of different ideals can found through rationality.<sup>306</sup>

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<sup>302</sup> It needs to be reiterated that tense-neutrality is not the same as tense-impartiality. A certain temporal period might enjoy favour above another, but these would be for the specific reasons detailed above and not because it is ontologically superior to another temporal period.

<sup>303</sup> Brink (n 294 above) 366.

<sup>304</sup> Ibid 370.

<sup>305</sup> Ibid 371.

<sup>306</sup> Ibid.

When, after rational deliberation, both sets of ideals or values seem worthless the most ethical option would be to find a worthwhile third option to pursue. If both sets of values seem to be good, some compromise must be found. If a compromise truly can't be made, then the most prudent, the path that leads to the best long-term outcome would be the best.<sup>307</sup>

The last tenet of temporally neutral ethics would be the minimisation of future suffering. Human beings tend to prefer suffering to be in the past rather than the future, even if the suffering is equal.<sup>308</sup> Thus it is not a matter of minimising the total suffering in one's life, but literally the temporal location of said suffering. Is this predisposition rational? It is in fact a temporal bias and while not dishonest, it is irrational. This is the product of the same presentism that we accuse the legal system of. This kind of judgment should not be trusted, and in the heat of the moment unethical choices can be made.<sup>309</sup>

It is thus clear that time has an inescapable part to play in ethics and justice. This section has shown that it is inescapable for humans to think of themselves outside of a narrative mode, which necessarily invokes temporality. Once this fact becomes apparent, the prudence of making decisions based on this reality seems to become the obvious answer to questions of justice and ethics. It is this kind of reasoning that autopoietic systems seem to be incapable of. By opening the boundary between system and environment, and allowing norms of narrative time and justice to enter into legal reasoning, prudence and justice sensitive to temporality could develop.

## **7 Remembering the future: law's symbolic time and narrative memory**

Ricoeur acknowledges that human beings have a complex relationship with the past and with history. One of the purposes of historical narrative is to represent a past that no longer exists, yet even in the present we still inhabit it.<sup>310</sup> The temporality that we

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<sup>307</sup> Ibid 373.

<sup>308</sup> Ibid

<sup>309</sup> Ibid

<sup>310</sup> Dowling (n 210 above) 69.

inhabit, the narrated or “third”<sup>311</sup> time of narrativity, is a time of volition. It remains a narrated time though because it is a temporality that is continuous with that of earlier generations, who also understood themselves in terms of the grander (and particular) narratives.

Ricoeur’s narrative time is close to Heidegger’s concept of Care and Being. Being is always oriented toward the future, always having a project concerned with the possibilities that lay in the future. Care is the self-awareness of the fallibility and limitations of Being, forcing it to make exclusionary choices, which in turn imparts significance on the choices that have been made.

Heidegger makes a serious challenge to empiricism, where the world exists independently from human experience. Ricoeur echoes this sentiment, stating that the world is significant for us before it becomes objective.<sup>312</sup> We start with a world filled with meaning and only then we abstract endlessly until we arrive at the objective world. Ricoeur focuses on this world of meaning, before the world of abstraction. The consequence is obvious: external time is not true time, but in fact it is false, exactly because it is an abstraction. The entire notion of authenticity is misplaced, and Ricoeur takes issue with the estrangement that occurs in external time. We can only understand the past when we separate the time of Care with the “jargon of authenticity.”<sup>313</sup>

The next question that Ricoeur asks is an interesting and important one. Seen in the light of Care, what sense are we to make of a past narrative?<sup>314</sup> To what extent does our own particularities and temporal distance make the agents of narrative unimaginably different? Are their fundamental experiences comparable to our own? Ricoeur answers these questions by saying that all agents leave a “trace”. He takes Levinas’ idea that this trace, being both a thing and a sign, is a dis-arrangement of some order that needs to be made sense of by searching for an absent cause.<sup>315</sup> This trace communicates information to us, despite the possibility that the agent did not mean to communicate anything. Yet as soon as we question the motivation and causes

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<sup>311</sup> It is a third time because it stands separate from Aristotle’s “time of the world” and Augustine’s phenomenological “time of the soul”, or in the terminology of this thesis, external and internal time.

<sup>312</sup> Dowling (n 210 above) 70.

<sup>313</sup> Ibid 72.

<sup>314</sup> Ibid.

<sup>315</sup> Ibid.

behind the trace, we break linear time and enter a time of preoccupation or Care. Heidegger refers to this trace as a “[Being] which has been there”.<sup>316</sup> For Ricoeur the trace or sign connects the world of the agent with our own, demonstrating that the agent had motivation and projects and lived in a world of Care. The trace tells of a web of significance. In short, the sign imparts a narrative.

Keeping this in mind, he claims that time plays a small role in how we make sense of the human past. Instead of looking for the Being that was there, we try to imagine the world in which these traces of significance existed and came to be.<sup>317</sup> We attempt to understand it as a world of volition, action, choices and motives. We tell ourselves “little stories” of the past. Understood like this, human time is therefore *always* narrated time. A historical timeline is thus not the universal time of Heidegger,<sup>318</sup> but a mere ordering of events that is only understandable in narrative causality.<sup>319</sup> Historical dating is only ever a service of a collective narrativity, a Heideggerian project of preoccupation and concern.

Ricoeur observes that almost all cultures have an original event, from which everything else is measured.<sup>320</sup> This is the imposition of a collective “now” of lived experience on the mechanical movement and change observed by said cultures. This original event, one that separates the past from the current era, does not make sense in purely external time. This very event in itself places historical time in the third or narrative time, the context in which society and individuals understand their temporal existence.<sup>321</sup> The implication is that human community is conceived as one being in time with a shared destiny. Narrative is essential for imparting significance to human action, to make sense of the heterogeneous mixture of motives and actions.

Sense can not be made of the past by an “Ideal Chronicler”,<sup>322</sup> recording history impartially and in every detail like a video camera. The past has to be interpreted to find its meaning and significance. Interpretation will always employ narrative to arrive at this meaning. If an historian describes two past events, it will remain a

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<sup>316</sup> Ibid 73.

<sup>317</sup> Ibid.

<sup>318</sup> Much like the model as proposed by A-theory time and as is evidently clear, a broader analytical understanding of time.

<sup>319</sup> See Chapter 3 Section 5 for a discussion on narrative causality.

<sup>320</sup> Dowling (n 210 above) 75.

<sup>321</sup> Ibid.

<sup>322</sup> Ibid 77.

description of two seemingly unconnected historical events if it not connected through narrative emplotment.

Gallie claims that the past always originates from either an actual or implied narrative. He claims that narrative consists of:<sup>323</sup>

1. A series of actions undergone by people or agents.
2. These agents are portrayed in situations that change, and their reaction to this.
3. These changes illuminate unexpected aspects of the situation and the agents involved in the narrative, so that
4. a new predicament is brought about that calls for thought or action.

This sequence presents a teleological development in the terms of narrative causality. Ricoeur approves of this model because not only does it give a meaningful role to individuals within narratives, but also to larger communities of human organisation such as countries or armies (what Ricoeur calls first-order-entities).<sup>324</sup> It sustains plot, motive and action on a larger scale.

Even historical narratives have a teleological conclusion. The future observer links the intentions of the past with the unintended consequences thereof. It is however important to avoid the “retrospective illusion of fatality”.<sup>325</sup> The *totum simul* view may make the consequences of events appear inevitable. This is a fallacy that is often seen in legal reasoning. For the agents acting in the narrative past, the consequences of their actions did not seem inevitable.

Aristotle claims that narratives are self-explanatory. We intuitively grasp the internal relation and logic of events.<sup>326</sup> Ricoeur does not take narrative to be so self-explanatory. To him narrative causality is rooted in the semantics of action, only making sense through the actions of individual agents. Events only come about through the action of individual agents, which is why events are inseparable from

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<sup>323</sup> Ibid 78.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid 80.

<sup>326</sup> Ibid.

action. All human action has to be interpreted, because we could always have done something else.<sup>327</sup>

Legal symbolism exists for the purpose of preserving law's identity and integrity.<sup>328</sup> Law abstracts real time into the *ephemos*, the time of a social system. Time is changed and becomes codified to suit the contexts and social patterns of a system. It has been said that "systems operate in a time proper to themselves."<sup>329</sup>

Legal systems draw their claim to authority and legitimacy when it is duly enacted through its own mechanisms of positive law, not because it was established in the past and projected as eternally binding. Therefore law needs to constantly establish itself in the present. When rapid, radical social change is happening, law codifies the social or political future in an attempt to stabilise and "present" itself.<sup>330</sup> It deals with social change by proceduralising it. Unsurprisingly, the "fast-forwarding" of social change by the law never seems just.

Another aspect of time that law manipulates is collective memory, the self-reflection of a social group. In South Africa the constitution is an embodiment of this process. This codification of memory creates a hermeneutic circle, since the codified memory also functions as the interpretive model for future legal structures.<sup>331</sup> It becomes surprising that the legal system is turned to in order to fix an unjust legal past.

According to Přibáň, it is not law's place and in fact law cannot provide just or ethical answers, only legal ones.<sup>332</sup> In this thesis we have argued that these systems and their norms aren't inherently exclusive. A partial solution to this is to find answers in quasi-judicial processes for injustices of the past, such as the Truth & Reconciliation Commission. The TRC placed an emphasis on remembering, showing a much more dynamic and responsible engagement with time. Yet this is not entirely satisfactory. Through quasi-judicial means an "official" account of history has been made. This means that certain events in the past are remembered while other are not. The

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<sup>327</sup> Ibid 84.

<sup>328</sup> Přibáň (n 293 above) 47.

<sup>329</sup> Ibid 48.

<sup>330</sup> Ibid 57.

<sup>331</sup> Ibid 60.

<sup>332</sup> Ibid 61.



officially sanctioned act of remembering paradoxically also becomes an act of forgetting.<sup>333</sup> Přibáň goes on to state that:

The moral demands of the laws and politics that the past should be unconditionally dealt with and all information available about it disclosed cannot be accommodated by the legal and political systems.<sup>334</sup>

Political and legal dealing with the past necessarily happens in the public sphere, a sphere which Heidegger cannot help but associate with “averageness” and “concealment.”<sup>335</sup> It would be too easy to claim that law and justice are separate systems, and that neither is capable of satisfying the other’s demands. Instead the challenge is to understand what law’s shortcomings are, and how they can be addressed.

## 8 Conclusion

We have seen in this chapter that narrative does hold answers that law does not possess. Narrative holds these promises of unspoken knowledge that are non-legal and even non-philosophical, something more subtle than the crude forms of empirical knowledge. These accidental insights can inform us of ourselves and the Other.

Narrative time is posed as a solution for the shortcomings of legal systems theory. Narrative time shows itself to reconcile between tenses as well as the gap between our internal time and the external time of the object world. Narrative time seems to collect these different temporal locations and present them in a unified whole through the medium of stories. Human identity and action is seen to be filled with an ethical dimension that law has seemed to ignore. Narrative imparts ethical particularity to us, separating it from the legal heterogeneity that we encounter. The individual and political elements of identity are recognised. Through the changing element of identity distance comes into being that allows the unchanging self to be judged, which leads to self knowledge and ethical development. This anagnorisis is a far cry from what is expected of legal subjects in systems theory.

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<sup>333</sup> Ibid.

<sup>334</sup> Ibid 66.

<sup>335</sup> Ibid.

Just as the nuanced and ethical dimension of identity comes to the fore, so does narrative time redeem human action. Through mimesis narrative time gives us a structure for the pre-understanding of human action. The environment is filled with meaning and symbolism that frame our actions. Actions have real meaning beyond the mere physical events typified by autopoiesis. It allows for the teleological understanding of action, and even admits that the interpreter of action adds their own additional layer of meaning onto it.

We also see that justice and ethics are inextricably tied to time. In a bid for legitimacy law's focus is on utilitarian considerations. The truth of the matter is that ethical decisions that are indeed not temporally neutral are almost per definition unjust. Law is almost exclusively concerned with presentist regards which limits it to short-term solutions. This is problematic in South Africa where current problems (that the law has no small part to play in solving) have significant temporal duration. By allowing narrative time to enter legal reasoning considerations of prudence and justice can be brought to the fore in the answering of the country's current social dilemmas.

It is in that light that we return to the concept of legal memory. Memory turns the past into an object of Care, imparting significance on our current actions. It is true that sometimes law attempts to create an official or communal memory such as in the case of the TRC. Paradoxically an official record of memory will necessarily result in a myriad of "official forgetting". This is another example of law being unable to deal with the complexity that human experience presents us with, and that narrative time seems more capable of dealing with.

So in answer to law shirking its responsibility to engage with justice, we see that narrative time allows for a way to do that. If law can be rid of its self-interest, the mechanism it has developed to protect itself from norms of justice can be implemented alongside legal norms, giving rise to better law. When law's boundaries are opened, it will allow for a much more complex vision of humans and their actions to become available to it. This complexity will manifest itself in narrative time. When faced with narrative time we will be unable to ignore the ethical dimension that narrative and time intrinsically demand. When this self-consciousness is breached nothing stands in the way of law to appeal to norms of justice, and hopefully experience its own self-distance and anagnorisis necessary to see itself and others in a

new light “to emerge from ourselves, to know what another person sees of a universe which is not the same as our own.”<sup>336</sup>

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<sup>336</sup> Dowling (n 210 above) 52.

## CHAPTER FOUR

# *Afriforum v Malema* AND THE DEMANDS OF COMPLEXITY

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### 1 Introduction

In the previous chapters we saw how the law functioned as an autopoietic system. This has allowed the law to isolate itself from the complexity of its environment, dealing with problems in a highly selective and instrumentalised manner. We have also seen that through its fear of having justice challenge its legitimacy law has effectively severed contact with the elements that make justice work. This situation can be salvaged if law became aware of and could incorporate narrative time. It demands a degree of temporal sensitivity that would restore many other aspects that law has failed such as identity, agency and ultimately justice.

In order to illustrate the debate more clearly the principles will be discussed at the hand of a case study. The case in question is the one of *Afriforum v Malema*, which after around two years of contention has been settled outside of court only a few weeks prior to the date of writing. At first the facts of the case from inception to conclusion will be briefly outlined. This will be followed by an analysis of the case in light of the theoretical work of Luhmann, and how the facts fit within his concept of autopoietic legal systems. It also looks at a Ricoeurian interpretation of the events, of the ethical tones underlying the matter and how it the theory of narrative time could redeem our understanding of the matter despite the initial court judgment.

Theoretical matters particular to the case will also be dwelt upon. In this case the court had to deal with a history that stretched beyond the immediate facts at hand. We see that the past can only be accessed through memory, yet memory is never perfect. It can never deal with the total complexity of what has happened and must therefore be selective in what it recalls. The selection is influenced by the prejudices, motivations and knowledge of the one who is remembering. We also find that law has an institutional memory and victim to the same shortcomings. There is thus always an

agenda through which law remembers – and more importantly, forgets – that we must question, as well as what it is that the system forgets.

Staying on the subject of memory we will see how the past becomes the storehouse for all knowledge. All knowledge being memory, we project it towards the future in order to imagine how to best stabilise our expectations. Thus we have to look at both the past and the future when dealing with legal problems, in a process described as “re-collective interpretation”. It shows how the past regulates our conduct, and how we can imagine different and better futures for ourselves and for law by breaking autopoeitic self-constitution in favour of constant re-definition through exposure to the Other.

Finally we return to the problem of complexity and how to best deal with it despite our limited means. We see how modern society has become fixated with the notions of speed and efficiency at all cost, and the implications it has for dealing with complex problems. The position is taken that in order for justice to be fulfilled in complex situations a reductivist strategy of law is counterproductive. Instead a slow unpacking of all the issues involved should provide better long-term solutions. We also see that complexity necessarily implicates our actions with ethical dimensions, and that making “sweeping” or “modest” claims regarding complex problems are not impervious to ethical judgment.

## ***2 Afriforum v Malema***

The case used to illustrate the points made in this dissertation is one that received a lot of attention. To understand the context fully, a summary of the facts must be given. Afriforum is a trade union that particularly endeavours itself toward the protection and promotion of the Afrikaner community in South Africa. In 2011 they sought relief from the court to prohibit the leader of the African National Congress Youth League, Julius Malema, from singing a particular struggle song at political rallies. The song in question is called “Awadubula (i) bhulu” or “Shoot the boer”. A literal English translation of the words is as follow:<sup>337</sup>

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<sup>337</sup> *Afriforum and another v Malema and others* (n 17 above) par 59.

Shoot! Shoot! Shoot them with a gun

“shoot the Boer”

Shoot! Shoot! Shoot them with a gun

Ma, let me “shoot the Boer”

Shoot! Shoot! Shoot them with a gun.

These dogs rape us

Shoot shoot shoot them with a gun.

On one occasion Malema added the words:

“shoot the Boer/farmer. “shoot the Boer” the farmer.

Shoot to kill. Shoot to kill.”<sup>338</sup>

Afriforum claimed that singing the song caused a systemic disadvantage for Afrikaners, undermined their human dignity and could propagate hatred and incite violence based on language, culture and ethnicity.<sup>339</sup>

The songs were alleged to have been sung during the month of March 2010 at Malema’s birthday party on the 3<sup>rd</sup>, on the 9<sup>th</sup> at the University of Johannesburg, at a Human Rights Day celebration in Mafikeng on the 22<sup>nd</sup> and again on the 26<sup>th</sup> in Rustenburg.<sup>340</sup> Malema claimed that since it was a struggle song he had the right to sing the phrases in question.<sup>341</sup> He contended that the song referred to the symbolic destruction of white oppression and should not be taken literally and was a part of the heritage of the liberation of South Africa.<sup>342</sup>

The media reaction to the case was significant. Especially after the song had been sung at the University of Johannesburg articles appeared in newspapers such as the Mercury, The Star, Beeld, The Sowetan, Citizen and Rapport. On the 19<sup>th</sup> of March 2010 the complainant led a march to Luthuli House in protest of the song.<sup>343</sup> A large section of the public followed the press coverage and was outraged by the fact that the

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<sup>338</sup> Ibid par 61.

<sup>339</sup> Ibid par 49.

<sup>340</sup> Ibid.

<sup>341</sup> Ibid par 53.

<sup>342</sup> Ibid par 61.

<sup>343</sup> Ibid par 76.

song had been sung. A common argument made in the black press was that the song was not an incitement to violence, but that it was in recognition of the struggle past and a reminder to oppose current oppression of black people.<sup>344</sup> More extreme opinions held that the considerations of oversensitive white fears should not have precedence over black aspirations.<sup>345</sup>

An interdict was issued against Malema prohibiting him from continued singing of the song, which he respected. On a visit to Zimbabwe he did however sing the song again. The Equality Court ignored this in the light that it happened outside of the Republic's borders.<sup>346</sup>

The court decided upon the issues that it had to determine. This included among other things what the meaning of the song's words meant, what meanings different groups ascribed to it, whether it constituted hate speech and whether the fact that it is part of a struggle heritage overrides the right of those claiming that it is hate speech.<sup>347</sup> The court found that through the reporting and interpretation by the press the song's words had taken on a specific meaning to certain sectors. Whatever Malema's original meaning might be, he continued to sing the words after becoming aware that the words had taken on a character that the court considered "derogatory, dehumanising and hurtful".<sup>348</sup> The court emphasised that while the song was appropriate during the struggle years, the original figurative meaning of the song seemed out of place. According to subsequent laws and agreements the enemy has become a friend and a brother and that singing such re-contextualised words was out of order.<sup>349</sup> The court decided that the words of the song could reasonably be construed to "demonstrate an intention to be hurtful, to incite harm and promote hatred against the white Afrikaans speaking community" and that it constituted hate speech.<sup>350</sup> Intention was regarded as being irrelevant. The words were shown to have different meanings and each meaning was to be accepted. The judge stated that people who felt an attachment to the song should develop a new morality and embrace new customs in the new South Africa.<sup>351</sup>

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<sup>344</sup> Ibid par 80.

<sup>345</sup> Ibid par 74.

<sup>346</sup> Ibid par 81.

<sup>347</sup> Ibid par 55.

<sup>348</sup> Ibid par 107.

<sup>349</sup> Ibid par 108.

<sup>350</sup> Ibid par 109.

<sup>351</sup> Ibid par 110.

In closing the court ordered that specific phrases of the song constituted hate speech and the respondents were interdicted from singing the song. The judge stated that morality should prohibit South Africans from singing it.<sup>352</sup>

The respondents took the decision on appeal to the Supreme Court of Appeal in Bloemfontein. On the 1<sup>st</sup> of November 2012 the parties reached a settlement agreement which became a court order the following day, substituting the order of the Equality Court.<sup>353</sup> The decision to settle and to abandon legal proceedings was praised publicly.<sup>354</sup>

This case serves as a good practical illustration of how law operates in an autopoietic system, and what happens when it moves outside of autopoiesis. In the second chapter we identified three operations law employs in order to evade its responsibility with justice. These were the drawing of boundaries and the stripping of complexity this allows in specifically identity and action.

The first of these issues, namely the drawing of legal boundaries, is very clearly illustrated. Early in the case Lamont J issued the parties with a directive to isolate before the court what the legal issues were, the evidentiary and factual matters regarding the issues, and on what extent the parties differed with regard to it.<sup>355</sup> The implication of this directive for the purposes of autopoietic law is clear. In a complex matter such as this, one that encompasses a broad temporal context and human activity and emotion, the court needed to know which of its own unique norms were at stake. This is the translation of real-world (or environmental) problems into the binary legal/illegal vocabulary of simple legal oppositions. Systemic operational memory had to be informed of exactly which norms to recall in order to assess what was at stake in a strictly systemic sense. Once the specific norms had been identified (Section 10 of the Equality Act) it becomes easy to establish which parts of the narrative fall within the ambit of the law and which do not.

This shows how problematic the notion of “input” is in law. The moment the relevant legal norm had been established, what made it cross the border from environment to

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<sup>352</sup> Ibid par 120.

<sup>353</sup> ‘Mediation agreement made and entered into by and between the ANC and Mr. Malema and Afriforum and TAU-SA’ 1 November 2012.

<sup>354</sup> ‘Skiet die boer se einde’ *Beeld* 31 October 2012. Also see ‘n Deurbraak vir redelikheid’ *Beeld* 2 November 2012.

<sup>355</sup> Ibid par 44.



system became greatly reduced. A rich full set of information has become nothing more of whether the criteria and benchmarks of a single (or small collection) of norms have been met. Law produces its own information with little need for environmental input. This case was one that clearly needed dialogue and active engagement between the parties with extralegal norms.

The second manner in which law evades its engagement with justice is through the denial of identity. The by-now familiar leitmotif of systems theory is repeated: “human beings do not and cannot communicate – only communication can”.<sup>356</sup> An interesting question is how hate speech is dealt with in a system that has this as a foundational premise. From the perspective of narrative time we know that we are dealing with complex identities in this case. Narrative time allows for the reclamation of subjectivity. Instead of being unable for communication narrative time identifies speech (or singing for that matter) as a constituting element of the unchanging *ipse* identity. Individual bodies are held accountable for their speech over great temporal distances. This is because narrative time can never be ethically neutral. Autopoietic legal systems, through identifying the relevant legal norm (hate speech) to measure the individual against, effectively disengages from the puzzle of extralegal norms of justice as well as removing the “I” that spoke the contentious words. The *ipse* narrative identity of the speaker immediately becomes irrelevant to the law.

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

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<sup>356</sup> Moeller (n 27 above) 5.

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

As we have seen, in autopoietic systems humans cannot be said to act, but instead it is always the system that acts. Furthermore an element of causality becomes lost in translation when it crosses the boundary from environment to system. Environmental events enter the system causing it to make selections. The facts are internalised as different, and law itself decides what the causal implications are. The moment a complex case, with a vast possibility of future outcomes such as this one, crosses the boundary we are left with a very limited amount of outcomes. Importantly these outcomes are almost necessarily legal outcomes. This allows of improper outcomes to be logically explained. Action loses much of its complexity when described through the designations of legal causality. The facts of the case at hand are particularly intricate, but the facts are typified as: the song had been sung, the press widely printed translations, Malema became aware of this but continued to sing the song. In a nutshell this is what remains of the action and causation as the court saw it.

A pre-narrative structure exists in which we can make sense of the facts of the case. This symbolic order imparts meaning to the identities, actions and contexts that make it understandable to us and imparts it with causality. This is mimesis<sub>1</sub> which imparts narrative meaning on human endeavour. We need to understand these narratives within in spatiotemporal context to make them part of a teleological whole. It is this that makes it possible to be evaluated and judged. This is the role of mimesis<sub>2</sub>. The final part, that of mimesis<sub>3</sub>, is the stage of interpretation known as refiguration. At this stage the individual nuances and prejudices of the interpreter come into play, such as his own experiences, his background or his culture. This implies imperfect knowledge

on part of the interpreter or judge, meaning that the facts of a narrative need to be struggled with in order to arrive at a good interpretative conclusion.

Ricoeur sees human action as rooted in cultural reality as much as the causation of physics is rooted in the material world. This kind of causality is situated within narrative time. In the case at hand the judgment seems to be an *a posteriori* one with little regard to the *a priori* events of the narrative that is essential to the teleological understanding of the facts. The temporal distance to the past is never really overcome.

We have seen that history plays an important part in our experience. Even though the past does not exist anymore yet we still inhabit it. The case returns us to the question of to what extent the past becomes unimaginable for our own narratives. The song itself is an example of the trace discussed in the previous chapter. It communicates something to us, while the original cause for the trace is absent or has changed. What it tells us is that there was a time of preoccupation and Care, of projects and motivation. The case asks the question of us, “are these projects and motivation relevant to our current preoccupation?” We need narrative employment to answer this question for ourselves. Second does it run the danger inherent in official memory?

As stated earlier the parties reached a settlement on the 1<sup>st</sup> of November 2012. While Afriforum celebrated the settlement for being superior to a court order (for reasons such as that court orders are difficult to enforce; that it would humiliate one party; and that it prevents constructive engagement between communities)<sup>357</sup> the question is begged: why was law chosen by the very same complainants as the norm-system in which to address the matter in the first place?

Is it possible that law could never have been an adequate avenue in which to resolve this matter? The parties themselves certainly gave reasons as to why a court order would be undesirable. There seem to be recurrent themes running through this. The first that I would like to identify is that it appears that the parties have realised that law seems incapable of dealing with this complexity. Second law could only translate the problem into a binary opposition where the song was either legal or illegal, where one party lost and the other won. In a case such as this one where the issue at stake is

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<sup>357</sup> ‘Mediation agreement made and entered into by and between the ANC and Mr. Malema and Afriforum and TAU-SA’ (n 353 above). See also ‘n Deurbraak vir redelikheid’ (n 354 above).

the peaceful and respectful co-existence of two race-groups (at least that is how it is portrayed by the self-appointed complainants) and the recognition of one of the group's heritage of liberation (again as portrayed by the respondents) a simple legal prohibition seems like a fundamentally inadequate measure to appease the matter. This problem is one that required dialogue, temporal sensitivity and respect for the narrative identity of the other. This would've allowed for ethical considerations to enter into the fore. Justice calls on us to engage with all of these. It cannot be achieved and is simply incompatible with a system of communication that is temporally biased toward the present, denies identity and refuses to engage with norms that do not suit its agenda.

### **3 The limits of the law**

As we have seen earlier, one of the problems of autopoietic reasoning is that it immunises itself from external critique. It is capable of this escape act through its self-drawn boundaries and differentiation. It becomes easy for law to reject criticism as not being directed at law itself, or as I have put it earlier “you might be right, but what you are talking about is not law!” One possible solution to this counter is to make sure you are talking about law, i.e. establish a location for criticism of law inside of the system itself. Is it possible for critique to infiltrate a system in such a manner at all? Or to put it more colourfully, can critique be smuggled across the boundary of the system?

One possible argument supporting such an internally-located space for critique is offered by Christodoulidis.<sup>358</sup> While he frames his argument within Luhmann's system theory of the political, and is even dismissive of the potential to employ it within the law, some fundamentals are translatable. The aim is to make a system “reflexive”, allowing a degree of self-consciousness and self-distance that makes judgments of the system possible by the system. This circumvents the escape act of designating critique as incompatible or not with the system. The author describes debates between system theorists and their critics as “total confrontations”.<sup>359</sup> The

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<sup>358</sup> EA Christodoulidis “A case for reflexive politics: challenging Luhmann's account of the political system” (1991) 20(4) *Economy and society* 380.

<sup>359</sup> *Ibid* 381.

theory he propounds allows for even a sympathetic reader of Luhmann to find a locus for criticising a particular system.

As was described in the second chapter, systems draw boundaries that allow it to differentiate external information and to turn this into meaning particular to the system.<sup>360</sup> The system creates representations of reality that is meaningful within the confines of the system. These different systems become increasingly separated from another until they are autonomous and incompatible to the point where one can no longer perform the function of the other.<sup>361</sup> One of the reasons for this is the important constitutive difference that makes up each system, the binary judgment code of each system such as legal/illegal or just/unjust.

This allows a construction of the environment that is typified uniquely by each system. It structures the discourse in which a system can communicate about human events.<sup>362</sup> So while a system is operatively closed in that it reconstitutes itself through its own past operations, it is this differentiation of reality that is said to make a system cognitively open. This gives the system the ability of self-observation in that it can distinguish between its environment that it makes subject to it as well as the internality of its own autopoietic operations. It is this point that Christodoulidis is interested in: the connection between operation and self-observation.<sup>363</sup> This self-observation is defined as the application of the differentiating code and an indication of something on that basis.<sup>364</sup> It is exactly this self-awareness that lies at the root of boundary-drawing.

As I have mentioned Christodoulidis puts this observation to the service of the political system in order to allow for utopian or radical politics to have a theoretical basis for change in system theory. Luhmann is of the opinion that utopian political groups are ineffective in changing social systems. He gives the example of ecological campaigns, criticising them for speaking in a vocabulary that is simply not understood by the government/opposition code of politics. It becomes information that the system cannot process and thus falls to the wayside. Politics however have developed a contingency value, a “third value” in order to asymmetricise itself in the form of “public

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<sup>360</sup> Ibid 382.

<sup>361</sup> Ibid 383.

<sup>362</sup> Ibid 383.

<sup>363</sup> Ibid 384.

<sup>364</sup> Ibid 384.

opinion”.<sup>365</sup> It allows for a degree of sensitivity for external reference from the system. Since autopoietic systems cannot directly observe its environment this becomes a gauge for the fulfilment or disappointment of the political system. Luhmann sees this as the true definition of democracy.<sup>366</sup> The political observes its environment (albeit in a manner of vastly reduced complexity) it decides to make the environment subject to its operations which then gives it an opportunity to observe itself. It can also be called the “re-entry” of the system/environment distinction into the system.<sup>367</sup> This sensitivity of the system however remains subject to what its binary code allows it to understand and deems relevant.

Thus the question becomes apparent: can there be such a third value for law? Despite Luhmann’s insistence that justice or ethics are incompatible with law, could it not be a contingent for self-observation? What holds true for one system must surely be a theoretical possibility for another. Justice insists that it should be done, and that we can always attempt to act justly. It allows us to question what is legal and how the law should be. It is the very thing that should allow us to redefine what legal communication can be. In the case of utopian politics the limiting factor is the democratic political system itself; the contingent third value of party politics opposes utopian politics. Just like utopian politics, justice cannot allow itself to be channelled into the existing scheme of the system.

Part of the problem returns to the reality of systems each creating a unique environment relative to itself. The result is that society has no “centre” from which law and justice can deliberate. There cannot be a whole of self-knowledge.<sup>368</sup> There is no environmental locus for collective rationality, since it is undermined by the incompatible system accounts of reality. In the case of law, it becomes reflected upon from the meta-level of politics in order to establish its limits. The question then arises which problems should be taken up again by politics, and which should be distributed to other systems.<sup>369</sup> The problem becomes a circular one: in which way is the political system more suited to deliberating these problems than the law is? Yet this meta-level of deliberation has made its way into political and legal systems, for example in the

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<sup>365</sup> Ibid 385.

<sup>366</sup> Ibid 385.

<sup>367</sup> Ibid 386.

<sup>368</sup> Ibid 388.

<sup>369</sup> Ibid 393.

forms of constitutions. Yet given the binary code of systems how are these meta-level deliberations supposed to be understood? The answer is that the distinction can be placed through theory into the context of another distinction.<sup>370</sup> The code that decided what was meaningful to the system can now be reflected upon. It is exactly through this meta-level that critique finds leverage from and can be carried into the systemic discourse itself. Law can question its very legal/illegal binary and realise that not all problems have to be differentiated and designated in this way. This could result in a different way in which the system perceives and presents the reality of its environment.<sup>371</sup>

The third contingent that allows observation also allows for the possibility to see how things could be different. The meta-level of theory in the system allows for a second-order observation. Theory can see what is visible and invisible to the first-order observation.<sup>372</sup> Thus first-order observations of the system can be problematic. Christodoulidis sees that as an opportunity to introduce a third value into the code, namely a “rejection value”.<sup>373</sup> In other words instead of the mere legal/illegal, the system is presented with the opportunity to reject the very choice. This gives the system a reflexive structure, allowing it to reject its own code. This allows law to decide if a certain problem should even be taken up legally. This allows law to impart problems with “legalness” that fall outside of the ambit of legal/illegal. Is it possible for this rejection value to call to norms of justice, of narrative time and of ethics? Can it be the chink in the systems armour that will allow for the infiltration of more radical norms than those offered by the current system?

We have seen that an important aspect of bringing law to answer to justice is the relationship the system has with time. Justice simply cannot exist without time. One of the ways in which law has shirked its responsibility is by not being temporally neutral but instead being presentist. Law’s relationship with memory and the forgetting that accompanies official memory is something that Christodoulidis also discusses.<sup>374</sup> Memory after all is important for all temporal locations including the future, as he writes “what future does not seek its point of departure in some origin in

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<sup>370</sup> Ibid 394.

<sup>371</sup> Ibid 394.

<sup>372</sup> Ibid 395.

<sup>373</sup> Ibid 395.

<sup>374</sup> EA Christodoulidis ‘Law’s immemorial’ in EA Christodoulidis & S Veitch (eds) *Justice, law and ethics in reconciliation* (2001) 207.

the past?”<sup>375</sup> Can we ever begin anew while being temporally sensitive, or does a new future necessitate a forgetting of the past? Even Ricoeur says that new generations feel the need to distance themselves from the “old Terror” of those that came before.<sup>376</sup> It allows the new generations to wipe the slate of hereditary debt. Can this be done at the price of historical continuity? After times of crisis newer generations seek a split with the communal narrative, unable to carry the burden that it imposes. Is it possible to free the future from the legacy of the past, and what role does the law have to play in this?

Time plays a role in letting people forget about the past, and it justifies why something has been forgotten. The true past and a better future become forgotten, and it helps maintain law and order.<sup>377</sup> It codifies the past and as Marx said that at the moment that men stand at the point of revolution, they fall back on old traditions to express themselves.<sup>378</sup> Memory can redeem the past and muddy the truth. The question at hand is whether law can redress this aspect of memory, or whether it is complicit. Could law allow us to spring from the past rather than derive from it?

The preamble of the South African Constitution gives a special role to memory, urging to remember the injustices of the past. Christodoulidis typifies this as a responsibility that we can never truly meet.<sup>379</sup> He remains sceptical of the integrity of memory in an institution that “closes down memory ideologically”.<sup>380</sup> It evokes memory as an “immemorial”, what can only be remembered as being forgotten. He continues to list three statements regarding memory: first that memory is necessarily selective; memory is released from sequence and jumps, cuts and moves in chronology, also implying omission; and last that memory is never presented as pure reality, but is constructed in the light of a question in order to illuminate the what, who, where or how of the past.<sup>381</sup> It is thus always presented with reduced complexity in service of certain presuppositions. In this manner even law can only deal with the

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<sup>375</sup> Ibid.

<sup>376</sup> Ibid 208.

<sup>377</sup> Ibid 209.

<sup>378</sup> Ibid 210.

<sup>379</sup> Ibid 212.

<sup>380</sup> Ibid.

<sup>381</sup> Ibid 213.



past through certain questions and goals thus establishing what is remembered and what is forgotten, what is memory and what is immemorial.<sup>382</sup>

Christodoulidis criticises philosophy for not having dealt with time in terms that are its own, instead time always being related to something else such as physical change.<sup>383</sup> Such causal theories of time are problematic since time is needed for causal events to unfold; it becomes tautological to use these events to then define time. This echoes the sentiment of Ricoeur who wishes to break away from the internal/external debate regarding time. Yet how can we define time if not through causality? Christodoulidis offers a definition very similar to that of Luhmann. Time is defined self-referentially as the difference between past and future.<sup>384</sup> This means that time doesn't need events or change to be constituted, and allows for different versions of memory for individuals. Lacking the substantive element of causality memory needs a frame of reference which it finds in the differentiation between events, keeping in mind that memory is structured through some a specific question or angle of inquiry.<sup>385</sup> The past cannot be accessed without memory, automatically linking it with time and narrative time.

Of course memory is never neutral and even legal memory has an “institutional imprint”.<sup>386</sup> Law structures memory with the same questions that access the past, and in this case these questions will have a certain legal character. Even the way that time is engaged with and how past events are defined are predetermined by the legal system. While narrative time allows us to look at time teleologically, law is a structure of *a posteriori*. Law needs to manage the past in order to stabilise social expectations.<sup>387</sup> These expectations do not cast a fixed version of the past, and the past can be reinterpreted. Yet no matter how many times law returns to the past, its memory will always be selective. The very functioning of the legal system requires that the past be classified, stripped of ambiguity and then be settled and closed. Law is only interested in reading the past insofar it can be rejected or accepted in the present in an act of constant constitution of the system and its reality.<sup>388</sup> This makes a true

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<sup>382</sup> Ibid 214.

<sup>383</sup> Ibid 215.

<sup>384</sup> Ibid 216.

<sup>385</sup> Ibid 217.

<sup>386</sup> Ibid 217.

<sup>387</sup> Ibid 218.

<sup>388</sup> Ibid 220.

engagement with the past impossible. Christodoulidis believes this can be changed through “asking the system to remember what it forgot and to remember that it forgot”.<sup>389</sup>

In South Africa the TRC exchanged truth-telling and memory for amnesty. It lost much of its legal function in order to gain a fuller picture of the truth of the past. The Commission itself saw itself as carrying a “moral responsibility” toward society.<sup>390</sup> This is expressed through an engagement with the matter of conflicting memory, rather than the legal attempt at resolution of conflict. Yet the TRC runs the pitfall of turning collected memory into collective memory, as well as what is collectively forgotten.<sup>391</sup>

Through shared interpretative experience a common memory can be built. Law is one interpretative model that attaches value to certain aspects and discards others as unimportant. Remembering the past through law side-steps the terminology of ethics.<sup>392</sup> As we have said before, the individuality of an ethical agent is replaced by the homogeneity of the legal subject. Any call of justice toward the Other becomes lost. Justice is not found in a legal responsibility but rather like Ricoeur we can find it sprouting from fragility.<sup>393</sup> Fragility of the Other calls us to action and responsibility from a position of strength, as he says “we are rendered responsible by the fragile”.<sup>394</sup> This is opposed to the legal responsibility of being the master of one’s own actions. Ricoeur sees the responsibility from fragility as the manner to structure our action in *a priori* situations, with the “traditional” form of responsibility only coming into play when making *a posteriori* judgements.<sup>395</sup> Fragility introduces an asymmetry into responsibility, no longer allowing it to be concerned only with itself but also another. This responsibility can never truly be exhausted.<sup>396</sup>

What does this mean for collective memory? How can someone take on the memories of another, never mind that of an entire population? Law has developed mechanisms of abstraction and reduced complexity in order to facilitate this. Yet this can never

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<sup>389</sup> Ibid 220.

<sup>390</sup> Ibid 221.

<sup>391</sup> Ibid 222.

<sup>392</sup> Ibid 224.

<sup>393</sup> Ibid 225.

<sup>394</sup> Ibid 225.

<sup>395</sup> Ibid 225.

<sup>396</sup> Ibid 225.

represent the whole truth and nothing but. Legal mechanisms all “trivialise, professionalise and rationalise, and thus fail to represent the memory of suffering, fail to make familiar what is senseless”.<sup>397</sup> Institutionally law is embedded with the immemorial.<sup>398</sup>

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

#### **4 The possibility of transformation**

It should be clear by now that a legal engagement with justice cannot help but engage with time. Considering the past and the future is essential for better law. Memory is employed to enter the past and to discover norms and conventions and how successful they were, while projection allows us to imagine how our current decisions will bring about a desirable future. It is in light of this that Drucilla Cornell calls interpretation “recollective imagination”.<sup>399</sup> This interplay of looking towards the past and future necessitates the use of imagination when interpreting law.

To some the idea of imagination in legal interpretation might sound alien or even alarming because of the public expectation of legal certainty. We know however that the indeterminacy of meaning dispels surety as an ideal that is impossible to live up to. This is not because there are no shared standards of meaning, but exactly because an autopoietic legal system carries institutional meaning that needs to be shared

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<sup>397</sup> Ibid 226.

<sup>398</sup> Ibid 227.

<sup>399</sup> D Cornell *Transformations: recollective imaginations and sexual difference* (1993) 23.

among many.<sup>400</sup> What is presented is a set of ideal norms that need to be communicated in the real. The environment of the real is too complex to be reduced to the symbols of the ideal or system. This is because signs in the environment can never directly relate to an object or be self-referential but always stand in relation to something else.<sup>401</sup> When one sign always points to another, the interpretive process can never be done and therefore no full determinacy can be reached.

Cornell invokes the notion of “Secondness” of Charles Peirce as the “real that resists” and that “against which we struggle and which demands our attention to what is outside ourselves”.<sup>402</sup> Secondness is what remains between cognition and reality after all knowledge, that which cannot be captured by signs, has been subtracted. It is the Other that lies beyond our systems of meaning. Knowledge and signs only inhabit the third realm in Peirce’s schema.<sup>403</sup> Thirdness is also where law and interpretation and general human conduct lies. This realm is open towards the future and always retains an element of indeterminacy that is more than mere repetition of the past. The implication is that we cannot be trapped by our situation as products of the past, but always possess the potential to free ourselves from it and take the future in a radical new direction.<sup>404</sup> This however does not remove the relevance of the past. Whenever we act we use memory to draw upon the past. The past is the “storehouse of all our knowledge” and we can only carry knowledge if it can be stated as a memorial maxim.<sup>405</sup> Interpretation is thus a kind of projection of the past onto the future, but coupled with our imagination to determine what our possible outcomes could be. In this sense all knowledge is interpretive and the past and future are both needed to provide meaning.<sup>406</sup>

When interpreting legal problems one would necessarily need to look at the past. However this is no simple matter. As we have seen, memory is our only tool to access the past, and memory is in itself not infallible. Instead we have to look at the past through differing interpretive frameworks. The goal is to stabilise these conflicting meanings of the past and as Cornell points out, the very fact of passing legal decision

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<sup>400</sup> Ibid 25.

<sup>401</sup> Ibid 25.

<sup>402</sup> Ibid 26.

<sup>403</sup> Ibid 26.

<sup>404</sup> Ibid 27.

<sup>405</sup> Ibid 27.

<sup>406</sup> Ibid 28.

stabilises this meaning insofar as law is concerned.<sup>407</sup> This meaning is employed to set a standard for future conduct. In this sense of speaking a historical fact such as “Christopher Columbus discovered America” (to use Peirce’s example) refers not so much to the past as it does to the future.<sup>408</sup> The historicity of the fact means nothing if it doesn’t regulate our future conduct regarding the position of the fact. In this sense the past cannot be grasped by us but instead we are grasped by it.<sup>409</sup>

Even legal norms are interpreted in the “spirit of the law” and through the projection of past application in the current case. Thus there is an inherent “should be” situated within norms, an orientation towards the future which implies creativity. It is this aspect of legal interpretation that Cornell refers to as “recollective imagination”.<sup>410</sup> This can be seen in cases where the law is presented with two conflicting principles. It is indeterminacy that which makes this conflict possible and a radical lawyer can use the tradition of law itself because of it. The fact is that the conduct of lawyers matter in what the law becomes.<sup>411</sup> Conflicting principles can be resolved by an appeal to a rational whole, if they are understood as the embodiment of relations. Law’s role is to synchronise these expectations of the community.<sup>412</sup> This act of synchronisation is one that can never be complete, and forces us to constantly re-evaluate precedent. It leaves law open for development and change.

When two conflicting norms are argued, we argue for a principle that justifies a norm the best. Even more than that, the arguments are for different versions of the future. Is it possible to remove ethical reasoning and recollective imagination from law? Interpretation makes this impossible, just as it makes pure autopoietic perpetuation of law impossible.<sup>413</sup> The exact replication of meaning is impossible and therefore its change must be inevitable. Cornell turns to Derrida to show how the intersubjectivity of language, its ability to repeat is at the same time the reason it can innovate. There is of course an institutional language of law and the challenge is to unlock the “would be” inherent in it.<sup>414</sup>

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<sup>407</sup> Ibid 29.

<sup>408</sup> Ibid 29.

<sup>409</sup> Ibid 30.

<sup>410</sup> Ibid 30.

<sup>411</sup> Ibid 32.

<sup>412</sup> Ibid 35.

<sup>413</sup> Ibid 38.

<sup>414</sup> Ibid 39.

Human identity and agency work similarly and that identity must constantly be re-affirmed over time.<sup>415</sup> Interactions with the Other allows a constant change in self-definition. No-one can isolate themselves from this interaction and thus constantly experience transformation. She goes on to state “What we think of as agency is precisely the engagement of the self with its own iterability”.<sup>416</sup> The self is involved in recollective imagination all the time. The possibility pregnant in recollective imagination is what gives agency meaning. The changing self definition reminds of the *ipse* identity of Ricoeur that is always changing within the confines of the unchanging aspect of the self.<sup>417</sup> Through hypothetical fantasies and internal conversations with an imagined other we can change who we are in the realm of Thirdness. We can always imagine ourselves as better, and our actions matter with how the law develops. We need to accept responsibility for law and bring it out of the control that closure provides for it, and instead expose it to the Other constantly.<sup>418</sup>

Recollective interpretation requires of us to look at the past in order to stabilise future behaviour and expectations. One has to look back at the substantial history relevant to the *Afriforum* case in order to pass judgment on it (even if not in the strict legal sense of the word). The historicity of it is only important to us insofar it can tell us how to behave towards it in the future, essentially the object of inquiry before the court. Through imperfect memory we access it (again framed by our specific preconceived questions and prejudices) and interpret what it means for our future conduct. This however can not be a once-off process. We need to expose our conduct and ourselves to the Other in order to re-evaluate and re-define our stance on matters as particular to South African society as this, allowing us to innovate and unlock the “would be” of our legal and extralegal relationships with one another.

## 5 Complexity

We have seen that autopoietic legal systems possess a presentist bias regarding time. Dealing with complex environmental (or “real life”) situations need to be stripped of complexity when entering the system. The reason for this is twofold: first the system

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<sup>415</sup> Ibid 41.

<sup>416</sup> Ibid 41.

<sup>417</sup> Ibid 42.

<sup>418</sup> Ibid 44.

applies its code to designate what is relevant to it, thus discarding much of the informational nuance that it deems irrelevant. Second, systems necessarily need to be less complex than their environment, for if they reflected their environment wholly there would be no need for the system. Despite this law does build information up with its own complexity once it starts processing it.

The common pragmatic counterargument to the criticism of law's reduction of complexity is to appeal to efficiency. Surely being more sensitive to temporality, narrative, identity, justice and ethics can only further bog down a court system that is already struggling to meet its demands? Wouldn't slowing down cases be in conflict with justice and good law? According to Cilliers it is destructive to positively link the "cult of speed" with efficiency.<sup>419</sup> He argues for slowness because it will help us (and undoubtedly the legal system) to deal with complexity better. It is a radical stance that recognises the importance of the past and memory in looking toward the future. It is an example of the ethical temporal neutrality that doesn't only emphasise present results but underlines the knowledge that the past and future can carry. Speed cannot be extolled as a virtue for progress since "it is actually an unreflective fastness which returns you to the same place".<sup>420</sup>

For Cilliers the fetishisation of speed is a result of Modernism. From the Enlightenment it became important to control our own destiny, to control the future. That requires co-ordinated action in the present. Thus decisive action in the present was necessary to control the future.<sup>421</sup> This co-ordination of action has led to the need for time to become universal through a compression of space and time. Increasingly accurate clocks, improved telecommunications and almost instant travel has given the world a shared present. The first satellite photographs of the earth banished the idea that spatial separation meant temporal difference. It is necessary for the underlying logic of multinational capitalism, and has led to society losing its ability to retain the past.<sup>422</sup> It also means that our private time has been overtaken by public time.<sup>423</sup> The immediate response has taken precedence over reflection.

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<sup>419</sup> P Cilliers *On the importance of a certain slowness. Stability, memory and hysteresis in complex systems* (2007) 1. See also: K Van Marle 'On loneliness and the value of slow reflection' (2009) 30(2) *Verbum et Ecclesia*.

<sup>420</sup> *Ibid* 2.

<sup>421</sup> *Ibid* 2.

<sup>422</sup> Currie (n 194 above) 9.

Society needs the future to be knowable in order to plan its projects. Since we can never truly know what the future holds, the best way to control the future is to make it as similar to the present as possible.<sup>424</sup> The future must not disrupt the present and the status quo needs to be upheld. This causes a state of the perpetual present. This turns its back on the very notion of temporality.<sup>425</sup> The problem with this is that we are temporal beings caught in a temporal environment. Derrida's very notion of Différance relays on spatial difference and temporal delay to structure meaning.<sup>426</sup>

Complex systems such as law are unavoidably situated in time but are also not symmetrical in time. They have pasts and futures that are not interchangeable.<sup>427</sup> Even autopoietic law has a kind of memory that carries past operations into the present and the future. Complexity needs memory to function. The relations between elements are only maintained if they are successful, and it is because of this that we can say that memory has a measure of constitutive qualities to systems.<sup>428</sup> Already this emphasises that systems are unavoidably situated in time that memory is important for the evolution of the body of knowledge of law. In the same way the future is so much more than an extrapolation of the present, but can only be anticipated in the light of memory. It follows logically that the more we understand of the past, the better we can anticipate the future.<sup>429</sup>

Since we know that memory cannot be but selective, the issue at stake is the principles on which autopoietic legal systems make such selections. When law is presentist the future teleological significance of past events is also ignored in the selection process. Justice and good law being as temporally anchored as they are cannot come into fruition in a legal system that makes fast selections. Law remains trapped in a fastness that leads to stasis, leading to its dealings with its environment being ridden with disappointment. Arriving at conclusions and meaning in the present is confined to the realm of disappointment and averageness, for true meaning never arises in the present. As Cilliers writes: "It is the anticipation of what it could yet

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<sup>423</sup> Cilliers (n 419 above) 3.

<sup>424</sup> Ibid 3.

<sup>425</sup> Ibid 3.

<sup>426</sup> Ibid 3.

<sup>427</sup> Ibid 4.

<sup>428</sup> Ibid 4.

<sup>429</sup> Ibid 5.



mean which draws us forward”. Slowness demands from us an ethic of time and reflection in order to separate noise from complexity.<sup>430</sup>

In this age it is considered more sophisticated to approach the law in a scientific manner. Whilst the scientific method has led to brilliant advances it is an approach not suited to law. Scientific reasoning is necessarily reductionist and eschews and underestimates complexity.<sup>431</sup> In order to serve the call of justice law must be considered as an interpretative discipline of knowledge. Positivist claims of objectivism are a false appeal to legitimacy that ignores complexity and finite human knowledge and thus becomes a matter of ethics, and through its disengagement with ethics, an unethical position.<sup>432</sup> Cilliers makes the distinction between modest and assertive claims of knowledge.<sup>433</sup> Modest claims are ones that are reflective and careful about what they claim. When we are dealing with complex problems, we need to make modest claims rather than assertive ones, considering our limited ability to deal with complexity. Making assertive claims we ignore the contribution that slow reflection can make. This echoes the deconstructivist claim that meaning cannot be reduced.<sup>434</sup>

Cilliers warns that modest claims of knowledge will likely be charged with holding a performative contradiction. This is the criticism that what you are saying is in contrast with how you say it, such as using rational arguments to argue against reason.<sup>435</sup> He rejects this angle of criticism: “Surely a test that will pass most self-assertive, macho claims and that will fail most modest claims cannot be all that useful when dealing with complex things”.<sup>436</sup> The fact is that the performative and locutionary levels of a claim cannot be distinguished unless you possess an objective vantage point. That however is the whole problem: there are no such points, and all observations are compromised in one way or another.<sup>437</sup> This performative tension is inevitable when dealing with complexity, and only goes to illustrate the very complex nature of what

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<sup>430</sup> Ibid 7.

<sup>431</sup> P Cilliers ‘Complexity, Deconstruction and Relativism’ (2005) 5 *Theory, Culture & Society* 255.

<sup>432</sup> Ibid 256.

<sup>433</sup> Ibid 256.

<sup>434</sup> Ibid 259.

<sup>435</sup> Ibid 260.

<sup>436</sup> Ibid 261.

<sup>437</sup> Ibid 261.

we are discussing. Denying this difficulty and the limits of our understanding becomes an unethical denial of ethics. Modest claims are thus responsible claims.

Another charge against modesty is that its claims can be vague.<sup>438</sup> Yet there is no reason in principle why modest claims should be vague. Intelligibility of a claim relies on differentiation, and claiming that meaning is not set in stone doesn't mean that there is no meaning. Deconstruction is not concerned with the intelligibility of our claims as much as it is concerned with the limits thereof.<sup>439</sup> Concepts have to be differentiated from one another clearly using the logic of true/false to make intelligible claims. This does not however mean that the concept is indisputable. As has been said, complexity is after all complex and we can never claim to understand it fully. Yet it also doesn't mean that we know nothing of it and that our claims are weak. It is entirely possible to make strong yet modest claims.<sup>440</sup>

It has been shown that because of our finite knowledge of complex systems we have to engage with ethics when engaging with such systems. We know already that ethics simply cannot exist in isolation of narrative time. Complexity demands engagement from us that is sensitive to these elements. Our finitude means that we cannot calculate from a positivist vantage – instead it calls for creativity in our efforts.<sup>441</sup> Law being a complex interpretive body of knowledge calls for this same creativity, but one limited by our responsibility towards modesty, justice, ethics and narrative time.

A court order was never going to deliver justice in the *Afriforum* case. By its very nature it is too tainted by efficiency and rejects ethical modesty in favour of absolute statements. Justice is something that we must wait for.<sup>442</sup> There is an ethical imperative for delay, to give attention to difference and to engage more deeply with the temporal aspects presented to us. It might be impossible to capture justice within a system,<sup>443</sup> but attempting to deal with complexity in a fast and rushed manner will guarantee failure.

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<sup>438</sup> Ibid 262.

<sup>439</sup> Ibid 262.

<sup>440</sup> Ibid 263.

<sup>441</sup> Ibid 264.

<sup>442</sup> Van Marle (n 1 above) 243.

<sup>443</sup> Ibid 251.

## 6 Conclusion

In this chapter we discussed the facts of the *Afriforum v Malema* case up until its seeming conclusion. We saw how the description of law by Luhmann is an accurate one in many regards, but this also illustrated that it is not a desirable description. It illustrates how autopoietic legal thinking uses abstraction and instrumentality to neutralise problems of aspects that require thoughtful engagement. Through narrative time those aspects are again brought to the fore, and can force the law to engage in a manner that will allow the law to consider justice and as well as its own future improvement.

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

It is through memory that we access the past, while at the same time the past is the location of all knowledge. Knowledge is taken from memory and projected and imagined upon the future in order to decide upon the most desirable course of action. The court failed to unleash the radical potential of recollective interpretation in the *Afriforum* case. It displayed a limited engagement with the past but instead only treated it as something that should regulate our future behaviour. It effectively tried to settle the matter efficiently rather than keep the debate open, allowing ourselves as well as the legal system constant exposure to the Other that could lead to more radical self-definitions.

Complexity exposes our cognitive limits and therefore cannot be dealt with non-ethically. This implies that narrative time must be a factor when dealing with the complex situations that law is presented with before it is reduced. This requires a degree of creativity and imagination from us in interpreting law. This cannot be done through a rushed process but instead demands patient contemplation from us. This was why a court decision was going to give an unsatisfactory result in the *Afriforum* case. Law is not only too fast, but also gives too absolute and forceful answers to effectively attempt resolving such complex problems. Instead justice requires of law to consider matters slowly and to give modest solutions that can always be re-evaluated. As can be seen the refusal of law to deal ethically with time has far-reaching effects, but we cannot believe that they are inherent to law and that there aren't real steps we can take to make law better.

## CHAPTER FIVE

### CONCLUSION

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In this study, I attempted to show how autopoiesis shapes not only law but the environment that it inhabits. Through drawing boundaries it reduces complexity. One of the first victims in this process is the way law understands time. One of the far-reaching consequences of this is that time is essential in our understanding of ethics, identity and action. These elements become severed and consequently an internal legal environment is created that cannot answer to its responsibility toward justice. We cannot expect good legal answers from a system that deals with time in this way.

Boundary-drawing is symptomatic of a legal system that has achieved a level of autonomy that allows it to solely decide what is part of it and what isn't. It then becomes a simple logical exercise to place norms of justice outside of the system. This boundary serves as a filter in which complexity becomes translated into a purely legal construct, abstracted further through additional systemic complexity that is piled on.

This process manifests itself on how law deals with human identity, which becomes reduced to an almost non-existence, only a mere legal existence. Since time is neutralised in the system, the essential narrative and temporal aspects cannot fill the legal subject with a particular identity. Human beings become mere causes of legal communication. Closely linked to the matter of identity are the actions of these agents. Again they are stripped of their complex temporality and only their shortest temporal duration (as designated by law) becomes relevant to the system. Once they cross the boundary they lose not only their temporal character but also their complex and ethical weight.

In this manner autopoiesis is a conservative argument that can support certain positivist conclusions, by not recognising standards that are not part of its own self-description. Through rejecting the complexity inherent in time it becomes easy to reject notions of justice.

I have turned to narrative time to look for knowledge that law does not seem to possess. It is able to reconcile the tensed nature of time as well as our internal and external time, presenting them to us as a unified whole. This view forces us to see ourselves and our deeds as possessing an ethical dimension that cannot be ignored. It imparts particularity that is in opposition with the heterogeneity of law. Temporal distance is created that allows for judgment, which leads to greater knowledge and ethical development. It provides us with a pre-understanding of action in a world filled with meaning that is a priori to law, and allows us to see our actions teleologically. It even admits that interpretation adds another level of meaning, including the interpretation of law through its institutional meanings.

Temporal neutrality is almost per definition unjust. This makes law's presentism and short-sightedness an untenable position. South Africa deals with problems that have their origin in a distant past, and will continue to be problematic for some time to come. Law has been and continues to be an important vehicle for addressing these issues and narrative time allows a prudent approach to these problems. Memory must be used to turn the past into an object of care, and special attention must be paid to prevent law from forgetting certain versions of the past. Currently law is unable to effectively deal with the complexity of history, and a slower approach that is modest instead of monumental in its solutions will allow for a more responsible account of the past.

Narrative time allows for law to reconnect with justice. If the system can be rid of its self-interest narrative time can be employed within its pre-existing structures, allowing for much more complex information to become available to it. It will be faced with the ethical consequences of human existence and can openly appeal to norms of justice with no inherent contradiction, and even develop its own ethical character through time.

We saw how autopoiesis works through illustration of the *Afriforum* case. It neutralised certain key aspects of the facts, and could only give answers to the problem through its internal code. Narrative time could allow the elements that were lost to return to the fore. Instead of trying to break with the past in a single legal decision, we can position ourselves to be confronted with the problems continuously, in order to re-evaluate our behaviour towards it. This engagement on our part is

necessitated through the fragility of the Other, and through the settlement it seems that the conclusion of the *Afriforum* case has taken some of this knowledge on board.

We must access the knowledge of the past to project a better future for ourselves. Through recollective interpretation we display temporal sensitivity and reject final answers, allowing ourselves and even law to evolve constantly as ethical beings. Being limited in the face of unlimited complexity necessarily makes our interactions with it ethical in nature. Narrative time acknowledges this. Therefore we have a duty to take our time in interpreting complexity and to understand it as best we can and not settle for the supposedly efficient approach that law takes. Justice demands slow consideration and responsible modest answers to our problems.

If law can open its boundaries and allow for the fuller complexity of the human experience to come under its consideration, it will be forced to deal with it in a more ethical way. Only can imagine that it could lead to a more just and better legal order.

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