Re-Describing the Limits of Anti-Discrimination Law through a Modern Systems Theory Perspective

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'Submitted in partial fulfilment of the requirements of the Degree of Doctor of Philosophy'

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ABSTRACT

This thesis adopts the methodology of systems theory to examine the limits of anti-discrimination law. The sociology of Niklas Luhmann, alongside extensions provided by Michel Foucault and Gilles Deleuze, is applied to construct a versatile re-description of anti-discrimination law. This is an innovative approach because it articulates the social basis for discrimination alongside a legal picture of anti-discrimination within the same theoretical framework. By considering each side of this discrimination/anti-discrimination equation the capacity of law to address discrimination is put into question.

The difficulty of providing a philosophically sound explanation for discrimination involves a legitimate academic question, but it also indicates its limitation. This thesis argues that this difficultly reflects a genuine divergence between the social meaning of discrimination and the ability of moral philosophy to comprehend this phenomenon. Racism is analyzed as a confluence of moral, artistic, and mass mediated communications; it is communicated through inconsistency and complex repetition. This confluence is described by tracing societal differentiations and self-descriptions, as developed by Luhmann, with an emphasis on the history of manners as a precursor to modern racism.

The legal picture of anti-discrimination presented here is divided into argumentation and decision. Firstly, the description of direct and indirect discrimination in terms of justice is questioned through an examination of argumentative limits, with legal liability being re-interpreted in the light of how concepts and interests inform argumentation. Secondly, the validity of a decision is analyzed as a separate problem for anti-discrimination law. The jurisprudence of the positivist Joseph Raz is criticized from the perspective of a Luhmannian theorization of law as symbolically valid decisions.

This thesis constructs an explanatory framework that redraws the limitations of anti-discrimination law by revealing [1] how racism is a protean social phenomenon, and [2] that separation of the legal understanding of anti-discrimination law into discrete streams exposes the concrete limitations available for engaging issues of justiciability.

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CHAPTER 1 - INTRODUCTION TO THE THESIS

"Many things are much too delicate to be expressed in thought, let alone, to be put into words"

(Luhmann, 2000a: 18, quoting Novalis)

Overcoming discrimination has been one of the essential challenges of the late twentieth century. Through the enlightening discourses of social movements and the enforcement accorded by legal regulation material achievements have been made to address some of discrimination’s most virulent manifestations. Even though long-standing inequalities still persist one cannot doubt that significant successes have been accomplished. Discrimination is a problem for modern society. Its conceptual focus on the treatment of individuals has arisen alongside the differentiation of society which is at once dis-embedded from older conceptions of tradition and status, but is also struggling to find solutions to the problems of individualization enabled by this societal dynamic. The semantics of discrimination locks into this struggle and, as such, that which was once non-visible can no longer be unseen. And yet, even with attention to discrimination as a problem and with the creation of successful solutions, the extent to which its emanations and ideologies are still pervasive has surprised even the most knowledgeable of advocates. Contemporary political realities have exposed both the progress made, their limitations, and the difficulties that lie ahead. Just as it appears that the intellectual prophets of the 1990s were mistaken in their conclusion that liberal-democracy was an end of history, so too we may find that the achievements of the last six decades have been far more ephemeral than previously supposed.

It now appears that expecting racism to be defeated by the election of the first Afro-American US President, or for sexism to fade away once more women are in positions of power, has been to presuppose a model of the world which does not approximate with reality. The rhetoric of inevitable

progression and attendant legal transformation has been too beguiling. Many recent events have thrown such expectations into relief, marking out discrimination as a complex and deep social phenomenon that involves more than the exhibition of outdated views and irrational bias; it can be shown to be a broader phenomenon than previously suspected encompassing the self-worth and self-respect of both the victim and the perpetrator. It is also a more elusive phenomenon than is classically supposed involving perception as well as structural bias, and lived experience alongside discrete actions.

Legal regulation has been developed in many jurisdictions to protect persons against such phenomena by the prohibition of both direct and indirect forms of discrimination. In restricted circumstances, the law has also allowed affirmative action to promote actively equal opportunity to confront the influence of historical and structural discrimination. And yet, there is also something further in play, and already at work, that cannot be easily expressed in these terms. This may be communicated with the sheer intensity of the gaze in which women find themselves, or the starkness with which race can become an issue in an interaction or a commentary. The words of Novalis cited above allude to this problem. Through their tightly-focused vision poets are often attuned to the fallibility of perception and language to form adequate representations. With the adoption of a critical mind-set we can see how statistics and public opinion can provide only a limited view on discrimination. There seem to be intensities that cannot be easily represented by word, fact, or figure. These intensities of discrimination are perhaps best approximated by various adjectives and participles - increasing, diminishing, exaggerating, demanding, compelling. They signify the manner in which distinctions actively operate, loosening and tightening connections between communications. These matters are salient components of discrimination. This thesis will attempt to provide a preliminary framework in which this social basis of discrimination can be appropriately theorized.

Only if this problem can be theorized, can a way towards a plausible legal response also be constructed. Of course, as often occurs, we can certainly call for further legal regulation and more effective enforcement of anti-discrimination laws. A new generation of rights focused on more positive duties may be valuable (Hepple: 2011), and a greater codification of discrimination in accordance with a substantive notion of dignity (Fredman: 2011) may also promote the ideals of anti-discrimination law. And yet, the broader social basis on which discrimination operates remains barely formulated, and the limits of legal understanding barely conceived and assessed with a view to considering whether there are inherent limitations on how law can process discrimination claims.

This thesis addresses several conjoined questions. What is the social basis of discrimination? How does the current philosophical and jurisprudential approach fail to adequately appreciate this social basis? What are the limits on how law can understand claims of discrimination and the discrete decisions made in such cases? The scholarship that responds to these issues presently offers an incomplete picture stemming from its basic methodological intuitions of consistency and coherence alongside an over-reliance on moral and political philosophy. Discrimination is certainly an issue which generates moral debates and it remains a presiding public policy concern, however this does not indicate that its generative foundations are delimited precisely in these terms, nor should we presume a constitutive affinity between anti-discrimination law and discrimination itself. Careful analysis of the legal categorizations of discrimination as they appear in statute and doctrine is a worthwhile area of study. Much may have been accomplished, but this does not mean that such a course can provide a complete representation of the phenomena, nor does it mean that alternative approaches cannot complement seemingly intractable dilemmas. We should not confuse the solution with the problem.

It is important to maintain a level of critical reflexivity between the research methodology and the research object. I would argue that this lesson is especially compelling where the object under

inspection is complex in its nature, and where that object is sufficiently sensitive as to change in response to the research methodology adopted.[1] It seems fair to surmise that the social basis of discrimination meets these criteria. Firstly, if it was not complex then it would not be differentiated into so many arguably contradictory concerns such as race, gender, sexuality, age, neither would it find itself manifested in ways which seem to extend from the scintilla's of personal interaction to the grand narratives of historical development. Secondly, it cannot be in doubt to even the most casual of observers that discrimination has responded and altered its disposition through contact with anti-discrimination law and the equality movement. These two trends – contradiction and reflexivity – suggest that a more complementary approach would be productive, and Luhmann's systems theory is well-placed to fulfill this challenge since it is a sociology epistemologically constructed upon paradox, reflexivity, and self-reference.

Recent scholarship that couples sociological insight with legal analysis (e.g. Solanke: 2017) highlighting stigma as a core component of discrimination is closer to the line of analysis pursued here. This thesis proposes that the limitations of anti-discrimination law can be sufficiently outlined if a methodology is adopted that can do justice to the historical, social, and legal dimensions of discrimination – especially, when these dimensions seem to be radically divergent. The methodology of systems theory, as mainly developed by Niklas Luhmann, is utilized as a tool which can adequately outline the limitations of anti-discrimination law while situating the problem of discrimination within a social and historical context.

[1] Luhmann (1995:24) defines complexity as indicative of 'immanent constraints in the elements' connective capacity'. Therefore, it refers to a state of affairs in which each element cannot be related to every other element, and thus *compels* the observer to reduce complexity and produce a selective, fractured perspective on the state of affairs as a whole. This *reduction* is mirrored in the way in which various headings of discrimination diverge into specialized advocacy (feminist, anti-racist, disability, anti-homophobia). There are ample examples in which these headings are categorized as in competition. For example, Sandra Fredman (2008: 209) notes that an issue with collective action over equal pay is that it creates a competition of interests between trade unions and anti-sexism campaigners along with an over-shadowing of individual experience by collective goals. There have also been many misgivings about the subsumption of formerly specialized commissions under the umbrella of the Equality and Human Rights Commission (O'Cinneide: 2007).

This thesis will make the claim that the social basis for discrimination is located in a particular type of communication that focuses on the *visible*. To adequately understand such a framework recourse to a socio-historical method is required. In his genealogical excavations of power and knowledge, Michel Foucault (1970: 131) proposed that 'natural history is nothing more than the nomination of the visible'. The conditions which underpin the possibility of observation was a recurring motif through Foucault's work – in the gazes of the medical profession and the architectural diagrams of power in the barracks and monastery through to Linnaeus's taxonomy of the animal kingdom. The basis of discrimination too is best grasped by an interlacing of the conditions that delimit the possibilities of perception, observational perspectives, and the conditions for taxonomic descriptions. A conception of visibility in communication comes closest to providing a reconciliation of these difficult themes. Race is chosen as an archetype because of its long-held centrality to discrimination scholars and for reasons of economy. When the thesis moves in Chapters 7-10 to outlining the legal understanding of discrimination the emphasis on race is dropped in favor of a more general approach since the specificity of a protected characteristic does not feature as a constitutive element in the construction of either legal argumentation or decision.

This broader notion of the visible can provide a platform for knitting together ways in which complex entities, such as labour and life, manage to bind together the strands of discrimination: the information and persuasiveness which the invocation of race provides at many different levels of sociality; the allocation of moral values and ethical reflections on these allocations whenever race is implicated; the way in which race manages to produce aesthetic compositions in which one can describe the world and even singular moments in new ways whilst maintaining a connection to how they were formerly comprehended.

To this end a versatile methodology combining the insights of modern systems theory, of Gilles Deleuze, and of Michel Foucault will be utilized to explain how discrimination communicates as a

social problem, and how law understands this problem in its own extremely limited manner. As already noted above, Luhmann's systemic architecture provides a great number of concepts which shed light on the social basis of discrimination, not least functional differentiation, societal self-description, communicative media, and complexity. Its position as a 'super-theory' provides a more complete rendering of the problem than reliance on more specialized sociologies.[2] And yet, this thesis found that Luhmann's methodology should be supplemented in order to better understand the social basis of discrimination. Foucault's diagrams of power illustrate how observational technologies (discipline, surveillance, governmentality) can be essential in understanding emergent social rationalities and organized complexity. Luhmann's more top-down approach and reliance on system differentiation does not easily comprehend such elusive, contradictory, but amalgamated, phenomena.[3]

Foucault's genealogical method combines observation and complex repetition, described by Deleuze (1986: 49, 50ff) as 'bands of visibility', alongside his concern with the forgotten and downtrodden that provides a supplement to Luhmann's systems architecture.[4] Both were fascinated by the epistemic break of modernity; however Foucault provides a lens on social exclusion, a topic only discovered by Luhmann later in his career. Deleuze (1990, 1994) provides a further supplementation to Luhmann's methodology through a more radical theory of time predicated on pure difference and complex repetition that goes beyond the Husserlian and Kantian predicates of Luhmann's theory. Deleuze's focus on pure difference provides a platform for understanding how race can intensify and irritate communications in functional systems and across such functional systems. As such Deleuze's tripartite intagliation of temporal repetition is proposed as a means to circumvent Luhmann's restrictions on systemic relations to structural coupling and interpenetration. The combination of

[2] For example Solanke (2017) who uses the insights of Erving Goffman on the interactive order and stigma to understand discrimination.

[3] Poul Kjaer (2017) proposes that Luhmann continues in the tradition of German Idealism and smuggles in many of its conceptual insights, with limited acknowledgement, from Hegel, Fichte, and Kant. This would make Luhmann the idealist, to Foucault's materialist.

[4] Foucault (1979: 77) tried to bottle the little *novellas* of such people as 'life-poems' and 'lightning-existences'.

Deleuze and Foucault is also needed to broaden Luhmann's conception of the *public* as a medial sub-stratum wherein the semantical antecedents of discrimination - which this thesis argues can be found in the socio-genetics of manner and esteem - are abstracted from textual mediums; indeed the modern semantics of racism abstract from a more complicated, temporal, *public medium* that is emergent in modern society. These methodologies combine to provide a description of discrimination from a socio-historical and philosophical angle which adds to those presently on offer in academic scholarship.

This is not a detailed intellectual history of discrimination semantics. It is limited to a few key illustrations to show the connections between self-descriptions and semantics, artistic sensibility, communicative media, morality, and the dynamic of society and the world. Racism, and the semantics of discrimination for that matter, touches far too broad an array of topics - nationalism, anti-semitism, colonialism, psychology, political ideology - to be addressed fully in this thesis; moreover, there is a rich history in labour law in which anti-discrimination legislation and doctrinal development is analyzed and criticized in response to compelling social objectives and philosophical projects. This thesis aims to address the thesis questions outlined above such that some of the important limitations presupposed by academic scholarship and some important limits immanent to law and society are re-described from a systems informed perspective. This thesis hopes to show the benefits of a turn towards a more sociologically and critically informed examination of discrimination, and thus provide a perspective attuned to the intensities of discrimination.

This thesis is not an exegetical exercise in how Luhmann, Foucault, or Deleuze did think or would have thought on discrimination.[5] Racism and jurisprudence were only occasional concerns for these authors - although, Luhmann's prolificacy gives a false impression in this regard.[6] Instead, their

[5] Stoler (1995), for example, undertakes such an analysis by delving into Foucault's posthumously published writings on governmentality, bio-power, and colonialism.
[6] Nobles and Schiff (2017: 52-54) provide a recent confirmation of Luhmann's extensive writing on law and his expertise to do so.

systems of thought have provided a hospitable methodology that has been applied to generate illustrations of the social basis for racism, the legal arguments concerned with discrimination, and the decisions on discrimination. In terms of Chapters 7 to 10, however, Luhmann's sociology of law is relied upon almost exclusively to explicate the immanent limitations on argumentation and decision.

The thesis begins by outlining the limitations of discrimination law presupposed in the scholarship and identified in the legal categorizations of Anti-Discrimination law in the UK. Chapter 2 presents an overview of the approaches to discrimination law identifying the issues and perspectives of discrimination law scholarship. These include the moral philosophical explanations which seek to identify the 'wrong' which discrimination law is claimed to address. Topics and structures are identified as constituting common presumptions in the academic literature - core moral understandings of discrimination, the requirement for discrimination to be salient, and the identification of inconsistency as a symptom of discrimination. It is these limitations which provide a focus for a later re-description by the methodological insights outlined in Chapter 3 and explained further in Chapters 4 and 5.

Chapter 3 will then proceed to provide an introduction to how systems theory can be aligned with socio-legal approaches to law with an emphasis on its empirical contribution. The key axioms of systems theory will be explained denoting points of particular relevance for discrimination law and this thesis: forms of societal differentiation, individuality, and human rights.

In Chapter 4 Luhmann's theory of a functionally differentiated society is utilized to argue that discrimination can be connected to the development of major changes in the way that society describes itself. The form of societal differentiation prior to function was based on the stratifications of status. These were distributed by significant divisions within society between different social roles and institutions, such as the court and the country. The work of Norbert Elias in the *Civilizing Process* is utilized to show how developing theories of manner, courtesy, and civility provides a social

precursor to how discrimination operates in modern society. This analysis is presented as both an extension in the social aspect of discrimination in terms of respect, and as a prelude to discrimination in the modern world which must be understood as an emergent type of communication that crosses functional lines.

Chapters 5 and 6 provide a description of discrimination in a functionally differentiated society. Racism is taken as an archetype of discrimination that combines contributions made from the mass media, moral communications, and art. An alternative mechanism to structural coupling is developed by recourse to the tripartite theory of repetition developed by Deleuze. From this position racism is categorized as a special type of communication that appears in the public capillaries between social systems. The emulation of esteemable behaviour projected by courtesy manuals and pamphlets on civility is transliterated into a fractured emulation of a Deleuzian *time in itself*. From a public medium presupposed by all social systems, fractured emulation ensures that race *intensifies* and *sensitizes* the channeling of irritations between social systems. The communication of race indicates a movement in which matters become visible and less visible, transparent and opaque. This active modality compels race to communicate through inconsistency and the reduction of complexity because only this structure can *reveal* at once that which was seen and not seen, spoken and silent, near-at-hand and distant, communicable and incommunicable.

The positioning of race in the public medium allows it to operate between social systems. It can therefore contribute to the de-paradoxicalization of society's self-description through combining the universal and specific aspects of society in terms of visibility. As a singular identity it can throw into relief the universal and specific scheme that concerns the universality of society and its specific sub-systems and the universality of each system and its specific operations. It avoids the paradox by making one side of the scheme visible in respect of the invisibility of other side of the scheme.[7]

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[7] For example, one can communicate about the universality of society in respect of the incommunicability of a sub-system. Race makes the direction of society transparent by association with the opacity of a specific sub-

Chapter 6 will illustrate this predicament by focusing on how labour and employment is a context in which race can handle the struggles faced by modernity in providing a description of society that is both universal in its scope and which can also account for the singularities of life and lived experience.

Chapters 4, 5 and 6 provide a description of discrimination from the perspective of systems theory. The argument is made that the social basis of racism, and discrimination *in toto,* is a distinctively modern phenomenon tied to functional differentiation. Chapters 7-10 turn to the legal perspective and produce a re-description of law's responses to discrimination with regard to argumentation and decision.

Chapters 7 and 8 focus on legal argumentation. Here Luhmann's theory of legal argument is explained. It is then applied to the conceptions of justice in anti-discrimination law whereby a different notion of justice is advanced with reference to the limits of legal argumentation. In chapter 8 Luhmann's theory of argumentation is extended to assess the range of doctrinal justifications provided by discrimination law scholarship. It is deployed with reference to how the concept of liability is produced in discrimination cases. This theory of legal argumentation is then extended to emphasize the constraints of redundancy and variety on the generation of key concepts and interests in direct discrimination cases.

Chapters 9 and 10 develop a Luhmannian understanding of a legally valid decision. The jurisprudence of Joseph Raz is used as a foil for this development. Decisions are distinct legal phenomena contrasted to legal arguments, and they provide another crucial position from which discrimination is constructed and dealt with by the law. The framework of a legal decision

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system - the future of our country is in jeopardy because (i) we don't know the actual immigration figures, (ii) the real level of socio-political commitment of non-white and foreign members of the population, (iii) the actual number of illegal acts committed or not prosecuted against non-white and foreign members of the population. The connection between the real and artificial, actual and fake in such accounts indicates that there is a semantics of revelation already at work in such *exempla*.

expounded in Chapter 9 is then illustrated in Chapter 10. Here the principle of equality is re-analyzed as a limitative principle on the making of legal decisions that is preconditioned by the underlying actions of decision-makers. Consequently, rulings and rules are produced by such decisions in anti-discrimination law that follow a set of limits. These limits have not been registered by scholarship in this area.

CHAPTER 2 - THE LIMITS OF DISCRIMINATION LAW – AN OVERVIEW OF THE LITERATURE

INTRODUCTION

This chapter will establish the context in which this thesis operates. I will contend that the application of a methodology infused with the sophistication of systems theory and the verve of a Deleuzian philosophy on repetition can illuminate the field of anti-discrimination law; but in order for this to take place, this chapter must establish the topics and areas of debate which act as foundational concerns for law's excursion into anti-discrimination and its attendant scholarship. This section will provide an overview of the academic approaches to the philosophical and moral implications of discrimination alongside coverage of the topics which have interested discrimination advocates and lawyers. By the end of this chapter such concerns will have been collated so as to highlight the limitations in the scholarship when it comes to addressing (i) the social basis for discrimination and (ii) the legal conceptualization of anti-discrimination claims. Once these limits have been established the way lies open for the succeeding chapters to re-describe such limits.

WHAT IS DISCRIMINATION AND HOW CAN IT BE OBSERVED?

Racism is a type of discrimination. For many, it is the archetype of discrimination and so if a thesis is to illuminate the social basis for discrimination in modern society then racism would seem to be an appropriate point of focus.[8] Racism is chosen also for reasons of economy. The literature on discrimination and racism itself is vast and one can only hope to provide useful insights within a narrowly confined field. Before we reach a discussion on racism, however, a template for recognizing discrimination should be offered. Since I will be adopting a methodology which recruits an epistemology reliant on a radical, constructivist perspective, then I will be assuming that discrimination - even within the rarefied atmosphere of philosophical enquiry - in its identification and description is a product of social operations. Discrimination is a 'highly protean concept' (Sunstein, 1991: 34) that seems to encompass a bewildering array of social situations. It is a topic that attracts the attention of journalists, politicians, legal experts, artists, and the public.[9] The fact that racism has the capacity to operate as a proxy and at a distance is a feature referenced in the scholarship.[10]

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[8] This is particularly the case in French scholarship. Taguieff (2001: 22) considers racism to be a social ontology of 'essentialism' communicating the idea of nature and the eternal: 'the vocabulary of race borrowed from zoology through the mediation of physical anthropology'. Bourdieu (1993: 133) finds that 'every racism is an essentialism' functioning as a sociodicy for a dominant class that seeks to justify the social order and whose power is based on a new range of 'titles' (taste, distinction, education) reminiscent of the older titles of property and nobility. Colette Guillaumin (1995) concurs with this direction. She suggests that modern racism develops from an older aristocratic notion of race (race of the Bourbons, blue blood, inheritance) into a scientific essentialism utilized by the dominant class to denote an inferior group.

[9] Viral might be a more appropriate description of discrimination. Luhmann (1995: 394-400) imagined moral communications operating as a virus upon society with law functioning as an immune system to fight against such threats. Discrimination is a topic of moral concern, not just as a subject for moral reflection and criticism, but also in its very actualization. These viral and dissimulating qualities are examined in Chapters 5 and 6.

[10] For example, Guillaumin (1995: 52-55) suggests that the older 'pre-racial' forms of discrimination were in the shape of a diachronic genealogy connecting the present of an individual to a line from the past; modern racism, on the other hand, is synchronic using bio-physicality to imply a 'spatial but a-temporal commonality' linking contiguous contemporaries and an infinite number of individuals across a huge material space.

Discrimination is communicated and observed through recourse to a semantics of *revelation* in which that which operates secretly and publically is called out. This elusive quality of discrimination, and racism specifically, will be taken as indicative of its particular construction.[11] As I will set out further in this chapter, the issues which discrimination scholarship tries to focus on can be more completely addressed if we take the social construction of discrimination seriously. Systems theory has the advantage of an epistemology that can theorize both the communication of discrimination and the communications on discrimination. Scholarship predicated on the tenets of analytical and moral philosophy does not have the necessary reflexivity to observe both of these positions at once, nor do they have the internal capacity to absorb the sociological and historical developments of discrimination which reside comfortably alongside the analysis of legal decisions and legal argumentation. Systems theory can see all these positions at once, but can it can also refuse to fold each perspective into a singular totality.

Most of the world has enacted some kind of constitutional and statutory provision outlawing discrimination. On the international level, Article 26 of the International Covenant on Civil and Political Rights prohibits "discrimination on the grounds of race, colour, sex, birth, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 14 of the European Convention for the Protection of Human Rights declares "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." In the UK, the Equality Act 2010 codifies several generations of anti-discrimination law into a comprehensive statute. The 14th Amendment of the US Constitution contains the Equal Protection Clause that has been highly influential in advancing equality and anti-racism.

[11] This position is developed in Chapters 5 and 6 of this thesis.

In general, scholarship on discrimination, perhaps because of its close connection with social reform, has been heavily tied to legal developments in statute and case law.[12] While very understandable this has often narrowed the focus into technical legal analysis and it may have blocked more creative forays; however, there are a growing number of scholars seeking to expand this area of enquiry with reference to robust philosophical analysis. This thesis is a socio-legal contribution to that expansion.[13]

A great deal of effort has been expended on providing a complete description of anti-discrimination law that unifies its various manifestations - direct and indirect discrimination, reasonable accommodation of disability, affirmative action, harassment, and so forth. Tarunabh Khatian (2015), for example, has sought to theorize the legal model of regulating discrimination in order to provide a distinct legal conception of discrimination that can be normatively justified. Broadly put, Khaitan asserts that the moral foundation for the law is located in freedom, rather than equality; discrimination involves an individual who belongs to a group that is disadvantaged relative to another social group; and the forms of discrimination should be understood in terms of the effects that these acts have as opposed to the intentions of the discriminator.[14] The difficulty with such approaches is that they assume that discrimination adopts a consistent structure that is amenable to philosophical analysis. Such an approach adopts what Isaiah Berlin (1999: 19-22) has contended are key tenets of the enlightenment: a belief that absolute and universal truth can be attained and if an answer cannot be found then either the question is incorrect or the questioner is in error and the answer can be provided by someone more virtuous or knowledgeable. These truth propositions can be ascertained by the application of reason. Such propositions are compatible and non-contradictory. As a consequence of this unacknowledged methodology, Khatian (2015) concludes

[12] See comments made by Smith (2007: 499 ff.) for such an analysis.
[13] The recent efforts by contributors to Hellman & Moreau (2013), Lippert-Rasmussen (2014), Khaitan (2015) are indicative of this trend. Classifying systems theory as within the socio-legal tradition is justified in Chapter 3 of this thesis.
[14] This latter proposition is controversial especially because direct discrimination is normally assumed to involve the intentions of the discriminator.

that certain cases have erroneously found discrimination where in fact there is none. But such an approach assumes that the legal understanding of discrimination necessarily accords with its social manifestation. If we would not claim that the legal definition of murder accords with other interpretations - a lay understanding or a literary understanding - then why does it make sense to claim that discrimination has a consistent and universalized meaning?

George Rutherglen (2013: 117-118) provides a meta-theorization of discrimination law contending that the meaning of discrimination operates at an intermediate level between the relevant, local norms and a comprehensive normative rationale. The law engages with discrimination never in isolation but 'only as part of a surrounding legal structure that gives them form and meaning.' The only points of consensus in this under-theorized concept are the questions: who is protected (the protected class or group), who can be held responsible, on what grounds do actions give rise to liability, what rights and opportunities must be affected, and are there exceptions in certain situations?

These points of consensus are a template reflected in prominent legislation – for example, Title VII of the Civil Rights Act 1964, Age Discrimination in Employment Act – , which is produced by and continues to influence lawmakers, interpreters, and more abstract philosophical discussion concerning values.[15] Apart from these structural components there is no other obvious reference point that grants internal coherence to the concept of discrimination. Indeed, Rutherglen contends that apart from the template there are no substantive commonalities between anti-discrimination laws, non-discrimination articles, disability accommodation, positive action, bona fide occupational requirements. He admits that there are historical trends: the progress of the field might be from narrow to broad prohibitions against newly identified forms of oppression; there may be a move from negative duties to positive rights; there may also be a gradual movement towards a particular

[15] As Rutherglen rightly points out, this template appears in other jurisdictions. Sandra Fredman (2011: 210 ff.) provides the analysis in these terms for the UK.

goal such as equality, efficiency, the promotion of liberty, or preserving dignity. That said, other observers would see the field very differently. Pluralists can see a variety of values at work - a person's claim of unlawful discrimination can be a violation of the principle of equality and a challenge to freedom of expression and association.[16] Furthermore, the construction and development of anti-discrimination law may be heavily reliant on political expediency (Rutherglen, 2013: 122-130).[17] This description of anti-discrimination law holds out some hope for our analysis because it emphasizes the likely inconsistency of the legal framework. If scant points of focus can be found in substantive norms or general trends, then this suggests that an approach which looks more closely into the social constitution of law may offer a more profitable way forward.

There are many intricate arguments projected from the perspective of moral and political philosophy, which touch upon significant debates around liberalism, egalitarianism, pluralism, teleology, and deontology. It is not the aim of this chapter or, indeed, this thesis to engage with these discussions on their own terms. This chapter aims to point out common assumptions in this scholarship with a view to highlighting the limits of such an approach. As a consequence, the necessity for a sociological component and a more precise methodology is proposed. In the next section, we will turn to an area of concern which has long held a fascination for anti-discrimination law scholarship: why is discrimination wrong?

[16] Rutherglen refers to the landmark case of *Brown v Board of Education* 347 U.S. 483 (1954). For a systems theoretical consideration analysing why various doctrinal developments were available in terms of the functional differentiation of society, consider Baghai (2015).

[17] I suspect this latter point will have more force due to the recent ascent of religious and nationalist political causes in the US and Europe.

THE MORALITY OF DISCRIMINATION - WHY IS DISCRIMINATION WRONG?

Unlike other engagements with this question, the following analysis is not a philosophical or ethical exercise in which the various moral justifications for anti-discrimination are assessed by reference to their correctness or cogency.[18] This thesis attempts to observe the context, literature, and debates, as constrained and given by the possibilities of communication in society. The literature on discrimination and racism is voluminous. That said, the following sections have the purpose of detailing the proposed moral justifications and explanations of the law but, in particular, to highlight a need for an account that is more sensitive to sociological precepts and more comfortable with a phenomenon which is, at its heart, inconsistent and elusive, and yet remains distinctive.

What am I observing? It would be disingenuous to suggest that academic commentary in this particular area constitutes a social phenomenon. The data set is too small. The communications of a handful of philosophers and academics does not represent a sufficiently complex social object.[19] There are certainly ways in which they could. One might choose to interpret them as representing a cultural and economic elite. Alternatively, we might suggest that their communicative meaning relies upon particular ideas or concepts, generated through social communication. This seems a more plausible route for a systems-based sociology.

Why does discrimination occur when a person is disadvantaged because of their race? Do we also think that discrimination occurs when a job applicant is rejected because they are less attractive, have a taste for a genre of music, or support a particular football team? Most persons would probably concur that racism is a morally objectionable action and additionally many would probably

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[18] For example, whether such explanations are over-inclusive or under-conclusive with regard to recognized categories of discrimination or key debates within the field is not of primary concern. For an examination of the philosophical requirements for an adequate conception of racism, see Garcia (1997: 6).

[19] Luhmann criticized Parsons for assuming that the university held a central position in modern society. We should be equally skeptical in the implied assertion that academic discussion concerning anti-discrimination law holds a central position in its social communication and actualization.

agree that rejection based on the preferences alluded to in the previous sentence is not as objectionable.[20] Although, in general, many scholars and lay-persons may agree with the last proposition, there is nevertheless not a substantive consensus over which moral principles or other significant factors can comprehensively explain why racial discrimination – and other established forms such as gender – are so very different from these other preferences.

IMMUTABILITY

Is racism wrong because race is an immutable characteristic? Discrimination may involve a judgment upon the relative moral worth of the victim. If this is so, then a judgment predicated on an immutable trait is morally repugnant. From a broadly Kantian perspective, moral worth must be based upon choices, not upon characteristics. Some commentators lean upon this idea as providing a foundation for why discrimination is wrong; however, there are a few notable defects with this argument.[21] Both religious affiliation and gender are protected characteristics under the Equality Act 2010; however, they are also to an extent mutable: the choice to change religion or gender may not be made lightly and individuals who make such choices may incur significant socio-economic costs (Alexander, 1992: 200).[22] But the possibilities of change here allow us to question whether

[20] A distinction that this thesis attempts to capture, by relying on Luhmann and Deleuze, is that eye-colour and appearance do not have the same *intensity* of communicable meaning as found in race. This is a conceptual position, which cannot easily be comprehended by the politico-moral philosophies adopted in the literature. This theorization is pursued in Chapters 5 and 6.

[21] Robert Wintemute (1995) concludes that discrimination because of sexual orientation is wrong for precisely this reason. Immutability refers to a personal status, which cannot be changed or chosen. However, in tune with other defenders of the immutability argument, such as Hoffman (2011), Wintemute explains that immutability should be used in tandem with another justification - that of fundamental choice. As Gardner (1998: 170) explains, the problem with this approach is it that it seems to be positing that both choice and the absence of choice explain the wrongness of discrimination. If this is the case then the liberal ideal of the autonomous life may provide a more comprehensive justification for the wrongness of discrimination.

[22] On the other hand, the choice component can be distinguished: (i) those under-going gender-reassignment may view the process as less of an autonomous choice and more of a *revealing* to the *world* of the person they have always been or are *destined* to be; (ii) the choice of religious affiliation is undermined by the likelihood that one is *pre-destined* by reference to the locale in which that person lives, parental affiliation, and tradition. Moreover, they may consider religious conversion as a *revelation* of the person that they have always been or that they are *destined* to be. This correlates with Deleuze's considerations of the pure past and destiny which are topics examined in Chapter 5 and 6 of this thesis.

immutability can be a unifying principle that accurately explains the protection of characteristics under anti-discrimination law; and, moreover, adequately explains why racism is wrong?

Sharona Hoffman (2011) has tried to salvage the argument for immutability by broadening its definition. She has contended that when we say immutable what we indicate is something, which cannot be changed through personal action. Many followers of a religion, therefore, would consider conversion out of the question because their adherence is held in place by a higher and transcendent power (Hoffman, 2011: 1508). In addition, immutability implies a status that cannot be altered by empirical verification and as such a person of religious faith would find their membership to be unaffected by a factual or legislative re-definition. In sum, Hoffman contends that immutability implies an attribute that is either an accident at birth, unchangeable in absolute terms, or a characteristic so fundamental that it is not legitimate and/or practical to require individuals to make such an adjustment.[23] This reasoning certainly offers a rationale in which religious affiliation and gender are morally immutable, but by stretching the principle to encompass legitimacy and practicality it struggles to provide a definitive and coherent model.[24]

The last major argument that supports the immutability thesis is that the public policy goals of fairness and justice demand protection of such characteristics. Why does justice demand protection of immutable characteristics? Is it because employers operating behind a veil of ignorance would choose to prohibit such actions in order to minimize the possibility of discrimination against themselves? This might carry weight – although it is admitted that is does not do justice to the complexity of Rawls' theory - because behind the veil a person would not know whether they are an

[23] Sharona Hoffman (2011: 1513), quoting Samuel Marcosson, makes an intriguing remark that offers a hospitable gesture to systems theory. Immutability indicates a characteristic that is fundamental to the person's identity; it is a 'self-concept which is a complex mix of cultural, familial and internal factors'. Such a definition is not too dissimilar to Luhmann's idea of a self-description, which is a crucial component in this thesis explained in Chapter 4.

[24] Indeed, the reference to practicality indicates the social context in which such statuses operate. It suggests a need for a sociological analysis capable of producing results that assess the social realization of these characteristics.

employer or an employee and therefore it is in their interest to curtail such decisions. From this position, fairness flows because the interdiction safeguards personal autonomy with respect to important life decisions (Hoffman, 2011: 1519).

Most commentators do not find the immutability thesis convincing. It does not seem to offer an adequate description of the actions of courts in recognizing and protecting a person from discrimination.[25] Immutability fails to provide a coherent and unifying principle that explains why discrimination is wrong in many situations in which many agree it is wrong without either recourse to further values (justice and fairness) or further moral tenets (legitimacy and choice). At best, it can cover all the accepted grounds if it is unfolded into a series of distinctions so that immutability can indicate both a non-chosen status and a chosen status. As we can see from Hoffman's reasoning this can be achieved by drawing the following distinctions: it might be a choice in theory, but it is not a *real* choice in practice; it may be mutable, but it is a fundamental (and therefore immutable) choice; and for the internal, personal life of the individual it is immutable even if externally it is mutable.

The point I wish to highlight is that these distinctions produced in order to avoid a contradiction between the philosophical explanation and social reality may be indicative of a deeper issue. Namely, that a philosophical perspective that seeks to establish consistency, coherence, and universality may not be best placed to observe these particular phenomena. The reason being that the contradiction and the universal/specific distinction may be part of the social basis for

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[25] There is a caveat to this statement. A major issue within anti-discrimination scholarship is that a great deal of commentary approaches the subject with unacknowledged assumptions and at cross-purposes. Replicating long-standing jurisprudential tensions, the normative and philosophical methodology of such scholarship is rarely clear. Is the correct moral justification derived from the norms established by legal doctrine, decisions by the courts, and legislative developments; or is it external to such phenomena and as such can be used as a means to criticize such developments? What do we mean by norms? How do such moral justifications interact with the law – do they underpin the law or rationalize it? What does this mean? Is the law and are such moral justifications derived from a higher political theory such that the moral justification can be used to assess the legitimacy of the law? There is little consensus on this point and, in this reader's opinion, this may be indicative of the phenomena at hand. Rutherglen (2013: 128), citing Sunstein, notes that discrimination is an under-theorized concept from which a range of concrete, abstract, and general descriptions have emerged. This thesis certainly sees the validity of this conclusion. This thesis offers the precision and austerity of systems theory as a more satisfying methodology.

discrimination; moreover, the moral communication of discrimination may indicate the intimate and personal aspects of discrimination alongside its connections to broader conceptions of group membership and society. These qualities can better be understood through a theory that can both explicitly delineate between morality and law, and further an approach expressly reliant on the social construction of such perspectives.

RESPECT

Larry Alexander (1992) offers one the most influential accounts of discrimination. He locates the morally objectionable aspect of discrimination as concerned with respect. For Alexander, discrimination is morally wrong intrinsically because the mental state of the perpetrator evinces an attitude of disrespect towards the victim amounting to an implication that they are of a lower moral status than others by virtue of their group membership. The attitude of the perpetrator is one of animus, hostility, or a belief in the moral inferiority of the other.

This approach articulates a moral philosophy reliant on Kantian foundations. Individuals are autonomous subjects with equal moral worth. It is only objects which have a price and so it is only objects that can be graduated according to a higher or lower status. So what does it mean to express disrespect? The paradigm cases of racism involving an animus and a deep belief in moral inferiority can certainly be explained by Alexander's argument. Moreover, biases and prejudices drawn from incorrect beliefs about the moral stature of a person because of their group membership would be caught by this explanation.

The difficulty with Alexander's argument can be located in two major issues. Firstly, it fails to account for many types of discrimination which do not involve disrespect. It would not be tenable to suppose that indirect discrimination or institutional discrimination involves an accompanying mental

state that expresses disrespect or a valuation of moral worth. Indirect discrimination in which a neutral set of rules creates an unequal outcome is defined through the absence of an intentional mental state.[26] Perpetrators are not intending to discriminate in such cases and they are not exhibiting hostility; they are simply failing to reflect on the possible outcomes of their actions and whether such actions contribute to substantive inequality. One might argue conversely that such blatant cases of racism are still well-recognized instances of discrimination; however, if we do so then we fail to provide a comprehensive formula for explaining why racial discrimination is observed when we consider the unjust distribution of resources in terms of race. Secondly, Lippert-Rasmussen (2014) contends that Alexander fails to account for the precise wrong of discrimination. This is because in constructing the moral wrong on the basis of a recognition of lower moral status in Kantian terms he exposes one to the contention that this account would not cover cases in which the rationality of the victim is in doubt. This would have the consequence that individuals that do not have the rationality and self-legislative capacity - either due to age or mental capacity - which underpins the idea of Kantian moral status could not suffer discrimination.

A final issue concerns whether respect explains why egregious examples of racism are wrong. They are wrong because they are *clearly* false despite rationalizations made by the discriminator. Nazi ideology is *clearly* wrong because it resists evidence and abundant reasons to the contrary.[27] This is a point I wish to take further. It is this demand which states that discrimination is manifestly and assertively wrong that I find particularly compelling. Not least because most accounts that tackle the moral wrong of discrimination suffer from being too broad or too narrow. In the former case they explain all recognized types of discrimination but for some reason fail to accord sufficient precision

[26] See for example, section 19 of the Equality Act 2010. The fact that a moral framework does not completely cover the actual categories of legal discrimination is a recurring impediment to theorization in this area. For example, Khaitan (2015) has produced one of the most substantive attempts of recent times, but since he frames his theory in terms of the 'effects' caused by a discriminatory action he struggles to explain why direct discrimination is wrong in these terms since this is a category normally defined with reference to the mental state of the discriminator. This thesis suggests that the semantics of racism cannot be tied to either the statutory legal framework or the strictures of moral philosophy. Racism is a complex, social phenomenon.
[27] Lippert-Rasmussen (2014: 122)

or moral salience to discrimination itself. In the latter case such accounts narrowly explain the salience and distinctiveness of discrimination, but fail to encompass the various types of discrimination within their description.

WRONGFUL ACTION

A series of influential accounts attempt to explain the moral wrong of discrimination in terms of an objective meaning. The most extended descriptions are provided by Deborah Hellman and Thomas Scanlon which I shall outline below.

Deborah Hellman (2008) holds the view that acts which are discriminatory carry an intrinsic moral wrong. They do so because such treatment signifies that the victim has less moral worth than the perpetrator. Hellman locates this signification within actions which denigrate and demean the victim. To demean a person is distinct from simply insulting that person because in some way it suggests a lower moral status. This formulation follows the Kantian categorical imperative of treating persons as ends in themselves as opposed to a means to an end. Hellman's account captures the most egregious examples of racism, such as when a victim is treated as sub-human.

The second aspect of Hellman's exposition is that the discriminator has to be in a position of power or dominance vis-à-vis the victim. This requirement intends to capture discrimination involving groups who have suffered a history of domination and exclusion. Clearly, race will satisfy this condition, however in most cases a social group which contains persons who exhibit a particular musical taste or style of dress will not. The difficulty with Hellman's account is that the idea of demeaning remains imprecise and furthermore as a concept it is not always co-existent with an indication of a lower moral worth. Lippert-Rasmussen (2014: 135) points out that paying less attention to the opinions of a teenager may be demeaning, but this does not amount to an

implication of unequal moral worth.[28] Instances of indirect discrimination, moreover, for the most part fail to express denigration towards the unintended victims. More often than not such discrimination arises from a failure to modify habitual ways of working to ensure that the interests of minority groups can be fulfilled. Finally, Hellman's explanation is uni-directional because it means that morally impermissible discrimination does not occur when a victim is a member of a dominant group. Therefore, although this approach permits affirmative action it does not consider that racial discrimination can take place against a dominant racial group.

Thomas Scanlon (2008: 37-89) provides an account in which the discriminatory action in itself is intrinsically immoral.[29] He argues that discriminatory actions express a view that certain people are morally inferior or socially unacceptable. Such actions insult the victim. In order to avoid the pitfalls that an intention-based account of discrimination encounters – that most recognized instances of indirect discrimination or statistical discrimination do not involve an expression of animus[30] - Scanlon suggests integrating intention into the meaning of the action in an intriguing manner. He argues that the intention of the discriminator operates in an indirect manner by its being of predictive significance. Simply put this idea attempts to highlight that individuals may interpret a particular action differently from its consequences. A refusal of promotion from the employer's perspective may have nothing to do with race. It may have been a decision made purely on merit. On the other hand, the victim of this action may consider that the decision was an act of racial discrimination. This is enabled because of the 'predicative significance' of intention. The victim may draw a conclusion from the past performance of the employer or from an appreciation that the employer holds prejudicial opinions that the action expressed an opinion of lower moral worth for a racial group.

[28] Furthermore, adolescents have not been a traditionally powerful social group.
[29] Lippert-Rasmussen (2014: 139ff.) explains and provides a series of weighty criticisms.
[30] Institutional discrimination occurs when broad injustices are produced through collective behaviour. There is a difficulty in addressing this type of discrimination through current legal frameworks. Iris Young (1990) disputes the significance of group-predicated discrimination because it presents discrimination as an exception and aberration to the rule, when in fact the profound wrongs of exploitation and marginalization can only be understood systemically through an institutional account of discrimination.

Namely, it manages to 're-enter' perception into communication and highlight this movement as a distinctive feature of discrimination; moreover, unlike other accounts it acknowledges that various parties may interpret an action very differently. Noticeably, Scanlon makes this argument within a philosophical frame that identifies agency, action, subjectivity and objectivity as axioms. These pre-conditions are not shared by systems theory.

In conclusion, explanations which attempt to explain the wrong of discrimination as intrinsic to the action itself encounter a number of drawbacks. They either fail to be sufficiently broad so as to align with all types of discrimination or they fail to be sufficiently precise such that the 'nature' or distinctive quality of discrimination is not identified.

HARM

Another direction for the identification of discrimination relies on the idea of harm. The advantage of such an approach is that it easily admits indirect discrimination and statistical discrimination within its remit. As we have seen, those descriptions which rely upon the identification of a subjective state of mind (prejudice, animus, disrespect, a judgment of moral inferiority) have struggled to convincingly explain why commonly accepted and legally constructed examples of discrimination are morally impermissible.

By focusing on harm, the wrong of discrimination is calculated in terms of consequentialism, namely a consequentialist philosophy. A generic account of harm will point out that racial discrimination is not intrinsically wrong; it is wrong by virtue of the harm caused to the victim and/or the community. In fact, in certain instances racial discrimination may be morally permissible if it enables greater benefit, happiness, or welfare than it prevents. Affirmative action or 'reverse discrimination' can thus be easily accommodated as permissible because to take such action may increase overall welfare. To be fair, most accounts which postulate that discrimination is intrinsically wrong because of a deontological principle can also permit such actions, for example, by expanding a notion of

equal treatment from a formalistic interpretation of equality to a more substantive egalitarianism. However, although this is readily accepted within the communications between moral philosophers and equality advocates it would be productive to remember that 'reverse discrimination' is often received as an example of blatant discrimination by members of the public.

Advocates of a harm-based account of discrimination can take many different paths towards calculating harm.[31] Harm can be assessed by focusing on whether the well-being of the individual is affected or whether the preferences and interests of the individual have been frustrated. Alternatively, harm may be interpreted in terms of material opportunities, access to important resources, or welfare. Indeed, if harm is calculated in certain ways particular forms of discrimination may be found to be permissible. If we consider harm in terms of how an individual's opportunities are affected over their life-time, then age discrimination may be permissible because where a person suffers at a certain stage of their life then they may gain at another stage. Furthermore, various subtle distinctions and debates coalesce around whether the idea of harm should be interpreted to indicate actual consequences or consequences as the perpetrator believed them to be.

Lippert-Rasmussen supports a particular strain of the harm-based explanation, which he argues contains both intrinsic and instrumental features. He labels this argument a 'desert-prioritarian' account.[32] In such a framework moral value is assessed by reference to three elements. Firstly, the moral value of an action is greater if it increases the well-being of the individuals impacted by the act. Secondly, the approach also stipulates that the lower the level of well-being that an individual possesses then the greater moral value is to be achieved in its amelioration. Therefore, an act which assists the most-needy is of a greater moral value than those acts which assist those persons who already have great access to resources. Conversely, this means that actions that discriminate against

[31] Lippert-Rasmussen (2014: 153ff.) provides a detailed exegesis of such accounts.
[32] Lippert-Rasmussen (2014: 165)

a historically disadvantaged racial group will be of a lower moral value than those actions that discriminate against a historically advantaged racial group. Such an account should also be able to draw a line between social groups who have suffered stigma and disadvantage and those who have not. Hence, discrimination against racial groups will be more harmful in the vast majority of conceivable cases than the harm caused to members of a group who have a taste for classical music, cuisine, or sports. Similarly, the fact that an employer chooses to discriminate against those who have inadequate qualifications will probably be less harmful because it is not accompanied by a history of systematic disadvantage.[33]

The harm account may be more convincing than those that depend on an intrinsic reason for the moral impermissibility of discrimination. As an account it encompasses indirect and institutional forms of discrimination. The principle objections are that discrimination is neither recognized as a *distinctive* moral wrong, nor does it satisfy the need for discrimination to be intrinsically wrong. And so we return to the intractable position in which discrimination must be intrinsically wrong in some manner, but in doing so no theory can also encompass adequately or sufficiently indirect and statistical forms of discrimination. In brazen terms: deontological theories are too narrow and teleological theories are too broad. I would suggest that this predicament may actually be informative in itself, and may call out for a theoretically informed approach constructed through sociological axioms as opposed to those provided by moral philosophy.

DELIBERATIVE FREEDOM

A relatively recent and innovative explanation has been set out by Sophie Moreau (2010). Moreau contends that anti-discrimination laws are activated when a personal wrong has occurred. She makes the argument that the best interpretation of these laws and their doctrinal development is through a consideration of tortious principles. Anti-discrimination law seeks to protect an interest

[33] Lippert-Rasmussen (2014: 168).

and provide a remedy when this interest is violated. For example, individuals have an interest in their reputation (tort of defamation) and their bodily integrity (tort of negligence). The interest which anti-discrimination aims to protect is deliberative freedom.

According to Moreau discrimination is wrong because such actions violate the deliberative freedom of the individual. In a liberal society individuals are entitled to make decisions about what they value and how they should live their lives in light of these values. Deliberative freedom is the capacity to make such valuable decisions insulated from the effects of 'normatively extraneous features' such as skin colour or gender. There are legitimate normative constraints that we can expect and structure into our decisions - cost of an activity, the resources required to pursue it, the needs of our dependents, expectations of those whom we trust.

Race is 'normatively extraneous' because in a liberal society we should have the freedom to engage in activities without being burdened by our race when we make a decision of moving to an area or applying for a job. The difficulty for Moreau is explaining how 'normatively extraneous 'differs from simply stating that irrelevant or irrational considerations ought not to impact a person's decisions in life. Why is race protected, but not other personal traits, such as styles of dress and musical taste? Moreau (2010:160) responds that an account of discrimination cannot give a single principled explanation for why each ground (sex, race, religion, etc.) is worthy of protection, except that over-time individuals have reflected and accepted that such grounds should be protected to safeguard deliberative freedom.

Yet again the difficulty with this account is that it does not seem to explain why racial discrimination is far more morally repugnant than discrimination based on idiosyncratic tastes or nepotism.[34] Simply stating that 'normatively extraneous reasons' should not impact decisions does that explain why certain very significant traits are normatively extraneous while others are not. Moreau (2010:

[34] Lippert-Rasmussen (2014: 189)

160 ff.) readily admits this weakness and as a fall-back position contends that such traits are recognized by reflection and acceptance over-time, and cannot be drawn from a priori principles.

In previous decades of the 20th century it was unthinkable for women to enter certain professions because they were deemed to be too diminutive, mentally incapable, or lacking in strength - institutions such as the army, police, and fire service. Similarly, it was only a short time ago that it was unthinkable for parks and buses to be re-designed to accommodate disabilities. As such, instead of suggesting that race has become normatively extraneous *over time*, we might note that in reality race (and gender, too) have become distinctive and visible in time.[35] Moreau, and other commentators, recognize the distinctiveness and exemplary character of race, but they fail to accord this quality the significance that it deserves.

SOCIAL SALIENCE

One noteworthy argument is that a social group can be the subject of wrongful discrimination if it is socially salient. Kasper Lippert-Rasmussen (2014: 30) reasons: 'A group is socially salient if perceived membership of it is important to the structure of social interactions across a wide range of social contexts.' Lippert-Rasmussen admits that this is not a concept which offers a high-degree of theoretical clarity; however, as a rule of thumb, he contends that it explains why some groups, as opposed to others, have come to be the subject of discrimination. The argument goes that salience is linked to both perception and self-identity. So firstly, the more that a characteristic becomes the focus of perception the more socially salient the characteristic. If a characteristic becomes increasingly perceptible then discrimination can occur because of increased social salience.

Race and religion are social groups often open to direct perception through bodily and clothing distinctions. An example of this is the marking out of Jewish people under the Nazi regime. Requiring

[35] In Chapters 5 and 6 of this thesis I will make the argument that this visibilization (and revelation) is indeed linked to time as a *repetition in time* (a fractured emulation), however this will be conceived with reference to a Deleuzian philosophy of time not considered by Moreau and other anti-discrimination scholars.

Jews to display the Star of David made the social group both salient and present within everyday interactions. This prominence further contributed to the probability of discrimination. The significance of perception is also recognized by those individuals who fear discrimination. The appreciated threat of perception may compel individuals to undertake 'information management.'[36] An individual may shorten their name or amend their details on a job application so as to avoid the possibility of racial discrimination. An employee may choose not to disclose details of their private life so as to avoid unwanted advances or to limit the possibility of their, for example, sexuality becoming a factor in the workplace. The point is that an individual prevents certain ascriptions becoming a topic of communication within the interactive order. The second factor that contributes to social salience is whether the characteristic forms part of the member's self-identity. This line of argument parallels other justifications in which autonomy and self-determination have been posited as the values which underpin discrimination. Harriet Baber (2001) offers a productive explanation of salience. Social salience is the degree to which an idea can allow an observer to predict the individual's character trait, taste, belief, or psychological quality. Salience signifies a generative and connective capacity. In sociological terms this might be expressed as a tight coupling between social forms.[37] Accent, for example, has a greater social salience than eye-colour because in registering an accent a person can then proceed to consider social class.[38]

This last explanation offers another facet to understanding why racial discrimination is wrong; however, similar to other accounts, it fails to be complete or sufficiently precise.

[36] Erving Goffman (1963: 57ff) explores the variety of ways that individuals control the information attributed to them when it comes to discreditable characteristics. Lippert-Rasmussen (2014: 30-33) clearly has in mind Goffmann's interactive order.
[37] It may indicate 'irritability' of communications. This goes some way towards the analysis conducted in Chapter 6.
[38] This point is pursued more substantively in Chapter 4 of this thesis when I contend that manners, etiquette, etc. formed an anterior semantics to discrimination.

WALDRON'S ACCOUNT OF DIGNITY

The final account which I wish to cover is the nearest the legal literature comes to adopting a more socio-historically informed methodology.[39] In his recent work Jeremy Waldron (2012) has been exploring the idea of human dignity. This is especially pertinent to anti-discrimination law because recent scholarship has turned to the idea of dignity as an explanation and normative justification for anti-discrimination law.[40]

Dignity functions as a value that signifies both self-esteem and expectations of esteem from others.[41] It denotes the commonalities and similarities of mankind (Smith, 2007). The concept has a history. As Waldron begins to explain, dignity used to refer to rank. Drawing on Kant, Waldron emphasizes that dignity in the history of England was distributed in accordance with rank: a duke has more dignity than a baron, a bishop has more dignity than an abbot. The monarch has more dignity than everyone else. Waldron asserts that dignity was 'trans-valuated' away from rank towards humanity. It was universalized by Judeo-Christian notions of the dignity of man. The idea of human dignity concerns an upwards equalization of rank so that every human being has dignity and an expectation of respect. What more Waldron (2012: 32) draws upon Romantic literature to signify this sea-change. The poetry of William Wordsworth and Robert Burns is held up as contending that true dignity was located in the lowly man and in those closest to nature.[42]

[39] Solanke (2017), however, also comes close by adopting an account of discrimination as stigma informed by Erving Goffmann.
[40] See Fredman (2011) and Khaitan (2012).
[41] This definition is closer to a sociological concern with morals as reflective of collective behaviour. It also corresponds to Luhmann's (1992b, 1996b) explanation of the moral code.
[42] Romanticism is taken as a key theme that presages the semantics of racism. It is discussed in Chapter 5.

Waldron further claims that the sacral quality of nobility has now been distributed to everyone in line with dignity. Every member of society is now dignified and entitled to respect, esteem, deference and due consideration. In previous times it was sacrilege to assault a duke. The dignity and distinction of classes were protected by sumptuary laws which defined the appropriate style of dress, sport, and etiquette.[43] On the other hand, in our society everyone's person is now sacrosanct with such interests protected by the law of torts - defamation, negligence, and intentional harm. Anti-discrimination laws protect racial groups from suffering disadvantage but also public contempt in the form of hate speech.

Waldron's account is of interest because it points towards the analysis conducted in Chapter 4. In particular, his focus on manners, styles of dress, and ritual coincides with my argument that these types of communication serve as way to understand the history of discrimination semantics, and point towards a needed re-description of anti-discrimination law.

WHY A SOCIOLOGICAL APPROACH IS NEEDED

The above analysis has sought to explain some of the prevailing theories of discrimination. I have emphasized the deficiencies in each which suggest that a sociologically informed analysis may prove beneficial.

Firstly, there is the persistent argument that discrimination, in some sense, involves a salience or distinctiveness which must be reflected in its moral description. Hence, those moral arguments appear to be inadequate which explain the wrong of discrimination in terms of harm, for example, but fail to explain the unique and compelling quality of discrimination which most observers seem to think should be present. This compelling quality of discrimination is indicative of a social basis which can be located in a notion of *informativity*. The salience expected by commentators is external to the

[43] See for example, Lawrence Stone's (1967) famous examination of the English aristocracy prior to the Civil War in which sumptuary law was enacted as a tactic to preserve the esteem and dignity of the upper class.

moral evaluation of discrimination. This theme will form one of the strands of discrimination which is emphasized throughout chapters 4, 5, and 6 of this thesis.

Secondly, I have implicitly asserted that the philosophical approach to discrimination may not adequately address the relevant phenomena. This is because the approach seeks to provide a comprehensive, non-contradictory, and specific, examination of discrimination. This may not be possible. I would suggest one of the reasons is that discrimination is indicative of social conflict or social contradiction, and so it cannot be captured by a formula which does not admit similar impressions. The second reason is one not likely to be mentioned by such accounts. There is an element of self-implication in which the philosophical explanations of discrimination already contribute to their object of inquiry, not least in the fact that in discussing discrimination we turn to hypotheticals and definitions which are drawn from cases and legal doctrine. The problem is that such examples have been formed via an implementation of the philosophic ideals of anti-discrimination. Marxist analysis encounters a similar problem in which it attempts to describe a society in which spectres of Marxism already circulate.

CONCLUSION: WHAT ARE THE LIMITS OF DISCRIMINATION WHICH I HAVE IDENTIFIED?

Are philosophical approaches best placed to analyze and theorize this phenomenon. Are such approaches able to provide an adequate reception to the themes and factual scenarios which fall within the concept of discrimination? If we take the act of theorization in its broadest sense, it is one that seeks to establish limits by (1) delimiting a unified field of inquiry and (2) by identifying measures which can ensure consistency and coherence between elements within this field.

Theories of discrimination that adopt philosophically inclined methodologies should be able to differentiate and isolate discrimination as a phenomenon. This may mean establishing the edges of discrimination by utilizing a series of distinctions, such as between morally permissible and impermissible types of discrimination, or by distinguishing between central instances and peripheral instances of discrimination. A limit is exposed in that very few accounts of discrimination can provide a diachronic perspective. Whereas anti-discrimination may be a relatively new phenomenon, this does not entail that discrimination as a social phenomenon does not have its own conditions of emergence.

Only a short time ago, discrimination was associated with virtue as indicative of refined taste and the ability to choose well.[44] How do we distinguish between this meaning of discrimination and modern unlawful invidious types of discrimination? Sandra Fredman (2011:208-9) observes that there is a further dilemma in how we treat people. On the one hand, individuals should be judged according to their personal and subjective merits, qualities and values. Treatment should not be accorded on an objective or group status. Nevertheless, not every objective and status-based distinction can be said to be discriminatory. Many individuals define themselves by group membership and objective status and feel if they are not represented in this manner then they are misrepresented. This is a topic which I pick up in Chapter 4, which I label the racial dilemma.

Describing discrimination from a moral perspective can only provide an incomplete picture. It misses its social manifestation. The fact that so many commentators emphasize the invidious and salient quality of discrimination should be taken as a clue that points towards the social basis for discrimination; furthermore, the fact that discrimination has a history in terms of taste should be considered more closely. The history of discrimination does not begin with the first anti-discrimination statute nor with the elevation of universal human rights in the 20th century. This history will be sketched in terms of manners and courtesy in Chapter 4. Further, the fact that there is

[44] A point noted in passing by John Gardner (1998: 167).

a tension between individual treatment and group status should be taken as evidence for a further limitation to the field which can be re-described by a methodology that has the appropriate level of depth to conceptualize dilemmas and paradoxes. It should not be discounted. Finally, the social basis for discrimination should be delimited from the legal understanding of discrimination. The limitations on a legal understanding of anti-discrimination law must be observed from a position that does not assume that law operates according to underlying moral norms.

Indeed, it is strange that anti-discrimination scholarship often assumes that the field can be limited by reference to a value of equality or freedom. Scholars are hard-pressed to describe other branches of law in terms of economic efficiency or justice. The complexity and contingencies of anti-discrimination law, like any other area of law, creates its own internal dynamics, which are non-reducible to an external model. Bearing these matters in mind, this thesis will re-describe some key elements in anti-discrimination law from a systems theory perspective by analyzing the relevant constitutive limits of legal argumentation and legal decision-making – the internal dynamics of anti-discrimination law.

CHAPTER 3 - THE SOCIO-LEGAL METHOD AND SYSTEMS THEORY

INTRODUCTION

This chapter will argue that systems theory can be placed within the socio-legal tradition. A particular effort is made to explain how systems theory is a sociology that can provide systematic and empirical insights on the operation of law and society. The key axioms of systems theory will be explained denoting points of particular relevance for discrimination law and this thesis: forms of societal differentiation, individuality, and human rights.

HOW IS SYSTEMS THEORY A CONTRIBUTION TO SOCIO-LEGAL SCHOLARSHIP?

This thesis can be most broadly construed as a socio-legal contribution to (i) the study of racism, (ii) 'anti-discrimination' law, and (iii) the jurisprudential examination of legal argumentation and decision. There have been notable disputes surrounding the suitability of sociology *qua* discipline to reveal the 'truth' of law which I will set out below. These disputes will be analyzed with the aim of contending that a Luhmannian inspired systems theory can offer a path that avoids these controversies.

The label socio-legal studies has become a general term encompassing a range of disciplines applying a socio-scientific perspective to the study of law, including the sociology of law, legal anthropology, legal history, psychology and the law, and political science studies of courts (Tamanaha, 1999: 2ff). This variability in research-design can be both a weakness and a strength. A persistent critique questions whether the application of socio-scientific methodologies can firstly account for the internal 'truth' of law and further whether it can present findings that are interesting to legal professionals. For example, David Nelken (1994) doubts the capacity for sociology to illuminate the uniqueness of law as a discourse. Additionally, applying economic theories of rationality fails to appreciate how actors who negotiate, participate, and co-ordinate legal processes actually comprehend the legal system. If we take the development of legal doctrine seriously then it

needs to be admitted that lawyers articulate opinions with respect to very different signposts from those adopted by social scientists. Legal arguments directed towards causation are typically concerned with responsibility, as opposed to the economic consequences of imposing liability or with consideration of the underlying socio-economic circumstances which underpin defendants' unlawful actions. When social science fails to appreciate this internal aspect it fails to grasp law itself.

The second indictment against socio-legal studies is that it has failed to present findings that are sympathetic to the needs and concerns of legal practitioners or legal theory. Access to justice, the organization of the legal profession, lay-knowledge of the law, and criminology are worthwhile subjects of study, but they are not the traditional concerns of the legal profession (Tamanaha, 1999: 15).[45] This has meant that sociological insight has not delivered the radical reform which it promises. Roger Cotterrell (1998) has offered a response which seeks to contextualize these accusations. He observes that the division of labour between lawyers and sociologists does not stand up to scrutiny. There are numerous examples - Weber, Durkheim, Ehrlich, Luhmann - in which sociologists have been able to study law through utilizing the development of legal ideas, concepts, and doctrine. They have often been trained in law and in some cases like Weber have placed developments in legal rationality as a cornerstone of societal change.

Another manner in which Cotterrell (1998) contends that this internal/external dichotomy can be abridged is to admit that law and society co-exist as non-differentiated phenomena. He proposes that the best understanding of law is as a combination of many motivating factors - ideology, the experiences of legal advocates, procedures, concepts, and doctrine.[46] Accordingly, law should not be considered as an object of knowledge but as a working practice. We may be able to analyze the legal concepts and relevant cases which impact on a legal issue, but this is only half the story. A lawyer

[45] Tamanaha (1999) in reply calls for a realistic and pragmatically grounded socio-legal theory.
[46] Bourdieu (1987) also avoids this internal/external distinction by proposing that law is a 'juridical field' with only a 'relative autonomy' operating as a site of competition for socio-historical forces.

will still engage in observation (of his client, the bench, or his opponent) and consider what is the best route forward in line with these observations. For Cotterrell (1998: 187) the sociology of law is a ‘transdisciplinary enterprise and aspiration to broaden understanding of law as a social phenomenon.'[47]

Systems theory can also respond to these charges. The uniqueness of law is readily admitted when the theory proposes that law should be recognized as an autopoietic sub-system of modern society. The fact that law is only meaningful by reference to law is a basic postulate of the theory. Although it may employ a highly technical lexicon, the theory is not trapped in the clouds of highfalutin idealism. It is a sociological theory that captures the verve of legal communication as it is delimited and energized by practical issues, legal procedures, and arguments over key concepts and protected interests. The boundary that law holds between itself and its environment is observed within legal communications. Therefore, the fact that lawyers are cognizant of this internal/external distinction is recognized by the theory in terms of the 're-entry' of the system/environment distinction into itself. Consequently, the world is translated into legal artefacts. The legal conceptions of property, contract, or a constitution differ fundamentally from their meaning in terms of economic transactions, or political settlements.[48]

Lastly, Cotterrell (1998: 177) indicates that research can be a sociologically informed contribution to legal scholarship if it can meet three foci: an emphasis on law as a social phenomenon, the bringing of particular instances within a systematic context, and the exhibition of an empirical aspect to the study. In the following sections I will establish that this present thesis can meet Cotterrell's stipulations.

[47] This is pragmatism in the operation of law. There are arbitrary cut-off points at which argument must end in order for a decision to be made. The judge often takes great care to justify their decision by reference to common-sense and the enforceability of a legal order. Accordingly, 'law's basic 'truth' may be merely the provisional, pragmatic consensus of those legal actors who are perceived at any given time to be supported by the highest forms of authority within the legal system of the state.' (Cotterrell, 1998: 181)

[48] This is a topic richly explored by scholars influenced by systems theory. See for example the work of Rogowski (2013) on labour relations, and Chris Thornhill (2011) on constitutions.

UNDERSTANDING LAW AS A SOCIAL AND SYSTEMATIC PHENOMENON

Cotterrell (1998: 173) contends that for law to be comprehended as a social phenomenon there needs to be an appreciation of certain basic sociological tenets. Firstly, that the social world is a field of experience in which actors subjectively construe their own actions. Secondly, that social life is structured through symbolic frameworks or constituted by forms of collective understanding. And thirdly, that social rules are continuously created and recreated through interaction. A systems theory approach satisfies these requirements for comprehending law as a social phenomenon; however, it addresses these concerns by providing highly distinctive representations. In the following sections I shall address each of these tenets respectively.

In contrast to many valuable sociological contributions, Luhmann does not think that the most basic social processes are performed by individuals, groups, or actions. These units are foresworn in favour of communication as a basal unit of analysis; they are re-configured into different slots within the theoretical architecture. Persons are pushed outside society and arrayed within different autopoietic systems - the psychic system of consciousness, the nervous system, the body. Personage and individuality are communicated as 'semantic artefacts' perturbing and 'interpenetrating' the sub-systems of society.[49] The crucial argument is that persons are only able to affect societal communication indirectly through irritations that generate further communications. Action becomes a communicative 'attribution as a reduction of complexity' and 'as an indispensable self-simplification of the system'.[50] The consequences of these re-formulations are that the subjective

[49] See Teubner (2001) and Luhmann (1995: Chapter 6)
[50] Luhmann (1995: 137). Action, speech, proclamation, message, operate as steering mechanisms for the communicative process. Communication is a 'discontinuous structure' composed of the tripartite distinction between information/utterance/understanding operating on the presumptive conditions of double contingency between alter and ego. Communication can be interpreted and thematized within communication as action. This allows communication to be steered and further communicative connections to be made on the basis of this semantic artefact. Once action becomes a theme of communication then connective capacity for further communication can be extended to the motivations for action, the actor, the success/failure of the proposed action, etc. See Luhmann (1995: 146ff) for a detailed analysis of how systems theory relies upon communication as a constituting unit as opposed to the action unit chosen in the works of Weber and Parsons.

interpretation of actors and the possibilities for consensus are distilled via several problematic relationships: the theorem of double contingency and the interpenetrative relationship between psychic systems and social systems.

Double contingency is a central problematic emphasized by Luhmann as exemplifying the sheer improbability of both communication and the continuation of a complex society.[51] The theorem of double contingency is linked to Cotterrell's sociological tenet that actions are meaningful through the subjective interpretation of the actor. This was fully articulated by Talcott Parsons (1951) as a key problem for social action. As a theorem it is a distillation of a fundamental question of sociology: how is social order possible? Several very famous answers have been posed to this question that may well be familiar to lawyers - the Leviathan State of Thomas Hobbes that keeps the violence of nature at bay, or Adam Smith's invisible hand of the market. Parsons contends that the theorem of double contingency clarifies this question of social order.

In focusing on this theorem I intend to explain how Luhmann's contribution differs from many sociological accounts when it comes to the subjectivity of actors and the role of social consensus. My account will position Luhmann's theory as offering a unique reservoir of tools from which socio-legal scholarship can be initiated.

Parsons' theorem of double contingency focuses on the difficulties actors have in achieving 'collective action' and the mutual dependency which appears to occur between such actors. The theorem ties together the following enquiries within a neat problematic. How do individuals establish an 'understanding' with one another despite the extant gap between them? How does the self-orientation and the other-orientation in each of the participants emerge and stabilize as a social relation? How is coordinated action between participant's possible? How can mutual comprehension emerge and continue? Few would doubt the importance of these question.

[51] This theorem underpins the symbolic medium of validity explored in Chapters 9 and 10 of this thesis.

There are two instances of contingency which appear on both sides of the participant equation. Firstly, in performing an action the participant will likely realize that they are seeking to influence the behaviour of another participant. In turn, this responding participant will also be seeking to perform an action or a re-action with the realization that the other participant is in a similar position. Consequently, each participant is aware that they are attempting to communicate with a conscious person who is opaque, self-directing, and capable of making their own choices according to their own motivations. The first contingency arises through this impasse.[52] Secondly, the choices made by each participant are dependent upon the choices and actions of the other participant. Therefore, there is an 'immanent circularity' endemic to this problematic: Alter's behaviour depends on Ego's, at the same time Ego's behaviour depends on Alter's.[53] From this position of dependency we can see the second contingency.

For Parsons this problem of double contingency can be resolved by a consensus anchored on a shared symbolic system of values. The cultural system maintains social order for a long duration by instantiating a common cultural inheritance. Reciprocal expectations condense into role-expectations in the personality system and the social system. Roles can then become institutionalized through the influence extended by the cultural system of value orientations. Values can be super-added to create expectations of moral conformity and deviance. Mutual orientation between ego and alter is therefore secured by values.[54]

Both Habermas and Luhmann criticize this position as overly reifying culture and operating on a presumption that values are able to perform such a guiding and stabilizing function. Habermas

[52] In cybernetic terms this is the realization that a 'person' can be understood as a non-trivial machine. For such objects the transformation of an input to an output cannot be predicted because (i) the processes that generate the stimulus/response mechanism are fundamentally opaque, and (ii) each input changes the state of the system that configures the processes converting inputs into outputs.

[53] Vanderstraeten (2002: 81)

[54] For a further comparison of Parsons and Luhmann on the theorem of double contingency, see Vanderstraeten (2002). Vanderstraeten raises a common criticism of Parsons' resolution arguing that the normatively shared cultural system relies on the inculcation of normative expectations into participants via education. The unanswered question is what forms of socialization guarantee this value consensus?

contends that the problem is solved by the communicative process itself. Simply put, participants are to be conceived of as orientated towards validity claims raised in communicative action that produces a shared understanding and a negotiated common perspective.[55] Luhmann provides a different resolution. He eschews all prospects of a grand consensus or tantalizing inter-subjectivity.

Luhmann positions double contingency as the point from which social systems emerge. He casts the problematic and its indeterminacy in a positive light. The meaning of *contingent* is extended beyond Parsons' interpretation that indicated indeterminacy and dependency (the first and second contingency highlighted *supra*). Instead, Luhmann draws from Aristotelian modal theory to point out that contingency invokes an observation of the distinction between actuality and potentiality, selection and non-selection.[56] To this disjuncture he affixes the concept of communication. For communication assists in the reproduction of what it requires for autocatalysis, namely the double contingency of participating actors. This double contingency enables and is replicated by the communicative distinction between utterance and information. The recipient observes the utterer and attributes the utterance to that person; however, the recipient also observes the utterer as indicating a piece of information. The form of utterance and information thus correlates with the well-worn distinctions between the indicator and indicated, signifier and signified (Luhmann, 2012: 126).[57]

As a generative dynamic double contingency initiates communication, and this communication inevitably constitutes a social system as a network of meaningful reciprocal selections between

[55] For Habermas' consideration of this issue see both (1996: 139; 1987: 221- 254). Habermas also criticizes the theorem as being exaggerated in prominence and overly individualistic in form. He points out that intriguing though the concept is it can hardly be seen as substantial because it so rarely raises an impediment to actual communication. On the other hand, this insignificance may in fact be a sign of its success. See Chapter 9 of this thesis for a discussion of how this relates to symbolic types of communication.

[56] The concept describes 'something given (something experienced, expected, remembered, fantasized) in the light of its possibly being otherwise; it describes objects within the horizon of possible variations' (Luhmann, 1995: 106).

[57] For a consideration of how communication relates to Ferdinand de Saussure's structuralism, consider Elena Esposito (1999).

participants – which reproduces the very problem of double contingency. Luhmann's solution to the problem is enabled through the mutual implication of the communication concept and the theorem of double contingency. Recognition of the theorem initiates greater sensitivity to the contingency and specificity of a person's actions. Topics are produced which can process contingency as the difference between actual and potential meaning. For instance, the topics of chance, fate, and serendipity are frames by which the unobservable vicissitudes of history can be conceptualized.[58]

This mutualistic constitution means that, in effect, participants engage as black boxes and manage to achieve only a partial transparency for one another and an ersatz level of control.[59] They can observe what they consider are causal patterns towards the behaviour of the other by examining inputs and their corresponding outputs. Patching together these expectations the unobservable become observable entities: the private composition of the system, the latent structures of the system, and so on.[60] These abstractions can then be geared towards the observations of the other - denoted as actions if attributable to the self-selections of the other, and denoted as experiences if attributable to the external-selections of the other (Luhmann, 1995: 104). The theorem is acutely felt and reaches prominence by posing the question: will the partner accept or reject a communication or, in terms of action, will an action help or harm the partner? (Luhmann, 1995: 112)

Hence, we can see Luhmann's highly original resolution to this problem in which an emergent system arises from the reduction of complexity and the attenuation of uncertainty. The significance, for the purposes of this thesis, is that meaningfulness is re-directed away from the orbit of individual

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[58] For a historiographical analysis of 'chance' and 'serendipity' as an expositor of historical events, see Koselleck (2004), and Merton & Barber (2004).

[59] 'Even if they themselves [as Black Boxes] operate "blindly", they proceed in relation to one another more effectively if they mutually assume determinability in their system/environment relationship and observe themselves through this' (Luhmann, 1995: 109). 'Through their mere assuming they create certainty about reality, because this assuming leads to assuming the alter-ego's assuming' (Luhmann, 1995: 110).

[60] Research in the field of second-order cybernetics has argued that a major function of human intelligence is to make the opaque transparent. For example, the identification that another participant has *memory* is a way to comprehend the passing of an unobservable complexity of a system's state to another state. In the same manner, the idea of *learning* enables one to comprehend (make transparent) the changing state of a system that also maintains its self-identity. See Ranulph Glanville (1982) for further details.

interpretation or consensus between participants towards an orthogonal relationship in which communication recursively connects to further communications steered through a self-reproductive process. This means that the meaning of racism, discrimination, and law, is defined within these communication loops and not by reference to higher norms or the subjectivity of actors.

The penultimate argument made by Cotterrell (1998) is that a contribution to socio-legal studies must be propelled forward with reference to symbolic, systematic, or structural constraints. This is not a problem for systems theory. For Luhmann, social life is structured by a multitude of processes including symbolic generalization, system differentiation, and social complexity; however, the idea of consensus and conflict are no longer 'constitutive' features of society; although, they do re-appear as social configurations. Lastly, the fact that 'social rules' are created and re-created continuously is heavily integrated into the theory. The radical 'temporality of complexity' means that the present as it appears and disappears has to re-draw new horizons signifying the future and the past through connections to available communications. Systems theory draws on a tradition of social constructivism expressed most famously in the work of Berger and Luckmann (1966).

The preceding section has sought to establish that systems theory, as developed by Niklas Luhmann, can meet the requirements set to denote a contribution to socio-legal scholarship. Luhmann's sociology advances from the sociological tenets highlighted by Cotterrell providing a profound and original theory of society. The second point made by Cotterrell concerns the capacity of the method to place matters within a systematic context. Systems theory no doubt achieves this in abundance, however it goes further because it can examine methods of thought - such as the relations between general and specific - as tied to epistemic epochs and societal complexity.[61]

[61] Consider Chapters 4 and 5 of this thesis.

IS THE APPROACH EMPIRICAL?

One of the most persuasive arguments for the sociology of law and the socio-legal movement is the centrality of an empirical element in its research. At first glance, this is a demand which an abstract, autopoietic theory of law cannot easily meet. Legal empiricism is habitually allied with the analysis of 'law in practice' as contrasted to 'law in the books'. Systems theory, however, is not constructed upon traditional philosophical categories such as the transcendent and empirical, subjective and objective, or idealism and realism. As a consequence, the distinction between practice and text cannot automatically be reflected in the theory.

Cotterrell (1998: 179-183) contends that systems theory cannot outline the uniqueness or the empirical existence of law. The formalism of the legal code provides limited purchase for understanding topics such as integrity, fairness, justice, authority and acceptability, nor can it explain how procedures and practices relate to social constraints.[62] He also offers doubts as to whether the universality of the legal sub-system can touch upon the diversity of legal perspectives - lawyers in particular courts, claimants and defendants in particular claims, political actors pursing special interests, practices differing across jurisdictions. Empirical perspectives, moreover, must be able to examine variation, continuity, and historical patterns, rather than idealized and abstracted social conditions.[63]

How can systems theory respond to such charges? If offering a diversity of perspectives indicates an empirical dimension, then this may simply suggest that further work needs to be done in deepening the systems theoretical understanding of law. That said, there is a fairly extensive literature in which

[62] This thesis does not accept such claims. Chapters 7-10 consider how systems theory addresses the communication of authority, acceptability, and justice. See also how Schiff and Nobles (2013) apply systems theory to a range of legal debates: legal pluralism, obedience to law, the appeal system, and so forth.

[63] Michael Lobban (2014) expresses a similar scepticism, noting that systems theory is likely to provide a over-generalized and reified perspective on historical development that fails to admit the partiality and particularity of social context.

law as a self-referential, autopoietic system has been deployed to explain legal phenomena.[64] Furthermore, the theory itself is heterogeneous and labyrinthine. There are multiple points of exit and entrance such that key concepts obtain a different prominence dependent upon one's frame of reference.[65] Indeed, Chapters 7 and 8 in this thesis presume that legal argument is recursively distinct from the perspective of a legal decision explored in Chapters 9 and 10 of this thesis. The structural coupling of law to other sub-systems provides a fulcrum from which divergent perspectives can be observed. Chris Thornhill (2011) examines the evolution of constitution as the legal and political sub-systems of society differentiate and become more complex. Gunther Teubner (2011b) examines the multifarious ways in which contract structurally couples the economy and the law.

Luhmann has consistently maintained that the theory is not constructed with the aim of reform in mind. Its foremost purpose is to provide an explanatory grid which can reveal law as a self-referential social subsystem.[66] This non-prescriptive and non-normative component of the theory does not deny an empirical element. It merely demands that the construction of such results openly acknowledge the unavoidable epistemological connection between the research method and its object of analysis.[67] In a similar manner, Foucault's genealogical method undoubtedly produced detailed, empirical insights, but Foucault remained adamant that reform proposals cannot be easily produced because of the entanglement of every observer in epistemic power structures.

[64] Consider Baghai (2015) for an examination of legal doctrinal development in terms of equality law and privacy, or the contributions made by Schiff & Nobles (2004, 2006a, 2013, 2017).

[65] For example, the analysis developed in Chapters 9 and 10 of this thesis focuses on valid decisions and the medium/form distinction. This does not disavow the cogency of the legal code and the system/environment distinction. It simply places them in the background while these other concepts are put to use.

[66] This is a point of dispute. For example, Ralf Rogowski (1994, 2001, 2013) has developed a model of reflexive law on the basis of systems theory which has been influential in the domain of labour law and regulation theory.

[67] Reza Banakar (2000: 275) recognizes this problem for the socio-legal method in which one observes 'a social act ... in which those being studied usually participate with the investigator to produce the final observations.'

Empirical insights that expose the difference between legal practice and legal theory manages to illuminate the contingency of legal ideology. On this condition, systems theory excels. A social science that critically observes social relations 'must be able to *pose alternatives* to the conditions he is criticizing' (Tamanaha, 1999: 23). The neo-functionalism of the theory ensures that diverse social entities can be seen to be performing a comparable function. Judicial decisions can be seen in line with decisions made by other organizations such as banks, schools, and executive bodies. Legal argument as the specialization of second-order observation can be compared to the pricing mechanism in the economy and the discussion of scientific discoveries in academic journals.

Social systems theory is able to bring a high degree of theoretical precision informed by a cornucopia of sociological, philosophical, and scientific sources. The sociological concepts by which law is analyzed attempts both to offer an intra-mural and an extra-mural perspective. The uniqueness of legal meaning is confirmed at the same time as technical categories are identified that provide an analytical grid for social phenomena in general: system/environment, code/programme, medium/form. It is certainly the case that systems theory does not admit an obvious empirical dimension, but it may still, as highlighted above, produce many of the insights available to such methods; however, this is achieved by pursuing a radical and constructivist perspective on the empirical.

In the preceding sections, I have established that systems theory can be considered as a contribution to socio-legal scholarship.[68] We will now turn to explaining Luhmann's systems theory in greater detail.

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[68] Systems theory may also have the capacity to be a critical, value-free sociology. See for example Philippopoulos-Mihalopoulos' developments of a critical autopoiesis (2010, 2015).

AXIOMS OF LUHMANN'S SYSTEMS THEORY

In this section I shall explain the methodology of a modern systems theory approach. In particular I will provide, using a broad brush, a panoramic of Luhmann's profound theory of society. After this point, we will then turn our attention towards Luhmann's unique vision of the legal system. Once achieved, the possibilities of systems theory to highlight the social constellations of racism and legality should be radiantly apparent.

METHODOLOGY

Niklas Luhmann's theory of society is the culmination of a thirty-year project to produce a theory that can adequately reflect the complexity and auto-logical dynamics of contemporary society.[69] The tapestry produced is threaded from a bewildering array of sources and disciplines - ranging from mathematics and biology to philosophy and sociology. He famously used a card-index system (*Zettelkasten)* to construct a theoretical architecture composed of concepts (code/programme, observation, operation, function, communication, medium/form) sufficiently supple as to allow the theory to have many different entry points. Once certain concepts are chosen as theoretical tools, then the remaining concepts are re-calibrated in line with these initial choices.[70] Luhmann's concentration on the complexity of social life has infected his theoretical architecture so that concepts arrange themselves into a complex system with its corresponding qualities: non-linearity, dynamic-stability, emergent properties, and self-organization. Consequently, key concepts acquire a

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[69] Luhmann's *magnum opus, '*Die Gesellschaft der Gesellschaft' has recently been translated into English as the Theory of Society Volumes 1 and 2 (Luhmann, 2012, 2013).

[70] This ingenuity follows Luhmann's opinion that sociology as a discipline grants far too much reverence to the idea of the canonical authors - i.e. the imposing triptych of Marx, Durkheim, Weber - and too little to the imaginative apparatuses each provided. Thus, sociology has been led into the doldrums caused by an arid focus on the key thinkers. For Luhmann, theory should have a certain life of its own (perhaps, one might say an autopoietic quality) that encourages innovation and development. In this vein, Marc Amstutz has moved modern systems theory away from questions of how systems handle external complexity and reflexivity towards co-evolution and inter-penetration - see Kjaer (2012) for an explanation of Amstutz's re-calibrations.

self-referential capacity and become non-reducible to one other: each comprises a scale in the imbrication of an emergent order.

Luhmann envisaged his approach as a combination of “systems theory” and functional methodology (Luhmann, 1995: 55). Lawyer's are certainly familiar with thinking of law as a system in terms of Kelsen's implicative legal norms and rationality; however, Luhmann's use of the 'system' concept is drawn from a completely different intellectual heritage than that commonly indexed under the heading of jurisprudence. We might think of the 'system' concept as a development on a long European tradition of describing the world via frames which play upon the distinction between whole and part or the distinction between universal and particular. Throughout the Enlightenment of the 18th century numerous intellectual endeavours sought to find how the entire world was present in each man. A priori judgments were located that identified the concept of reason, the moral law, or the concept of the State as a guiding distinction that provided the epistemic foundations of a universal theory (Luhmann, 1995: 4-7).

Systems theory is a grand theory which offers a significant paradigm change. First developed in its early stages by Ludwig von Bertanffy the insights of thermodynamics, evolution, and biology were combined into a general systems theory. A difference was established between open and closed systems with the latter representing those systems unaffected by environmental pressure either completely or only through specified channels. In contrast to older conceptual frameworks modern systems theory can manage self-reference as a basic premise. System differentiation is 'nothing more than the repetition within systems of the difference between system and environment’ (Luhmann, 1995: 7). A differentiated system is no longer composed of different parts and relations between them. It is instead composed of a large number of operationally employable system/environment distinctions. If we take a classic utilization of the whole/part frame, then this point will become clear. The *whole* of the human world is composed from its *parts* and *relations*

which are persons and the relations between persons. The issue is how and whether we can sufficiently define either persons or their relations. In the human sciences there is little consensus on how this can be done.

A second issue to which the dexterity of systems theory offers a solution is the fact that mapping the human world (and world more generally) according to one description often precludes different descriptions which may be better attuned to the research object. Discussing the world in terms of gender, class, or *homo economicus* preclude more viable approaches. Thus, we can already predict the likely conclusion of such descriptions when applied to fresh phenomena.[71] The relative poverty of these positions is exposed by their inability to offer surprising or counter-intuitive proposals. Systems theory offers a level of abstraction, however, in which the complexity and self-referentiality of systems are taken into account.

For modern systems theory, system differentiation can only occur on the basis of self-reference. Each element, takes form by reference to another element contained within the same system. To enable this self-organization on the basis of recursive self-reference: 'systems must create and employ a description of themselves; they must at least be able to use the difference between system and environment within themselves for orientation and as a principle for creating information' (Luhmann, 1995: 9). Hence the 'environment' is a necessary correlate of the system concept. The concepts of distinction, self-reference (and other-reference), system and environment, congregate together in a nexus. From this holding further concepts can be generated of description, self-orientation, and information. The environment is necessary because we need to know how closed systems can also be open.

[71] A recent study (Porter and Adams, 2016) springs to mind in which economists 'discovered' that parents are motivated to care for their children in order to receive care in their retirement years. Is it so remarkable that a methodology premised on a model of man as a self-interested and rational agent should produce a conclusion that reasons that actions are motivated by a cost/benefit analysis in an effort to maximise future rewards? Such approaches will uncover the world in their own image, but unlike systems theory they refuse to deal with this self-referential characteristic.

This theory design moves perspectives for research onto different territory which is an equally compelling proposal for socio-legal research as it is for sociology. Interests in regulation and control are turned towards considerations of autonomy and environmental sensitivity. Interests in planning and governance move toward issues of non-teleological evolution. Interests in structural stability (for example, norms) and consensus re-align through dynamic-stability.

The systems theoretic paradigm is anchored by the prominence of the system/environment distinction, which is heavily asserted within all of Luhmann's later work (Luhmann, 1995; Luhmann, 2014). The distinction operates asymmetrically in the sense that only the system side can be marked and only this side is capable of generating meaning. Meaning is the evolutionary achievement and distribution of a system's complexity and possibilities for self-reference. We must refer to the system-side of the distinction primarily and use the environment as a negative which delineates the edge of the system. Importantly, we should not view the environment as accidental and peripheral in contrast to the essential significance of the system; the environment is constitutive of the system.

The system/environment distinction when actualized in the medium of meaning can be observed as the difference between self-reference and external-reference. Luhmann asserts that the self-reference of systems is a key characteristic of modern society. His argument proposes that the idea of a distinction is 'conceptually identical' to the idea of self-reference (Luhmann, quoting Louis Kauffman (1987)). These ideas are conjoined because they emerge from George Spencer-Brown's calculus of forms. Luhmann's reliance on Spencer-Brown's work is an important theoretical direction in his later period, so it is appropriate that I spend some space explaining the conceptual architecture of Spencer-Brown's work.

George Spencer-Brown (1972) developed a theory of how distinctions operate through the creation and subsequent manipulation of a 'form'. A form is a triadic composite of an indicated (marked) space, a separating boundary (distinction), and a non-indicated (unmarked) space. From this insight,

Spencer-Brown was able to develop an innovative calculus that established a collection of manipulations through which forms could be constructed. He manages to tie together the concepts of self-reference and distinction by noting how this idea of form can be both an operation and an observation. A form operates through indication and distinction, for example: the car is red. An observation involves observing the indicated, the distinction, and the un-indicated space. The car is then observed as being both red and also not any other colour.

The system takes the place of the subject in the archetypical and humanistic subject/object distinction. We observe, we understand and we mark all our meaning on the subject-side of the distinction. Furthermore, it is a basic assumption that the object is not able to generate meaning of its own and cannot observe the self as it observes itself. The object remains the environment of the self and of the system. It is this system/environment distinction which accords normative closure and cognitive openness to the legal system in relation to its environment.[72] The closure occurs a second time at the second-order level when system-referential operations observe observations. Here, the system observes the observations of another system and, consequently, observes itself because every external-observation is actualized on the basis of a self-observation, and vice versa. This re-entry of the system/environment distinction on the side of the system engenders operational and normative closure in the system's functional space. This compulsion to self-reference creates recursive systemic structures and when coded through the legal binary ensures that legal/illegal operations can only refer to other legal/illegal operations. Elevated to the second-order level, law observes economics by constituting self-observations based on external-observations. Therefore, each demarcation and observation of the environment, or a complex in the environment (another subsystem), in fact actualizes legal self-observation. We can observe these processes as culminating

[72] Luhmann is very clear that autopoiesis cannot be partial or graduated. The re-entry of the system/environment distinction into itself is the premise of an autopoietic system. However, other commentators within the vein of modern systems theory do not agree and argue that autopoiesis can occur in varied degrees; see for further example: Teubner (1993) and his discussions on hyper-cyclical formations and reflexivity.

in the tautology: law is law. Or, unfolded a little: the boundary and operational capacity of law are defined by law itself.[73]

Secondly, Luhmann's approach is predicated on a functional methodology. Functional analysis allows the construction of problems because it 'uses relations to comprehend what is present as contingent and what is different as comparable.'[74] The relationship between problem and solution generates additional questions and possibilities, stabilities and instabilities; as opposed to simply forcing the dissolution of the problem. Functionality differs from dialectical movements in two important respects: (1) contingency is derived from the complexity of the system and indicates a possibility for actualization which is not necessary; and (2) it holds no prospect for a final resolution or end of history. The functional approach allows the comparison of causal patterns and so provides a second-order observational position whereby we can perceive the relations between relations. In comparing these causal streams, we attempt to obtain information i.e. the norms and factual conditions under which a difference makes a difference. The functional process has the twin effect of generating information through observation of other causalities and also of generating information about the system itself. Every problem must be conceived through the system/environment scheme: therefore, every problem is a system-problem. Functionally specific mechanisms deal with each problematic and each system configures a problem in its own peculiar way through recursive reference to its own communications.[75]

Functional specification does not mean that law has been designated a specific purpose by a higher power, such as politics or society. Function indicates the irreducibility of law to other subsystems and it is the non-identity of law to other systems which marks the functioning of law as different; hence: functional differentiation. Looking at this more closely, it explains the ability for law to be

[73] See Luhmann (2004: Chapter 2) on the 'Operative Closure of the Legal System'. Teubner provides an elaboration of the double closure of law and its possibilities for justice and transcendence in Teubner (2009: 10-23).
[74] Luhmann (1995: 53)
[75] Luhmann (1995: 55-7)

differentiated from its environment, and other subsystems, not just on the level of the code legal/illegal, but on the autopoietic level in which the functioning of law - distinct from its performance - constructs the conditions of its possibility. This is not to say that other systems may not observe the legal code and use the code in its operations. They may very well do so. However, in contrast to the legal system, the code will be used as something substantial on the programmatic level, rather than something concerned with value attributions on the code level. The reason why law itself cannot use its code on the programmatic level is because the system would quickly encounter the paradox of the code and would be compelled to question the legality or illegality of the code itself. Therefore, when observed by another system the complexity of law (as a functionally differentiated system) can only be reduced; it cannot be matched on a point to point basis. The distinctive function of law in modern society is the autopoietic capacity to maintain (stabilize) normative expectations in the face of counterfactual events. For example, even though theft takes place despite the legal norm prohibiting such conduct, law still maintains normative expectations that it should not occur.

Unlike other theorists who begin from a platform of unity or a form of difference, Luhmann wishes to start by theorizing the actualization of questions and answers within the framework of problems. In practice, this means that structures of circularity and recursion are of particular relevance. As I have started to elaborate above, operative closure and the continuation of complexity are the benchmarks of a Luhmannian methodology. As a result of this approach, questions of reference and questions of causality must remain separate (otherwise, they corrupt each other and de-differentiate).[76] The possible problematic generated by each respective question of reference and question of cause cannot overlap without compromising their productive force and usefulness.

[76] This is a distinction heavily emphasized by Luhmann as a misapprehension often held by his commentators: Luhmann (1991-1992: 1421-1423).

The effect of such an exacting methodology is that any arguments which attempt to note the development of legal structures in the legal system must refrain from making assertions as to how certain legal events came about or, perhaps, how law appeared to respond to a change in the political system. Indeed, we cannot make accurate predictions about the future effects of a law because to do so is to reduce the complexity of the present by selecting some variables whilst ignoring others. That is not to say that this cannot be done, but if we do so we run the risk of offering fairly unproductive observations. Such stringency is perhaps why several commentators have called for autopoietic theory to be understood as an aesthetic theory which could be used in a creative and playful way as an artistic development of different knowledge fields.[77]

The technical issues elucidated above sought to situate the idea of a systems-problematic. At this stage, it would be useful to explain the axioms of modern systems theory that will be applied later on, and also to explain law as a social system. This is not a complete description of Luhmann's observations on law. Inevitably, I have placed emphasis on particular features which are productive for the subject matter at hand; however, I do not think that Luhmann would object to a re-framing of certain features as long as it is done self-consciously and with circumspection to its own contingency.

COMMUNICATION, FUNCTION, CODE, AND EVOLUTION

We need to enquire: which societal constellations create the meaning of meaning and the interactive possibilities of interaction? Which units foreshadow the observational possibilities of observation? Here, modern systems theory uses communication as the unit of analysis because it has the flexibility to meet such demands. Social communication is the basic unit of analysis in

[77] Nobles, Schiff and Teubner (2002: 925). Teubner reaffirms this point with the description of systems theory as 'German Neo-Romantic autopoiesis' in Teubner (2008: 839).

modern systems theory. Communication exists as the performance of society and consists of the unity of three distinctions: utterance, information, and understanding.[78]

Luhmann argues that a self-referential system requires a 'discontinuous infrastructure'. By which he means: the underlying units that perpetuate systems of self-reference must be inherently dynamic, composed of distinctions, and capable of attracting other units to produce further differences. These basal units actualize the system through a process of selective co-ordination which in turn allows further selections. Communication is the processing of selection. It forces choices to be made through the application of distinctions whereby something is marked whilst other things are ignored. In order for communication as a process to select, it must be able to draw from a prior selective capacity; and when communications force a selection, further selections in response to this selection are produced. Thus, communications become bundled together and are able to attract further lines of communication. From these selective processes, the complexity of the system can force continuous selective processes which create space for meaning to emerge. Communication is not transmission, for this presupposes the transmitter, the message and the receiver as independent elements; and as should be clear from the above discussion, communication is a far more fluid process comprised of differences playing off differences that are inadequately described if they are considered as only stable quantities interacting with one another.[79]

Therefore, what cannot be communicated cannot be part of a subsystem of communication or a society which actualizes itself by communication. Consequently, thoughts are not coextensive with communication. Thoughts are the elements present in psychic systems of consciousness. Thoughts and communications are not identical or reducible to one another. Strictly speaking they cannot even cognize the existence of each other, except with recourse to their own terms of communication or terms of thought

[78] Luhmann (2004: 89)
[79] Luhmann (1995: 137-139)

But, what can this approach say about change, dynamism and evolution? Furthermore, can a statement of law (for example in a statute) provide an adequate background to understand the meaning of such a statute and the possibilities for its meaning within law and society in general? Observers can make statements about the law of tort or the law of trusts and qualify this action with the admission that this is a valid or sufficient observation at the time in which they are making it, but without a rigorous epistemology the question must be asked whether these observations are sufficiently complex and sensitive to highlight the dormant and dynamic characteristics of a legal area. Inquiries need to be made as to the part played by academics and practitioners in influencing the concretization of laws and their interpretative possibilities in the legal system and in other subsystems of society.

Modern society is functionally differentiated into subsystems of communication, examples of which are: politics, law, economics, the mass media, science, religion, education. Function systems are closed by the fact they are communicatively coded. The code itself is a symmetrical binary that encodes a communication as part of one functional system rather than another. It is symmetrical because meaning can be generated through both sides of the binary. Therefore, any communication encoded by the legal system can precipitate the production of many more communications through reference to the legal side and the illegal side at the same time.[80] In comparison to the asymmetrical system/environment binary distinction, the code cannot perform a stable re-entry on the grounds that this leads to the paradox of the legal system where the code is applied to itself. There are, of course, important functional systems aside from law, such as: (1) the political system encoded by government/opposition; (2) and the economic system encoded by payment/non-payment.

Luhmann explains that society has evolved through several stages of differentiation. This is not to say that this evolution has been in the direction of a categorical finale or an eschatological plane.

[80]'If the question arises whether something is legal or illegal, the communication belongs to the legal system, and if not then not', Luhmann (1991-1992: 1428).

Nor is it stochastic in the sense of an arbitrary or random production of elements independent of structural constraint. The evolution of society is located somewhere in the hinterland of these projections; society perpetuates itself via self-reproduction and the maintenance of dynamic stability: autopoiesis.[81] Indeed, as I have elucidated above, even if the cause and effect ratio is complicated by functional differentiation and self-reference, stabilities have emerged for a period and filter patterns have allowed society to operate within particular differential models. Therefore, although we cannot predict and explain specific events, we can still offer observations on structural drifts and filter-mechanisms.[82] Yet we must at the same time be very rigorous in qualifying these observations and acknowledging their epistemological presumptions.

At the micro level, evolution occurs through the blind interplay between variation, selection and stabilization.[83] Elements refer to the possibilities of variation and selection, which in turn refer to the possibilities of structural formation. Stabilization, on the other hand, brings about the integration and independence of structures within far more complex associations, such as sub-divisions within subsystems, for instance the courts in the legal system or the administration (civil service, local councils, etc.) in the political system. The process of stabilization allows the maintenance of dynamic stability and the continuation of autopoietic reproduction whilst striving to install a unity to the evolutionary process.[84] Translated into the legal context, variation is manifest in the mutation of laws. Selection is the process wherein opinions or facts emerge in the legal system through comparisons between the particular information and the memory of similar situations contained in the legal system. Put more abstractly, this involves the utilization of the redundancy/variety relationship alongside continual actualization of the system/environment (self-reference/external-

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[81] Teubner denotes evolution within a functionally differentiated society as blind evolution: Teubner (1993: Chapter 4).
[82] Teubner (1993: 48-50)
[83] This is not to imply that the theory has a hierarchical shape (micro/macro). Theoretical devices engage as horizontal patterns and, no doubt, strange loops can occur between different sections of the theory akin to those of the legal subsystem described in Teubner (1993: 1-5). The notion of blind interplay is discussed in Teubner (1993: 57).
[84] Luhmann (2004: 232)

reference) distinction. Stabilization emerges through self-observations and self-descriptions. Self-descriptions, for example, can be found in the attempts by jurisprudence to explain the unity of law by posing the question: what is law?[85] Self-descriptions can only function effectively in offering tenable descriptions of unity if they can be found to be in accordance with the actuality of the subsystem. Hence, we can see why natural law was suitable in one period for the legal system (at least in reference to European legal systems), but not to the same extent in other periods.

THE PERSON AND THE SYSTEM

Individuals do not command an *essential* space within modern systems theory, or at least not within the context in which they are habitually presented. Detractors have often lamented this gesture as the marginalization of the individual through the privileging of communication and abstract social systems.[86] They contend that Luhmann cannot provide a sufficient description of society when he is prepared to place the individual outside society's possibilities of operation and communication. Can a theory of society be tenable and cogent if we do not emphasize a person as an undivided and unified agent, or as the major cause and origin of events? In answer, I should like to pick up on the term essential emphasized above. Perhaps criticisms simply attempt theory construction through a different lens; and, in the end, we may come to the conclusion that we are asking different questions and dealing with different problems. Theorists may place importance on securing and understanding the central and essential issues pertaining to society and then, in some cases, proceed to propose a hierarchy or set of power-relations in which these stratifications may be analyzed in order to uncover latent structures and forgotten perspectives. Luhmann does not begin his theorizing within this nomenclature. Instead, his work within modern systems theory ventures to

[85] For a treatment of how jurisprudence relates to the development of law's self-description, see Nobles and Schiff (2006a).
[86] See for example: Teubner and Febbrajo (1992).

understand events and issues through the axioms of functional differentiation, circularity, and contingency.

Luhmann emphasizes the polycontextuality of persons and the functionally differentiated forms of inclusion and exclusion in which they partake. They appear as semantic artefacts within subsystems reconstructed within a system's recursivity and possibilities of communication; however Luhmann still accords the person a *sui generis* totality of an individual consciousness.[87] Individuals may not be empowered to bend social relations to their will or avoid socialization, but they still retain the freedom of their own thoughts which can only be misunderstood and miscommunicated in society. Quite simply, the standard hermeneutical circles have been redrawn as internal divisions of society and as external variations within a person's consciousness. Traces of individuals can be found like footprints in the system. There is little point trying to find these persons or ascertain where they came from. Alternatively we might try to understand how these footprints are formed in the legal landscape and how these formations have varied at different times.

These footprints in the system must be interpreted with recourse to society's semantic arrangement. As a result, if the semantic composition of society changes then the artefact (that represents the exclusion of the person) alters too. Luhmann explains that society can be theorized as three distinct epochs: segmentation, stratification, functional differentiation. The transition from, and the particularities of, stratification through to functional differentiation are analyzed later in this thesis.[88] When society evolved from one anchored by stratification in favour of functional differentiation, the person was reconstructed under the auspices of subjectivity within the functional sub-systems. In the legal system, this would be in the terms of subjective rights. Subjective rights signify the structural coupling (or interpenetration) of the legal system and psychic

[87] See Luhmann (1995: Ch. 7).
[88] See Chapters 4, 5, and 6 of this thesis.

systems.[89] It is through the concept of subjective right that the legal system creates a space that is expressly fine-tuned for (in the expectation of) perturbations that are generated within its environment i.e. individual psychic systems. This high level of 'personalization' certainly disturbed the legal system, encouraging conditions with a far higher level of variety than law, hitherto, had entertained. Forms of legal argumentation became increasingly sensitized to the communications generated in reaction to these receptive channels and, as a consequence, the complexity of possible legal claims and the capability for variety in selections made by legal communications ballooned.[90]

For example, the division between the person and the subsystem (in particular, the political system or the legal system) is recognized in the general principle that admissions obtained under torture do not constitute reliable expectations for the system in relation to its environment, which in this case is the individual's thoughts and intentions.[91] In essence, the system self-observes and comes to the conclusion that it cannot trust its environment; in theoretical terms this means that operations stabilize and condense the system's reliance on expectations regarding the environment. The mechanisms which allow the system to trust or mistrust its environment influence the formation of selectivity and the openness of the system to rapid change in situations where double contingency is present. If the system considers the trustworthiness of its environment in relation to the riskiness therein, then it does so through the construction of 'specific selective sensibilities' that create greater possibilities for action. Trust becomes a very sensitive apparatus that is constituted by choosing to reject mistrust and in doing so sensitizes itself to occasions of mistrust.[92] Mistrust rarely causes a re-constitution of its elements through encountering reasons to trust; mistrust relates itself towards trust through incremental increases of reasons to trust from the consistency of environmental expectations. Gradually the system's norms learn to trust through reference to the

[89] See Pierre Guibentif (2013) for the permutations of legal rights as a medium allowing interpenetration between consciousness and the legal sub-system.
[90] Luhmann (2004: 269-271); Luhmann (1990: 140-141).
[91] Verschraegen (2002: 114).
[92] For an explanation of trust in terms of systems theory, see Luhmann (1979).

cognitive recognition of environmental actions. To take our example again: on a structural level, it is not the action of the victim in itself which instigates mistrust, but the conceptual irritations generated by the term torture and the reference field which it inhabits.[93]

At the level of functional systems, personalization is internalized in different ways dependent on the specific system and its own internal capacity. In the political system there are voters and citizens. In the legal system we have litigants, victims and other subjective-formations dependent on sub-divisions of the system. Our personal histories become episodes in which we materialize within the performance of each system as semantic artefacts, only to disappear as the event itself disappears. In a stratified society the person was in a situation of 'total inclusion', whereby a person's social status and possibilities were primarily and nearly totally derived from the social hierarchy to which they belonged. Exclusion from the stratified order (or the *polis*, for that matter) was exclusion from society. However, when the dynamic-stability of society changed, so did the person; and as society fragmented, subjectivity (and subjective rights) became a compensation for the loss of full inclusion.[94] In a functionally differentiated society, such as ours, persons can only be partially excluded from all subsystems and can no longer belong completely to any.[95] Hence, through the vehicle of subjectivity inclusion becomes a problem for a system which is endlessly productive; and for the individual, there is a crisis of identity that leads to feelings of anxiety.

The concept of the subject has metastasized through the internal norms of the legal subsystem culminating in the medium of constitutional rights; a similar occurrence created the form of the

[93] Luhmann (1995: 127-129). 'In its self-referential mode - that is, with the help of legal concepts - law must reflect on its own riskiness', Luhmann (2004: 473). Concepts compound distinctions for easy digestion by the system and create the conditions for the dissemination of a larger variety of decisions. Just as with rules, concepts go through a dual process of condensation and confirmation as they go through repetition. Through repetition their meaning is enriched because memory of past-application links with productive new strands to form decisions and other chains of meaning: Luhmann (2004: 337-339).
[94] Verschraegen (2002: 106).
[95] Braeckman (2006: 69). Braeckman notes that Luhmann observes the major shift occurring from a stratified society to a functionally differentiated society as occurring within the Eighteenth century; however, Luhmann's descriptions are primarily concerned with Western civilization and so it is a point of contention (always productive) whether this observation extends to a global level. Luhmann (1990: 221) does however note the phenomena of partial-exclusion, especially in relation to the political subsystem.

contract which emerged as uniquely different formations in the economic subsystem and the legal subsystem. Both the constitution and the contract are instances of double-sided forms. They signify the conduits which enjoin and separate the above subsystems. But, as always with Luhmann, they perform a duplicitous role. For on one hand, whilst they provide a channel by which each system can generate 'waves of resonance', they also prevent systems from colonizing other systems (personal and social). Constitutionality, as it is referenced in legal self-observations, in all its multiplicity (civil rights, the rule of law, elements of substantive justice, legitimate expectations - public law *in toto*) announces the legal system's observations on this theme. Constitutionality becomes the vehicle by which the political system and its ambitions to dictate and colonize are pre-empted. For instance, laws relating to freedom of expression and religion exemplify the legal system observing the political system's tendency to colonize the individual, the mass media, religion, science, art, etc. The notion of the state also provides an instance of a double-sided form between the political system and the legal system.[96]

On the societal level, this concern for colonization is manifested in a mechanism to prevent systemic corruption and de-differentiation. Human rights may be emerging as the social mechanism which prevents functional systems from regressing. Luhmann appears to hint that this may herald the emergence of a new functional system that arbitrates the inclusion and exclusion of the individual in society. Terms like 'human dignity' certainly employ a very high degree of variety and openness to change. Furthermore, when a theory establishes itself by referring to 'inalienable' rights we are seeing a reference to the environment of society, in that inalienability is a distinction that cannot be easily distinguished by social communications because it seems to come from the material world.[97] Although I will not specifically focus on this societal-innovation, I would like to note two points. Firstly, there is a very real need for human rights to be explained sociologically and more fully with

[96] For an examination of this relationship in terms of law see Luhmann (2004: Chapter 9); and in terms of the welfare state, see Luhmann (1990).
[97] Verschraegen (2002: 270-271).

reference to society. At the present moment, they tend to be conceived only as political and legalistic themes. Secondly, it is certainly ironic that human rights on the societal plane may be evolving as a mechanism to stabilize the functional differentiation of subsystems, since as legal concepts they have led to an unprecedented level of juridification of societal issues.

CONCLUSION

In summary, we have explained the position of the person in relation to a social system by emphasizing the difference between social and psychic systems. Persons are identified as fragments within the operations of each subsystem. Moreover, we have begun to analyze the complex web of interactions between social systems and their environments, noting how the possibilities of such interactions change in line with societal transformations. In this chapter we covered how systems theory can be understood as a contribution to socio-legal scholarship. Some of the main axioms of the theory, especially those relevant to this thesis, have been critically explained. From this position we can now proceed to apply systems theory to uncover the socio-genetics of discrimination and racism in modern society.

CHAPTER 4 - ANTERIOR CIVILISING SEMANTICS: ON THE WAY TO RACISM

Mead: I was speaking in those days about three things we had to do: appreciate cultural differences, respect political and religious differences and ignore race. Absolutely ignore race.

Baldwin: Ignore race. That certainly seemed perfectly sound and true.

Mead: Yes, but it isn't anymore. You see, it really isn't true. This was wrong because—

Baldwin: Because race cannot be ignored.

(Baldwin and Mead, 1974: 14)

INTRODUCTION

In this chapter Luhmann's theory of a functional differentiated society is utilized to argue that discrimination can be connected to the development of major changes in the way that society describes itself. The form of societal differentiation prior to function was based on the stratifications of status.[98] These were distributed by significant divisions within society between different social roles and institutions, such as the court and the country. The work of Norbert Elias in the *Civilizing Process* is utilized to show how developing theories of manner, courtesy, and civility provides a social precursor to how discrimination operates in modern society. This analysis is presented as both an elaboration of the social context of discrimination in terms of social esteem and respect, and as a prelude to discrimination in the modern world which must be understood as an emergent type of communication that crosses functional lines. A number of key limits highlighted in Chapter 2 are retrieved and employed so as to re-describe the presumptions and difficulties of both moral analysis of discrimination and racism, and sociological approaches to racism by reference to societal evolution. The chapter does not provide a detailed historical study in terms of institutional

[98] Jeremy Waldron (2012) gestures towards a socio-genetics of discrimination as explained in Chapter 2 of this thesis. This present chapter is a more theoretically organized approach to the topic.

development or the grand ideas integral to discrimination. The intention is simply to identify key characteristics of discrimination and abstract these into a scaffold that highlights a range of functionally comparable scenarios. By doing I hope to be able to offer a broader and more innovative perspective on the social reality of discrimination.

A RACIAL DILEMMA

The dilemma encountered by James Baldwin and Margaret Mead lies at the heart of the discrimination debate.[99] How can and how should race be handled by communication? When is race relevant and irrelevant? What is and is not racism? The answer oscillates: race must not be relevant, but it cannot be ignored. It is informative and uninformative, visible and invisible, disruptive and irrelevant. For those engaged in ethical reflection the dilemma may be handled by a more rigorous schematization and the adoption of various strategies, for example: by defining the limits of racism and pointing out errors in its deployment, or by balancing the prohibition of discrimination and the promotion of positive action; however, it remains to be seen whether these resolutions will survive or if they are sufficiently persuasive for the vast majority of the public, which is of course the audience who must be convinced if the equality movement is to achieve its aims.[100] This indelible and paradoxical communication of race is worthy of further scrutiny.

[99] With reference to the Deleuzian themes developed in Chapters 5 and 6, we might say the dilemma *contracts and relaxes at the heart* of the debate.

[100] The dilemma is avoided through the manipulation of various distinctions between structural racism and individual racism, historical racism and present instances of racism, unconscious racism and conscious racism. Rejoinders appear claiming that racism as defined must be blatant and predicated on individual belief; mere unfortunate outcomes or cultural insensitivity do not meet this definition. A similar balancing act is provided by those theorists who define racism in terms of an individual's cognitive, volitional, or behavioural capacities: for example, Garcia (1996) who finds that the volitional ill-will of racism seeps through into institutions by a connection to the founders, or the will of present members. The imagination of these solutions strikingly mirrors that proposed in the great debate over aristocratic gentility. These concerned whether virtue was

Focusing on this dilemma will elucidate the social basis for discrimination while utilizing themes and limitations that resonate within anti-discrimination scholarship, specifically: the morality of discrimination, the disconnection between legal categorizations of discrimination and its social basis; the linkages between perception, prejudice, and racism. Indeed, by focusing on the indelibility of race we search within a context from which these questions radiate like spokes on a wheel. This dilemma is not a factor to be discarded; it is a paradox to be embraced.

For modern systems theory the isolation of a paradox calls for a closer analysis of its communicative structure. Systems theory is sympathetic towards the rhetorical tradition whereby a paradox was a device to provoke new lines of enquiry, as opposed to a more recent understanding where it signifies a logical fallacy requiring the application of greater analytical rigor (Luhmann, 1994:26). Paradoxes occur when two seemingly incompatible positions are held together by communication such that an oscillation takes place between the two. Spencer-Brown (1972: 69ff, 57) phrases it as an oscillation between the marked and unmarked sides of the form.

One type of paradoxical formulation of particular relevance for this thesis is the 'unresolvable indeterminacy' (Spencer-Brown, 1972:57) produced when a form re-enters a form. This uncertainty arises in self-referential systems when the difference between the system and the environment is observed from within the system. Another way to grasp this indeterminacy is to notice that such a re-entry generates an infinite regress in which the re-entry can occur *ad infinitum*.[101]

There are two structural arrangements which may hold the key to understanding the dilemma of race. Firstly, we must consider the relationship between the interactive order and society. In a broad

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allocated by birth or by performance, with one such resolution being that virtuous parents bred virtuous children (Saul, 2011: 171-176). Such comparisons are informative of the social basis for discrimination.

[101] A practical example would be the way that the distinction civilization/nature re-enters on the side of civilization as natural and unnatural civilized practices. See Luhmann (1993) for further examples drawing on Aristotle's *Politics*. The re-entry of the form into the form is a common occurrence in relation to identity. For example, the distinction between female and male can re-enter on the female side of the form as femininity, and the re-entry can occur again to produce additional semantical formulations such as 'femme' and 'butch'.

sense, this distinction mirrors the micro-macro debate within sociology in which one tries to consider how the sociology of micro events, like Goffman's conversational analysis, relate to macro-level structures, such as class, ideology, and power. Following the discussions in Chapter 2, what we are looking for is how this distinction maps onto the difference articulated between the individual and the racial group, or the actions of an individual and racist ideology. Secondly, the notion of self-description also corresponds to this dilemma. Self-descriptions operate as observations which specify in their unifying gesture a world of known and unknown quantities. These descriptions propose a unified vision of all the many varied parts of society in the shape of grand narratives, myths, cosmologies, and ontological frameworks (Luhmann, 2013: 175- 180). As we will see below, however, they also encounter a dilemma in which the paradox of holding together a unity alongside its particulars is dealt with either effectively or ineffectively.[102]

Before we follow this course, a question must be posed: why are we not reflecting upon the socio-evolution of race *per se*? One would think that a methodology which considers race in its socio-genesis and its manifestation within specific institutional arrangements - slavery, apartheid - may be more beneficial to explicating the social basis for racism and ultimately discrimination. Is the proposed method involving difference and paradox not likely to provide a poorer refraction of the intimate experience of race within the strictures of a grand theory? Can modern systems theory avoid the fate of Parsonian and Marxist theory in which the research framework may be thought to fail to apprehend its object of study?[103] Systems theory can surmount this hurdle because the theory adheres to Kant's injunction that an enquiry should focus on the *conditions of possibility*. The theory incorporates second-order observation into its corpus.

[102] Nobles and Schiff (2006a) provide an analysis of how jurisprudence has evolved and contributed to the self-descriptions of the legal system.
[103] This statement does not intend to discredit such approaches. It simply suggests that the tools should match the job at hand.

The conceptual web of modern systems theory provides tools of sufficient suppleness and generality that a deep understanding can be gleamed of phenomena if the objects under scrutiny are aligned with the most appropriate concepts, in the circumstances of this thesis: paradox, system differentiation, and self-description; moreover, with reference to Chapters 5 and 6 in particular, systems theory is supplemented by some insights offered by Foucault, and Deleuze. The additional input from these authors strengthens the methodology employed in this thesis because they provide significant theoretical advances and socio-historical illustrations while maintaining a close sensibility to a philosophy built on difference and paradox.

A review of the literature in Chapter 2 showed that defining racism and presenting a consistent moral rationalization of its structure has run into difficulties. It is suggested that the elusiveness and inconsistency encountered in such forays is indicative of its communicative structure. As such a valuable approach may be one which is wider in ambition and is targeted at the socio-historical conditions which enable such elusive and apparently inconsistent qualities to be fully appreciated. By examining the evolution of the interaction/societal relationship and societal self-descriptions this chapter will illuminate the operational conditions of the race problematic; however, prior to the application of these concepts we need to explain and justify their employment, especially in the context of this thesis.

INTERACTIONS AND SOCIETY

Luhmann provides a systematization of the micro-instances of sociality by leaning heavily upon the insights developed by Erving Goffman in his descriptions of interactive orders.[104] For Luhmann, the interaction system is one of the differentiated systems of modern society - along with functionally differentiated sub-systems, and organizations. Within Luhmann's oeuvre however, the interaction system is rarely considered with the thoroughness applied to other systems; partly, one suspects, because Erving Goffman provided such a rich and textured discussion of their various manifestations, but also because he considered them of relatively minor importance in the context of constructing a grand theory of society.[105] Interaction systems are of relevance to the study of discrimination for several reasons.[106]

Firstly, such systems are differentiated episodes of communication on the basis of presence.[107] Communications that indicate presence are those which are relevant for the often short-lived autopoiesis of the interaction system. The idea of presence drives the connectivity of operations in the system so that only those contributions attributed to presence can be recognized within the system. In practice this takes the form of face to face interaction, turn-taking in conversations, playing games, business meetings, crowds in public spaces, passing in the street. There is a huge spectrum of contexts in which these micro-systems can take place. Absence can also become a topic through re-entry of the present/absent schema into the system on the side of the present.

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[104] For a recent consideration of Goffman's writing on stigma in the context of discrimination, see Solanke's (2017) argument that stigma provides a better set of indicators for discrimination than other grounds.

[105] Luhmann (2013: 132) refers to interaction systems as rather minor and ephemeral in terms of societal evolution: 'The major forms of societal subsystem float on a sea of constantly forming and dissolving minor systems'. That may be true, but this thesis suggests that they play a significant role in explaining racism.

[106] For a discussion of how the legal sub-system relates to the interactive order, see Luhmann (1981).

[107] Presence solves the problem of double contingency by assuming that every contribution in the context of the present situation is made by present participants. For an enlightening discussion of this difficult topic, see Vanderstraeten (2002).

There is an affinity between the indelibility of race and the fact that interaction systems establish their boundary on the basis of presence. It is this indelible and unavoidable quality of race which saturates face to face interaction. There seems to be a heightened sensibility to such personal characteristics in the presentation of the self, which means that actions and inactions can be immediately attributed to the presence of the characteristic.[108] From the perspective of communication this points towards a greater probability of the difference between information and utterance being understood. The distinction between information and utterance as a component of communication can only emerge if some form of *intentionality* can be located behind the utterance in order to produce information. It is the processing of the difference between the ego and alter-ego which is required for communication to take place; and because of the salience of race this seems to intensify (i) the level of inadvertent communication and (ii) the uncertainty as to whether race should become a factor within the interaction.[109]

Secondly, these micro-systems through their specificity and diversity comprise a crucial arena in which discrimination occurs. Disrespect and even violence may arise, and perhaps with some frequency, in the way individuals treat one another face to face: in the interactions between vendor and buyer, employer and employee, people in public spaces, all the variety of unconscious sleights that can take place in the close confines of life. Evidently, the decisions and programmes of organizations matter a great deal too. Decisions that choose to hire and fire, distribute income, or de-bar members on the basis of particular personal characteristics.[110] Nevertheless, what the

[108] Race is readily available as an explanation for action or inaction; one might suggest that it performs a similar role as the semantics of chance, serendipity, wit, and miracles because it explains causalities and enables further communication on a topic through securing a connection between variables. Chance, for example, is used in historical research as a 'pure category of the present' non-derivable from past causes or future expectations so that, for example, the fall of a city or the beginning of the First World War can be explained by a chance encounter (the murder of Franz Ferdinand) rather than as a series of unfolding causes (Koselleck, 2004: 115).
[109] The potential racial dilemma of experience, in the terms of the interactive order, should be familiar to everyone. There is a great deal of uncertainty when we are ‘jolted out’ of our normal surroundings, meet new people, see new faces, etc.
[110] For a consideration of organizations via systems theory, see Seidl & Becker (2005).

interactive order holds for our enquiry is a relationship with society in which communications can take flight from the micro-confines of the interaction into the macro-setting of society. It is here, this thesis argues, that the semantics of discrimination forms a linking institution between interaction and society. It is this bridge traversed by moral communications, mediated communications, and artistic communications that consolidate into the semantics of racism and, finally, discrimination. In chapters 5 and 6 this notion of the interaction system is extended to encompass an emergent system predicated on a 'common presence' available to functionally differentiated sub-systems: publicly mediated communications.

By bringing these notions within a common functional framework it is plausible to argue that moral education and the history of manners, as they circulated in a stratified society, performed a comparable function to the semantics of racism in modern society. With this equivalence in mind, the issues faced by each can be compared and contrasted so as to expand our understanding of discrimination as a social phenomenon. And with this perception, we shall address a key research problem for this thesis: what is the social basis for discrimination from a systems theory perspective?

This section has explained Luhmann's concept of the interactive order and indicated its relevance for discrimination. The next concept to be explained is that of the self-description of society. This will go towards providing the analytical grid for proposing that a history of manners and social esteem is a precursor to modern racism.

SOCIETAL DESCRIPTIONS, SEMANTICS, AND SOCIAL STRUCTURE

This section seeks to apply Luhmann's concepts of self-description and social semantics to illuminate the communication of racism. In order for this analysis to be effective some explanation of the meaning of these key concepts needs to take place.

Self-descriptions articulate 'imaginary constructions of the unity of the system that make it possible to communicate *in* society, if not *with* society, at least *about* society' (emphasis in original, Luhmann, 2013: 167). The unity of society in all its diversity is visualized within a scheme that steers society down particular pathways. Just as racism is bedeviled by paradox so too is self-description. The presentation of a *unitas mulitiplex* encounters an 'unresolvable indeterminacy' when we accept that a system both (1) generates the difference between system and environment, and (2) orientates itself by observing the difference between system and environment (Spencer-Brown, 1972: 57). The paradox of unity and difference can be avoided through imaginary constructions within societal descriptions that conceal the issue, for a time at least. These imaginary constructions conjure origin myths and narrative tales of genesis that unfold the paradox and skillfully conceal its indeterminacy through distinctions between hierarchical levels, the visible and invisible, and the civilized and barbaric (Luhmann, 2004: 64).[111] This emphasis on social imaginaries also aligns with features of racism which we wish to illuminate.[112]

Self-descriptions persist over time by reference (1) to particular texts which can be re-read by others in a variety of different circumstances, and (2) through denotations that circulate the description, such as the labels - Greeks and barbarians, Christians and heathens, civilized and savage (Luhmann, 2013: 175). Texts are created and recognized through repeated use, co-coordinating self-

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[111] This imaginary *tunnelling out* from the contradiction caused by re-entry is clarified by Spencer-Brown (1972: 58-62). Luhmann (1988: 159) expounds such paradoxes in relation to the self-description of the legal system: 'the paradox, like the sun, passes underground and reappears in the future'.

[112] For Omi & Winant (1994) the hallmark of racism is the reproduction of structures of domination supported by an ideology based on essentialist racial categories. A key aspect is the assertion of this ideology against reality, and the maintenance of belief despite evidence to the contrary.

observations with guidelines that Luhmann labels as 'semantics'. Specialized semantics are created through which orthodoxies and heterodoxies are constructed by seasoned experts who derive social prestige via delineating between correct and incorrect interpretation of such texts.[113] The constructing of orthodoxies attributable to professionals and experts is intriguing because they enable the creation of concepts and counter-concepts. The fact that experts *divine* societal semantics provokes counter-currents, especially when textual interpretations consolidate into lessons about taste and morality.[114] One can see how this dynamic has a long history: Martin Luther and the Reformation; the anti-courtier literature criticizing the apparent expertise of the courtier; the cult of the sublime advancing against the professionalization of art criticism; the mobilization of Romanticism against the rationality of the French Enlightenment; and, more recently, the protestations of political correctness against the *perceived* liberalism of mainstream experts and a socio-political élite.[115] A few of these illustrations will be detailed in order to expand on precursors to the semantics of racism in modern society.

Social semantics develop as a repository of articulated experience that contains the conditions of possible events. They comprise the structures of society by forming circulating conceptions, interpretations, and condensations around societal descriptions.[116] These structures can be understood as generating expectations which can produce surprises (information) and disappointments from which learning or not learning may follow. Crucially, these structures enable the anticipation of possible events, but not their necessity. And so semantics can operate as a type

[113] We should note the functional similarity between self-descriptive texts with the idea of the 'market' in the economic subsystem and 'public opinion' in the political subsystem. Each of these institutional forms enable the co-ordination of self-observation. In chapters 5 and 6 this textual medium is transformed into a *public* medium from which racial forms are extracted.
[114] The ritualized aspect of such communication is very important. This factor will be relied upon in Chapter 5
[115] The latter example embodies three intriguing factors: a clash of values between freedom and equality, the involvement of *perception* and communication, and the dominating force of the mass media in generating societal self-descriptions (see for this last point - Luhmann, 2013: 314 ff). These factors should be kept in mind as this chapter and the thesis progresses. They are of crucial importance for chapters 5 and 6 of this thesis.
[116] In a limited sense, this is comparable to how conceptions circulate around a concept. Although, as Esposito (1996) notes, systems theory does not share the hermeneutical assumption of a 'text' with a univocal meaning around which a multiplicity of interpretations can be organized.

of linking institution between the societal level (self-descriptions and societal differentiation) and the interactive order (events).[117]

In the following sections we see this relationship, between the societal and the interactive, play out in a variety of different socio-historical scenarios; however, before this begins an attempt will be made to explain how society relates to its environment by reference to a *world-concept* and, secondly, we will re-frame modern racism in terms that are comparable to the history of manners and esteem discussed later in this chapter.

THE WORLD

The idea of the world is not a prominent concept in Luhmann's theory, but it is pertinent to a discussion of discrimination. In this chapter, references to the world appear frequently because it has been repeatedly evoked alongside instructions on moral education and descriptions of social hierarchy. A remarkable number of permutations have occurred: the cosmopolitan as a citizen of the world, the *demi-monde* on the fringes of respectable London society, a person of the third world, a member of Hume's 'conversible world'.[118] Some of these will be relied upon later. Luhmann considers the idea of the world in relation to his concept of communication; its theoretical relevance will be explained below.

For systems theory, communication divides the world producing a caesura saying what it says, and not saying that which it does not say. The world 'is only that which endures the cut produced by communication' (Luhmann, 1994: 25). The world shadows communication as that which cannot be communicated. Consequently, to speak of the world means to communicate according to a paradoxical form that attempts to unify communication and non-communication; inevitably the

[117] Luhmann borrows the term semantics from Reinhardt Koselleck who pioneered a historical approach based upon unearthing concepts (constitution, *Bildung,* revolution, utopia, crisis) and counter-conceptual formations (man/woman, public/secret). Koselleck's idea of a historical concept is similar to Laclau's identification of the 'floating signifier'. For a useful survey of Koselleck and Luhmann, see Anderson (2003).
[118] Consider Gurstein (2000) for an explication of the 'conversible world' in the 18th century.

communication of this paradoxical form leaves behind the world, which remains fundamentally incommunicable. 'The thematization of incommunicability in communication can then also be viewed as an indicator of the fact that the world is carried along' (Luhmann, 1994: 27). There are many objects which cannot be captured by communication without encountering this paradox - perception, silence, consciousness, the blind-spot of observation, materiality. Whether communication takes place through the disseminating media of orality, writing, or telecommunication, this aporia is unavoidable.

So how does the thematization of the 'world' as the incommunicable differ from other themes that focus on materiality or perception? The idea of the 'world' signifies the incommunicable as juxtaposed to the communication of society *in toto*. Following modern systems theory, we observe that society is functionally differentiated into sub-systems. Law is one of these sub-systems; however, we know that - and law certainly knows - it operates in an environment composed of other systems, persons, plants, animals, and other things. It admits this by adjusting its structures to accommodate the environment and by doing so thematizes, explicitly or implicitly, the *silence* external to it. Well-known examples are the limits of justiciability of politically charged issues, or the unsuitability of granting a legal remedy (for example, an injunction) where it would be impossible to implement. Law clearly acknowledges the limits imposed upon it by its environment. On the other hand, this conception of the world suggests a *silence* more encompassing and more complete. The *silence* of the world indicates the incommunicable outside all the possibilities of social communication. The world is a 'counter-image which society projects onto its environment, or it is the mirror in which society comes to see that which is not said is not said' (Luhmann, 1994: 33).[119]

This is not as grandiose an idea as it may seem. The semantics of anti-racism is shot through with such references: *give voice* to the voiceless, *include* the excluded, *make visible* the invisible, *expose*

[119] It should be no surprise then that mirrors, and other such metaphors, often indicate the attempt to map the world through a conceptualization of society.

inequalities, *unearth* the roots of racism, *reveal* the false consciousness. Explanations for the social basis of racism are also communicated in these terms: *in reality* anti-immigration rhetoric is a cry for help *against* economic forces, a *protest against* the dissolution of communal values and an idealized past no longer present; racism is an ideology that *resists* evidence *to the contrary*; racism is a modern ideological phenomenon that *mirrors* the emergence of European nationalism in its search for origin and unity;[120] racial prejudice is a *defensive* attitude meant to *preserve* white power.[121]

The steering component of self-descriptions is also evident such that the social basis for racism operates through *blatant* and *exemplary* instances.[122] At the operational level the connectivity of communications into tight couplings and automatic transmissions signifies this systematic self-steering: the recognition of race opens up a whole web of expectations about the person, as racism involves the insistence of an essential and a natural series of qualities read over onto the individual on account of their racial group (i.e. that which cannot be changed by communication).[123] This associative quality is also communicated on the observational level through the re-drawing of the past and the future by (i) the equality movement with the past involving racial injustice and the future involving emancipation, and (ii) by racist ideologies who provide a historical and eschatological narrative to suit their ends.[124]

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[120] Hannah Arendt (1958) pursues such a thesis. Her argument comes closest to that of this chapter by suggesting that a precursor to racism resided in the insecurities felt by the 18th century French aristocracy as they struggled to associate and see the whole of society with the Monarchy and Clergy. Threatened by the rise of the Third Estate there was an *assertion* of aristocratic genealogical origins. Lawrence Stone (1967) tells a similar story when he notes the *assertion* of aristocratic rights prior to the English Civil War *against* the rise of a mercantile class.

[121] Michel Weiviorka (1995: 1-34) provides a useful summary of the various historical, psychoanalytic, ideological, and mythical explanations for racism.

[122] There is a consistent critique in the literature that racism must not be over-inclusive, but confined to glaring examples. See Chapter 2 of this thesis for the extraction of this theme.

[123] Racism is 'the idea of (some sort of link) between the - physical, genetic or biological - attributes or heredity of an individual (or group) and the intellectual and moral characteristics of that individual (or group)' (Wieviorka, 1995: xvi).

[124] This associative line may also be present when the end-point of racism is located in the concentration camp.

Unlike other accounts of racism, this reliance on essence, nature, and association is not locked within a singular site of reference. It is not indicative of a scientific mentality or prejudiced state of consciousness. The semantics of discrimination resides in the communicative continuum of society and as such indicates relationships between systems, the connectivity of communications, and the relationship of society to itself. In part, the semantics of discrimination is communicated through unifying the communicable and the incommunicable with reference to a self-description of society.[125] This conception of the world should be kept in mind because it appears, repeatedly, as a feature in societal self-descriptions. Through the invocation of such references to the world in the semantics of race and discrimination we can see the relevance of self-descriptions to this type of communication.

THE STRANDS OF DISCRIMINATION: RACISM

It is the claim of this thesis that systems theory can expose certain communicative strands that provide a medium from which racial forms radiate. As a consequence, an original explanation for racism can be put forward. Other theoretical approaches do not have the resources to either outline the socio-genetic influences or conceptualize its genealogy. Through an analysis of selective socio-historical examples in which these communicative strands have congregated, this thesis hopes to produce several counter-intuitive precursors to the modern communication of racism. By explaining racism through the dynamics of societal development and differentiation a more complete understanding of racism is on offer. Before we delve into such an examination, we need to clarify that these strands are visible within what we would consider to be a racial context that is further

[125] Taguieff (2001) argues that racists and anti-racists are locked within a system of conflict and mutual observation. This thesis agrees that there is some truth to this insight, but instead we seek to establish the social basis for discrimination in terms of how communication schematizes the assertion of incommunicability, contradiction, and reality. For as we know, reality is communicated as that which resists and asserts itself as communication against communication (Luhmann, 2000b: 76-95). Ralf Rogowski (2013) suggests that labour relations are perpetuated as a social system orientated on conflict with a code of negotiable/non-negotiable delimiting the boundaries of the system.

recognized as such by anti-racist and racist communications. This will be developed with greater cogency, with the aid of more finely tuned theoretical tools, in Chapters 5 and 6; however, at this stage it may be salutary for the reader to provide an illustration as to why the social basis of discrimination can be located in the communicative strands of morality, artistic sensibility, and some of the restrictions on communication media. For it is within these system references that the qualities of communication highlighted in the previous section are apparent.

Race is a public issue. How this can be conceptualized is formalized in Chapter 5. Race arises in what we might consider as the public space, public sphere, or public consciousness as a feature of an object, which is sufficiently pliable to capture certain communicative strands. One such object from which race attaches itself is a notion familiar to discrimination lawyers: the polyvalent notions of Labour and Work. Each of these terms have a rich sociological and philosophical heritage; moreover, even amongst those scholars who may consider themselves black-letter employment and discrimination lawyers there is an appreciation and interest in the wider ramifications of what these grand terms may indicate. Their inner complexity enables the various strands and conceptualizations detailed above to be brought together. How do these concepts manage to implicate race and yet also provide a pivot upon which societal mechanisms can hinge?

Firstly, there are well acknowledged empirical examples in which race is implicated via employment and these points, in turn, draw upon the various strands of communication emphasized above. The separation of certain types of work and distinctive ways of doing work are often brought to life and communicated through racial inference. This is not only accepted via statistical analysis, but also through the generation of social stereotypes and sundry anticipations that are at work, already set in motion, to produce assumptions of race alongside certain occupations, roles within organizations, and also ways of approaching work. The moral component of work is recognizable to all. Work is a theme through which people communicate their self-respect and self-esteem. It provides a moral

identity for a person and a method of evaluating others. The fact of being employed or being unemployed is a status that signals allocations of respect and value. There are also notable second-order moral formations concerned with work in which a person's ethos to work, or a person's work ethic are well-known topics of moralizing communication. Anti-discrimination discourses and racist ideologies offer reflections on the nature of work and the strategies required to address ethical dilemmas of race within different sectors of the economy and the workplace itself. To be clear, within Luhmann's description of moral communications, morality and ethics are not the special preserve of celebrated philosophers or the academy. Moral communications are a social fact. To be a moral communication, such a communication does not need to cohere to a deontological or teleological model. Ideologies that incorporate a racial dimension, in a central or incidental fashion, can moralize and produce ethical reflections on the appropriate distribution of the moral code without being damaged through their irrationality.[126]

Secondly, the idea of Labour implicates race through a reflection on communication by communication. In contemporary society the considerable ambit of the mass media provides one channel by which the informativity of communicated information is assessed. The mass media encompasses a wide range of programmatic silos, including the news media, entertainment, and advertising. The reach of dissemination media also adds to this circumscription by underwriting communicative possibilities. These include broad conditions that delimit the exchange of information and the acceptability of communication for its participants. For example, this can include the extent of trade and transport networks that provide sustainable communicative routes, or the impact of the printing press and telecommunication. One key performance of such media is the manner in which the limits of society are *made visible by the influence of the world environment.* In the same manner, we can perceive how silence punctuates speech by outlining each word. Once

[126] This sociology of morals is a significant divergence from the moral philosophy examined in Chapter 2.

this limit is exposed, it is explained by reference to the *assertion of a systemic reality*.[127] The mass media performs this doubling effect (providing themes for organizing communications about communication) in many different ways. Specific programmatic streams and genres are generated on the premise of distinctions between fact and fiction, opinion and fact, imaginary and real, appearance and essence. Terms such as authenticity and sincerity are dependent on these distinctions because they measure the relationship between each side – how much does a person's appearance coincide with their actual nature? The establishment of these distinctions in communication can be triggered by distinctive signals that a narrative and story is about to begin. More precisely for the purposes of this thesis, racial forms are implicated by reference to progress and regress, emancipation and domination: one designates an idealized side and analyzes how far actuality is from meeting these ideals.[128] These signals indicate, for the participant, that we are now concerned with publically communicating about communication. Novels accomplish a similar feat with a typical opening phrase such as 'once upon a time'; however, books have the advantage of relying on a text as a supporting medium, rather than the semantics of the public.

These distinctions between appearance and actuality produce observations upon the informativity of information. A great number of themes are mobilized to explain this relationship across a wide thematic spectrum – prominence, obviousness, publicity, and celebrity are only a few such examples. The connection between morality and the mass media is apparent whenever we consider how informativity can be a virtue in itself: celebrity culture, self-publicity, punctuality, and polish.[129]

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[127] These highlighted topics were conceptualized earlier in this chapter.

[128] The communication of progress and emancipation are not the preserve of the equality movement. Racial ideologies may assert levels of racial maturity and regression to justify their programmes, but, in a strange similarity, equality advocates too rely on such terms through classifying their opponents as carrying regressive and ignorant mind-sets. Conservative political programmes have been co-opting the language of the future with the promise of reform, freedom from the state, and 'continuous revolution' since at least the 1980s. To be clear: this thesis describes racial communications, it does not argue for the normative equalization of racism and anti-racism.

[129] Virtue and vice are attracted to race as a 'prominent' form, for example - the vulgarity and coarseness of a person's comments, or the vitality of racial designations ranging from the complementary (protestant work ethic) to the decidedly less so (non-white working methods). Garcia (1996) defines racism by relying on,

These themes are picked up in the context of employment and work. The sphere of work is distinguished from other areas of life. This enables a further internal distinction between formality and informality in the workplace. Informativity involving more tightly focused instances of news, entertainment, and advertisement depend on this differentiation of work: the differences between official communication and gossip, solidarity and humor, charisma and seduction.

Thirdly, aesthetic appreciation and artistic judgment also plays a part in the meaningful communication of Labour. Luhmann (2000a) argues that the artistic sub-system of society solves a number of functional problems. [1] It allows society to observe itself as different to itself by combining both recognition and astonishment in the artistic object. [2] It provides a locus for communication to cope with the non-communicable, especially perceptual data. Through artistic communications one learns to see the world anew. Works of art are objects that produce a caesura in the world such that there is a before and an after.[130] Art requires work to be produced and further work is needed to learn how to see what it is portrayed. One must gain expertise. There is also a broader aesthetic quality familiar to discrimination lawyers: the elusive quality of merit. It is the exercise of judgment that suggests an aesthetic component in which an employee is employed or their contributions are calculated. Judgment combines the recognizable with the new, it hinges between past performance and future accomplishments, the person at interview and their suitability for the role, an interaction and wider societal implications. It is the communication of judgment predicated on the elusiveness of the incommunicable (perception, sensibility, sensitivity, intensity) that produces normality and abnormality in the workplace. This will be analyzed in Chapter 6.

Finally, the notions of work, employment, and labour manage to connect, what a previous generation of researchers might have labeled, the material and the ideal. With reference to the

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ultimately, Aristotelian virtues in which racism only properly occurs when feelings of ill-will and the vice of malevolence are found in the discriminator.

[130] This feature is formalized when a Deleuzian conception of repetition is aligned with the sub-system of art in Chapter 5 of this thesis.

theorizations made earlier in this chapter we would point out that the notion of Labour manages to connect both the societal plane and the interactional plane. In this light, it will be shown to be influential in the self-description of modern society.

This section focused on the idea of Labour as a place where the strands of discrimination congregate. These features need to be highlighted at this stage because in a society differentiated on the basis of function it can be no simple feat to bring together informative, esteemable, and artistically coded communications. In earlier societal semantics which operated as precursors to racism these strands were not so stringently divided and were distributed across the stratified structures of society. We now turn to these earlier forms in order to provide a socio-historical dimension for the basis of racism.

MANNERS AND MORAL EDUCATION

The following series of sections will apply the theoretical tools outlined above. We aim to establish that as a sociological phenomenon discrimination operates as an inheritor of various dynamics existing in a socially stratified society. We will cover at a necessarily abstract and selective level, the development of what Norbert Elias famously called the 'civilizing process' in European society. This civilizing process 'expresses the self-consciousness of the West' as social control was gradually extended into a form of self-control during the period between the Early Middle Ages and the 21st century.[131]

Similar subject-matter as discussed by Elias will be highlighted, however the axioms of Elias' figurational sociology will not be applied. Elias saw the civilizing process as an expansion of social control over the individual, particularly through the pressure of mutual and reflexive expectations becoming ineluctably inscribed in social relations. This greater binding of the personality was caused

[131] Elias (2000: 5). The period traversed in this section is a selective rendering of the narrative stretching from the old humanism of the twelfth century French Renaissance to the neo-humanism of Foucault's panoptic society.

by two dynamics. Firstly, the differentiation of social functions that encourages greater monopolies (one might say specializations) of social functions, such as the execution of violence or the means of exchange. Secondly, the greater interdependencies between persons and the extension of complex networks of action delimiting personal freedom so that increasingly a person must attune their behaviour to that of others.[132]

Elias highlighted the changing modes of manner, courtesy, and moral education in European society. This will also be our concern. In contrast to Elias the axioms of systems theory will be applied to analyze this transition. The themes discussed will be: the self-description of stratified society and its associated semantics, the resolutions and dissolutions of such societal self-descriptions, the distinction between communication and world, and the development of dissemination media. Since we are concerned with a stratified society, functional differentiation has not yet (across the board at least) taken place, and so morality, taste, and information form an imbroglio of structures distilled throughout a hierarchically organized society.

Following Elias' initiative we will discuss the transformation of manners through chivalry, courtesy, civilité, and etiquette. At the same time, analysis will be applied as to how these normative expectations coincide with societal self-descriptions and the dissemination media of communication. Prior to this analysis, however, we must justify the choices of research programme: (i) Can we really compare manners to discrimination? (ii) How can the changes in dissemination media be connected to manners and discrimination?

Today few would consider that discrimination can be seriously compared to table manners. The impact of racism in society is far too serious and infused with compelling moral questions for it to be

[132] Elias (2000: 368ff) also notes a gradual extension of temporal horizons so that interdependent relationships compelled a consideration of long-term effects prior to action. Actions that align themselves with immediacy (violence, bodily functions, and psychological drives for pleasure and pain) were pushed to the periphery of social relations and stigmatized. This thesis coincides with Luhmann's (2013: 16-27) argument that social exclusion denotes a greater proximity to sexuality and violence.

placed alongside the elaborate rules of etiquette and civility of pre-modern Europe. What this assertion overlooks is that racism is a comparatively new identification. The term 'racism' itself only appeared in the 1930s alongside a broader assessment of Nazi Germany.[133] If we want to understand why both racist communication and communications about racism occur in contemporary society, then we must understand the social conditions in which these themes emerged. The elaborate ceremonies, rituals, and intricacies that previously delimited social relations also forged the conditions for the allocation of (self-)respect, (self-)esteem, and their opposites. Slavery may have been a blight for as long as there has been human society, but the opportunities for slavery to be a communication of racism and for slavery to be considered as a racist institution are relatively recent. Racism has had to be separated out from other topics and considered on its own terms. This, I would argue, has only be achieved relatively recently.

Furthermore, the dissociation of manners from morality, art, and education, is principally a consequence of a functionally differentiated society. Only for the last few centuries has art and education been differentiated from moral communications. It was only in the 19th century that etiquette became sidelined to such an extent that it came to be seen as trivial. The fact that it mainly became a feminized concern - pejoratively labeled 'the marriage market' - is evidence for its peripheral status to the ordering of society.[134] In its previous incantations as gentility, it was morally infused and played a significant role in producing a series of semantics that maintained societal self-descriptions.

From the Middle Ages to the French Revolution manners were thought worthy of serious attention by young men. They constituted an important tool in the ideal of civilization which provided a moral education in the form of a variety of chivalric literature, courtesy books, and educational exemplars.

[133] Robert Miles (1993) traces the concept to Magnus Hirschfield's book *Racism* published in 1933/4.
[134] Davidoff (1986) provides an argument that the power exercised by women through the organization of the social calendar to affect political appointments and social conventions is overlooked. In this period class semantics provided a short-lived self-description of society.

The materials promulgated the ideals of character, the correct values, accomplishment, habits, manners, and morals - in short, 'the art of living in society'.[135] In contrast to modern times such instructions were deliberated by serious scholars over an extremely varied palette of topics: steps to a fashionable dance, piety, Aristotelian moderation, table etiquette, and the requirements of justice. There was an extreme mix of high and low culture, which modern ethical deliberation is more inclined to leave to other disciplines. Such writers aimed to provide advice to titled nobility, substantial gentry, and the aristocratic class. The advice was to ensure that those with the correct birth and status, who were to play a major societal role, should comport themselves with the correct manners and virtues to do the job properly.[136]

It is not only manners which have changed in their articulation. Ethics has changed too. Ethical reflection as a deliberation of moral judgments is a product of a functionally differentiated society.[137] Prior to its modern form, ethics was known as ethos which was a self-description of societal-political life. The schools of the Middle Ages sub-divided Ethos into ethics, economics and politics depending on whether one was concerned with the ethical constitution of the individual life, household, or political society. Ethos also had the latent function of delimiting exemplariness and the possibilities for emulation to societal elites.[138] Culture is also an important concern because it involves the communication of learning patterns.[139] It is from the following of these norms that we learn to distinguish between standards of acceptable and unacceptable behaviour.

[135] Curtin (1985: 395)

[136] Curtin (1985) provides an excellent survey.

[137] In system theoretic terms - ethical communication is actuated as a second-order observation upon the application of the moral code: Luhmann (1992b).

[138] Luhmann (2013: 212 ff). Emulation was a way in which one could follow and repeat the actions of one's betters. The image of the mirror indicates a self-description at work in which the silence of the world is felt in the communication of society. Of course, this form of emulation works well when there is a central point of focus. But where can the mirror be placed when a functionally differentiated society is fundamentally de-centred? One must look to the semantics of race, amongst other options, as a perch for such emulation and repetition.

[139] Interestingly Luhmann (1996a: 518) argues that because the latent function of culture is to compare incomparable situations then there is an inevitable simplification and concealment of the differences in each situation. This lack can be observed and communicated as a 'culture of suspicion' in which one believes that

The development of communication media has had a serious impact on societal differentiation and social evolution. This postulate may seem over-wrought for those who have not accepted the legitimacy of a radically constructivist methodology, however there is great virtue in this method as long as precision is sought and facile generalities avoided. The fact that certain ideas, thoughts and contentions are successfully communicated is steered by the possibilities of society. Certain problems and questions emerge because of social conditions. For example, it is fair to argue that Aristotle did not have a conception of or concern for human rights.[140] He lived and communicated in a vastly differently political and legal culture to our own. The world of Hellenistic Greece is not the world of the Enlightenment. Modern functionally differentiated society is vastly different partly because of the long development of dissemination media and symbolically generalized media.[141] The possibilities of meaning, the scale, and the intensity of communication can barely compare. Advances in technical means and increased opportunities for communication presented opportunities for increasingly complex social communication.

The advent of the printing press, for example, is considered a major precursor of modernity. The distribution of printed materials fundamentally affected learning, thinking, and perceiving among literate elites. The uniformity and synchronization of printed texts has become so commonplace that we have to be reminded that in the times of the scribe they were absent factors. Printed materials enabled 'a sharper sense of individual difference ... fostered by repeated encounters with identical types' (Eisenstein, 1979: 230). Tracts which previously focused on societal exemplars and archetypes (princes, courtiers, merchants, councillors) now, through standardization, brought into relief

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something is being hidden for unidentifiable motives and insidious purposes. Isaiah Berlin (1999: 104) diagnoses Romanticism as containing a similar tendency towards topicalizing the ungraspable (*the incommunicable, the world)* through references to the sublime, nostalgic, paranoid, and conspiratorial. The contemporary reality of racism and discussions around political correctness exhibit similar tendencies.

[140] This is not to deny that his intellectual output cannot lend itself to such concerns.

[141] Luhmann suggests that attempts were made in Ancient Greece and Rome to differentiate between functional areas (law, religion, politics), but without the technical means of communication this differentiation could not come to fruition until the development of the printing press. Only in the period between the 16th and 19th centuries was this societal transformation consummated (Luhmann, 2013: 226ff).

idiosyncrasies and the awareness of singularity. The success of Montaigne's *Essays* attests to this transition. Another effect was the expansion of self-learning and the opportunities this offered. No longer did Newton have to travel to Paris and sit at the feet of the masters. No longer did the laity have to sit in the pews and listen to the Gospels as promulgated by the priesthood.[142]

In summary, manners are the everyday rituals of life that provide institutional linkages between societal influence and the interactive order. Their importance should not be under-estimated. With a close inspection of their development we can observe how standards of respect, esteem, and disesteem developed alongside technical innovations in communication media and unfolding societal self-descriptions.

CHIVALRY

In this section the societal self-description of the high medieval period is explained by reference to the whole/part schema. Chivalry alongside a theological framework provided ways of living and thinking that temporarily resolved the prevailing self-description's paradox by reference to this schema. These resolutions relied, however, on the practical constraints subjacent to the circulation of communication. As a consequence, communication media and their containment effected the success of such semantics. Once such circumstances changed then chivalric culture became less successful at taming the paradox and holding together the disparate planes of communication (interaction, ideology, system reference). From the perspective of systems theory, discrimination semantics has inherited this challenge. By surveying such a landscape, the social basis for discrimination can be understood at a deeper level.

The chivalric honour code constituted one of the first steps in Norbert Elias's (2000: 45 ff., 162-3) description of the civilizing process. It sought to restrain violence through the application of self-

[142] For an extremely thorough account of this communicative development, see Eisenstein (1979).

control.[143] Its reach, however, was wider than Elias' thesis allows. Medieval chivalry was more a lifestyle and outlook than an ethical doctrine. The virtues and qualities esteemed were loyalty, generosity, dedication, courage, courtesy. The semantics of chivalry, however, were versatile (one might say, *elusive*) allowing multiple interpretations: the lawyer saw it as a legal framework to organize war in which acceptable behaviour was clearly established; for the Church it was a religious vocation to wage a just war against the infidel in their crusades; for the writers of romance it was the attainment of virtues to impress the lady; further, it was a way to describe the military and aristocratic elite as the second *ordo* (order) of God's creation (Saul, 2011: 3-5). Since the aristocracy held a pre-eminent position at the apex of society the adoption of this code of honour percolated down into other areas of social concern: the conduct of disputes, funeral processions, architecture, design, and literature.[144]

Chivalric culture sprang up in the second half of the twelfth century in an exotic border region called Latium on the edge of Latin Christendom. Here a group of *milites castrorum* began to adopt a way of life that was eventually conveyed across the mountains into Europe by entertainment literature in forms such as the *chanson de geste* (song of heroic deeds). The archetypes developed in this literature began to be adopted by small groups of knights. By the latter half of the twelfth century these ideals had entranced the European aristocracy. In 1184 Frederick Barbarossa staged a grandiose chivalric festival at Mainz in an attempt to revive the Germanic Empire's prestige through the myth of crusade and the ideal of knighthood. At the same time the knightly values spread across France uniting the lay ruling class in a single body (Duby, 1980: 293ff).

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[143] Saul (2011: 13) contends that the chivalric code, espoused by the Norman Invaders of England, did lead to a more restrained form of warfare in which opponents were accorded respect, civilians were left unharmed, and barbarity was reduced to a *fixed purpose*. A side-effect of this was that the English began to consider the Celts and other peoples of the British Isles as culturally inferior. A familiar story can be told on how the elevation of universal reason and human rights allows an accompanying observation on the inferiority of those who do not exercise such reasoning, or refuse to educate themselves in its use.

[144] For an overview of chivalric culture and its relationship to the nobility as a legal class, consider Bloch (1965: 33-53)

The formalization of this knightly order stemmed from the use of the title *Miles* in 1025. By 1175 *Miles* was adopted as a designated title preceding the patronymic of all knights. Duby (1980: 294) argues that this change in the legal lexicon signified the establishment of a superior body of men recognized by birth, rather than military specialization. Like the Church, knighthood became to be seen as an *Ordo.* On the other hand, Bloch (1965) maintains that this was not a social group of nobility in the strictest sense because knighthood itself could not be inherited - only the conditions which made knighthood available could.[145] Knightly society began to self-differentiate itself from the unwarlike multitude through membership rituals - initiation rites, ordination and sacramental procedures, and dubbing practices (Bloch, 1965: 33-40).[146]

Chivalry has its own behavioral ethos distributing virtues and vices, self-respect and disrespect. A variety of perspectives are available on account of the flexibility of the knightly ethos - lovers and fighters, crusaders and soldiers. It provides a description of society compatible with the possibilities of the time. Titles and symbolic actions have an *informative value* indicating membership in a group. Associations are made through the journey undertaken to become a knight (*revelation* in the forest) or the possibility of inheritance.[147] Specialist expertise are required in order to understand the order. Entertainment literature and artistic communications are an influential means to reproduce the mythic and imagined knightly order.

Chivalric culture emerged within a feudal Europe. Feudalism appeared as a social structure amenable to a society in which centres of power were numerous and relatively minor, economic and

[145] This lack of automatic heritage contributed to its downfall. Saul (2011) documents that an increasing number of persons eligible for entrance to the knightly order considered the offer declinable.

[146] Communicative restrictions afforded by secretive rituals provides an intensity for the formation of complexity. The closed loops of the salon, coffee-house, and masonic lodges provided such a site for enlightenment thought - see Habermas for an extensive examination (1989). We might speculate that this is prevalent in contemporary society, for example: the self-restriction of loyal viewers and readerships, and the social bubbles of modern media. A theoretical parallel, noted by Luhmann, resides in Goffmann's schemata of interpretation, however my concern is with typologies exclusively confined to the communicative medium of meaning (Luhmann, 2000b: 107-116).

[147] The intensity is given through self-restriction that enables communication of the non-communicable world - the *silence* and *seclusion* of the forest, the non-variance of nature and inheritance. Contrary to Elias, this can be viewed as a communicative restriction, rather than a incremental restriction on the use of violence.

physical security was tenuous, and settlements were isolated. This state of affairs had come about through the period labeled the 'dark ages' of European history in which the continent had suffered mass migrations of the populace caused by Germanic and Moslem invasion, destruction of state power, retreat of towns and cities once prosperous under Carolingian rule, and a declining economy. The feudalistic order provided a means by which social relations and expectations could be managed in a tenuous and isolated environment. Insecure settlements began to band together in a frequency far greater than under Carolingian, Capetian, or Merovingian rule. These latter empires maintained a centralized authority not available to a feudalistic Europe.[148]

This society, however, was unified by more than a common fear of an approaching apocalypse?[149] On a broader level, society was described by reference to a tri-functional schema known as the Three Orders that reflected a higher triadic division - clergy (spiritual), knight (temporal), labourer (corporeal) (Duby, 1980: 305). The Three Orders operated in the terrestrial kingdom which was an imperfect copy of the celestial kingdom above. The holy church acted as an intermediary between these two kingdoms occupying a place on both planes - heaven and earth, in the invisible kingdom and the visible kingdom, in aeternitas and tempus.[150] The sovereignty of Christ is enthroned in the celestial kingdom bridging the divide between the two planes as right hand of the Father and as the apex of clerical authority.[151]

The self-description of society manages to avoid its own paradox by recourse to these *imaginative* formulations. The body of Christ enjoins the visible and invisible kingdoms, and with the assistance of the clerical order, holds together the different functions of society. This self-description of society

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[148] See Bloch (1962: 59-72) for an overview

[149] There was a belief that the invasions into central Europe by the Hungarians and Scandinavians communicated the end of days predicated in the Book of Revelations (Bloch, 1962: 55).

[150] In respect of this schema, Gerard of Cambrai observed: 'Priests gird kings with their swords' (Duby, 1980: 32).

[151] For an explanation consider, Duby (1980: 32-34) and Chroust (1947). John of Salisbury in the *Politicraticus* held that the human individual and every form of human association - from estate to class to family - is a microcosm reflective of the harmonious architecture of nature and God i.e. the macrocosm.

is suitable for a society dislocated across Europe. It reflects Luhmann's (2013: 196-209) schema of the whole and parts in which the paradox is made safe by finding a whole in Christ that is both part of each part and also the whole within each part. This self-description held, or appeared to do so, until the recovery of the European economy and royal court. The tri-functional scheme guided an elite culture in which chivalric values were highly esteemed; however, with the Gregorian reforms this schema become less tenable.[152]

Communicative technologies and possibilities underpinned the success of these self-descriptions and prefigured further societal evolution.[153] Consequently, the spreading of education amongst the upper-class laity had a profound impact. Knights were literary men. It was not uncommon for a prince to be a troubadour and a composer of lyric poetry, such as William IX of Aquitaine. Troubadour lyrics expressed a new tenderness and sensibility. The literature of the period began a fascination with heraldic and symbolic display, romance, history, and heroism. The *genuine* enjoyment of such pleasures was too refined to be appreciated by simple villeins. Artistic appreciation, taste and the development of sensibilities were distributed through the social hierarchy such that there were high and low cultures.

Membership of knighthood involved a series of ritual inculcations.[154] First, there was dubbing at Pentecost by the clergy. This was followed by an education in which one learned about the *ways of the world* through routes forbidden to the lower orders of society. The knight ventured out into the world. He moved in courtly high society of ladies and the lower society of maids. He went on a crusade against the infidel in the Holy Lands. He explored the dangerous through the tournament

[152] Berman (1983: 85-120) argues that these reforms began the out-differentiation of ecclesiastical authority from political authority, which in turn contributed to the gradual functional differentiation of society.
[153] Latin Christendom benefited from a common tongue amongst the upper class providing a critical mass for the emergence of complex communication. In contrast, Celtic and Scandinavian regions had a rich poetic and didactic tradition, but were confined to localized languages. See Bloch for an overview (1962: 75-78).
[154] There was a formal comparable process that occurs in scholastic schooling. The *trivium* provided the student with the means of communication through introduction to dialectic, rhetoric, and grammar. The *quadrivium* provided the student with knowledge of the *world* - geometry, music, astronomy, arithmetic (Luhmann, 2013: 219-222).

and the wild through hunting and ambuscade. The knight even quested into the *'anti-world'* to glimpse what lay beyond the gates of wisdom by visiting the divinely deranged hermit in the forest; he traversed the world of dreams and mirages, compelled to quest from ordeal to ordeal.[155]

The combination of these educational processes alongside increased literacy provides a fulcrum for the communication of the incommunicable. The mediation of communication, the informative value of communication, and the artistic sensibility of communication are strands all present in the way chivalric culture provided a semantics corresponding to the self-description of society. Such strands are present in the communication of modern discrimination; however, the self-description and differentiation of modern society differs greatly. Stratification ensured that such means of communication and understanding of the world were reserved for the upper echelons - princes, vassals, and the nobility; they were not suitable for the peasantry.

The artistic and symbolic components of chivalry enabled the communication of a history.[156] There was a keen emphasis on chronicling the deeds of knights so that they might be passed down to familial descendants and preserved as a collective mythological memory. Stories of valour were cherished for the honour conferred and accumulated over the centuries. There was also a kind of present memory around the chivalric order in which each knight took pride in the achievements of every other knight. Heraldic inventories such as rolls of arms preserved such feats. The heraldry would be displayed by knights in their locality, and in tournament and battle. Verse narratives were composed by minstrels. Coats of arms were increasingly popular as a display of such narratives - in

[155] Duby (1980: 306). This yearning for the ineffable concerns the communication of the incommunicable. We see the same story told in the response of Romanticism to the Enlightenment. Schiller and his compatriots turned their attention towards the immediate, the wild, and the other-worldly experience contained in the sublime and baroque. See Berlin (1999) for an examination of this topic.

[156] The semantics of discrimination also contributes to the maintenance of memory and a 'common present' in society. It is through these constructed histories and futurologies that connective complexes are maintained, and connect and disconnect operations in society. This dimension to the social articulation of discrimination is easily missed by anti-discrimination scholarship which views the subject through non-reflexive moral philosophies, or approaches dependent on legislative developments as explained in Chapter 2 and referenced throughout this thesis.

tombs, churches and households.[157] In such practices we can how the informational value of such symbols combines moral esteem and artistic sensibility into a memory which holds chivalric semantics together.

The *chansons de geste* cast a spell over Europe weaving myth, fantasy and historical fact. They were great works of romance projecting worlds of mystery and enchantment. This literature, however, also indicated a society in which stories need not be historically accurate because perceptions were sufficiently refined such that there was a presumed separation of 'literary imagination from the description of real events.' There was an approach by story-tellers to recount both deeds and feelings of such great men. It contributed to the rehabilitation of the individual and the growth of a more introspective habit of mind. This new literature provided a medium of thought and action not available to their predecessors.[158] The rise of chivalric culture coincided with the French Renaissance in which a new outlook on life was emerging. The pessimism of the Dark Ages was receding to be replaced by a belief in reason as the route to understanding the mind and will of God. The world seemed to open up and God became a more closely human, immediate figure.[159]

In this section, I have sketched out a picture of chivalric culture that was amenable to the societal self-description of the period. I have noted several communicative references that re-appear in modern discrimination - informativity, moral esteem, aesthetic sensibility - which contributed to this semantics. From a systems theory perspective, underpinning these themes are communicative media and technologies. Similar to other semantics noted below, these infra-structures influence and constrain how societal semantics are able to address the paradox of the prevalent self-description while adequately holding together the varied planes of societal communication (interactive order, etc.). The notion of the *world* was emphasized because it was through the

[157] Saul (2011: 283ff)
[158] Bloch (1962: 107) maintains that this was an extension of 'auricular confession' only formerly practiced in the monastic world. We can see how important such mediums are for semantic innovation. Foucault (1977) follows a similar route reliant on a different terminology.
[159] Morris (1972) details the rising individualism of the 12th century.

communication of the incommunicable, and the means available for such operations, that elusive, revelatory, and secretive qualities appeared. In the semantics of modern racism these re-appear in different guises but still can be seen to reflect the set of concepts and relationships which underpin chivalry.

COURTESY AND CIVILITÉ

In this section, we shall turn our attention to the semantics and self-descriptions which appeared in late-feudal and early-modern Europe. This is not an exacting historical study of the period that describes the development of particular institutions, or specific countries and regions. The aim is to exhibit how the long gestation of the socio-communicative scaffold for discrimination, which has not been adequately addressed, if addressed at all, by anti-discrimination scholarship, which relies heavily on a normative description, or draws solely upon the 20th century concern for equality, freedom, and human rights.

The dissolution of chivalric culture coincided with a resurgence of royal power. The twin forces of the monarchical state and urbanization re-constituted the possibilities for communication. Consequently, the self-description of society in terms of the Three Orders became less tenable. The legitimacy of violence was gradually transferred from the military orders to the hand of the royal court. The nobility began to distinguish itself from ways of thinking and doing characterized by the marshal orders of the past.[160]

Around such structures orbited a culture linked to the Royal Court and urban centre. New social roles emerged in the form of the *gentilhomme,* gentry, and courtier. The former indicated a man of good stock and lineage - rather than knightly virtue - with such membership criteria solidifying the nobility as a legal class transmitted by birth. The gentry arose as a uniquely English construction. In England, there was never the legal formalization of nobility (with its privileges, such as exemption

[160] Elias (2000: 257-268) has heavily documented the emergence of the such transformations. See also Morris (1972).

from public taxation) as occurred in France and Germany. The lesser nobility acquired the rank of gentry and the upper nobility became the peerage sitting in the House of Lords. Gradually the gentry became composed of the non-labouring professions - lawyers, bureaucrats, administrators, and servants to magnates. Comparable to chivalry, gentility concerned a way of thinking and living: non-bestial work, a good conversationalist, virtuous discourse, good manners, elegant dress, engagement in the right sort of leisure activity such as hunting, and possible ownership of a country estate.[161] All these markers conveyed *informational value* as to one's position in society and from this position *esteem* and *deference* were communicated. The *informational* value of gentility transcribes and abridges the sociality of micro-interactive events with macro-societal semantics: smooth hands indicate a non-labouring gentility, and the performativity of elegance *speaks for* one's status. The *world* of the *gentilhomme* as the communication of the incommunicable provides in large part the operative conditions that allow this to take place.

Only in the second feudal age in which self-consciousness seemed to appear did these rules take on a life of their own. Ideas of *courtoisie (*courtesy) and *prudhomme* served to describe the sum of noble qualities. These rules of conduct emerged from around the kingly and baronial assemblies. Emulation and social contact was required for social advancement;[162] thus, a greater moral sensibility coincided with increased inter-communication and the consolidation of greater municipalities and monarchies. It was the ethos of the royal court which required emulation, rather than the exemplary archetypes of knightly virtue.

The ability to emulate the virtuous life of the court requires explanation. The art of letter writing flourished in the early Italian Renaissance between the 13th and early 16th centuries. As a mode of communication it enabled the praise of virtue and condemnation of vice. The ethics of civilita were understood to be the ethics of the nobility - promoted by the courtly culture of Burgundy and in the

[161] Duby (1980: 168-170)
[162] It is the *world* as the emulation of action by action that enables one's moral esteem to rise and fall (see Chapter. Greater communicative (and thus incommunicative) possibilities allow a more complex *world*.

transition from republics to principalities in Italy.[163] Courtier literature emerged most prominently authored in the 16th century by Erasmus (On the Education of Children) and Baldassare Castiglione (Il Cortegiano). Both were incredibly popular and were some of the first books to be mass produced and distributed throughout Europe.

The rituals of the courtier imported informational values in accordance with acceptable behaviour at court: table manners (spitting, blowing one's nose, use of utensils, turn taking), hygiene and ablutions, speech and language, interaction with one's friends and peers, sexual relations and marriage.[164] Courtiers should have an effortless quality, holding their own in gallant company, refined and urbane, and even be sensual as lovers.[165] Castiglione places chivalric values still at their core, but emphasizes also one’s social duties as well. An emerging theme in the manuals was that the basis of true nobility lay in virtue and wisdom acquired through a new education and applied to the service of the 'publicke weal' (Charlton, 1965: 83).

The semantics of civilité provided a more self-aware moulding of the person than courtesy with less emphasis on self-advancement. In the courtly behaviour of the French aristocracy the acquisition of the *science du monde* involved: 'apply oneself to knowing men as they are in general, and then gain particular knowledge of those with whom we have to live ... of their inclinations and their good and bad opinions, of their virtues and their faults.[166] In the train of Renaissance and humanist thought, civilised behaviour could be taught and learned once the rational mind was awakened to its possibilities: self-knowledge could be gained through *revealing* the *world* as an individual's untapped potential (Rothblatt, 1976:23). At the same time, however, there was a greater emphasis on surface

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[163] Consider, Luhmann (2013: 215-17)

[164] Elias (2000: 52-60) provides a survey of courtoisie texts detailing late-medieval table manners and rules of hospitality. Such texts were often arranged into poetic form (drawing from the epic poems of knightly society) or in mnemonics for ease of recollection and emulation. These latter types were labelled *Tischzuchten* (*table disciplines*), a serendipitous arrow towards the *discipline* of Foucault as described in Chapter 5 of this thesis. The question is how does memory in modern society operate now that emulation is not commonly transmitted through poetic metre, mnemonics, or rhyming couplets?

[165] For a review of courtesy literature in the civic humanist tradition, see Charlton (1965: 21 ff.)

[166] Elias (2000: 68). Note also the recurrent reference to *monde* (the world).

details such as individual comportment, eloquence, and clothing.[167] As such these moral pedagogies dropped the moral fable in favour of attaching virtue directly to behaviour itself.[168] Even Petrarch could see how there was a more direct alignment between *informative value* and *moral esteem:* 'for virtue only finds eternal fame'.

The aesthetic influence varies throughout the semantics touched upon above. A greater appreciation towards form occurred in the literary modes that held together moral sensibilities and informativity. Rothblatt (1976: 53-55) maintains that under civilité, nature became more associated with feelings and emotions as opposed to idealizations. Artistic impressions (the sensual, the sublime) were accorded a far greater role in assessing the worth of art. If the form is more significant than the factual content, then there needs to be someone to designate taste: the critic. In a parallel fashion, Georgian education required everyone to become self-aware actors (Rothblatt, 1976: 80-81). But this *world* provides the means for counter-accusations against the (i) art critic for offering useless knowledge and pedantry, and (ii) the social actor for affectation, inauthenticity, and hypocrisy (Rothblatt, 80-81).

In terms of a self-description, the court represents the unity of society with the country (provinces, regional estates) as its parts.[169] Courtly culture provided an intense site for the stringing together of interactions into a wider semantics of societal significance stretching from the late middle ages to the opening of modernity. Throughout this period there were many major communicative changes which heralded new possibilities of thought and action. The advent of the printing press was a

[167] Erasmus detailed clothing as 'the body of the body' (Elias, 2000: 67).
[168] 'The conduct it describes is always more important than the examples to which it refers' (Rothblatt, 1976: 22)
[169] Anti-courtier literature emerged, opposed to the vanities of such courtly culture. Such sentiments sometimes took revolutionary forms. Zagorin (1969) explains how the schism between the court and country transformed into the Country faction (parliament) against the Court faction (royalist) in the English Civil War. One can no doubt see eerie parallels with the conflict of sentiments between urban and rural regions that drives some of the issues today.

revolution.[170] Education was transformed enabling self-learning - a student no longer had to travel to sit at the feet of the Parisian masters. The priesthood was weakened as soon as the laity could read the gospels for themselves and the Reformation followed. The *world* could be *revealed* through different mechanisms. The circulation of maps allowed a standardization of geography. The imaginary realms of distant lands so characteristic of the Middle Ages were filtered out.[171]

The imagination of Renaissance Europe was also invoked by holding moderns as equals of the ancients. From such a position, Thomas More could conceive of a utopia as an education reformed society with good counsel. An interest in historiography led to a categorization of the world into ages - Augustine, progress, enlightenment, dark ages (Rothblatt, 1976: 21). By the 18th century, courtesy and civility had moved away from influencing the court into wider public arenas occupied by the merchant, country gentleman, and public figures (Rothblatt, 1976: 59).

Elias (2000: 88) proposes that *courtoisie*, *civilité*, and *civilisation* adumbrated the civilising process, but what is being claimed here is that this, in fact, traces the communicative and incommunicative capacities of society as exposed by the *world*. We can compare these communicative restrictions backward to the chivalric journeys of discovery or on the crusade, and forward to the drawing-rooms and balls of London Society. All such epochs share similar features. There is a combination of informational value, moral esteem, and artistic appreciation that was not universal in scope. The rustics and the common-folk were not included in such a *world*. It is the pivot towards a self-description that is universal in scope and singular in focus, and that is characteristic of the modern world in which discrimination operates.

[170] See Eisenstein (1979) for an authoritative overview.
[171] The Letter of Prester John is an infamous example. We can see how a figure such as race might inherit this *imaginary* and *revelatory* structure. Consider how the Dreyfus Affair involved the circulation of a pieced-together note that disclosed confidential French military secrets to a German military attaché. There was a counter-letter too in the form of Émile Zola's "J'accuse...!".

ETIQUETTE

In this short section, I will sketch out the more recent semantics of etiquette which provided a means of orientating oneself in a world in which the strands of discrimination - informativity, morality, and aesthetics - were becoming disconnected. The gradual functional differentiation of society ensured that such system-references could no longer be bundled together and distributed through a stratified order. Etiquette is of particular interest because of how, at this point, such standards of social behaviour began to diminish in their societal significance.

The rules of etiquette emerged in Georgian England organized around a societal description in which London Society was distinguished from provincial society. The etiquette book came about because the connection between morals and manners dissipated. Good manner's improved one's chances in life; however, it began to be proclaimed that manners were only a pursuit of self-interest in a wicked world. Chesterfield in *Letters to His Son* lamented the self-conceit, cynicism and conscious manipulation of manners for one's own ends (Curtin: 1985: 404). Etiquette books were concerned with precise descriptions of the exact rules of interpersonal behaviour with relative disregard for moral thought. Instructions were directed at social interactions such as at dinners, balls, receptions, presentations at court, calls, promenades, introductions, salutations. As opposed to earlier semantics, etiquette only provided a short-lived hinge between the planes of interaction and society in response to the pressures of the early 19th century - industrialization, urbanization, increasing population, and a rising middle class. It seems to have offered a time-limited safeguard for the upper-classes against the labouring classes.

London Society comprised of an elaborate calendar of events (the Season) which unified the private sphere of the family and the public sphere of politico-economic institutions; however, this

description could only operate for the upper echelons of the class-organized society and as such could hardly operate as a complete description of the world. The behaviour exhibited at social events was *informative* of one's position in society, but since there was only a loose connection to a broader idea of morality, these scenes could hardly serve as *exemplars* for others, in other social classes, to emulate.

There was little concern with the individual virtues of self-control, grace, and fortitude. These older forms were translated into a veneration of life-styles. Acceptance into Society depended upon meeting the norms of gentility *exemplified* by the idealizations of the English Ladies and Gentlemen.[172] The elaborate requirements of greeting, leaving cards, and hosting dinners was enabled through the improved transport infrastructure of Georgian and Victorian England.[173] Etiquette became a highly formalized institution through its concentration in urban areas and its activation in private homes that provided intensive opportunities for self-observation between individuals. This tendency to partition was mimicked in the isolation of gentility from the labouring classes through the separation of servants quarters from the household and the division of sitting rooms from the kitchen.[174] On a wider scale there was a movement away from public events and the great pleasure gardens of Vauxhall, Hampstead Wells, and Ranelagh Gardens which enabled the commingling of classes in public games, entertainment, and drinking. Instead there was a proliferation of private gardens and invitation only events (banquets, dances, and hunts). Alongside

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[172] 'Individuals were "placed" and identities formed on the basis of a myriad of tiny bits of information drawn from the realm of manners, most of which could be understood only in the context of the social class system' (Curtin, 1985: 414).

[173] Such as the postal service, the canal network, and the railways.

[174] This isolating trend is common throughout the semantics discussed in this chapter. The restriction of communicative possibilities provides an opportunity for an observation on the incommunicable (*the world*). This division of communicative competencies invites specialized vocabularies which can observe this phenomenon: purity, cleanliness sincerity, authentic, privacy, publicity, etc. If one has expertise in these topics, then one can disparage and disrespect certain trends, for example: from a certain position of standardized 'English' *judgment* can be passed on regional accents. The *world* is thematized by such communications precisely because they entail the division between communicative spheres, which is to a large extent incommunicable.

this we have an intensified concentration on separating the private and public in terms of the body - cleanliness, punctuality, church attendance, personal sobriety.

Rules of etiquette had the tremendous ability to exaggerate small differences by assisting one to distinguish the upper from lower aristocracy, lower aristocracy from upper middle classes, and so on. They functioned so successfully because they were readily available to assist the individual to compare themselves to those nearby. As such etiquette was productive at unveiling the minute dissimilarities between similar persons. This increasing emphasis on petty vanities further differentiated manner from virtue; and the competition for social status was separated from the higher virtues of civilized life (Curtin, 1985).

Etiquette also dictated the important rituals of gentility - rites of passage (marriage and childbirth), and the introduction of new members through the prescription of highly elaborate requirements for the behaviour in polite society of the unmarried, widows, and spinsters. A particularly influential example is the mourning period for the death of Prince Albert which became a national affair.

The elevation of London Society as the unity of society was further exemplified with the triumph of Society pronunciation. The voice of London Society morphed into Received Standard English. With received speech being associated with the Capital, this threw into relief the distinctiveness of regional accents. Language became a means of social discrimination. Correct elocution indicated one's good upbringing, fashionableness and membership in the *'beau monde'*. Rhetoric was associated less with logic and more with a pleasant and graceful style.

There were significant currents that ran against this self-description. As usual the impetus came from those who could place one foot in society and one foot outside. Bohemians formed the anti-society within society, the other-worldly against the world. The term itself emanated from a derogatory term for an outsider group - the Roma people. Another group who defied the world of etiquette were the so-called 'demi-monde'. These persons inhabited a twilight social world outside

the rules of etiquette: fallen women (those involved in sexual impropriety, who transgressed the code of respectability), prostitutes. This category included working and middle class women. Sexual respectability within the rules of etiquette was maintained by being identified with a home, a family status. When it came to women respectability and esteem seemed to depend on appearing in public – professional actresses could not be respectable or certainly struggled, but amateur dramatics was considered respectable.[175]

The relevant self-description of High Society and Provincial Society was no doubt found wanting because it could not accurately capture two social trends - the emerging working class, and the broader movement towards democraticization and nationalism.[176] The period inherited the communicative developments of the 18th century in which there was a flurry of linguistic theories, kinds of grammar, dictionaries, spelling books, and proposals for re-ordering pedagogy. There was a rise in prescriptivism (e.g. Jonathan Swift) in the English language and calls for standardization in response to population movements, technological change, and the expansion of global communications. This further placed a focus on the *purity* of language (Elfenbein, 2009: 30ff., 74). William Wordsworth sought to purify poetic diction from the common language of men. In the period 1780-1840 there was the appearance of mass education, the rise of children's literature, didactic popular fiction, a great rise in literacy, and a step-change in the circulation of news-papers, religious pamphlets, and political tracts (e.g. Thomas Paine's, *Rights of Man*).[177] All these changes alter the communicative landscape and provide a basis for etiquette to successfully hold together interactive practices with societal significance.

[175] Davidoff (1986: 77ff.)
[176] For an erudite, but ultimately grasping, examination of working-class consciousness, see Thompson (1966).
[177] Thompson (1966: 375-401) details the fatalistic millennialism of the time. Richardson (2004) provides an overview of the educational and literary vectors of the time as they influence British Romanticism.

CONCLUSION

This chapter began by highlighting a racial dilemma. Race seems to be both relevant and irrelevant. I have argued that this dilemma is linked to societal forms of self-description and the pathways in which social semantics unfold this paradox. This process schematizes the communicative structures between interactions and society by reference to the *world* concept. In this space unfolds the socio-genetics of chivalry, courtesy, civility, and etiquette. These themes share communicative strands which currently provide the social basis for discrimination: informativity, moral esteem, and aesthetic meaning. By reflecting on this long development discrimination has been re-described within a far broader and more theoretically astute context than has been afforded by other methodologies. This stretch into the past provides the tool-box for a re-description of discrimination in the present. These examples from the past offer an equivalence for the essential components of discrimination which will be taken forward in the next chapter to explain how racism is communicated in a functionally differentiated society.

CHAPTER 5 - THE MODERN SEMANTICS OF RACISM

INTRODUCTION

This chapter aims to illustrate why racism is an intensive topic of communication in contemporary society. Following on from the diachronic perspective of Chapter 4, this chapter presents a synchronic perspective on racism in modern society. It suggests that Romanticism prefigured the turn to a universal and specific self-description of modern society. From this point onwards the connection between manners and morality have collapsed and the strands of discrimination highlighted in Chapter 4 have become isolated in discrete social systems. I will argue that Deleuze's conception of repetition provides a pivot to connect these systems through reliance on a public medium. Within this medium identity discourses - such as race - operate to intensify irritability between social systems.

Racism is a phenomenon that can only have arisen in the special circumstances of modern society. This implies, moreover, that racist formations that appeared prior to the functional differentiation of society are (a) short-lived and incidental, and (b) disconnected in theoretical terms from racism in a fuller meaningful sense. Within the previous chapter, I sought to set out the pre-adaptive advances for a semantics of racism located in humanist moral education, the history of manners, and the unfolding self-descriptions of society. This 'socio-genetics' of racism was excavated through a diachronic perspective fine-tuned to improbable sites - the social subsystems of art, the mass media, morality, and the self-descriptions of society. This chapter will now consider a more synchronic perspective in which racism has inherited the system-references and communicative dynamics identified in Chapter 4 but, however, in contrast to such topics covered therein, race is now communicated in a society that has become functionally differentiated into self-referential sub-systems of communication.

The emulation of esteemable archetypes must operate in a different fashion than that which was possible in the hierarchical and stratified societies covered in Chapter 4. It must accomplish two feats: (i) it must operate heterarchically via capillaries that traverse sub-systems, and (ii) it must, at the same time, accommodate the self-referential closure of each system. This poses an immense difficulty for Luhmann's theory.[178] Fortunately, the versatility of Luhmann's approach attracts experimental combinatorics. Bearing in mind such an approach, this impediment will be handled by deploying Deleuze's philosophy on pure difference and complex repetition alongside insights from Foucault's work on discipline and power. By relying on this theoretical troika, I will argue that the social basis for racism in modern society involves the systemic-references (noted above) working together to produce a *fractured emulation* within *scenes* and *plateaus* that take place in the *public medium.* This type of emulation does not involve actions copying archetypes of actions, or the accurate reflection of factual circumstances. Racial emulation involves a complex and fractured repetition of time itself. Eigen-objects within the *public medium* provide a site formerly delivered by such distinctions as the Court and the Country. Objects such as Labour and Life provide a context in which interactive orders can be threaded together into a *public scene* from which racial semantics can bridge the gap between Labour and the rest of society.

To comprehend the visibility of racism we must go beyond its obvious manifestations and unearth its foundations. Without doubt the *visibility* of different persons afforded by migration and multiculturalism are factors in energizing racist communications, and links between the nation-state and racism are certainly present; however this does not mean that these factors are constitutive of the reproduction of racism *qua* communication. Instead we look to the emergence of the *public medium* precisely because it communicates as *visibility* (the blatant, the near at hand, the transparent) and provides a purchase for the observation of the non-visible (the distant, withdrawn, and opaque). The fact that distinct trends – migration, changes to the racial make-up of a

[178] Chapter 3 hopefully provided a concise and necessary overview of Luhmann's sociological project.

population, alteration of normality in the work-place - are visualized as communication can only be accomplished in the public medium which provides an already present and assumed normality for other sub-systems.

The notion that racism is a peculiarly present-day topic is not as outlandish as it might appear. For example, there is ample historical evidence that the idea of the child was effectively invented during the late 18th century. This coincided with the development of an education system uncoupled from religious decrees and familial necessities. The child was differentiated as a self-standing entity, no longer a precursor on the road to adulthood.[179] As the previous chapter made clear, the relationship between communication and the world should be closely examined as a perspective for the disclosure of social evolution. The technical innovations in dissemination media (the printing press, the mass distribution of the paper-back books, and tele-technologies) contribute to the capacity to expand the communicable and to realize an expanded form of the incommunicable world in the public medial sub-stratum.

[179] The out-differentiation of the educational system is explained in Luhmann & Schorr (2000). For documentation on the emergence of the child see both the work of Philippe Ariès and the brief survey in Luhmann (2000: 38-41). Consider also how Foucault asked: why did medical knowledge transform completely in only a few decades in the 18th century? Looking to the heavens became a bygone approach to diagnosing and curing bodily aliments. Instead, medical knowledge was sought by looking inside the body. Stating that this was explicable in terms of British empiricism and the influence of Francis Bacon fails to note that the acceptance of new approaches to questions and the success of new communicational combinations, cannot be attributed to the overpowering authority of an author or the self-evidence of results. People do not have to accept communications.

THE UNIVERSALIZATION OF MORALITY AND THE MODERN SELF-DESCRIPTION

Luhmann contends that morality underwent a universalization at the same time that the subjectivity of man became an accepted tenet in 18th century philosophy.[180] As such moral expectations became increasingly orientated around self-regulation, personal freedom, and the allocation of respect made on the basis of a person's intentions as well as their actual behaviour.[181] The older distinctions between virtuous and vicious behaviour were supplemented by a distinction between intention and behaviour. The person was increasingly seen as universal in scope (homme universel) and singular through their pursuit of self-understanding and self-determination.[182] Individualism in a stratified society was more concerned with being better than others, not by being different from others. Luhmann maintains that the new predilections for unrest and desire, interests and pleasure (plaisir), passion and self-love signified a turn in individualism's meaning. The older notion could not adapt to historical change. The new notion, however, permitted the individual to change through self-cultivation, self-realization, their freedom and reason. Consequently expectations as to how moral communications could handle this self-development had to be formed by reference to normalizations and its counterpart in deviation – shocking normality, avant-gardism, and revolution.[183] Moral communications could not reliably produce such accumulations for themselves; as such moral communications have to rely on their structural coupling with the mass media in the form of scandal. For it is within the realms of the mass media that the *public medium* is generated.

In the same period, the direct connection between morality and manners collapsed. This was triggered in part by changes in the possibilities for societal communication - heightened literacy,

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[180] Moral communication is 'inclusory and exclusory communication concerning respect and disrespect' (Luhmann, 2013: 280).
[181] Luhmann labels this as the 'specification of accountability' is held up as a condition for qualifying an action as moral. The morality of an action is meaningful by reference to the inner consent and self-motivation of the individual (Luhmann, 2012: 148-149, 240). See also Luhmann (1992b: 1001)
[182] Luhmann (2013: 277-8)
[183] Luhmann (1995: 257-262, 267)

greater travel, dissolution of social ties through socio-economic transformation, population migration, colonialism, the first waves of globalization, and the inevitability of meeting strangers. How can moral expectations be formed on the basis of social behaviour in which neither side is aware of the other? How can this opacity be handled and made transparent? Ethical reflection on good reasons for good behaviour left the salons and coffee houses for the university. The doctrine of civility could no longer internally regulate the conduct within societal strata, caste, and locality. It no longer made sense to differentiate moral demands by reference to a person's status as a peasant or a member of the nobility.[184] Universalized morality instead needed to produce concrete instances for moral concern such as the plight of the hungry and oppressed, or the victims of human rights abuses. A further instance noted by Luhmann is the capacity for code sabotage to attract moral concern.[185]

This combination of the universal and singular establishes, at least in part, that the 'moral restricts itself to the criterion of the ridiculous'.[186] Increasingly, moral communication takes on a polemegenous form in which it is generated from strife and in turn generates strife.[187] Morality serves as an alarm function and 'society clearly recruits moral communication for serious problems caused by its own structures and above all by its differentiation form'. It has free rein to bring to attention social problems like: the social question in the 19th century, stark world-wide differences in globalized wealth, ecological catastrophes.[188] It is this increasing concern for *salience* and *special cases* which was a theme I emphasized in Chapter 2. In Chapter 4 we detailed the exemplary archetypes of the virtuous knight and courteous courtier, amongst other examples, as providing a

[184] Luhmann (2013: 280)
[185] See Luhmann (2013:277-283) for further explanation.
[186] Luhmann (1992b: 1003). The scandalous and the graphically packaged information generated in the mass media grants a healthy source upon which moral communications can be irritated. Once articulated morally the communication of respect/disrespect can provide further irritations for communications in the system of the mass media. A positive feedback loop can thus emerge within (and between) systems. See Luhmann (2000b).
[187] Luhmann (1992b: 1004)
[188] See Luhmann (2012: 242). The social question of the 19th century weighed the industrial advances of technology against the costs to human dignity and alienation afforded by the labour-process.

series of actions which should be emulated. For in modern society, I have suggested that this type of emulation relevant to race is now fractured and constitutes perturbations between social systems. Morality's concern with the ridiculous is aptly suited to a contemporary self-description of modern society which seeks to combine the universal and the specific. We will turn to this theme in the next section.

Isaiah Berlin maintains that this moral transformation was encapsulated by Romanticism in the period 1760-1830. The literature of Victor Hugo, Byron, Coleridge, the Schlegel brothers, and Goethe best reflected the universalization of morality. In their works it was not particular virtues, vices, or values that was held in high esteem. What was valued was the dedication to values themselves. This was assessed through judgments on a person's sincerity, authenticity, purity, and integrity. How dedicated was that person to their ideals? How ready were they to sacrifice themselves for those values? Previously, no Christian knight or Protestant of the religious wars could admire and respect another person simply for their absolute belief in itself. In contrast, what mattered was the factual makeup of their beliefs or the social position of the believer. With Romanticism, however, martyrdom could be admired because of its sacrifice towards an eternal truth and having trenchant beliefs that one is willing to die for became a morally estimable quality in itself.[189] Motive matters more than consequences because motives are products of the will which can be controlled, unlike consequences. This freedom in relation to ourselves is that of authenticity and sincerity. This means that we can respect different opinions and different cultures because they are authentic to themselves.[190]

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[189] See Berlin (1999: 1-12). Lockridge (1989: 50) describes the ethic as a 'will to value'.

[190] Berlin traces the roots of Romanticism to the obscure German poet, Johan Georg Harmann, who went onto influence Goethe, Herder, and Kierkegaard. Harmann generalized Hume's insight that we can only really perceive probabilities rather than iron laws to claim; that we can only really claim to know anything, and anyone, through a leap of faith and a giving of trust (Berlin, 1999: 40-45). Considering our reliance on a Deleuzian notion of eternal return, one might phrase this as requiring an *amor fati*, a love of fate.

Richardson (2004) posits that the historicity of the individual emerged in the 17th century, which can be seen in the educational advice for the proper upbringing of the child. The most common paradigm in the Romantic period was the extension of John Locke's philosophical reliance on experience into the associationist psychology of Harley and Godwin. The child had a developmental structure akin to a growing plant and a young sapling. Children's primitive condition was gradually lost as they became more cultured through learning of the world. The literary portrayal of the self also reflected this emergent and self-distinguishing individual through observations on anecdotes that revealed the self, and epiphanic moments that punctuated the life of the self.

Romanticism was governed by a sense of the inadequate fit between the real and the apparent, heaven and earth. It concerns a struggle (between soul and body, content and form) and a desire (for something always still to come).[191] In order to grasp these gaps and inadequacies of fit, Romanticism called for the heightening of perceptions and an intensification of sensations so that that the ordinary and normal could be invested with new tones, implications, and connections. That said, there was an aversion to didacticism in art and a mechanical conception of man. The ethics of Romanticism praises a commitment to the unknowable.[192] It is this impetus which signifies a dual transformation: (i) morality operates under an interdiction on self-exemption, and (ii) the re-entry of the *world* into functionally differentiated sub-systems as the distinction between the universal and the singular.

[191] Curran (1993: 7)

[192] See in general Lockridge (1989).

SELF-DESCRIPTION OF MODERN SOCIETY: UNIVERSAL AND SINGULAR

'Concrete idiosyncrasies arise, "identity discourses", which assert their meaning against the unmarked space of all other possible meanings and at the same time throw acute light on certain oppositions in specifically rejecting global features of modern society.'

(Luhmann, 2013: 209)

The semantics of racism, and discrimination, communicate as 'identity discourses' that assert themselves against the 'unmarked space of all possible meanings'. This unmarked space has already been indicated within the concept of the world as the realization of the incommunicable in communication. The singularity of identity discourses throws into relief the universal and specific aspects of modern society.

Under the conditions of modernity the communicative landscape for identity discourses differs from that available to the anterior semantics of manner and courtesy. The functional differentiation of sub-systems means that the strands of discrimination are no longer unified and distributed through a hierarchical society. In such situations, the world was found by observing the distinctions that unify a stratified society. It appeared as the secret lines that separated behaviour at court from the provinces, or the seclusion generated by the knightly journey. Observations arose on this basis focused through stratifications in which the informative value of behaviour called for a positive or negative moral estimation - a citizen of the world, or a *demi-monde* - by reference to how far a person's behaviour emulated the idealized behaviour of the time. The communicative potentiality in terms of technology and the possibilities of dissemination intensified the lines between the

semantics that unfolded the self-description of society - Three Orders, the Court and Country, and so forth.

In modern society all social systems (including society as a social system) assert claims to universality but only within their respective domains. Universality and specificity operate on at least two levels. Society is universal and each system is specific. Each sub-system is universal and its operations are specific. The question is how are these two sides of the equation held together? How is the universal (the most indeterminate and distant) held together with the specific (the most determinate and near-at-hand)? It is the world that re-appears as the connection between sub-systems. In the same way that it had managed to hold together interactions at court and a wider societal ideology it now de-paradoxicalizes the societal self-description through emergence in the public medium, which is presupposed as a 'common present' by all sub-systems. Race as an intensive type of communication operates between the systems of the mass media, morals (to the extent that, in the modern world, morals can be thought of as a system), and art, to channel irritability.

A problem remains, however. Luhmann's functionally differentiated society does not, at least in a substantive way, provide for such a relationship between these three systems. Therefore, we will turn to Deleuze's triadic theory of repetition to provide a plateau upon which these social systems can be brought into alignment.

DELEUZE ON REPETITION

'Repetition as universality of the singular'

(Deleuze, 1994: 2)

Deleuze (1994) explores whether repetition can be understood as a creative process operating in respect to difference, rather than similarity.[193] How can we grasp the repetition of unique events? Does this not formulate a paradox i.e. the repetition of the unrepeatable? Deleuze asserts that repetition should be understood as a creative process distinct from conceptions of resemblance, equivalence, and substitution. A repetition of difference consolidates to produce identities. Deleuze presents an example in which the French national holiday, Federation Day, does not annually commemorate or represent the fall of the Bastille, but in fact the fall of the Bastille celebrates and repeats in advance all the Federation Days. Equally, Monet's first water lily repeats in advance all the others. A *secret* vibration resonates within the singular event extending it to the universal. This may seem to be counter-intuitive and so to properly grasp the argument we need to unpack his theory a little more deeply.[194]

Deleuze contends that metaphysics has failed to realise that similarity and generality are not constitutive operations. Drawing productively on the work of Bergson, he explains that repetition and difference underpin the identity of matter. Things, such as a chair, acquire their identity through repetition. Parallel to the actual plane where identities like the chair-thing consolidate there is a virtual plane. On this latter band effects play out in a complicated variety of series with intensities

[193] The use of Deleuzian metaphysics in this thesis does not pretend to do justice to the rich and complicated architecture laid out in his magnum opus *Difference and Repetition*. I have borrowed his observations on repetition and deployed their framework to produce a creative encounter with Luhmannian concepts. At least within this creative application I follow Deleuze in spirit, if not in the letter of his writings.

[194] Deleuze, 1994: 2. Interestingly Foucault (1977: 93) investigates the new forms of punishment that developed in the 18th century not in terms of desert or deterrence, but in terms of repetition. A person was not interned in order to be re-educated, deterred, or prevented from committing future deviations from the norm. Internment must prevent repetition - 'one must punish exactly enough to prevent repetition'. James Williams' (2003) critical guide and introduction provides invaluable assistance in understanding Deleuze's *Difference and Repetition.*

overlapping and coming into contention: the chair is becoming hard, becoming shiny, becoming comfortable. The boundaries of the thing are marked out through repetition as an animal marks out its territory by iteratively patrolling the perimeter of its territory. The retention of repetitions in habit and the reproduction of repetitions in memory lead us to the fixed representation of things.

The identity of the chair is given by a *secret* repetition that occurs as both passive and static syntheses in the mind: living present produced by habit, pure past produced by memory, and the 'royal repetition' concerned with the future. Underscoring this representation of the same territory is an infinite series of repetitions that the prowling animal and particular territory abstracts from: repeated paths of other animals, changing cycles of weather, the ebb and flow of the tides, the cycle of aging, the encroachment of civilization that beats to the rhythms of man and techno-industrial mechanisation. Even the more mundane matter of the chair is given through repetitions: the repetitive approximations that the body makes to the chair (shifting for comfort, standing up and sitting down, tiny variations made in its position in respect of the floor and desk), the cycle of hours and daylight. Some might object that these are not repetitions - for the same day is not being repeated, the same movement between body and desk is not being repeated. Could it not be argued that we are *imagining* connections and a continuum where there none is available? To resolve this issue, we must turn to an explanation of how repetition can occur between different items.

The production of difference between each repetition is inserted into the virtual plane as 'pure differences'. These differences are not held between similar things, but as differences in a relationship to differences without recourse to generality. For instance, when we commute to work each day there are a number of pure differences in the virtual plane which make this quotidian routine rather unique - becoming wealthier, becoming older, bumping into people we'll never see again at points in their lives which are singular. Thus, the unrepeatable - the unique - holds down a close proximity to the universality of repetition. A second example can highlight how the virtual

bends towards the infinite while representation proceeds in finite stages. Many paintings by Mark Rothko operate as gradients of colour becoming lighter and becoming darker; however, this band cannot be compartmentalized into segments. It is very difficult to say when we perceive differences occurring in the paintings.

The incapacity of a finite and representational medium to portray an infinitesimal series is common knowledge. Sorites paradox throws into relief this affliction: if we have a heap of sand and we remove a grain at what point does it no longer constitute a heap? *We cannot say*. Philosophically this paradox can be avoided by finding the term 'heap' inadmissible due to the fact it is a vague predicate; however, equally, we suggest that we are witnessing the interaction between the actual and virtual planes. Some ideas cannot be measured or quantified; they must be felt. In sum, we can perceive the work of 'pure differences' in actual things, but we cannot identify them except through recourse to representational language.[195] Thus linguistic signs cannot sufficiently give voice to the variations of intensity, but can only separate them into identifiable and concrete differences between similar things.[196] We can thus see that, in a truncated manner, there is a similarity between Deleuze's distinction between representational sign/virtual intensity and Luhmann's distinction between the mediums of language/perception from which communicative forms are abstracted.[197]

A repetition must be linked to the concept of difference otherwise we would not re-peat - the moment lives on resonating from the fall of the Bastille in each Federation Day, but our intense reactions and perceptions are very different at each repetition. We have also seen how repetition can produce singular moments. The everyday walk, the commute to work, and the schedule of the

[195] This continuum is suspected and imagined by many. It is translated into articulated communication in the guise of paranoid phantasy and conspiratorial day-dreams.
[196] This inability for the actual plane of signs to completely grasp the virtual plane with its perceptual intensities is registered by Novalis (as set out at the beginning of Chapter 1 of this thesis) - "Many things are much too delicate to be expressed in thought, let alone, to be put into words" (Luhmann, 2000a: 18, quoting Novalis).
[197] For a consideration of the encounter between Deleuze and Luhmann, see Chapter 3 in Philippopoulus-Mihalopoulos and la Cour (2013). Pottage too (1998) provides a development of Foucault's account of Bio-power through a comparison with the work of Luhmann and Deleuze.

working day, is distinct each time it is repeated because it involves variations in the virtual intensities with respect to earlier cycles and later cycles, and thus changing relations in wider series. We change with the walk - I'm getting tired, I'm becoming cold. Will the path and cycle of a local dog-walker intersect with mine, will the cycle of the seasons impact my walk making it too cold and dark to go outside at this hour in the morning? Even the most regular and universal of tasks can be *imperceptibly* imbued with a unique and singular quality. If we reflect on Durkheim's work, this might be re-assembled as the emergence of the sacred in the profane and daily grind of life.

In what has been set out above, we have begun to see how Deleuze's theory of repetition can link with the following concepts already highlighted in this thesis: the production of intensity, the universal and singular, and a notion of the secret and the public. In order to delve more thoroughly into these analyses I will now explain how repetition comes about through passive and static syntheses. Once explained I will then suggest that the system references pertinent to racism can be associated with Deleuze's syntheses - the passing present in the mass media, the pure past in moral communications, and open future in the sub-system of art. Each system reference is further connected by structural couplings that maintain the cycle between these references, namely: scandalization between mediated communications and morality, judgment between morality and artistic communications, mainstreaming/re-normalization between artistic communications and mediated communications.

PASSIVE SYNTHESIS OF HABIT AND THE FUNCTION OF THE MASS MEDIA

The repetitive quality of habit comes about through a passive, non-reflective synthesis. Our idea of a chair consolidates through passively synthesizing prior experiences and prior encounters with this chair-thing. Habit cannot be understood in terms of generality, but must be understood in terms of a constantly altering *scene* where an action has to change in order to reinforce the habit in the same context (this time do it as if you mean it, the position of the desk remains the same but our way of

sitting must adjust), or the action remains the same but is activated in a different context (we cycle the same route to work in bad weather and fair weather).

Repetition of the sequence (AB, AB, AB) elicits a response in the mind. Nothing changes in the object (AB), but the mind registers a difference: something new appears in the mind. The imagination contracts such that it retains the first AB when the second AB appears, thus an expectation of AB is formed. Out of this contracting process a living present emerges. The past is produced in the living present as the contraction of previous instants. The future is extended from the living present by an expectation produced in this contracting process. Particular past instants are contracted to produce a generality which is an expectation of the future. The mind registers the AB and comes to expect a repetition of the AB.[198]

To confirm the dynamism of the above passage: the imagination makes that which contracts appear as a repetition of an element or case (respectively: A, A, A; AB, AB, AB). The appearance of a difference between each repetition allows a difference to appear between other series (of repetition): the nods of a chicken's head accompany the repeated pulsations of the heart; the cycles of the season accompany the daily commute to work - even going so far as to solicit alterations in that repetitive route: public transport in winter, bicycle in summer.

So this first synthesis of habit produces the idea of a living present. A present on the move passing away from but also into the past while heading towards a future. How might this conception of repetition be relevant to this thesis?

Firstly, a living present accords with the function guaranteed by the system of the mass media. As Luhmann (2000b: 1) epigrammatically proclaims: 'Whatever we know about our society, or indeed about the world in which we live, we know through the mass media'. Knowledge of the familiar is generated by the mass media for the benefit of other sub-systems of society. One of the successes

[198] Deleuze (1994: 91-100)

of the mass media is the production of a common present that all other systems can take as a given. In providing a necessary or universal anchor the mass media mirrors Deleuze's dialogue with Kant in which Deleuze seeks to provide non-empirical grounds for a lived reality. Thus, in producing an observed reality the mass media construct a 'transcendental illusion'.[199]

This 'transcendental illusion' involves is a pre-given time for all. A profane space which all communication can assume exists.[200] This does not undermine the hypothesis that social systems construct their own temporal horizons. The mass media does not provide an operational synchronicity between systems. Instead the mass media provides the illusion of a common reality for the benefit of communication. Increased complexity can be managed intra-systemically because society no longer has to check that each communication connects with each other communication, nor do systems need to check that there are adequate environmental conditions for this to take place, 'amongst other things, about whether the participants are still alive'.[201] This commonality of the present operates as a quasi-transcendental anchor for the benefit of other social systems in society producing eigen-objects through its recursive performance.[202]

Luhmann states that the mass media 'includes all those institutions of society which make use of copying technologies to disseminate communication. This means principally books, magazines and newspapers manufactured by the printing press, but also all kinds of photographic or electronic copying procedures, provided that they generate large quantities of products whose target groups

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[199] Luhmann (2000b: 4)

[200] This common present is even reflected and re-packaged by the topics of the mass media. The notions of first, second, and third worlds, assume a common present from which all can be anchored.

[201] Luhmann (2000b: 96). This presumption of connectivity between communications may be a productive site to consider the concept of life, or even bio-power. This argument seems to offer a plausible area of research in which the complexity of social systems can be analysed in tandem with the functional differentiation of the mass media.

[202] Foucault (1970: 243) refers to Labour, Life, and Language as 'quasi-transcendentals' which make possible the objective knowledge of living beings, of the laws of production, and of the forms of language. They 'totalize phenomena and express the a priori coherence of empirical multiplicities'. For the time being we should bear in mind the theoretical affinity between quasi-transcendentals, eigen-behaviours (Luhmann, von Foerster), cybernetic objects (Ranulph Glanville), and quasi-objects (Serres).

are as yet undetermined.'[203] Dissemination by broadcasting is also included provided that it aims for general accessibility. The inter-position of technology as the copying medium crucially prevents co-presence and interaction between individuals. What is of importance is the fact that this communication is mass communication. Ceremonial and theatrical encounters are not a product of the mass media, nor are telephone conversations.

To summarize: the mass media enables a 'widespread dissemination and the possibility of anonymous uptake' alongside a 'constant re-actualization of the self-description of society and its cognitive world horizons'.[204]

A common present is guaranteed as familiar to all individuals. A system can take advantage of this presumption. With the production of further information future expectations can be set out and the system can then adapt itself to the past reference of this future anticipation. When the mass media disseminates news about the stock market which would impact the economy then the economy can adapt itself to these projections for companies and markets. The past and the future can be re-assembled according to this intervention of an updated present provided by the mass media. The memory contained within the mass media and the reality effect that this generates can initiate changes in the memory of other sub-systems.[205]

Returning to Deleuze, this function of the mass media operates in a similar fashion to the passive synthesis of habit. The mass media generates information about the world as a common present. This information is processed into non-information by an application of the media code which creates non-information i.e. redundancy. The double-helix of social redundancy and information is presumed by society and its sub-systems. The repetitive application of the code (information/non-information) contracts past instants through a present moment and generates expectations of a

[203] Luhmann (2000b: 2)
[204] Luhmann (2000b: 103)
[205] Luhmann (2000b: 98-99)

future. From this medium, other sub-systems can receive information about a present which re-configures future expectations and then generates a re-configuration of the systems' past.

An important quality of the living-present is the project of future expectations by the contraction of the past. Through repetition of experience things attain a degree of consistency. So the animal gradually draws out its territory by patrolling. With the appreciation of consistency comes the capacity to appreciate errors. The unveiling of errors is a hallmark of ritualistic communication. Small deviations are thrown into relief by the normalizing effect of rituals. The small singularities of each morning walk are exposed because the walk produces consistency via a repetitive action.[206]

To be clear, the mass media does not specialize in increasing knowledge or educating persons in conformity to norms.[207] The system is not concerned with the production of normality, or even exemplary models indicating appropriate behaviour. A more complex phenomena is underway, when compared to some of the earlier doctrines on manners, courtesy, and taste. This is understandable if we reflect on the hyper-complex state of modern society. Descriptions of society and normative orientations arise as a factual effect from the constant generation of information and its processing into non-information. The mass media enables the adaptation of systems to their environment. It is this assurance of a common presence which confirms adequate adaptation of each system to its environment to enable autopoiesis.

THE MASS MEDIA AND THE GROUNDS FOR THE RACIAL SCENE

In what has been summarized above, we have established how repetition can be provided through the functioning of the mass media system.

[206] See Luhmann (2012: 141-142)

[207] The mass media provide a huge medium and range of possibilities from which communication can select forms. A kind of background knowledge available to all society (Luhmann, 2000b: 66).

The offerings of the mass media allows social communication to be furnished with an ongoing reference to ‘individuals’ without having to consider the specificities of other functional systems.[208] The mass media provides on one hand, as mentioned earlier, a space for individualizing motives and reflection on their possibilities, and on the other hand provides generalities and standardizations for individuality. This latter operation can be glimpsed in the contribution of statistics to the operations of the mass media. Statistical forms manage to combine specificity and generality for the purpose of communicating informativity. For example, through the generation of averages and means, deviations 'stand out' as informative. Both anti-racist and racist movements make use of statistics to *reveal a world* and *expose a reality*. The informativity given by such mechanisms is then susceptible to moral assessment, for instance: it is unjust that unemployment disproportionately effects racial minorities; and, alternatively, the disproportionate levels of unemployment reflects the different work ethic of racial minorities.

A general effect produced by the mass media on society is to increase its capacity for irritation and thus the ability to produce information. To be irritated comes about through the setting of expectations, and it is specifically the mass media that produces a plethora of expectations of normality which can be increasingly shattered by irritations.[209] Luhmann suggests that the mass media's focus on individuality has certainly contributed towards a position in which the mode of second-order observation has settled, such that 'everything that is uttered is deciphered in terms of the one who utters it'[210]. Consequently, a culture of suspicion and paranoia arises in which motives can be questioned and self-observation is encouraged. The secondary effect in particular solidifies a growing pre-occupation with the self.[211] The mass media has attained functional differentiation on account of its ability to solve a societal problem. 'The mass media guarantee all function systems a present which is accepted throughout society and is familiar to individuals, and which they can take

[208] Luhmann (2000b: 74)
[209] Luhmann (2000b: 82)
[210] Luhmann (2000b: 84)
[211] Luhmann refers to this phenomenon as the 'self-psychiatrization of communication' (Luhmann, 2000b: 93).

as given when it is a matter of selecting a system-specific past and establishing decisions about future expectations important to the system.'

The mass media manage to operate as the memory of society. The system produces social redundancy and maintains the eigen-objects upon which societal memory is closely dependent. These eigen-objects are dynamically-stable entities that emerge through the recursive process of communication. Although valued highly as an innovative contribution by Luhmanns to his theory of society, unfortunately there are only a few fully worked out examples from which we can develop our application to racism. Significantly, Luhmann considered these eigen-objects as a far more likely 'foundation' for continued societal communication than consensus, or a social contract.[212] A number of other theorists have a similar, but less theoretically attuned concept. George Herbert Mead considers 'objects' as symbols of orientation. They operate as a principle of social co-ordination upon which behaviour can adapt; however, for Mead these are material objects and are not products of communication itself. Mead gives the example of a car as an object that symbolically orientates two persons on either side of the street. The car is a fulcrum anchoring the line of sight between the two persons, drawing them into a timeless instance despite their divergent spatio-temporal planes.[213]

There are many eigen-objects pertinent to the communication of racial difference. Our concern will be with how Labour is produced and irritated by racial connotations found in the incommunicability of the *world*. Race is an intensive factor that separates categories of acceptable and rejectable communications in the workplace. This will be examined in closer detail in Chapter 6.

[212] Luhmann relies heavily on the notion of eigen-behaviours developed by Heinz von Foerster (2003).
[213] See Mead (1922: 260, 1925)

PASSIVE SYNTHESIS OF THE PURE PAST: MORALITY

Deleuze reasons that his innovative interpretation of repetition first occurs via habit in which a living present passes away into the past. This first passive synthesis suggests a second synthesis. For we can see how instants contract into a present from the past and create structures for a future, but this does not explain how the present falls away into the past. This first synthesis we have explored with reference to Luhmann's system of the mass media. This second synthesis can be associated with Luhmann's observations on morality. These provide further conditions for a racial scene of light. To approach this, I will first turn my attention to explaining what Deleuze means by a passive synthesis of the pure past.[214]

The notion of a pure past must provide an argument for why the present passes away into the past. This archive is absolutely necessary if the present is to be experienced as enduring, continuing, and falling behind into a past. It needs to operate as the mediator between two reference points: the present which the past was, and the present to which it is the past. This pure past exists, but it has never become present. We glimpse it through representations of nostalgia and reminiscence. The involuntary memories summoned by a madeleine that point towards Proust's idealised Combray, the *imaginative* lands of Albion, or any other *purified* and *transparent* past which never reached actuality.[215]

The pure past operates as a configuration of potentiality and variability. By definition, it cannot be realised, however it still manages to arrange variation such that the selection of information can occur. In reference to the continuing present it provides a variety of options between each contraction of successive (repeated) instants. Successive refers to a causal chain that is not objective, but determined by the interlacing of these two passive syntheses. These causal chains can be represented, but they are conditioned by more fundamental processes engendered through

[214] Deleuze (1994: 102-108)
[215] For a discussion in terms of Proust, see Deleuze (2000: 52-67)

repetition. We are moving towards another pre-condition of the racial scene. The imagination of a pure past as represented through nostalgia. Moreover, using imaginative themes also enables the observer to occlude the paradoxical state of societal self-descriptions.[216]

How does this pure past relate to Luhmann's lexicon? It *embeds* the succession of moment to moment. It modulates that which is retained and reproduced, and that which is remembered and forgotten. We can see how this notion of the pure past relates to Luhmann's conception of memory. In communications there must be a way to understand why some connections between operations are remembered and some are forgotten. The memory function describes this process. Plainly, how memory functions is specific to each system. Legal memory explains how communications in terms of decisions, arguments, reasons, advice, and norms interlink. In modern society, the memory is heavily influenced by the operations of the mass media and the eigen-objects produced therein; however, we are concerning ourselves with a racial scene that comes about through the nexus between systems. Its memory must be distinctive from its formation.

To comprehend how expectations are memorized in communication we need to locate a destructive and restorative force. Furthermore, particular communications must be constitutive and patently relevant to racial communication. What communications irritate other communications compelling changes in expectation structures? These would be a set of communications that are triggered by conflict and in turn generate further conflict. Moral communications can undertake this role. It is a figure such as race that can intensify and guide the influence of moral communications on the mediated normality associated with Labour. It is the figure of race which can support or destroy the historicality and the lived experience of the workplace. We know that race must support normalized practices in the workplace because once race is *revealed* to be a factor then a whole set of variations are re-set.

[216] As explained in Chapter 4, imagination provides a means to unfold the paradox located within societal self-descriptions.

For example, communication in the workplace often takes place at a distance or in the abstract.[217] We receive a job application and then talk to the candidate over the phone. We meet up with a person face-to-face whom we have only ever spoken to over the phone or via email. When race becomes a factor in communication it does so through a *revelation* in which the already present but unaddressed assumptions are re-distributed. The fact that the candidate is black or speaks with a foreign accent causes a re-appreciation of our previous actions and relations. Did I accidently disrespect that person? What is the best way to proceed? Should I admit my mistake, should I re-appreciate my interview questions and responses? Does the race of the person re-calibrate all the exchanges of information in our email correspondence? Race appears as a visualization (a communication of the incommunicable) of irritability connecting morality and mediated communications. It is a singularity that holds these two universalized systems together. Of course, it may not be picked up by communication, but this does not discount the effects that follow when race does perturb and luxate the relationship between morality and mediated communications. The fact that moral communications can re-calibrate, destroy, and restore the meaningful structures of the mass media is evidence that the relationship correlates with that between the pure past and the passing present.

We have turned to moral communications for two reasons: firstly, morality is heavily interlinked with racism and its academic commentary as was shown in Chapter 2 of this thesis; secondly, I have detailed in an earlier chapter how the history of manners provides exemplars for respectful behaviour. In the provision of this guidance the conditions for esteem and disrespect are communicated. I have made the argument that due to the entanglement between self-descriptions

[217] Communication at a distance or in the abstract in which the recipient can only be roughly surmised (averaged, assessed as a probability, a generalized but anonymous audience, etc.) is indicative of communication in the *public* medium. The fact that employment and work itself seems to be a scene in which such communication can occur at a distance may be indicative of its suitability as an eigen-object. The alienation associated with Labour may also coincide with this point.

and these models of appropriate behavior, these forms are the precursor to racism proper, or at least provide a perspective for racism to be more fully understood.

STATIC SYNTHESIS OF THE OPEN FUTURE: ART

So far we have discussed how Deleuze's understanding of the continuous present and the pure past corresponds to Luhmann's conceptions of the mass media, social memory, and moral communications. The last step to consider is whether Deleuze's third synthesis of time explains how remembering and forgetting are modulated. Does the final synthesis correspond to what Luhmann has labeled oscillation, and is memory oscillated by the influence of the artistic sub-system? I will argue that it indeed does, sufficiently at least for the purposes of this thesis.

Monet's famous water lilies are copies of the very first lily. In a similar fashion, each Bastille Day commemorates the revolutionary storming of the Bastille by the sans-culottes of Paris; and the festivities on these days mark another grand turning in the cycle (199, 200, 201 ...) that extends from the momentous event itself. In either instance, repetition is predicated on similitude. The same event is repeated with a level of similarity as measured by likeness or distance. The intriguing question posed by Deleuze is whether this idea of repetition can be more fundamentally grasped as a figuration that works through and with differential relations. How can the fall of the Bastille 'repeat in advance' all the Bastille Days? Firstly, the phrase 'in advance' must be considered in terms of the future. Next, repetition must be configured in terms of the future. What is repetition for the future? It certainly cannot be understood as predestination or eschatology. Neither Luhmann's nor Deleuze's philosophical enterprise would permit such an interpretation.

As outlined in the discussion above, the present repeats as a synthesis of habit. This is a contractive process that transforms earlier series. On the other hand, the past repeats through a continual

transformation of the dynamic relations in the past. The future repeats, however, by allowing the past to return as different: 'the third repetition, this time by excess, the repetition of the future as eternal return' (Deleuze, 1994: 113). This is Deleuze's profound re-interpretation of Nietzsche's doctrine of eternal return. The radical openness of the future is the condition for the ‘new’ which appears in both present and past syntheses as a transformative component.[218] For example, if an effort is made to replicate a behaviour from the past (let us live as our ancestors once did; let us march on Parliament like the Suffrage movements once did) then we can only do so by changing the series which underpin this past event. The action has to be plucked out of its context and re-cited within contemporary conditions. There is an essential element of innovation contained within this extraction and re-inscription. Repetition in advance is the third synthesis of time; it is the condition for genuine novelty and only that which is genuinely different can return.

In order to be authentically novel the past must return in such a way that the new present is free of all determination. It must be pure. Accordingly, the return of the past caused by the future does not follow a determinable orbit such as the Earth follows around the Sun. Instead, the rotations are de-centred and fractured; and with each revolution the past passes into these forged fault lines as a 'new' living present. It turns out that Marx was correct. History repeats itself as farce and as tragedy.[219] Those repetitions based on similitude and its connotations in the modes of resemblance, analogy, opposition, and identity will be eliminated because they fail the test of eternal return.[220] The only constancy permitted by this formulation is the return of difference that is pure, transparent, and unadulterated; for that which is similar can never return.[221]

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[218] This emphasis on an open future compares favourably with Luhmann's insistence that time was fundamentally re-orientated when society underwent functional differentiation.

[219] And this component is particularly important for the communicative aspect of repetition. Both farce and tragedy are recursively communicable on the basis of contradiction - a doubling as tautology, plus negation.

[220] Deleuze (1994: 381 ff.)

[221] It is repetition of the future that ‘constitutes the independence of the work’ (Deleuze, 1994: 113). Deleuze (1990) in *Logic of Sense* extends his analysis of temporal structures in a more figurative direction closer to recognizing the aesthetic quality of such a movement.

The only return permissible is through an action that wipes the slate clean and forces a new beginning - a caesura is *asserted* that distributes a before and an after. In terms of the employment context I would suggest that a racial intensity in the form of a judgment disrupts the on-going narrative at work. The exercise of judgments asserts a before and after because it provides a punctuation in the on-going story of an employee. For example, a judgment to offer an employment or refuse a promotion denotes a before and after the event. It is race as a specialization within identity discourses that channels such dislocations. Time is thrown 'out of joint' as the assertoric process internally splinters the on-going narrative in the workplace, such that each new phase in the relationship forges ahead into the lines of fracture.

A judgment has to be made and it is through this avenue that we can see the structural coupling between morality and art. It is a *judgment* that is meaningful both as a moral communication and an artistic communication.[222] Judgments similarly combine heterogeneous qualities harmonizing such elements. Such aesthetic judgments that establish a caesura are also an integral component of Foucault's notion of power. *Discipline and Punish* is heavily concerned with setting out an aesthetics of life.[223] In noting the epistemic changes to punishment Foucault frequently invokes aesthetic qualities. The old jurisprudence exhibited 'an entire poetics' (Foucault, 1977: 45, quoting Giambattista Vico) with its mimesis of the original crime in the punishment spectacle (a hanging should take place at the site of the crime, the same gestures and instruments should be employed), and symbolic performance and restitution in terms of the nature of the crime (the tongues of blasphemes should be pierced, the impure burnt). Through atrocity the invisible was made visible

[222] There is only a loose structural coupling because art is particularly isolated sub-system in modern society. The many evolutionary permutations between morality and art are discussed by Luhmann (2000a: 74-81, 275 ff.) in *Art as a Social System*. 'A judgment of unity comes about only when, after working through the play of differences, after reconstructing the work's inner circularity, one distinguishes the work from something else'(Luhmann, 2000a: 72).

[223] In Deleuze's (1988: 59) interpretative monograph on Foucault seems to concur with this contention. Deleuze finds that throughout Foucault's scholarship an obsession with the visible, with diagrams and geometries, and with institutions that allow 'multisensorial complexes ... [to] emerge into the light of day'.

and the whole (sovereign) is brought in line with the parts (status, ranks, persons). What is required is a 'relation that is immediately intelligible to the senses on which a simple calculation may be based: a sort of reasonable aesthetics of punishment'.[224]

Foucault's thinking also follows the change in emulation highlighted within Chapter 4 and Chapter 5 of this thesis. Foucault emphasizes the informative, moral, and aesthetic components of power.[225] When discussing the transition from a pre-modern to a modern society he notes that the fabulous narrative of the nobles with their exemplary conduct warranting respect and esteem is dislodged in favour of the obscure, anonymous, lives of the masses.[226] Foucault presents this as a transition from fabulous communication that operates on the basis of a distinction between the true world and the false to literary communication that 'puts itself forward as *artifice'* disregarding claims of imitating the natural world in order to construct fictional worlds.[227]

In a later work, Foucault examines the *Exempla* offered by the lives of infamous men; not great villains, but those persons who through their perceived idiosyncrasies and maladjustment to their environs were interned in prison and asylum. He designates these examples as *'nouvelle'* for two reasons which are pertinent to this thesis. Firstly, as communicating a piece of news. Secondly, by reference to the literary form of the short story, the novella. These *Exempla* combine in a diagram that channels information, narration, and morality.[228] For Foucault the few lines that detail the traces left behind of a sodomite friar, a fantastic usurer, or a deserting soldier are 'lightning-existences' and 'life-poems'.[229] Each such description communicates a scene in which the narrative quality of reality is made perceptible. These scenes are not simply distilled from the real world and

[224] Foucault (1977: 106)
[225] Deleuze (1986: 72) claims that Foucault's panopticonism imposes a 'particular *taste* or *conduct* on a multiplicity of particular individuals'
[226] Foucault (1979: 90) goes so far as to argue that this compulsion generates a moral duty 'to tell the most common of secrets'.
[227] Foucault (1979: 90)
[228] Foucault (1979: 76ff)
[229] Foucault (1979: 77)

then prepared into a memoir or recollection. Instead, these scenes operate as a 'dramaturgy of the real' in which the relationship between the communication of artistic invention and the reality effect in communication is made transparent and amenable to the senses - as an episode in a battle, as a weapon of hatred, and as a gesticulation of despair.[230]

The reason that I have reference Foucault in the above paragraphs is that his line of thought bears a number of similarities to the thesis advanced in this chapter; moreover, the notion of judgment appears in many of his *scenes* and *exemplas* precisely because it signals a punctuating point in an on-going and abstract narrative. The communication of judgments in the context of employment occupy a comparable position to that suggested by Foucault in the workings of the prison and hospital. Labour can be argued to be an eigen-object generated within the recursivity of the mass media. Akin to the judgments denoted by Foucault, judgments occur in the workplace that perform a fractured mimesis that is driven by the racial intensity between morals and art: (i) a person of Asian ethnicity may be refused a job at a car dealership in a predominately white area because it is felt they would not be a good fit for that workplace; (ii) the judgment that the limited representation of black people in the work-place makes a single black employee the voice of all black people; (iii) the generalized judgment that an individual should conform to racial stereotypes. In such instances, the expectations of normality and life in the workplace are punctuated by such judgments that create a new phase in the employment context. In each example detailed there is a gap, which judgment fills.

This before and after quality is a central component to Luhmann's theorization of art. The detachment of the work from the artist evidences the manner in which the caesura disconnects past from future. The individuation of the work of art, which doubles reality for the purpose of observing

[230] Foucault (1979: 77)

reality, reflects this distancing from the original author.[231] What more, through this individuation an imagined world comes into being which pushes the idea of copy-original into irrelevance.[232] For it is not a repetition of the same, but a repetition of an intangible (read: *incommunicable*) distinction that takes place within the perceptual plane.

In the section above we have argued that Deleuze's third repetition of the open future can be considered to be aesthetic in nature. The structural coupling between morals and art is accomplished through the communication of judgment. Through this channel racial intensities serve to irritate and perturb, such that a *fractured emulation* occurs between the relevant social systems. A judgment is able to combine two dissonant elements into an equation allowing moral communications to be translated into artistic communications. Within Deleuze's philosophy this allows the past to return as a different future.

THE PUBLIC MEDIUM

From the above argument we can conclude that repetition can be understood through a triad of temporal syntheses that relate to the eternal return of difference. Repetition need not be defined along the standard lines of repeated movement in which the same action is repeated in instance one, two, and three. Each singular moment can be connected to a universal plane through a repetition of difference. This brings together our concern with perception/communication and the self-description universal/singular. We have also surmised that this secret vibration does not need to be contained in a tumultuous event - the Fall of the Berlin Wall, the 9/11 attacks. With this we can look for less essential and dramatic sources for societal change. Racism need not be related to a

[231] See Luhmann's (2000a, 54- 102) discussion on the connection between first-order and second-order observations for an erudite examination of this communicative structure.
[232] Hence, the movement from emulation of esteemable actions detailed in Chapter 4 to a fractured emulation which connects the social systems of the mass media, morals, and art.

spectacular and cataclysmic event, or even a prominent sequence of events. It can be involved in the daily sleights in the work-place, and even the everyday decisions to promote and dismiss employees.

Once this background is understood, a scene of light can be isolated as a confluence upon which repetition occurs. It is here that the various systemic references are located (the mass media, morality, art) that contribute to racially intensive communications. How can these forms be brought together? How can these systemic communications be tied down within a site? We need to find another medium to accompany these forms and from which new forms can propagate? That medium is the *public*. This is the successor to the *secret* vibration. This is the *public* vibration, the public scene of repetition.

Each synthesis constitutes a fold in the next, as each bends suggestively towards the next synthesis. As an image a spiral-shell appears.[233] The first synthesis: in order for the present to pass into a past, there must be a reference point which is the past. Otherwise, why is the present not the only dimension of time? What are the conditions of this contracting each present instant into a habit that produces expectations? The second synthesis: in order to maintain a pure past, an archive is needed.[234] The third synthesis constitutes a *caesura* that dislocates a past from running into a future. The *caesura* is the 'image of a unique and tremendous event' operating as a 'symbol', which manages to 'throw time out of joint'.[235] Through this luxation the caesura constitutes a sequence of repetition that consolidate into a temporal series.

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[233] This is doubly significant. Firstly, Foucault (1970) in his in-depth explication of Velasquez's *Las Meninas* imagines the scene as constituting a spiral-shell in which each observational point interacts and bends towards another. Secondly, Jean Clam (2000) explores the proto-ontology within Luhmann's deployment of operation and considers the operations moving towards the understandable as a 'sempiternal wrap' or a 'whirlpool' in its capacity to produce a certain static image through dynamic forces. We might even argue that this scene in which various levels of repetition enfold one another prefigure the formation of an autopoietic system. Could such an avenue provide an alternative vista to Teubner's hyper-cycle, or Luhmann's gnomic remarks regarding the 'causal' processes bringing about autopoeisis. On the latter point, there does seem to be a potential because Deleuze explicitly constructs the spiral-shell on the basis of heterogeneous levels gravitating towards each other in a non-causal manner.
[234] Deleuze (1994: 100-101, 110-112)
[235] Deleuze (1994: 112)

Throughout the preceding sections I have been placing certain terms in italics - *imagination, perception, set apart, close at hand, familiar, secret, poetics, invisible, visible,* and *artifice*. The aim of this practice has been to serve as a vehicle for better signposting various abstract affinities contained within theoretical works and the development of manners in Western Europe. These are meant to serve as indicators of the diachronic and synchronic semantics of discrimination which have been highlighted in Chapter 4 and this Chapter.

I have been italicizing the term *secret* as a means to more clearly signpost later developments of this thesis that take place in this section. Secrecy, Luhmann notes, provided a functional comparator to an idea of the *public* in contemporary society. At first glance this may seem to be contradictory. Therefore, when I referenced a *secret* repetition I have been trying to point towards the notion that this repetitive communication takes place in a locus of the *public*.[236] That which is visible/invisible intersects with this.[237]

The mass media reproduces a public space in which all the internal environments of society can be attributed. A public-facing, a front-end, a public profile, a public spokesman, which can be created by an organization or safeguarded of a functional sub-system. Communications that are directed towards this idea of the public can see that the environment is affecting their system, but the system cannot identify or concretise the author. The idea of the public - of the mass - comes in here.

If the system 'reflects that it is being observed from outside, without it being established how and by whom, it conceives itself as observable in the medium of the public'. This often leads to the generation of generalisable and publicly defensible points of view. This concept precedes the idea of

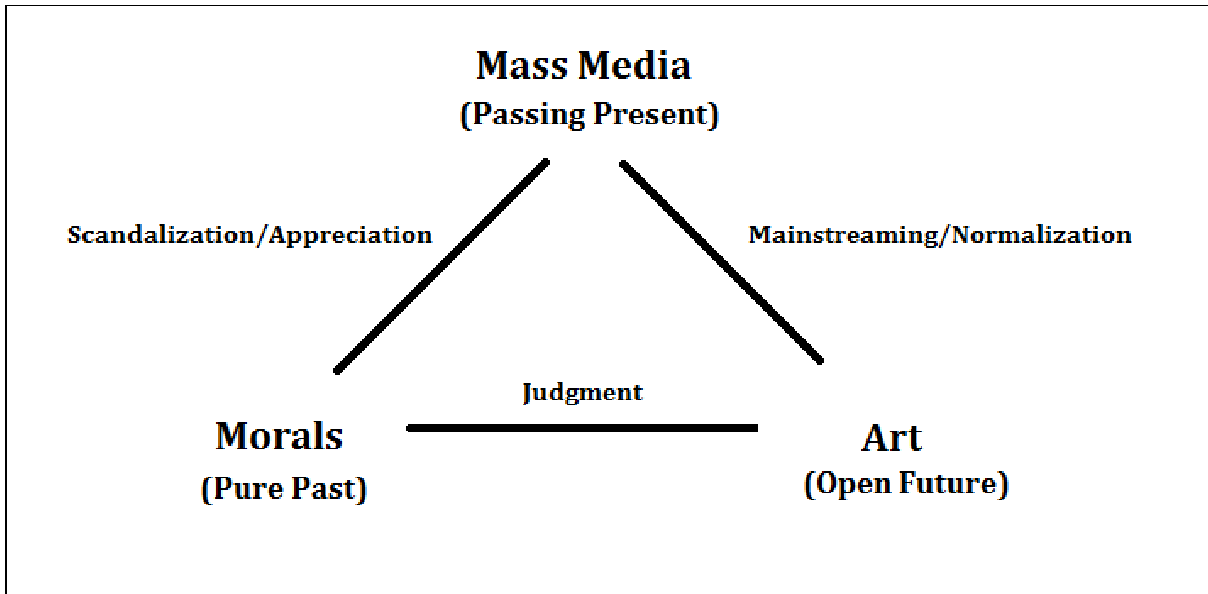
[236] 'Like theatre, the mass media also put the individual into a scene that is outside the scene set on the stage.' This is a technical condition for the differentiation of the media system. A defining feature of the Romantic era is a crisis of the social self. There was a confusion of life and life in literature which was explored by the featuring of twins, reflections, and doppelgängers: Luhmann (2000b: 114)

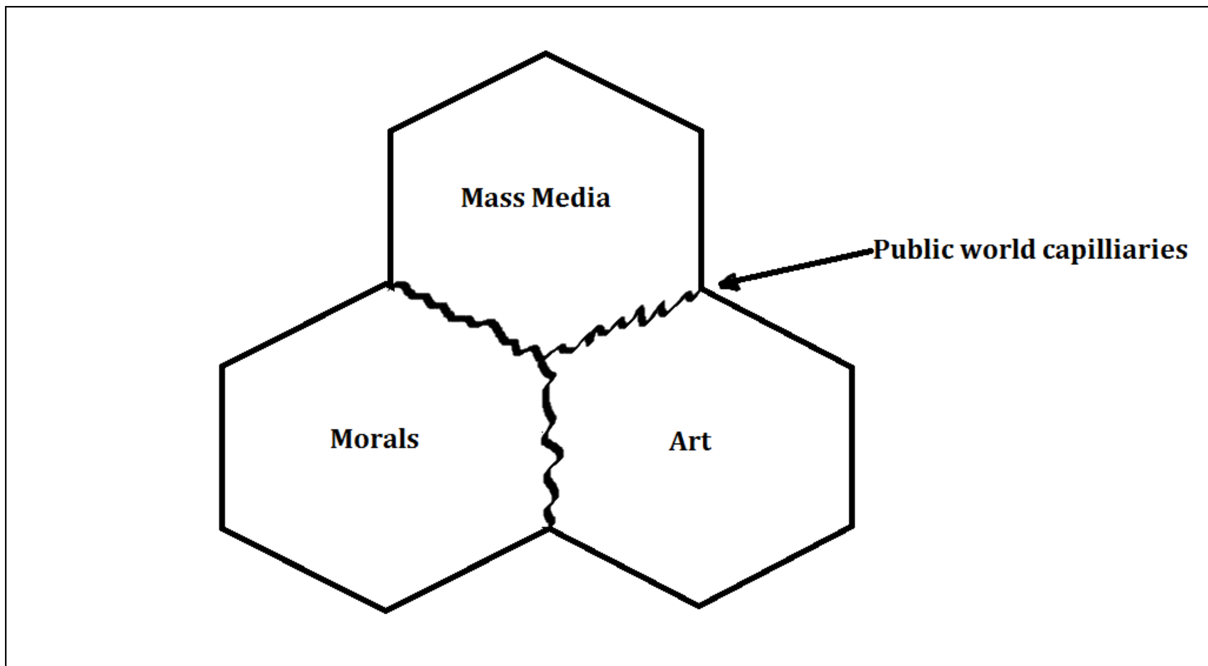
[237] The mythology of the modern leaves the suggestions that an invisible power is at work behind all this. 'Needs are diverted away into that *qualitas occulta* using simplifying explanations, enabling perceived reality to be reduced to a schema of power and victims': (Luhmann, 2000b: 70)

public opinion and a constitutionalised concept of public life that demands freedom of expression. As a social medium it inspires and spurs on the specialisation of second-order observations within sub-systems: public opinion within politics, the market within economics, scientific publications within science. It is within this public medium that the racial scene takes hold. This will be examined more closely in Chapter 6.

CONCLUSION

This chapter has provided a synchronic description of racism from the perspective of systems theory, Deleuzian repetition, and Foucauldian themes. I have argued that the strands of discrimination - informativity, moral esteem, and an artistic component - have become locked within their respective functionally differentiated social systems. Moreover, the self-description of modern society now operates in trying to balance the universal and the singular. The relationship between these social systems has been theorized to involve a Deleuzian triad of repetitions providing an anchor through which racial intensities irritate and perturb each social system. The *world* concept identified in Chapter 4 - the *secret vibration* that separated Country and Court, or London Society and the provinces - has re-emerged within the public medium of modern society. In this medium race generates communications that are elusive, inconsistent, and above all, involved in making the invisible visible for modern society. This will be made clearer in Chapter 6 where a more in-depth illustration is presented in terms of the employment context. All of this analysis contributes to re-describing the social basis for discrimination from a systems theory perspective. The diagrams set out below provide a slightly reified representation of the arrangement which this chapter has tried to explicate.


Mass Media
(Passing Present)
Scandalization/Appreciation
Mainstreaming/Normalization
Judgment
Morals
(Pure Past)
Art
(Open Future)


Mass Media
Public world capilliaries
Morals
Art

CHAPTER 6: AN ILLUSTRATION OF RACISM

INTRODUCTION

Chapters 4 and 5 sought to express the social basis of discrimination from a systems theory perspective by a review of the multiple communicative strands and societal narratives that anticipated the semantics of discrimination in pre-modern society. The socio-genetics of esteem and manners were sketched to accomplish this goal. In Chapter 5 this systems approach was extended through reference to what can be described as the archaeological work of Foucault and Deleuze's theory of repetition. The present chapter combines these insights and continues the story of Chapter 4 by providing an illustration of race and racism in modern society. The strands of discrimination are brought to prominence within the idea of Labour and Work such that racial forms of communication can be understood.[238] This is accomplished through the insertion of Deleuze's triad of repetitions as a holding pattern between divergent social systems. Consequently, racism is explained not as an instance of repeated action and thought, or as a way to divide space, but as a repetition in time that affects the predominant self-description of modern society in terms of the universal and singular.

SYSTEM FORMATION AND DELEUZIAN REPETITION

What are the eigen-objects which circulate in the mass media? What folds are formed through the programmatic streams of news, advertisement, and entertainment? Since we are concerned with eigen-behaviours the worlds upon which we can focus our efforts are not particular advertisements or specific entertainment shows, but rather the formal operative conditions which are consolidated through the continuous repetition of these processes.

[238] A preliminary rendering of this illustration was provided in Chapter 4.

Certainly, there are many entertainment shows which offer an opportunity to observe on the core of race through trading in racial stereotypes, or by offering a more general commentary on racial themes; however, what we are seeking to grasp is (i) the objects that constitute a memory for society situated within a public world anticipated and relied upon by other sub-systems, and (ii) that these objects must establish a 'living present' through which habitual contractions occur establishing a particular past and a general future. These contracted states must give the feeling of movement to the present from the past and towards the future. This notion of the 'living present' corresponds to Deleuze's first synthesis of time. I will attempt to situate this first synthesis as operating in accordance with Luhmann's argument for the production of eigen-objects within the mass media.

The most profitable departure point would be to proceed from the notion of life and bio-power; not least because Foucault (1970: 250 ff.), I would submit, offers the figures of life, grammar, and labour as eigen-behaviours produced through the self-application of the biological, linguistic, and economic discourses of the 17th and 18th centuries. Furthermore, Foucault's interest in bio-power offers a fertile field with similar concerns to our project. Broadly stated, modern power operates between two polarities - the anatomy of the body and the life of the population - and thus stretches between the utmost singular and the utmost universal. For example, for a notion such as life, or some comparable entity, to operate, it must bring together the practice of repetition, the universal-specific distinction prevalent in societal self-description, eigen-objects, and the mass media.[239] My argument is that these objects, as with life, form an integral part of the communication of race in modern society. In this chapter we will focus on Labour.

Each programmatic stream of the mass media doubles the world and by virtue of this gesture provides a platform for the observation of reality – from distinctions between the real and ideal,

[239] Life is described within natural history in terms which are increasingly similar to eigen-behaviours i.e. as the repeated re-channelling of a system's outputs to its inputs within the same transformative process: 'Organic structure is becoming an abstract being . . . capable of assuming numerous forms' (Foucault, 1970: 263 quoting Saint-Hilaire).

mundane and fantastical, latent and manifest. This doubling distinction carves out a sphere in which a present moment generates past and future dimensions whilst initiating a movement from a particular past to a general future**.** For Deleuze this would be phrased as the contraction of differential variations that integrate various intensities- such as, to give a naturalistic analogy, all the cycles that contract to synthesize the becoming of a pebble lying on a beach - tide, moisture, air. The life or 'contemplative soul' of the pebble absorbs past variations and draws expectations of future variations.

Returning to Luhmann's nomenclature, in the mass media these duplications bracket time in a similar fashion. There is a beginning and an end to each world that is both signaled to the viewer and articulated within the terminology of a narrative. The meaningfulness of topics is organized in accordance with and within the internal walls of the world. The maintenance of such momentary individuations operates in a similar fashion to events in interaction systems. For it is in a conversation, meeting, or party, that meaningful communications are bracketed by the requirements of this momentary system which begins and ends, often without leaving a lasting trace. For example: the meeting is opened, the chair convenes, first speaker, second speaker, refreshments, cross-discussion, and so on, concluding remarks, the meeting is closed. Steps and strategies within a game are marshaled with a view to the beginning and end of the interaction. It is from the million-fold iterations of such programmes that a public world can emerge.

The broadcasting of news operates in cycles in which a narrative runs telling a story by conveying information for an imagined audience. Such cycles run in sync (not in terms of synchronicity, but as another contraction between a news-cycle and an audience cycle) with the inception and termination of an audience's imagined attention-span and life-style.[240] Advertisements grab a

[240] Note that one's attention-span and lifestyle are the culmination of habits i.e. contractions and repetitions of the Deleuzian first synthesis. A person's attention only lasts so long until it moves on - I scan a page for meaning, I am distracted by the internet, I hear a door slam. In each instance, my attention-span begins and ends, and then repeats the motion. In terms of life-style, 24/7 news 'co-ordinates' with a 24/7 life-style.

person's interest, entice a viewer to cross the threshold into a fictional landscape through the assertion of captivating forms, and delay meaningful resolution so that 'understanding' only comes about through the engagement of the viewer. Entertainment communicates time-signals so that the audience is given a sign that the fictional world is beginning and ending (opening credits to a film, 'once upon a time', epilogue) and events are meaningful within the narrative arc of the film (characters, relationships, plots, hero-villain).

It is not the content of such worlds which is of interest, but rather the formal conditions for their generation. How do these bubbles rise to the surface so that other sub-systems can consider them as a public environment? How exactly does this public world-environment establish a common present to be presumed by other societal sub-systems and what eigen-objects does it present as indicative of this common present? To consider this question we must return to Deleuze. In explaining repetition, he suggests that imagination holds together two discrete instances so that repetition can occur. This is not imagination in a psychological sense, but as a notion far closer to Luhmann's references to how paradoxes are often unfolded through imaginative resolutions. In fact, Deleuze discards imagination for the term 'contemplative soul' which is more in tune with his almost vitalist metaphysics. It is a figure such as a soul, in the sense noted above, that operates as an eigen-behaviour. It denotes a construction that combines dynamic and static qualities produced through repetitive contractions. Other figures which perform in a similar fashion are the Hegelian concept of Spirit, History, Life, Grammar, and Labour.[241] All of these exhibit features of eigen-behaviour in which they appear to operate as system-limited control mechanisms that offer guidance to a system.

The effect of moral communications on mass media communications replicates the relationship that exists between the pure past and the living present. The aggregated syntheses of the living present fall away through becoming excessive or saturated. They pass on. The morality of the pure past allows this to take place. We know that moral communications structurally couple with the mass

[241] Luhmann (2000a: 10) refers to the Hegelian notion of Spirit as a 'circum-locution of communication'.

media through the disruptive influence of scandals and the like. The question is how the artificial, synthetic, and public quality of communications is dissolved by the impact of morally coded communications? How do communications that re-programme the moral code dislocate trends, moods, and climates. They do so through influence exercised via a structural coupling between morality and the mass media in the forms of - scandal, infamy, public embarrassment, depreciation, controversy, cause célèbre, delinquency, deviation, vilification, corruption, debasement, opprobrium; and their opposite - commendation, appreciation, approval, acclaim, honour, sensibility, etc.

These forms advance the notion of the synthetic and the artificial. In broad strokes, the constitution of communication becomes a topic of communication such that a concern arises around the synthetic and prosthetic qualities of the voice, image, and text. Communication is being constituted through observing how informative utterances are understood. The public aspect of communication is this notion of artificiality. What is the public except an acknowledgement of mediation and a generalized media apparatus? Within the public space diverse interests overlap and are then successfully mediated. Historically, this public space appears with the arrival of tele-technology. Such a change creates, for communication, a situation in which recipients are far more passive. Mass-copying technologies disconnect the active and passive modes of communication. Prior to such inventions as the printing press, the fact one could read probably indicated that one could also write. One could both listen and speak. However, the formalization and technicalization of dissemination technologies separates these modes. This disconnection is further exacerbated from the 19th century onwards in which increasingly the passive and active modes of communication become specialized and centralized. The fact that we can receive a communication via television, radio, or the internet does not require any knowledge of its production or the ability to communicate in return. Consequently, there arises a common suspicion that actuality is actively constructed. The reality on offer is produced via a pre-selection, filtering, and pre-ordering.

Actuality is grasped only in a partial fashion through a mediation. Actuality is thus, ‘actually’ observed through the framework of the fictional, virtual, fantastical landscape.

These synthetic, mediated communications need to be comprehended by reference to transparency. They need to be de-coded, de-ciphered, and de-programmed. And yet we must remember that if something is made transparent then other items are, in consequences, made more opaque. One’s frame of reference telescopes and in the same gesture other subjects of interest lose focus and become de-framed. Accordingly, the production of both transparency and opacity emerges in the same action. De-ciphering communications communicate in turn through reliance on an artificial and synthetic quality. Public communications recursively connect to other public communications.

It is within the contradictory and artificial aspect of these communications that race is configured. Significantly, as I stated at the beginning of Chapter 4, and as realized by both James Baldwin and Margaret Mead, race demands to be both ignored and recognized, appreciated and disavowed.

COMMUNICATIVE THEMES: LABOUR AND WORK

In terms of labour and work what signals a doubling of our view on the world? A novel manages this through a phrase such as 'once upon a time'. From then on the observer knows that the world has been split into the actual and the fantastical. The reality of the world in which we live is exposed by the novel. The text provides this viewpoint for such a second-order observation. We are concerned, however, with a wider occurrence in the mass media, particularly how trends, fashions, and normalities are exposed within the broad context of work and labour. What allows us to realize that there are normal or expected ways of working? It is the influence of the abstract conception of the world via the public medium that allows these second-order observations to take place. In the same

manner that silence punctuates words and throws them into various degrees of focus, the public medium indicates a common present available to all systems. Through consideration of commonality we can see how overlapping concerns have been already negotiated, or how there is a presumed set of expectations that underpin our navigation of social relations. Forms are extracted from this medium which allow an observation on reality and as such normality can be conceptualized, or the presumptions and interests that underpin our world can be thrown into view.

In the work-place, generated within the concatenations of the mass media, this doubling occurs in many situations such that a 'reality' is revealed and an observational position on this 'reality' is constructed.[242] Expectations are negotiated in the work place.[243] The consensuality of relationships is also an issue: average rates of pay are revealed; an employment decision needs to be made to employ or promote. From here, a consideration of presumed expectations arises and the question is posed: what is acceptable? It is in the revelation of this normality and the articulation of formerly unarticulated expectations that certain visibilities arise. For example - the differences of informativity relevant to the workplace can include the following: formal/informal, charisma/seduction, teamwork/jocular, company emails/gossip, confident/aggressive.

These examples cannot be easily classified. It is not the case that one side of the distinction represents formality, and the other side informality. It can be a formal requirement that one is assertive or aggressive (in sales, in requesting a promotion), and being labeled confident may be an informal estimation. Additionally, being unable to appear relaxed or attend informal events can be an impediment in the workplace. These are not classifications that map onto racial and ethnic distinctions. Being charismatic or indulging in gossip are not reliable grounds for differentiating on

[242] Notions of work, employment, and labour are constructed in the mass media. However, as eigen-objects, I am extending their meaning from that intended by Luhmann. I refer to a public medium which is a far more discursive space than Luhmann seems to envisage. His examinations of the mass media are more directed to the communications that are generated through institutions at the centre of that system.
[243] Their negotiated quality indicates a mediated quality, which is indicative of how I have described the public medium above.

the basis of race, or any other characteristic for that matter. It is however the impact of moral communications in the allocation of esteem and value that grants one side greater prominence and reduces the other side of the distinction to a lesser prominence. Prominence can be either negative or positive: good/bad, respectful/disrespectful. The force of race is the differential that translates across these systems as an intensity tightening and loosening distinctions, granting prominence and depreciating certain states of the system. Race is one differential that regulates the irritations between morals and the employment context. Since it is a pure and virtual difference it operates as a distinguishing force between the distinctions noted above. It channels the impact of moral estimations to cause the passing present of normality to break-down. Unlike the history of manners and courtesy moral esteem cannot be allocated on the basis of copying actions, for example: acting with honour or being chivalrous. Emulation is fractured in time and occurs as the irritability between systems.

Race is often the hidden distinction that is the difference between such distinctions in the work-place. It attracts moral appreciation to such other distinctions, in that whether a person is considered confident or aggressive may come down to race as the unspoken factor. Whether a person is doing the right thing at work or going about the task in the right way is distinguished on the basis of race. Whether one is respectful or disrespectful by gossiping, or making a joke, may be a distinction motivated by race as the hidden factor. Whether one is charismatic or sleazy, doing well or doing worse, laid-back or lazy are all distinctions which can be intensified by race.[244]

This is why racism is so elusive. It operates as an intensity between social systems. It can only be observed through a semantics of revelation in which it is revealed or exposed. The invisible is made visible. It does so through *world* and *public* lines which delineate the work-place. In a similar manner

[244] Other identities, such as gender, operate in a parallel fashion, to force such distinctions.

as to how the doctrine of manners bisected the Court from the Country and High Society from the masses, identities like race secretly beat within the eigen-objects of modern society. [245]

Observations on race that conceptualize anti-racism and racism also operate through revelation and exposé: average pay rates are revealed, the institutional racism of the police force is exposed, the unconscious racism of the employer is highlighted, 'stop and search' tactics are uncovered as a potential hidden punishment for black youths, neutral conditions of employment are unveiled to have a disproportionate impact on certain racial and ethnic groups, security assessments turn out to involve racial profiling. And conversely racism is communicated through visibilization: the uncommunicated assumption is communicated that a Muslim woman will stop working after she has a child, saying what the silent majority is really thinking;[246] anti-Semitic conspiracies unveil the exercise of power from a distance;[247] the description of black criminals as displaying a savagery incommunicable in the modern world; monitoring black youths instead of white youths because in reality their future actions (unknown as yet) are likely to be criminal.

Turning back to the employment context. How does this moral estimation of employment transform into an artistic judgment? If we recall that an artistic judgment provides a structural coupling between morals and art then race can also intensify such a relationship. An artistic judgment must produce a caesura between the before and after, a revelatory and epiphantic moment in the life-cycle, a disconnection between the old normal and the new normal. Luhmann's vision of art registers these qualities in the combination of recognition and astonishment, the derivative and the

[245] Luhmann is not unaware of this modern predicament. When discussing sociology in modern society, he notes a similar phenomenon. For, after all, if everything we know about the world comes from the mass media then the eigen-objects it produces must create the grounds for the visible and invisible: 'Precisely this highly modern mixture of knowledge and agitation supports our thesis of double invisibilization. In the unmarked space of what can be described only with fictitious "scenarios" and in terms of interest- driven assumptions about probabilities and improbabilities, a description of society establishes itself that reacts with self-invisibilization' (Luhmann, 2013: 325).

[246] For example, the recent comments of Donald Trump in questioning whether it is a good immigration policy to allow immigrants from 'shit-hole' countries is justified by other commentators as suggesting that this is what we are all really thinking.

[247] The appraisal of George Soros' educational enterprises often take this form.

innovative, that which it fits and does not fit. We have already touched upon employment situations which encounter these characteristics. Employment decisions often involve a jump between what is known about a candidate from their CV and interview into what is unknown i.e. their future performance, or where a person's expertise at work may be recognized and rewarded by a preferential decision. Such judgments can construct a new living history for the employee populated by achievements or dismissals, failures and successes, sleights and moments of ingenuity. Many of the observations made by racists and anti-racists, illustrated above, are likely to obey this judgmental structure.

A situation noted above, also follows this judgmental structure. This situation involves moments of revelation in which the jolting observation of race re-patterns the dimensions of meaning available to communications: their historicality, former and future correspondence, the allocation of social roles in which we find ourselves, facts of importance and insignificance. For example, we meet a person to whom we have always communicated by email. In person it turns out that they are black. We realize that there is an unarticulated assumption that presupposed them to be white. So how should we act now and how does this innovate the history of our relationship?[248] Alternatively, perhaps we have only ever been with a colleague in formal surroundings. But then we interact with them in informal surroundings - share a joke, have lunch, grab a drink - and the hidden intensity of race recasts the situation anew. Was that joke actually racist? Should I act differently because her/his skin colour and nationality makes her/him stand out in a crowd?

The re-emergence of these artistic combinations into normality and a common present is accomplished through the structural coupling of art and the mass media, namely through the processes of mainstreaming, of appropriation, of de-radicalization. In the mediated world of work this involves the re-institutionalization of normality. This occurs through an eternal return of

[248] I emphasize the already because this is how these communications operate. They are mediated and pre-patterned. They communicate by making visible and invisible a state of affairs that has been going-on without our knowledge or cognition.

difference contained within the intensity of communications about race. This engages a fractured emulation between social systems. Unlike courtesy and civility it involves the emulation *in time* and not the emulation of esteemable behaviour. Through all these systematic encounters and transformations it is the figure of race that moves as a differential between these systems.

DESTINY AND FREEDOM

Luhmann's theory of society, and in particular his description of morals, precludes an easy finding that discrimination can be explained in terms of autonomy, equality, or deliberative freedom.[249] The complexity and elusiveness of discrimination is not easily contained within a set of prescriptive elements; moreover, the complex interplay between social systems does not accord moral values a central position. Deleuze, however, offers a possible reprieve.

Destiny and freedom involve the relationship between the pure past and passing present. I have argued that these syntheses can be placed within moral communications and mass mediated communications, respectively. The contraction which surfaces on the public screen of the mass media is one in which the common present is the most contracted state of the successive, independent elements from which it is drawn; for morality the present is the most contracted degree of an entire past which coexists as a totality.

Labour as an eigen-value is the most contracted state of all the rituals of employment and the workplace. Destiny is the sense in which each instance of work plays out the same idea of Labour; each working moment whistles the same tune. Destiny is not deterministic but is the manner in which 'non-localisable connections, actions at a distance, systems of reply ... transcend spatial

[249] See Chapter 2.

locations and temporal successions.' (Deleuze, 1994: 105) The emergence of an eigen-object is the line which each interactive event invisibly threads into a common and public present available for all. It is the same tune even if each moment is comprised of a different intensity, programmatic informativity, and irritable context. Destiny is therefore the complex relationship between all the information that is mediated in the workplace and the eigen-object of labour, produced through the recursive linking of such communications to like-minded communications.

Freedom lies in choosing the levels for a focus on the basis of a past which was never present i.e. choosing the instance that re-writes its own history and offers its own chronology through irritation by a moral allocation of appreciation or respect. One moment may play another moment at a different level because of the variable differential intensities that thread them together. These histories, for Deleuze, are constructed with references to orders of similitude - succession, simultaneity, contiguity, causality, resemblance and opposition. Freedom resides in re-writing the history and chronology of the workplace. We can see how this is pursued by equality-focused scholarship when the world of work is re-told from a feminist perspective; however, in practice this freedom to choose is constrained by race because it is such an unacknowledged influence that conditions histories and time-lines, success and failures that move towards producing the idea of Labour and the workplace.

CONCLUSION

In this chapter I have presented an illustration of the social basis for discrimination. I have focused on the impact of race in the field of employment. Out of necessity this has taken place at an abstract level. In Chapter 5 I made the case that Deleuze's triadic form of repetition could provide a crux connecting the social systems of the mass media, morality, and art. The public medium vibrates in the space between these systems with race operating to channel the irritability between such

systems and contribute towards the continuing reproduction of eigen-objects such as Labour. This chapter contributes to providing a re-description of the social basis for discrimination which has not been adequately acknowledged in current scholarship. To articulate this social basis is a central aim of this thesis.

Over the first half of this thesis I have attempted to re-describe discrimination via the prism of race. This focus was chosen for reasons of economy. At the inception of Chapter 4 a discussion between James Baldwin and Margaret Mead was quoted in order to highlight the elusive and indelible aspects of race. It is the intention of this thesis to suggest that this elusive indelibility, and the same framework constructed in Chapters 4-6, may be equally applicable to gender. These diachronic and synchronic descriptions of discrimination are meant to indicate a re-description that is not confined to race, gender, or any other such 'identities'. The formal structures and evolutionary dynamics - self-description, societal/interaction, society/world, complex repetition, and so forth - supporting these analyses form the constitutive communicative context in which such figurations, like race, are unveiled and occluded as intensities. I have taken great pains not to refer to race and gender in terms of identity. Firstly, because any systems theory use of the term would be very different than that supposed by a more conventional philosophical position underpinning the literature surveyed in Chapter 2 of this thesis. Secondly, the framework deployed in the preceding chapters attempts to grasp the inconsistent, elusive, and paradoxical qualities of racially infused communications and communications about race. As a consequence, relying on identity as a basal concept might be misleading. For it might encourage the reader to suppose that once the destination has been reached then, following Wittgenstein's advice, we can discard the ladder that has assisted our journey. This is not the case. In fact, race and discrimination may very well be an epiphenomenon of publicly mediated communications that make visible a complex infinity of irritations. Gender, therefore, could have formed the main focus of analysis in the first half of this thesis and as such

when we turn in the upcoming chapters to discuss unequal pay and sex discrimination we remain dedicated to responding to the same object of study.

On a broader level we can see how the public transmission of discrimination is a very complex problem for the law to address. There are no easy solutions. Furthermore, we should not lightly dismiss the suspicion that while the law may seek to eradicate discrimination it may be entangled in its revelatory structure set out in the preceding chapters. How can the law address that which is becoming visible and opaque through the mediated communication of scandal and moral appreciation? How can the law address the aesthetic judgment and re-normalization which plays a role in this fractured cycle? How does the law impact on this confluence, particularly when having the law on one's side may be indicative of respect and esteem? Does the background projection of legal norms contribute to the scandalization of normality? These are all profound, complex, and, perhaps, intractable questions. They are beyond the scope of this thesis to address adequately; however, I would hope that some of the points raised above can contribute to its comprehension.

A broader conception of law, hinted at in Chapter 4's survey of manners and courtesy, involves understanding anti-discrimination law as a modern emanation of a certain type of social regulation concerned with delimiting the boundaries of esteem and respect. This reorientation would move the discipline away from the internal legal picture that associates the field with employment law. Anti-discrimination law could then be aligned with a long tradition in which a person's reputation and social status are protected by the law with reference to communicative limitations. For example, Nicola Lacey (2008) has argued that the English criminal law of the 19th century was primarily focused on identifying bad character and protecting reputation. Re-describing anti-discrimination law within these optics may provide a more revealing and accurate understanding of the law.

In the second half of this thesis we turn to consider the distinctly legal constructions of anti-discrimination with a focus on argumentation and decision. The recursive limitations of both

argument and decision are not guided at a constitutive level by the choice of a characteristic – whether it be gender, race, disability, or any other. The analysis in these forthcoming chapters on corrective/distributive justice, the concept/interest dynamic, and the limitative principle of equality need not be solely focused on race. As such the operative limitations of anti-discrimination law can be outlined by reference to a whole plethora of cases normally caught under the umbrella of anti-discrimination. Therefore, we are able to make use of cases concerned with equal pay and sex discrimination to support the following analysis.

CHAPTER 7 – LEGAL ARGUMENTATION: EXPLANATION AND APPLICATION TO JUSTICE

'Arguments cannot achieve what they do not cause ... : to alter the symbol of validity of law.'

(Luhmann, 2004: 305)

INTRODUCTION

This chapter engages the research question by outlining the operative limitations on the production of legal arguments. It aims to re-describe the restrictions on a claim for direct and indirect discrimination whereby less emphasis is placed on the statutory framework while more emphasis is placed on how *finding* discrimination involves the pursuit of reasons which can allow and preclude differences of opinion. To this end, Luhmann's theory of argumentation is set out and then deployed to enhance the discussion of which form of justice best encapsulates direct and indirect discrimination. Following this, Luhmann's theory of argumentation will be applied to a development in equal pay law to illustrate the operative limitations on discrimination claims by, in particular, emphasizing the redundancy and variety components of legal argumentation.

A great deal of scholarship has been expended on how anti-discrimination law can be justified. This question of justification is approached from a range of perspectives - moral philosophy, liberal political philosophy, academic excursions that seek to rationalize the law, or jurisprudential approaches which strive to understand the grounds of rationality for each sub-division of anti-discrimination law. Often the most difficult aspect of surveying such scholarship is disentangling

each strand in order to come to understand what precisely is being proposed.[250] Systems theory offers an austere approach to this question because of its focuse on the recursive limitations of legal argument. As a consequence, enquiries that seek to establish the morality of discrimination (for example, how is it wrong?) and anti-discrimination law (does the present law correct the wrong?) are sidelined; so too are approaches which consider whether and how the law can legitimately be used, in a free and liberal society, to eliminate forms of discrimination and, for example, promote affirmative action. Instead, our enquiry into the justifications for anti-discrimination law focuses on the recursive limits of legal argumentation in order to demonstrate how arguments arrange themselves into clusters and, further, how the argumentative arrangements can provide a vision of justice internal to the legal system.

Our first port of call will be to explain Luhmann's theory of legal argumentation. Special emphasis will be placed on how such arguments and justifications relate to decisions. The meaning of legal decisions for anti-discrimination law is explored in Chapters 9 and 10 of this thesis. This chapter forms a complement to such analysis in order to construct a rounded view of anti-discrimination law from a systems theory perspective.

[250] John Gardner (1996: 364-5) makes a number of pointed remarks as to this tendency in the work of others such as Morris (1995), but also in his own earlier writing on this area: Gardner (1989). Systems theory, for all its infelicities, offers a reprieve in this respect because of its absolute insistence on the operative closure of the legal system. In fact, as I will discuss below, the tendency for perspectives upon the law and for headings within the law to become fuzzy may be indicative of how argumentation is recursively established in the context of anti-discrimination law.

LUHMANN'S THEORY OF LEGAL ARGUMENTATION

Argumentation, deliberation, and the generation of reasons for action forms a necessary prelude to a legally valid decision. In this respect, Luhmann intends to differentiate legal argument from legal reasoning because the former is constructed with a view to the making of a decision.[251] To think and communicate like a lawyer – reasoning from precedent, for example – does not compel a participant to prepare the grounds for a decision. Legal argument however does. Although operatively distinct from the validity of a decision, argument is still preconditioned by the execution of such decisions. Texts recognized by the legal system allow a structural coupling between argumentation and valid decisions that is internal to this sub-system.[252]

Argumentation involves enquiring '*how* the text can be handled in communication' (Luhmann, 2004: 307). A participant observes how they themselves observe the text and how others observe the text. From this position, second-order observations are generated such that the textual implication of a valid decision is interpreted through a vast panoply of argumentative *topoi*. The distinctive application of the legal code made by the legal decision is brought to life by its text for the benefit of potential argument. The clarity of a legal decision is put to the question by communications that offer confirmation, interpretation, disputation, contestation, and so many other argumentative topoi. The clarity of a decision may, for example, be deemed doubtful. Justifications are attached to it and then advanced, potentially placing a decision in a different light. The differing interpretations offered, however, must move towards – one might say, gravitate to - the making of a further valid decision.[253] Even if the participant agrees with the decision, they still need to observe that decision

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[251] For an examination of how Luhmann's theory of legal argumentation can be understood by reference to more general jurisprudence, and especially to Ronald Dworkin's jurisprudence, consider Nobles and Schiff (2017).

[252] 'Unlike statutes or valid judicial decisions or contracts or wills, arguments cannot change the law, or implement new rights or duties and thereby create conditions, which in turn can be changed.' (Luhmann, 2004: 305)

[253] The admonishment of an advocate by a judge to *get to the point* indicates one way in which argument must construct itself with a view to producing a position and an alternative decision. The practices of distinguishing *ratio decidendi* and *obiter dicta* also provide an in-built mechanism in which argument both finds a decision

and present reasons for agreeing or not with it. Although it is true that this will not need to be communicated until another decision is on the horizon: such as in an appeal, or a further case.[254]

Theorizing argumentation involves evaluating the 'arguments in relation to their persuasive powers in the process of communication and in relation to their impact on communication' (Luhmann, 2004: 307). The justifications for discrimination law can be outlined from this angle. In doing so, I stress that this is not from the perspectives of moral philosophy and political legitimacy, or with a view concerning legal coherence, but from a quasi-empirical perspective in which we can reflect upon how argumentative justifications orient themselves to key junctures by way of recursion. What are the good and bad reasons, the better and worse reasons for interpreting a text in a particular fashion? The gravitational pull that attracts reasons to cluster together occurs on the terms of the internal limits of legal argument and its relationship to a decision.[255] These will be outlined below.

Legal argumentation feeds off the variety of cases enabling an 'elaboration of differences in each specific case' (Luhmann, 2004: 311).[256] Argument must be able to offer 'seemingly compelling reasons for decisions' that can be repeatedly used - such as the general terms of liability, offence, defence, fault, contract, fiduciary, etc. - to elaborate differences in the case at hand by relying on a 'recursive web of ancillary considerations at their inception' (Luhmann, 2004: 313).[257] These reasons

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and anticipates a further decision, particularly important for the common law in which the doctrines under deliberation are stretched throughout a profundity of texts and not collected together as they are under, for example, a civil code.

[254] To agree with a decision still requires an observation on the application of the code, for example that this decision is correct because it conforms with a long-established doctrine, or interpretive practice.

[255] Plainly this account differs from Dworkin's theory of interpretation. The development of legal doctrine does not proceed by ensuring that good reasons be replaced by better reasons with the latter providing a superior fit with other legally accepted propositions, than the former. The invisible hand of political-morality is not exerting a gravitational pull on legal interpretation to pull good reasons to better to best reasons. Nobles and Schiff (2017: 75 ff.) provide a productive comparison of Dworkin's and Luhmann's theory. Furthermore, unlike Hart's approach, the meaning of a rule is not defined by reference to the invisible hand of socio-linguistic convention.

[256] In contrast, legal decision-making forges a unity from a variety of cases such that the differences between cases are made to stand out as the background to a decision. See Chapter 9 and 10 for an explanation and illustration of this phenomenon.

[257] Such general terms are great reservoirs for academic commentary. In reality, their multi-faceted nature may be indicative of their actual significance for the legal system. The inability to pin-down an exact meaning

for seeing a text in a particular way allow argument to move *de parte de partem* whereby there is no need for an inductive unification by reference to a defining principle or a general norm. Consequently, the generation of legal arguments and justifications for discrimination law do not in a unified way reside in a straightforward principle of non-discrimination or in norm of equality.[258] Not if we give credence to the internal restraints of law. Terms such as defence and fault serve to connect reasons that elaborate differences; they are not discrete components of a formula for corrective or distributive justice. To understand better the functioning of discrimination law in respect of legal argument requires an examination of the reasons, terminology, and exemplifications that predominate this branch of law. Before this can take place, however, a few more key characteristics of Luhmann's theory of argumentation must be spelt out.

Legal argumentation is generated through a reaction to 'past and/or anticipated differences of opinion about the attribution of the code values legal and illegal' (Luhmann, 2004: 315). It can only work through the recognition of different perspectives on the execution of valid legal decisions. If an adopted topic of argument fails to elaborate differences in each case then it is unlikely to be retained for long. Argument proceeds on a generative platform of divergent perspectives and contestation. For example, it is not a persuasive argument simply to make a declaration of law, or give a pure reading of a text, until a reason is communicated for such assertions. As such one must make a declaration of law with reference to precedent or the status of the court, and one must justify a pure reading by reference to a literal doctrine of interpretation, or upon the looser notions of the ordinary meaning of words and the general approach of the court in such cases. How is the text (that stands in for a decision) to be understood? We interpret the text in its 'ordinary meaning'. The notion of ordinary - the practice of the interpreter, court, linguistic usage - elaborates the differences that are available in the text by, for example, separating out clauses and distinguishing

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of liability, fault, or contract is indicative of the great internal complexity of these concepts. They enable the 'elaboration of differences in each specific case' and in the form of arguments prepare the ground for a decision to be made.

[258] In Chapter 8 of this thesis, I have outlined the argumentative fall-out for when this does occur.

the ordinary meaning from specialist or over-extended interpretations. At the same time this elaboration must work towards a future decision by asking, for example: what are the consequences of applying this line of reasoning? Alternatively, arguments can be presented in such a fashion that there are central aspects and more peripheral concerns. As should be clear, none of this coincides with how doctrine or claims for anti-discrimination are normally analyzed.

There are deeper formations to argumentation generated through the recursivity of communications. This can be labeled as redundancy and variety. At a formal level these structures foreclose the variability and invariability of connections between communications. Argumentative components such as reasons, rules, principles, and other general terms operate through reliance on various degrees and combinations of redundancy and variety. Redundancies establish indifference. They enable a focus which can channel relevant information and disregard irrelevant information. A practical example would be the manner in which the road network delimits the possibilities for driving. It is true that we cannot always drive anywhere by the most direct route, but by using the road network we avoid many impediments that would occur if it was not available. We can plan ahead with a clear view as to how the journey will progress. We can assume that others also use the network and follow the same customs – driving on the left, stopping at red lights, not driving across fields, etc.

Variety is the ‘number and the diversity of the operations which a system can identify as its own’ (Luhmann, 2004: 35). It signifies the number and range of possible selections which can be made by argumentation. As a structure it is does not have the capacity to establish consistency which is within the remit of redundancy. Open-textured terms and principles of law maintain a higher degree of variety than other argumentative topoi. Maxims in equity for example can be cited repeatedly, not only historically but also in the modern era, over a whole range of instances. In terms of anti-discrimination law, the presence of a protected characteristic (race, gender) is highly variable across

different contexts. Within systems theory redundancy and variety are the highly technical concepts developed to understand the relevant recursive communications. To grasp their significance for legal argumentation we need to translate their concerns into the generative conditions of legal argument.

‘Reasons produce differences and refer to themselves by what they exclude’ (Luhmann, 2004: 327). Reasons combine levels of redundancy and variety in order to elaborate differences in each case and to prepare the ground for a future decision. Although general terms such as liability may not always be invoked explicitly, that does not mean that there are not common practices in play which circumscribe and vitalize the connection of argumentative communication to communication. We know that reasoning towards a decision is taking place if (i) differences are indexed in an item or case, and (ii) if the recognition of this practice is revealed by considering what was excluded from consideration. Reasons are not ‘points of view which can be defined simply. They are complex processes of thought, which justify both the inclusive and exclusive effects that they have’ (Luhmann, 2004: 328). Principles follow the same route such that the operation of the principle can be understood by its exclusive effects rather than by reference to a definition of the principle’s form. Reasons couple with the exclusive effect of the principle's redundancy to produce a greater variety of possible connections.

As such when a legal issue (point of law, consideration of fact, etc.) arises it must be presented as potentially decidable with good reasons presented as consistent with valid law. Argumentation appears as ‘cluster formations around certain texts, but without any hierarchies and without teleology’ (Luhmann, 2004: 333). Reasons are sequences of argumentation condensed into perspectives for decision-making in the process of their reuse, or in anticipation of their reuse. Argumentation justifies itself by reference to the different consequences and outcomes (for a decision) which would arise if different perspectives were followed (different rules and reasons

applied). Reference must be made to system-internal and system-external consequences – for conceptual and notional outcomes, and for interests.

Luhmann however also identifies more refined structural formations with reference to concepts and interests. Concepts enable access to already proven distinctions and organize the generation of new distinctions at this level: a difference between contesting or interpreting a contract has internal consequences in respect of further distinctions such as intent and negligence, possession and property, etc. The perspectives one can have on the terms of a statute are delimited by compounded information held together in especially legal concepts and notions. Identifying such notions in argument, however, depends on an observation that a familiar understanding of this concept or notion is not quite correct and that a better one can be found.

The protection of interests 'refers to catalysts for the self-organization of references to the relevant environment' (Luhmann, 2004: 347). More generally it is involved with managing law's responsivity to the changing states in its environment; to do this it has recourse to substantive argumentation. Concepts are directed at the refinement of the *quaestio juris* and the limitation of analogical reasoning. The appearance of interests, however, comes about through formulating the difference between legally protected and legally unprotected interest – thus, in acknowledging the interests of the accused or the victim, possibilities for seeing the interests are made available (Luhmann 2004: 248). Consideration of the interests of defendants provide scope for consideration of the interests of claimants. This theoretical distinction between concepts and interests will be further considered in Chapter 8.

JUSTICE AND ANTI-DISCRIMINATION LAW

Unsurprisingly anti-discrimination law is concerned with justice. Not least because this branch of law understands itself as genuinely transformative of social relations and as such finds itself working in a highly political and morally volatile field. Anti-discrimination law bears the responsibility to explain why discrimination is wrong and why the legal framework to address this problem rights this wrong. The great schisms of jurisprudence cannot compete with the environment in which anti-discrimination law finds itself. Discrimination and anti-discrimination are objects of fascination for the political and moral arenas, and the mass media, and are frequent pivots in the according of esteem and disrespect in all the many quotidian areas of life to which a person finds themselves in attendance – at work, on the street, in the home, and between friends. Consequently, articulating the normative foundations of discrimination law is more than just a legitimate academic exercise; it is a necessity.

This investigation can take place at different analytical levels. The path taken in this section will be to analyze how scholars have comprehended the law by reference to forms of justice. The level of analysis in this section will consider justice as it pertains to legal argumentation.

This section is concerned with some of the classifications of justice proposed in anti-discrimination scholarship. These classifications model a discrimination claim by reference to Aristotelian conceptions of corrective justice and distributive justice. Evidently other formulations of justice are available, such as that developed by John Rawls and Ronald Dworkin; however, these Aristotelian models seem to have attracted academic interest for three reasons: (i) the distinction between the models corresponds to a type of justice directed both at individual parties and at social groups; (ii) the difference suggests a divergence between those claims which seek justice on the basis of past

wrongs and those which seek justice in order to achieve future goals; (iii) and the models provide an opportunity to compare a discrimination claim to a tortious claim.

Andrew Morris (1995), for example, considers the basic distinctions between corrective justice and distributive justice to be the following. Corrective justice is concerned with giving reasons for restoring the relative position of each individual to the position which existed before or would have been attained if not for an action or decision. This calculation is agent-relative because it is concerned with the history, context, and predicament of the individual or the individuals involved. Distributive justice, on the other hand, is concerned with the supplying of reasons unconcerned with restoring a past position or providing status, and instead involves reasons for everyone to act in a certain way or to secure a certain result. On this basis, Andrew Morris (1995) argues that indirect discrimination involves corrective justice. Under a standard interpretation of the law this is not the case. Under the relevant statutes (even as they have changed over time) direct discrimination is set up to find wrong-doing by the defendant and correct this through a legal remedy - corrective justice. Indirect discrimination, on the other hand, involves a neutral condition that creates a disproportionate impact that cannot be justified.[259] Hence, it is concerned with the distribution of goods flowing from the decision, and not the actor's mentality in making their choices.

On the other hand, Gardner (1996a: 357) is quite correct in his estimation that such distinctions do not map onto the statutory structure of anti-discrimination law, nor do they reflect the manner in which such decisions are made. Gardner summarizes the essential distinction between such forms of justice as: (a) ‘reasons of corrective justice are reasons for or against restoring people's relative positions to what they were before, or would have been apart from, some action or series of actions performed by one or other of them’. 'Reasons of distributive justice are reasons for or against changing people's relative positions other than by way of such restoration' (Gardner, 1996a: 356-

[259] Bob Hepple (2011) explicates such themes in the evolution of UK anti-discrimination law and its codification under the Equality Act 2010.

357). The persuasiveness of this distinction lies with its reflection of the arithmetic (what was added must be subtracted) and the geometric (what there is must be divided up in such-and-such a way)

Gardner (1996a: 353) states that 'reasons of justice are reasons for or against altering someone's relative position'. In the context of a judicial decision this can be understood as the reasons for or against granting a judgment to one party at the expense of another party. The person's relative position is wrong and justice demands that the wrong be made right. Gardner, along with many commentators, understands these duties in a concrete sense and not only as productive of argument itself. As such he claims that the primary duties of discrimination established by statute conform to this idea of justice. The law establishes duties for the employer and shopkeeper, amongst others, to treat people in a certain way *relative* to how others are treated.

Justice is normally aimed at grander ideals of political philosophy concerning the distribution of goods in line with desert, merit, and equality. However the overall justice of a judicial decision amounts to a secondary concern. John Gardner (1996a: 355) expresses it thus: 'The primary question of justice is always (in one form or another): how are some people treated in comparison with others? But only if there is an (arguable) disparity here does the secondary question of justice arise at the point of adjudication, which is: how can judges and adjudicators do justice now in view of the (arguable) injustice that has been done by this defendant?'.

Gardner notes that much of this discussion depends on what we mean by the law of indirect discrimination or direct discrimination. He surmises that the law first imposes primary duties on the employer not to discriminate indirectly, and ancillary to these duties is a framework of administration upon which the law considers the possibilities of an arguable breach of such duties. From this perspective, indirect discrimination appears to be a form of corrective justice since the remedy for a breach involves compensation for the individual or reinstatement. According to Gardner, Andrew Morris over-extends this formulation so as to encompass the primary duties too.

Andrew Morris (1995) contends that indirect discrimination involves corrective justice. He suggests that the presentation of disparate impact evidence in an indirect discrimination claim provides an opportunity for the court to look more closely at the wrong which has occurred.[260] This establishes the wrongful action and intentions of the defendant as a crucial element in an anti-discrimination claim. According to Morris, a finding of indirect discrimination corresponds to identifying and correcting the wrong-doing of the defendant. Gardner (1996a: 364-5) suggests that Morris is confusing the definition of discrimination with the proving of discrimination. This is an interesting distinction to make between finding and defining the law. In the section below we will consider this in terms of legal argumentation. I will contend that any confusion by Morris is actually reflective of the operative limits of how legal arguments, and thus claims under anti-discrimination law, are constituted.

THE CONFUSION BETWEEN DEFINING/CLAIMING AND DIRECT/INDIRECT DISCRIMINATION

The practices of *defining* discrimination and *claiming* discrimination are often confused. John Gardner (1996a, 1996b) concludes that this occurs because of a misunderstanding of *prima facie* findings. Such *prima facie* findings signify that a wrong or a breach of a duty has been admitted, but this can be rebutted, defended, or justified. From Gardner's perspective, Morris is making the mistake of according a definitional role to disparate impact assessments. Gardner (1996b: 107) explains that *prima facie* findings are 'partial justifications' that operate as claims acknowledging both reasons for and reasons against an action. Complete justifications, on the other hand, progress

[260] Under section 19 of the Equality Act 2010 indirect discrimination is established where a neutral practice or criterion places those who shared a protected characteristic at a particular disadvantage when compared with the members of a comparable group. This replicates a standard formula contained in earlier anti-discrimination statutes such as the Sex Discrimination Act 1975. For example, if an employer alters the shift pattern then this may have a disproportionate impact on those employees who are likely to have child-care responsibilities (more women) as compared to those who do not (more men) - see: *London Underground Ltd v Edwards (No 2)* [1997] IRLR 157

on the basis that 'all things considered' the reasons asserted prevail over any other reasons available. In essence, complete justifications have reached the point of their conclusion.

Partial justifications involve claims that can be rebutted or defended. Such justifications circulate in the domain of legal argumentation because, as explained above, these elaborate differences and connect to other communications on the basis of a difference of opinion. Claiming calls out for a counter-claim. *Prima facie* findings are particularly meaningful through their relationship to a potential rebuttal. Thus, a breach is meaningful in terms of a possible defence. The modus operandi of argumentation is to draw from fixed legal positions to produce differences of opinion at various levels of abstraction (reasons, rules, principles, etc.) and in respect of an internal or external orientation (concept, interest). Systems theory would assert that defining discrimination in terms of the distribution of rights and duties corresponds to the production of legal positions by legal decisions. Claiming discrimination, however, involves the relationships (in the production of different opinions) between such limits established by legal positions (rights and duties). Argumentation communicates under a double horizon: it dissolves decisions in order to produce legal positions from which future decisions can be abstracted.

This is not simply an academic criticism. Morris' confusion reflects a constitutive paradox of legal argumentation.[261] Argument is caught in a double horizon in which it dissolves past decisions to prepare the ground for future decisions.[262] It is in the unobservable present that argument distinguishes between past and future. These two horizons are reflected in Gardner's distinction between partial and complete justifications and the difference between argument and decision. The

[261] This confusion may also be immanent to the concatenation of legal doctrine. In Chapter 8 of this thesis the case of *James v Eastleigh Borough Council* [1990]1 Q.B. 61 seems to blur the boundaries between direct and indirect discrimination by interpreting direct discrimination in a more purposive and victim-orientated vein. These qualities are assumed to be concerned with the model of indirect discrimination, not direct discrimination.

[262] Although this is explained in terms of a temporal meaning it can presumably be articulated in terms of both the factual dimension (*this* decision and *that* decision) and the social dimension (a participant's decision and another participant's decision).

distinction between argument and decision re-enters argumentation. A decision (the assignment of a right or duty, for example) is made open to argument by reference to partial justifications. A legal position, deposited by a decision, is broken upon by a difference of opinion located in a whole panoply of differential schemes: claim/counter-claim, claimant/defendant, offence/defence, liability/justification. These contentions are meaningful in respect of the opinion to which they differ: reasons for liability call out for a consideration of reasons for non-liability. After this stage argument moves towards producing a further decision through the provision of complete justifications. Legal positions are produced that unify the differences of opinion such that rights and duties (as an example of a legal position) are re-allocated by reference to the preceding differential schemes.[263] For example, an employer is found to have breached a duty owed to the employee (who has a right to a remedy) because the employer committed an offence under the relevant statute.

In general, it can be suggested that these two argumentative stages (movements) correspond to the models of Aristotelian justice. First, the whole decision is divided into parts through the elaboration of differences. John Gardner (1996a: 357) defined distributive justice as 'reasons for or against changing people's relative positions other than by way of such restoration'. As a model of justice it dissolves legal positions seeking a different re-constitution through supplying partial justifications. This first stage corresponds to distributive justice because it involves a geometric disposition that divides a whole: the legal position is broken open by partial justifications.

Second, argument moves towards producing the grounds for a decision through complete justifications that point towards a decisional-horizon. This corresponds to corrective justice because the specialization of argumentative terms (liability, defence) narrows down the range of options available for selection. John Gardner (1996a: 356) summarizes corrective justice as involving 'reasons for or against restoring people's relative positions to what they were before, or would have been

[263] The first stage emphasizes the distinction in the unity and the second stage emphasizes the unity of the distinction.

apart from, some action or series of actions performed by one or other of them.' The second stage of argumentation involves a specializing effect in which liability, for example, narrows the focus through its redundancy as it moves towards providing a legal position from which a legal decision can be made. This movement corresponds to the arithmetic of corrective justice because it involves a narrowing of focus (adding certain connections, subtracting other connections) as it seeks to restore 'people's relative positions to what they were before, or would have been.'

The difference between these two movements - partial justifications/complete justifications, distributive/corrective justice - is normally unobserved. Once argument is turned towards this difference then finding and defining discrimination are likely to become confused because it is precisely this distinction which is in question when the court considers the non-legal meaning of a term such as when the law attempts to consider its environment.[264] This is an operative limitation on how anti-discrimination is communicated in legal argument. Statutory frameworks and philosophical models that distinguish between direct and indirect discrimination on the basis of corrective and distributive justice, or on the basis of perpetrator -focused and victim-focused, fail to reflect the actuality of legal argumentation.

AN ILLUSTRATION OF LEGAL ARGUMENTATION: RESPONSIBILITY FOR UNEQUAL PAY

The following section argues that a broadening interpretation of a legal provision may, counter-intuitively, result in a more restrictive interpretation. This occurs when an interpretation adopts a form which is open to a wide variety of information; however, the form is unable to process complex events because there is insufficient redundancy to counter-balance the variety of possible

[264] In Chapter 8 of this thesis this confusion within legal argumentation is analyzed through the lens of the concept/interest distinction.

information. If there is only a low level of redundancy to counterbalance this high level of variety, then firstly it is likely that errors and inconsistencies will not be registered, and secondly the lack of redundancy will mean that capacity to process complex environmental events will be reduced. In effect this argument seeks to indicate that cognitive openness can only occur if there is sufficient normative closure. Legal structures carry with them basic 'indifferences' towards law's environment. Without such indifferences the reasons deployed as 'symbols of redundancy' (Luhmann 2004:323) will struggle to separate the relevant information from the irrelevant. Such an examination is pertinent to the overall thesis because it reveals an operative limitation on the processing of anti-discrimination law.

The following example traces the evolving interpretation of Article 157 of the TFEU (formerly Article 119 of the Treaty of Rome and Article 141 of the EC Treaty) by the UK courts and the CJEU. Specifically, what is of interest is the extent to which Article 157 limits the range of possible comparators available to the claimant. One of the greatest challenges to equal pay is the decentralization and fragmentation of the workforce. The reason for this is that equal pay legislation requires some type of nexus of responsibility between the claimant and their chosen comparator. In the absence of such a commonality unequal treatment cannot be proved because there is no benchmark or 'normal' rate of remuneration which can be deployed as a metric from which inequality can be established. The court does not have the expertise at its disposal to calculate the appropriate market price.

This analysis may indicate that anti-discrimination law has experienced some of the effects noted by juridification scholarship: the legal capture of a political conflict, the insertion of abstract values and 'vague standards' into legal discourse which are overly reliant on environmental definitions,[265] and the increased focus on the particularities of each case at the expense of maintaining generalized standards. This latter effect symbolises the movement from normative expectations to cognitive

[265] See Roberto Unger (1976) for an explanation of juridification in modern law.

expectations in which the legal system learns and responds far more actively to changing states in its environment. This responsiveness can be a worthwhile change - for law must learn from its environment, but the question this anticipated is: how much - however the drawbacks to such a transformation should not be overlooked. From the perspective of recursive rule development this means that the operations of condensation and confirmation will tend to give way to those of cancellation and compensation.[266]

Cancellation, for example, occurs when an activity previously considered legal becomes illegal - for example, the CJEU in the landmark case of *Barber*, which famously stated that occupational pension schemes were no longer outside the ambit of equal pay legislation.[267] In such a significant judgment a whole range of legal arguments are rejected and economic expectations predicated on legal sources dislodged. These operations of cancellation and compensation have such a dynamic effect because of their all-or-nothing character and their penchant for variety, rather than redundancy.

To make an equal pay claim, such a claim must establish that a person in a comparable position was paid more. The court can then conclude that the only difference is the gender of each employee. That said, in cases of direct discrimination the construction of a hypothetical comparator is a relatively common occurrence. On the other hand, courts will be extremely wary in drawing inferences as to the market value of a position or the normal level of remuneration for a particular job. Even the CJEU adopts a high level of scrutiny in such cases and only allows deviations in limited circumstances - such as where a woman is hired at a lower rate than a man who previously held her position.[268] To decide whether contractual rights - such as pay - have been allocated on the basis of sex the court relies upon an independent assessment, such as a job evaluation scheme. Without

[266] For a very lucid explanation of condensation and confirmation in legal reasoning alongside a discussion of Edward H. Levi's (1948) well known exposition of the nature of legal reasoning, see S.C.Smith (1995).
[267] *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) [1991] 1 Q.B. 344
[268] *MacCarthys v Smith* [1976] E.C.R. 455; [1976] 2 C.M.L.R. 98. Here the court rejected the hypothetical worker test for pay disputes because the court could not decide what the right pay is or what the appropriate contractual terms are for a worker.

some form of common legal nexus even this comparison cannot occur. We will now consider how Luhmann's theory of argumentation can explain the fall-out from interpreting this common legal nexus in an expansive fashion.

The Equality Act 2010 and its predecessor the Equal Pay Act 1970 define 'same employment' in both a restrictive and a detailed manner. Since the case of *Defrenne [II]* the CJEU has accepted that Article 157 is directly effective and bestows rights on individuals against both private and public entities. [269] Therefore, claimants can rely upon Article 157 directly. In the case of *Lawrence* the CJEU, following the Opinion of Advocate General Geelhoed, appeared to broaden its definition of common employment by explaining that the test was whether the responsibility for differences in contractual terms and remuneration for both the claimant and comparator can be traced to a 'single source of authority'. [270] The reason provided for this interpretation is that the equal pay principle requires the clear identification of the responsible body who could then rectify the wrong committed.

On the facts of *Lawrence* a single source of authority could not be identified, and the comparator suggested was not suitable to form the basis of an equal pay claim. The case involved a number of cleaning and catering staff at a local school whose contracts had undergone a transfer of undertaking on account of the competitive tendering process of the local authority. The staff were then re-employed by a temping company at a lower rate of pay than they previously enjoyed. The CJEU in applying this 'single source test' were unable to allow a comparison between the claimants who had been contracted-out and those male comparators still retained doing similar work for the local authority. When the Court applied the test to the facts of the case it was decided that there was no common nexus between the claimant and their comparator. A single source of authority could not be observed because the council was no longer responsible for the terms and conditions of employment of the claimant. The contracting company was now responsible.

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[269] *Defrenne v SA Belge de Navigation Aerienne (SABENA)* (43/75) [1976] 2 C.M.L.R. 98
[270] *Lawrence v Regent Office Care Ltd* (C-320/00) [2002] 3 C.M.L.R. 27

The *Lawrence* decision was followed in the case of *Allonby* and no common connection between claimant and comparator was established in its circumstances either.[271] In *Allonby* the local education authority sought to reduce costs by re-hiring part-time lecturers on an hourly basis through an agency. As a result the re-hired lecturers received lower wages and lost access to a statutory pension scheme. The claimants attempted to compare themselves to male teachers who were still directly employed by the local education authority. The Court applied the 'single source test' and it was found that because there was no common authority with the power to vary terms and conditions of employment for both the claimants and their comparators then there was no single authority who could be held responsible for the inequality. Even the patent influence between the college and pay from the agency was not sufficient to satisfy the test in *Lawrence.*

Both the Employment Appeal Tribunal and the Court of Appeal considered the decision of *Lawrence* in the case of *Robertson*.[272] At the EAT hearing, what became clear were the lines of argument which the decision in *Lawrence* had deselected. The tribunal noted that the commonality required under Article 157 needed the identification of a single body to which the differences in pay and conditions of the workers could be attributed, but this could not be proven in the case at hand. *Robertson*, a civil servant, attempted to compare his rate of pay with civil servants who worked in a different governmental department. The tribunal stated there was no common source of authority. There were separate collective bargaining processes for each department and it was irrelevant that the Crown retained legal powers to revoke the delegated authority of each department. The point being is that the tribunal was unable to apply the standard established in *Lawrence* to a de-centralised governmental structure despite the fact there was clearly a number of legal forms which could be traced back to the Crown. On appeal, the same arguments for a finding of common employment were rejected again. Mummery LJ admitted that the *Lawrence* formula was a 'rather imprecise

[271] *Allonby v Accrington and Rossendale College* (C-256/01) [2005] All E.R. (EC) 289
[272] *Robertson v Department for the Environment, Food and Rural Affairs* [2004] I.C.R. 1289 [EAT]; *Robertson v Department for the Environment, Food and Rural Affairs* [2005] EWCA Civ 138 [CA]

approach' and that to find the body responsible was a 'pure question of fact' regarding the body who was responsible for making the decisions on the level of pay, rather than considering the appropriate legal source of the decision-making power.

The Court of Appeal reaffirmed the approach adopted in *Robertson* in the case of *Armstrong*.[273] Arden LJ made it clear that the single source test was not a 'brightline test' of the kind in which any involvement by an employer in the negotiations of terms and conditions at departmental level would result in an assumption of responsibility for this negotiation. In this instance the question was whether the local hospital was responsible for the setting of terms and conditions or whether the hospital trust which oversaw several hospitals in the local area could be held responsible. Arden LJ explained that responsibility would turn on the facts of the case

This motif of focusing on the factual circumstances to establish fault and responsibility continues in the *Edward Jones v Rawlinson* and *Dolphin v Hartlepool* cases.[274] In both cases the restrictive nature of the *Lawrence* test was made apparent. In *Edward Jones* the claimant was employed as an administrative officer at a secondary school. Her pay was fixed by the secondary school which took account of national pay scales. Her chosen comparator was a bursar employed at a different school under the same local authority; however, his wage was set in line with national pay scales. Ms. Rawlinson, the claimant, was unable to establish a sufficient commonality between herself and her comparator because although there was an influential connection between the national pay scale and the setting of her wage, in the end the local school was responsible for setting her wage and not the local education authority. Almost an identical situation occurred in *Dolphin.* In both cases the EAT applied the restrictive standard established in *Lawrence* and consequently, even though there was certainly a considerable legal connection between the local authority and the schools in question, this was not sufficient. The tribunal focused on the factual operation of the local schools as

[273] *Armstrong v Newcastle upon Tyne NHS Hospital Trust* [2005] EWCA Civ 1608
[274] *Edward Jones High School Governors v Rawlinson* Employment Appeal Tribunal 06 March 2003 (unreported); *Dolphin v Hartlepool Borough Council* (2006) 150 S.J.L.B. 1290

autonomous from the local authority and responsible for hiring their own staff on the conditions which they chose to negotiate. In each case it did not matter that the terms and conditions applied to claimant and comparator were effectively derived from the umbrella organization or from national pay scales. The tribunal was unwilling to see past this impediment.

The cases discussed above are certainly not exhaustive but they do show the difficulty in establishing responsibility for unequal pay in a decentralised and fragmented labour force. In many of these cases there was actually a common employer - the Crown, the hospital trust, the local education authority - and yet it was not thought to be sufficient to ground liability. Instead the 'single source test' has focused on factual responsibility as opposed to legal responsibility. This is particularly surprising because it was adopted in *Lawrence* as a more expansive test, that has thereafter resulted in a more restrictive approach. This rather restrictive interpretation of the *Lawrence* ruling has come about because of the lack of redundancy retained in its concept of responsibility. Redundancy in this instance is the retention of mechanisms to check for errors and to ensure consistency. Specifically, the *Lawrence* decision followed on from reasoning in *Defrenne [II]* in which a range of typical examples were set out . The *Lawrence* decision, however, sought to abstract and explain the shared facets in three categories by absorbing them under a more general test.

'The first [category] *covers cases in which statutory rules apply to the working and pay conditions in more than one undertaking, establishment or service. By way of example, one may think of the salaries of the nursing staff working for a service such as the National Health Service. Secondly, there are cases in which several undertakings or establishments are covered by a collective works agreement or regulations governing the terms and conditions of employment. Finally, the third category concerns those cases in which the terms and conditions of employment are laid down centrally for more than one organisation or business within a holding company or conglomerate.'*[275]

[275] Opinion of Advocate General Geelhoed, para 49 in *Lawrence*

Prior to the ruling in *Lawrence* the interpretation of 'common employment' under Article 157 was more flexible and expansive in line with the three categories outlined above. These categorizations functioned as redundancies from which difficult and complex scenarios could be processed by the court. Firstly, in the case of *Hasley* an office administrator employed by the Fair Employment Agency compared herself to a male comparator doing similar work at the Equal Opportunities Commission.[276] Although not successful on the facts of the case, Article 157 was considered applicable nonetheless because the claimant and her comparator were in public service of the same kind, holding posts which are graded by the same officers and on the same principles of job evaluation. The important point is that the court was willing to be guided by the statutory underpinning and the functional similarity between the two agencies to allow a comparison to take place.

Secondly, in the case of *South Ayrshire v Morton* a primary school head teacher wished to compare herself against a male head teacher employed by another educational authority.[277] A commonality was established in this case by considering a number of factors: the statutory nature of the collective bargaining process which indirectly calculated their respective salaries, the sufficient community of interest shared by education authorities due to their common statutory underpinning, and lastly the need to approach the problem in a loose and non-technical manner. Arguments were rejected that sought to draw distinctions on the basis of factual dissimilarities such as different professional training, local conditions and the size of the school. The significance being that the decision drew upon *Defrenne's* categorization of collective work agreement as an indicator of common employment in order to decipher a complex statutory arrangement.

This brief set of examples has illustrated that the capacity for argumentation to grasp complex scenarios is dependent upon retaining sufficient redundancy to process such information. By

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[276] *Hasley v Fair Employment Agency for Northern Ireland* [1989] I.R.L.R. 106
[277] *South Ayrshire Council v Morton* [2002] I.C.R. 956

referring to the indexing of factual circumstances into condensed categorizations, tribunals and courts under *Defrenne's* arguments were able order the information in each case in line with these categorizations. When *Lawrence* attempted to adopt a more purposive standard then these indexes were cancelled in favour of the more expansive 'single source' test. The unintended consequences of this change was to discard helpful redundancies in favour of a more varied approach; however, this approach at the operative level of argument was more restrictive than supposed. This proposition mirrors the fact that cognitive openness can only come about through normative closure. What we have re-described here are the limitations on arguments and claims brought under anti-discrimination law. Such an outcome is particularly important because of the urge by many commentators to adopt a more flexible approach to the law, or to align the law around and toward more substantive ideas of equality and dignity.[278]

CONCLUSION

This chapter has sought to re-describe the limits of anti-discrimination law by deploying Luhmann's theory of legal argumentation. The models of justice often ascribed to anti-discrimination law were re-cast as reflecting significant components of how legal argumentation dissolves and prepares for further legal decisions. This suggested that models that rely on moral philosophy fail to reflect the recursive generation of actual discrimination claims. From this point a preliminary study was made on equal pay law to show how the limits of doctrinal development can be, and are in practice re-drawn by reference to redundancy and variety.

[278] As sketched out in Chapter 2 of this thesis.

CHAPTER 8: LEGAL ARGUMENTATION - THE FORM OF DIRECT DISCRIMINATION; CONCEPTS AND INTERESTS

The following chapter analyses the development of direct discrimination as it has been interpreted by the courts and tribunals of the UK legal system. The scope of the chapter ranges from a discussion of early cases concerned with the Sex Discrimination Act 1975 to more recent cases brought under the Equality Act 2010. Luhmann's theory of legal argumentation is deployed to highlight the tensions and motivating factors behind claims of direct discrimination. This chapter will re-describe the limits of anti-discrimination law by illustrating how Luhmann's distinctions between concept and interest can support, in part, an explanation of the law which recognizes the innate tensions at the heart of discrimination law in its effort to transform social relations while relying on legal concepts of liability.

INTRODUCTION

The portrait painted below will highlight the relationship between the legal concept of liability and the legally protected interest of non-discrimination and equal treatment. A legally protected interest is normally understood as a protection from some harm or wrong. As explained in Chapter 7, this distinction has congregated into bundles of legal arguments predicated on either self-reference (a legal concept of, for example, liability or possession) or external-reference (a legally protected interest which may be private or public in nature).

These bundles are condensed interconnections between reasons and grounds for the allocation of the legal code. Over time these interpretations of legal texts congregate into legal rules that distribute forms of informational-redundancy. Such legal rules can then be abstracted further

through linkages with other legal rules until principles and more generalized notions emerge. Finally, abstraction can occur further into the domain of legal concepts that allow disparate reasons, rules, principles and notions to be brought under a common heading for the processing of similarity and dissimilarity, consistency and inconsistency between these various elements.[279] Liability operates as a radial concept through which disparate rules in various branches of law - such as tort and statutory regimes like anti-discrimination law - can be generalized under a more abstract scheme. The radial quality of liability allows comparisons to be made across diverse rules of law. We will now consider how this legal concept of liability is a key component in the dynamics of anti-discrimination law.[280]

Denise Réaume (2001) examines a thought-provoking contradiction at the heart of anti-discrimination law. The tension involved lends itself to the explanatory strength of systems theory. Réaume explains that the contradiction resides in the intangibility of the normative value that guides the law - variously phrased as dignity, self-determination, autonomy, or equality.[281] For Réaume these values point towards the presence of a legal interest which should be protected. If its value is violated, then corrective justice should be exercised. The intangibility of such values, however, means that the problem which anti-discrimination aims to solve is not clearly established. Such

[279] This description is a condensed version of the Luhmann's explanation of legal argumentation in Luhmann (2004: Chapter 8).

[280] Contract and unjust enrichment are also legal concepts that operate in a similar manner (Luhmann, 2004: 340-343). A concept depends on self-referential meaning such that its activation has system-internal consequences and it recursively links to like-minded communications. If the activation of a topic for communication has system-external consequences, then this indicates a legally protected interest. For Luhmann (2004: 340-351) neither 'concept' nor 'interest' are at the apex of a hierarchy of juridical forms. Instead, reasons, rules, principles and notions gravitate around them.

[281] Consider the various justifications offered by anti-discrimination scholars set out in Chapter 2 of this thesis.

values are mercurial.[282] Consequently, the sheer variety of possible meanings applicable to those values can create a complex and indeterminate situation.[283]

The protection of an interest, such as dignity, from harm seems complicated, since it is apparently less concrete than other interests.[284] For example, we can compare how law deals with other types of harm such as economic loss or bodily injury. In each situation law relies upon knowledge from its environment as a means to conceptualize such loss - expert evidence provided by economists and the medical profession. Systems in the environment of law pre-structure complexity making information more predictable and allowing law to stabilize expectations towards its environment. Is there a similar pre-structuring of complexity in relation to values or moral norms? Probably not. This is then an issue if courts are required to maintain normative expectations of non-discrimination by reference to such values as indignity or inequality.

A similar pattern has occurred in cases where the law has been required to quantify psychological damage in either civil actions or the criminal law. Initial attempts to quantify such damage were prone to indeterminacy and a lack of coherence until it became clear that medically recognized psychiatric damage may form the most appropriate reference point for law. Thus, complexity in the

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[282] This is not the same as saying they are 'empty' as Westen (1982) argues in relation to equality. Indeterminacy can be a strength if it provides flexibility. In Luhmann's (2012: 221-228) lexicon, value communications achieve this feat by allowing participants to presume a consensus around its negative formulation (indignity, domination, inequality) such that a great variety of selections can be made without the need for checking for consistency or actual agreement.

[283] This tension has been reflected in concerns about the handling of cases at employment tribunals: (Leonard, 1987; Gregory 1989). The problem stems from the function of lay-tribunals and the complexity of the law involved. Discrimination law aims to reform social structures and complacent models of thinking, which need to be overhauled, and stereotypical assumptions which need to be dismantled; however, the 'specialty' of the employment tribunal is that of applying common-sense and pragmatic solutions to disputes. The reliance on received wisdom undercuts the 'transformatory' ideal of anti-discrimination law. This problem has been exacerbated in recent decades as there has been a trend to greater 'legalisation'. Parties are increasingly represented by legal counsel. Case law is increasingly cited at tribunal hearings. The contribution of the industry experience of the lay representatives on the bench has been eroded. See, for example, Munday (1981).

[284] I am far from convinced that dignity will be found to be any more concrete than other values such as equality. Although, it does seem to be à la mode as a point of reference particularly with those writers who wish to broaden the focus of discrimination law to a branch of law more closely involved with the human rights tradition. See for example, Fredman (2011).

environment was reduced through medical expertise and legal reasoning was then able to form reliable expectations in relation to this topic. Such trust in the environment has allowed law to construct a complex configuration of legal rules that identify different types of damage and attach varying scales of legal blameworthiness.[285] These rules are concatenated 'symbols of redundancy' (Luhmann 2004: 331) that allow specialization to be produced in the legal system engendering the reconstruction of complexity within the system.[286]

The central difficulty averred to earlier emerges when another tenet of the discrimination law discourse is brought into play. Anti-Discrimination law attempts to provoke social transformation in a number of areas of society, for example: in the manner individuals are treated in the work-place or how decisions are made regarding access and success within organizations - employment, educational access, the provision of services to the public. In the UK context this socially transformative agenda was made clear by the five year advance warning given to employers before the Equal Pay Act 1970 came into force in 1975. Furthermore, the CJEU ruled in the landmark case of *Barber* that the Equal Pay Directive covered occupational pension schemes. As such an enormous number of pension schemes were then in breach of the law.[287] Extraordinarily, the court allowed a period of five years to elapse before the judgment came into force because of the recognition that a significant number of economic structures were aligned to this now unlawful model. In a similar fashion, discrimination scholars have begun to discuss the law in terms of 'transformation' and under the epithet 'equality law' (Hepple, 2011; Fredman 2010). Moreover, there is a call for realignment of discrimination law alongside human rights and constitutional law, as opposed to a sub-specialty of employment law.

[285] For example, rules in the criminal law of England and Wales differentiate between grievous bodily harm, actual bodily harm, and less serious harm by reliance on the medical definition of bodily injury.
[286] Structural coupling in the shape of the constitution, contract and property operate in a similar manner with the difference being that such an alignment of structured expectations occur in both 'co-ordinated' systems, rather than simply on the side of the legal system.
[287] Barber v Guardian Royal Exchange Assurance Group (C-262/88) [1991] 1 Q.B. 344

The interest which grounds the law is intangible. Nonetheless, if we relied on received wisdom to determine the limits of this protected interest, then disadvantaged groups would be forever at the mercy of the prejudices and misconceptions of the majority. To the extent that law seeks to react to a protected interest constructed in response to mediated scandal (explained in Chapters 5 and 6), a systems theory perspective supports Réaume's (2001: 368) argument that the diffusive quality of dignity further makes it more likely that discrimination law will confirm social change, rather than provoke social change.

This tension in anti-discrimination law indicates the potentially destabilizing force of legal interests on legal concepts. Any interest which the law seeks to protect can only be conditioned through legal concepts because any external-reference must be predicated on self-reference. Therefore, the possibilities of liability condition the potential for the recognition of legal interests - not the other way round. Later on in this Chapter an illustration is provided to support this claim.

On a broader level, this tension might be re-shaped as an aporia that disrupts legal communications within this branch of law. The intangibility of this projected value-horizon has to be processed by the resources currently available to the system. Hence, the variety of information available to legal communications has to be processed by reference to the redundancies already available. The complexity of the system can only be reduced and re-constructed by the well-worn tools available to the legal system in the particular channels of legal argument reserved for such environmental complexity. Re-expressed temporally, the tension may be a reflection of the inability to process the projections of the present-future without recourse to the recursively constructed past.[288]

In contrast to Réaume, the strict separation imposed between the system and its environment within Luhmann's systems theory means that dignity, or any other moral value for that matter, may provide a useful *normative justification* of doctrinal development, but it cannot *describe* doctrinal

[288] For an explanation of system temporalization, consider Luhmann (1976).

development. Such moral values do not enter unhindered into judicial discourse. Such values are given meaning by their recursive relationships with other leal communications. The meaning accorded to such values in moral communications, however, is different to the meaning accorded to such values when they are translated into legal communications. For systems theory, morality is distinct from law. Social communications coded by the moral code or orientated by ethical reflections creatively perturb legal communications into transition and re-orientation, but they do not displace or colonize such communications.[289]

Furthermore, when moral values or political goals are translated into the legal systems they are not processed as goal-orientated programmes. As Michael King explains (2000) it is not possible for the legal system to construct programmes which are not conditional programmes for activating the legal code. Even consequentialist reasoning or purposive interpretation does not follow a goal-orientated route. The meaning of a legal position cannot be questioned by the fact that events did not turn out as planned. A new legal decision may be needed but that does not invalidate the old decision. King gives a telling example of this: that even when the cardinal principle of 'the welfare of the child' is interpreted under the Children Act 1989, which requires a legal examination of the future welfare of the child, the fact that this may turn out to have been an incorrect assessment of this future, does not invalidate the original legal decision.

In the next section I will provide a succinct overview of direct discrimination law in the UK. After this I will then show how Luhmann's theory of argumentation and his concept/interest distinction can be deployed to illustrate the dynamics of legal doctrine in this area.

[289] Luhmann (1995: 374) suggests that law acts as society's immune system. Morality and other conflict-based systems act as viruses de-stabilizing society, forcing the legal 'immune' system to produce antigens. Andreas Philippopoulos-Mihalopoulos (2010: 129-136) in his critical autopoiesis project has also noted the viral aspect of moral communications. Philippopoulos-Mihalopoulos has expanded on this quality and describes the environment as the 'secret hôte' rupturing the system from within by refusing to be dissolved and cancelled out by legal operations.

LEGISLATIVE BACKGROUND AND OVERVIEW

Direct discrimination concerns unequal treatment of an individual on the grounds of a protected characteristic; indirect discrimination describes inequality resulting from the application of a provision, criterion or practice which is apparently neutral, but which has a disadvantageous effect upon persons sharing a protected characteristic. Commentators maintain that the distinction between direct and indirect discrimination is the conceptual core of equality law.

A key legal development has been the changing interpretation of a component of a direct discrimination claim. Direct discrimination occurs 'on the grounds of' or 'on the basis of' a protected characteristic. Under section 1(1) of the Sex Discrimination Act 1975 (hereinafter SDA 1975) 'a person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if ... *on the ground of her sex* he treats her less favourably than he treats or would treat a man'. The court when interpreting this provision has had to decide which factors would be relevant in ascertaining whether a given actor had made a decision or performed an action 'on the ground of her sex'. It has formed an opinion on which factors of mental processing are necessary for establishing a claim of direct discrimination.

The SDA 1975 was replaced by the Equality Act 2010. A major piece of codifying legislation, the Equality Act brought the manifold legislative enactments of discrimination law under one roof. Section 13 of the Equality Act defines direct discrimination as: 'A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.' When the court's interpret the phrase 'because of a protected characteristic' they will encounter the same problem as experienced under the old legislation.[290] Namely, the

[290] The Explanatory Memorandum to the Equality Bill 2010 stated that 'this change in wording does not change the legal meaning of the definition, but rather is designed to make it more accessible to the ordinary user of the [Act].'

abstract nature of the provision enables differing constructions of how a protected characteristic is linked to a relevant action.[291]

Should we understand this provision as primarily concerned with the impact on the victim or the culpability of the defendant? Evelyn Ellis (1994) argues that discrimination law is, and should be, focused on the victim's perspective. This is because the primary objective of discrimination law is to provide a remedy to those perceived injustices or disadvantages suffered by marginalized groups. Drawing evidence from the preambles to equality directives, various statements of the Council and Commission, and remarks made by the Court of Justice of the European Union, Ellis contends that the logic underpinning both direct and indirect discrimination is the connection between adverse consequences for the victim and a protected characteristic. Therefore, according to Ellis, the purpose of the law is to provide a remedy and compensate victims for the wrong committed against them, as opposed to the purpose being to punish and hold blameworthy people to account.

In contrast to Ellis, other scholars consider the law as primarily concerned with holding the blameworthy to account for their egregious actions. Both John Finnis (2011b) and John Gardner (1998) emphasize this role for discrimination law and so construct their evaluation of legal cases by reference to whether the court has adequately considered the practical reasoning and deliberative processes of the discriminator which underpin legal responsibility. Liability can only accrue to those who have acted with a discriminatory purpose or have incorporated a discriminatory ground into their reasons for action. This disagreement between perpetrator-orientated and victim-orientated is reflected in the vacillating interpretation of the provision 'on the ground of sex' by the courts. Those

[291] The statutory construction of direct discrimination is relatively similar across other jurisdictions. 'On the ground of is' the term under the Sex Discrimination Act 1975, s 1. 'On racial grounds' was the phrase in the Race Relations Act 1976, s 1. In Britain, s 5 of the Disability Discrimination Act 1995 defines direct discrimination as less favourable treatment 'for a reason which relates to disability.' The same language is used in the Sex Discrimination Act 1975, s 2, in the compound case of sex discrimination by victimization. 'Based on' is the terminology of the Canadian Charter of Rights and Freedoms, s 15(1). 'Because of' is the terminology of the U S Civil Rights Act 1964, s 703a. 'Because of' is the terminology used for direct discrimination under the Equality Act 2010.

arguments more responsive towards the victim's perspective emphasize the legally protected interest of equal treatment (or non-discrimination) and those arguments that wish to emphasize legal responsibility seek to limit liability by reference to established principles for analyzing the mental processes of the defendant.

Systems theory offers a descriptive methodology. It does not provide a normative framework to indicate what the role of discrimination law must be, nor does it indicate the elements which must be located within legal doctrine to accord with a normative theory of justice. Systems theory does not provide an interpretative perspective with the capacity to render the law as intelligible and coherent through reliance on an evaluative examination of the non-trivial components of the law.[292] On the contrary, systems theory adopts a scientific and descriptive analytic highlighting the elements and relations which are essential to law as a self-referential, sub-system of society. In particular, emphasis is placed upon the generation of the difference between self-observation and external observation in legal argumentation. As such we see the relationship between concepts and interests in direct discrimination as an angle amenable to a systems theory approach.

Before we consider the relationship between concepts and interests within sex discrimination law, it would be useful to explain what specifically reasons, rules and notions mean in relation to liability. Reasons refer to arguments advanced in at least two situations. Firstly, reasons allow the facts of the case to be considered from a lawful or unlawful perspective. The facts can be analyzed from a number of different perspectives using a variety of different methods to discern the relevant and salient facts of the case in its reference to other legal communications. This variety allows reasons to argue that a factual scenario can be legal or illegal by reference to a legal norm. Secondly, reasons

[292] Private lawyers often differentiate between descriptive, interpretative, normative, historical and transcendental theories of the law. For a useful examination in relation to contract law, see: Smith (2004). These categorizations, however, are by no means straight forward. What exactly is indicated by an interpretative approach is a deeply interpretative matter.

develop grounds for considering an alternative interpretation of a legislative provision or legal precedent as either lawful or unlawful.

Rules operate so as to provide observational distinctions to guide the application of the code. Therefore in relation to the provision under inquiry (on the ground of a prohibited characteristic) such rules are deployed for deciding whether an employer has, for example, refused promotion on the grounds of sex by considering what their 'real' reason is as opposed to their apparent reason is, or by considering their covert reasons for action as opposed to their overt reasons, or the difference between conscious and sub-conscious reasons, and so on. In contrast to reasons, rules combine a certain level of closure through indifference along with openness to a variety of information. They enable specialization by maintaining connections to certain reasons and a lack of connection to other reasons. Such formations crystallize into an 'emergent order' which enables one to recall former occasions on which these rules were applied and to project future occasions on which these rules will be applied. The specialization and indifference which rules carry as symbols for redundancy allow for errors in reasoning to be highlighted. For example, if a rule is formulated in which the proper interpretation of s 1(1) of the SDA 1975 is that one must ask what the 'real', 'substantial' or 'overt' motivations of the employer were in overlooking a candidate for promotion then these rules block operations which consider information that cannot be covered by such terms; furthermore, the deployment of such rules allows flaws to be observed in other applications of the legal code to particular factual scenarios or interpretations of the law. When Luhmann (2004: 322-334) claims that rules, through their iterative use and redundancy conservation, can isolate legal errors this is what he seems to have in mind.

Notions develop in the 'manifold repetitions in situations of decision-making' (Luhmann, 2004: 340). They operate as guiding principles allowing arguments to be separated and grouped. The most obvious such notions in direct discrimination are the lines drawn by jurists between subjective and

objective notions of fault. Subjectivity as a notion is mobilized to separate reasons and rules for analyzing the mental processes and culpability of the defendant or claimant. Objectivity as a notion is a standard deployed to concentrate on causal factors distinguishable from the state of mind of the employer. Such a standard is also summoned to isolate phenomena as innately sexist and discriminatory; thereby, blocking any such legal operations which seek to question and draw distinctions from the mental processes which lie behind such actions.

Reasons, rules and notions can also be orientated around a legally protected interest. Their identifying mark is the fact such observations operate as a distinction that responds to changes in the environment.[293] Purposive interpretation of legislation operates in this fashion. Arguments that develop by reference to policy and the administration of justice operate in a similar manner. For instance, what seems key in the interpretation of direct discrimination are two opposing interests: (i) firstly an interest in providing a remedy to the victim; (ii) secondly an interest in the administration of justice, in which the court considers the consequences of its judgment by observing itself in its environment. This latter interest plays a prominent role in the oscillation at the heart of direct discrimination because it is concerned with the need to hold only persons accountable for what they are legally responsible for by reference to their intentions and deliberations. The point is that the court recognizes that individuals normatively expect to be considered in this manner when they are alleged to have been a discriminator - this is particularly evident when the court takes great pains to explain that finding a school or council as responsible for direct race or sex discrimination is not declaring that they have acted in a racist or sexist manner.[294]

To be clear, the relationship between concepts and interests explained above is not meant to imply that Luhmann's systems theory is a re-fashioning of legal formalism in the clothes of continental

[293] See, Luhmann (2004: 343-346)
[294] The Supreme Court has taken great care to make clear that a judicial ruling against the local council in *James v Eastleigh Borough Council* [1990] 1 Q.B. 61 and a ruling against the school in the *JFS* case (R. *(on the application of E) v JFS Governing Body* [2009] UKSC 15) was not a declaration that either defendant was sexist or racist, despite their actions constituting direct discrimination on the grounds of sex and race.

philosophy, although there are certainly parallels with more recent incantations of legal formalism which emphasize dynamic-formalism.[295] Nor do I wish to reify these relationships to such an extent that they appear to be suggesting a deterministic formula. By suggesting that the concept-interest scheme is a significant component of direct discrimination claims, this chapter contributes to the substantive aim of the thesis: to re-describe the operative limitations of anti-discrimination law from a systems theory perspective.

We will now consider how the oscillation in the concept-interest relationship operates to delimit the arguments available to direct discrimination claims.

[A] MALICE AND MOTIVE

Early cases restricted the potential for liability by focusing on the mental culpability of the defendant. The phrase 'on the grounds of sex' in s. 1(1) of the SDA 1975 was determined by ascertaining whether a prejudicial motive provoked the defendant's actions. The initial limitation of direct discrimination to cases of sexist and racist attitudes was a trend mirrored across many jurisdictions, possibly through an initial judicial association of discrimination law with the criminal law. At the time this seemed to be the most appropriate approach to the relevant provisions because the SDA 1975, along with the Race Relations Act 1976 (hereinafter RRA 1976) and the Equal Pay Act 1970 (hereinafter EPA 1970), formed major legislative interventions into the conduct of the labour market and social life more generally. The SDA 1975 and EPA 1970 were the first legislative enactments to tackle the problem of discrimination in the employment sphere, so it would seem

[295] For example, in the work of Stanley Fish who emphasizes that legal rhetoric must absorb ethico-political values, but denies that it is doing so while projecting an image of determinism and clarity. Weinrib (1995: 215 ft 12) indicates that the autopoietic description of law advanced by Teubner and Luhmann is similar to his brand of legal formalism; however, the key difference is that Weinrib draws upon the transcendental Kantian Principle of Right as a presupposition of the justificatory structure immanent in juridical relationships, whereas for Luhmann the normativity of law is constructed by the legal system without any reliance on any transcendental formulation. For a lucid critique of the new legal formalism advocated by Fish and Weinrib, consider Rosenfeld (1989).

only natural that the primary aim of such legislation would be understood as prohibiting instances of outright bigotry and sexism.[296]

In several early cases the courts and industrial tribunals (now employment tribunals) interpreted the legislation so as to require a malign motive on the basis of sex or race. According to Luhmann's theoretical scheme, this determination operates as an observational distinction in the form of a legal reason or rule (Luhmann 2004: 330-334). The specific reasons were argued in each case for determining the lawfulness of the employer's actions, and then processed by reference to the motive of the defendant. Such an apparent rule opens up the possibility of presenting a good motive as sufficient evidence to dislodge liability. In the case of *Peake v. Automotive Products Ltd*[297] Lord Denning allowed chivalry as a sufficient reason which would suggest that the employer was not treating a person less favourably 'on the ground of sex'. On the facts, female employees were allowed to leave work five minutes earlier than their male colleagues. The Court of Appeal held that this was not discrimination on the grounds of sex against their male colleagues because such an arrangement ensured that female colleagues would not get caught in the hustle and bustle of leaving the factory.[298]

The decision in *Peake* has led to a slightly incongruous interpretation of the detriment provision. Less favorable treatment is a component of unlawful discrimination by virtue of section 1(1)(a) of the SDA 1975 and also under the successor statute by virtue of section 13 of the Equality Act 2010. Since the *Peake* decision permitted a consideration of the defendant's motive in ascertaining liability then this looser level of scrutiny made space for a looser interpretation also to prevail upon of the

[296] See Réaume (2001) for further explanation. Blumrosen (1972) describes the US stages of development in discrimination law as firstly concerned with illicit motives then secondly concerned with intentionally treating members of one group differently from other groups.
[297] [1977] I.C.R. 480
[298] Such a rule, or its interpretation as such, which allowed good motives to dislodge liability was quickly dismissed by Lord Denning himself in the later case of *Ministry of Defence v. Jeremiah* [1979] 3 All E.R. 883 as a mistaken interpretation because such a position leaves too much scope for employers to absolve themselves of responsibility.

'less favourable' section. Space was made by indicating that a looser interpretation was consistent with notions that underpinned the rule in *Peake*. Namely, that a pragmatic approach should be adopted in which the tribunal would not focus excessively on each detail of the employment arrangement by making comparisons between the treatment of each sex, but should take a wider view of the matter. Therefore, less favourable treatment is not considered synonymous with differential treatment - with the exception of racial segregation.

The rule enunciated in *Peake* was applied in the case of *Schmidt v Austicks Bookshops Ltd*. Philips J. at the Employment Appeal Tribunal relied on the approach adopted in *Peake* to state:

'it is quite clear that following the tenor of those judgments [in Peake] the word "detriment" has to be given a meaning more in line with the other words used in the section, and that something is only to be said to constitute a detriment when there is something serious or important about it.'[299]

In *Schmidt* the complaint concerned the clothing restrictions exercised by the employer. Women were compelled to wear skirts and overalls, whereas men were not. The tribunal made it clear that a wide discretion for the employer to dictate the apparel of its employees would be allowed; furthermore, a sensible approach would be to acknowledge mutual restrictions on clothing for both sexes, and so there was no need for a garment by garment comparison between the sexes.

In *Smith v. Safeway Plc*[300] the Court of Appeal had to decide whether the dismissal of a male delicatessen assistant for a violation of the employer's dress code for male staff constituted unlawful discrimination. The male member of staff wished to wear his hair long down to the collar and contended that since female staff were permitted to have longer hair then to prohibit him from doing so amounted to less favourable treatment contrary to the SDA 1975. The rule extracted from *Schmidt* stated that differential treatment would be lawful if a common principle of smartness and

[299] [1978] I.C.R. 85, 87
[300] [1996] I.C.R. 868

conventionality was enforced in regard to both sexes, despite the fact that the content of such a standard may differ between men and women. It was also confirmed that the most sensible approach was to consider the code of appearance and compare its effect on each sex as a whole. The argument that the SDA's purpose was to disrupt the conventional assumptions about the sexes was rejected at the Court of Appeal even though such an argument found favour at the Employment Appeal Tribunal.[301]

The point which I wish to emphasize is that even though the good motive ruling in *Peake* has been overturned by subsequent decisions the more abstract argument from principle that generated such a rule also generated other rules which have not been dislodged. The principle enables observational-distinctions (*qua* rules) that pursue a lower level of scrutiny and a higher level of respect to the needs of the employer. It supports judgments that are made out of *common sense* and pragmatism. However, this represents a position that is overly-redundant and unresponsive to the purpose of equality legislation; it implicitly accepts the current state of affairs and refuses to challenge established inequalities which discrimination law is there to overturn.

[B] INTENTION

After several early cases which allowed motive and purpose to define 'on the ground of sex' the legal position changed so that it was considered that the provision now obliged the tribunal to establish the reasons for the employer's decision or action. Was the accused actor able to offer an alternative reason for their decision which was not connected with race or sex? In the case of *Grieg v.*

[301] *Smith v Safeway Plc* [1995] I.C.R. 472. This argument about dislodging prejudice and disrupting conventional norms was successful in the unreported cases discussed at the Employment Appeal Tribunal.

Community Industry[302] an organization was seeking to employ young people, particularly those who were considered to be socially and educationally disadvantaged. Arrangements were made for the claimant to begin work in the painting and decorating team, starting alongside another female employee; however, the other female employee was unable to commence employment with the company and so the claimant would be the only female in an all-male team. The personnel officer felt that it was inappropriate to have only one female member of such a team - from past experience such an arrangement had not worked well - and therefore retracted the offer of employment. It was said that the decision was in the interests of good management. The employer claimed that they had reached this decision on the best motives and with the interests of the claimant and the business in mind. Slynn J. explained that the motives were not relevant and what should be asked is whether with respect to the grounds for the decision the outcome would have been different if the claimant was not a woman. The court made clear that the reasons for action and the deliberations of the employer was the correct interpretation of the provision ('on the ground of sex').

In the case of *Seide v. Gillette Industries Ltd*[303] the complainant was a Jewish toolmaker who suffered anti-Semitic harassment from a colleague. To resolve the situation the company moved the complainant onto another shift pattern which offered Mr. Seide a lower level of pay. The company maintained that they took this action in the interests of good industrial relations in the running of their business and considered it the most practical solution to the problem.[304] The complainant claimed that this transfer to an alternate shift with lower pay amounted to less favorably treatment on racial grounds constituting unlawful discrimination. The EAT emphasized that the question was "whether the activating cause of what happens is that the employer has treated a person less

[302] [1979] I.C.R. 356
[303] [1980] IRLR 427
[304] Although this interest-based argument was not accepted by the tribunal, it is contended below that the adoption of an interest-based perspective in interpreting the statutory provision opens the door for similar interest-based arguments such as the one advocated by the company in this case i.e. in the interest of good industrial relations.

favourably than others on racial grounds." The EAT concluded that the industrial tribunal was entitled to infer from evidence, with regard to the thought-process and feelings of the employer, that the employer's reasons for action were not concerned with race, but with the management of the industrial situation and employee relations. In the case of *Owen & Briggs v. James*[305] a non-white woman applied for a position as a short-hand typist at a litigation solicitors. She was told that she was too inexperienced; however, the firm then proceeded to hire a white woman with less experience. The senior partner at the firm explicitly stated to another interviewee, after enquiring as to her family history, that an English employer should hire English people first. Stephenson L.J explained that the tribunal was to consider the 'substantial reason for what has happened to the candidate' and whether the refusal was because of her race. On the facts the tribunal concluded that a substantial reason for the firm's refusal to employ the claimant was the company's attitude towards her race. The Court of Appeal found that the industrial tribunal had applied this standard without error to the case at hand.

In a similar fashion in *R v Commission for Racial Equality*[306] a trade union official hired a non-white man with the good motive of seeking to change the prejudicial attitudes of the other employees. The Court confirmed that when more than one reason for an action is offered then one must ask (i) what is the most substantial and effective cause for the action, (ii) and was this reason connected to a protected characteristic? Lastly, Sir Nicolas Brown-Wilkinson V.C in the case of *James v Eastleigh*[307] at the Court of Appeal (overturned on appeal) argued that the statute limits the tribunal to consider only the reasons for the action. Therefore, enquiries should be made as to the overt basis for the action and whether this was related to sex. If the overt basis was deemed to be false, then further enquiries should be made as to the covert reason for actions and then a consideration should be made as to whether this is connected to sex or a desire to treat a person less favorably on that basis.

[305] [1982] IRLR 502
[306] [1984] I.C.R. 770
[307] *James v Eastleigh Borough Council* [1990] 1 Q.B. 61

The point I wish to make about the above cases, is that, for a number of years it was without dispute that the provisions 'on the ground of sex' or 'on racial grounds' invited the court to consider the mental-processes of the decision-maker, firstly in terms of malicious motives, and later in terms of the substantial reasons for action. The above cases are indicative of this approach and the advantages in doing so. Here liability as a legal concept motivated notions of subjectivity and principles of deliberation that in turn generated rules. These rules operated as observational perspectives for the court obliging the tribunal at first instance to look for signs of the substantial and operative cause, the real reason, and also the covert reason for action. This approach has a number of advantages in that the courts are well versed in interpreting the varied differences between motive, intention and purpose.[308] These rules enable an intricate web of redundancy to be carried along with the interpretation. Alongside this redundancy a higher level of openness and variety can also be supported with this interpretation.

A variety of factual stimuli can serve as information for these rules. The court can consider the level of knowledge of employers and the alternative explanations presented by employers for their decisions. The court may draw inferences that these explanations are a sham to conceal the real or covert reason for the employer's actions. The consideration by the court of the employer's responsibility may not be in the form of Aristotelian deliberation, but it is constructed with the experience of elaborating and distinguishing rules in regard to the liability and culpability of the defendant.[309] This is not to suggest that there are no significant draw-backs with such a focus, particularly with the need to connect the culpability of the defendant and the act itself. The problem with such a position is that it fails to (i) consider institutional reasons for discrimination, (ii) proving that discrimination - except in the most egregious instances - has taken place is difficult for the

[308] Barmes (2003) draws an interesting distinction between motive as the 'reason for reason' and intention as the reason for an action.

[309] Consider Finnis's (2010) criticism that the court is failing to apply adequate techniques of practical reasoning. Systems theory suggests that even if the court's deliberation could meet this standard, over time such a formula would be subsumed within the recursivity of legal argumentation, and, in the end, would reflect the relationship between concepts and interests indicated above.

claimant because quite often discrimination occurs by virtue of unacknowledged stereotypes and sub-conscious predispositions held by the respondent; (iii) relying on conscious and deliberative reasons for action runs the risk of not challenging the status quo and accepting the easy answers given by employers.

In sum the model of direct discrimination at this stage is orientated towards the culpability of the defendant, rather than the harm caused to the claimant. This enables the court to generate a number of rules for observing such a phenomenon through iterative interpretation of the following provisions - 'on the ground of sex', 'on racial grounds', 'by reason of', and 'because of'.

[C] THE 'BUT FOR' TEST AND CAUSATION

Following a number of high profile decisions at the Supreme Court there was a 'gestalt' shift in the legal interpretation of direct discrimination.[310] Liability edged away from a consideration of the subjective and mental processes of the defendant towards an objective standard of culpability which was responsive to the effect of the discrimination on the victim. A test began to be formulated labeled the 'but for test' that inquired whether the decision would have been different *but for* the sex or race of the claimant. This moved the reasoning process away from the intentions and motives of the respondent to an examination of factual causation.

The court stated that the basis for altering the interpretation was the requirement to consider the purpose of the legislation. In the *EOC* case the issue was whether it constituted sex discrimination for a local education authority to set a higher admission standard for girls to the local grammar schools than it imposed for boys. [311] There were substantially fewer places for girls than boys in the area and therefore higher standards had to be imposed. Did this constitute discrimination on the

[310] Réaume (2001) labels this shift as Gestalt; from a systems theory perspective, this might be labeled as an evolutionary 'structural drift' or a shift in the recursive platform of legal communications.
[311] *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] A.C. 1155

'grounds of sex' even when it was a long-standing problem? The authority argued that there was no motive or intention to discriminate on the grounds of sex; however the reasoning by the House of Lords made it clear that the provision 'on grounds of sex' did not allow a consideration of intention or motive because to allow such a consideration opens up space for arguments to claim 'customer preference, or to save money, or even to avoid controversy' as alternative justifications. For Lord Goff 'such a conclusion seems to me to be consistent with the policy of the Act, which is the active promotion of equal treatment of men and women.'[312] Crucially, the court emphasized that the provision embraced cases in which the action, instrument, or decision was intrinsically gender-related. This activates a movement from legal notions of subjective fault to objective fault as a support for the legal concept of liability.

This standard of culpability is not readily concerned with the intentions or motives of the defendant. It was labeled the 'but for' test and was confirmed by the 3:2 majority in the landmark case of *James v Eastleigh*.[313] The facts of the case were that a local authority wished to subsidize swimming for older residents in order to alleviate pensioner poverty. To achieve this goal, the Council stated that all pensioners would be able to use the swimming pool free of charge. Unfortunately this was a time when the state pension ages differed between the sexes with the result that men were not eligible for a pension until 65 and women were eligible upon reaching the age of 60. Consequently, because of the claimant's sex, and the fact that he was below the pensionable age for men, he was compelled to pay an admission fee; in contrast, his wife was 60, above the pensionable age for women, and so gained entry free of charge. The issue was whether the Council's actions were 'on the grounds of sex' and therefore directly discriminatory. Lord Bridge for the majority concurred with the purposive

[312] *Reg. v. Birmingham City Council, Ex parte Equal Opportunities Commission* [1989] A.C. 1155, 1195 (per Lord Goff). This conclusion echoes sentiments made at the Queen's Bench by McCullough, J. who stated: 'The tenor of the Sex Discrimination Act 1975 as a whole is to this effect. Its purpose is to eliminate discrimination. Its provisions are 'result-directed' rather than 'intention-directed'. The preamble declares that it is 'an Act to render unlawful certain kinds of ... discrimination ... and establish a Commission with the function of working towards the elimination of such discrimination and promoting equality of opportunity between men and women generally.'

[313] *James v Eastleigh Borough Council* [1990] 2 A.C. 751

examination made by Lord Goff in the *EOC* case. His Lordship highlighted that in this case the metric used was intrinsically linked to differential treatment on the basis of gender.[314] Lord Bridge re-iterated that the motive and intentions of the defendant were not relevant. Cases of direct discrimination under section 1(1)(a) of the SDA can be considered by asking the simple question: 'would the complainant have received the same treatment from the defendant *but for* his or her sex?'.

This switch in interpretation from intention-focused to result-focused is what Luhmann calls a 'crossing' of the boundary from one side of the form to the other. In this instance the crossing is caused by the operation of justice as a formula for contingency; it has the effect of realigning the recursive structures in this area to reflect the legal interest which requires protection - non-discrimination, equality, dignity - on behalf of the claimant. The prominence of liability as a legal concept is thus diminished in favour of a legal interest which is more responsive to the needs of the environment (the claimant), and any changes which may take place in that environment (any signals of purposive change or possibly even consequential failures experienced by discrimination law). This 'gestalt' shift signals (i) a new reliance on cognitive expectations and learning as opposed to normative expectations and non-learning, and (ii) an increase in the variety of information which can be processed by the model of direct discrimination, but with an attendant loss of redundancy.

There was a notable level of criticism of this new test. Firstly, it was contended that the test elided the basic distinction between direct and indirect discrimination at the heart of equality law. By interpreting direct discrimination in terms of the impact on the victim, this encroached upon the territory circumscribed for indirect discrimination. One of the important conceptual distinctions is that direct discrimination cannot be justified by reliance on a defense, for example of economic

[314] *James v Eastleigh Borough Council* [1990] 2 A.C. 751, 772

efficiency, administrative expedience or proportionality.[315] Secondly, there is a more fundamental critique of the practical reasoning adopted by the court. It was argued that the majority failed to understand the difference between an operative premise and an auxiliary premise for action with the consequence of broadening liability to such an extent that it was uncertain who would be punished and held to be discriminatory.[316] Moreover, John Finnis has contended that the practical reasoning employed by the court is fallacious because it separates deliberation and the mental-processes of the defendant from the action, by claiming that an instrument or decision can be intrinsically or inherently wrong i.e. discriminatory.[317] Interestingly, he aligns this objection alongside an old refutation of Peter Lombard and Abelard in the twelfth century by Thomas Aquinas. The contention made by Aquinas is that acts are not wrong in themselves (mala in se) but only in connection to the purpose, will, intention or motivation of the person who does the act.[318] Therefore, for the court to simply focus on the causal-effect relationship is to observe the person's action externally; if the intentionality of the person is observed, Finnis contends, then the court is adopting the internal perspective of the actor. This distinction can be translated into the terms of systems theory if we state that this internal-perspective relates to internal legal semantics signified by the concept of liability. The external-perspective criticized by Finnis for objectifying acts into intrinsically wrong acts relates to the legal semantics indicative of legal interests which are more responsive to the environment, and in this circumstance the perspective of the victim.

An additional issue with the 'but for' test is that it may appear to be overly inclusive. Weinrib notes that this is a problem commonly experienced by tests that aim to determine factual causation. Such tests are able to exclude liability but they are unable to establish the criteria for inclusion of

[315] This is perhaps a simplification because there any formal exceptions labelled as 'genuine occupational requirements' that allow an employer to discriminate on the basis of sex or race if certain criteria can be established.
[316] See Gardner (1998)
[317] Finnis (2011a).
[318] Finnis (2011b: 243-250)

liability.[319] We are left with an almost tautologous situation in which either (i) a defendant directly discriminates or (ii) they do not, but there are no criteria to establish whether it has or has not occurred. Liability has been inflated at the expense of generating rules for assigning fault; or put differently, the variety of possible information has increased but at the expense of legal rules which enable specialized legal observations.[320]

In summation, the change from a subjective consideration of liability to an objective consideration came about because of a purposive interpretation of the legislation. This generated a test for liability far more influenced by a legal interest in preventing harm to the claimant; however, according to Luhmann's theory (i) all interests need to be processed by a counter-balancing concept because all external-reference can only come about through a prior self-reference, (ii) interests allow greater openness and variety, (iii) there is still the oscillation at the heart of discrimination law to contend with, namely that the 'harm' is by no means clear while, at the same time the law cannot rely on received wisdom to conceptualize that harm.

[D] FORM - INTENTIONALITY AND ADVERSE CONSEQUENCES

The sections above have sought to explain that the change in direct discrimination from a meaning centered on liability and culpability to a meaning generated by reference to the harm caused to the victim is also a change from auto-reference to hetero-reference, or from a focus on concepts to a focus on interests. In this next section I analyze the more recent pull back of the interpretation of discrimination towards liability and an assessment of culpability. There are two points I would like to emphasize. Firstly, this is not surprising because the interest-based test of 'but for' causation must

[319] Weinrib (1975)
[320] Michael Connolly (2001) also seems to recognize this contradiction.

be processed through a legal concept of liability.[321] Systems theory insists that any external-reference will be channeled through a prior self-reference. Secondly, in opening up the interpretation to a legal interest that focuses on the victim, or the purpose of the legislation, what this also encourages are other arguments which are interest-based. These arguments relate to policy directions and observations on how the legal system affects the environment (the effects of the administration of justice). However, because of the nature of legal interests in which few rules are maintained to check for errors and inconsistency (redundancy maintenance), there is no mechanism to resist the emergence of legal interests which are actually in conflict with non-discrimination. Finally, I would argue that this dynamic between concept and interest is likely to continue because it reflects the underlying tension at the heart of discrimination law.

In *Nagarajan* the meaning of the same statutory term ('on the grounds of sex') was again interpreted by the Supreme Court. Lord Nicholls came to the conclusion that save for the obvious cases in which the 'but for' test would be sufficient, there would need to be some consideration of the mental processes of the alleged discriminator.[322] Lord Browne-Wilkinson concurred indicating that the 'but for' test is not a rule of law, but a rule of convenience depending on the circumstances of the case. Lord Nicholls explained that most employment decisions came about for a variety of reasons which may be quite complex and that the 'but for' standard is unable to properly process these cases. This is certainly a fair point.[323] Lord Nicholls also explained that discrimination which requires racial grounds (or on the grounds of sex) to be the following: a cause, an activating cause, a substantial or effective cause, a substantial reason or an important factor in the reasoning processes of the defendant. In addition, he suggests that an additional distinction between conscious and

[321] Hart and Honoré (1959) came to the conclusion that causation is ultimately driven through arguments concerned with responsibility.

[322] *Nagarajan v London Regional Transport* [1999] ICR 877

[323] In the case of *Martin v Lancehawk Ltd* (unreported) 15 January 2004 the male managing director dismissed a female employee after their affair came to an end. She claimed that 'but for' her sex no dismissal would have taken place because if she had not been a woman, then the affair would not have occurred. As we can see the *James* 'but for' standard can fail to deal with such cases because it does not generate sufficient rules to analyze this phenomenon because any affair in such a situation would be on the grounds of sex.

subconscious reasons may be used to widen the scope of enquiry and capture quasi-institutional reasons for discrimination. What we see is that the rules that can be generated under the auspices of the subjective liability are far more complex than those which can be generated under a legal interest.[324] The interest-orientated test captures a great variety of possible circumstances but it cannot easily create ways to process and compartmentalize these circumstances. Secondly, we can see that any factual examination or external-reference must be predicated on a legal concept of responsibility as a self-reference.

In the recent case of *Amnesty International v Ahmed*[325] the claimant, who was of northern Sudanese ethnic origin, was refused promotion to the post of researcher for Sudan by the respondent employer, a human rights charity, on the grounds that, being from the north and having an "Arab" appearance, due to political and ethnic tensions she could be perceived to present a conflict of interest, and if she visited the region she and her colleagues would be exposed to an increased safety risk. Underhill J. the President of the Employment Appeal Tribunal broadly applied the reasoning of Lord Nicholls in the case of *Khan* in which a distinction is drawn between 'but for' cases as examples of obvious discrimination and *Nagarajan* type cases in which the mental-processes are relevant.[326] The reason given for preferring Lord Nicholl's interpretation was that it can never have been intended for the 'but for' test was to replace the words of the statute. It was meant as a gloss or guidance rather than a definitive interpretation. Space was made for this type of argument because of the loosening of interpretation adopted in cases such as those of *EOC* and *James*. Once the purpose of the legislation or the purpose of a test is scrutinized then it can always be re-scrutinized.

[324] In the case of *Chief Constable of West Yorkshire Police v Khan* [2001] 1 WLR 1947 Lord Nicholls confirmed that: 'What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'

[325] [2009] I.C.R. 1450

[326] A similar approach was adopted in the recent case of *Martin v Devonshires Solicitors* [2011] I.C.R. 352 UKEAT/86/10 in which the causation test was avoided because of the indeterminacy generated by it.

As mentioned earlier, there is an awareness by the judges that unlawful discrimination could be construed as labeling the defendant as racist or sexist. Hence, there is a significant attempt to evade such a condemnation. In essence, this can be understood as the internalization of an external observation in which the legal system considers how it operates in its environment and the consequences which flow from this observation re-enters as a factor in its decision-making processes. More recently in *Network Rail Infrastructure Ltd v Griffiths-Henry*, the EAT stated: 'Plainly there cannot be a finding of sex or race discrimination every time an employer carries out a selection process unfairly to the detriment of somebody who is black or female.'[327] How the law appears in its environment has slowly come to play a role in the determination of discrimination.

I would suggest that this oscillation over the provision is likely to continue because underlying discrimination law is the tension that the interest which it seeks to protect, or the harm it seeks to prevent, is indeterminate because it is defined in terms of moral values. Therefore, once purposive interpretation turns to consider this interest there are insufficient rules that can be generated to stabilize the operating perspective. In turn this will cause a reversion to the legal concept of liability and an analysis of the mental culpability of the defendant; however, the fact that the law is not challenging social norms, but confirming social norms will become apparent and the whole process will begin again. This oscillation relates to the form of direct discrimination in which a boundary is drawn between the defendant and the victim by applying the distinction between intentionality and adverse consequences.

CONCLUSION

This chapter has illustrated that a systems theory analysis can explain the innate tensions within anti-discrimination law by drawing attention to the following: the oscillation between intention-based tests and consequence-based tests, the dynamic between the concept of liability and the

[327] [2006] I.R.L.R. 865

interest in non-discrimination, and the tension between punishing the defendant and providing a remedy for the victim. By outlining Luhmann's theory of argumentation we have been able to re-describe certain limits that have occurred in the development of interpretative frameworks within anti-discrimination law. These limits cannot be illuminated by traditional approaches to this area. We will now turn our attention to explaining how systems theory grasps the communication of a valid legal decision.

CHAPTER 9: VALID DECISIONS, RULES, AND THE LIMITS OF DISCRIMINATION

'The system can avail itself of its symbol for validity only in this mysterious form of decision-making.'

(Luhmann. 2004: 284)

INTRODUCTION

Legal validity is not a topic richly discussed in Luhmann's many works on law; however, it is a topic with a deep jurisprudential history. In this chapter, the symbolic medium of validity will be explicated by combining Luhmann's insights into decision communications alongside his sociology of law. A Luhmannian understanding of a valid decision resembles a number of approaches in analytical jurisprudence, namely: (i) Joseph Raz's description of legal authority, particularly in his reliance on the executive quality of a legal directive; (ii) H.L.A. Hart's notable division between the nature of habits and the nature of rules. These reflections will be brought to bear on anti-discrimination law to highlight a number of features that are significant for understanding the limitations of the field. The implications of these reflections for this thesis are twofold. Firstly, the analysis will show how the insights of analytical jurisprudence can be extended through absorption into Luhmann's theoretical understanding of law. Secondly, the focus on the recursivity of valid decisions militates against giving prominence to either a central norm, or a set of cohesive principles, as an adequate theorization of anti-discrimination law as explored in Chapter 2. Instead, the legal understanding of anti-discrimination law can be re-described as the 'qualitative duality' between decisions and argumentation (Luhmann, 1995: 289). Chapters 7 and 8 explained how argumentation limits claims for discrimination. This chapter will explain the operation of a valid legal decision, with Chapter 11 providing an illustration pertinent to anti-discrimination law.

SYMBOLICALLY GENERALIZED MEDIA OF COMMUNICATION – LEGAL VALIDITY

The main evolutionary pressure for the emergence of symbolic media is the need to overcome the improbability of acceptance. This is brought about through a number of factors particular to communication in modern society: the increased distance between sender and recipient, the likely anonymity of the eventual audience (even if they can be thematized as the "public"), the individualization of motives for both sides of the communication, and the tying of increasingly complex structural conditions to motivations (Luhmann, 2012: 190-238). The fact that law has to be successful under such difficult conditions is, at best, an infrequent concern in analytical jurisprudential.

So how does law succeed under such limitations? How does law exert pressure and bind actors?[328] The answer lies in the circulation of symbolically generalized media. Other sub-systems have also availed themselves of such abstracted media: money for the economy, power for politics, truth for science. Legal rules do not appear *ex nihilo* for the contemplation of the actor. They must be communicated via a medium, but their reception cannot be closely observed as is possible in a physical interaction. As a consequence, the popular thought experiments of much jurisprudential literature fail to appreciate reality.

A motorist is approaching a red light. They have a clear view of the crossing and there are no motorists or pedestrians in sight. There are no other persons present to observe the motorist's behaviour. Why does the motorist stop? Do they accept that they are under an obligation to stop? Do they accept that there is an authoritative rule which creates a reason to act in this manner? Both Hart and Raz can offer their own answers to this question, but both fail to respond to the empirical conditions faced by law in modern society. Hart, for example, adopts an approach indebted to the

[328] Luhmann (2012: 191) explicitly states that the examination of symbolically generalized media by Parsons and himself is an alternative to classical social theories which explain social order by reference to a social contract, natural law, or moral consensus.

advances of the linguistic philosophy of J.L. Austin and Ludwig Wittgenstein. The quietism of ordinary language philosophy enables Hart to construct a concept of law by a close analysis of how terms and phrases are used in everyday and specialist parlance. His distinction between 'being obliged' and 'having an obligation' as representing external and internal statements of law emanates from this careful reasoning. Language is certainly a medium through which law must travel to reach its audience. Nevertheless, it is not the only medium integral to the performance of law.[329] Medias of dissemination, such as writing and tele-techologies, must be significant not only for the historical development of law, but also for its moment to moment self-reproduction. There must also be a media specialized in securing the acceptance of legal communications in a highly complex and volatile world. The symbolically generalized medium of validity is differentiated for this very purpose.[330]

Raz's thought experiment assumes that legal authority, whatever it may be, is comparable to the authority exercised by a parent over a child, or by a teacher over a student. However, most legal circumstances do not involve the hovering presence of the State demanding compliance, or a charismatic figure calling for allegiance. The perpetuation of modern law occurs on only a minority of occasions via personal interaction between actors who are present and capable of mutual observation. We turn to the generalized symbolic aspect of law to overcome the improbability of

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[329] Recent research into the 'normativity' of spatiality and materiality convincingly show that legal phenomena are not only tied to textual or linguistic mediums. See for example, Andreas Philippopoulos-Mihalopoulos's (2014) examination of spatial justice and the lawscape

[330] Even John Searle (1996: 25) struggles to conceptualize 'collective intentionality' and social relations as a discrete medium of meaning. At best Searle punts for a vaguely Hegelian notion of the 'We' as an epiphenomenon affixed to the cogitations of the mind. Gerald Postema (2008), however, does acknowledge that modern law must contend with an inevitable distance and alienation between its officials and the general populace. Postema proposes that for a legal system to exist it must effectively resolve this alienation, therefore there must be a congruence between the norms produced by legal officials and those of the general public. This is a congruence which is not admitted, or sufficiently explored, by either Kelsen or Hart.

communication when the proximity of actors, shared knowledge and moral values, and possibilities for quick adaption are negligible.[331]

Generalized symbolic media ensure that improbable communications have a chance of success. In this context success signifies a 'heightening receptivity to the communication in such a way that it can be attempted, rather than abandoned at the outset' (Luhmann, 1986: 18). The media prepares the audience and acts as a compère before the arrival of the communication. The demands placed on media increases in the course of social evolution. If society increases in its complexity, then selectivity within each system increases in turn. The communication of particular topics thus finds a world which offers a wide range of possible selections. With such a surplus of options, a co-ordinating mechanism has to be established if motivation is to be receptive to certain selections. Symbolic media have been differentiated to make such improbable communications more likely. This is completed by co-ordinating specialized topics (selective conditioning) with a motivation to accept such communications.

Like other symbolic media, legal validity manages to effect this co-ordination by making the conditioning of selection into a motivating factor. We are more likely to accept a communication if we can assume that the proffered information has been already organized in accordance with certain conditions. At this point, it may seem that Luhmann has left open a gap in which these conditions can be specified. Is it to be a moral consensus around political-morality, or do these conditions require only a moral minima to be successful? Such as when Hart (1994:87) alludes to that which is 'necessary to the maintenance of social life'? The answer is in the negative. The resolution of double contingency between participants does not require a substantive alignment of ideals. If this was necessary, then the problem would never be solved.

[331] The closest discrimination scholars have come to this symbolic quality is through reference to the expressive dimension of law. Khaitan (2012) analyzes dignity in this regard. And yet, scant mention is made of sociological research which can systematize and complicate this approach.

The resolution of double contingency requires that Ego anticipate that Alter-Ego has its own expectations, and that Ego pre-structures its anticipations reliant upon the fact that Alter-Ego has its own expectations. In essence, there is a mutualistic constitution emergent between the participants which recognizes that both sides are self-referential actors. Both sides have the freedom to act as they choose and these selections cannot be predicted beforehand; however, this intransparency can be managed if a solution is developed that replicates the circularity of the problem. The constitution is mutualistic, but as I explained above the participants are not face to face and so mutual observation is not achievable. In such a situation there must be a symbolic structure which can be trusted by each participant.[332]

The resolution can take a plethora of forms as long as it acknowledges the circularity between the two participants alongside their intractably self-referential positions. For example: (i) I do not allow myself to be determined by you, if you do not allow yourself to be determined by me; (ii) I allow myself to be controlled by you, if and only if you allow yourself to be controlled by me; (iii) I will not do what you want if you do not do what I want (Luhmann, 1995: 117 ff., 389). What is the symbolic resolution available to law? To retrieve an answer, we need to consider further restrictions on symbolic media.

Symbolically generalized media hold together motivations and selections. When a selected piece of information is provided the motivation to accept this communicated form is made more probable. Not all contexts give rise to the need for attribution and decision. To explain when this is the case we need to establish the *reference problem* and *attribution constellation* for legal validity (Luhmann, 2013: 202).[333] The reference problem is encountered by a rapidly developing society concerned with managing opacity and contingency on a grander scale than that demanded in personal interaction.

[332] For an erudite analysis of double contingency that contextualizes the problematic sociologically and philosophically, consider Chapter 3 of Luhmann (1995).
[333] One does not need to rely on the validity symbol, exclusively: in court one can convince through the demonstration of evidence, rhetoric, personal magnetism, etc.; however this complaisant context tends to operate via personal interaction.

For example, the symbolic medium for truth, associated with the sub-system of science, hinges upon a reference problem in terms of the incorporation of as yet undiscovered knowledge. The scientific revolution presupposes the discovery of ignorance. Only with the French and Italian Renaissances did new knowledge begin to be considered as worthy of curiosity. The mentality of the times allowed for further understanding and therefore further communication on these topics. Such unheard of knowledge would have been dismissed as deviant and otherwise irrelevant in the European Middle Ages because it departed from divine providence (Luhmann, 2012: 203-204). The symbolic medium of truth provides a platform from which extant knowledge can be observed. The question of truth becomes reflexive: how do we know that it is true? Resources for constructing methods, theories, and proofs are then provided to supplement this enquiry.

What is the reference problem unto which legal validity offers a resolution? Validity must adhere to a framework that admits the mutualistic constitution of communication while also confirming the self-referential constitution of each participant. Hints at a resolution have been touched upon by Hart in his abstract historical sketch (1994: 91-99). He argues that the key distinction between a pre-legal and a legal system proper is the maintenance of a core union between primary and secondary rules. Secondary rules address issues which have contributed to the transition from a simpler to a more complex society. On their own primary rules of obligation managed communal existence in a world of close proximity, where the authoritative regime is likely to be unofficial and unstated. In the evolution of Hart's society a number of contingencies arise to threaten the social order. *Uncertainty* is generated as communal ties are loosened (e.g. traditional familial structures disintegrate and an allowance is made for social mobility) and the capacity to monitor participants' behaviour is stretched by the geographical spread of the group. In response to this emergent uncertainty a rule of recognition offers consolidation. It circulates as a validator of other rules that is a 'conclusive affirmative indication that ... [the rule in question] is a rule of the group' (Hart, 1994: 94). Thus a more symbolic dimension is attained that can transform this *uncertainty* into certainty.

The *static* quality of the social structure is revealed to be a problem when changing circumstances can no longer be incorporated by it. Changing circumstances not only in terms of a rapidly expanding world of knowledge but also, in a key movement emblematic of modernity, in the fact a person can now change their status by performance and are no longer exclusively defined by their birth station. The idea of individual subjectivity gains traction from the confessions of St. Augustine to its culmination in the European Enlightenment and the fall of the *ancien regime*.[334] Secondary rules of change are developed in the shape of legislatures and in the power-conferring rules available to legal persons. The performance of these secondary rules changes the legal status of a person, such as when citizenship is gained or employment is secured. Lastly, the *inefficiency* of monitoring compliance is scrutinized. It becomes an issue that participants cannot be observed except through extraordinary expenditures of effort and time. Rules of adjudication are thus formalized. Organizational roles are created. From a more centralized platform, official participants are able to adjudicate upon public standards of behaviour.

It is difficult to encapsulate these insights in a terser form. Nevertheless, they conform to the requirements of a resolution outlined above by their combination of circularity and self-reference. For example, the changing circumstances for the individual and society are neutralized by the provision of a stable state which can limit the possibilities of change. In terms of a power-conferring rule this would form the conditional proposition: I will accept that you can attain this legal position (employee, citizen, party to a contract, tortfeasor) if your actions meet x, y, and z conditions. The validity of your legal position can then make acceptance more probable such that you can anticipate that I will take your valid action as a premise for my actions.

Alternatively, the duopoly of private compliance is managed by a monopoly of official, public standardization. In this instance the duopoly refers to the fact that the self-referential aspect of

[334] Luhmann (2013: 183-226) provides a systematic rendering of this theme in terms of societal self-descriptions.

participants has come into focus through the difficulties of monitoring and anticipating their actions. They have become opaque and akin to a black box. This situation is resolved by organizing the rules of adjudication. There is ample room for further analysis, but even in this abbreviated explanation, the possibilities of systems theory's insights are clear. Let us now move onto the second condition which legal validity must meet in order to circulate as a symbolic medium.

The attributive constellation is that special arrangement which classifies the Ego - (*Alter*-)Ego relationship in terms of action and experience. This is of particular interest because it indicates a fault-line registered by both systems theory and analytical jurisprudence. Legal validity has been out-differentiated as a symbolic medium from that of power. Simply put, validity is recursively constructed with an attributive constellation that links actions of Alter-Ego to actions of Ego. By placing law in this constellation we are able to see how it operates in a comparable but distinguishable fashion to power, love, truth, property, art, and value. By limiting validity to this constellation the basal structure of valid decisions is severely confined. This will be discussed and developed in relation to the jurisprudence of Raz and Hart below.

Finally, I will explain the symbolic aspect of validity and its relationship to insights gathered by jurisprudence. The specificities and the universality of the legal system are held together by the symbolization of legal validity - this is an iteration on the symbolic level of the circularity and self-reference explained above. The symbol stands in place of each side, making the self-description of the legal system amenable to communication (Luhmann, 2013: 191 ff.). Typologies and modes of classification can be communicated as a topic. This would suggest that the various branches of law can be communicated through reliance on this symbol of validity. This composition can be calibrated in many different ways. Legal history makes this multiplicity evident. One need only glance at Roman Law to see how alien different self-descriptions of the legal system can seem when placed side by side.

A symbol operates such that participants can presuppose a prior ordering.[335] In the case of law this would be a prior chain of actions and decisions. The circulating symbol of validity operates in a similar fashion to Kelsen's G*rundnorm* and Hart's Rule of Recognition because it provides a pivot which connects the whole system to each particular component; and like both concepts, it would lose its functionality if a participant refused to rely upon the prior ordering indicated, but not explicated, by the symbol: the *grundnorm* must be presupposed as a transcendental assumption that conditions the normative system; the rule of recognition is a generalized practice even if it can be understood as series of rules .[336]

This special quality of symbolization is evident in other media. In times past the gold standard guaranteed the money supply, but a person need not attempt to redeem the value of bank note in gold for the medium of money to be a successful mode of exchange. In fact, if such a redemption was demanded then the advantage gained by the symbolic media would be lost. Similarly, the abstract notions of friendship and solidarity do not need to be uncovered to be effective at bringing forward agreement as long as their extended formulations are available for use (Luhmann, 2012: 206-209; Luhmann, 1986: 18-34): I can accept a request out of friendship without weighing whether we are really friends and what this actually means.

Symbolization provides a pivot that ties together the unity of the legal system with its disparate parts. Thus, a symbolization makes the topics of unity and diversity within the system amenable to communication by presupposing that complex negotiations and opportunities for understanding

[335] The symbolic mode corresponds with the need for law to offer a systematic quality establishing a horizon for the self-direction of actors. Postema (2008: 54) recognizes this aspect when he suggests that positivist jurisprudence, such as that offered by Bentham, fails to explain the existence of an individual legal norm because in reality law exists as a web of interrelated norms. Law provides an 'infrastructure or context for meaningful interaction' that mediates between the actors and their reasons for action. Further this assumption of systematicity enables alienated participants to take an *in sensu diviso* position to legal norms (Postema, 2008: 56, 63). Raz (1995: 231 ff.) also highlights the significance of this mediatory function in his service conception of law.

[336] Note how Hart (1994: 101) suggests the symbolic form in the following: 'the rule of recognition is not a state, but its existence is *shown* in the way in which particular rules are identified, either by courts or other officials or private person or their advisers.'

have taken place. This is a type of situation in which there is little if any indulgence in close questioning and counter-argument. We simply accept such communications by virtue of such symbols even though the request may be inconvenient. As they say, *money talks* and *love speaks for itself*. This specific communication problem re-arranges unity and difference such that: whoever can pay gets what they want; whoever cannot pay does not. Whoever can rely on legal validity gets what they will; and whoever cannot rely on legal validity does not. Below we will see how closely these propositions relate to Raz's focus on the authority of law.

The above paragraphs have sought to explain the generalized symbolic media of validity. This symbolic form is tied to a decision communication therefore an explanation is required as to how a decision communication imbricates validity and action. We shall turn now to this topic. The jurisprudence of Raz and Hart will be used as a foil to fine-tune the intricacies and implications of the argument presented above.

DECISION COMMUNICATIONS AND THE SYMBOL OF VALIDITY

As noted in the opening quote to this chapter, the symbol of validity circulates via the mysterious form of decision-making. The concept of a legal decision is certainly a thoroughly mined vein of jurisprudence. Luhmann, however, provides a theorization of a decision in terms of communication. This expands the context in which a decision can be observed to areas external to adjudication proper. The advantages of this approach are several: analytically, the form of decision-making is extracted from the exclusive control of formal organizations; decisions are made sufficiently abstract as to afford the possibility of a comparison between legal decisions and decisions made in other social contexts (economic, scientific, etc.); and finally, isolating a decision as a communication further explains Luhmann's unique contribution to jurisprudence, providing a platform upon which a

decision made by a court can relate to a decision made by an employer, business, and other actor significant to the communication of discrimination.

A decision is made when an action is communicated along with an expectation. By communicating each element at once an opportunity arises for considering whether the action conforms or deviates in respect of the expectation.[337] This can be phrased in many different ways because our analysis is conducted at a high level of generality.[338] For example: the person acts appropriately, the action is unexpected, the action is constrained by an expectation, or an expected action takes place. What is distinctive about this analysis, however, is the fact that an action can be associated with an expectation in the form of an obligation or an act of obedience - the action occurs because of the expectation.[339] A decision crystallizes through an acceptance or rejection of such a formulation as valid or invalid; this acceptance or rejection then communicates itself as a valid decision. Within such an analysis the legal validity of a judicial decision can be considered alongside the legal validity of an employer's decision or an individual's decision to act. The significance of this re-composition is that Hart's distinction between obligation and obedience, rule and habit can be visualized within the context of both official decisions and the more mundane actions executed in everyday life. The combination of an action and an expectation gives rise to a decision because it provides the conditions for a constitution of a choice from amongst alternatives. The decision chooses by highlighting its acceptance or rejection of the action-expectation form.

Naturally, expectations can vary in their orientation. They might be cognitive: a dark cloud can provide an expectation of rain and so when I go on my walk (action) this provides conditions for a

[337] Recently, there has been a surge of research on a Luhmannian approach to decisions and organizations. See for example: Seidl & Becker (2005); however, these insights have not been applied in detail to the court as a decision-maker. A feat mildly attempted here.
[338] For instance, scientific truth circulates as a symbolic medium by tying together experience to experience. Nature reveals itself as shared experience; nature does not perform actions. The presence of actions (bias, mere opinion, non-repeatability of experimentation) short-circuits the performance of the medium. Since actions do not form part of the medium neither do decisions. Karl Popper (2002) provides, perhaps still, the most influential description of scientific epistemology.
[339] The different dimensions of meaning afford a range of options for 'seeing' this formulation, see Chapter 10.

decision to be made; if connections are available then these can provide grounds for decisions to be communicated as choices, such as to carry or not carry an umbrella. A selection from amongst other options is communicated if a decision communication takes place. I may have chosen other options such as not to carry an umbrella, or to remain inside instead. Expectations may also be normative, for example, many would consider it proper for a person to iron their shirt before a job interview; however, perhaps that person is running late. Then the grounds for a decision can emerge such that the person becomes the subject of a decision in which they choose not to iron their shirt. This decision can then contribute to the premises, alongside other possible decisions, for a future decision as to whether they should get the job. Another instance is when a conflict arises between opposing parties to a claim. Legal decisions are made by 'seeing' that there are many parties to the case (various selections) upon which a decision can then be made from amongst the alternatives.

To be a decision the 'choice is treated as contingent and the actions connected with it are motivated by this contingency' (Luhmann, 1995: 296). A decision must be communicated on the basis that a choice has been extracted from amongst alternative selections. To choose means to select, but the selection must acknowledge the contingency of its choice by showing the other possible selections which could have been made. The execution of a decision works upon this form of action/expectation; it observes the form as communicating an acceptance or rejection in respect of the relationship between the action and the expectation. An important aspect that needs emphasis is that a decision is being made by observing the formation of a prior decision.[340]

Decision communications are recursively constructed such that the basal element of the system can only connect to other basal elements of the same type. These recursive limitations are similar to those apparent within coded communications constructed by reference to the legal code (Luhmann, 2013: 145, 254). The system differentiation of decisions allows a connection between judicial

[340]This requirement of connectivity has implications for Raz's service conception of law which will be considered in greater detail below.

decisions and legislative decisions, and judicial decisions and business decisions. Rather than a code (legal/illegal, government/opposition, paid/not paid) establishing the system-boundary, it is the basal constitution of a decision.

In a legal context a decision can connect to another decision in a number of different ways with each connection taking the form as a selection amongst alternative selections: the interpretation of a text, inference from evidence, an investment decision based on current demand, an assessment as to an employee's suitability for a role, consideration of the facts. Each of these examples involves the extraction of a selection from amongst other possible selections. The completion of the decision comes about when it is recursively connected to another decision: a decision to produce a new product is connected to a decision in the marketing department to advertise this new product; a decision to allow an appeal is connected to a decision to find against a party.

Decisions are precarious however, because they are uniquely compact communications that communicate their own contingency. To operate, a decision must communicate both the selection of some information and the range of options which were not selected. The greater the emphasis placed on the choice component of the decision then the less it will seem to be *justified* as the contingent component of the choice has been diminished. On the other hand, the greater emphasis that is placed on the contingent aspect of the decision the more that other alternatives will appear to be possible and so the less it appears that a decision has been made. This paradoxical situation comes about because of the combination of necessity and contingency within the compact form of the decision. In the field of psychiatry this has been touched upon by Ruesch and Bateson (1951). For these authors, the paradox was unfolded by inserting a distinction between on the one hand, the reporting of a communication as a selection from amongst alternatives, and on the other hand, the

commanding aura of the communication which increases the probability that a decision will be accepted as decisive by other communications.[341]

How do legal decisions deal with this paradox in which the decision may appear either to be excessively decisive, or excessively contingent? A plausible, but perhaps extreme, example will help to make this clear: what if a court considered a legislative enactment as *too decisive* a decision, if parliamentarians had been intimidated into passing the Bill? In such a situation, the court may unfold such a paradox by inserting a distinction on the basis of constitutionality, or by suggesting that parliamentary sovereignty was premised on a number of presumptions. Alternatively, they may adopt a more formalistic interpretation and suggest that contingency lies in the future in which a forthcoming parliament could choose to vary the decision by repeal or amendment at a later date.

Decision premises are the preconditions produced by other decisions. These premises can be organized into several groupings - programmes, communication channels, and personnel.[342] In contrast to programmes that supplement the legal code, programmes that premise decisions can be both conditional or purposive in their structure. Personnel premises concern terms of membership, recruitment, and organization. These relate to the decision because they change the expectations of the 'actor' involved in the decision. For example, a senior member of the company has different expectations from those of an intern. Lastly, communication channels are decision premises that relate to the organization of an organization. These channels concern hierarchical formations. The effects of a decision (the conditions for connection) executed at one level are unevenly distributed to other levels. For example, a decision by a lower tribunal will have a different effect on the Supreme Court than a decision made at another level of the court system.

[341] In effect, Ruesch and Bateson attempt to avoid the paradox by separating the decisional form from the symbolic medium of validity (i.e. a command, a directive, etc.). This separation may be available at an analytical level; but at the level of the actual operation of law, the legal decision co-constitutes (and vice versa) the symbolic medium of validity in the form of valid decisions. For a brief explanation of decisions as they occur within the court setting, consider Luhmann (2004: 282 ff.)

[342] For further explanation of the decision paradox and decision premises, see Seidl & Becker (2005).

This section has provided a brief overview of Luhmann's theorization of a decision communication. In the next section, we will place this alongside the symbol of legal validity in order to shed light upon the recursivity of valid decisions. The limitations of decision communications will be set out by focusing on the dual requirements for decisions to be premised on actions, and for decisions to avoid their paradoxical constitution if they wish to be valid and authoritative.

UNDERSTANDING THE COMMUNICATION OF VALID DECISIONS VIA RAZ'S NOTION OF AUTHORITY

In the following section we will consider how Luhmann's concepts of validity and decision can align with one of the most influential contributions to jurisprudence in the 20th century, namely that of Joseph Raz. By pursuing this analysis I hope to situate Luhmann's account of law alongside important concepts in analytical jurisprudence. This will lay the groundwork for understanding the limitations on legal decisions and the application of Luhmann's account to discrimination law.

Joseph Raz (1995: 210-238, 1980: 209-237, 1979) has long asserted that authority must hold a prime position if we wish to understand the existence and identity of law. By emphasizing practical authority, reasons for action, and the executive function of law his jurisprudence offers a number of insights that complement a Luhmannian theorization of legal validity. Let us outline the essential components of Raz's legal philosophy so that we might consider how it aligns with Luhmann's conception of a valid decision.

Raz defends a positivistic view of law which he places under the heading of a 'sources thesis'. In its finality, all law is source-based. Law's existence and content can be identified by reference to social facts alone. He argues against viewing law as either connected to morality by entailment (for example, law can only exist if it meets a moral objective such as the maintenance of order), or that

law is a combination of legal sources and the soundest moral justifications for such sources.[343] These approaches are respectively labeled by Raz as the 'incorporation thesis' and the 'coherence thesis'.[344] The latter is generally considered to reflect Dworkin's view on law - or at least Raz's interpretation of Dworkin's view. In Raz's sources thesis it is his twin emphasis on 'social facts' and the separation of law from morality that brings his approach closest to Luhmann's description of law as a self-referential, autopoietic system.[345] Moreover, Raz's dismissal of the incorporation and coherence thesis for law coincides with a major tenet of this thesis: commentators fail to understand the actual operation of discrimination law if they rely on either the identification of moral principles incorporated into this branch of law, or if they seek to uncover the politico-moral justifications that best lend the law coherence and unity.[346]

According to Raz, only by observing the social and factual activity of law can we elucidate the mechanics of law's existence and its individuation; on this basis, Raz reaches the conclusion that the common sources of law - the judiciary, the legislature, and custom - are pivotal to the legal system because they provide a crux upon which decisions and actions can be organized so as to carry an 'authoritative mark' (Hart, 1994: 93). Raz is a hard positivist and claims that law consists only of 'authoritative positivist considerations' and these aforementioned sources provide a finality that is absolutely characteristic of law. Persons deliberate and consider on what is the correct behaviour, or the right course of action for any given situation. This deliberative stage involves a person considering 'the merits of alternative courses of action' and when 'an intention is formed deliberation is terminated' (Raz, 1995: 206). Once an intention and choice has crystallized then the

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[343] Notwithstanding this position Raz does not consider law to be an autonomous organization. Law is delimited by a political system (variously suggested as comprising such entities as the state, church, nomadic tribe).The identity of the legal system depends upon the continuity of the political system. For further details see, Raz (1979: 97-103) and Raz (1980:210).

[344] A succinct version of Raz's thesis is presented in Chapter 10 of *Ethics in the Public Domain* (Raz, 1995). Chapter 10 is a re-print of the widely read article in the *Monist*, Raz (1985a).

[345] Unfortunately, Raz is as unconcerned with sociological research as Hart apparently was. One can assume however that the sociology of organizations would complement Raz's philosophy well.

[346] As sketched out in Chapter 2 of this thesis.

executive stage of action comes to the fore. 'The sources thesis assigns the law to the executive stage of social decision-making' (Raz, 1980: 213) such that law, properly so-called, is a web of executive, positive, reasons for action. Legal decisions communicate reasons for action by exhibiting a quality of finality such that our prior discussions come to an end through the executive performance of law. Consequently, it makes sense for Raz to stress the standard sources of law as projecting this function. In the vast bulk of situations, where our deliberations do not result in the initiation of legal proceedings, we invariably turn to statutes or judicial decisions to provide guidance for our behaviour.[347]

Raz states that a ‘judicial decision expresses a judgment on the legal consequences of the behaviour of the litigants. It is presented as a judgment on the way the parties, and others in the same circumstances, ought to behave’ (Raz, 1995: 221). In the same vein, legislative enactments purport to express themselves as a judgment of what subjects ought to do in certain situations, and custom reflects the judgment of the bulk of the population on how people ought to act in a given situation. So far, we may find it plausible to see that Luhmann's conception of valid decisions correlates with Raz's jurisprudence, however in what sense can custom as a source of law be understood as a decision or an action. Where is the decision-maker?

Firstly, a source of law should not be considered as a singular flare, but rather a prism through which a collection of texts and a 'whole range of facts of a variety of kinds' can be located (Raz, 1979: 48). Legislation and adjudication are not uncomplicated in their genetic structure. Statutory enactments and landmark cases may operate by providing a singular, authoritative reason for action, but their constitution is interwoven with other laws and norms - as Bentham discovered to his dismay, the meaning of a legal norm cannot be adequately separated from its interrelations with other legal

[347] Dworkin offers a divergent emphasis by following what Raz (1995: 199) calls the lawyer's perspective. Dworkin's jurisprudence focuses upon on how courts adjudicate in hard cases as revealing a salient evaluative dimension to the legal system. Dworkin’s perspective far more closely follows the recursivity of legal argumentation examined in Chapters 7 and 8 of this thesis.

norms. Even a constitutional statute cannot project an authoritative guide for our behaviour without a consideration of its surrounding context.[348] In addition, we must stress that the idea of meaning within systems theory relies on an epistemology often at odds with that assumed by analytical jurisprudence. Legislation does not present a singular decision, norm, or rule, but rather a channel by which a plethora of decisions can be connected and synthesized. Meaning is concerned with connectivity, not intentionality (Luhmann, 1995: 59-103). There is a more obvious point as well - the legislature is a fictionalized decision-maker, and, in many cases, adjudication is reached also through a synthesis (a majority) of those sitting on the bench. Custom as a source of law can be constructed through examining the generalized motivations for accepting a premise as legally valid. We accept the rule as valid and binding because others *customarily* behave in a similar way.[349] The social dimension of meaning allows such connections to be made. Customary norms are explicitly recognized as an authority in public international law and arbitration procedures. It is not the categorization of the source which matters, but whether it can be observed as propagating a legal norm non-accidently as a premise for behaviour or a future decision. After all many perfectly effective and authoritative legal systems have relied on animistic spirits and deities as sources of authority. We can begin to see how Raz's jurisprudence overlaps with Luhmann's decision communications.

[348] The executive quality of legislative communications might be attributed to their temporality. The crystallization of selection (the announcement of a decision) stems from the establishment of a line between before and after. The point of inception can be observed. On the other hand, custom, by its very nature, is difficult to conceptualize in such terms because of its emergence through collective actions. Nevertheless, that does not rule out the possibility of customs becoming authoritative through utilizing the factual or social dimensions of meaning. The customary practice of a legislature provides the premise for the communication of a decision, for example constitutional conventions; or indeed, when greater influence is attached to a judicial statement if the author is a well-known expert in a particular branch of law. In reality, these meaning dimensions can hardly be separated. Being a well-known expert involves both a social influence (she has a reputation in which others acknowledge her expertise) and a temporal influence (she has been influential in past instances).

[349] This thesis agrees with Raz's (1979: 149) position that the notions of legal validity and legally binding are interchangeable. For Raz, a legally valid rule is one which has the normative effects to which it claims. In essence, both notions signify the connectivity of legal communications.

The inter-relationships between norms, highlighted above, points towards a systematic quality of law. This systematicity, however, is not produced through the ordering of logical postulates, or by the conditioning of *a priori* intuitions and presumptions (Kelsen's *Grundnorm,* for example). This systematic quality is alluded to in Raz's jurisprudential project, in terms of his *dependency thesis* and the *exclusionary* force of authoritative reasons. These will be set out below. Each of these components form part of Raz's service concept of law which affords authority a place of prime importance. I have stressed that decision communications offer a sociologically and epistemologically superior explanation of this phenomena; however, the importance of action and behaviour for the communication of valid decisions, foci so important to the jurisprudential projects of Raz, have not been fully explored. Action is a key component within the symbolic medium of validity. By drawing out the consequences of action we can expose limitations on how decisions are communicated, and consequently limitations on how discrimination law can be analyzed.

Raz stresses that legal authority is a practical authority because law offers reasons which are convincingly independent of whether they are incorrect in terms of experience or by miscalculation.[350] These reasons do not simply add to the reasons for action already under deliberation so as to tip the scales in the law's favour. Law's reasons for action exclude reasons under deliberation. Authority is transmitted as an executed decision, not as a ground for deliberation.[351] Raz (1995: 210-238) outlines several properties that an authoritative legal system needs to maintain in order to ensure its legitimacy and, ultimately, its efficacy. The level of authority of an actual legal system depends upon the extent to which legal directives approximate to these ideals. In explicating these properties, the resemblance with Luhmann's thesis will be clarified.

[350] The law that requires the wearing of a seat-belt is authoritative despite the fact that the decision-premises and the deliberation that underpinned the statute may be incorrect. Legal authority is not (directly) affected by an incorrect scientific assessment on road safety, or a miscalculation as to the economic or policy benefits of such a law.

[351] Although there are certainly points of nuance, I have deployed the following terms as roughly interchangeable, with each presenting a specific angle on the same phenomenon: reasons for action; premises for a decision; and motivations for compliance, conformity, or agreement.

Firstly, a legal directive should be exclusionary such that the offered reasons for action *replace* the reasons for action under consideration by the individual.[352] The subject of authority accepts the reasons provided as a substitution for the reasons generated in their own deliberative process. Secondly, the reasons offered by the legal directive must communicate that the replaced reasons have been considered and reflected in the authoritative reasons now on offer. Reflection may not have in fact taken place. It is simply sufficient that the authority communicates as if it does reflect and as if it is dependent on the deliberations of the subject. These two facets contribute to what has been called Raz's 'service conception' of authority.

This reflection of other reasons, demanded by Raz, aligns with Luhmann's perspective that a decision must be both decisive and contingent such that a selection has been made from amongst alternate selections. The replaced reasons are retained by the reference to the alternate selections that condition the determined selection. The *dependency* on alternate selections (read: reasons for action) may also refer to the connectivity guaranteed by the chain of validity, but this node can be interpreted imaginatively - a present duty connects to a prior duty, a norm is recognized because a higher court recognizes this norm, a right or liberty can be recognized because other social actors recognize this conception, a norm is valid because it is effective, a norm is valid because it is similar to another valid norm.

Lastly, as referenced already within footnotes, the authority of the legal directive does not emanate from the substance of the directive. It emanates from the 'source' of the directive, namely the decision-maker or adjudicator. Authority is independent from the content of the directive (Raz, 1985b), and so the author and the authoritative instruction must be distinguishable from one another. This also entails that the directive must be identifiable without recourse to the purported

[352] There is a structural similarity here with how a legally valid decision motivates its own acceptance and monitors this acceptance by observing that its decision has become the premise for the subject's decided action.

reasons upon which it adjudicates or legislates.[353] In spite of the reference to a *decision-maker*, this 'source' is compiled within the communicative medium and does not rely upon the intentionality of an actor. For individuals are only 'semantic artefacts' within a society composed by communication (Teubner, 1989: 741).

THE ATTRIBUTIVE CONSTELLATION: ACTION TO ACTION, DECISION TO DECISION

Raz's concentration on practical authority and action offers a bridge between his project and Luhmann's sociology. A number of features in Luhmann's framework of legal validity correlate with Raz's conception of authority.[354] In a previous section, we outlined a provisional framework for a symbolically generalized media that is exclusive to the legal system. We will now deepen the exploration of this framework.

Luhmann (2012: 213) considers the circulating symbol of legal validity as a modern extension and secondary coding for the power medium. Such a secondary coding was co-emergent with the functional differentiation of the legal system and the modern theorization of the rule of law. This thesis, however, makes the argument that there is a symbolic medium of validity that now works exclusively on behalf of the legal system, no longer epiphenomenal on the medium of power. By outlining the operation of the power medium the structure of legal validity can be illuminated. One key point to reinforce is how much such an argument parallels jurisprudential developments made

[353] This observation seems to reflects a point made by Luhmann: a decision must be distinguishable from the premises upon which it was made. This coincides with Raz's claim that the executive stage must be distinguishable from the deliberative stage.

[354] Alternative accounts of legal authority have pursued themes more congruent with sociological concerns, such as deference, trust, respect, and even gratitude. Dan-Cohen (1994: 39) has defended a theory of authority in which deference is the motivating factor for compliance. He notes that authority operates as a 'medium for symbolic communication' that resolves a 'co-ordination problem'. The similarity to this thesis is evident.

by Hart (1994) as he launched his own concept of law by identifying the shortcomings of Austin, Bentham, and Kelsen. It is Hart's panoply of key distinctions - rule and habit, obligation and obliged, primary rules and secondary rules, internal and external statements of the law - that points towards the out-differentiation of the symbolic medium of validity and detachment from the power medium. Hart's comprehension of a rule, obligation, and internal statement accords with the circulation of legal validity.

Communication requires an infrastructure that is attendant to the problems of double contingency in the *co-ordination* of autonomous participants. How do black boxes speak and understand one another? Luhmann's proposal is an attributive constellation which classifies this relationship along the lines of whether meaning is reliant on external attributions (experience) or internal attributions (action) for the participants in question. The attributive constellation of power concerns: 'the action of alter consists in a decision about the action of ego that is required to be obeyed' (Luhmann, 2012: 212). Accept the directive or else suffer the alternative. The power symbol attempts to secure acceptance from the subject by soliciting the communication of conformity or compliance. If the media fails to convince then a sanction can be applied; however, over-application of the sanction will diminish the influence of the power medium to secure compliance.[355] This tension is salient too for the validity medium in which – and this depends on the precise construction of the 'or else' component that motivates compliance for law – the excessive application of a consequence for deviation must be used sparingly. This thesis goes further, however. The application of a sanction is broadened to encompass the forms of communication that are recursively constructed by reference to an exposed contradiction, deviation, non-compliance, and non-congruence of perspectives held

[355] This is not an esoteric point. We know that excessive use of a sanction provokes a response – often in kind – that diminishes the effectiveness of that threat. Excess exposes the power-holder to a possible contest over who should exercise such power. Comparatively speaking, this problem was addressed by Cardinal Richelieu in his efforts to enhance the royal authority of the *Sun King,* Louis XIV, through the intense ritualization of the twofold relationship between the monarch and his subjects: always watching (through a hanging portrait, and the extension of the state apparatus), but never approachable. Foucault (1977) famously theorized how power was able to resolve this issue as a step-change from sovereign, hierarchical power to a more diffuse, horizontal type of power which focused on technology, discipline, and surveillance.

by participants. How a violation can be *seen* will be considered with recourse to Wittgenstein's comments on the nature of rule-following.

The symbol of legal validity does not secure compliance by recourse to physical sanctions alone. The many cogent criticisms levelled by Hart against Kelsen and Austin certainly suggest that this possibility does not reflect modern law. How can a sanction, particularly as an action that manifests itself by force and violence, explicate either commitment to the law, or the vast majority of legal arrangements which create rights and grant powers? Clearly it cannot. The transmission of legal validity must rely on a different device to motivate acceptance. Hart offers a suggestion which seems to point in the correct direction. He observes that a rule has an internal aspect. The participant acknowledges that they have an obligation to follow the standard of behavior set by the rule and the consequences for deviation are to suffer disapproval. Accordingly, rules are able to provide a guide 'to the conduct of social life, as the basis for claims, demands, admissions, criticism, or punishment' (Hart, 1994: 90). Participant's with the internal perspective 'accept and voluntarily co-operate in maintaining the rules, and so see their own and other persons' behaviour in terms of rules'. For the successful functioning of a legal system, official participants must maintain an internal perspective such that they should sustain a 'critical reflective attitude to certain patterns of behaviour as a common standard' (Hart, 1994: 91, 57). Hart's analysis suggests that the internal aspect of rules is generated through an interaction between rules (as a decision communication) and a specific component of consciousness – as a type of commitment brought about through the volitional, cognitive, and reflective capacities of the participant. The motivation for the acceptance of a rule is enabled by this relationship and the deviation from a rule (the 'or else') is delivered by a threat of 'disapprobation' (MacCormick, 2008: 70-71).

These arguments are edging towards a formulation within the optics of systems theory. This autopoietic model of legal validity, however, differs from that proposed by Hart, Raz, and Kelsen by

virtue of the radical recursivity of the medium. Consequently, the imputation of validity is not assigned by reliance on a singular source or a locus of authority, such as Kelsen's presupposition of the *Grundnorm,* or Raz's notion of legitimate authority. Recursivity signals that validity is re-generated with each present decision and its connections to other decisions. The *efficacy* of norms can therefore become a factor in the assignment of validity.

Gerald Postema (2008) observes that positivists such as Hart and Raz have shown little concern with analyzing how the efficacy of legal norms, and the collective divergence between internal and external perspectives, may destabilize the existence of legal systems. Hart's jurisprudence is generated in line with the actions of legal officials. The rule of recognition divides valid rules from invalid rules through dependence upon a self-constructed generalization of official behaviour. The classes of behaviour under law's jurisdiction are determined by the rule of recognition which in turn is generated through the actions of the centralized and official institutions of law. A presumption appears in Hart's work, namely that the circumstances for the motivated acceptance of a rule - the lynchpin connecting legal communication to consciousness - is prioritized in favour of formal institutions instead of social consequences. In a similar manner, Raz unequivocally states that de facto authority presupposes legitimate authority because actual control is only possible if a prior acceptance has been elicited (Raz, 1979:28-30). This ignores a significant issue. Any kind of control presupposes the communication of acceptance on its own level. The threat of explicit violence can only motivate action (i.e. exercise control) if acceptance is communicated in a language equivalent to the decision implying such a threat. Such an acceptance need not be in the form of consent, but for control to occur there must be a communication of acceptance. The forced action must take the other controlling action as a premise for its decided action. This may take the form of genuflection or as the lack of effective opposition to such power. Control requires the *seeing* of acceptance such that explicit acceptance (in the form of verbalized assent, for example) is not necessary and is in reality often avoided. Logic only dictates de facto authority as presupposing legitimate authority if

the circulation of validity makes use of such logical postulates to recursively organize its transitions from state to state.[356]

Postema (2008), on the other hand, asserts that law is *dependent* upon social practice and that there must be a certain degree of congruence between legal norms and standard social conventions for a legal system to exist. Of particular note is Postema's argument that this is necessary in order to overcome the alienation and distance between institutional authorities and the general population. Postema suggests that law provides constitutive guidance shaping the horizons for deliberation by ensuring that 'norms must be publicly accessible, both synchronically and diachronically' (Postema, 2008:57). Although, Luhmann and this thesis would not go so far as to agree that there must exist substantive congruence between legal norms and social conventions located within an 'informational commons' (Postema, 2008: 59), Postema's instincts touch upon certain key features which must be incorporated into any adequate theorization of legal validity. A cogent formulation of the attributive constellation must include a semantics of commitment and a recognition of the difficulty in motivating acceptance at a distance. The *dependencies* outlined above - Hart's rule of recognition, Raz's service conception of authority, and Postema's insistence on the convergence between norms and practice - reflect the manifold generalizations in which the connectivity of valid decisions can be motivated.

Enabling such generalizations of the validity medium is an attributive constellation that connects action to action. Postema (2008: 58) alights on a plausible conceptualization of this constellation when he frames the relationship between participants as: 'what makes sense for parties on one side to do *depends* on what they expect parties on the other side to do, while, at the same time, what it makes sense for the latter to do depends on what they expect their counterparts to do.' Postema further asserts that legal directives have public, practical significance only if subjects can be

[356] This idea of *seeing* is developed below with reliance on Wittgenstein's proposal for and resolution of the rule-following paradox.

confident that the significance attached to them by their fellows generally meshes with their own. The attributive constellation *binds* participants into a *co-dependent* relationship; however, this convergence cannot be over-specified through substantive normative alignment between legal insiders and legal outsiders, or through explicit articulation. This is so because, firstly, if acceptance was to be explicitly motivated through negotiation then this would undercut the possibility of trust in the symbolic expression of the legal system. The more explicit the agreement, the greater scope there is for disagreement. Secondly, there are structural reasons why co-dependence must be under-specified.

All symbolic media have a symbiotic component that allows a continuously generated platform for communication to comprehend its participants (Luhmann: 227-230). This component is required because the medium is attempting to procure a motivational response from its participants and it must maintain receptivity to the changing states in their consciousnesses. This arrangement is theorized as the interpenetration between social systems and conscious systems (Luhmann, 1995: 210 ff.). The symbiotic component differs for each symbolic media: perception for truth, need for money, sexuality for love, violence for power. For law I have proposed that it must be located in a notion of commitment and engagement that is constructed around the volitional and cognitive capacities of consciousness. Under-specification of this component allows for interpenetration between communication and consciousness to be continued over time and over a vast array of topics. If the component is over-specified then this can lead to positive feedback such that both communication and consciousness become increasingly estranged and self-concerned, which leads to undermining the motivation for acceptance of communication. The capacity of legal validity to secure compliance is diminished if we insist upon (i) a substantive congruence between official norms and social conventions, and (ii) an exacting level of commitment from participants. There must be a mutual restriction by both communications and consciousness (interpenetration), and

from participant to participate (double contingency of communication) such that each side restricts itself in accordance with the system expected in its environment.

This line of argument has already been highlighted in jurisprudential scholarship. When Hart distinguishes between rules of law and rules of etiquette he suggests that one distinction is that rules of law require some sacrifice of interest or preference on behalf of each participant (Hart, 1994: 87). This is part of Hart's acknowledgement that certain social facts are necessary for the efficacy and existence of the legal system, and it corresponds to a systems theory analysis of a symbolic medium: the motivation for acceptance of a valid rule – communicated as a decision to act – must involve a denial of self-concern by the participant.[357] Raz, unknowingly, provides a supplementary addition in terms of a triple negation. Legal rules are 'exclusionary reasons for dis-regarding reasons for non-conformity' (Raz, 1979: 30). This proposition needs to be unpacked. For Raz, legal rules are exclusionary because they mediate between alternate reasons for action that have been offered by parties, or which have been considered in the deliberative processes of participants. I have argued that this exclusionary force is structurally akin to the execution of a decision communication. The operation of this executive stage has a further effect. It serves to restrict the basis upon which interpenetration can take place. It affects motivation by prohibiting selections based on non-conformity. This is a negative formulation of the interdiction against self-interested motivation.

In the previous paragraphs I have attempted to explain how the medium of legal validity can motivate acceptance between autonomous participants. The reason that this seems so complex is

[357] We might conjecture that the over-extension of communication has occurred in relation to certain scientific topics. The medium of truth relies on perception as its organic referent to consciousness; however, there is a restriction on its use such that perception develops dependent on interpenetration with communication and not through a reliance on other perceptual data. Consequently, intuition and instinct are not celebrated as an appropriate irritation site for the interpenetration between consciousness and communication. A common refrain amongst climate-change deniers is the reliance on 'common sense'. This might have been encouraged by an overextension of the communicative medium of truth; perhaps through the efforts made to keep the public informed and abreast of scientific developments. A similar restriction is imposed on the medium of love in terms of interdictions against onanism and self-love (Luhmann, 2012: 199-236).

because it brings two discrete cycles into an orthogonal relationship: (i) the interpenetration between legal communication and consciousness, and (ii) the establishment of mutually *dependent* expectations between participants. Let us summarize this relationship.[358]

A valid rule is likely to be accepted if we are able to anticipate that it will conform to certain pre-conditions; and in turn, a valid rule can increase the probability of its acceptance if it conforms to these anticipated pre-conditions. Through this circular relationship the motivation to accept a rule is *dependent* upon the pre-conditions for the rule, and in turn the pre-conditions for the rule are *dependent* upon the motivation for acceptance. A feedback loop is thus instantiated that manages to both pose and then dissolve a problem of co-ordination through a reliance on the symbolic expression of validity.[359] As alluded to above, these pre-conditions need not be specified (in fact, they must not be) for this feedback loop to take off. Symbolic media have the advantage of participants assuming that agreement and conformity has already been secured. Consequently, consensus is presumed and need not actually be substantively formed. This agrees with Wittgenstein (1958): to understand that a rule is being followed involves each side assuming that the other side 'sees' the rule in the same way.

This feedback loop relies on a symbiotic component that establishes a bridge between legal communication and consciousness. I have made efforts to explain that this is best understood as the concretion of the volitional and cognitive capacities of consciousness in the shape of non-specific *commitment* and *engagement*: if you do not adjust and anticipate my will then I will not adjust and anticipate your will. As time passes, the issue of double contingency is resolved through such a concretion. Commitment signifies an alignment of wills over time so, in a sense, it is open-ended. In MacCormick's (2008: Chapters 4) examination of Hart he alludes to this requirement. MacCormick

[358] Teubner (2001) refers to an orthogonal relationship between law and its environment through the term 'production regimes'.
[359] Luhmann (2012: 193) sets out this theoretical structure, but he does not go as far as to apply it to the legal concerns of validity and authority.

(2008: 45-49) makes the point that the volitional component of a rule must not be one of principle. Support for law cannot be because it coincides with our vegetarianism, for example. Commitment must be towards an end or common value. It is a conscious commitment that is directed towards communication.

This idea of *commitment* corresponds to a specialized function of law highlighted by Luhmann (2004: 145ff.) – the capacity of law to bind time. This is a conception of time that exists prior to meaning, because it provides the foundations for communication.[360] This binding of time concerns the irreversibility of events and the reversibility of structures; it is not the same idea as that which I have previously discussed under the banner of the temporal dimension of meaning.[361] Law solves a specific problem for communication concerned with learning and non-learning. Norms address the problem of under what circumstances we should expect our expectations to change? The normative expectations provided by law do not change (i.e. learn) in the face of cognitive disappointments. The very functionality of the legal system and its differentiation in modern society is at stake when the relationship between *binding time* and *mutual commitment* is threatened. It is therefore managed with special care. The threat of *dis-engagement* and *dis-commitment* operates so as to taper the range of possible selections in a similar manner to the operation of Hart's threat of disapprobation; however, in contrast to Hart, this position does not require the presumption of a social group or community upon which this threat can be conditioned.

Like the thermostat: how do legal actor's control by being controlled? Let us recall that the attributive constellation is aimed at resolving the problem of double contingency. Symbolically generalized media offer a solution to this problem of co-ordination, and it is an answer that is precisely adapted to the exigencies of modern society. On each side of the equation there is both an

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[360] This positioning of *time* as prior to the generation of phenomena is one of the reasons that Luhmann has been aligned with Kant.

[361] See Luhmann (1995) for a greater consideration this concept of time and the phenomenology underpinning his sociology.

awareness of contingency and an attempt to manage it. A observes B and sees that B is also an observing entity. A observes that B knows that they are under observation from A. Furthermore, A is also aware that B is adapting their observations in line with A's observations. 'In line' does not signify rational consensus: once a distinction is established between the two minds it cannot be effaced.[362] This primordial distinction with its attendant impasse can only be avoided if the issue is shifted out of view by adroit (!) manipulation of the temporal, social, and factual dimensions of meaning.

In an analogous move to the nominal reflection required by Raz's *dependency thesis* explained earlier in this chapter, Luhmann's co-dependency in the medium of legal validity need not be substantive. Indeed, it must not be. Symbolic generalization overcomes not only the problem of double contingency between actors face-to-face, but additionally the symbolic form conquers the great exigencies endemic in the modern world, specifically: delayed and protracted communication between participants, spatial distribution, factual complexity, and the social individuality of motivations for actions (Luhmann, 2012: 190 ff.).[363] As a consequence, there are severe limitations on the capacity of the legislator to monitor the reception of any valid legal action. In contrast to the close proximity that is likely to exist between a parent and child, a legal action that attempts to secure acceptance by recourse to the symbol of validity is not able to assess whether the legislator's decided action forms the premises for the recipient's decided action.[364] The complication can be posed in several different ways depending upon the issuing authority in question. Is the law being

[362] Being *in line* signifies a highly formal interaction between participants that has *sidelined* the problem of double contingency. It signifies an assumption of mutual commitment and a meshing of perspectives between such participants. It also references Wittgenstein's (1958:201a) rule paradox.

[363] I would emphasize again that this sociological insight is a valuable complication to the topic articulated within analytical jurisprudence. The symbolic generalization of valid law differentiates law's performance from that which takes place when the authority of a parent is exercised over a child, or the rule-bound behaviour in a chess game.

[364] For the parent-child example this proximity need not be simply physical (a conversation in the kitchen the same room, living in the same household, etc.). Proximity is also guaranteed by a limitation on the possible actions such that, on a factual level, there is a limited context for parental authority to be exercised or rejected. There is also a restriction on the possible moves that can be made on a chessboard. Not in the sense of a valid move, but in the fact that there are only a certain number of squares on the board and there are a limited number of chess pieces.

followed? Will the court accept our contractual arrangement and the accompanying actions as valid? Will the beneficiary accept our execution of the trust? Will they make mischief? Has compliance really taken place?[365] The actualization of the validity symbol ensures that these anxieties can be avoided. Trust is placed in the symbol and such concerns are off-loaded to a site in which this level of variability and complexity can be managed, namely: legal argumentation. The symbol would fail on its own terms if a person had to enquire as to whether these pre-conditions were actually met by such actions. Symbols stand in place of such enquiries, such that we can successfully form expectations of others expectations without encountering the knotty problem of finding out (a) what these expectations and pre-conditions in fact are, and (b) whether these pre-conditions are in reality met by the corresponding actions. It is the circularity of validity which is of importance: the anticipation of conformity to pre-conditions and the conformity to anticipated pre-conditions.[366]

This section has sought to explain how the attributive constellation interacts with communication. From the perspective of the constellation, symbolic validity circulates as a decided action connecting to a decided action. I have highlighted the number of *dependencies* recognized by Hart, Raz, and Postema. The reason for doing so is to highlight the radically heterarchical nature of connections between valid decisions.

We will now move on to consider the distribution of validity as connectivity. The import of this analysis for discrimination law will be revealed by showing how experiences are registered as invalid positions.

[365] Doctrines of statutory interpretation recognize the difficulty in assessing the acceptance of a rule. What would constitute acceptance of a rule? Does one judge the rule on the basis of its purpose, on its literal meaning, or on the mischief it seeks to correct? Crucially, I am suggesting that such ambivalences can be generalized outside the official environs of the law to consider legal actors in a more universal and complete sense.

[366] As referenced above in this chapter, a symbolic media cannot be specific. Notions of friendship and solidarity connect the elements of the love medium to other elements, but for love to be an effective medium the particulars of these relationships do not need to be uncovered as long as their extended forms are available for use. A thorough analysis of a friendship, or the 'reality' of a marriage, often destabilizes the bond between persons. We need to be very careful in offering proofs of our love and our friendship lest we damage the relationship itself. Best leave these risks to events that can be organized beforehand, so that expectations can be closely controlled.

CONNECTIVITY AND CONTINGENCY: HOW IS VALIDITY AND INVALIDITY, RULE-FOLLOWING AND RULE DEVIATION SEEN?

The positive value 'symbolizes the connectivity of medium-specific operations, whereas the negative value symbolizes only the contingency of conditions for connectivity' (Luhmann, 2012: 218).

Actions follow actions. A pedestrian may cross the street quickly in order to avoid an oncoming car, or a customer eats what they have been served. Jurisprudence has often taken refuge in such hypotheticals as a way of explicating the nature of rules. Often enough these can be framed as a chain of actions. For example: (i) on the chessboard one move follows another move; (ii) A orders B to hand over his money and threatens to shoot him if he does not comply; (iii) party A requests that party B pay his taxes or be prosecuted. These latter instances of the highwayman and tax-collector are deployed by Hart to illustrate the difference between 'having an obligation' and 'being obliged' (Hart, 1994: 82). Positivists, in various degrees, hold that the existence of beliefs and psychological experiences, such as compulsion, are neither necessary nor sufficient for appreciating the existence of binding rules.

We might interpret Hart’s legal outsiders as understanding phenomena through the lens of experience. A person makes a decision to stop at the red light because in their experience this is the safest course; or even, a person stops at the red light out of an unconscious habit. The action of stopping is brought about by an experience of a certain regularity. In contrast, the legal insider will understand such phenomena as action following action. The person driving the car stops before the red light because the traffic light signals an expected standard of behavior with an accompanying

obligation to comply with the standard (Hart, 1994: 90).[367] The regulation has been enacted through an action and it demands an action (or forbearance) by the driver in response.

For systems theory, how can the actions of the highwayman be categorized? The action is viewed as an example of an invalid decision brought about through a signal of dis-engagement. As I have explained above, the symbolic media of validity relies on an organic referent of engagement to motivate acceptance from each participant. The continuum of the validity medium hinges upon mutual commitment as a solution to the problem of double contingency. The possibility of disruption to this infrastructure is used as a way to procure acceptance of a rule. It is this recognition of invalidity and experience by the decisional-chain which can indicate the limitations on how discrimination can be understood by such decisions. Let us consider these topics more closely.

This thesis suggests that the meaningfulness of valid decisions *qua* actions are generalized through reference to Luhmann's tripartite dimensions of meaning - factual, temporal, and social. Connectivity and contingency in the validity continuum are achieved through the performance and interconnections between these generalizations. The concatenation of valid decisions is not secured to unchanging sources of authority because the recursive structures of communication change from event to event. Generalizations are certainly retained as programmatic clusters, but these are not set in stone; they are continuously re-written and may be severely up-ended from time to time. These generalizations are sufficiently abstract as to allow normative terminology to be set alongside factual similarity, opportunities and constraints offered by time, and the demarcation of social competences. Analytically we can separate these generalizations, but in reality they interlock and

[367] Hart (1994) holds that the majority of the population carry the insider perspective. Tentatively he admits that this is a necessary fact for the functioning of the legal system. A systems theory approach, however, sees the problem differently. It holds that the admittance of the external perspective must be closely controlled because it signifies invalidity within the system. Statements of illegality and declarations of invalidity are allowed sparingly, but only as a reflexive value to allow a managed reconfiguration of validity.

modulate one another.[368] Holfeld's normative correlatives can be upended by the application of a legal proposition and the logical postulates that are deduced from it. Factual generalizations from past cases and similar instances can be upended by a higher court, or a legislature.

The system re-constructs itself in each event. Each operation re-establishes its own meaningful horizons. Motives for action are ascribed *ex post facto* and deliberations for a decision are established by the decision itself: a judge re-constructs the history of a case around the context of their decision. This means also that consequences can be conditions for a decision.[369] In terms of invalidity and experience: past disengagement can trigger a legal reaction, but equally anticipation of future dis-engagement can trigger a reaction. A party may feel obliged rather than obligated to follow the order of the highwayman, but this non-normative decision to follow the highwayman can still connect with further decisions. The highwayman's order can be construed as an invalid decision by a valid decision. Invalid decisions are not binding, but they can offer themselves as a reflective pedestal for the communication of a valid decision. From the perspective of the continuum of valid decisions, the invalid aspect of the highwayman's decision provides a scope for reflection that supports the validity continuum. This is achieved because the invalid decision of the highwayman serves as a motivation for the acceptance of a valid decision. Not in terms of a sanction or a display of group disapproval, but in terms of a threat of dis-engagement.

The future threat of disengagement posed by the highwayman – whether by that person continuing to act as such, or because the threat diminishes the future commitment of the population to the law – should be avoided. The threat of dis-engagement is, in many respects the motivation or the real sanction of modern law. It works within the symbolic medium of validity as the organic referent acting to pressure the making of a valid decision that can connect to other valid decisions. The

[368] It is oft-stated, incorrectly as it turns out, that the Chinese character for crisis also indicates opportunity. But there is value in perceiving this connection. A crisis in terms of social legitimacy offers an opportunity to reduce factual costs. The pressure of time may cause a person to see the situation in a new light.
[369] A strange loop in which the future conditions the past.

actions of the 'outlaw' contribute to the formation of legality because they contribute to the invalidity of law to be generalized as a violation of a norm, deviation from a rule, and contravention of a statute. From this position, the threat of dis-engagement shadows the connectivity of valid decisions ranging from the layman and employer to the court.[370]

Hart and Raz may diverge from such a conclusion because the philosophical bases of their theorizations do not stem from a theory of distinctions and therefore refuse to admit fully the paradoxes associated with self-reference.[371] Drawing a distinction opens up the possibility of self-observation such that a re-entry may occur. Neil MacCormick's analysis of the hermeneutic position in which an outsider can observe an insider without losing their initial external position points in this direction. Taken further, a fourth position materializes in which an insider observes an outsider without losing their initial internal position. This is a fairly unremarkable encounter - a judge observes the actions of a person *alienated* and *uncommitted* to the law. Luhmann's theoretical enterprise allows for a distinction to have a positive and negative component such that both valid and invalid positions are realized within the legal system.

This connectivity can also be found in Raz's philosophy of law. Raz has made the claim that each decision must depend on the deliberations which it seeks to displace. This service model of authority seems to be tenable in terms of a judicial decision since it would be a rare occasion indeed in which a judge would suggest that they had not taken the arguments of the parties into consideration at

[370] Nobles and Schiff (2002) recognize a comparable position by noting that a superior court must establish a workable relationship with a lower court by supporting the validity of the lower court's decision (showing deference to its ascertainment of the facts and reports of evidence) which in turn bolsters the superior court's validity because it has been reached through an appeal process; and further, a lower court defends the finality of its decision by managing the threat of future dis-engagement from the decision of a superior court. This is done by following precedent and presenting the decision as consistent with other valid decisions.

[371] For a deconstruction of the rule of recognition through a revealing of its foundational circularity, see Kramer (1988). Unlike analytical jurisprudence, systems theory has no issues with paradoxes. Such constructions are not considered a logical error, nor do we need to develop a hierarchy of types to avoid them.

all.[372] This may be one reason why a court is reluctant to rule on an issue which is not pertinent to the case at hand. Equally, the legislature may justify its decision to enact a new law by reference to a political mandate or a public expectation. It is only *in extremis* that the risk is taken in which a connection to a further valid decision is not sought such as in the granting of emergency powers.[373]

The instigation of action by action is integral to the connection of valid decisions to further valid decisions. In the previous sections I have sought to deepen this analysis by stressing the numerous *dependencies* recoverable in the scholarship of Hart, Raz, and Postema. The aim has to been to transliterate their theses on dependency, authority, validity, and efficacy into a systems theoretical framework. From this exercise the recursivity and connectivity of valid decision communications are exhibited as limitations on the law.

A legal decision motivates acceptance through validity because it communicates a commitment to be controlled i.e. it is already *committed* as a resolution of double contingency. With the availability of various meaning dimensions a valid decision has a variety of connections from which it can construct its premises, but with this being the case even the highest authorities seem to depend on bodies which are lower down the ladder. So who is in control?

By itself the attributive constellation does not indicate which side of the action-to-action equation has priority. Each 'actor' performs the role of both Alter and Ego, and therefore each actor has the capacity to *bind* the other. The distribution of priority is dependent upon the manner in which

[372] In a further sense, Raz's dependency thesis may correlate with Robert Alexy's (2002) argument that law makes a 'claim to correctness' such that law avoids self-contradiction. Therefore, any failure to reflect the excluded reasons - i.e. the dependent reasons - would amount to a self-contradiction which would undermine the validity of a legal decision.

[373] One further point to note is that these singular legal decisions communicate on the basis of their rarity. Not every judicial decision, even in the highest court of the land, can be a landmark decision. This may be a further example of an applied sanction proper to modern law. Application of sanctions must be rare because it risks destabilizing the delicate interplay of interpenetration between communication and consciousness. We might consider this as a sanction in the sense that its validity is predicated on dis-engagement. There is a communicated shift in which the recursive structures connected to decisions are abandoned in favour of new structures. If performed too often then the dialogical commitment that underpins legal validity may be disrupted. We can see this is in the manner that the overuse of emergency powers dilutes commitment to the law, or how the excessive production of landmark decisions may destabilize trust in the law.

meaning is allocated in the factual, social, and temporal dimensions. A hierarchical allocation mobilized through the social dimension is the most familiar formula. The doctrine of *stare decisis* operates as a scheme in this regard. The legal system produces a range of feedback loops in which observers mutually observe each other. An actor observes another, making predictions and decisions in respect of the other actor's behaviour, while presuming that they are under observation themselves. This proposition is not only well-founded for the relations that a court maintains with other courts and legal personae. It can be extended also to suggest that *binding* can occur in which the formal sources of law – for Raz, the legislature, judiciary, and custom – are capable of being *bound* by legal persons. Strange loops do occur.[374]

The symmetry of these loops is dislocated by the insertion of a distinction. In the social dimension, this would be an acceptance of an action made by Alter because other Ego's also accept action's made by Alter. Broadly, this can be understood as leadership (Luhmann, 1979: 156-160), but it also conforms to Raz's social thesis in which the legislature, judiciary, and custom are sources of valid law by virtue of convention. Alternatively, the temporal dimension might be the mode which is generalized. In this situation, the action which binds another action is given by finding that the present action follows a past action. An example would be the operation of precedent and tradition. A more controversial example, however, would be the fact that a claimant has found that their legal arrangements have persuaded the court to take an action which is premised by their actions. The court communicates acceptance of their actions by declaring such arrangements to be legally valid. In such cases it may appear that the court is merely kowtowing to a business, or perhaps the legislature.

[374] Gunther Teubner (2011: 376) provides a Talmudic example of this phenomenon.

INVALIDITY

When does a decision appear to be invalid? Raz (1995: 213) suggests that authority is lost when a decision fails to be *content-independent, exclusionary*, *and dependent*, and he also suggests that authority is lost when an 'arbitrator was bribed, was drunk while considering the case, or if new evidence of great importance unexpectedly turns up'. I have associated Raz's theses with the connectivity brought within the validity continuum. This, however, does not fully explain how invalidity is registered by the medium. This is especially important for this thesis because discrimination law, for a large part, seeks to identify and remedy violations of the law. Unlike other branches of law, discrimination law mainly operates so as to create obligations for employers to conduct their actions in a particular way. It is not especially constitutive of legal relations in which individuals manage their affairs in reliance on its precepts. Rights are granted but they emerge in the shadow of a violation. Consequently, understanding how invalid decisions are connected to valid decisions is important for this thesis.

How can we know whether a rule has been followed or not followed? Since we hold that a rule can be encapsulated by the form of a valid decision the question then becomes: once a valid decision has been received has it been accepted or rejected by the receiving decision? Acceptance and rejection are communicated in response by the action of the participant that is expressed as a decision communication. Acceptance is communicated if the valid decision has been taken as a premise for the receiving decision; rejection is communicated when the valid decision is not taken as a premise for the receiving decision. I have argued above that rejection concerns dis-engagement.

The *Philosophical Investigations* of Wittgenstein (1958: 201a) indicates the theoretical difficulty of discovering whether a rule has been followed. How can we know that each participant understands the rule in the same way? We can provide a more detailed version of the rule so that any misunderstanding can be avoided, but this provides further terms which can then form the basis for

a divergence of opinion. Greater explication invites greater possibilities for dissension. Alternatively, we can assemble all the past applications of the rule and use these instances as a direction for the appropriate application of the rule; however, the grouping of similarities between past cases is not guaranteed. Past cases can be collated and generalized using a variety of different metrics. And yet for the most part this quandary is avoided. Wittgenstein offers a prophetic explanation of how this works that fits with the sensibilities of this thesis. He suggests that to understand a rule is to know how to act. It is an issue of being able to 'see' and 'go on in the same way'. The following action goes on in the same way as the ruling action. Bert van Roemund (2013) explains this in terms of a 'rehearsal' and a response in kind. Explaining the meaning of a rule corresponds to providing a recipe for a meal. Following the rule involves cooking the recipe. Rules operate as icons such that to execute a rule (follow, apply) is a response in kind. Wittgenstein (1958, para. 241) proposes that agreement between human beings is not concerned with opinions, but as a 'form of life'. A game proceeds not by expressing consensus or through explicit rule-agreement, but by a 'joyfully tuning into each other's actions'.[375] Agreement comes about as a presupposed mutual understanding. It coincides with the manner in which motivation to accept becomes entwined with selective co-ordination. Validity manages to make the conditioning of selection into a motivating factor. Acceptance of a communication can be more likely if we know that the proffered information is organized around certain conditions and limitations. In turn, a valid rule is more likely to be accepted the more it restricts its conditioning.

Systems theory, in contrast to the theory of Raz, holds that valid rules and invalid rules are contained within the legal system. Illegality, invalidity, and exceptionality exert themselves as limitative principles on the circulation of legal validity: an exception proves the rule. In its broadest terms, invalidity provides the jurisdictional limit on the formation of legal validity as conceived from the

[375] Van Roemund (2013: 556-7) quoting Wittgenstein. This conclusion is not overly esoteric. It works in the same manner as when we say that the only real way to *engage* with a painting is via another painting.

perspective of an attributive constellation.[376] The threat of dis-engagement establishes the boundary for the circulation of validity and the threat is processed as a topic of communication through the recording of invalid and illegal positions.

Robert Alexy (2002: 35-39) comes close to this thesis when he asserts that a 'claim to correctness' is a necessary element of law such that a performative contradiction will arise if a judge decides in favour of a defendant whilst stating that this decision is incorrect. Implicitly or explicitly law makes a claim to consistency and non-contradiction. When a contradiction emerges: 'Legal character is forfeited when norms or systems of norms cross a certain threshold of injustice' (Alexy, 2002: 28). Alexy's concept of injustice replays the manner in which invalidity forms the boundary of validity. Validity communicates with consistency and invalidity communicates with inconsistency. This can be formalized with reference to the lexicon of systems theory. Such a step is important because the claims which systems theory makes with reference to justice and validity are not reliant on substantive ideals.

Consistency is a matter of 'seeing' the connections available to a communication. Inconsistency and contradiction is concerned with 'seeing' the contingency of such connections available to communication. This can be summarized in the legal maxim that justice demands like cases to be treated alike and dissimilar cases to be treated differently (Luhmann, 2004: Chapter 5). The question left open is what is meant by a 'case' and how is consistency/inconsistent communicated? I have already made the argument above that the notion of a source or case or even a text should be understood as a complex manifold, rather than singular point of analysis. Hence, justice as a formula for contingency provides an angle for the interpretation of the validity continuum as it is bounded by a horizon of invalidity. Logic and social convention, however, do not provide an exact determination

[376] The threat of physical coercion works as a horizon for the application of power. It is the 'inescapable borderline case of an avoidance alternative which forms power' (Luhmann, 1979: 149).

as to how consistency or inconsistency may arise. This is a matter for communication and the manipulation of temporal/social/factual dimensions of meaning. We will now consider this point.

To observe the violation of a norm or the compliance of a norm can only come about when we realize that such insights are co-produced. The norm represents the connectivity of operations and the violation represents the contingency of such connections. The exception delimits the norm causing a consequent re-formulation of what the norm means. Furthermore, a rule has a very different effect dependent on the context. A rule indicates the decisive element of a decision, but for argumentation it is a 'symbol of redundancy' (Luhmann, 2004: 323). The invalidity of a norm is produced by visualizing a contradiction - an action rejects an expectation, for example.

The manipulation of meaning conditions the assumption of consistency and the visualization of contradiction. Time multiples contradictions, but can also dissolve them: extending the boundaries of a situation allows further actors and intentions to come into contention, but an extension also allows the possibility of smoothing out the contradictions as a sequence (Luhmann, 1995: 378): chronology, narrative, epochs, or steps from a series of actions required to accomplish a goal.

The dissolution of the contradiction, however, arrives with the modulation of meaning dimensions. A sequencing of events is achieved by reliance on a factual assessment such as the calculation of costs. Once the costs have been assessed then negative aspects of the action can be sorted into acceptable and unacceptable. Actions can then be taken which pursue the most advantageous and acceptable decision. Of course, this finding can then be modulated again, to be contradictory as a social dimension. Once acceptable costs are calculated and followed by actions then an opportunity arises in the social dimension of meaning. Those that find their interests to fall into being unacceptable costs are then engaged in a competition with others to secure their interest.

Invalidity is visualized, therefore, through delimiting the connectivity of valid decisions *qua* actions. It involves seeing that something is an experience, rather than an action, that communicates the

absence of a valid decision which can be followed, or the absence of a decisional-premise for a decision. Both of these are disconnections in the attributive constellation underlying the communication of valid decisions with (i) involving action leading to experience, and (ii) involving experience leading to action.

CONCLUSION

To conclude, in this chapter we have produced a Luhmannian conception of legally valid decisions through a reflection upon the jurisprudence of Raz and Hart. With this complete, a platform has been produced for understanding how the continuum of valid decisions is delimited by its constitution. These limitations will now be applied in the next chapter to the decisions made in anti-discrimination law.

CHAPTER 10 - APPLICATION OF DECISION ANALYSIS TO DISCRIMINATION LAW

'Lawyers interpret the equality principle not as a prohibition of inequality, but as a prohibition of arbitrariness. This points to organization as a tool for regulatory specification. In other words, the equality principle is not a conditional program but a limitative principle.'

(Luhmann, 2013: 152)

This chapter illustrates how legal decisions work against the assumptions articulated in anti-discrimination law scholarship and analyzed in Chapter 2 of this thesis. This analysis will uncover an unavoidable limit in the constitution of anti-discrimination law that contributes to providing a more complete description, which I have consistently described as a re-description, of this field. This is accomplished by placing the theory of a valid legal decision made out in Chapter 9 alongside the limitative principle of equality. In contrast to common assumptions in anti-discrimination law scholarship, equality is not a substantive or formal norm, but a constitutive and inviolate level within the recursion of legally decisive communications. Under the influence of this limitative principle, key terms within anti-discrimination law are meaningfully communicated through decisions by finding inconsistencies that can be explained in terms of experience. This involves understanding terms by considering the point of contact for further communications as an external cause, rather than locating the point of contact as an internal cause.[377] Firstly, I will explain how the limitative principle of equality relates to the attributive constellation of action and the symbolic medium of valid decisions. Secondly, I will apply this analysis to argue that the meaning of key terms in anti-discrimination cases (on racial grounds, on the grounds of sex) can only be understood through

[377] The difference between attributions of action (internal cause) and experience (external cause) has been explained in Chapter 9 of this thesis.

exposing and excluding arbitrariness as opposed to defining such terms in a positive manner. These registrations of arbitrariness are recognized as instances of prioritization, displacement, and inconsistency within the factual, social, and temporal dimensions of meaning.

The principle of equality is a hallmark of a modern legal system in which social status is no longer determinative of legal relationships; each individual can avail themselves of rights and duties, powers and immunities, etc., by presupposing a reference to the universal legal category of the person. Exceptions to this principle of course exist, especially for those below the age of legal responsibility, or for those deemed incapable of making legal decisions. The history of discrimination law in the UK over the last six decades has aimed to provide a more substantive articulation of equality. In some respects, this goal aligns with the regulatory incursions into private law that have taken place over the last century. The abstract principle of equality has been supplemented with concrete protections for disadvantaged parties in legal relationships. Efforts to re-set imbalances of power have been pursued in a wide range of areas - labour and employment law, consumer law, landlord and tenant legislation, and so on. Public immunities and protections granted by human rights may also adhere to this trend.

Luhmann's principle of equality, however, is activated through the relationship between law as a communication system and the attributive constellation intimate to the symbolic media of validity. The principle operates as an unavoidable restriction on the concatenation of legal decisions. It does not arise through the particulars of a judicial decision nor through legislative enactment; accordingly, it cannot be repealed or directly effected through alterations emanating from this level of analysis.

In the previous chapter I explained that Raz's conception of authority declares the authority of a decision, as distinct from the content of a decision. If the decision is factually incorrect or disappointing in its outcome, then this does not diminish its authority as a decision. Here there is a structural resemblance to Luhmann's equality principle. Both the equality principle and Raz's notion

of authority point towards the limitations constricting legal decisions from extending beyond their underlying attributive constellation. This has salient consequences for the jurisprudence of discrimination law which I will develop below.

The equality principle limits the recursive connection of decision to decision by prohibiting arbitrariness. When we are concerned with excluding the arbitrary, or that which is comprehended through chance and probability, there is a shorthand reference to the exclusion of experience. The equality principle functions so as to privilege a certain distribution of meaning by distinguishing between action and experience; thereby the system clarifies whether the point of contact for further operations is an internal or external cause (Luhmann, 1995: 83-84). If the connection for further communications is not confirmed as arbitrary and external, then it is instead explicable by internal attribution. By definition decisions are not made arbitrarily, but as determined selections from amongst alternatives.[378] When decisions do appear arbitrary then they run the risk of undermining their constitution.

In its broadest sense, this equality principle delimits the jurisdiction of law.[379] The legal system maintains a number of practices that implement the equality principle. When legal decision-makers condense and review relevant cases – stating the facts along with the salient legal issue, and articulating general legal propositions – the experiential aspect of the decision is identified and excluded. Each case under review is presented as distinguishable from each other case. They are presented as distinguishable items (exempla, scenarios, and scenes) as the premises from which a choice is to be made. This is a common feature of judicial decision-making. In the recent discrimination case of *Walker v. Innospec Limited,* Lord Kerr undertook just such a review of relevant cases when deciding on the extent to which the retrospectivity of judgments affects the liability of occupational pension schemes. A range of comparable instances were considered in order to

[378] This has been explained in Chapter 9 of this thesis.
[379] Martin Stone (1995: 65, ft. 50) also makes this connection by reference to his Wittgensteinian concept of interpretation as a 'rule of jurisdiction'.

provide a ruling on the time at which rights and duties become available for non-heterosexual spouses.[380] Once such examples are distinguishable, then further points of contact for each case can only come from within each case as an internal implication. How far does this conclusion go? I am not suggesting that the cases surveyed by Lord Kerr are not available for further reasoning. In future decisions they can legitimately be subsumed within another case or a more general concept; however, if this takes place during the execution of a legal decision then these cases will be manipulated in order to distinguish a further array of examples from which a decision can be selected.[381]

This review of rules and rulings is a way for a decision to eliminate arbitrariness. An illuminating antithetical structure is evident in scientific research. Science deploys a number of limitative principles to find the truth and universality in each result. It is not a question of finding niches in which a result can be explained on its own terms, but instead each result must contribute, and hence be explicable, with reference to a shared world of experience. The veracity of each discovery is determined through its relationship to an external cause beyond itself whereby experimental procedures aim to ensure that each result is independently reproducible. Indications of an internal motivation are eliminated by the scientific limitative principles associated with falsifiability and testability.[382] Science has an attributive constellation that chains experience to experience with an associated limitative principle that prohibits uniqueness and singularities. Mere opinions, biases, and idiosyncrasies are rooted out by explicit limitations within scientific methodology. Legal rulings are the opposite. Interrogation of rulings seeks to preserve the particularity of each decision by gradually smoothing out their arbitrariness, allowing the ruling to stand out amongst other

[380] [2017] UKSC 47, 30-44. The cases highlighted by Lord Kerr were - *Defrenne v Sabena* [1981] 1 All ER 122; *Bilka-Kaufhaus GmbH v Weber von Hartz* [1986] ECR 1607; *Barber v Guardian Royal Exchange Assurance Group* [1991] 1 QB 344, etc.
[381] The method in which cases are formally *distinguished* would be an illustration of this procedure.
[382] Luhmann (2012: 203-207) sketches this out with reliance on Karl Popper's (2002) famous work on *The Logic of Scientific Discovery.*

alternatives as a communication of a decision which can premise further decision communications.[383]

If a court observes that a prior ruling has misunderstood a key issue, then that prior ruling is rejected as a premise for the decision at hand. This means that this aspect of the prior ruling is erroneous and is deemed unpersuasive. In the language of law's symbolic media, it is seen as invalid and adjudged to be dissimilar from the decision at hand. Invalidity provides an opportunity for reflection upon the contingency of valid rules. We are familiar with how exceptional cases trigger reconfigurations in the understanding of a rule by shedding light on the nature of the rule: the exception proves the rule. The decision-maker must observe the rule to be construed as invalid, but this is not given by logical deduction.

So how can invalidity be observed? As Wittgenstein (1958) has explained, the observation of rule-following involves acting and 'going on in the same way'. The analysis presented in the preceding chapter asserted that validity circulates presumptively and in essence you either see it or you do not. Invalidity, however, involves the recognition that the observed rule fails to cohere with one's understanding of the rule. In a sense, utilizing Wittgenstein's metaphor, we see the invalidity out of the corner of our eye with the rail on which we stand running disconnected to this other rail. On a practical level this phenomenon manifests itself in a variety of guises. A prominent manner in which the arbitrariness of a case is exposed is to adjudge that it is either an over-extension of a more general case, or that it fails to present itself as distinguishable from other cases. To understand such instances, we must seek communicative meaning from causes external to the case, and therefore information which is experiential in its bearing.

[383] This limitation of a decision is required because the collection of second-order observations in legal argumentation operates by presuming a 'difference of opinion'. An opinion is a type of *action*. Although the opinion may be factually incorrect, the meaning of the opinion is generated by reference to internal stimuli - intentions, motives, personal background. Legal decisions contribute to the consolidation of textual topoi from which legal arguments can productively abstract their differences of opinion, varying interpretations, and competing conceptions.

In the *Walker v. Innospec Limited* case Lord Kerr finds the decisions issued by the Court of Appeal and Employment Appeal Tribunal unpersuasive on this basis. He notes that these previous decisions failed to assert a crucial distinction between legislative retrospectivity and judicial retrospectivity.[384] Noting that in each instance they failed to see this fundamental issue is tantamount to exclaiming that they can be understood in respect of a point external to them. They fail to distinguish themselves because they fail to see the matter in the same way as Lord Kerr. The analysis pursued above may seem overly technical but it has already been considered by those inspired by Wittgenstein's *Philosophical Investigations* who follow his conclusions to assert: (i) the meaning of a rule cannot be extracted from its context, (ii) a rule is self-directed, and (iii) accordingly legal rules are a 'self-declared domain' determining their own 'limits, so to speak, of what can be said' (Stone, 1995: 70, 71).

What are the implications of this analysis? On a jurisprudential level, this limitation reflects the contention that Hart makes in differentiating between a habit and a rule. Rules indicate a normative state of obligation through the presence of an internal commitment; having a habit suggests that a person is obliged by the pressure of an external factor.[385] The phenomena falling under a habit fails to stand-out on their own terms as self-attributive selections. Dimensions of meaning are utilized to establish a priority from which the habit is understood as an extension. Temporally speaking this can be understood in terms of how present habits come about as an extension of former actions. A person follows their former actions. Socially, habitual behavior can be observed as an extension of another's behaviour. A person out of deference or social pressure follows the actions of another. The factual dimension is helpfully highlighted by Martin Stone (1995). It is a question of *this* following *that* such that a ruling is conceived as an extension of another rule; and we should recall that Luhmann's (1995: 76) definition of factuality involves distinguishing *this* from *something else*. To

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[384] [2017] UKSC 47, 41

[385] (Hart, 1994: 57)

be clear: it is the presence of extensionality or displacement which signifies that the observed phenomenon is an experiential attribution because the communication connects to a point of contact external to itself.[386] Stone (1995: 70 ff.) presents a convincing argument that the notion of reasonableness often works in this manner. Reasonableness is the factual prioritization from which various procedures and sub-rules extend.[387] He considers the well-known *Spartan Steel* case as an example (Stone, 1995:72-74). In this judgment, Lord Denning considers whether the plaintiff can recover for economic loss arising from negligent damage to an electrical cable caused by a contractor. The issues argued would normally concern the traditional tort concepts of duty, remoteness, and the directness of damage caused. Instead of this approach Lord Denning feels that the authorities cited offer little guidance for deciding on this difficult issue. Therefore, he turns to the public policy considerations for extending liability for economic loss. Should it be spread to the whole community or be placed on a single pair of shoulders? This is a hard case and the uncertainty encountered by the court is managed by limiting tortious liability through reference to policy considerations. Martin Stone contends that *Spartan Steel* illustrates that the meaning of tortious concepts (duty of care, reasonableness) are consolidated by focusing on the external considerations of policy.[388] Tortious concepts of duty and remoteness are not settled by investigating them in their particularity - perhaps through sub-dividing duties into separate headings and Benthamite

[386] I have used the following terms to attempt a description of this movement - extension, displacement, prioritization. Descriptors such as a reduction or constriction might also be suitable terminology because they are meaningful as a movement from a state that is out of sight (non-constricted) to a state that is in focus (constricted) i.e. the state in focus is explicable by reference to an external cause.

[387] An example developed by Stone (1995: 69-72) involves judicial directions given to the jury. Here the interaction between a judge and counsel works towards providing limitations on the jury's decision: could a jury reasonably conclude that the defendant's actions fail to discharge their duty of care. The arbitrariness is pared away to form a judicial decision, but the concept of duty of care or reasonable care, however, is never specified or dictated. Like a negative theology, the general rule of reasonable care is understood only through its extensions.

[388] The meaning of interpretation in this chapter is confined to the recursive stream of legally relevant decision communications. Therefore, references to concepts and policy are basally distinct from those references made in Chapters 7 and 8 of this thesis. In these earlier chapters, references to concepts, policies, and interests were located within the recursive stream of legal argumentation. Legal decisions and legal argumentations are two distinct recursive cycles. There may be structural dependencies between items in a decision and argumentative topoi; however, these are not explored in-depth in this thesis.

tabulations. Instead, the generality of tortious rules is preserved by a limitative principle that delimits these rules by exposing topics such as policy that can be understood only by considering information external to itself. Policy is meaningfully communicated by how it contributes towards a goal external to itself; it is explicable and dependent upon an external prioritization, for example: how far or near it is to an aim, or whether it is the appropriate method for achieving a goal. Similarly for anti-discrimination law, the fact that key terms - such as 'on racial grounds' - are self-directed and outlined by exposing inconsistencies will be examined below.

Clearly the references to interpretation in the preceding paragraphs differ from its normal utilization in jurisprudence. This type of interpretation concerns the manner in which decisions respond to decisions. It is a type of communicative understanding concerned with how something can be explained by something else, or how an expression can be usefully substituted for another expression.[389] Literary theory scrutinizes this phenomenon under the topics of metonym and metaphor. The Equality Act 2010 is the codifying statute for anti-discrimination law for the UK. Like many statutes there are a number of terms presented that operate as substituted expressions for each other. Section 4 explains that the protected characteristics can be understood to indicate: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, sexual orientation. Section 9 of the Act explains further that race can be understood as including ‘colour, nationality, and ethnic or national origins’. Section 13 sets out a definition of direct discrimination as when a person directly discriminates against another if, because of a protected characteristic, that person treats the other less favourably than they treat or would treat others. Section 13(5) stipulates that less favourable treatment according to race includes segregating that person from others. Section 19 outlines a claim for indirect discrimination as when a person applies to another a 'provision, criterion, or practice' which is discriminatory in relation to a

[389] Stone (1995:64).

relevant protected characteristic. The detailing of 'provision, criterion, or practice' can be understood as various expressions which indicate something else.

The criticism that one may raise in response to the preceding proposition concerning interpretation is that each term simply presents a more specific form of the most general term. Is there not a general meaning of direct discrimination which is further specified by forms that explain each term by reference to further terms? Can we not clarify direct discrimination by reference to a test in the form if x, y, z are established then a legal consequence follows? So, for example, we have the general term 'protected characteristics' which is a key component to each form of discrimination and this determines a class of further terms: race, gender, sexual orientation, and so on? I would suggest not. Even the most general terms are *explained* and *understood* by reference to other terms. The recursivity of meaning demands it. This does not invoke an infinite regress because meanings cluster into sub-complexes and programmatic streams; moreover, communication would never get off the ground if such paradoxes were frequently encountered. This will be illustrated in the sections below.

In terms of decisions communications a legal rule is not fashioned to achieve an aim beyond or outside itself. A concept is clipped through ironing out arbitrariness. The consequence of this approach is that the rules and concepts that compose direct discrimination are not constructed so as to achieve a particular aim outside of themselves. These rules are not aimed at finding whether there is liability or a wrong committed by the employer, nor are the rules constructed with a view to upholding a principle such as equality or dignity. Understanding direct discrimination and indirect discrimination as formulae or a collection of steps to ascertain a particular result fails to grasp how rules operate.

ILLUSTRATIONS OF THE LIMITATIVE PRINCIPLE IN DISCRIMINATION CASES

The determination of a decision communication is not executed through the interpretation of a legislative provision. A decision is executed by following a rule. And yet, by taking into account Wittgenstein's rule paradox, we cannot observe whether a rule is followed in a substantial or positive manner. The limitative principle of equality ensures that valid decisions follow other valid decisions by an *ex negativo* route in which arbitrariness and inconsistency are identified within the dimensions of meaningful communication. This is accomplished by observing relationships of priority and extension in the factual and temporal dimensions, or through the presence of experiential attributions in the social dimension. As a consequence, decisions in the field of discrimination law are executed without positive reliance on key legislative provisions, or through precise articulation of substantive norms. This finding contradicts how most anti-discrimination scholars have presented the law (examined in Chapter 2 of this thesis).

The facts of *James v Eastleigh Borough Council*[390] related to a leisure centre that provided a discounted rate for all pensioners who wished to use the swimming pool. The issue was whether the provision of this discount for pensioners violated section 1 of the Sex Discrimination Act 1975 that prohibited direct discrimination on the ground of sex. At the time, the pensionable age differed between men and women. As such it was alleged that this discount amounted to less favourable treatment 'on the ground of' sex contrary to the Act. The issue on appeal concerned the proper meaning of this statutory provision. Does 'on the ground of' require a discriminator to intentionally treat a person less favourably such that gender was a motivation or a substantial reason for the treatment? Controversially, a majority at the House of Lords found that the provision was essentially causative in nature in which one should ask whether 'but for' the sex of the victim the treatment would have been different. The way each Law Lord justified their decision exhibits how a decision communication is executed through exposing and avoiding of arbitrariness. Lord Bridge, in the

[390] James v Eastleigh Borough Council [1990] 2 A.C. 751

majority finds two inconsistencies to support his decision. Firstly, he relies on the social dimension of meaning by stating that to decide otherwise would be to contradict a decision already made by other courts:

'But to construe the phrase, 'on the ground of her sex' as referring to the alleged discriminator's reason in this sense is directly contrary to a long line of authority confirmed by your Lordships' House in R v Birmingham City Council, ex parte Equal Opportunities Commission [1989] IRLR 173.' (para. 9)

Secondly, he discerns an inconsistency in the adoption of the term 'pensionable age' as a discount rate because this referred to a statutory definition which was already discriminatory such that the actions of the leisure centre are an extension of a previous decision or another decision-maker. As I have explained earlier in this Chapter, seeing a matter as an extension of a further issue is suggesting that the matter is meaningful by reference to what is external to itself i.e. as an experiential attribution that is highlighted and eliminated by the limitative principle of equality. Policy, in general, also has this quality when visualized by a legal decision. Alternatively, the term pensionable age can be understood as a factual inconsistency in which the meaning of a term is contracted - as a shorthand, or synecdoche - into a further expression:

'The expression 'pensionable age' is no more than a convenient shorthand expression which refers to the age of 60 in a woman and to the age of 65 in a man.' (para 8.)

On the other hand, Lord Lowry dismissed the appeal. He framed his decision by reference to a choice between divergent opinions given by the other Lordships to the case. This observation of an inconsistency between these opinions provides premises for Lord Lowry's decision:

'I can discern in your Lordships' speeches, which I have had the advantage of reading in draft, two logical and persuasive trains of thought which lead to opposite conclusions, and the question is how to choose between them.' (para. 41)

He then provides further examples of arbitrariness, that are reliant upon the factual dimension of meaning in which a phrase signifies *this* rather than *that,* to support his decision. Through statutory construction he gives meaning to his selective interpretation (i.e. decision) by seeing an inconsistency between the natural, grammatical, and dictionary meaning of a term and the causation definition provided by Lord Bridge. Seeing an inconsistency involves finding an externally caused attribution such that the 'causation definition' in focus is determined through its inconsistency relationship to the 'natural meaning' that is out of focus: causation<natural meaning.

'Counsel argued that the subjective construction 'artificially confines the meaning of "ground". I must disagree: the subjective construction uses 'ground' in its natural meaning, whereas the causative construction suppresses the natural meaning. The phrase 'on the ground of' does not mean 'by reason of'; moreover, 'ground' must certainly not be confused with 'intention'.' (para. 50)

If the term is defined through an extension from a prior source or as a state inconsistent in respect of another state (something else), then this signifies that its meaningful communication is located externally to itself i.e. as an attribution of experience. Such indicia are sought out and eliminated by the limitative principle of equality.

The JFS case provides a further illustration of this thesis.[391] The case concerned the admissions policy of a Jewish school which gave preference, in the event of over-subscription, to those children regarded as Jewish by the standard Orthodox test of matrilineal descent. The question for the court was whether this policy was discrimination contrary to section 1 of the Race Relations Act 1976. The court was split 5:4 with the majority deciding that the policy was implemented on the grounds of race and therefore in breach of the Act. Lord Philips, for the majority, premised his decision by 'seeing' inconsistencies in the manner of preference given, as articulated above. He notes that section 3 of the Act defines racial grounds as involving 'colour, race, nationality or ethnic or national

[391] *Regina (E) v Governing Body of JFS and another* [2009] UKSC 15

origins'. The issue is whether JFS's reliance on matrilineal descent falls within this section. Lord Philips frames his reasoning in contradistinction to the arguments of counsel made by Lord Pannick who asserted that matrilineal descent is not necessarily racial in character because it also includes converts to the Jewish faith. Lord Pannick asserted further that the policy essentially involved a religious test, rather than one grounded on race. In the prior case of *Mandla v Dowell Lee*, Lord Fraser had provided a detailed examination of the section in considering whether Sikhs could be considered as an ethnic group for the purposes of the 1976 Act.[392]

'Initially I found Lord Pannick's argument persuasive, but on reflection I have concluded that it is fallacious. The fallacy lies in treating current membership of a Mandla ethnic group as the exclusive ground of racial discrimination. It ignores the fact that the definition of "racial grounds" in section 3 of the 1976 Act includes "ethnic or national origins". Origins require one to focus on descent. Lord Pannick is correct to submit that descent simpliciter is not a ground of racial discrimination. It will only be such a ground if the descent in question is one which traces racial or ethnic origin.' (para. 33)

Lord Philips perceives an inconsistency between the criteria laid down by Lord Fraser in the *Mandla* case and the statute itself. The *Mandla* group is not the 'exclusive ground of discrimination' envisioned by the Act. Lord Philips' interpretation of the *Mandla* group involves seeing it as a reductive and incomplete version of that which was provided for under the Act: *Mandla* group < Act. Thus, Lord Philips' interpretation of *Mandla* conceptualizes it as a movement from the meaning provided by the Act i.e. as meaningful in reference to a cause external to itself. Following this

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[392] *Mandla (Sewa Singh) v Dowell Lee* [1983] QB 1. This case was concerned with whether a Sikh suffered racial discrimination as a result of the school's refusal to allow him to wear his turban. Lord Fraser delivered a ruling on the definition of the term 'ethnic group' under the Race Relations Act 1976. He reasoned that the term encompassed a range of essential characteristics, such as: a long and shared history, a recognizable cultural tradition particular to the group, a common geographical origin or a descent from common ancestors, and so forth. In *JFS* the validity of Lord Fraser's ruling was not disputed, however the decisions made by the court did not involve an application of the positive elements of the term provided by Lord Fraser. The *Mandla* decision was selectively filtered, in the same manner as the Race Relations Act 1976, by the decisions in the *JFS* case through reliance upon the limitative principle of equality. *Mutatis mutandis*, the decisions communicated by Lord Fraser in *Mandla* followed the same recursive structure and their meaning does not reside in the list of essential, positive characteristics which he set down in his definition of the statutory term.

conclusion, how does Lord Philips deal with this observed inconsistency? He does so through a schema of extension and prioritization in which the provision of evidence and authoritative religious statements provide a definition that extends to section 3 of the Act and the present case. He relies on the statements by the Chief Rabbi on the nature of conversion to the Jewish faith, and also on submissions made by the head of the movement for Reform Judaism (para. 39-40). The words of the Act are envisioned as an extension from the (prioritized) statements of the Chief Rabbi and other authoritative religious statements. Lord Philips premises his decision through exposing such schemata. It is the limitative principle of equality which guarantees the excavation of his decision.

Baroness Hale, also in the majority, in her opinion set out the principles and context of anti-discrimination law. And yet, two of the major propositions which support her decision are also conceivable in terms of a contradiction. In a sense, she invokes a purposive interpretation of the legislation by noting that no parliament would fail to extend protection to the Jewish people from racial discrimination; the history of the 20th century contradicts such a proposition. In the below passage, parliamentary intention is invoked *ex negativo* – what it denies and prohibits.

'There is no doubt that the Jewish people are an ethnic group within the meaning of the Race Relations Act 1976. No Parliament, passing legislation to protect against racial discrimination in the second half of the twentieth century, could possibly have failed to protect the Jewish people, who had suffered so unspeakably before, during and after the Holocaust' (para. 67)

In the same passage Baroness Hale also noted another negative proposition which supports her decision by explaining what the Act does not do and what it does not mean.

'Parliament might have adopted a model of substantive equality, allowing distinctions which brought historically disadvantaged groups up to the level of historically advantaged groups. But it did not do so. It adopted a model of formal equality, which allows only carefully defined distinctions and otherwise expects symmetry.' (para. 67)

If we turn to the decisions in the minority then we see the self-same pattern in which the restrictive influence of the limitative principle of equality recursively forecloses the premises for each decision communication. Both Lord Hope and Lord Rogers founded a part of their decision on the issue of consequences. Lord hope suggests that the decision of the majority 'leads to extraordinary results' (para. 188) - a sentiment seconded by Lord Rodgers:

'*The decision of the majority means that there can in future be no Jewish faith schools which give preference to children because they are Jewish according to Jewish religious law and belief.'* (para. 225).

After this recognition, Lord Hope suggested: '*The phrase "racial grounds" in section 1(1)(a) of the 1976 Act requires us to consider what those words really mean--whether the grounds that are revealed by the facts of this case can properly be described as "racial".' (para. 199).* Three inconsistencies are registered. First, highlighting the consequences of the decision relies on showing that the present decision leads to a future state which is at odds with aim of the Act, or the intentions of Parliament. Second, the majority verdict contradicts the provision of Jewish faith schools *in toto*. Third, this leads Lord Hope to visualize a contradiction between the 'what the words really mean' and the meaning proposed by the majority.

In conclusion, if a concept of equality or definition of a key term impacts upon decisions then it only manages to do so in terms of the limitative principle: arbitrariness is highlighted and excluded in the concatenation of valid decisions. The exposure and exclusion of inconsistencies provides a series of selections upon which a decision is premised and from which it is extracted.

CONCLUSION

In respect of the literary review in Chapter 2 the preceding analysis in this chapter suggests the following. If each statutory term and central concept of discrimination law is self-directed and delimited by inconsistencies, then the ability to explain the forms of discrimination as a test is doubtful. Each concept does not constitute a step within a formula such as - if x, y, z then consequence A. Much scholarship has been directed towards distinguishing the forms of discrimination (direct, indirect, harassment, positive action, disability) in accordance with how they can be understood morally and with reference to justice. Various formulae and schemes have been generated to comprehend such discrimination claims. The recursivity of decision communications in this area suggest that this approach of generating simplified schemes does not reflect the operation of the law. For decision communications in anti-discrimination law the following concepts are defined by exposing information which is externally constructed: protected characteristics, causation, a justification for indirect discrimination as the 'proportionate means of achieving a legitimate aim', etc. Inconsistencies are found through manipulating the factual, social, and temporal dimensions of meaning of such terms. As a consequence these key terms are only understood through delimitation; they are not defined positively. This would mean that a valid decision by the court to find direct discrimination, for example, does not involve identifying an action and intention on behalf of the employer. Instead, these concepts are delimited by finding inconsistencies that can be explained in terms of experience i.e. the point of contact for further communications is an external cause.

In this chapter, we have presented a further re-description of anti-discrimination law. The manner in which legal decisions are recursively connected occurs in a far different manner than is generally supposed. The principle of equality is a limitative principle operating as an 'inviolate level' for the execution of decisions; it is not a substantive norm or a formal concept that rationalizes or brings coherence to anti-discrimination law. Both Chapters 10 and 11 complement the theorizations and

proposed limitations on anti-discrimination law that has been highlighted in the literature. This analysis contributes towards providing a re-description of the limits of anti-discrimination law promised by this thesis.

CHAPTER 11 - THESIS CONCLUSION

This thesis set out to address the following questions. (1) What is the social basis for discrimination from a systems theory informed perspective? (2) How does this perspective add to the incomplete view on offer in anti-discrimination scholarship? (3) What are the unacknowledged limitations on a discrimination claim when we focus upon the recursive limitations of legal argumentation? (4) What are the unacknowledged limitations on a legal decision when we focus upon how valid decisions are recursively constructed as legal communications? The overall aim has been to re-describe the social problem of discrimination and the legal understanding of anti-discrimination law from a perspective that is attuned to the discontinuity of these positions, and which can further elaborate upon the ethereal and intensive modality of discrimination itself.

One key contribution of this thesis has been to find a way towards identifying a social basis for discrimination that presumes (i) that this phenomenon is inherently complex, and (ii) that there is no central or essential conception of it. This has been accomplished by considering the diachronic development of systems-references and social structures in addition to a synchronic consideration of racism. The route taken has identified certain of Luhmann's concepts as significant for this analysis (society/interaction, society/world, self-description, and functional differentiation), then supplemented their Luhmannian analysis by combining methodologies from Foucault and Deleuze to explicate how race operates visibly in a *public scene* to channel irritability and intensities between social systems, especially through repetition in time itself. A more orthodox approach to systems theory is found wanting because one is left with either racism as operative at the societal level interlinked with functional differentiation, or racism as a system-specific history available in

differentiated models - functional sub-system, organization, interaction. These perspectives provide incomplete descriptions of discrimination.[393]

The title of this thesis echoes the title of a collection of essays by Niklas Luhmann (2002): *Theories of Distinction: Redescribing the Descriptions of Modernity.* In those essays Luhmann suggests that the pre-conditions under which the problematic of modernity has arisen can be re-described with the aid of systems theory. The problematic of modernity encompasses the problems to which it has given form and the proposed solutions that have been created in response. A defining issue of modernity is a loss of faith in the continuum of reason to link the human with the rationally ordered universe.[394] The social developments and technological advances of modernity have damaged our capacity to comprehend the whole of the world alongside its many antagonistic parts. Since at least the 18th century philosophy has sought to provide a resolution to this problem. In these essays Luhmann, however, does not propose a new solution, but offers instead a major epistemological shift such that the pre-conditions of the problematic are re-described.

Luhmann's systems theory relies on an epistemology of second-order observation to consider the pre-conditions that underpin what an observer can see and not see, acknowledge and not acknowledge, remember and forget. The motifs picked up by Luhmann explore the radically ungrounded nature of observation - its partiality, self-reference, and paradox - in the fields of science, logic, philosophy, and social theory. Luhmann takes the hallmark of modernity, along with its tensions and paradoxes, and uses it productively to create a theory of society that accords it a prominent role. In no small part, this thesis has sought to re-describe anti-discrimination law in line

[393] If we are faithfully to follow Luhmann's departure from Talcott Parsons functionalism, then we should be wary about concluding that the elimination of race (and other characteristics of discrimination) is an inevitable result of functional differentiation. System differentiation is not a smooth process and, as noted by other authors concerned with system colonization, the speed and intensity with which certain functional systems differentiate can have unforeseen consequences. See, for example, the contributions in Blokker and Thornhill (2017). As such we cannot assume that there is a quasi-consensus established by functional differentiation which does not come into conflict with alternative communicative dynamics. Systemic complexity precludes such an assumption.

[394] As explained in William Rasch's illuminating introduction to this collection of essays (Luhmann, 2002: 1-30).

with these motifs. Where partiality, self-reference, and paradox have been found, then these have not been discounted as observational errors, but as indicative of the constitution of the phenomena under observation.

The limitations of anti-discrimination law established by the literature review in Chapters 2 and 3 have served as points of focus to produce a re-description that takes racism as the archetypical form of discrimination. The difficulty of holding together a picture of the world and its constituent parts is reflected within discrimination scholarship in the tensions between: distributive justice and corrective justice, social groups and the individual, equality of outcome and equality of opportunity. This hallmark of modernity is also found in the difficulty in locating a core definition of discrimination, or a central moral tenet that matches the empirical reality of discrimination. There has been much recourse to concepts of autonomy, rationality, and immutability, as these can be seen as justifying action that is beyond partiality and prejudice. Consequently, discrimination has been identified as the obverse of such phenomena where, for example, the autonomy of the individual is violated or given insufficient regard. Via the optics of systems theory this thesis has attempted to reposition this approach.

Anti-discrimination scholarship has defined its problems and offered its solutions by assuming a continuum that avoids the anxieties of modernity. There is an appeal to nature, universal human rights, historical and transcendental ideas of freedom, autonomy, and equality. But this vision dissipates as soon as we acknowledge that different rationalities are at work in the production of discrimination. The moral understanding of discrimination need not match the legal understanding; and the legal meaning of discrimination can be further split into sub-divisions surveying the justifications for finding discrimination in terms of legal argument, and the definitional concepts of discrimination in terms of legal decisions.

Modernity struggles to provide a description of society that is both universal in its scope, but which can also account for the singularities of life, system-specific references, and lived experience. In the same fashion, the identities protected by anti-discrimination law, such as those of race, gender, sexuality, age, religion, and disability pivot around this juncture, which allows them to bring together both a collective and abstract idea, and the individual and specific reality of experience. It is here that the methodologies adopted in this thesis can operate. The communication of discrimination is taken as an attempt by modern society to square both the universal and the singular in a way different from that of pre-modern-society; pre-modern society had provided a different self-description that could support rather different historical analogues of discrimination.

THEMES AND CONCLUSIONS – HOW HAVE THE RESEARCH QUESTIONS BEEN ADDRESSED?

This thesis set out to address a series of questions pertinent to anti-discrimination law scholarship; however, it also had ambitions to extend the scope of such questions to engage with a wider set of implications not normally addressed by such work. The notion of limits was chosen as a crux upon which relevant questions could be refined, and as a point of focus amenable to a systems theory informed methodology. This was accomplished by firstly suggesting in Chapter 2 that discrimination operates in such a manner that is not easily grasped by existing approaches, because there is an assumption in such approaches that moral philosophical frameworks and legal categorizations can adequately, or already do in fact, reflect key facets of discrimination as an actual phenomenon. Legally informed approaches are especially guilty of assuming that the solutions proposed to counteract discrimination reflect the structures of the problem that, it is thought, need to be addressed. Distinctions between direct and indirect discrimination may be able to operate as

suitable statutory formulae, but this does not mean that they reflect the social basis for discrimination, or indeed the doctrinal development of relevant decisions and argumentation.

Chapters 4 – 6 sought to identify a social basis for discrimination by revealing the complex history of discrimination, and finding limitations in terms of its communicative meaning. This was attained by proposing that the associated phenomena comprised at least three different strands of meaning that could not be collapsed into a central definition - mass mediated communications, moral communications, and artistic communications. The limitations of discrimination were then re-described by considering historical comparators to discrimination which were more closely aligned with the allocation of esteem. Furthermore, the social basis of discrimination was positively linked with the societal structures of each epoch. This supports our initial assertion that discrimination is not a historic constant, but a factor in how society describes itself. The implication is that to understand discrimination properly we must see its historical contingency and the conditions which give rise to its reproduction in modern society. Finally, the malleability and intensity of discrimination was described by reference to the way in which modern society allows racism to make itself felt through a complex series of repetitions. This was exposed and expressed by reliance on the notion of Labour and Work in Chapters 5 and 6.

Chapters 7-10 re-described the limits of how law understands discrimination by reference to discrete sections of the legal sub-system. Luhmann's autopoietic theory was used to produce and apply both a theory of legal argument and one of legal decision. One of the main aims of this analysis was to show that the legal categorizations of discrimination codified in statute do not reflect how the legal system reproduces its own understanding of discrimination. Firstly, in terms of legal argument, it was suggested that an approach in which moral justifications provide a suitable explanation for how doctrine develops or coheres fails to accord with reality. Argumentation, even in a field with heavy moral interest, is not directly affected by moral justifications and, consequently, any classification of

discriminatory headings in terms of justice will fail if it assumes that it is. Argumentation recursively connects in its own special way, operating and drawing out its own limits. Secondly, Luhmann's theory of decision was developed through productive opposition to Raz's jurisprudence. The aim of Chapters 9 and 10 was to articulate a contribution to how law constructs its decision and then to apply the identified limits to discrimination cases.

EVALUATIONS AND EXTENSIONS

One of the aims of this thesis has been to provide a preliminary proposal for the social basis of discrimination from a systems theory perspective. For reasons of economy, racism was chosen as the archetype best placed to explicate this social basis. However, reliance on such an expansive series of system references in the mass media, morality, and art, anticipates a framework which is equally applicable to other characteristics protected under anti-discrimination law. A few, key illustrations were given as to how racial communications can be understood through this framework. A more in-depth socio-historical study that considers the development of certain trends in each of a number of the sub-systems of modern society may pay dividends in further highlighting this complex and elusive object of study.

A route for further enquiry might consider a thicker description of law's relationship to discrimination. The thesis sought to develop innovative insights into the necessary limits on the communication of legal decisions and of legal argumentation as they appear in discrimination cases. Other possible lines of enquiry, and exploration of legal limits are certainly available. One such route, already mentioned by the socio-genetic development of manners and courtesy in Chapter 4, would be to re-describe Anti-Discrimination Law as coupled with different branches of law which tackle comparable problems. Indeed, it was suggested from the historical excursus of Chapter 4, that Anti-

Discrimination Law is a modern emanation of a certain type of social regulation concerned with delimiting the boundaries of esteem and respect by reference to the structural limitations of society. This reorientation would move the discipline away from the internal legal picture that associates the field with employment law, or the broader impetus that strives to place it within the purview of constitutional law and human rights. Anti-Discrimination Law could be moved closer to its historical antecedents and thus could gain a more coherent, sociological explanation for the law, which has the advantage of aligning with the social basis for discrimination identified in this thesis. Anti-Discrimination law would thus be aligned with the long tradition in which a person's reputation and social status are protected by law by reference to the limitations of communication. For example, Nicola Lacey (2008) has argued that English criminal law in the 19th century was acutely focused on identifying bad character and protecting reputation. With the provision of functional comparators comes functionally comparable issues faced by the law and, more importantly, functionally comparable solutions.

One of the objectives for isolating the aesthetic component of discrimination was to bring our understanding of the phenomenon much closer to its older counterpart, in which discrimination corresponded to ideas of taste and expertise associated with the distribution of respectful, esteemable social status. In so doing, however, the argument was made in Chapters 5 and 6, that the aesthetic component played a key role in allowing discrimination’s meaning to be terribly elusive. Art permits racism to return because it shifts the active intensity of race into different contexts through a type of metempsychosis: (i) a communicated judgment which combines to that which was known before about an employee (one's impressions, achievements, comportment) with the unknown (the difference between declarations and their actual achievements, their contribution to the company, their fit into the workplace culture); (ii) the jolt of race combines recognition with astonishment. A working relationship is completely re-patterned when the race of the person is revealed. Is this relevant or irrelevant? And in respect of which variables at work - task,

presentational ability, working ethic, etc.? This argument was predicated upon Deleuze's re-interpretation of Nietzsche's law of Eternal Return, such that only that which remained different, and not the same, could return again and again. Artistic communication posits a caesura between the before and after that punctuates the career of an employee and the history of a work-place. Are there categories or instances of discrimination which cannot re-emerge because they fail the test of Eternal Return?

The return of racism can only come about through the capacity of supporting distinctions remaining available, thereby allowing a certain level of inner difference and complexity to be maintained. As noted in Chapters 5 and 6, this holding pattern between communicatively discrete systems can only be maintained through reliance on structural couplings and special restrictions on communication – the interdiction of moral self-exemption (finding and rejecting hypocrisy) and a restriction on artistic external-reference (finding and rejecting derivative qualities to protect the originality of the artistic work).[395] If we are to find that certain types of discrimination lose their intensity and fail the test of Eternal Return, then this may be a profitable avenue on which to make further enquiries. For the emergence of the artistic object to take place, its originality and inner dimensions are imagined through identifying and discounting external causes. The object of art must in some way emerge and detach itself from its conditions of construction. It must have an inner complexity. On this basis, some artistic objects may be criticized for a lack of originality.[396]

In the history of art, there is a long tradition of distributing both esteem and originality. This can be considered to be similar in approach to the way in which the essential characteristics protected under Anti-Discrimination Law are given meaning. For example: craft, gastronomy (until recently),

[395] This is explained in Chapter 5.
[396] But, some not, which is why Shakespeare's Hamlet is hailed as such a significant artistic achievement. For example, the leading character seems to have an inner complexity capable of supporting many different interpretations. Hamlet can be re-imagined anew for each new generation and can say something of import on a whole panoply of issues. Race seems to be able to accomplish this feat, although of course on a far grander scale.

embroidery, flower-arranging, and fashion were excluded from the pantheon of high art because of their instrumental, decorative, and everyday qualities.[397] The intensity which allowed this derivative/original distribution was gender. Fan-art and zines are denigrated as vain and poor reproductions of original art-works, and video-games are proclaimed as derivative based on framing the interactive input of the user as an external contribution to video-games. Here the intensity is age. Non-Western art is described as immature and rustic. The intensity involved could be race, ethnicity, or nationality. The fact that artistic works produced in art therapy or during incarceration are dismissed as overly instrumental or naive could be explained by reference to disability as an intensive process.

Could this trend provide a further insight into the social basis on which discrimination discriminates? Possibly so. It may suggest that in order for the aesthetic experience to enable a transformation and re-emergence of racism depends on what amounts to the constitutive restriction of art. This limit will not be satisfied if the type of discrimination refuses by definition to depend on an inner / outer attribution or a derivative / original construction. The most obvious form of discrimination which defines itself purely as an externality without reference to an internal aspect is tattoos.[398] These are decorative etches across a surface that, for the most part, do not signify or at least depend upon an inner reference for their meaning. They are presentational indications. The fact that tattoos in public have become far more frequent and acceptable may support this speculation. Another form of discrimination which may not last into the future is sexuality. For institutional reasons, sexuality has not served as a differentiating force for the inner and outer attribution of the artistic object; and yet, its increasingly accepted performative nature may place it that position, defined precisely as unable to differentiate between inner and outer attributions necessary for the formation of an artistic object. If these considerations can gain in cogency then it might suggest that future anti-

[397] For an analysis of craft in the hierarchy of arts, see Parker & Pollock (2013: 50-82).
[398] Discrimination on the basis of appearance (tattoos, body weight) has been a recent concern for anti-discrimination scholarship. See, for example Solanke (2017: 160-205).

discrimination strategies could revolve around, paradoxically, de-essentializing and 'trashing' that which we currently wish to protect.

In summation: this thesis has re-described the limits of anti-discrimination (and, thereby, anti-discrimination law) in respect of its social basis, and its legal articulation as argument on the one hand, and decision on the other. The insights of systems theory in particular, and of some writings of both Foucault and Deleuze, have been deployed to provide a series of innovative responses to enable the formulation of this re-description.

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