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LAW AND REFLEXIVE POLITICS

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INTRODUCTION

Law is the great concealer; and law is everywhere. Or so claimed Marxists once upon a time.

> [Law] was imbricated within the mode of production and productive relations themselves ... it intruded brusquely within alien categories, re-appearing bewigged and gowned in the form of ideology; ... it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigour of its own autonomous logic, it contributed to the definition of the self-identity of both the rulers and the ruled.[1]

Does the old critique of domination still hold any sway?

Apparently not. Or so even scholars of the far Left keep reminding us in their eagerness to embrace law and proclaim their allegiance to the new constitutional politics of civil society. Old Marxists now describe popular sovereignty as 'co-original' with, and democracy 'internally linked' to constitutional rights[2] and find it hard to remember what it was they once disagreed with liberals about. No *tension* left between emancipatory politics and oppressive law; instead we have *reciprocal constitution*, simultaneous realisation. In the Left's embracing of the new constitutionalisms its old critique of law - the critique of the law's concealment of class inequality, class conflict and class action - is left behind. In a way that is indicative of the odd embarassment with which the West European Left faces up to its tradition today, it is now all too willing to abandon all that it once held with such commitment, too busy shouldering responsibility for the aberrations of state coercion and central planning to remember that it has been *its* ideals, commitments, achievements and negotiated compromises of the last half century that have made our western societies humanly functional.[3]

Against so grand a coalition I will attempt to make a case for the critique of legal ideology. I will claim that the law *does* conceal and that its ideology does mask the exclusion and the compulsion of meanings. I will claim that this compulsion is not external but structural and occurs at the very point of the recovery of meaning. In effect to treat law, as many advocates of (what I will call) *'republican'* constitutionalism do, as a lever and substitute for politics depletes the emancipatory potential of politics. I argue against impoverishing politics in this way. My argument draws - selectively and sometimes 'heretically'- on Luhmann's version of systems theory.

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[1] Thompson, E P, 1978, 288

[2] E.g. Habermas (1992b)

[3] See Glasman's excellent (1994) and (1996)

Constitutionalism is about the intersection of law and politics. Through recourse to Luhmann I will explore what kind of intersection this is, and why it makes the republican celebration of constitutional politics somewhat hollow, and to the extent that ideology is at play, somewhat dangerous. Then, in place of legal politics, I will put forward a suggestion for *reflexive* politics, that is emancipatory, utopian and an-archistic.

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

The book is divided into three parts. The first is an exposition of the 'republican' argument culminating in the 'containment thesis'. This is a thesis about legal politics that unites theorists as diverse as Dworkin, Habermas, Unger, Ackerman and the other 'civic republicans'. The second part is a critique of the republican thesis undertaken with the help of Luhmann's version of systems theory. The third part advances a suggestion for a definition, or re-conceptualisation, of the political as 'reflexive', one that cannot be captured or contained in law.

More specifically:

Part I explores the foundational notion of popular sovereignty as guiding ideal - or at least key precondition - of constitutionalism. By sanctioning the public political sphere, constitutional law maps out a universe of politics. I will approach the intersection of law and politics from the republican perspective, where the role of law is seen as substantiating the ideal of

[4] The allusion is to Dworkin, 1986, opening and closing phrases.

popular sovereignty and as empowering politics. Constitutionalism, here, is above all about self-determination and sovereignty and the sanctioning of the processes where the sovereign will is formed. I review the theories of some key advocates of republicanism and conclude this part with an account of their institutional suggestion for the 'containment' of the politics of civil society. Those familiar with the recent arguments of Habermas, Dworkin and the American 'civic republicans' need only refer to chapter six of this part, which summarises what I take to be the crux of the republican theory of 'legal politics', and thus what I take to be at stake. The rest of the book is a critique of this position.

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

It begins with a short *introduction* to some very basic premises of autopoietic theory. This introduction only aims to kickstart the analysis and has absolutely no aspirations to completeness; aspects of the theory will be visited at much greater depth later in the book. This expositional structure is justified for the following reason. All too often autopoiesis, in truth much too rapidly marketed,[5] is recruited to back empirical studies of regulatory failures without any serious attempt to fill in the middle ground. From a theoretical account of why the logics of systems do not, and cannot, meet we are transported to a practical account of, say, social workers who misunderstand their clients' needs. This is regrettable because systems-theory is invaluable in probing what is precisely missing in these analyses: it makes available a heuristic device of great power and precision that can lend insights into the mechanisms of the construction of meaning, the dynamics of overlapping and mutually undercutting accounts of problems, of the communicative media that 'seduce' certain linkages at the expense of others, the simultaneity of coupling and closure of communications, that are at once 'the same and different'.[6] My expositional structure thus denotes my intention to work *with* the theory and not *from* its already given conclusion of incommunicability across systems.

Law is an index of how much conflict has to be suppressed. That is how Alasdair MacIntyre describes the main function of the law of liberalism.[7] My own venture into the relationship between conflict and law, in chapters seven to fourteen, aims to explore the degree to which dissensus can be represented in law. I suggest here that law allows for conflict selectively, by setting the thresholds of valid dissensus, the *when* and *how* of possible conflict. In the process not only is much repressed but much is appropriated as well, as

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[5] 'Autopoietic theory has been perhaps truly too rapidly marketed' says Luhmann (1985b, 389)
[6] Glanville (1981)
[7] MacIntyre, 1981, 253

political conflicts are forced to meet criteria of legal relevance in order to be represented. But if law is to be the vehicle and guarantor of the public deliberative processes it must host people's entry and engagement in public life and guarantee that their dissenting voices will be heard. It must be able to voice conflict over the terms of social life - the expression of our disagreements, griefs and angers. If it fails to do that, by allowing only certain conflicts to register, it is not containing but instead selectively privileging and suppressing. And if that is so, then our legal democracy is prejudicial and deaf to genuine aspirations expressed in civil society - aspirations which are manifest in political conflict *but not* in legal argument. Or so I will argue.

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

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

What motivates my critique of republicanism is a perception that politics is neither contained, nor empowered through law but instead silenced by it. In

every aspect discussed in Part II fundamental aspects of the political are submerged, litigated away, obliterated. In the final **Part III** of the book I will attempt a re-construction by suggesting elements of a theory of reflexive politics that will re-politicise all the assumptions behind conflict, action and identity that the law takes for granted. What is 'stilled' by law here becomes contested terrain again and, as such, political.

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

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

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

What is reflexive politics? It is a politics that keeps the question of its revisability always open and where the political constellation of meanings is always disruptable: only in that does it gain its quality as political. By replacing the reflexive with the exclusionary, which dictates its own limited mode of revisability, law dictates the terms of closure of the field of political possibility. Reflexive politics is an attempt to recover it.

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

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PART II

Political Conflict Under Legal Categories: A systems-theoretical critique of Republican Constitutionalism

PART III

Reflexive Politics

PART I

Republican Constitutionalism

CHAPTER ONE

CITIZENSHIP, PASSIVE AND ACTIVE

The last few years have witnessed a remarkable renewal of interest in citizenship. The ideal of an active citizen has made a spectacular return to the political agenda of both the Left and the Right.[1] On the Right the active citizen is resurrected along the lines of 'the more Victorian concepts' of charity, philanthropy and self-help and called upon to compensate for the gradual abolition of the Welfare State. The Left has viewed it as an appropriate lever to retrieve its tradition of solidarity. Indeed, rarely in recent years has a theory gripped the imagination of legal scholars of the political Left with such force as the new republicanism. The Left appears increasingly attracted to the promise of a republican constitutionalism as the site where the politics of the people will be redeemed. And citizenship-talk has become so pervasive that conceptions of republican 'empowered' citizenship have come to signify not only political involvement and popular sovereignty as such but also individual self-government and even self-fulfilment. Why? On the face of it the answer seems simple. The republicans are advancing a theory about the self-legislating political community. The emphasis has been shifted from rights and individualism to duty and care; from myopic bargaining to public disinterested deliberation; from self-interest to 'empathy'; from compromise to the pursuit of common collective values. The theory professes to fulfil the promise of what Habermas calls a 'constitutional patriotism' or even the more elusive one of social solidarity, which, as Walzer once said, is the patriotism of the Left.[2] In all, it exerts the appeal of an emancipatory project that is ambitious and all-inclusive.

If one contrasts the promise of the new politics with the otherwise poor condition of contemporary political imagination, one can discern the source of their appeal. After the popular mobilisations of the late 1960s theorists like Donzelot described the retreat of the political - the decline of political passions - as 'nous détachant de la chose politique au lieu de nous offrir sur elle la prise renouvellée que nous escomptions.'[3] 'Liberal democratic politics,' writes Wolfe in a similar vein, 'has given many citizens of Western societies [the] unique gift [of] liberation from politics .. Released by politics

1 On the revival of the notion of citizenship in British politics, see Heater (1991), Oliver (1991), Oldfield (1990)

2 Walzer, 1970, 191

3 Donzelot, 1984, 9