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***Salus Populi Suprema Lex Esto***
**(Badiou *et alii*)**

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# *SALUS POPULI SUPREMA LEX ESTO*
# (BADIOU *et alii*)

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# The Editor's note

Sometime in March, I contacted Alain Badiou. An article he had written had been rejected, or shall we say "censored" by a French newspaper of (so-called) record. His essay dealt with the French Yellow Vests (*Gilets jaunes*) movement which, at that stage, had clocked up another record in a country that is supposed to be a benign democracy (and is in reality an illiberal republic): hundreds of injured protesters, and worse; and no result, being outmanoeuvred by managerial politics. I wrote to him, asking whether he would let AYOR publish it. "*Bien entendu*" was his immediate response. I let those who understand French to weigh those two words: "*bien/entendu*".

Aware of Badiou's scepticism about rhetoric I tried to assuage him by ending my entreaty on this aphorism: *salus populi suprema lex esto*. He shot back with a line from Tacitus, that was drilled into us at school as the *suprema lex amoris*: "*Titus Berenicem invitus invitam dimisit.*" He added: "*La rhétorique latine m'a toujours impressionné.*" In that rhetorical line of thought, nothing has or will ever match the terseness of a Latin prose clausula or the imperious clarity of a Latin judicial apophthegm. Badiou's essay is about the stunning *salus populi suprema lex esto*; and why, *inviti invitos*, *Gilets jaunes* protesters dismissed themselves at the very moment they thought they were embodying *salus populi* and forcing onto government the *esto* of their protests.

*Esto*? It is a strange word, and while volumes have been written about *salus populi suprema lex*, less attention has been paid to *esto*. Scholars versed in the history of Roman law have shown how the imperative mode was the key rhetorical element to the power of laws, starting with the Twelve Tables. The grammatical imperative became the jussive mode, which is simply lost in translation when paraphrased by "shall" or "shall be". Interestingly, one rhetorical way in which jurisprudence asserted its prudent claim to *interpretatio* of the laws was to mimic, rhetorically, the jussive command inherent in decemviral laws.

If one believes this is not a contemporary issue relevant to law and rhetoric, it suffices to read the Epilogue of the Interim Constitution of South Africa (1993). The Epilogue is jussive: "In order to advance such reconciliation and reconstruction, amnesty shall be granted." This is an *esto*, and with the arresting cadenza of a Latin clausula too. The primordial, sacerdotal *esto* was injected into a constitutional process, thus creating a dual foundation – an ethical foundation through the Truth and Reconciliation Commission (TRC); a political one through the Constitution. This uneasy duality remains the conundrum at the heart of the South African polity. The epilogical *esto* remains jussive, as Desmond Tutu has ceaselessly reminded politicians. The *esto* that grounds reconciliation is supposed to operate continuously, imperatively, modelled on the theological concept of a *creatio continuans*. While the political class considers the TRC to be a semelfactive event, something that happened once, but is now done with and gone, by contrast the jussive concept of reconciliation ought to remain active, if *salus populi* is to be *suprema lex*.

*Philippe-Joseph Salazar*



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Philippe-Joseph Salazar, "The Editor's note", p. i.

# '"I have forgotten my umbrella"': On the abdications of style in law and rhetoric

Jaco Barnard-Naudé

"But, it must not be forgotten, it is also an umbrella. For example, but it must not be forgotten."
Derrida[1]

"Safe. I wouldn't have thought it possible for a single word to have such an impact. Safe."
Lanchester[2]

Towards the end of Jacques Derrida's extended meditation on Nietzsche's styles, he refers to a handwritten fragment from the unpublished manuscripts, containing the phrase '"I have forgotten my umbrella"'[3] (note that in the original manuscript, the phrase was rendered "isolated in quotation marks"[4]). Mooting several possible reading strategies (hermeneutic, psychoanalytic, hermeneutic-psychoanalytic, Heideggerian) that would yield a meaning for the phrase (the umbrella's "symbolic figure" is, after all, "well-known"[5]), Derrida is ultimately at pains to insist that, because the fragment is "structurally liberated from any living meaning", we will never know "*for sure* what Nietzsche wanted to say or do when he noted these words", that its meaning remains "in principle inaccessible" and, finally, that "it is quite possible" that the fragment "should remain forever secret".[6]

Yet, the readability of the phrase as the marks of a writing, the traces of the spoken word, remains. It is, in fact, the phrase's very readability – its *structure* as writing - that ensures the secret of the "possibility that indeed it might have no secret".[7] In any case, its secret is not simply demarcated by its structure – it is "confused" with it. And in this way, the unpublished fragment delivers the provoked hermeneut up against the disconcerting limit of "decoding", of producing meaning (as such).

Thus, reading "which is to relate to writing" remains; and as remains it perforates the "hermeneutic sail"[8] – in the manner of a stylus that is at once a style amongst others. And yet still, Derrida, in a classically deconstructive *il faut*, writes that "if the structural limit and the remainder of the simulacrum which has been left in writing are going to be taken into account, the process of decoding, because this limit is not of the sort that circumscribes a certain knowledge even as it proclaims a beyond, must be carried to the furthest lengths possible."[9] Thus, Derrida ventures: "If Nietzsche had indeed meant to say something, might it not be just that limit to the will

[1] Jacques Derrida, *Spurs: Nietzsche's Styles / Éperons: les Styles de Nietzsche,* trans. B. Harrow, intro. & preface S. Agosti, (Chicago: The University of Chicago Press, 1978), p. 41.
[2] John Lanchester, *The Wall*, (London: Faber & Faber, 2019), p. 193.
[3] Derrida, *Spurs / Éperons*, p. 123.
[4] *Ibid*.
[5] *Ibid*. 129.
[6] *Ibid*. 133.
[7] *Ibid*.
[8] *Ibid*. 127.
[9] *Ibid*. 133.

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Jaco Barnard-Naudé, ""I have forgotten my umbrella": On the abdications of style in law and rhetoric", pp. 1-13.

to mean, which, much as a necessarily differential will to power, is forever divided; folded and manifolded".[10] Like an umbrella.

For Derrida reading Nietzsche, the simulacrum's eternal division means that it cannot be used "as a weapon in the service of truth or castration" and that to do so "would be in fact to reconstitute religion".[11] However, this recognition does not and cannot preclude the question of the *origin* of this originally divided simulacrum which can be used neither in the service of truth nor of castration. What is this origin, phenomenologically speaking, if not the voice (recall that Nietzsche's fragment is "isolated in quotation marks")? And from whence – or from what - issues the injunction to decode its simulacrum "to the furthest lengths possible", without using it in the service of truth or castration, if not from the constitution *of* rhetoric (the one that rhetoric constitutes as much as rhetoric is constituted by it) in the democratic polis?

To be sure, it is not that the voice is not itself divided at the origin and thus the product of a differential division / *différance*. That much Derrida made clear early on in his project of deconstruction, most notably in *La voix et le phénomène* (1967). And it is certainly not that the constitution of rhetoric and rhetoric's constitution in the democratic polis – and thus as political through and through – are not divided. The political is division through and through, the constitution is division through and through, rhetoric is division through and through. To put it in terms of Derrida's late work, there is prosthesis at the heart of (every) origin.

But if we are to gather our bearings, so to speak, in terms of what takes place when one inserts the "question of style" between law and rhetoric (which authors like James Boyd White had told us, amount to, more or less, the same thing; such that law *is* rhetoric (but is rhetoric *really* law?)[12]), we would perhaps do well to direct our attention, by way of introduction, at these basic rhetorical commonplaces,[13] which, one may venture, were always meant to function like an umbrella – at once

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[10] *Ibid.*

[11] *Ibid.* 99. I think that it is precisely this weaponisation of the simulacrum that Alain Badiou aims at in his discussion of "simulacrum and terror" in Alain Badiou, *Ethics: An Essay on the Understanding of Evil* (London: Verso, 2001), pp. 72-74: fidelity to the simulacrum is the "unending construction" of an "abstract set" and this can take place only by way of constantly voiding what surrounds the "closed particularity" of the abstract set. "Hence, fidelity to the simulacrum […] has as its content war and massacre."

[12] James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life", *The University of Chicago Law Review,* 52(3), 1985, pp. 684-702.

[13] In a magisterial footnote of his magnum opus, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum,* (New York: Telos Press Publishing, 2003), p. 50, Carl Schmitt recalls that "[t]he Greek word *topos*, in the course of time, has acquired the significance of *locus communis* or 'commonplace'. Today, it serves to designate general and abstract banalities. But even such commonplaces become concrete and extraordinarily vivid if one considers their spatial meaning." Somewhat blithely noting that "[t]he theory of *topoi* was developed by Aristotle as a part of rhetoric" and that "[t]he latter, in turn, is a counterpart, an antistrophe of dialectics", Schmitt nonetheless treats us to a succinct, if now somewhat anachronistic, update of the relationship between space, rhetoric and the common: "Rhetoric is the dialectics of the public square, the *agora*, in contrast to the dialectics of the *lyceum* and the academy. What one person says to another is debatable, plausible, or convincing only in a given context and at a given place. So, even today, we have the still indispensable *topoi* of the chancellery and the lectern, of the judge's bench and the town meeting, of conferences and congresses, of cinema and radio. Any sociological analysis of these various sites must begin with an account of their *topoi*."

"aggressive and apotropaic", "threatening and / or threatened". Precisely, like the voice in our "democratic" times.

As for law "and / as" rhetoric, and considered from the point of view (and thus one style) of a discourse of *critical* jurisprudence, one could perhaps be forgiven for rather bluntly concluding that the law today increasingly seems to have forgotten its umbrella. One may even be forgiven for concluding that the umbrella lies forgotten in the opening pages of Aristotle's *Rhetoric*. As the positivistic militarisation of "democratic" law intensifies in the instance of the factual exception (such that there is no longer any concretely workable distinction between law and fact (writes Agamben)), enacted if not declared in the very heart of democracy, who or what will forgive the law for this forgetting?[14] If what is at stake here is the forgetting of Being, then we must be prepared to ask whose "*salus*" "*esto*" in the Real today? For "*esto*" is Being if it is nothing else. And what does it tell us about the state of the Symbolic Order, about the *suprema lex* of the collectivity that we still refer to as the *populi*?

Those who pick up this volume, thinking that this question is, once again, "merely" rhetorical play, a game which does no more than add up to its own version of the night in which all cows are black; well, they would perhaps do well to put it down, then, and look – like the poets who they are not – out of the window, where, as I write, the early winter rain is pouring down on the townships of Cape Town – Nyanga, Langa, Gugulethu, Khayelitsha; places where the distinction between law / right and fact continues to collapse into Agamben's "real zone of indistinction"[15] which has been *norm*-alised, named as the "normal emergency",[16] because it has been, and is, *spatialised as law*. *There*, there is no umbrella. The other umbrella – the umbrella of the Other – (also) lies long forgotten in the Epilogue of the Interim Constitution – its "need for *ubuntu*",[17] for instance – which is to say *in the law*. Can this form of forgetting be forgiven? And by whom? By what?

By rhetoric? Rhetoric itself? Another style of rhetoric? For another style of law? Perhaps. Or is it rather the case that, for the sake of (what remains of) the polis today, law and rhetoric (by which I mean, of course, "lawyers" and "rhetoricians" and those who are both), law *and* rhetoric, are once more politically enjoined to affirm and insist, in every possible way, on the plurality at the origin of both: what Hannah Arendt called, precisely, the "*law* of the Earth",[18] "the fact that men, not Man, live on the Earth and inhabit the world".[19] There we have a terse rhetorical formulation of the terms

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[14] And "[w]ould the forgetting of a being (an umbrella, for example) be incommensurable with the forgetting of Being?" (Derrida, *Spurs*, p. 141). Recall that Derrida is reading Heidegger in this "P.S. II" at the end of *Spurs*, the Heidegger who is warning that in the last phase of nihilism, Being veils itself as a protective concealment and that in such a movement "consists the essence of forgetting".

[15] Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* (Stanford: Stanford University Press, 1998), p. 10.

[16] Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*, (Ann Arbor: University of Michigan Press, 2013), p. 248. Sitze quotes Richard Rive, *Emergency Continued*, (London: Readers International, 1990), p. 8.

[17] It is worth noting, too, that Sitze, *The Impossible Machine*, pp. 215-248 has raised the question of *ubuntu* in the context of the legal history of *salus populi suprema lex esto* in South Africa. In a chapter entitled "Salus or Ubuntu?", Sitze considers not only the constriction of the *populi* by way of state racism during apartheid, but indeed the question of how *ubuntu* might displace this history in the context of postcolonial neoliberalism.

[18] Hannah Arendt, *The Life of the Mind,* (San Diego / New York / London: Harcourt Inc., 1977), p. 19.

[19] Hannah Arendt, *The Human Condition,* introduction by Margaret Canovan, (Chicago & London: University of Chicago Press, 1998), p. 7.

("man", "men", "Earth", "inhabit", "world") of the entire problematic that is given "our" dark times.

It seems, then, not so much that "if there is going to be style, there can only be more than one",[20] as Derrida puts it at the end of *Spurs,* but rather that there can be the more than one of this plurality only if there is going to be style, a differential style, no doubt, "another style of the master-signifier"[21] (which is to *say*, of the law), says Lacan in the seminar on the discourses, having opened the *Ecrits* only a few years earlier with Buffon's definition of style: "Style is the man himself"[22] (the "man" again) – and then immediately alters the definition in order to "comply with the principle […] that in language our message comes to us from the Other": style is "the man one addresses".[23] Thus, plurality, again, even if, or precisely because, "man is no longer so secure a reference".[24] But Lacan goes further than that when he writes that "it is the object that (cor)responds to the question about style". This "object" is, of course, the famous *objet petit a*, the object-cause of human desire.

In her reading of Lacan's "Overture" to the *Ecrits*, Judith Miller returns to Buffon's statement and argues that Buffon gives to style the main function of assigning to someone his "differential identity"[25] and that Lacan's addition of "the man one addresses" in no way alters that function, for we locate our differential identities in the Other: "[f]rom the moment that style refers to another, the one who is defined by his style is defined by his relation to the other."[26] Identity thus is divided between "what style represents and the one before whom it is represented",[27] who himself is someone who addresses another, and so on. Difference *as* style, then, and style *as* difference. Why? Because it is in the Other that man locates his desire (which is to *say* his lack) as a self that is at once other - and that is why the question of style "(cor)responds" to the *objet petit a.* Here it is also worth noting that when Julia Kristeva turned to the question of psychoanalysis and the polis, she turned to style (specifically, Céline's style of "'spoken' writing"[28]) to show that the "subject of enunciation" is born in a fundamentally "binomial" way.

Surely, this is the very *esto* which the rhetorician's voice in the opening of this issue of the African Yearbook of Rhetoric resolutely calls forth, alongside the *esto* of Alain Badiou's intervention which opens this volume. *Esto*, "it must not be forgotten", "is also an umbrella". Opened, closed, threatening, threatened – styling and styled. In order to be thought again – not "now and again" – but again, re-membered, from the start, now, now-again. That seems to be precisely what Badiou calls for below in his searing critique of the *Gilets jaunes* movement.

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[20] Derrida, *Spurs / Éperons*, p. 139.
[21] Jacques Lacan, *The Seminar of Jacques Lacan: The Other Side of Psychoanalysis: Book XVII,* trans. R. Grigg, (New York / London: W.W. Norton & Company, 2007), p. 176.
[22] Jacques Lacan, *Écrits: The First Complete Edition in English,* trans. B. Fink, (New York / London: W.W. Norton & Company), p. 3.
[23] *Ibid.*
[24] *Ibid.*
[25] Judith Miller, "Style is the Man Himself", in Ellie Ragland-Sullivan and Mark Bracher (eds.), *Lacan and the Subject of Language,* (New York: Routledge, 1991), p. 143, p. 147.
[26] *Ibid.* 147.
[27] *Ibid*.
[28] Julia Kristeva, "Psychoanalysis and the Polis", in Toril Moi (ed.), *The Kristeva Reader*, (New York: Columbia University Press, 1986), p. 301, p. 316.

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Miller also mentions that to "reach *a point of view* that allows one to obtain ideas that are productive and gather the main threads of the subject at hand"[29] is, for Buffon, homologous with style as the assignation of differential identity. Each contribution in this volume testifies to this function of style as reaching (for) a differential point of view: an authored disposition, addressed to the Other, suggesting, at times imploring, a point from which to view. At the same time, these contributions are each concerned to state their own point of view in relation to something at once general and specific – the *esto* of the *salus populi* as *suprema lex*. In this way, each of the contributions collected here can be said and be seen to open the umbrella *of* style over the question of the *salus populi*, its *suprema lex* and, ultimately, its *esto*, in new and provocative ways. Yet, the maxim *salus populi suprema lex esto* itself functions as an umbrella in this issue of *AYOR*, uniting as it does divergent styles of law and rhetoric.

However, and as several essays in this volume show, the present political moment / the *esto* of the *salus populi,* is marked and re-marked by what Timothy Barouch calls an "abdication of law" in his essay for this volume. This is the case in several senses of the phrase. Perhaps these essays simply recount the latest instalment in the general decline of the Interdiction that thinkers like Pierre Legendre have diagnosed as characteristic of "ultramodern culture".[30] In 1995, Legendre proclaimed that:

> "[a] generalized Economism and Managerialism is in the process of impairing the symbolic capital of humanity. This works to remove from the domain of thought the question attached to the reproduction of the animal that speaks: the problem of rendering the discourse of the Interdiction habitable by each human being."[31]

Judith Butler writes, à propos "the psychic field we call 'Trump'",[32] that we have "wandered into a psychoanalytic wonderland".[33] Thus, in reading these essays, one cannot but wonder whether, in our relentless attempts finally to sever the head of the King, we have only guaranteed the ascent of '"His Majesty, the Baby'".[34] As I write, the leader of the opposition in the United Kingdom is on television calling the Prime Minister's attitude to the Benn Act[35] "childlike").

If, then, as Carl Schmitt lamented, the new *nomos* of the Earth will be "no more *nomos*",[36] then the irrevocable impact on the *salus populi* of what can only be called this

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[29] *Ibid.* 145.
[30] Pierre Legendre, "The Other Dimension of Law", *Cardozo Law Review,* 16(3-4), 1995, p. 954.
[31] *Ibid.* Here, Legendre is prognosticating what Bernard Stiegler would, almost twenty years later, come to diagnose as "symbolic misery". See Bernard Stiegler, *Symbolic Misery Volume 1: The Hyperindustrial Epoch*, trans. B. Norman, (Cambridge: Polity, 2014).
[32] Judith Butler, "Genius or Suicide", *London Review of Books,* 41(20), 2019. Retrieved from: https://www.lrb.co.uk/v41/n20/judith-butler/genius-or-suicide?utm_source=newsletter&utm_medium=email&utm_campaign=4120&utm_content=aunz_nonsubs [Accessed 17 October 2019].
[33] *Ibid.*
[34] Sigmund Freud, "On Narcissism: An Introduction", in Sigmund Freud, *The Standard Edition of the Complete Psychological Works of Sigmund Freud Vol XIV*, trans. and ed. J. Strachey, (London: The Hogarth Press and The Institute of Psychoanalysis, 1957), p. 91.
[35] European Union (Withdrawal) (No. 2) Act 2019.
[36] Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947–1951,* (Berlin: Duncker and Humblot, 1991), p. 179.

catastrophic regression surely does not deserve to pass us by. And that is what each of the essays in this volume of *AYOR* is at pains to underscore. If style is the Other whom we address, if it is the object that corresponds to the question of style, then these essays do not track the abdication simply of law, but in fact bear witness to the abdication of style itself. Sarah Burgess's essay on the United States Supreme Court's decision in *Matal v. Tam* is perhaps most explicit about this insistence on / persistence of forgetting the umbrella, but it is the rhetorical thread that runs throughout the volume.

In an intervention as unflinching as it is pointed, Alain Badiou analyses a certain abdication of style in the *Gilets jaunes,* whose yellow vests have functioned both as individual umbrellas and as the collective umbrella of a protest movement that Badiou does not hesitate to describe as undeniably a product of the "middle class". In several ways, the lineage of the Yellow Vests can be traced back to Hong Kong's Umbrella Movement of 2014. For one thing, it was the Umbrella Movement which brought yellow back as the colour of its pro-democracy protests. In many ways, it could be argued that the *Gilets jaunes* represent an intensified derivation – a sort of heightened style – of the Umbrella Movement. Yet, in arguing that the subjectivity of the movement could be called "individual populism", Badiou is tracking its abdication of style.

The Yellow Vests' confusion of individualism with democracy resonates remarkably with the experience of the Fallist student protests in South African universities between 2015 and 2017, in which Achille Mbembe first detected a deeply narcissistic form of aggressivity (perhaps most prominent in the movement's disposition towards women / "womxn" and queer positionalities).[37] For Badiou, the protest movements of contemporary history have in fact all followed the same catastrophic trajectory, because they seem wholly to have ignored the "implacable and stark rules that govern the world today". The abdication of style thus includes this wilful ignorance, resulting in an organisation "only around what is negative"; or, to stay with the South African resonance, only around what "must fall". In remembering their umbrellas, these movements have thus also forgotten them. Yet, there is for Badiou in the Yellow Vests movement (as there was in the Fallist movement) nonetheless the potential of a future communist mo(ve)ment that would lend its support, "in the first place" and precisely, to education about the laws of contemporary capitalism. In this regard, Mbembe insists – and Badiou strongly implies - that an "anticipatory politics"[38] cannot be organised in the individualist mode of self-enclosure that has characterised so many of the social movements of our time.

Ian Hill's essay on the drone warfare of the United States provides a stark illumination of the militaristic aspects of what Badiou in conclusion calls the "laws of

[37] Achille Mbembe, "Achille Mbembe on the State of South African Political Life" in Sean Jacobs (ed.), *Africa is a Country.* Retrieved from: https://africasacountry.com/2015/09/achille-mbembe-on-the-state-of-south-african-politics [Accessed 15 October 2019]. On the narcissistic aggressivity of the movement in relation to non-hegemonic categories of identification, see Sandy Ndelu, Simamkele Dlakavu & Barbara Boswell "Womxn's and nonbinary activists' contribution to the RhodesMustFall and FeesMustFall student movements: 2015 and 2016", *Agenda*, 31(3-4), 2017, 2: "sexism, heterosexism, homophobia and transphobia have emerged as characteristics that marred these movements, albeit unevenly, across various institutions"

[38] *Ibid.*

Big Capital". Writing in 1950, Schmitt ventured that the future *nomos* of the Earth will be neither terrestrial, nor maritime – it will consist, and was to an ever greater extent already consisting in, the appropriation of the air.[39] It was in this context that he started questioning the future of *nomos*. For Hill, drones are configured by way of a style of rhetoric, as "the contemporary iteration of the [generic] archetype of airborne power". The striking feature of the United States' version of this airborne power is that it has – and there are no surprises here – little to no regard for the existing *lex* of the *populi*. As Hill notes, the style of its military drone programme "has broken or stretched multiple domestic and international laws". Hill's essay, then, reveals a profound contemporary tension between *lex* and *nomos* – and especially how easily *lex* is jettisoned in the rhetorical consolidation of a new *nomos* of the atmosphere, which effectively turns out to be "no more *nomos*". Because here it is as if the drone both creates for itself and then operates within its own state of exception "with a novel, automated, and remote police brutality" that does not abandon law altogether, but rather transforms "bureaucratic legal rhetoric into ambiguous drone pseudo-law" (an Agambenian "real zone of indistinction") which, however '"lawlike or "lawlite"' it may be, does not hesitate to consider itself the *suprema lex* of the *salus populi*. "The vagueness of drone metonymy", Hill writes, is used to "legalize drone warfare with the assertion that the goal of national security justifies any lethal exercising of American sovereignty". That this state of the air amounts to a profound abdication of style, Hill makes abundantly clear when he writes that this vague/opaque drone metonymy is nonetheless well understood by "foreign populations" as "the entire meaning of the US as a country".

In Sarah Burgess's close reading of the American Supreme Court's decision in *Matal v. Tam*, the abdication of style is formulated as the question of "what happens to law when it revokes its own power to limit speech (in the name of freedom)". Here illuminated stands the withdrawal of law in the name / for the sake of what a Court believes the *salus populi* and its *esto* to be, or *must* be, in the age of neoliberal governmentality. Such a retreat, as Burgess illustrates, has everything to do with an ignorance of style and "an absence of rhetorical sensibility". Showing that the Court in *Tam* "refuses to address how speech operates, while claiming to uphold and honor liberal principles", Burgess argues that this is nothing if it is not the American judiciary undermining "its own foundations (in liberalism)" and implicitly authorising a "neoliberalization of speech". The essay concludes with a demonstration of the fundamental importance of style — which Burgess defines as "*how* the performative works", as the "turn of the trope" — for a more appropriately liberal protection of "free" speech in which the law might well have to confront its own scandalisation, a "challenge to the norms that the law (as a scene) provides".

In Peter Goodrich's essay, the law (as a scene) is confronted, by way of style, with just such a challenge to the norms that it provides. Goodrich tracks the form, across two continents, of what he calls an "arbitral modality" in recent judicial rhetoric. This arbitral modality is styled by way of what one could call the advance of the image in court judgments. Goodrich argues that the incorporation of the image into the textual terrain of the judicial word blurs the distinction between the two and constitutes a "third site of signification" – another style of (judicial) rhetoric – the viserbal.

[39] Schmitt, *Nomos,* pp. 49 and 347.

The most immediate effect of the insertion of an image into the text of the *Housecanary* judgment that Goodrich analyses, is that the image thereby "acquires a precedential status and weight" – it will perform, in other words, the function of forensic rhetoric in judgments to come. At first glance, the image, as a style, is *meant* to strengthen the rhetorical force of the text, playing as it does on the affective dimension of both rhetoric and judgment, indeed relaying another set of motivations that engages the senses, the embodied nature of the jurist. Yet, at the same time and precisely because of its affective (and affected, even comical) style, the viserbal image also undermines the pretended textual structure of unchanging norms in which a court / the law is said to deal. The viserbal, in other words, re-introduces the law to novelty.

The point, in both Burgess and Goodrich's essays, is that in the face of its critique, the summary abdication of style in law's rhetoric is by no means warranted; on the contrary, its responsibility for the *salus populi* is heightened and newly dispersed (as much as the *Housecanary* Court, for instance, wants it to be otherwise). Goodrich believes – and it is hard to disagree – that in an age as preoccupied with the image as is ours, "retinal justice" will undoubtably have its day. Yet a reader of Burgess's essay cannot fail to recall her conclusion here: the force of law "comes from the recognition of the contingency of any speech act, including its own". In Goodrich's essay, we can thus observe how the image in judicial rhetoric is today not only made to "speak", but made to say – at this third, viserbal, sight of signification – something other than, and other to, the law's unitary speech.

Tim Barouch considers how what at first appears as the abdication of law is really the abdication of style before Badiou's "laws" of contemporary capitalism. Barouch's focus is the role of the private corporation and of private contractors in the delivery of the war on terror. Arguing that the controversy surrounding the legal liability of private contractors for detainee abuses at Abu-Ghraib "highlights crucial elements of Western legal style in the era of twenty first century empire", Barouch considers the case of *Saleh v. Titan Corp* as a "significant expression of legal style that paved the way for imperial expansion".

Barouch's argument resonates well beyond the specificities of American imperialism. The imperious style of legal discourse that he describes reveals the critical role that it plays in masking imperialism as liberal constitutional tradition. And so the discourse of the Interdiction becomes more and more uninhabitable – *salus* ***populi*** is no longer *suprema lex*.

South African legal theorists who have criticised the collapse of transformative constitutionalism into liberal constitutional *doxa* under the weight of a conservative legal culture, while at the same time holding out the trope of "decolonisation" like a flashing beacon in the long interpretive night, may well discover in Barouch's analysis how it is that transformative constitutionalism and decolonisation continue to face a common enemy that has long been masquerading as a *salus populi* of "democratic political process" and "democratic tradition".

Dennis Davis's analysis of the South African Constitutional Court's decision in *Volks v. Robinson* not only confirms the above, but also highlights another dimension of imperious legal style. For Louis Althusser, it was "an irrefutable fact that the Family is the most powerful ideological State apparatus",[40] and in Davis's analysis it becomes

[40] Louis Althusser, *The Future Lasts a Long Time*, (London: Vintage, 1994), p. 105.

clear how judicial rhetoric produced by conservative legal culture works to hold the ideological, indeed imperial, boundaries of "marriage" in place, at a time when transformation is the law.

Once again, Davis illustrates that the style of the judgment amounts to an abdication of style, with the Court steadfastly rejecting any enquiry into the *populi*, let alone its *salus* in this context, which would lead it to stray from what Davis calls "the pigeonhole dictated by *logos*". Davis illustrates the critical role that *ethos* plays in the fashioning of what may be called the Court's discoursal self and how it co-determines the pigeonhole of *logos* in the first place. In other words, if there is dictation by *logos,* this does not come from some external, reified source of Reason eternally embodied in precedent - it is the Court dictating to itself.

Romain Laufer's essay on the rhetoric of management and marketing comes against the backdrop of Barouch and Davis's essays critically to remind us that marketing is the paradigmatic contemporary form of sophistry. At the same time, Laufer recalls Legendre's topological description of management as a word "without a homeland", gesturing at the ease with which the term seems to migrate into other fields (the critical difference, however, being that when it so migrates, it also tends to colonise the field in which it arrives).

The emergence of "management in the field of legal normativity", Laufer writes, subverts both the principle of law (ignorance is no excuse) as well as the monopoly on legitimate violence on which that principle relies for its force. Laufer, then, is echoing Legendre when he describes a crisis of law's legitimacy as a result of its infiltration by management and marketing. Like Barouch, he is attributing the abdication of style in law and rhetoric to assassins that are masking as allies of the *salus populi*. Their "styles" have perforated both the hermeneutic and the institutional sail, allowing the storm of "Big Capital" mercilessly to blow in.

In his essay, Laufer writes that everything opposes Ancient Greece from the modern world, "except for what can be called the ideological situation", and it is as if Sergio Alloggio's essay on Book I of the *Republic* takes its cue from these words. Alloggio also takes up the concern with class voiced in Badiou's essay, and he does so in resonant style, carefully illustrating how the *politeia* of the *populi* in the *Republic* is rhetorically constructed by way of class-based repression. In this regard, Alloggio unearths a formidable term for this sort of repression: *katabasis* – and, as he goes on to reveal, it is fundamental both to Plato's style and to his project of ideological utopian construction in the *Republic*.

This style of rhetoric, then, could be read as the arch-template of the imperious judicial style that Barouch's essay describes – and so Alloggio adds to the analysis the dimension of a *longue durée* when it comes to the abdications of style. Alloggio relates the rhetoric of class-based repression in the *Republic* back to current problematics in South African philosophy, characterisable as it is by "the persistence of white supremacy in discourses of decolonisation and transformation". In this reading of decolonisation rhetoric, Alloggio mirrors a style similar to the one that concerns Barouch in judicial rhetoric and Laufer in management rhetoric. Again, it turns on a strategy of masking that is grounded in a *jouissance* no less indulgent than Plato's in the *Republic*. In short, it is a style before which style is made to bend the knee.

Nathaniel Greenberg turns our attentions to a different kind of arbitral supremacy – the rhetoric of Libya's Khalifa Hifter, whose style nonetheless vividly re-iterates the style described in other papers. Arguing that Hifter has positioned himself

as a pragmatic "technocratic" leader, Greenberg reveals the highly technologically sophisticated "communicative aesthetics" of Hifter's campaign and how its own propaganda, through the exploitation of the media and especially of social media, reinforces its "permutative" aspect, namely how it is "automatically tied to, and ironically reliant upon, the very material" it seeks to supplant.

Greenberg shows how this style of rhetoric is fundamentally bounded up with a (cynical) invocation of the law and of legality, with Hifter positioning himself as the supreme purveyor of Libya's "struggle for stabilisation", its return to Law and Order. What emerges here is "stability" or "securitisation" as itself "permutative", thus, as a signifier that no longer communicates just one aspect of the *salus* of the *populi*, but indeed as a signifier that would communicate the *suprema lex* itself. In other words, it would occupy the position of master-signifier and as such, as Lacan had it, "represent the subject" for all the other signifiers; its style – *how* it communicates, to resort to Burgess's formulation for the moment – is, ironically, firmly rooted in the very technics of hyper-reality to which it is seemingly opposed.

In the other contribution that concerns itself in this issue of *AYOR* with what Salazar has called "paroles de leaders",[41] Sifiso Ngesi focuses on an instance of presidential rhetoric that could be read in contradistinction to the utterances of the "leader" who concerns Greenberg. In his analysis of the rhetoric of the early stages of the Ramaphosa presidency in South Africa, Ngesi raises the rhetorical stakes of an apparently sincere, if desperate, attempt to return to style by way of the rhetorical appeal to the rule of law: the *lex* which (de)limits, or is supposed to delimit, the *esto* of the *salus populi,* and constitutively so – at least in modern democracy as we know it. Ngesi illustrates that a renewed commitment to the rule of law has consistently been styling the rhetoric of the new, post-Zuma presidency – and here in the sense of the rule of law not simply as *lex* but indeed as *nomos*, as the "wall of law"[42] which arises deliberatively to stabilise, secure and lend a degree of permanence to the always fragile *polis.*[43]

However laudable this attempt to return style to post-apartheid sovereignty may be, it may also not be enough. At the end of his consideration of *ubuntu* and the *salus populi,* Adam Sitze warns that the rule of law is, in its neoliberal and (neo-)colonial declension "a juridical form that is unlikely to address or redress the problem of the 'normal emergency'". The return to style by way of the rule of law thus faces the challenge of overcoming the mere repetition of "business as usual".

Thapelo Teele's debut paper for this edition of *AYOR* returns us to the question of forgiving forgetting. Arguing that the dialectical encounter between the rhetoric of self and the rhetoric of space operates as the condition of possibility of forgiveness in Marlene van Niekerk's *Agaat,* Teele's careful reading indeed brings us up against the very limit of the fluid relationship between law and ethics. What is being suggested when the main character – a woman of apartheid's law (she is, after all, Milla *de Wet*) – dies on National Reconciliation Day, which for her would always have been

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[41] Philippe-Joseph Salazar, *Paroles de Leaders: Décrypter le discours des puissants,* (Paris: François Bourin Editeur, 2011).

[42] Arendt, *The Human Condition,* p. 64.

[43] This is, at least, the way in which Arendt's version of *nomos* as a "wall of law" has been read in the context of the American liberal constitutional tradition and its numerous emulations. See Hannah Arendt, "The Great Tradition: I. Law and Power", *Social Research*, 74(3), 2007, p. 717. Also see Schmitt, *The Nomos of the Earth,* p. 70.

apartheid's Day of the Vow? Does the excessive quality of forgiveness – the forgiveness that takes place regardless of apology, without spoken remorse – nonetheless insist on the law, and demand that there be law if there is to be style? And, even more, does it demand that such law be "another style of the master-signifier"?

To close this edition of *AYOR* on the occasion of the twenty-fifth anniversary of South Africa's transition from apartheid to constitutional democracy – a transition famously described by Etienne Mureinik as one from a "culture of authority" to a "culture of justification"[44] – Erik Doxtader returns us to how it all began, in the hastily drafted, hastily appended, postamble / epilogue of the 1993 interim Constitution – an urgent / emergent constitutional expression of the *salus populi suprema lex esto* if ever there was one; rendered, moreover, and as Doxtader does not fail to remind us, in a state of emergency.

Unearthing all the contradictory expression, over the years, about this most provocative and ambiguous of modern constitutional utterances, Doxtader argues that these not only evince "a pervasive and deep curiosity", but that the extensive and pluralistic catalogue of utterances about the utterance points to a "sufficient consensus" (to echo, in decontextualised style, the important court case to which he refers) – even if more than somewhat tenuous - that the epilogue "is a place to begin" (again) and, specifically, to begin "to understand a beginning". As such, it is the "corner piece of the puzzle", the tip of the umbrella (if not, of course, of the iceberg).

And yet, the "compound question" at which the corner piece gestures, has all too often been turned into "a picture puzzle, a problem in which the task is to discern and fit discrete pieces to an apparent and given end". In taking a history of the many and variegated readings of the epilogue, Doxtader teases out the "hope for certainty" as their common symptom.

In stronger terms, this could indeed be stated as not simply a hope *(spes)*, but rather a *compulsion* to render certainty as the umbrella that would shield, unite and defend the fractured and fragile "nation". It is no coincidence that Doxtader is echoing here Laufer's discussion of certainty and especially his discussion of Mary Douglas's understanding that "certainty is only possible because doubt is blocked institutionally". "Certainty has sinister aspects" in a liberal democracy, Douglas writes, because it needs authority to control dissent.

Like "*esto*", "epilogue" is a "strange word".[45] For what is it that, here, comes in addition to *logos*? This question passes from the potential of a simple answer in rhetoric to its full complexity when the "*esto*" *is*, imperatively, normatively, declaimed as the / an epi-logue. *Esto* as epi-logue, epi-logue as *esto* – a strange affair indeed. And what if Being was an epilogue? Should the *pathos* and the *ethos* that is implied, pointed to, by the epi-logue, simply be considered as "certainly" complementary to the *logos* in addition to which it appears? Or, are we here in the territory of the notorious "dangerous supplement" which is, nonetheless, nothing outside the text? Or both? Or none? With faith in the "compound question", how are we to decide? Even more so if, as Doxtader writes, the bridge metaphor turns the Constitution into a question?

But decide we do, decide we must and decide we did, in the face of this law as *un*certainty, as if we had taken Jean-Luc Nancy at his word: "Where certainties come

[44] Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights", *SAJHR*, 10, 1994, p. 32.

[45] See The Editor's Note in this volume.

apart, there too rises the strength that no certainty can match."[46] Doxtader would position the *esto* of this *salus populi,* on account of the epi-logue as an opening, as both inside and outside the law; it is a jussive that both cannot do without and yet does without the law. As such, the continuity of apartheid has turned the epi-logue "into an open wound". With this, Doxtader delivers us to the "untold suffering" of the body politic (the interim Constitution's diagnosis, as accurate as ever). In other words, here is *esto* as trauma. The *salus populi suprema lex* of apartheid – then and now – folds and unfolds as the *trauma populi suprema lex* of its aftermath.

In a somewhat forgotten part of his oeuvre, Jacques Derrida argues that the founding violence of law in South Africa could not manage "to have itself forgotten":

> "In the case of South Africa, certain 'conventions' were not respected, the violence was too great, *visibly too great*, at a moment when this visibility extended to a new international scene, and so on. The white community was *too* much in the minority, the disproportion of wealth too flagrant. From then on this violence remains at once excessive and powerless, insufficient in its result, lost in its own contradiction. It cannot manage to have itself forgotten as in the case of states founded on a genocide or a quasi-extermination. Here, the violence of the origin must repeat itself indefinitely and act out its rightfulness in a legislative apparatus whose monstrosity fails to pay back: a pathological proliferation of juridical prostheses (laws, acts, amendments) destined to legalize to the slightest detail the effects of fundamental racism, of a state racism, the unique and the last in the world."[47]

The wound, thus, open "long, long, long" (as Doxtader writes), before the epi-logue which finally recognised, *marked*, it *legally*. One could go as far as saying that the wound opens at the origin. Can one, how does one, begin with an open wound, found style and law upon coagulation? Doxtader would retrieve an affirmative critique of violence (including its own violence) from the gape of this open wound. Trauma, then, as critique of violence and precisely, of the traumatic violence of the state of exception at the heart of law, at the heart of apartheid, at the heart of today (the "traumatogenic" institutions of neoliberalism, as Mbembe names them).[48]

To be sure, a very different task than the work it is routinely asked to perform in the canonical version of transitional justice is here imagined for trauma. For Doxtader evokes a way of processing trauma by understanding it as an "open exception, a double exception". It is a way of not so much marking the open wound, as *re-marking* it – without resolving anything. Such a remarking as critique of violence necessarily implies that *the* condition of its possibility is that the performing and performative "we" remains, somehow manages to maintain its dwelling, in the symbolic order of language, but perhaps even more precisely, in the deliberative order of rhetoric.

And so, the remains, the open wound, unfolds as umbrella - at once "aggressive and apotropaic", "threatening and / or threatened": "[t]he rhetorical history of apartheid is a crime against humanity *unfolded* through the 'law' of language and the 'language' of law." The "post"-apartheid cannot unfold other than as this remembrance. It is its *esto.* If, as Augé puts it, "[o]blivion is the life force of memory

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[46] Philippe Lacoue-Labarthe and Jean-Luc Nancy (eds.), *Retreating the Political,* (London: Routledge, 1997), p. 158.

[47] Jacques Derrida, "The Laws of Reflection: Nelson Mandela, in Admiration", in Mustapha Tlili and Jacques Derrida (eds.), *For Nelson Mandela,* (New York: Sever Books, 1987), p. 18.

[48] See Jacqueline Rose, "One Long Scream", *London Review of Books,* 41(10), 2019. Retrieved from: https://www.lrb.co.uk/v41/n10/jacqueline-rose/one-long-scream [Accessed 18 October 2019].

and remembrance is its product",[49] then there can be no "surfeit of memory"[50] here, no forgetting the umbrella, no *esto* without remembrance (the *polis*, for the Greeks, was nothing if it was not "organised remembrance",[51] "physiognomically guaranteed by its laws"[52]). As Paul Ricoeur once remarked, to fail to remember is to "kill the victims twice".[53] What remains, thus? Language remains.

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[49] Marc Augé, *Oblivion*, trans. M de Jager, foreword J.E. Young, (Minneapolis: University of Minnesota Press, 2004), p. 21. The sentiment is echoed in Laufer's essay for this volume when he writes that "every history is as much about amnesia as it is about anamnesis" (p. 90 *infra*).

[50] Charles S. Maier, "A Surfeit of Memory? Reflections on History, Melancholy and Denial", *History and Memory,* 5(2), 1993, pp. 136-152. See the powerful rejoinder of this argument in Muldoon, "The Power of Forgetting: Ressentiment, Guilt, and Transformative Politics".

[51] Arendt, *Human Condition,* p. 198. Also see Arendt, *Human Condition,* p. 95: "The whole factual world of human affairs depends for its very reality and its continued existence, first upon the presence of others who have seen and heard and will remember, and, second, on the transformation of the intangible into the tangibility of things. Without remembrance and without the reification which remembrance needs for its own fulfilment and which makes it, indeed, as the Greeks held, *the mother of all arts*, the living activities of action, speech, and thought would lose their reality at the end of each process and disappear as though they never had been" (emphasis added).

[52] *Ibid*. 198.

[53] Paul Ricoeur, *Figuring the Sacred: Religion, Narrative, Imagination*, trans. D. Pellauer, ed. M.I. Wallace, (Minneapolis: Fortress Press, 1995), p. 290.

# Lessons from the "Yellow Vests" movement

Alain Badiou

What should we be thinking, or what passes for thinking without running around barking, about the violent and sustained contradistinction between the Yellow Vests movement and state powers, led by the diminutive President Macron?

I stated clearly, right after the final round of the presidential elections, that I would neither rally to the cause of Marine Le Pen, captain of the parliamentary extreme right, nor to Macron, who was leading a "democratic coup d'état", as a pseudo-reformer at the behest of Big Capital.

I shall certainly modify nothing in my judgment of Macron. I have nothing but disdain for him. But what to say about the Yellow Vests movement? I must admit that, in its initial stages last year, I discerned nothing in its make-up, its assertions or in its behaviour that was *politically* novel or progressive.

I can affirm, without hesitation, that there are numerous reasons for the revolt and one can thus consider the movement as legitimate. I am only too aware of the desertification of the rural landscape; the mournful silence of the desolate streets in small and even in middle-sized towns; the increasing estrangement of the masses from public services, which are being privatised bit by bit: dispensaries, hospitals, schools, post offices, railway stations, telephone services. I am only too aware that impoverishment, at first stealthily, then rapidly, is affecting a population which, forty years ago, enjoyed a buying power that continuously improved. There can be no doubt that new and worsening forms of fiscal creep are partially to blame for this impoverishment. I cannot fail to be aware that survival for whole families has become a struggle, especially for the many women who are particularly active in the Yellow Vests movement.

To sum up: in France, there is great unhappiness among those we can call working people, mainly in the provinces and with modest salaries, and among the middle class. The Yellow Vests movement is a striking manifestation of this unhappiness in the form of active and violent revolt.

The historic and economic reasons for this uprising are crystal clear for all those who wish to pay attention to them. The Yellow Vests believe their miseries originated forty years ago: on the whole, the eighties marked the beginning of a long capitalist-oligarchy counter-revolution, wrongly referred to as "neo-liberal" when it was simply "liberal". This meant a return to the savagery of nineteenth century capitalism. This counter-revolution manifested itself as a reaction to the ten "Red years" – more or less from 1965 to 1975 – whose French epicentre lay in the May 1968 protests and whose global epicentre was in the Chinese Cultural Revolution. It was impelled further by the collapse of the world-wide Communist project in the Soviet Union and then China: nothing in the world then stood in the way of capitalism and its profiteers, especially the transnational billionaire oligarchy, exercising unlimited powers.

Of course, the French bourgeoisie latched onto this counter-revolutionary movement. The activities of the "new philosophers" even provided intellectual and ideological capital while they saw to it that the Communist Idea was run down everywhere as being not only "false" but even criminal. A number of intellectuals, renegades of May 1968 and of Maoism, became the conscientious watchdogs of this

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Alain Badiou, "Lessons from the 'Yellow Vests' movement", pp. 14-19.

bourgeois and liberal counter-revolution, using fetishist and anodyne terms like "liberty", "democracy" or "our republic".

All the same, the situation in France, from the eighties until today, slowly went downhill. This country can no longer claim to be what it was during the "glorious thirty years" of post-war reconstruction. France is no longer a strong world power, a conquering imperial power. It is compared nowadays to Italy or even Greece. Competition forces it back everywhere, its colonial returns are coming to an end and, to keep them up, it has to pursue many costly and risky military operations in Africa. What is more, since labour costs for workers, for example in Asia, are notably lower than in France, larger industries are slowly but surely decamping to foreign parts. This massive de-industrialisation brings in its wake a kind of social ruin which extends to entire regions, such as Lorraine with its steelworks or the North with its textile factories and coal mines, right up to the suburbs of Paris, which are abandoned to real estate speculation on the endless wasteland left by decaying industries.

The consequences are that the French bourgeoisie, with its dominant oligarchy of shareholders on the CAC 40, can no longer keep a politically servile middle class in employment, as it had done previously, especially before the 2008 crisis. This middle class has actually been the historical cornerstone for the pre-eminence of the various electoral manifestations of the right, a pre-eminence directed against unionised workers in the large industrial complexes, who had been won over to communism during the '20s and, of course, during the period from 1980 to 1990. This explains the present uprising by a large and grassroots part of the middle class, who feel they have been abandoned, against Macron as the agent of local capitalist "modernisation". This modernisation involves turning the screws ever tighter, economising, promoting austerity, privatising without any concern for the well-being of the middle class, a concern that was the price for their consent for the prevailing system thirty years ago.

The Yellow Vests, in the face of undeniable impoverishment, wish to extract a steep price for that consent. That is absurd, though, because, firstly, Macronism is exactly the expected result when the oligarchy had less need of the costly support of the middle classes after the waning of the communist danger; and, secondly, it can no longer afford to pay for electoral servility on the same scale as before. Logically, therefore, advances are made disguised as "necessary reforms" to achieve authoritarian politics. A new form of state power will be the platform for robust "austerity", extending from the unemployed and workers right into the lower ranks of the middle class. This is handy for the true masters of this world, namely the principal shareholders of large groups in industry, commerce, raw materials, transport and communication.

In the *Communist Manifesto*, written in 1848, Marx had already assessed this kind of scenario, and spoke precisely about what we now call our Yellow Vests. He wrote this: *The middle class, small manufacturers, retailers, artisans, and peasants struggle against the Bourgeoisie because they pose a threat to their existence as middle class. They are not revolutionaries but conservatives: moreover, they are even reactionaries; they want history to go into reverse gear.*

The demands of today are ever more shrill, as the French bourgeoisie is no longer able to keep up, let alone increase, its buying power in the wake of developments in global capitalism. The Yellow Vests, it is true, are "in combat with the Bourgeoisie", as Marx put it. But they are struggling for the restoration of an antique and worn-out order, not to achieve a new social and political order, which, since the nineteenth

century, goes by the names of "socialism" or, especially, "communism". Because, over almost two centuries, everything that was not identified as having a more or less revolutionary bent, was, quite rightly, associated with capitalist reaction. In politics there were only two major directions. We must indisputably return to that certitude: two paths, in politics, two only, and no specks of "democratic" dust of pseudo-trending, under the aegis of a self-declared "liberal" oligarchy.

This general assessment allows us to examine the real characteristics of the Yellow Vests movement. The, as it were, spontaneous nature of the movement, not impelled by forces outside the mainstream of the uprising, is actually, as Marx suggested, "reactionary" but in a more modern sense: the subjectivity of the movement could be called individual populism, mobilising personal rage against new forms of slavery now imposed on everyone by the Dictatorship of Capital.

That is why it is wrong to say, as some do, that the Yellow Vests movement is intrinsically fascist. No. Fascism, more often than not, mobilises identity, nationality or racial impulses, with great discipline, even militaristically. In the present disorganised uprising, there are all sorts of people from all sorts of trades, as is always the case amongst the urban middle class, and they are, therefore, for this reason alone, individualistic, and they often and sincerely consider themselves to be democrats and have faith in the law of the Republic, which today cuts no ice at all. In fact, for the great majority, their true political convictions are fickle.

In this movement as manifested in its initial "pure" form, I can find nothing that appeals to me, that pricks my interest, that mobilises me, except for its rare collective action, its commands and its repeated slogans. Its public pronouncements, its random disorganisation, its style of action, its perceived lack of general philosophy and strategic vision means it is wholly without political inventiveness. I am unconvinced by its hostility to all manifestations of leadership and its obsessional fear of centralisation and of unified association. This fear conflates democracy with individualism as do all modern reactionaries. There is nothing in its nature that makes it a long-term progressive, innovative and all-conquering force against the odious and miserable Macron.

I am aware that opponents who are to the right of the movement, especially amongst the renegade intellectuals, those ex-revolutionaries who became the praise-singers of police powers once the oligarchs and the state had offered them a platform for their liberal chit-chat, accuse the Yellow Vests uprising of anti-Semitism or homophobia or, worse still, of "being a danger to our Republic". I am also aware that, if there are traces of all that, they do not arise from a shared belief, but through the presence of active infiltration of the extreme right into a movement so confused that it is vulnerable to all sorts of manipulation. But let us not deceive ourselves: clear signs, notably of short-sighted nationalism, of latent hostility towards intellectuals, of demagogic "democratism" in the crypto-fascist style of "the people against the élites" and of random pronouncements should make one wary of considering what we see today as a global phenomenon. Let's face the fact that gossip-mongering in the "social networks", which passes as objective fact for the majority of the Yellow Vests, means that the movement seethes with ludicrous conspiracy theories throughout.

There was once a proverb: "All that moves isn't red." For the moment there is unquestionably no "red" in the Yellow Vests movement, and although it certainly "moves", all I see, besides yellow, is the tricolore, which has always been a bit suspect in my eyes.

Naturally, the ultra-left, the antifas, those woken from their sleepwalking, those folk who are always jumping on the bandwagon of a "movement", and those gloating at the "imminent insurrection" all celebrate the democratic pronouncements (that are actually short-sighted and individualist), ushering in the cult of decentralised gatherings and imagine they will soon be re-storming the Bastille. But this cheerful carnival fails to impress me: over ten years and more, it has led to terrible setbacks which have cost people dearly. The "movements" in contemporary history, from Egypt and the "Arab Spring", to Occupy Wall Street, to the central squares in Turkey, to Greek riots, to the indignities suffered all over in Greece, to the outrage of Nuit Debout and from Nuit Debout to the Yellow Vests and a whole lot more, all seem wholly to ignore the implacable and stark rules that govern the world today. Once the exhilaration of the movements, the demonstrations, and the miscellaneous occupations has dissipated, people are astonished at how hard it is to make a mark, how they are always a failure, and how they have merely contributed to making the opposition more determined. The truth is that they have not even scratched the surface of true adversarial action for finding a different, universally applicable means of confronting contemporary capitalism.

Actually, nothing is more important than being aware of the lessons to be learnt from this sequence of "movements", including the Yellow Vests. It can all be summed up in a single maxim: a movement which unites only around what is negative will either fail and result more often than not in a situation worse than that which obtained at the outset, or it will divide in two, giving rise to the emergence from its creative energy of an affirmative political creed truly opposed to the dominant order underpinned by disciplined organisation.

All the movements of the past few years have followed almost the same, and it must be said, catastrophic, trajectory wherever they arose and however long they lasted:

— at first, a unified front against the government in power. This is the "liberating" moment: "Mubarak must go!" to "Let's party with Macron".

— unity maintained by a complementary, wholly negative watchword, after a period of anarchy and disorder when its sustainability begins to teeter for the masses: watchwords like "down with oppression!" or "down with police violence!" at which point the "movement", in the absence of real political content, has nothing to rely on but its wounds;

— unity undone by the electoral process in which one part decides to participate, the rest, not, without any real political substance backing those in favour or those against. At the time of writing these lines, the electoral polls give Macron the same score that he had before the Yellow Vests emerged and the overall vote for the Right and the Extreme Right more than 60% and the only hope for the defunct left, La France Insoumise, 7%;

— as a result, through the electoral process, something worse comes to power. Either the incumbent coalition wins, and with a crushing majority (which was the case in May 1968 in France); or a "new" formation, hostile to the movement and even less agreeable, takes the laurels (in Egypt, first the Muslim Brotherhood and then the army under Al Sissi; Erdogan in Turkey); or the left-wing chatterers are elected but immediately surrender their substance (like Syriza in Greece); or the extreme Right wins on its own (the case of Trump in the USA); or a group which emerges from the movement joins forces with the extreme Right to secure itself a place at the

government table (the case in Italy where the Five Star movement allied itself with the Fascistoids of the Northern League). Let's face it, the latter is possible in France if an organisation claiming to emerge from the "Yellow Vests" works out an alliance with Marine Le Pen's electoral sect.

That is because unity nourished by the negative is in no condition to create policy and is bound to be steamrollered in any battle in which it engages. Beyond proposing something more than denial, the enemy must be identified and what it means to launch something different must be understood – something, anything, truly different to what the enemy is doing. This implies the requirement for a minimum of true knowledge of what contemporary world capitalism means, of how France, in its decadence, fits in, of solutions of the communist type to the problems of ownership, the family (inheritance) and the State and of measures to be implemented immediately to reach these solutions, such as an accord, informed by an historical perspective, on the forms of organisation appropriate to meet these needs.

Only an organisation established on new ground can achieve this and be capable, at some time in the future, of rallying a part of [the middle classes] which is in such disarray. It is also possible, as Marx wrote, that the middle class *will act in a revolutionary way for fear of being sucked into the Proletariat: they will thus defend their future interests and not their present interests; they will abandon their own attitudes for those of the proletariat.*

In this, there is a precious pointer to a partly positive conclusion, but on one principal issue: in the Yellow Vests movement there doubtless lies a potentially very interesting Left-wing minority: those who are activists in the movement who have actually discovered that they need to consider their future and not their present objectives and to find a future way to rally around something more than their persistent grievances concerning buying-power, taxes or parliamentary reform.

This minority would consist of the real people inasmuch as it reflects a constant political conviction of there being a way truly hostile to the liberal counter-revolution.

Naturally, on their own, the Yellow Vests as they are now could never represent "the people" without mass incorporation of a new proletariat. Otherwise, that would mean reducing the least advantaged of the middle class simply to reclaim its former social status before its decline. To be "the people" in today's politics, the masses must mobilise together with a strong core contingent of the nomadic proletariat of our suburbs; a proletariat from Africa, Asia, Eastern Europe and Latin America. It must give clear evidence of its break with the dominant order. Firstly, it must display visible signs like the red flag instead of the tricolore. What is declared in tracts and on banners must give directives and slogans which show its antagonism to the order. Its minimal demands should be, for example, the complete ending of privatisations and the undoing of all that has been undertaken since the eighties. Its central theme should be collective control over the means of production, the banking system and all public services (health, education, transport, communication). In short, the political actors should not be happy merely to exist by gathering a few thousand malcontents, even if there are at my estimation, one hundred thousand of them, and to demand from what they, quite rightly, call a detestable state, that it gives you "consideration", that it organises referendums (for what? I ask), improves maintenance of local services and raises your buying power a little and lowers taxes.

After all its antics and bluster, the Yellow Vests movement could hereafter become very useful, from the point of view of its future, as Marx said. If we actually

confine ourselves to the minority of activists in the movement who, through the power of meeting, acting and discussions, have intuitively understood that they need to develop an overarching vision, on the world stage, not just for France, and identify the true source of their discontent, namely the liberal counter-revolution, and would thus be ready to construct step-by-step a new force, then these Yellow Vests will ponder their future and doubtless contribute to the existence of a political people. That is why we need to engage with them, and, if they consent, organise with them meetings where the first principles will be constituted for what we may call, indeed what, to be clear, we must call, communism, yes, a new communism even if this word has been accursed and arcane over the past thirty years. The rejection of this word, as experience has shown, has been the signal for an unprecedented political retrogression, against which, unconsciously, all the "movements" of the recent past have risen up, including the better segment of the Yellow Vests: the militants who trust in a better world.

These new militants, in the first place, will lend their support to what I consider indispensable: the creation wherever possible of schools in large suburbs and little deserted towns, to teach and discuss unambiguously and lucidly, the laws of Big Capital and how to combat them under the aegis of a completely different political framework. If such a network of schools for red politics were to exist this would begin a movement which would be of true significance through its indirect power of enlightenment beyond the episode of "Yellow Vests against white Macron", towards a future and better episode.

*Translated from the French by Babrius Translation Services.*

~ *Collège international de philosophie, Paris* ~

# Sovereign terror, legal style, Giambattista Vico, and the military drone as rhetorical archetype

Ian E.J. Hill

**Introduction**

Here come the eagles. There go the locusts. The sky delivers the hand of God as well as fallen angels on their Hell-bound descent. We welcome the spring sunshine, and shelter from the cyclones. Rain gives life while space junk burns through the stratosphere. From above comes the invisible hand of capitalism, apportioning wealth and destitution, and manufacturing privileged oases alongside toxic ruins. Airplanes deliver emergency food-aid and tons of bombs. Gods and monsters dwell in deep space, so in the sky, as on earth, humanity can greet its most perfected and horrendous mutations. And from our airspace descends the topic of this article – drones. Drones, or unmanned aerial vehicles [UAVs], deliver figurative payloads that interconnect the political, religious, capitalistic, visual and visceral global society. Drones are marvels of technological achievement that make our movies more beautiful and our militaries more terrifying; they observe and record the world in exciting new ways while facilitating powerful new forms of surveillance. UAVs entertain recreational drone racers and UCAVs (unmanned combat aerial vehicles) disintegrate children. And as humanity faces this somewhat new aerial power, drones must be reconciled with conventional social institutions, including the powers of law and rhetoric, which provide the interpretive framework for this essay's assessment of the relationship between drones and style.

I argue that stylistic patterns of archetype usage reveal how societies understand drones and that differing rhetorical conceptions of the archetype of airborne power influence the social institutions that regulate UAVs. Thinking stylistically – through figures and tropes (*elocutio*) – humanity has configured itself as a global drone society. By drone society I mean that drones manifest a specific contemporary worldview that, with the cognitive assistance of rhetorical tropes, is imbued with historical knowledge of airborne power. People fall into typical antithetical patterns of depicting the positive and negative forces that descend from the sky, and drones, too, are understood for their beneficial and dangerous capacities according to repetitive commonplace tropes that are connected to the intellectual, ethical, technological, and political capacities of drones to wield a trinity of powers – observation, authorisation, and execution. Drones, as institutionalised manifestations of the archetype of airborne power, surveil, police, and punish, delivering law, just and unjust, unto populations. Thereby they enter into a multiplicity of legal structures, judicial and extrajudicial, from banning drone flights over crowds to facilitating lawless assassinations. As drones enter into legal understanding via rhetoric and embodied experience, the stylistic patterns of drone discourses interconnect with other historical, archetypal, and stylistic conceptions of airborne dangers and panaceas. In this way, patterned, stylistic depictions of drones perpetuate an ancient thought pattern – fear of death delivered with terrifying force by omniscient and omnipotent sources, countered by worship of the life-giving foundational principles of authority that support institutions, including religions, governments, and

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economies. As a counterforce, these institutionalised powers necessitate and compel resistance to drone society.

In order to analyse the central archetype of drone society, I invoke Giambattista Vico's theory of "poetic wisdom". Vico provided a historical methodology for interpreting how fundamental elements of style – metaphor, metonymy, synecdoche and irony – reveal the origins, status quo and future trajectory of societies via the transformation of the language used to describe, narrate and connect its vital archetypes. According to Vico, "popular traditions [and myths] always have a public basis in truth, which explains their birth and their preservation for many years by entire peoples."[1] Popular drone truths, or drone common sense, exemplify how and why airborne power possesses authoritative force. The combination of common sense and authority provides the foundational logic and ongoing institutional legitimation of drones.

Although rhetoric undergirds all of his work,[2] Vico is conducive to an analysis of style, legality and weapons because not only is law "paradigmatic for Vico" and his rhetorical theory,[3] but his historicist perspective facilitates linking the past and present. Looking backward, Vico understood ancient Greek rhetoric as the origin-point of both a "universal right" and subsequent legal systems.[4] And cognisant of the co-development of military-research sciences and law as, respectively, fundamental instruments and a systematic "complementary aid" for inquiry,[5] he presciently understood the militaristic trajectory of modern advanced study, while also identifying a specific correlation between successful warfare and successful eloquence.[6] In these ways, Vico facilitates understanding of how durable stylistic patterns perpetuate drone society's thinking about airborne power, and reveals a particular legal style characterised by figurative vagueness.

I begin by elucidating how Vico provided a methodology of rhetorical criticism.[7] Then I use that methodology to analyse some of drone society's commonplace tropes for the archetype of airborne power to demonstrate how institutions reflect common sense rhetoric and vice versa. I conclude by suggesting that Vico's methodology is generalisable to myriad topics and worthy of uptake.

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[1] Giambattista Vico, *New Science: Principles of the New Science Concerning the Common Nature of Nations*, 3rd ed., trans. D. Marsh, (New York: Penguin, 2001), pp. 81 and 346.

[2] David L. Marshall, *Vico and the Transformation of Rhetoric in Early Modern Europe*, (New York: Cambridge University Press, 2010).

[3] Catherine Hobbs, *Rhetoric on the Margins of Modernity: Vico, Condillac, Monboddo*, (Carbondale and Edwardsville: Southern Illinois University Press, 2002), p. 62.

[4] Giambattista Vico, *Universal Right*, trans. and ed. G. Pinton and M. Diehl, (Atlanta: Rodopi, 2000), pp. 4-5.

[5] Giambattista Vico, *On the Study Methods of Our Time*, trans. E. Gianturco, (Ithaca: Cornell University Press, 1990), pp. 11-12.

[6] Giambattista Vico, *On Humanistic Education (Six Inaugural Orations, 1699-1707)*, trans. G. A. Pinton and A. W. Shippee, (Ithaca: Cornell University Press, 1993), pp. 108-122.

[7] For overviews of Vico's rhetorical theory, see Marshall, *Vico and the Transformation of Rhetoric*; Michael Mooney, *Vico in the Tradition of Rhetoric*, (Princeton: Princeton University Press, 1985); and John D. Schaeffer, *Sensus Communis: Vico, Rhetoric, and the Limits of Relativism*, (Durham: Duke University Press, 1990).

**The Emergent Methodology of Vico's "Poetic Wisdom"**

Vico's theory of "poetic wisdom" provides a somewhat idiosyncratic model of rhetorical criticism. Poetic wisdom demonstrates how the "four master tropes"[8] validate the thought patterns that formulate interpretive, archetypal worldviews. From analyses of the master tropes in action, a methodology emerges from Vico's *New Science* that shows how collective common sense and style configure drones as the contemporary iteration of the archetype of airborne power.

In short, Vico's critical methodology uses etymology, analogy and *ingenium* to explicate how a society's collective common sense, or *sensus communis*, reflects that society's institutions via rhetoric and vice versa.[9] *Ingenium* is the most vital aspect of the methodology, and likely the least familiar. Vico defined *ingenium* as "the faculty that connects disparate things and diverse things".[10] The sharpest thinkers, according to Vico, "are able to find a likeness or ratio between things very different and far removed from one another, some way in which they are cognate, or who leap over the obvious and recall from distant places the connections appropriate for the things under discussion."[11] Together etymology, analogy, and *ingenium* divulge imaginative, unexpected, and revelatory historical connections. *Ingenium*, first and foremost, "is the mother of poetic inventions" and therefore the driver of the poetic wisdom that defines drone society's common sense.[12]

Vico's concept of poetic wisdom focuses on the multidirectional thinking and abstract reasoning that rhetoric and the master tropes empower. Vico used his facility with *ingenium* and tropes in *New Science* to survey world history, and by doing so, he demonstrated the interaction of commonplace rhetoric and common sense. Vico defined *sensus communis* as both the "unreflecting judgment shared by an entire social order, people, nation, or even all humankind" and "the guiding standard of eloquence".[13] When common sense matches common rhetorical patterns, the institutions and other works that develop in that period reflect a society's poetic wisdom. For Vico, *New Science's* "master key" unlocks the "poetic wisdom" materialised by the origins, structures and transformations of societies such that rhetoric provides the empirical evidence of collective human understanding.[14] "All the primary figures of speech are corollaries of poetic logic", he wrote, referring to the way that languages reflect thinking and vice versa. The connections between thought and style become collective wisdom when the same concepts appear again and again in different languages across time and space to form similar social institutions (e.g. families, religions, governments). Inventive connection-making reveals a "history of human ideas", adds words to the universal "conceptual dictionary of human social institutions" and underpins a "philosophy of authority".[15] Thus, historical usage of archetypes, novel drone tropes, and institutional formations provide the evidence to make assertions about drone-society thinking.

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[8] Kenneth Burke, *A Grammar of Motives*, (Berkeley: University of California Press, 1969), p. 503.
[9] Vico, *New Science*, p. 80.
[10] Giambattista Vico, *On the Most Ancient Wisdom of the Italians Unearthed from the Origins of the Latin Language*, trans. L. M. Palmer, (Ithaca: Cornell University Press, 1988), p. 96.
[11] Vico, *Most Ancient Wisdom*, p. 102.
[12] *Ibid.* 162; and Vico, *Study Methods*, p. 13.
[13] Vico, *New Science*, p. 80.
[14] *Ibid.* 24.
[15] *Ibid.* 128-131.

Vico's methodology hence entails evidencing the master tropes to make connections that demonstrate how social institutions emerge from rhetoric and how rhetoric transforms institutions. Using *ingenium*, as described by Vico scholars, empowers critics to "make connections among disparate elements" with a type of "patterning" that "constructs knowledge" in conjunction with the full range of topics and the master tropes.[16] *Ingenium* creates poetic wisdom when "one image seeds the next; one word, one symbol, one myth leads to another, not through any logical extrapolation but through an endless social dialectic between public language on the one hand and a culture's changing sense of self on the other."[17] These "great chains of images" and "etymologies … function always as parts of a great puzzle, as means by which disparate items are bound together or things unknown produced from what is familiar or near at hand."[18] In the end, these "linguistic expressions may be used to determine the world view of a historical period".[19] Thus, the master tropes function as the evidence to make large etymological, theoretical, symbolic, and argumentative leaps in order to explain social transformations. So, more than a "reductive" limiting principle that "impoverishes" the concept of rhetoric,[20] concentrating attention on the master tropes opens up the entire global, historical, empirical database of language, liberating critics by encouraging them to delve into the numerically sublime network of potential linguistic connections. A critic can employ Vico's rhetorical methodology by locating a topic, and seeking understanding of it via inventive assertions about the historical relationships between institutional power, common sense and style.

An instructive example of how Vico's critical methodology works and how he envisioned it functioning is evidenced by *New Science*'s frontispiece, which serves as a type of Enlightenment-era infographic of the book's argumentation.[21] Observe the interconnections of the frontispiece's objects and concepts.[22]


[16] Hobbs, *Rhetoric on the Margins of Modernity*, p. 90.
[17] Mooney, *Vico in the Tradition of Rhetoric*, p. 231.
[18] *Ibid.* 232 and 195.
[19] Lucia Palmer, in Vico, *Most Ancient Wisdom*, p. 38.
[20] Brian Vickers, "The Atrophy of Modern Rhetoric, Vico to De Man", *Rhetorica: A Journal of the History of Rhetoric,* 6(1), 1988, pp. 28-29.
[21] Vico, *New Science*, p. 1.
[22] Giambattista Vico, *Principj di Scienza Nuova.* Retrieved from: https://books.google.ca/books?id=yvRCmhGR3CYC&printsec=frontcover#v=onepage&q&f=false [Accessed 17 October 2019].

All the elements of the frontispiece are metaphoric, synecdochic and metonymic representations of human society. Among many other tropes, readers observe the eye of God (synecdoche) radiating the ray of providence (metonymy) onto metaphysic's (metonymy for Vico's axioms, postulates, and definitions) breastplate jewel (metaphor). Providence reflects into Homer (an archetype), the founder Greco-Roman culture, culture that is symbolised by a series of visual metaphors collected at the bottom of the image to represent institutions such as medicine, government, religion, law and language. These tropes connect the divine to the human, ancient prehistory to Vico's time, and ancient Greek to the vernacular terms each reader of *New Science* uses to name these objects. The whole image elucidates the inherent connection between rhetoric and universal, collective common sense, or poetic wisdom. Yet, as much as it explicates *New Science*, the frontispiece is a thoroughly ironic construction of society. This Eurocentric image subverts his arguments about universality even as ironic *ingenium* still connects them to the world's cultures. Vico's methodology thus connects far-flung trope to far-flung trope to interpret the entries in his universal dictionary, which would include UAV as a recent addition.

Piracy, whose archetypal powers arise from the depths rather than descending from above, further exemplifies Vico's methodology. To explain piracy, Vico began with the metaphorical source of pirate power, Neptune, whose fundamental importance comes from the pre-historical, ubiquitous coining of words for water as another entry in humanity's universal dictionary. As Vico explained, people "at first, pointing mutely … believed they interpreted [things] as the substances of the sky, earth, and sea, which they imagined to be deities; and, trusting the truth of their senses, they believed they were gods."[23] Being a powerful entity that controls weather patterns, tides, tsunamis, and the fates of all sea-goers and shoreline dwellers, "Neptune is portrayed as armed with the trident he used to make the earth quake", Vico noted, and "with this trident, Neptune made people's cities, *terre*, quake in fear of his raids."[24] Vico asserted that "fear of divinity … is the first and most fundamental basis of a commonwealth."[25] Vico thereby linked divinity and sovereignty via the trident/weapon metaphor while *terre* established the antithesis between sea and land. Two opposed sovereign domains entailed competing divinities, asymmetrical arsenals, and differing loci of jurisprudence. By invoking the land/sea dichotomy, Vico moved into a consideration of pirates as a more specific manifestation of "inhospitality" as the "basic principle of the ancient law of war", which both dictated seeing "foreigners" as "perpetual enemies" and justified raids against enemies "by land and sea".[26] Thus, with the prehistoric deification of water and earth, the bases of sovereign power, law and warfare ensued before common sense us vs. them binaries became codified in the diplomacy and international laws that protect nations from each other and from pirates,[27] if not from hurricanes, maelstroms, and other materialisations of Neptune's trident.

Homer, as the central example in *New Science*, synthesises Vico's methodology. Homer reflected the common tropes of his era that over time became archetypal, and

[23] Vico, *New Science*, p. 158.
[24] *Ibid*. 284.
[25] *Ibid.* 280.
[26] *Ibid.* 285-288.
[27] Alessandra Beasley Von Burg, "Caught Between History and Imagination: Vico's Ingenium for a Rhetorical Renovation of Citizenship", *Philosophy and Rhetoric,* 43(1), 2010, pp. 26-53.

thereby Homer also became a model archetype.[28] By modelling archetypes, Homer proved foundational for Greek society's collective understanding of both itself and its institutional rationale. After Homer narrated the *Illiad* and the *Odyssey*, Greeks could "imagine human behavior only in terms of the striking archetypes of their illustrious exemplars", such as Achilles, Odysseus, Agamemnon, Helen, etc.[29] Over millennia innumerable tropes have adhered to these heroic archetypes.[30] Vico explained that generalisations about personality types depicted in the two popular tales concretised into foundational principles via constraints introduced by poetic language. He wrote "poetic archetypes … represent the *manner of thinking of entire peoples*" by "magnify[ing] the ideas of particular things" and imagining ways to express them as general maxims.[31] In this way, poetic archetypes provide the foundational trajectory for the co-development of rhetoric and society. They do not disappear. Rather, they attain, maintain and lose social power over time as new tropes transform the original models. Homer thus initiated a process that generated common sense out of poetic particulars. In turn, Greek nationalism developed from Homeric archetypal metonym, "because these Greek peoples were themselves Homer".[32] Homer the archetype therefore became valorised for his synecdochic relationship to the whole of the Greek population, his metaphorical representation of history, and his mythic capacity to metonymically switch between being the cause of Greek society and an effect of it. This foundational valorisation of Homer, though, was ironic for Vico because Homer was just a random poet-commoner who used commonplace tropes to narrate the commonplace topics of his era.[33] Greek *doxa* remains rooted in Homeric narrative, even as contexts have changed, and therein lies the particular Greek "conceit of the nations" or its amplified nationalistic ego.[34]

Even though a generic archetype remains perpetually vital, the name and form of archetypes keep transforming via humanity's multitude of languages and the proliferation of tropes within each language. From one perspective, Vico held a somewhat traditional view of archetypes, defining them as "certain *imaginative general categories*", "what myths are in essence" and "simply the most complete ideas of human types in each genre".[35] They are "imaginative categories or universals, to which … men could assign all the particular species that resembled them."[36] Yet, Vico emphasised that the functional role of archetypes is to move thought back and forth between the general and the particular, the whole and the parts. "Philosophical statements approach the truth as they ascend to universality. Poetic statements gain certainty as they descend to particulars", Vico wrote.[37] Tropes, and especially metonymy and synecdoche, aid this movement. As human inventions – from technologies to personality types – become the archetypes that infiltrate commonplaces, their designs provide the conventional, patterned style of their social

[28] Vico, *New Science*, p. 381.
[29] *Ibid.* 365.
[30] Mari Lee Mifsud, "The Figure of Homer in the Rhetorical Structure of Vico's Pedagogy", *New Vico Studies,* 20(1), 2002, pp. 37-44.
[31] Vico, *New Science*, p. 367.
[32] *Ibid*. 382.
[33] *Ibid.* 355-363.
[34] *Ibid.* 76.
[35] *Ibid.* 24.
[36] *Ibid.* 93.
[37] *Ibid.* 95.

embedded-ness by indicating how tropes interconnect them. Many topics, artefacts and archetypes remain static, even as new topics, artefacts and archetypes emerge. Tropes empower understanding of the interconnectedness of the model archetypes and their new impermanent iterations. In this way, of all the theorists of archetypes, Vico is perhaps closest to Marshall McLuhan, who defined an archetype as "retrieved awareness or consciousness" and "consequently a retrieved cliché" to which "other archetypes' residues adhere".[38] Over time, archetypes pick up and cast off attributes according to differing tropes. The master tropes render the same experience into different words, names and phrases that in turn metaphorically, synecdochically, metonymically and ironically spin off new variants that add polysemy and nuance to old archetypes.

Thus, archetypes facilitate the use of the master tropes, the tropes in turn reify archetypes, and Vico has provided a somewhat eccentric methodology for rhetorical criticism that mobilises etymologies, analogies and *ingenium* to reveal how societal institutions form according to underlying rhetorical patterns. The methodology developed in *New Science* might seem chaotic and unbounded, but it is exactly this multifaceted characteristic of Vico's version of philological empiricism that explains how any iconic person or object can accrue so many different meanings, interpretations and judgments. Hence, I now turn to an analysis of UAVs and drone society's version of the archetype of airborne power. Like the archetype of Homer both reveals a dense network of tropes that have defined what it means to be Greek and represents the best and worst of human behaviour, the archetype of airborne power as materialised by UAVs reveals a dense network of tropes that interconnect the people and institutions that attempt to manage drone society's laws and ethics.

**Drone-Society Style: Tropes, Surveillance and Extra-Judicial Killing**

Drones, with their capacities to surveil and destroy, revise an archetypal symbol that fits well within the analytical domain of *New Science*. Drones connect to the frontispiece's sword, divine omniscient eye, and the authority established by their iconic proximity. Vico wrote that the frontispiece's sword "represents the public wars waged by the cities, which originated in brigandage and piracy" and is "supported by the fasces", a symbol for administrative authority.[39] The frontispiece sword and fasces symbolise the interconnection of weapons to societies and their legal structures, while also indicating that rival populations' power rests upon both military might and self-centred, nationalistic conceptions of justice.[40] By contemporary metaphorical extension, the sword symbolises drones and the fasces symbolise contemporary constitutions, treaties and other legal documents. This visual analogy alludes to the ways that the master tropes connect all drone-society stakeholders to each other across demographics, economies, political hierarchies and locations, as do all analogous weapons and other airborne dangers and panaceas in a vast terminological and conceptual network of surveillance and "rhetoricoviolence".[41] As drone society's tropes depict the archetype of airborne power, their proliferation shows what different populations think about drones and reveals the sources of drones' legitimacy

[38] Marshall McLuhan & Wilfred Watson, *From Cliché to Archetype*, (New York: Viking, 1970), p. 21.
[39] Vico, *New Science*, p. 28.
[40] *Ibid.* 16 and 28.
[41] Heather Ashley Hayes, *Violent Subjects and Rhetorical Cartography in the Age of the Terror Wars*, (London: Palgrave Macmillan, 2016), p. 34.

and illegitimacy. I therefore suggest that the tropes that inform drone common sense configure the authority of governmental, legal and social institutions and vice versa. Drones possess the power of their own holy trinity – omniscience (observation), omnipotence (policing) and killing (sovereignty) – which metaphor, metonymy, synecdoche and irony elucidate as contested drone common sense.

The most common UAV metaphor – "drone" – comes from Middle English and refers both to male bees whose sole task is impregnating queens and to monotonous buzzing sounds. The most eloquent drone wisdom, once connected to its archetypal model, becomes the template for all the imitative, banal bee clichés that follow therefrom. Vico noted that "when people can form no idea of distant and unfamiliar things, they judge them by what is present and familiar",[42] and so buzzing, swarming bees have come to represent black-boxed drone technologies. Contemporary drone bee and bee-vision metaphors connect the divine power of omniscience to the capacities of drones to surveil and record the world, so the commonplace tendency to call UAVs drones makes sense when people see them flying about mindlessly collecting data, like bees collecting pollen.[43]

As drone operators record the world for monetisable data, like scouts surveilling fields for blooms, drone businesses seek distant markets desirous of drone delivery services for everything from dry goods to human organs. While common usage of drone has become modified to now connote mindless workers rather than impregnators or idlers, the monotonous buzzing sound of the bees still fits its etymological sonic origins. These mundane bee-like UAV attributes have necessitated and codified a number of standard non-military drone guidelines that are iterated in numerous government documents, like India's "Digital Sky" initiative: thou shalt not fly drones near airports and international borders.[44] Thus, the drone metaphor helps to mandate that drone operators must work within standard legal protocols at the same time drone operations, sometimes mindless, perturb the limits of changing regulations.

Drone cameras, sometimes regulated but often not, reimagine the world through bees' eyes as a type of "drone vision".[45] Drone vision gets earthbound humans to see the world as drones do, as in the infamous grainy images of US extrajudicial assassinations in the Middle East that might, if distribution spreads, increase public demand for accountability for drone warfare.[46] But drone vision can see in high resolution too, providing novel, beautiful cinematographic perspectives of, say, Rift Valley waterfalls or bombed-out Aleppo. Drone vision enlivens and enhances our films, amateur videography and journalism by emplacing the viewer in a bee-like aerial position that increases the amount of available visual data. Conversely, with its "dull repetition, indolence of movement, and lacunas and banalities within visual narrative", low-quality and repetitive drone footage might be

[42] Vico, *New Science*, p. 76.
[43] For an introduction to the rhetorical implications of surveillance, see the *Surveillance/Rhetoric* issue of *African Yearbook of Rhetoric*, 3(1), 2012.
[44] Retrieved from: https://digitalsky.dgca.gov.in [Accessed 17 October 2019].
[45] Daniel Greene, "Drone Vision", *Surveillance & Society,* 13(2), 2015, pp. 233-249.
[46] Roger Stahl, "What the Drone Saw: The Cultural Optics of the Unmanned War", *Australian Journal of International Affairs,* 67(5), 2013, pp. 659-663.

just plain boring.[47] Whether exhilarating or boring, though, video and photography enthusiasts can see the world with metaphorical bee vision.

As a counterpart to drone vision, the apt blended metaphor "drone porn" connotes the voyeuristic pleasure introduced by UCAVs' recording and killing capacities,[48] and indicates that drone cameras are sophisticated enough to create erotic surveillance footage.[49] People knocking and shooting privacy-invading drones out of the sky demonstrates that most people do not want to be subjected to drone vision's gaze, which elucidates another commonplace drone principle that law has yet to well regulate: thou shalt not record me without my permission. Everyone's power to avoid getting "shot" with a drone camera would seem to validate shooting down drones. But, "don't shoot it out of the sky—report it", advised one British Columbia police officer, adding "if you want to shoot something, shoot it with your camera."[50] Apparently drone repellent mobilises surveillance technologies as neighbours become reconfigured as antagonistic spies. Yet, when drones threaten privacy, common sense dictates that individual rights to privacy trump any public right to surveillance. Drones are insect pests.

Beyond omniscient privacy invasion, all-seeing deities render judgments and inflict punishments according to the laws written in their name, and such is the case when drone surveillance intersects with drone violence. So rather than buzzing, the etymology of "drone" indicates, via Swedish and German etymologies, that to drone is to roar, or for a UAV, to announce its violence capacity.[51] David Gregory noted the "genetic pathways between WWII-era hornet/weapon metaphors and what the Pashtun now call the *machay*, the bees that have their own deadly sting."[52] Other common drone metaphors, such as "Reaper" and "Predator", further draw attention to the mindless, buzzing activity of worker-soldiers who serve a centralised authority, but who might deliver their sting without warning anytime one hears their approach. The buzz is "the sound of terror".[53] When drones impinge on foreign airspace, they focus attention on the bee's stinger and the judicial powers of injuring and authorising injury, especially as controlled by the most notorious user of UCAVs, the United States military.

Drone society's central metonymy involves the substitution of the causes and effects of drone warfare whereby American sovereignty (cause) represents the violence delivered by its Predators and Reapers (effects) and vice versa. Vico defined

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[47] Jessy J. Ohl, "Nothing to See or Fear: Light War and the Boring Visual Rhetoric of U.S. Drone Imagery", *Quarterly Journal of Speech,* 101(4), 2015, p. 614.

[48] Stahl, "What the Drone Saw", p. 663.

[49] Rhianna Schmunk, "Kathryn Redford, Vancouver Woman, Says Drone Peeped on her Sunbathing Topless", *The Huffington Post*, 14 August 2015. Retrieved from: https://www.huffingtonpost.ca/2015/08/14/kathryn-redford-vancouver_n_7990018.html [Accessed 17 October 2019].

[50] Sarah Gawdin, "Residents in B.C. City Complain about Drones Spying on Backyards", *The Columbia Valley Pioneer*, 27 July 2018.
Retrieved from: https://www.columbiavalleypioneer.com/news/residents-in-b-c-city-complain-about-drones-spying-on-backyards/ [Accessed 17 October 2019].

[51] "Drone", *Oxford English Dictionary*.

[52] Derek Gregory, "Lines of Descent", *Open Democracy*, 8 November 2011. Retrieved from: https://www.opendemocracy.net/en/lines-of-descent/ [Accessed 17 October 2019].

[53] Nasser Hussain, "The Sound of Terror: Phenomenology of a Drone Strike", *BostonReview*, 16 October 2013. Retrieved from: http://bostonreview.net/world/hussain-drone-phenomenology [Accessed 17 October 2019].

the somewhat flexible concept of metonymy as substituting cause for effect (and vice versa) and substituting an attribute of a thing for the name of a thing (and vice versa).[54] Specifically, "drone strike" and "targeted killing" metonymically condense the complex interactions of the US, Pakistan, Afghanistan, Yemen, Sudan and elsewhere, and the international laws and treaties that legitimate (or not) UCAVs. These metonyms connect destruction and bloodshed on the ground to the jurisprudence that is supposed to govern UCAVs. Even as other countries increase their drone programmes this metonym iterates and reiterates the common-sense association of UCAVs with the US's tens of thousands of War-on-Terror drone sorties. Blood on the ground, in Waziristan, for instance, is thus the effect of the US's technological and extrajudicial control of airspace, while the same blood comes to define the unethical character of US sovereignty.

The sovereignty/killing metonym contained within "drone strike" implicates American society's responsibility for its militarism. The US's UCAV programme has broken or stretched multiple domestic and international laws, including breaching the US Constitution's Fourth Amendment protections against illegal searches, bypassing the mandate for the US Congress to approve declarations of war, impinging on international borders and airspace without permission to carry out acts of war, assassinating its own citizens without due process (e.g. Anwar al-Awlaki and Samir Khan), and generally trouncing international standards for the conduct of war.[55] The US Air Force defined "air and space power" as "the synergistic application of air, space and information systems to project global strategic military power",[56] but drone strikes connect the UCAV programme to drone society's other key metonym – "targeted killing". As Paul Virilio has noted, "the violence of speed has become both the location and the law, the world's destiny and its destination."[57] With their combined powers of surveillance and violence, informatics and missiles, drones can become a type of remote constabulary that culminates in a brutal police raid reconfigured as targeted killing. The US's UCAV programme corroborates that the new airborne logistical powers of communication and killing unofficially undermine global legal structures with a novel, automated and remote police brutality, despite the Department of Defense's mandate to abide by international law of war protocols.[58]

The obvious way to observe the metonymic power of drone strikes and to define the encroaching imperialism of American sovereignty is to visit violent places, to descend from the height of generalisation into the philological particulars and listen to the common-sense testimony of victims. As Vico noted, when the truth is elusive, people "hold to what is certain",[59] and nothing is more certain than the blast of drone strike. For the foreign populations below American UCAV flightpaths, targeted killings and drone strikes have metonymically come to encompass almost the entire

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[54] Giambattista Vico, *The Art of Rhetoric (Institutiones Oratoriae, 1711-1741)*, trans. and ed. G. A. Pinton and A. W. Shippee, (Atlanta: Rodopi, 1996), p. 141.
[55] Martin S. Flaherty, "The Constitution Follows the Drone: Targeted Killings, Legal Constraints, and Judicial Safeguards", *Harvard Journal of Law & Public Policy*, 38(1), 2015, pp. 21-42.
[56] United States Air Force, *Targeting*, Air Force Doctrine Document 3-60, 2011, p. 111.
[57] Paul Virilio, *Speed and Politics: An Essay on Dromology*, trans. M. Polizzotti, (Los Angeles: Semiotext(e), 2006), p. 167.
[58] USAF, *Targeting*, p. 88.
[59] Vico, *New Science*, p. 451.

meaning of the US as a country. Khalid Raheem, a drone strike witness from Pakistan, testified that,

> "We did not know that America existed. We did not know what its geographical location was, how its government operated, what its government was like, until America invaded Iraq and Afghanistan … Now we are always awaiting a drone attack and we know it's certain and it's eventual and it will strike us, and we're just waiting to hear whose house it will strike, our relatives', our neighbors', or us. We do not know. We're just always in fear."[60]

In the drone-strike metonym, the effects of terror and killing represent the US's causal reliance on aerial attacks, eclipsing the US's territory, population and government in symbolic importance. When foreign populations understand the US via its UCAV programme, the indiscriminate mandate of targeted killing with drone strikes invites potential terrorist blowback. Peter Sloterdijk has noted that when terror and terrorism descend from the air to transform the sky into a battlefield with "assaults on the environmental conditions of the enemy's life", enemies "are helpless to counter" the "atmoterrorism" of war as it "becomes indissociable from an extra-judicial trial".[61] Drone violence thus symbolises American-style justice. As the lawless signifiers of the American regime, drone strikes and targeted killings motivate *Pashtunwali* – "revenge for the death of a close relative or fellow tribesman".[62] In circular fashion, the same metonymic relationship between cause (terrorism) and effect (the War on Terror) comes to represent the US's mass-mediated popular understanding of its relationship to the Middle East.

The certainty of drone violence also shapes the US's reactionary legal interpretation of the metonymy of drone strikes and targeted killings. On 12 December 2013, a General Atomics Predator approached the al-`Amri or al-Tisi family's wedding party's convoy in Aqabat Za'j, outside the city of Rad'a, Yemen. The drone operator launched a Lockheed Martin Hellfire Missile. And another. And another. And another. Twelve dead and fifteen injured. According to Abdullah Mabkhut al-`Amri, "we were in a wedding, but all of a sudden it became a funeral … We have nothing, not even tractors or other machinery. We work with our hands. Why did the United States do this to us?"[63] The singular truth of this drone strike, however, is vexed by the proliferation of the multiple probabilities and "numberless" falsehoods that could be derived from the same incident.[64] The answer to al-`Amri's question is that the US targeted the wedding convoy because drone operators decided that the victims were terrorist militants, and because US UCAV operators can use almost any justification to target anyone in the name of American sovereignty.

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[60] International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law, *Living Under Drones: Death, Injury, and Trauma to Civilians from US Drone Practices in Pakistan*, 2012, p. 151.

[61] Peter Sloterdijk, *Terror from the Air*, trans. A. Patton and S. Corcoran, (Los Angeles: Semiotext(e), 2009), pp. 13-16, 28, 51 and 66.

[62] Hassan Masood, "Death from the Heavens: The Politics of the United States' Drone Campaign in Pakistan's Tribal Areas", *Critique: A Worldwide Student Journal of Politics*, 2013, p. 26. Retrieved from: https://about.illinoisstate.edu/critique/Documents/Spring2013/masoodfinal.pdf [Accessed 17 October 2019].

[63] Human Rights Watch, "A Wedding that Became a Funeral: US Drone Attack on Wedding Processional in Yemen", 2014. Retrieved from: https://www.hrw.org/report/2014/02/19/wedding-became-funeral/us-drone-attack-marriage-procession-yemen [Accessed 17 October 2019].

[64] Vico, *Study Methods*, p. 19.

US UCAV targeting policies import the vagueness of drone metonymy to legalise drone warfare with the assertion that the goal of national security justifies any instance of lethal American sovereignty.[65] "For an operational plan that includes the option of lethal force against targets other than identified HVTs [high value targets], an explanation of why authorising direct action against targets other than identified HVTs is necessary to achieve U.S. policy objectives", according to the Presidential Policy Guidance used by Barack Obama.[66] For the Obama administration, that Yemeni wedding-party victims were not HVTs mattered little in terms of the legality of the drone strike, since "terroristic security threat" is all that the US UCAV mission planners need to see, think and say about Middle Eastern populations in order to justify violence. UCAVs thus deliver a particular vague legal style that uses sovereignty/killing metonymy to legitimate any act of war. Whatever the drone observes, the drone can mindlessly sting.

Sovereignty/killing metonymies empower the US government's sense of divine authority[67] in addition to empowering the convenient legal exceptions that the US uses to further legitimise its UCAV programme. For instance, the 2009 Military Commissions Act contains multiple exceptions to its detailed legal procedures, exceptions that declare drone strikes legal whenever the conduct of warfare makes legality and justice inconvenient, or when, in the words of former US Attorney General Eric Holder, another "nation is unable or unwilling to deal effectively with a threat to the United States".[68] According to Giorgio Agamben, "the normative aspect of law can … be obliterated and contradicted with impunity by a governmental violence that—while ignoring international law externally and producing a permanent state of exception internally—nevertheless still claims to be applying the law."[69] Hence the Obama administration used states of exception to transform specific bureaucratic legal rhetoric into ambiguous drone pseudo-law that Ian Shaw and Majed Akhter call "*lawlike*" or "*lawlite*".[70] The nebulous foreign incapacity to guarantee US security, as an exception, is lawlike because, as soon as the Military Commissions Act details legal UCAV protocols, it diverges from and contradicts the legislation by appealing to wartime sovereignty as a means to authorise almost any drone strike or targeted killing. Thus, the US government understands UCAVs through common sense metonymic sovereign conceit that overrides international

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[65] US Department of Justice, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities*, 2013, pp. 16-17. Retrieved from: https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets [Accessed 17 October 2019].

[66] *Ibid.* 4.

[67] Marouf Hasian, Jr. *Drone Warfare and Lawfare in a Post-Heroic Age*, (Tuscaloosa: University of Alabama Press, 2016), p. 40.

[68] H.R. 2647, *Military Commissions*, 2009, p. 9. Retrieved from: https://www.humanrightsfirst.org/wp-content/uploads/pdf/LS-2009-Military-Commissions-Act.pdf [Accessed 17 October 2019], and Eric Holder, "Attorney General Eric Holder Speaks at Northwestern University School of Law, Chicago, IL", Department of Justice, 5 March 2012. Retrieved from: https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law [Accessed 17 October 2019].

[69] Giorgio Agamben, *State of Exception*, trans. K. Attell, (Chicago: University of Chicago Press, 2005), p. 87.

[70] Ian Shaw and Majed Akhter, "The Dronification of State Violence", *Critical Asian Studies,* 46(2), 2014, p. 232.

collective common sense understanding of targeted killings as unethical, extrajudicial assassinations.

Sovereignty/killing metonymies also inhibit resistance to drone society by concealing accountability for targeted killings behind the broad ambiguity and applicability of lawlite's exceptions. Oppositional common-sense perceptions of drone strikes and targeted killings tend to categorise people into two possible personalities – those who condone drone strikes and targeted killings according to the ethics and legalisms used by the US, and those who condemn them and the perfidy of lawlite extrajudicial exceptions. Advocating drones therefore entails advocating American sovereignty, and resisting drones entails resisting American sovereignty. Anti-American sentiment can hence appear as anti-drone sentiment, or "droneism", a kind of technological, rather than racial, bigotry.[71] As central metonyms for the US, drone strikes and targeted killing have become defining features of Barack Obama's presidency, as indicated by the common sense of the popular "I have a drone" internet meme.[72] Martin Luther King Jr.'s "dream" of African-American dissent and political power transformed, via metonymy and collective *ingenium*, into a nightmare of extrajudicial airborne terror in which holding people accountable, including Obama, presents a daunting legal challenge.

President Obama's close association with drone strikes points toward drone society's primary synecdoche that identifies drones with the governmental systems that control them and vice versa. Closely related to metonymy, synecdoche uses a part to represent a whole or a whole to represent a part. This synecdoche defines the US as a drone-centric society. In short, the whole of a country that deploys drones can be represented by that one part of its arsenal. When UCAVs act as proxies for sovereign power by performing remote-controlled mobile surveillance, psychological manipulation and military punishment, that one technology should represent the entire American governmental apparatus becomes common sense.

Identifying the whole of the US with a part of its arsenal implies that drones are the definitive American social force. American drone sovereignty appears global because it deploys the most UCAVs, and this drone synecdoche connotes ever-encroaching empire. Academic assessments of drones tend to reiterate this common-sense synecdoche by which a technology becomes a new global sovereign entity that governs common sense, emotions and actions. The "tactical imagination" of UCAV deployment aims at perfected global "panoptic surveillance",[73] which supports the "technological rationality" of drone strikes that seek "global mastery".[74] Foucault has argued that a theoretical perfected panoptic surveillance, now by necessity updated with contemporary UAV optic technologies, would inscribe governmental power into individuals such that they observe, police and even punish themselves.[75] Global mastery entails a global system, but when one country's military dominates UCAV

[71] Joanne McNeil and Ingrid Burrington, "Droneism", *Dissent,* 61(2), 2013, p. 57.
[72] Kevin Howley, "'I Have a Drone': Internet Memes and the Politics of Culture", *Interactions: Studies in Communication & Culture,* 7(2), 2016, pp. 155-175.
[73] Priya Satia, "Drones: A History from the British Middle East", *Humanity: An International Journal of Human Rights, Humanitarianism, and Development,* 5(1), 2014, pp. 1-2.
[74] Katharine Hall Kindervater, "The Technological Rationality of the Drone Strike", *Critical Studies on Security*, 5(1), 2017, pp. 33-34.
[75] Michel Foucault, *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan, (New York: Vintage, 1995).

usage, in turn, US drones seem to dominate both the US and the world. The weapon/state synecdoche is often iterated in drone scholarship to the point of becoming a clichéd academic meme, including my own usage of drone society. For Ian Shaw the US has created a "Predator Empire", while for Grégoire Chamayou the US is a "drone state" and for Laurie Calhoun it's a "drone nation" to synecdochically encompass, respectively, America's ambitions, government and identity.[76] McLuhan asserted that "new clichés or new technological probes and environments have the effect of liquidating or scrapping the preceding clichés of cultures and environments created by preceding technologies."[77] So, according to McLuhan's logic, drone scholars follow drone common sense by replacing the "nuclear state" with the "drone state". Thereby history, too, becomes UCAV-centric when "the age of the drone"[78] replaces the nuclear age in a chronology of dominant American weapons technologies. History is a "rag-and-bone shop" littered with abandoned weapons clichés, in McLuhan's words, while the archetype of airborne power remains vibrant across time.[79]

Irony often supports or subverts the other drone society tropes, demonstrating how differing perspectives construe drones as historically banal and as an unprecedented terror weapon. Irony is a "falsehood which reflection disguises in a mask of truth", Vico wrote.[80] Commonplace ironies that purvey euphemistic appeals to humanitarianism and energise archetypal Hollywood movie plots indicate that what I have called drone society is an artificial fabrication. The irony of the drone-society construction demonstrates that the advantage of Vico's method is also its greatest risk, for when one centres any term, concept, institution or important entity and uses etymology, comparison and *ingenium* to identify and formulate the connections empowered by the master tropes, the results can be as reductive as they are revelatory.

Drone lawfare indicates that the complicated arguments for and against drone surveillance and drone strikes often retread all-too-familiar ironies based on "humanitarianism". "The principle of humanity requires us to use weapons that will not inflict unnecessary suffering", said Eric Holder, for instance.[81] Even though the in-humanitarian toll of wedding-ceremony drone strikes is obvious, UCAV operators have been removed from direct battle, making the act of killing videogame-like[82] and bolstering arguments that UCAVs preserve "life" rather than dealing death. Allison Rowland demonstrated that the Obama administration attempted to justify its UCAV programme with this "commitment to the sanctity of 'life itself'" that "performs humanitarianism" by associating drones with life-affirming medical metaphors, such as "cleanliness, sterility, and [the] precision of surgical operations" that configure the

[76] Ian Shaw, *Predator Empire: Drone Warfare and Full Spectrum Dominance*, (Minneapolis: University of Minnesota Press, 2016), pp. 5 and 10; Grégoire Chamayou, *A Theory of the Drone*, trans. J. Lloyd, (New York, New Press, 2015), p. 18; Laurie Calhoun, *We Kill Because We Can: From Soldiering to Assassination in the Drone Age*, (London: Zed Books, 2015), p. 3.
[77] McLuhan, *From Cliché to Archetype*, p. 118.
[78] Jeremy Packer and Joshua Reeves, "Romancing the Drone: Military Desire and Anthropophobia from SAGE to Swarm", *Canadian Journal of Communication,* 38(3), 2013, p. 310.
[79] McLuhan, *From Cliché to Archetype*, p. 158.
[80] Vico, *New Science*, p. 162.
[81] Holder, "Attorney General".
[82] Gregory, "Lines of Descent".

enemy as a "cancer".[83] Irony thus matches domestic common sense, which will always be more attuned to preserving the home country's soldiers at the expense of the enemy's, and contradicts the "unbearably human"[84] common sense of bombed populations for whom the US's claims of "humanitarianism" can be nothing but ironic.

And when UCAVs kill, they also mislead with a pretence of power. Ironic drone power belittles the persuasive force of the US's poetic wisdom but leaves technological power intact. Nancy Struever made a vital point that examining law with Vico means that "traditional constructs of 'justice' and 'power'" cannot have an "edge" in legal contemplation.[85] As positive law, commonplace UCAV legal stylistics lack nuance and just reiterate the binary of lawful vs. extrajudicial killing. Yet, Struever continued, "the distinctively human communicative capacity … is 'the art of words' that can represent good as evil, and evil as good. Insofar as they lack this capacity, bees have a social advantage over us."[86] Ironically, the buzzing of drones forces humanity to rehash traditional antithetical ethical arguments about justice and rhetoric, which displays the archetype of airborne power's sovereignty over language itself. Such nonhuman agency dehumanises humanity in the name of autonomous technology[87] and ironises humanity's lethal complicity. UCAVs and tedious legal argumentation that justifies slaughtering non-combatants in Waziristan with appeals to humanitarianism and lawlite legal exceptions only possess as much power as the *sensus communis* cedes to them.

Perhaps the best exemplar of ironised terroristic drone society that connects global surveillance's informatics, policing, and targeted killings is portentous, but thoroughly fictitious. The 2014 Hollywood blockbuster *Captain America: The Winter Soldier* mobilises the generic white superhero-saves-the-world from an autonomous technology-out-of-control plot. In this film, the terminator technology is a UCAV system that uses artificial intelligence to surveil everyone's internet and social media data, targeting anyone who might dissent against a neo-totalitarian, global US regime.[88] The movie's exterministic AI-UCAV weapon aims to slaughter only imaginary victims, but the US Department of Defense's Minerva Initiative, which seeks to predict dissent and terrorism based on patterned internet usage, teaches that the plot is all-too plausible.[89] The movie ends, and although its storyline feels ominous, UCAVs still lack omniscience, omnipotence and sovereignty. The Minerva Initiative is not operational, but like all of humanity's monsters "The Terminator" is ironically real because it mirrors common sense thinking through archetypes.

Thus, as people's metaphors, metonymies, synecdoches and ironies position and reposition the institutional primacy of drones, humans and law, drone-centric

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[83] Allison L. Rowland, "Life-Saving Weapons: The Biolegitimacy of Drone Warfare", *Rhetoric & Public Affairs,* 19(4), 2016, pp. 603, 611 and 614.
[84] Ian Graham Ronald Shaw and Majed Akhter, "The Unbearable Humanness of Drone Warfare in FATA, Pakistan", *Antipode,* 44(4), 2012, p. 1505.
[85] Nancy S. Struever, "Hobbes and Vico on Law: A Rhetorical Gloss", *New Vico Studies,* 19, 2001, p. 64.
[86] Struever, "Hobbes and Vico", p. 68.
[87] Anthony Stagliano, "Experiments in Posthumanism: On Tactical Rhetorical Encounters between Drones and Human Body Heat", *Computers and Composition,* 52, 2019, pp. 242-252.
[88] Anthony Russo and Joe Russo (dirs.), *Captain America: The Winter Soldier*, (New York: Marvel Entertainment, 2014).
[89] The official Minerva Initiative website (https://minerva.defense.gov) has eliminated most descriptive content about the project.

common sense poetic wisdom, situated in between generalities and particulars, expresses both humanity's precariousness and hope for technological security.[90] Drone society as revealed through its tropes is only as factual and fictional as the facticity of Vico's representation of all societies across time and place. Both Vico's *New Science* and drone society are based upon common sense as revealed by everyday use of the master tropes that communicate stable, clichéd archetypes of airborne power, among many others. In place of Vico's frontispiece, imagine an ironic frontispiece for this article: it depicts a lightning bolt emanating from Neptune's trident, reflecting off Vico's own mind's eye, down onto Captain America and his patriotic shield, which converts the lightning into a stream of binary that illuminates an array of contemporary institutional symbols – a UCAV resting upon the US Constitution and UN and Geneva conventions. Nearby lie a pile of money, a small globe, a smartphone, an oil drum, and an ornate Pakistani wedding dress.

**Conclusion**

Just like Vico's presentation of poetic wisdom, I have barely scratched the surface of the archetypal significance of drones and their tropes. Vico's methodology, which links generalised concepts to the empirical evidence that shows how societies base their institutional common sense on rhetorical style, empowers critics to use *ingenium* to make connections across times, places, and languages by exploring etymologies, making comparisons, and finding representative examples of commonplace rhetorical expressions. The network of commonplace metaphors, metonymies, synecdoches and ironies that emerge from all corners of drone society provide an empirical foundation for analysing how the global community configures drones as a site of conceptual and material antagonism. Yet, drone society is an ironic, artificial fabrication. Vico's methodology is risky and open to charges of inadequacy owing to the sheer numerical impossibility of making all potential analogical, stylistic and etymological connections. However, any rhetorical network that emerges from the method creates provocative revelations about how social institutions operate according to diverse versions of common-sense poetic wisdom – in this case, legality and sovereignty operate according to banal entomological vagueness. This advantage makes Vico's methodology worthy of uptake as means of analysing competing rhetorical domains.

My interpretation of Vico's methodology and my analysis of drone tropes indicate that people depend upon both incontrovertible facts and ironised constructions to understand complicated networks of sovereignty, legality and ethics. A Vichian analysis of tropes and archetypes shows how they illuminate the origins, transformations and stagnancy of social institutions as they attempt to create just societies. Sometimes, though, injustice ensues, often at the expense of enemy populations, but often enough for domestic populations too. Humanity's worst and most unjust monsters have empirical rather than fictional origins, just as tropes come from common sense experience rendered into rhetorical form. Drone terror is as real as sovereign power can deliver and as real as the common-sense tropes that victims use to speak unspeakable violence.

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[90] Ian E.J. Hill, *Advocating Weapons, War, and Terrorism: Technological and Rhetorical Paradox*, (State College: Penn State University Press, 2018).

# The style of a mark: The scandal of free speech in *Matal v. Tam*

Sarah Burgess

> "The role of the government shouldn't include deciding how members of a group define themselves. That right should belong to the community itself …. Americans need to examine our system of privilege and the ways unconscious bias affects our attitudes. But that discussion begins with the freedom to choose our language."
>
> *Simon Tam*[1]

**Introduction**

The freedom to choose our language. What are the conditions and the effects of such a choice? Writing in the *New York Times* three days following his win in the United States Supreme Court decision *Matal v. Tam*,[2] Simon Tam argues that this freedom follows from the suspension of law's judgment in favour of allowing communities to give voice to and name themselves. A freedom less given by the law than opened by law's withdrawal, the ability of a community to choose their own language opens an avenue for critique that affords a view into the oppressive structures that lend meaning to our shared collective life. Moreover, this freedom grants members of a group some measure of participation in crafting an identity that "can be influenced by as well as influence the world around us".[3]

For Tam, this argument takes shape (perhaps surprisingly) in his legal battle over United States federal trademark laws. On 14 November 2011, Tam, the founder of a dance-rock band based in Portland, Oregon comprised entirely of Asian-American members, applied to register the trademark "The Slants". The United States Patent and Trademark Office [PTO] denied the application, however, because they claimed that the band's name violated the Lanham Act—the primary law governing federal trademark registration, meant to protect consumers by clearly identifying the source of goods and services and prohibiting the "misappropriation" of commercial marks by "pirates and cheats".[4] Since its passage in 1946, Section 2(a) of this Act has permitted the PTO to refuse registration of a trademark which "consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute."[5] Relying heavily on *The Urban Dictionary*, the PTO concluded that "slant" is in fact a derogatory term that is "disparaging to a substantial composite of people of Asian descent"[6] and, as such, constituted an appropriate exception to trademark registration.

Tam subsequently sued the PTO, claiming that the disparagement clause of the Lanham Act violates his First Amendment right to free speech. According to Tam, the

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[1] Simon Tam "The Slants on the Power of Repurposing a Slur", *New York Times*, 23 June 2017. Retrieved from: https://www.nytimes.com/2017/06/23/opinion/the-power-of-repurposing-a-slur.html. [Accessed 6 May 2019].

[2] *Joseph Matal, Interim Director, United States Patent and Trademark Office v. Simon Shiao Tam*, 137 S.Ct. 1744 (2017).

[3] Tam, "The Slants on the Power of Repurposing a Slur".

[4] *In Re Tam*, 808 F.3d 1321, p. 1328 (Fed. Cir. 2015).

[5] Lanham Act, 15 U.S.C. §1052 (current version 2016).

[6] *In Re Tam,* 808 F.3d 1321, p. 1332.

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Sarah Burgess, "The style of a mark: The scandal of free speech in *Matal v. Tam*", pp. 36-49.

Asian-American band's use of the term "slants" was not intended as a slur, but as a speech act of re-appropriation in and through which they might reclaim "terms that were once directed at them as insults and [redirect] the terms outward as badges of pride".[7] The name of the band was meant to be a "vehicle for expressing [Tam's] views on discrimination against Asian-Americans".[8] The PTO's attempt to thwart that expression, therefore, amounted to an injury that violated the basic legal principles of free speech and ethico-political principles of equality: "It was as if because we were Asian, because we were celebrating Asian-American culture, we could not trademark the name the Slants."[9]

On 19 June 2017, the Supreme Court handed down its 8-0 decision in *Matal v. Tam,* addressing and ostensibly remedying Tam's claim that his right to choose the language to represent himself and his band had been violated. Supported by two different sets of arguments, the Court unanimously held that the disparagement clause of the Lanham Act constitutes a form of viewpoint discrimination and, as such, violates free speech protections guaranteed by the First Amendment of the Constitution.[10]

To come to this conclusion, the Court found that trademarks are, in fact, instances of private speech, not government speech, allowing their owners to demand free speech protections.[11] The Court then conceded that trademarks have an "expressive" function that exceeds a trademark's operation as a source identifier for goods. "Then, as now", Alito notes of the history of commercial marks, "trademarks often consisted of catchy phrases that convey a message."[12] Trademarks become not only referents of some product, but messages that articulate a specific viewpoint. For the Court, this is the primary problem with the disparagement clause: it gives the PTO the power to decide which viewpoints will offend and enables it to prohibit speech it deems offensive. The First Amendment cannot sustain such practices or power: "It offends a bedrock First Amendment principle: Speech may not be banned on that ground that it expresses ideas that offend."[13] Striking down the disparagement clause not only allows Tam to register The Slants, it removes the power of the PTO to make decisions about what messages are appropriate or necessary for the public to hear.

The decision was not only a victory for free speech rights, according to Tam; it also recognised the fundamental dignity of underrepresented communities by affirming the right to name themselves. He explains:

> "The battles about hate speech shouldn't be waged at the Trademark Office, decided by those who have no connections to our communities. Those skirmishes lead to arbitrary, inconsistent results and slowly chip away at the dignity and agency of oppressed people to decide appropriateness on our terms. A person's quality of life, opportunities and rights may hinge on that person's identity. Those rights should not hinge on the hunch of a government employee armed with wiki-joke websites."[14]

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[7] Brief for Respondent, *Lee v. Tam,* 582 U.S. (2017), pp. 1-2.
[8] *Ibid.* 1.
[9] Tam, "The Slants on the Power of Repurposing a Slur".
[10] *Tam,* 137 S.Ct. p. 1748.
[11] *Ibid.* 1758.
[12] *Ibid.* 1752.
[13] *Ibid.* 1750.
[14] Tam, "The Slants on the Power of Repurposing a Slur".

Two things are important here. First, Tam suggests that what is ultimately at stake in this case is the formation, constitution and recognition of identity. Beyond its commercial operation and economic impact, the trademark is primarily a mode through which one might name oneself or one's community. (The first album the band released following the case was titled "The Band Who Must Be Named".[15]) Second, this act of speaking oneself—one that seems to both generate and be founded in a sovereign voice (and body)—takes place outside the law. Embodied by individuals without ties to the communities they serve, law, for Tam, cannot be the appropriate scene in which decisions about speech can or should be made. It is only outside the law, in the community, that the structures of power within law are laid bare.

Despite Tam's certainty that the Court's ruling guarantees freedoms for underrepresented communities, legal scholars are more sceptical of its practical effects. Commentary about *Tam* has vacillated between various poles: "The case has been lauded as a victory by free speech advocates, while others have viewed it as a defeat of the power of the state to protect minority groups from hate speech."[16] Many concede that the Court's decision to find the disparagement clause unconstitutional was the right legal decision.[17] It addresses the arbitrary and vague standards used by the PTO to issue its decisions about trademarks. Not only were there no official guidelines about what kinds of trademarks constituted "disparagement" (or for that matter "immorality" or "scandal"),[18] the PTO's decisions created questions about whether there were principles being employed at all. In other words, the line between what could be trademarked and what could not was wholly unintelligible. For example, "the mark QUEER GEAR, for clothing, was registered, while the mark CLEARLY QUEER, also for clothing, was not successfully registered."[19] Littered throughout the commentary are lists of similarly confounding comparisons of trademarks that evidence the arbitrariness with which the PTO makes decisions, rightfully calling its legitimacy as an institution of law into question.[20]

Yet, even while supporting the ruling of the Court, many authors share their unease with the scope and the potential impact of striking down the disparagement clause. Acknowledging that the *Tam* case is "a case with favorable facts and a sympathetic party—a rock band using a term that was intended to empower, not to insult",[21] authors detail the unwanted and potentially harmful impact of the case.[22]

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[15] Mark Conrad, "*Matal v. Tam*—A Victory for *The Slants,* A Touchdown for the *Redskins,* but an Ambiguous Journey for the First Amendment and Trademark Law", *Cardozo Arts & Entertainment,* 36 (1), 2018, p. 121.

[16] Malik C. Edwards, "Nommo: Understanding the Power of Words, A Critique of *Matal v. Tam*", *North Carolina Central University Science & Intellectual Property Law Review,* 11(1), 2018, p. 50.

[17] See Conrad, "*Matal v. Tam*—A Victory for *The Slants*"; Andrew Lehmkuhl, "The Aftermath of *Matal v. Tam*: Unanswered Questions and Early Applications", *University of Cincinnati Law Review*, 87(3), 2018; Lisa P. Ramsey, "Free Speech Challenges to Trademark Law after *Matal v. Tam*", *Houston Law Review,* 56(2), 2018.

[18] See Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 111; Megan M. Carpenter and Kathryn T. Murphy, "Calling Bullshit on the Lanham Act: The 2(a) Bar for Immoral, Scandalous, and Disparaging Marks", *University of Louisville Law Review*, 49, 2010, p. 468.

[19] Carpenter and Murphy, "Calling Bullshit", p. 473.

[20] See *ibid*. p. 467; Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 121.

[21] Conrad, "*Matal v. Tam:* —A Victory for *The Slants*", p. 123.

[22] As one former PTO director put it, "Probably the right legal answer, but it may become a bit of a classic 'be careful what you ask for.' Just as we're trying to 'lessen the polarization and crudeness' of

The immediate fallout of the case has challenged Tam's unqualified claim that the ruling will allow underrepresented communities to seek out dignity in self-definition. Because of *Tam,* Suzan Shown Harjo of the Cheyenne and Muscogee tribes lost standing to challenge the trademark of the "Washington Redskins" by the National Football League. After sixty years of protest against slurs directed at Native Americans used as mascots, logos, and team names, *Tam* provides no legal remedy (and no standing) for those who wish to challenge this harmful speech.[23] As well, since the Court's decision, at least seven applications for trademarks have been made for the N-word, and several more for the swastika symbol.[24] The by-product of recognising Tam's right to free speech is that it also effectively provides "protection for those who wish to trademark names intending to demean, caricature, or inject crude humor".[25]

As a rhetorical inquiry, this essay does not seek to pass judgment on the Court's decision—to assess whether its ruling was constitutionally sound. Instead, it examines these risks detailed by legal commentators—the risk that undesirable, hateful, or harmful speech will be introduced in public life without qualification and the risk that the absence of law's voice on such matters will leave those harmed no room to stand. It seeks to understand the conditions and effects of "the freedom to choose our language" in a way that might complicate Tam's imagination of this benign (and sovereign) freedom. This essay thus reaches beyond, without leaving behind, the concerns over how reclaiming slurs might challenge structures of address to enact change. It pushes us to understand what happens to law when it revokes its own power to limit speech (in the name of freedom). And, it demands that we think about what speech is and how it acts in and for law.

Such inquiries no doubt exceed the limits of this paper. But they do provide the context for a close reading of *Tam* as well as *Iancu v. Brunetti*—the recent Supreme Court case that addresses the "immoral and scandalous" clause of the Lanham Act. By closely reading the Court's logic in *Tam,* in the first section, we see how the Court transforms trademarks into viewpoints by reducing the work of speech to the creation and communication of a message. In doing so, it discounts the context in which the speech is addressed, the relationship between the speaker and hearer, and the style of the trademark. Without these elements, the Court can do nothing but disqualify its own power to address and regulate the speech of the marketplace. The second section responds to this disqualification by re-imaging style as the rhetorical mode of expression that might re-figure the relationship between the power of law and speech. Here, I argue that style constitutes not only the referent of the trademark, but also the scene on which the speaker and hearer employ the trademark, ultimately suggesting that style has the power to scandalise law's speech in a way that illuminates the conditions in which such speech becomes free.

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public discourse, I'm worried that this [ruling] may have something of a negative result." Quoted in Conrad, "*Matal v. Tam:* – A Victory for *The Slants*", p. 121.

[23] Victoria F. Phillips, "Beyond Trademark: The Washington Redskins Case and the Search for Dignity", *Chicago-Kent Law Review,* 92, 2018.

[24] Lehmkuhl, "The Aftermath of *Matal v. Tam*", p. 871.

[25] Conrad, "*Matal v. Tam:* – A Victory for *The Slants*", p. 123.

**Marking the Mark**

> "The privilege of 'free speech,' like other privileges, is not absolute; it has its seasons; a democratic society has an acute interest in its protection and cannot indeed live without it; but it is an interest measured by its purpose. That purpose is to enable others to make an informed judgment as to what concerns them, and ends so far as the utterances do not contribute to the result […]. Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used, of which the relation between the speaker and the hearer is perhaps the most important part."
>
> *Learned Hand*[26]

The jurist and judicial philosopher Learned Hand postulates that free speech freedoms are bound by and to the purpose of speaking within democratic societies. Speech remains free insofar as it operates within an ethical (in the classical sense) rhetorical scene—a scene dedicated to persuasion in the service of the audience's knowing and knowledgeable judgment. Hand is clear that in such a scene words in themselves or by themselves have no meaning. It is instead in the relationship between the words, the "interpenetration" of words, that speech takes place before the law, giving meaning to the words in law. In taking (their) place, words—their meanings, relationships, and effects—reflect and refer to a particular constellation of speaker, hearer and setting. Without an ethical purpose in the midst of this triangulation, Hand reminds us though, the freedom of speech meets its limit.

What is fascinating in *Matal v. Tam* is that the Supreme Court appears to reverse or perhaps pervert Hand's formulation of free speech. The Court finds the limit of law—not speech—in the (unlimited) mark that not only can, but must, be spoken outside the reach of law. In what follows, I trace the logic of the Supreme Court in *Tam,* as well as *en banc* Federal Circuit Court *In re Tam* whose decision the Supreme Court affirmed. Reading across these two cases, I show that the Court refuses to address how speech operates, while claiming to uphold and honour liberal principles. When the Court withdraws law's force to regulate speech, however, this power is transferred to the marketplace where the value of speech becomes tied to its "use". The result, I contend, is not only that speech loses its capacity to critique social, historical norms, but also that the Court misunderstands its task of marking the mark.

Commenting on the aftermath of *Tam,* Mark Conrad notes that "it is safe to say that this question [of whether offensive trademarks will be allowed] is now based on business ethics and societal norms, rather than the law. The ruling seems clear: *Matal v. Tam* eliminates an important, if not crucial avenue for those aggrieved to challenge the offensive trademarks."[27] Conrad, here, points to what, for me, is the most striking thing about these two cases: the Court takes exception with its own power to say what can be said. It disqualifies law from addressing the injuries that speech may generate. We might note that, at first glance, this is not shocking as it is in fact a reflection of the judiciary's role in American liberalism. The Court appears to be conducting a primary task of law: deciding when the government's interests must be curtailed in the name of individual freedoms. The Court regularly limits its own power in order to allow communities and individuals to decide what is best said or done—the bedrock of everything from privacy protections to individual rights of association to gun

[26] *National Labor Relations Board v. Federbush Co.*, 121 F. 2d 954, 957 (2d Cir. 1941).
[27] Conrad, "*Matal v. Tam* – A Victory for *The Slants*", p 89.

ownership in the United States. In this way, what the Court has done in *Tam* ostensibly fulfils both the demand for and the promise of liberalism in a way that is consistent with its history.

To read the Court's refusal of law's power through this lens, however, misses how the Court upends or risks its own foundations (in liberalism) as it misunderstands the critical capacity of speech. In both cases, the Court relies on viewpoint discrimination to justify its finding that provisions preventing trademarks which are "disparaging" are unconstitutional. The logical and rhetorical moves to transform a trademark's "speech" into a viewpoint—and to first even recognise the mark as speech—illuminates precisely how the Court does more than simply uphold individual freedoms by limiting the power of law. In *Tam,* the Court draws on a distinction between the commercial aspect of the mark and its "expressive" component. The Lanham Act defines the commercial purpose of the trademark in this way:

> "The term 'trademark' includes any word, name, symbol, or device, or any combination thereof—(1) used by a person, or (2) which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter, to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others to indicate the source of the goods, even if that source is unknown."[28]

The commercial value of a trademark is its ability to act as a sign of the source of goods within a particular marketplace, referring back implicitly to a person or company who holds that mark. As outlined here, the commercial "speech" of the trademark is found in its (uncomplicated) referentiality: the mark is a direct sign of an already established and "fixed" referent. It provides an "informational function".[29]

The trademark's commercial use, confined to the marketplace, does not trigger First Amendment concerns for the Court. Free speech becomes an issue only when the "expressive" function of trademarks comes into play. This expressive speech occupies the attention of the Federal Circuit Court *In re Tam.* In Justice Dyk's opinion, concurring in part and dissenting in part, he suggests that some, but not all, trademarks act as "core political speech", rising to the level of first amendment protections.[30] For him, the distinguishing mark of this form of protected speech—one he wishes to extend to Simon Tam—is that it "reflects a clear desire to editorialize on cultural and political subjects."[31] Judge Moore similarly remarks that "[Simon Tam] advocates for social change and challenges perceptions of people of Asian descent. His band name pushes people. It offends. Despite this—indeed, because of it—Mr. Tam's band name is expressive speech."[32]

In short, expressive speech provides a message that offers more than information; it comes from and projects a critical attitude toward something in the world. It does something—editorialises or offends—*because of the message that it provides,* a message that seems bound to the intent of the one who holds the mark. The Supreme Court adopts this idea in *Tam*. Justice Alito remarks, "Companies spend

[28] Lanham Act, 60 Stat. 427 (1946) (current version 2016).
[29] *In re Tam,* 808 F.3d 1321, p. 1365.
[30] *Ibid.*
[31] *Ibid.* 1373.
[32] *Ibid.* 1338.

huge amounts of money to create and publicize trademarks that convey a message. It is true that the necessary brevity of trademarks limits what they can say. But powerful messages can sometimes be conveyed in just a few words."[33]

Important here is that across various courts the character of expressive speech depends not on the way it is expressed—what we might name the style of the mark—but instead on the content that is created. The words of the trademark are merely (transparent) mechanisms for delivering the ideas. As Alito marvels at the very thought that we might squeeze a message from so few words—it is very expensive!—we see the Court's uncoupling of the words (and the work these words do) from the message itself. Placing the work of these words aside allows the Court to make two sets of arguments. First, the presence of a message trumps the commercial function of the trademark: "it is always a mark's expressive character, not its ability to serve as a source identifier, that is the basis for the disparagement exclusion from registration."[34] As Moore points out, "that the speech is used in commerce or has a commercial component should not change the inquiry when the government regulation is entirely directed to the expressive component of speech."[35] Even though later she claims that commercial speech and expressive speech are "inextricably intertwined",[36] commercial speech is transformed from words that signify to the context in which expressive speech takes place. The trademark's signifying function becomes secondary, a meaningless context, for what is important: the announcement of a message.

Second, and following from the first, the Court's focus on the message of the trademark invokes the issue of viewpoint discrimination. In *Tam,* Justice Kennedy explains that "the test for viewpoint discrimination is whether—within the relevant subject category—the government has singled out a subset of messages for disfavor based on the views expressed …. Within that category [of disparagement], an applicant may register a positive or benign mark but not a derogatory one."[37] What the Court cannot allow according to its reading of the First Amendment is for the government to become the gatekeeper of "good" messages. The clauses barring disparagement, immorality and scandal do more than simply prohibit categories or topics or groups of people that can be discussed.[38] They prohibit particular messages from being heard and mandate what Kennedy calls "happy talk"—speech that only articulates a positive message and, as such, exceeds a call for non-discrimination.[39] Trademarks—especially those that have the potential to offend or injure—then cannot be regulated, the Court argues, because the government cannot have a say in which messages are made public. As the Court reminds us in *Tam,* "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'."[40]

Protecting the message of a trademark as a viewpoint, however, undermines the relationship between the speaker and hearer that Hand suggests provides the

[33] *Tam,* 137 S.Ct. p. 1760.
[34] *In re Tam,* 808 F.3d 1321, p. 1338.
[35] *Ibid.*
[36] *Ibid.*
[37] *Tam,* 137 S.Ct. p. 1766.
[38] *In re Tam,* 808 F.3d 1321, p. 1335.
[39] *Tam,* 137 S.Ct. pp. 1764-1765.
[40] *Ibid.* 1764.

necessary conditions for understanding the meaning of the words we speak. The Court's focus on the message, in various ways, strips the expressive function of the trademark of all three. For Alito,

> "The disparagement clause denies registration to any remark that is offensive to a substantial percentage of the members of any group. That is viewpoint discrimination in the sense relevant here: Giving offense is a viewpoint. The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of the hearers."[41]

There is here a curious, but telling, turn of phrase: "Giving offense is a viewpoint." By the Court's own logic, that which gives the offence is the message itself. *It* does the work of articulating an idea that others might experience in a negative way. What disappears first in this equation is the speaker. While the Court references Tam's right to reclaim his identity by appropriating and re-signifying a slur,[42] his identity is a false anchor for his right to free speech. Because it is the message that matters for legal protection, the identity of the speaker is irrelevant when the expressive function and the signifying function of the trademark have been severed. (The Washington Redskins continue to own the trademark that portrays a slur against Native Americans without claiming the identity of an indigenous person.) It is also the case though that the primacy of the message—the object of free speech protections—discounts the role of the hearer in the creation of the message. Explaining that the disparagement clause cannot be considered neutral because "Section 2(a) does not treat identical marks the same" since "[a] mark that is viewed by a substantial composite of the referenced group as disparaging is rejected", the Federal Circuit Court reasons that the disparagement clause is invalid *because* it "turns on the referenced group's perception of a mark".[43] Viewpoints are protected in spite of the audience. The hearer is figured only as a passive addressee of the message, asked simply to bear either the benefits or burdens of the expression. Her relationship, contrary to what Hand suggests, is to the message, not the speaker. The primacy of the message, its role as the object of the free speech protections, not only de-contextualises the scene of address in and through which the message is created and articulated, it divorces the message from the ways in which it operates in relation to both speakers and hearers on this scene.

In the Court's argument, the absence of a rhetorical sensibility is profound. The disjunction of words from messages, speakers from hearers, forms of address from their scenes results in an unpredictable and unnuanced account of *what* speech means precisely because the Court does not address *how* speech works, how it operates to both signify and critique (in so few words). The Court's refusal of a rhetorical perspective, that is to say, results in a loss of metaphoricity that ultimately undercuts the very foundations of law. Kennedy traces this loss towards the end of his opinion in *Tam*:

> "Justice Holmes' reference to the 'free trade in ideas' and the 'power of … thought to get itself accepted in the competition of the market', … was a metaphor. In the realm of trademarks, the metaphorical marketplace of ideas becomes a tangible, powerful reality. Here that real

[41] *Ibid.* 1749.
[42] *Ibid.* 1750.
[43] *In re Tam,* 808 F.3d 1321, p. 1337.

> marketplace exists as a matter of state law and our common-law tradition, quite without regard to the Federal Government."[44]

The Court reverses its logic here. To protect the expressive nature of the trademark, the Court rendered its commercial function as the context for the speech, making it irrelevant to the question at hand. But, once recognised and protected by law, the expressive function of the trademark is returned to its scene where its use in commercial contexts becomes regulated by the forces at work there. The shift between the marketplace of ideas and the marketplace is seamless for the Court. The only distinction is that the marketplace is "more than a metaphor"; it is "real"—and conveniently outside the reach of federal law. The Court effectively then uses the expressive nature of speech to justify the message's commercialisation.

*Matal v. Tam*, as a result, enables the conditions in which the power to regulate speech is thus transferred from law to the marketplace. As Kennedy notes at the end of his opinion,

> "A law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government's benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society."[45]

Law, here, is figured as the fundamental threat to speech and to those who wish to offer minority opinions. Its judgment can re-double the injury for those whose views are prohibited. For the Court, there is "safety" in the "free and open discussion in a democratic society"—a safety that apparently prohibits the kind of injury the law might inflict. Yet, there is a slip in this logic. The regulation of trademarks does not land in a wide context of social and political debate where we hope that truth and justice rise to the top in sustained, reasonable debate. It populates instead a commercial context in which speech is regulated according to neoliberal principles that determine how best the mark might be "used". I do not mean to suggest that the Court's decision alters speech, submitting it for the first time to neoliberalism and its forces. The definitions and practices of trademarking are steeped in an economic language that at once subsumes and makes intelligible social experience. My point, rather, is that in the name of liberalism, the Court suspends the force and potential of law to regulate, or even address, speech. In doing so, the appeal to liberalism becomes a ruse, a cover for the neoliberalisation of speech itself. Trademarks take their value from their use in a marketplace that "incentivises" or "disincentivises" them according to what would be best for the market.[46] The expressiveness of the speech that the Court wishes to protect means little, then, unless it can be used to sell and brand goods.

The Court thus commercialises the expressiveness of speech, undermining its own claim that it acts to secure the possibility of public debate. To be clear, I am not worried that the law fails to fulfil its promise to realise liberalism. I am not trying to return law to its proper liberal roots in the hope of re-building its sovereignty. Instead, I simply want to illuminate how it is that the Court, in the name of liberalism, fundamentally misunderstands its task in relation to the question of speech. As the

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[44] *Tam,* 137 S.Ct. p. 1768 (citations omitted).
[45] *Tam,* 137 S.Ct. p. 1768.
[46] *In re Tam,* 808 F. 3d 1321, p. 1342.

Court defines it, an application for a trademark asks the government, sited in administrative law, to decide whether or not the mark is appropriate, to decide whether speech is allowed or not. The Court makes clear that the law's recognition of a trademark does nothing to transform or alter the mark. The justices insist that the government does not "dream up" the mark, nor does it claim ownership over the trademark once it has been registered.[47] "When the government registers a trademark", Justice Moore explains in the lower court decision, "the only message it conveys is that a mark is registered."[48] The trademark, the mark of the mark, appears as an act of law that holds no power; it cannot constitute, transform, or express. Law's imprimatur comes almost too late and with little force, accompanied ultimately by the question of its worth. After all, one can use a mark—without any legal regulation whatsoever—even if it is not legally trademarked. My argument—one that will be fully detailed in the next section—is that the Court misses how its mark on the mark is a form of recognition in which the Court is called to recognise not only *that* the mark refers to a source, but also *how* it refers to this source. That is, the Court fails to fully understand how the style of the mark, how it refers, helps us to re-imagine the power of law in the face of the demand for free speech.

**Re-imagining the Scandalising Potential of Style**

A week following the two-year anniversary of its decision in *Matal v. Tam*, the Supreme Court announced its ruling in *Iancu v. Brunetti*.[49] This case challenged the "immoral and scandalous" clause of the Lanham Act's Section 2(a), and addressed Erik Brunetti's claim that free speech protections should apply to the trademark for his clothing line "FUCT".[50] The PTO had reasoned that "FUCT is the past tense of the verb 'fuck', a vulgar word, and is therefore scandalous."[51] With *Tam* as settled law, it was expected that the Supreme Court would (easily) agree that the immoral and scandalous clause constituted the same kind of viewpoint discrimination found in the disparagement clause. The majority did, in fact, do just this. Justice Kagan, writing the Opinion of the Court, noted that the–

> "Lanham Act allows registration of marks when their messages accord with, but not when their messages defy, society's sense of decency or propriety. Put the pair of overlapping terms together and the statute, on its face, distinguishes between two opposed sets of ideas: those that aligned with conventional moral standards and those hostile to them; those inducing nods of approval and those provoking offense and condemnation."[52]

Treating the "immoral" and the "scandalous" as "overlapping" and thus synonymous terms, the 6-3 majority struck down the clause, replicating the logic of *Tam.*

The justices in the dissenting opinions, however, flinched when they imagined that there would be no law barring the most vulgar or profane trademarks. Unlike in *Tam,* several of the justices in this case were unwilling to relinquish all of the law's

[47] *Tam,* 137 S.Ct. p. 1758.
[48] *In re Tam,* 808 F.3d 1321, p. 1346.
[49] *Iancu, Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office v. Brunetti*, 588 US (2019) (slip opinion).
[50] Brunetti had employed the name since the founding of the clothing line in 1990. He applied for the trademark in 2011 and was denied.
[51] *In re Brunetti,* 877 F.3d 1330, p. 1337 (Fed. Circ. 2017).
[52] *Brunetti,* 588 US (2019) (slip opinion) (Kagan).

power to limit the worst kinds of speech.[53] Justice Breyer, for one, argued that "[a]n applicant who seeks to register a mark should not expect complete freedom to say what she wishes, but should instead expect linguistic regulation."[54] Justice Sotomayor made a more specific argument, with which Breyer himself joined. She agreed with the majority that the bar on immoral trademarks constituted a form of viewpoint discrimination and was thus unconstitutional, but she refused to read the prohibition on the immoral and the scandalous as a single clause:

> "[W]hile the majority offers a reasonable reading of 'scandalous', it also unnecessarily and ill-advisedly collapses the words 'scandalous' and 'immoral'. Instead, it should treat them as each holding a distinct, nonredundant meaning, with 'immoral' covering marks that are offensive because they transgress social norms, and 'scandalous' covering marks that are offensive because of the *mode in which they are expressed.*"[55]

Although dismissed by the Opinion of the Court,[56] Sotomayor suggests that there is, in fact, a way to read the law to address the style of the trademark—in her words, the mode of expression—rather than the message that is offered. The difficulty, however, is that she equates the mode of expression with vulgarity and profanity, failing to differentiate how "bad words" are a problem of style rather than their content. Her silence on this matter is literal. At two points in her opinion, she refuses to speak the words that could be prohibited according to their mode of expression, relying instead on the reader's imagination to figure out "the small group of lewd words or 'swear words that cause a visceral reaction, that are not commonly used around children and that are prohibited in comparable settings'."[57] Ultimately, though her turn to the mode of expression might provide a way out of what she understands as the "coming rush to register such scandalous trademarks—and the Government's immediate powerlessness to say no", she reverts back to a set of content-based judgments that arise in particular situations—bad words we do not speak in front of the kids—foregoing a richer understanding of how style affects (and potentially effects) the rhetorical situation.

This concluding section takes up Sotomayor's project of articulating how the mode of expression might re-figure the relationship between the power of law and speech. The challenge she poses is to imagine the mode of expression, or style, as something that at once allows law to provide a scene in which those who are injured (by speech) might make a claim to justice, while also performing a critique of the (law's) violence directed toward the inventive capacity (of its own) speech. That is, I ask: How might style be both a generative and critical force before the law?

The answer to this question requires that we understand style as the operations of a performative speech act—the work that links conditions, message and perlocutionary effects of speech together. Style, we might say, becomes scandalous, not in the Court's sense as that which shocks or offends the truth, but in the way that it makes a scene—that is, a scene of address that positions speakers and hearers in relation to social norms in an effort to alter these norms. Style thus reveals *how* speech

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[53] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor).
[54] *Brunetti,* 588 US (2019) (slip opinion) (Breyer).
[55] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor).
[56] *Brunetti,* 588 US (2019) (slip opinion) (Kagan).
[57] *Brunetti,* 588 US (2019) (slip opinion) (Sotomayor). Throughout the briefs and oral arguments, the Court asked that the name of the clothing brand not be repeated needlessly.

takes place, offering a view into which contexts are foreclosed, which speakers are silenced, and which hearers are dispossessed of their right to make a claim before law. By returning to the problem of what it means to reclaim a slur, I show that such an account of the style of speech de-stabilises the sovereign power of the law without removing its potential to serve as the site in and through which individuals can make a claim to speak critically in the name of justice.

In its broadest definitions, style can be understood simply as "the way in which we do something".[58] There is a tendency to read this definition, however, as if one of two things were true. First, some presume that style is something that can be controlled, mastered or originated by a subject with an intent to accomplish some end. While for certain notions of style—those associated, for example, with fashion—this assumption rings true, for an understanding of the style of the trademark (and speech more generally) treating style simply as the (transparent) mechanism or tool might miss the complex ways speech refers and offers a message. Second, the broad definition of style seems to uphold a distinction between what is done and how it is done. This distinction, to some extent, has appeared as "one of the most widely recurring claims made about style" suggesting that "it deals with signs but not their referents, with image but not substance".[59] Both of these readings seem to replicate the problem that we see in the Court's understanding of the style of speech in *Tam* and *Brunetti*, albeit in different ways. On the one hand, the Court reads Tam's trademark through his intent; the judges attribute the mark to his claims about why he formed the band and the social justice work he intends to do with it. On the other hand, the Court's focus on the message enables the judges to disregard style altogether as they uncouple referentiality and expressive functions of the sign.

To avoid such a problem, I define style as the work of the performative, the rhetorical operations in and through which speech acts constitute their own referents. Style, that is, is how the performative constitutes the action it names. J.L. Austin's account of the performative, now a touchstone of rhetorical theory, defines utterances as performative insofar as: "A. they do not 'describe' or 'report' or constate anything at all, are not true or false: and B. the uttering of the sentence is or is a part of, the doing of an action, which again would not *normally* be described as, or as 'just,' saying something."[60]

For Austin, how the word is said—including not just the language itself, but the context in which the speech takes place, the sincerity of the speakers engaging in the talk, and the appropriate audiences—constitutes the referent of the speech. In his famous example, during a marriage ceremony, when "I do" is spoken, the speech is the constitution of the vow as there is no vow prior to or outside of the speech itself toward which the speech might point.[61] For all of Austin's efforts though to lay down the grammatical rules that would allow us to recognise a performative speech act, he does little to explain *how* the performative constitutes its referent in the appropriate scene so that speech can be read as doing the thing it says.

If we return to *Tam,* we begin to see that style is *how* the performative works. Consider what is at stake in the trademark for Tam. He claims that using the slur "the

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[58] Barry Brummett, *A Rhetoric of Style*, (Carbondale: Southern Illinois University Press, 2008), p. 1.
[59] *Ibid.* 7.
[60] J.L. Austin, *How to Do Things with Words,* (Cambridge: Harvard University Press, 1962), p. 5.
[61] *Ibid.*

slants" allows him to "re-claim" the term, changing its meaning—its referent—in the process. "Re-claim" is a bit of a misnomer, however. As Cassie Herbert explains, "[c]ontrary to what the name of the project seems to imply, reclamation projects aren't an attempt to 'take back' a term the target group once had control over; it is rarely the case that the group had this kind of linguistic control of the term."[62] The project of reclamation is thus not just a change in ownership over the term. It is an attempt to re-signify the meaning by re-constituting the referent, the scene in which that sign might be used, and how the word might affect those who hear it (its perlocutionary effects). For Tam, the message of the "slants"—one that he claims expresses his pride in being Asian-American *while* revealing the discrimination he faces—is not separate from the way the trademark identifies its source. He claims that the band "toured the country, promoting social justice, playing anime conventions, raising money for charities and fight stereotypes about Asian-Americans by playing bold music …. In fact, our name became a catalyst for meaningful discussions with non-Asians about racial stereotypes."[63] The referent of the trademark is not just the band, but a band who is engaged in critical social practices that challenge the use of racial slurs and stereotypes. Reclamation is performative then in that it not only challenges who can speak the term, but also the ways its use re-sets the scene of address in which speech is made intelligible. "Reclamation projects", Herbert points out, "are a form of social protest, one which is explicitly discursive in nature …. This relies on changing the discursive conventions connected to the term so that a hearer can appropriately take up the speech in which the term is deployed."[64]

The speech that the Court wants to protect, but perhaps does not know how, is speech that does the work to expose *how* language expresses its message in relation to its speakers, hearers, and the context in which the speech becomes intelligible. It is clear that not all trademarks do the work of critique in the same way Tam advocates, nor should they have to in order to be registered. But what is clear is that paying attention to the style of speech, the way that the trademarks signify, might offer the Court a way for the law to distinguish between those trademarks that deserve the protection of the First Amendment and those that do not. This distinction would require the Court, however, to understand how the style of a trademark—and of all expressive speech—is more than a mechanism of communicating a message. It is the movement of a trope that allows the performative to constitute its referent *and claim the scene in which that referent might become intelligible.* For all the ways the Court ignores style, when a hint of it does appear across the various opinions, it appears as a concern for rhetorical tropes. In Justice Dyk's opinion *In re Tam,* he hints that it might be possible to distinguish between purely commercial trademarks and expressive speech if we see parody as a rhetorical device that signals expressive language.[65] As a trope, parody mimics in order to illuminate how the accepted or historical use of a particular concept or word figures the scene of address in which the speaker and hearer of that word relate.

In this way, I claim, the style of speech (and of trademarks in particular) is the tropic movement that makes the scene in which the referent becomes intelligible and

[62] Cassie Herbert, "Precarious Projects: The Performative Structure of Reclamation," *Language Sciences*, 52, 2015, p. 131.
[63] Tam, "The Slants on the Power of Repurposing a Slur".
[64] Herbert, "Precarious Projects", p. 131.
[65] *In re Tam,* 808 F.3d 1321, p. 1337.

positions those on scene in order to hear. Style, then, is not simply a mechanism through which we might express some message. As the turn of the trope, it asks us to account for the way language works to claim a particular scene. This scene renders speech meaningful in the relationship between the speaker and hearer, both positioned by the norms of recognisability at play on the scene. For law, this means that style can issue a challenge to the norms that the law (as a scene) provides. That is, to understand that style makes (and in the case of speech that re-claims, re-makes) the scene of address suggests that speech has the capability to scandalise law. Law does not provide *the* scene in which speech operates. There is truth to the idea that most decisions about speech belong in the public sphere. But, when the Court removes itself from any scene disqualifying itself from speaking to or on speech itself, when it cannot imagine ways in which it might be interpellated into a scene when other scenes are foreclosed or speakers and hearers misrecognised, it misunderstands how the law acts as interlocutor in scenes not of its own making. It misses how speech, especially critical speech, can expose not just the harms of language in everyday life, but also the way that law harnesses and deploys those harms in its own language. It can reveal how law's style can be "a powerful reinforcer of hierarchy".[66]

The ability of speech to scandalise the law, however, is not to claim that all speech (and all trademarks) will do this work. If style works to create a scene, to position speakers and hearers, then there will be configurations and scenes that the Court may find untenable in light of certain democratic principles and some they will find wholly workable. In this context, the force of the law comes not from its sovereign power to rule, but from its ability to expose the ways in which speech "swerves".[67] That is, law's force comes from the recognition of the contingency of any speech act, including its own. To find the potential in this contingency is to understand that the scene of speech has never been fully rooted for all time, never fully settled. It demands recognition and, in doing so, calls the law to respond to a desire for the freedom to choose our own language that might call the law's foundations into question.

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[66] Barbara Johnson, "The Alchemy of Style and Law", in Austin Sarat and Thomas R. Kearns (eds.), *The Rhetoric of Law*, (Ann Arbor: University of Michigan Press, 1994), p. 262.
[67] Hayden White, *Tropics of Discourse: Essays in Cultural Criticism,* (Baltimore: Johns Hopkins, 1978), p. 2.

# Viserbal laws: On an arbitral modality recently adopted in judgments

Peter Goodrich

**Introduction**

In a long running litigation over home appraisals, mortgages, lending and trade secrets, the parties' representatives irked the judge. The pleadings were a litany of "dirty lawyer tricks", the record replete with complaints about stalling, non-disclosure, failure to attend meetings, abusive language, "Rambo tactics" and vexatious filings.[1] The inability to observe norms of civility, and the disturbing length and expense of the proceedings, which showed no signs of moving towards a close, led the District Judge to insert four images into a short decision. The pictures are didactic, exhortative, comic, popularising and potentially reorientating. They are also revealing, I will argue, of an emergent novel form of judicial rhetoric, a new symbolaeography or mode of writing that incorporates images and so proffers a sea change in the form of transmission of law.

The use of imagery in the decision in *Housecanary v. Quicken Loans* takes an intriguing and indicative form. Rhetorical figures, verbal icons and vivid descriptions are gauged to bend and persuade, to enliven and influence. Technology now expands the range of options and judges increasingly have recourse to screen captures and photographs, emojis and simulations that augment the text and can now render a seemingly more real version of what the text merely describes. The imagery variously expresses moments of emotion, fissures in the linear logic of judgment, disturbances of the text at a formal level as well as an opening up and disclosing of the judge's drive and the site of arbitral invention. The image, in other words, is a symptom, a break in the text that signals not only a change of medium but an affective drive, a desire to express in a disjunctive form, an appeal to visible figures as somehow effectuating more than words alone.

In brief description, only one image appears in the signed text of the decision in *Housecanary* and this is significantly not a picture, but the more conventional and juristically acceptable diagrammatic form of a map. The cartograph or charter shows the borders of the state of Texas, North and West, and portrays forces intruding into the state from Mexico – "foreign" – and adjoining states – "migration". It is lawyers from out of state, Northerners, non-Texans, who are lowering the Bar in San Antonio (Figure 1). For the moment, however, the key is that the map is the only image that makes it into the text, as opposed to into the appendices where the other images, an evolutionary clock of world history, the Judge's own set of rules of conduct for litigating attorneys, and a picture of Abraham Lincoln are lodged.

The use of the map as the first depiction, as part of the text, reflects its diagrammatic character and putatively schematic role as a rational representation that charts a real geography and so escapes the aesthetic and sensory qualities of images.[2]

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[1] *Housecanary, Inc. v. Quicken Loans, Inc.* Civil Action No. SA-18-CV-0519-FB (2018).

[2] On the atlas as a blend of epistemic purity and sensual aesthetic representation, as mixing word and image, and as thus constituting a licit form of visual representation, see Georges Didi-Huberman, *Atlas, or the Anxious Gay Science*, (Chicago: University of Chicago Press, 2018).

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Peter Goodrich, "Viserbal laws: On an arbitrary modality recently adopted in judgments", pp. 50-60.

It is legally a preferred use and acceptable mode of depiction even though it distorts and invents quite as much as photographs and other pictorial presentations do.[3] The history of the earth in a 24 hour clock and the cliché image of Lincoln dourly discouraging wasteful litigation do not have the same privilege of access to, and concurrence with, the legal text and so are cautiously secreted at the end of the judgment. Be it noted, however, that they are there, extant and visible in the order handed down. They are inserted into the literary pickle jar of precedent and comprise part of a rapidly increasing corpus of visual reasons for decisions that require excision, classification, exposure and analysis. There is a growing population of precedential pictures being used to convince, persuade, legitimate and authorise judgments, while also performing a more phatic role of expression of emotion – comedy, anger, fear – and foray of the court into the world, interior and exterior, as it knows it.

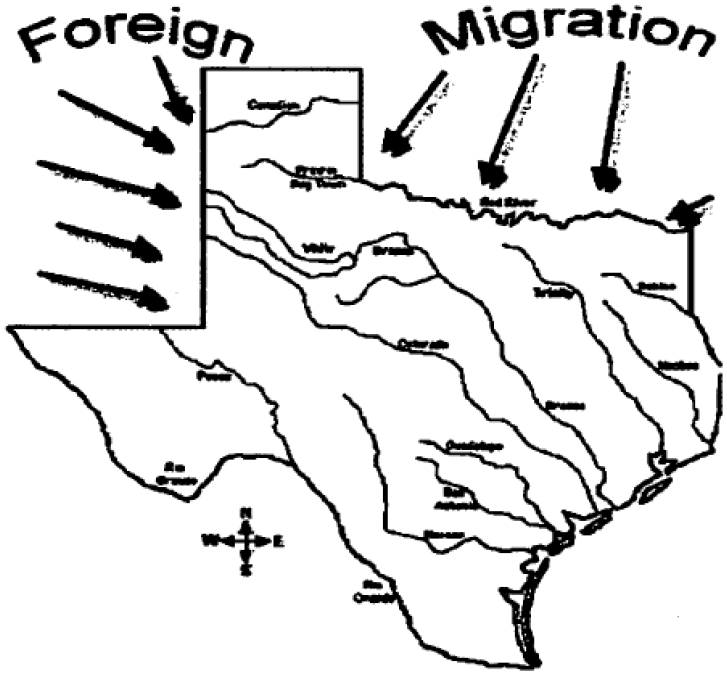


**Figure 1**

***Vividae Rationes***

We exist as subjects of both words and images. While the distinction historically aligned law with strict literalism, an art of inscription, recording and archiving judgments, legislative and judicial, the image dominated the realm of politics and ceremony.[4] Judges were to manipulate laws, indicatively enough *more geometrico*, according to a linear scriptural logic and an epistemic of purity and autonomy of form and language. Images, the whole social panoply of statuary, monuments, architecture, engraving, ritual and portraiture, costume and rite belonged in the dominion of the political, to populism and persuasion. It is precisely that schismatic distinction, the juridical caesura of word and image that the rhetorical or perhaps better the

[3] See Goodrich, "Retinal Justice: Rats, Maps and Masks", *Critical Inquiry* (forthcoming, summer 2020).
[4] For a recent excursion on this point, see Pierre Legendre, *Le Visage de la main*, (Paris: Belles Lettres, 2019) and the corresponding site, www.arsdogmatica.com, which provides a translation.

semionautical digital conflations of internet transmission disrupt and disorder. The image is out of joint with the text because it evidences more than it shows. The depiction makes the figure visible, the emotion – technically *enargeia* – visceral and extant and so introduces through portrayal a distinct order of association of ideas and archive of imagery that is distinct and plural. Pictures are rhizomatically connected to other pictures, to lineages and morphologies of affect and drive that reason knows not and that texts cannot contain. It is this distinctive sign function that the viserbal seeks to explore.

In his essays on *Image Science*, Tom Mitchell usefully fuses imagetext as constitutive of a third site of signification, a fractal space of convergence of sight, sound and the senses, of eyes, ears and, I would add, the two horns of the nose.[5] His key point is that the images are nested inside discourse, an alien assemblage within, but also breaking out of a discursive frame and sensibility. Viewing is not reading, just as in psychoanalytic terms the associations generated in dream and reverie are not those of the conscious and secondary processes of waking thought – or to borrow from Freud, the dream work does not think.[6] The image belongs through not belonging in the sense that the apparent novelty of form condenses and displaces the linear dominion and putative control of the text over meaning; there is something more, *plus ultra* in the old language, wherein mind and eye wander, divagate, sense and feel something else, a viserbal and sensuous apprehension of something real but absent. Words are always present; the image nests or intrudes upon the pure reason of the text and exists in relation to the discursive contours and progressions of the syntagma but also exceeds and displaces it.

The image covers over a void, a gap in reason and text that necessitates a novel form and alternative expression. Most obviously the map that Justice Biery inserts introduces a series of affects and signals a distinct set of reasons for the decision and order. The map is in this context, as a facet of the precedent, on its surface, a jointure of irony, comedy and remonstration. It used to be, the judge opines, that lawyers in San Antonio all knew each other and resolved disputes with handshakes but now counsel "immigrate into Texas, as shown in this illustration". To this he adds "Texans you are guarding the wrong river". [7] The reference mixes nostalgia, melancholy and humour, with frustration and an element of satire, the discursive divagation beginning with a rather self-conscious quotation from the movie *Star Wars*.[8] The reference to the extra-terrestrial is also a signal of the alien and the theme of the movie, which is of opposed warring forces, darkness encroaching upon and threatening the existence of the good. This can provide a point of entry to the image as revealing much more than has been verbally and consciously formulated.

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[5] Tom Mitchell, *Image Science*, (Chicago: Chicago University Press, 2015), pp. 43-47. On the gnosis of the nose, see Goodrich, "Proboscations: Excavations in Comedy and Law", *Critical Inquiry*, 43, 2017, pp. 361-388.

[6] Sigmund Freud, 'The Interpretation of Dreams', in James Strachey (ed.), *The Standard Edition of the Complete Psychological Works of Sigmund Freud Volume V*, (London: The Hogarth Press, 1953), p. 507: "The dream-work … does not think, calculate or judge in any way at all; it restricts itself to giving things a new form." The key commentary remains Christian Metz, *Psychoanalysis and Cinema: The Imaginary Signifier*, (London: Macmillan, 1982) chapter 18. This work can be complemented by Jean-François Lyotard, *Discourse Figure*, (Minnesota: University of Minnesota Press, 2011) and Laurence Moinereau, *Le générique de film: de la lettre à la figure,* (Rennes: Presses Universitaires de Rennes, 2009).

[7] *Housecanary*, p. 4.

[8] *Ibid*: "A long time ago in a galaxy far, far away." A footnote is appended to reference the source.

Rhetorically an enigma, a reference to external and unacknowledged sources, the diagram, like all maps, creates a subject and stakes a claim. The depiction is in the shape of Texas and evidences a jurisdiction, possession in a somewhat retro form of actual as distinct from virtual geography. It makes, however, the jealous point that this is, as stated, ours. Foreign and emigrant forces press upon "our" sovereignty and intrude into "our" state, threatening the standing of Texas and the proprieties of the bench and bar. The image delineates an imaginary jurisdiction, a space of disparate identity, and an isolation is inserted that wills itself pure and free of external threat, resistant to incursion. The diagram shows more. The foreign and the immigrant are imminent, pressing against the borders, about to invade. The nine pointers, the foreigners being a greater threat or at least more numerous than the immigrant attorneys, represent war, the arrows are the mode of belligerent communication, the messengers of the enemy that pierce the skin and kill, or break through the border and overrun. That was the fate of King Harold at the Battle of Hastings, 1066 and all that, and such seems to be the judge's fear for the fate of Texas, not the Normans but the Normativos.

The image expresses a sensibility and shows an apprehension of siege and invasion which recalls directly the separation of the South from the North, the American civil war being referenced as well by the figure of Abraham Lincoln that is also reproduced in the appendix (Figure 2). It is significant, however, that it is the diagram of Texas, a jurisdictional portrayal, a linear graphic representation of a place that inaugurates the other text, the visual depictions that differentiate and diversify the rhetorical force of the judgment. There is the appearance of reason, the schematic modality of the diagram is transitional in being linear but figural, verbal and visual, containing the rational instruments of names of places and a compass if not a coda or key. Reason is mixed with the aesthetic of a picture, juvenile though it may seem, the visual with the verbal, and so a third epistemic space and rhetorical figure of possibility is created, and an interruption – a *metastasis* – of the textual relay necessarily occurs.

Judge Biery is certainly not alone and the trend of using maps is a growing one, granted the ease of reproduction and the familiar and comforting character of these emblematically viserbal insertions. In other instances, the map will be coloured in, shaded, and provided with a key.[9] Increasingly frequently, the judge will supply a Google Earth image of the site and occasion that is under review. These satellite depictions enhance the reality effect of the depiction although they are seldom of the site at the time of the event that is to be judged.[10] The immediate point is that the map in the text of the judgment gives the chart a precedential status and weight of legal reason as an acceptable image, a permissible figure, rhetorically an icon, that is licit, more than anything else by virtue of the limitation of its aesthetic and its linear sensibility. It is an image that is not an image or at least it is one that is only part portrayal, and so marginally transgressive of the *litera mortua* of strict law.

[9] An instance from Hong Kong, for example, has the judge requiring the litigant to shade in the portion of the map which they claimed by virtue of adverse possession: *Chan Chuen v. Forestside Limited* High Court of Hong Kong HCA 2055/2011 (2016). Further discussion can be found in Goodrich, "Retinal Justice: Rats, Maps and Masks".

[10] See, for a relatively early and inelegant example, *Gilles v. Blanchard* 477 F.3d 466 (2007).

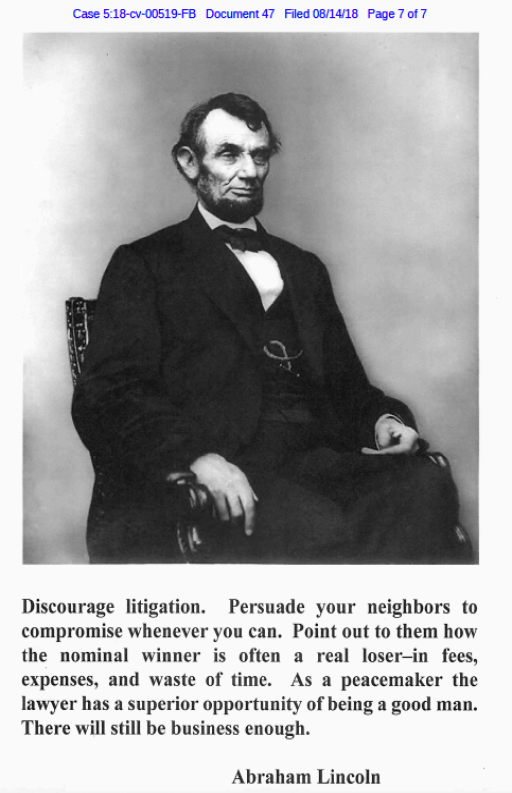


**Figure 2**

**Sensibilities**

The second image in the decision comes not in the text, but in a footnote to the judge's peroration. The parties, he exhorts, should get on with each other. The litigation represents a nanosecond, a blink of the eye, in the 14-billion-year history of the planet. For what it is worth, that is a considerable exaggeration, an inaccurate representation, on any count, of the importance and longevity of the lawsuit, but it prompts the judge to reproduce an image, adapted he states from Carl Sagan's Cosmic Clock, in the footnote (Figure 3). The History of the Earth in a 24 hour clock, perhaps bravely in South Texas, takes the scientific, evolutionary view of the development of life and depicts the cycle of life forms ending with the human at 11:58:43. Such an appearance, at the eleventh hour as the colloquialism goes, is insignificant and should be kept in perspective, a reasonable conclusion to the dispute should be possible, communication rather than antagonism and uncivil belligerence should be the order of the day. And to this is appended the signature, Fred Biery, District Court Judge.

[8] The History of Earth in 24-hour Clock below is adapted from Carl Sagan's Cosmic Calendar.

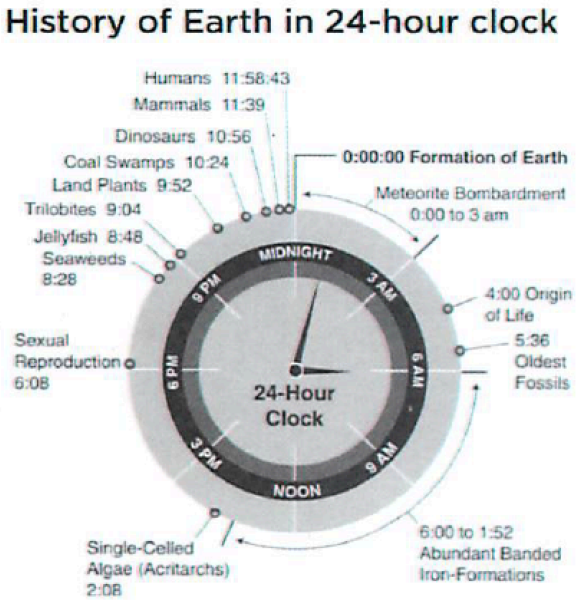


**Figure 3**

The jurist's footnote, on which much has been written, historical and critical, has an ambivalent status as discourse extant below yet incorporated into the text.[11] An image in a footnote has an even greater ambiguity of status and instantiates what Emanuel Coccia describes as the medial multiplication of forms and truth. Entry into, which simply means recognition and acknowledgement of the imaginal quality of all representations, is made more explicit by the use of the graphic depiction of the clock: "Becoming an image is both an exercise in relocation and dislocation, but moreover in multiplication of self."[12] For our purposes the inhabitation of images, made explicit now in a picture reproduced in the footnote, multiplies the medial presence of the judge and judgment while also relocating and promulgating in an expressly imaginal form. The multiplier is the image or, as Pierre Legendre has lengthily traversed, we inhabit the text as image and here the text expressly becomes image, thus underpinning and legitimating the thesis that the text in its multiplying forms is no longer text but a diversity and plurality of medial distributions.[13]

There is not only an ambiguity of status, a diffidence towards the image, in the placement in the footnote, but there is also an element of indirection, a partially unconscious and subtextual force, a differentiation fostered by the hesitancy to use

[11] Mention has to be made of Anthony Grafton, *The Footnote: A Curious History,* (Cambridge: Harvard University Press, 1997) and of Geoffrey Bennington and Jacques Derrida, *Jacques Derrida,* (Chicago: University of Chicago Press, 1993) in which Derrida's text, *Circumfession*, is a book-length footnote to Bennington's *Derridabase*. In critical legal contexts, see Luke W. Cole and Keith Aoki, *Casual Legal Studies: Art During Law School*, (Cambridge: HLS Incorporated Press, 1989) and Aoki's 1990 "Supplement" to the volume.

[12] Emanuele Coccia, *Sensible Life: A Micro-ontology of the Image,* (New York: Fordham University Press, 2016), p. 31.

[13] Most recently in English, see Pierre Legendre, *God in the Mirror: A Study of the Institution of Images: Lessons III,* (New York: Routledge, 2019).

satirical depiction in a judgement. That said, the image is now a constant presence, a frequently encountered manifestation of judicial opinion expressed in visible form and representing everything from re-enactment of the scene, to evidence, to subject-matter, to an increasing incursion, as with Judge Biery, of judicial expression, phatic opinations in cut and pasted visuals leading to a parallel strain of judgment and of precedent as a relay of imagery. This constitutes what has been coined as the *imago decidendi* or the image that subtends and drives judgment.[14] Force will out, judicial drives are not hid long, the picture propels not only a multiplication of rhizomes and relays of decision but also a view – glimpse, conspectus, visage – of that indefinable moment, without rule or calculus, that is in Derrida's coinage justice being done.

The relay of images brings legal judgment both closer to the real, defined as the sensibility of being which is necessarily a spectral affair, an abstraction from bodies and things as experienced by the subject. This theatre of visibilities gains its highest expression to date in the virtual domain and through internet relay, the multiplication of screens and optimised sites of viewing. The court is led into the world and into the dominion of the visible by images which, whether or not they gain direct expression or space and relay in the judgment, are nonetheless the interior presence and intimate theatre of decision. To judge it is necessary to imagine, to put into image, and a simple example from a South African case can help describe. A murder scene is re-enacted using mannequins *in situ* to give a sense of the scene of the crime as well as to indicate with red dots the entry points of bullets[15] (Figure 4). There is nothing dispositive about the depiction, nor does it either confirm or further the analysis of the warrant officer who details the trajectory of the bullets. What then is the purpose of the juxtaposition of word and image? The answer is that it visualises the scene, the external imagery facilitates and aids the internal imagination of the event, changing, dislocating the site of thought from text to image, words to pictures, generating another reason, another form. The simulation using mannequins neither imagines the scene and curiously humanises the crime by means of these dummies. It is a juridical "as if" or *scilicet*, that is neither what it shows – mere simulation in frozen time – nor tracks the path of the bullets, but it appeals to the sensibility of being there, of seeing the situation, of experiencing the sparseness, the scrimshaw free environment, the squalid circumstances, the cramped and lavatorial occasion of death.

[14] At the risk of self-reference, for an introduction see Peter Goodrich, "Pictures as Precedents: The Visual Turn and the Status of Figures in Judgments", in Elizabeth Anker and Bernadette Meyler (eds.), *New Directions in Law and Literature*, (Oxford: Oxford University Press, 2017), p. 156.
[15] *S. v. Redhouse and Another* (CC14/2017) [2018] ZAECPEHC 43 (26 July 2018).

**Figure 4**

The mannequins, differentiating the two participants by the use of different colours, and depicting gender by the use of slim mannequins and bra and knickers, specifically aim to lend an air of reality and precision to a crude and largely non-probative depiction of the scene.[16] The depiction plays the role of all images as false truths, alternate relays that are both real and fantastical, representations whose epistemic status in the judgment is that of legitimating the effect, trajectory and outcome of decision. The judge, Justice Mandela Makaula, introduces this image, a single picture from a photo album that the police had presented in evidence, so as to justify the police testimony and to support his conforming deliberation, his reasoning and conclusion. There is a weight to the depiction, a power of the image that accords with Ovid's observation that it is always more than it shows – *plus quam videatur imago*.[17] It is sensory, cathartic, a mode of mourning and release, of seeing and evacuating an event, an anterograde portrayal that allows judge, court and reason to move on.

It is the aesthetic of the image, the effect of the figuration that our two disparate instances of viserbality betray. It is tradition that is betrayed, not simply etymologically but equally in the interruption, the collision of forms, the movement of the judgment as a system of signs from linear text to these Pentecostal and persuasive modalities of portrayal. What I want to argue here, as justification for the path from the seemingly irreverent and playful cautels of Judge Biery to the melancholegalistic imagery of Justice Mandela Makaula's mannequins is that the hermeneutic or, better, apprehensive principle is the same. In each instance it is effect that instigates the irruption, the rending of text – *déchirure* – that the advenience of the image fosters and displays. In both cases the image is law by other means, the sudden

[16] Henry Bond, *Lacan at the Scene,* (Cambridge: MIT Press, 2009) might argue that the simulation is the *studium* of the murder scene and represents the dream content of the real event. This reconstruction would appear to be a psychotic crime scene, in which familiar and ubiquitous objects "have been radically recategorized", unbonded from their symbolic signifying grid.
[17] Ovid, *Heroides*, 13.149.

apparition of judicial determination in which the depiction, the staging, is of image as evidence and evidence as image. In each case the picture is treated as subject to the text, subordinate to the sovereignty of the word, the mechanics of reason being linear logic, and so whether evidencing the idiocy of the litigants or the scene of the crime, the purpose of the image is to be the vehicle of the text. The picture produces more words, it is the *via regia* back to the text, to the augmented text, and to the judicial order or verdict as the application of rule, to be sure, but as an affective and sensible distribution as well, as feeling just, rather than just feeling.

The same point can be pursued again in Judge Biery's decision which in its appendices introduces an intriguing twist to the above observations because the images, now deep in the textual unconscious, coalesce in an image of words, a crescendo picture of commandments. After the historical clock of the world, resident visually just under the Judge's chirographic ownership of the order announced, comes Appendix A. This takes the form of an image of a text, a tabulation, no less, of Biery's own nine commandments: The Rule for the Practice of Law, inclusive of instructions for implementation and penalties for non-observance (Figure 5). Echoing Robert Burton's *Anatomie of Melancholy* and its raillery at lawyers as the cause of most of the unhappiness in the polity: "where a population be generally contentious, where there be many discords, many laws, many law suits, many lawyers … it is a manifest sign of a distempered, melancholy state."[18] Whatever the status or originality of these rules – the Texas Lawyer's creed – presenting them comedically as a table, as an image, a Diet of Worms, in an appendix, both dislocates them, distances the table from the case, but also authorises and legitimates the rules by rendering them as a tabulation, a flyer or posting that is theatrical, simultaneously parodic and pompous. All of this, recollect, is in a judgment issuing an order and is followed by the image of Abraham Lincoln, the President who saved the Union, who brought peace, who sits now, dour, unsmiling, waistcoat and fob watch chain as if a judge, as if holding a hearing, about to pronounce judgment on the lawyers today.

Lincoln's view, cited below the photo portrait, is an irenic one, urging compromise, communication, comity and community. Make peace not law. But why show the portrait, the all too solid, sedentary figure, *ex cathedra*? Granted that the image comes after the historical clock of the world and the rules of irenic legal practice, the answer has to be that this is firstly a history lesson, part of the blinking of the eye, a reminder of who Texas is and where it belongs. The civil war was lost, the Union persists, and keeping the peace means following the time honoured and genteel traditions of specifically Texan lawyers, so that the North does not come down again. More than that, however, the portrait, *haec imago*, is a sledgehammer image of authority and foundation used here to authorise "The Rule" and bring *gravitas* to the *levitas* of the nine tables of the law. It appears *in ludo veritas*, an instaning of the playfulness of truth.

[18] Robert Burton, *Anatomie of Melancholy* (Oxford: Cripps, 1628), p. 69, continuing: "a purse-milking nation, a clamorous company, gowned vultures … a company of irreligious Harpies, scraping, griping catchpoles (I mean our common hungry pettifoggers …) without art, without judgment, that do more harm … than sickness, wars, hunger, diseases."

# The Rule
## For the Practice of Law

*Treat others (including lawyers, parties, witnesses and Court staff) as you would like to be treated.*

***The Implementation of* The Rule**

Our goal is the fair, peaceable and efficient resolution of disputes, and to seek the truth within the bounds of the rule of law.

There is a difference between advocacy for the sake of prolonging advocacy and serving the best interests of clients in bringing litigation to closure.

The law is only a part of life. It is easier to abide by The Rule if one occasionally breaks bread with one's adversary.

Abide by the Texas Lawyer's Creed.

***The Penalties for not abiding by* The Rule**

The loss of respect and goodwill from one's professional colleagues, thus making the practice of law much less enjoyable.

The writing of The Rule in multiples of fifty on a Big Chief tablet with a Number Two pencil.[1]

The donation of numerous pictures of George Washington to deserving charitable organizations.

Others within the discretion of the Court.

**Fred Biery**
United States District Judge

**Figure 5**

**Conclusion**

Specular legal philosophy, retinal justice, and the dogmatic methodology that should follow the chirographer's maxim, *procedere ad apparentiam*, is still but a minor jurisprudence, a micro-legal studies but unrecognised or if adverted to, deemed flippant, unserious, confusionist and chaotic. The lawyers' desire for analogy, to proceed *ad similia*, according to the same, has always involved a degree of hostility

towards new forms, difference and change. Beware of novelty – *cave novum* – is easier, is more stable and hides law behind a structural status of unchanging norms, uses unsullied by reality or contact with the quotidian. The minor jurisprudence of the specular and spectral will, however, undoubtedly have its day and the jurist of the image, of virtuality, of sensible life extant in the rhizomatic relay of images, in the multiplicities of the viserbal, material and immaterial, intimate and extimate promise a new *ars iuris*, one in which the art of living, embodying, opening to images as media of law will draw the jurist into the world in differential and divergent forms.

Judge Biery's peculiar and comedic use of images is not a good example but it is strangely probative and strikingly revealing. Judgment is an embodied sense, replete with images, visible and verbal expressions of judicial sentiments. The effect of deciding, the symptoms and triggers of decision, carries with it a dimension of the human comedy, the theatre of images amongst which we walk, judges, lawyers, pixelated commoners all alike. The minor jurisprudence of the specular, *ius imaginum* in the old tongue, is not mere scrimshaw or ornament, ever the castigation of rhetoric itself, but rather a domain and methodology of novel insights and indigitations of the truth. *Video et rideo*, I see and I laugh, meaning that the epistemic sense of the scopic drive sees into, sees through, perceives and apprehends differently, corporeally, viscerally, and virtually. Judge Biery may have hidden his images in footnotes and appendices, rendering them minoritarian, lessening their juristic significance and precedential value – these are simply *obiter depicta* – but for the scholar, the jurist of the future, the reader of the book of law yet to come, which is no book, the comedy signals both a caution and a radical divagation. The order contains another judgment, a viserbal relay, an alternative set of motivations and elaborations that link to a distinct and antique tradition of juristic imagery, emblematic relays, the visible devices and desires of lawyering, the *serio-ludere* of humanist thought as such.

~ Benjamin N. Cardozo School of Law, Yeshiva University, New York ~

# Performing imperious legal style: *Saleh v. Titan Corp et al.* and private military contractor accountability

Tim Barouch

**Introduction**

In March 2003, the Iraq War began with an assault on Baghdad. The United States-led coalition assembled quickly on the heels of the 9/11 attacks, made possible in part by the broad military authority Congress delegated to President George W. Bush. The composite case for the invasion in the United States included claims that Iraq was actively developing weapons of mass destruction, that Iraq was cooperating with al-Qaeda, and that Iraq was a dictatorship that should be overthrown. The war produced worldwide opposition based on the speed with which the United States built the case, the seeming cavalier attitude that the coalition had toward human life (embodied in the Shock and Awe campaign and the conversion of 'most wanted Iraqis' into a deck of playing cards), and the suspicion of ulterior motives such as the establishment of Western power projection and easier access to oil. In short, it appeared that the United States was (charitably) taking indiscriminate vengeance or (uncharitably) exercising its imperial ambitions.

One socially significant dimension of the war was the conspicuous presence of military contractors. These corporations took on a large role in the fighting, providing security services for troops, government officials, and prisoners. Their presence amplified ongoing concerns about democratic transparency and accountability in the war effort itself. As P.W. Singer observed, these entities "operate as global businesses … in institutionally weak areas … unwilling or unable to enforce [their] own laws…. [They] have the ability to move across borders or transform themselves, whenever and wherever they choose."[1] All of these factors contribute to a "general vacuum in law".[2] The question was particularly important for the Iraq War, whose violence began with traditional legislative deliberative mechanisms perverted by the trauma of 9/11 and exploited by ideological opportunists.

Critics saw the Iraq War as a war of empire. Michael Klare wrote at the time of the invasion of the "pursuit of oil and the preservation of America's status as the paramount world power".[3] Prominent conservative pundits made the case for American empire at the time,[4] and much academic reflection on the war described it in imperial terms.[5] The role of private military contractors in an imperial project

[1] P. W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, (Ithaca and London: Cornell University Press, 2008), p. 239.

[2] *Ibid*.

[3] Michael T. Klare, "For Oil and Empire? Rethinking War with Iraq", *Current History*, March 2003, pp. 129-135 at p. 132.

[4] See, for example, Max Boot, "The Case for American Empire", *The Weekly Standard*, 15 October 2001 (arguing for war to rid Iraq of weapons of mass destruction). Retrieved from: https://www.weeklystandard.com/max-boot/the-case-for-american-empire [Accessed 15 October 2019].

[5] For arguments concerning the Iraq war and American power projection through military bases, see Tom Engelhardt, "Iraq as a Pentagon Construction Site", in Catherine Lutz and Cynthia Enloe (eds.), *The Bases of Empire: The Global Struggle against U. S. Military Posts*, (New York: NYU Press, 2009), pp.

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Tim Barouch, "Performing imperious legal style: *Saleh v. Titan Corp et al.* and private military contractor accountability", pp. 61-72.

created a powerful new wrinkle: "a combination of American economic and political-military unilateralism … that twins practices of empire with those of neoliberalism."[6] Private military contractors "operat[ing] outside national and international law … can unleash global instability or global crisis."[7]

**Imperial Excess: Torture at Abu Ghraib**

Baghdad fell in April 2003 and then-President George W. Bush (in)famously declared the end of major combat operations in May 2003. That declaration proved hollow, and instead marked the start of a decade of intense sectarian violence and instability. Immediately after the fall of Baghdad, the United States converted Abu Ghraib – a brutal prison operated by the Hussein regime – into a military detention facility, which housed a mix of civilians suspected of crimes and supposedly "'high value' leaders of the insurgency".[8] The Army appointed General Janis Karpinski to lead Abu Ghraib operations. Although she had no previous experience governing a prison system, General Karpinski was "in charge of three large jails, eight battalions, and thirty-four hundred Army reservists, most of whom … had no training in handling prisoners."[9]

General Karpinski was suspended a month after her appointment amidst an Army investigation into her governance of the prison. The ensuing report found significant evidence of "sadistic, blatant, and wanton criminal abuse" of inmates.[10] The incidents included: breaking chemical lights and pouring phosphoric liquid on detainees, pouring cold water on them, beating them with broom handles, and sodomising at least one, among other instances of abuse. The Taguba report referenced "detailed witness statements" and "extremely graphic photographic evidence" documenting the charges.[11] Although the report was intended to be secret, both the report and the photos were placed into wide circulation. The photos were aired by *60 Minutes 2* on 28 April 2004 and *The New Yorker* published Seymour Hersh's "Torture at Abu Ghraib" a few days later. The photos depicted "leering G.I.s taunting naked Iraqi prisoners who are forced to assume humiliating poses"[12] and Hersh's piece quoted liberally from the Taguba Report, which *The New Yorker* had obtained.[13]

The resulting outcry set off a series of institutional responses, including public condemnation, testimony and reform. Many of the perpetrators of the abuse and torture were held criminally responsible as individuals and were dishonourably

131-144. Saba Mahmood examined neocolonial justifications for intervention (in Iraq and elsewhere) to liberate indigenous women from patriarchal cultures in "Feminism, Democracy, and Empire: Islam and the War on Terror", in Hanna Herzog and Anne Braude (eds.), *Gendering Religion and Politics: Untangling Modernities*, (New York: Palgrave MacMillan, 2009), pp. 193-215. See also Benjamin Barber, *Fear's Empire: War, Terrorism, and Democracy*, (New York: W. W. Norton, 2004).

[6] Jan Nederveen Pieterse, "Neoliberal Empire", *Theory, Culture & Society*, 21(3), 2004, pp. 119-140, p. 123.

[7] *Ibid*. 137.

[8] Seymour Hersh, "Torture at Abu Ghraib", *The New Yorker*, 10 May 2004. Retrieved from: https://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib [Accessed 15 October 2019].

[9] *Ibid*.

[10] Article 15-6 Investigation of the 800th Military Police Brigade ("Taguba Report"), p. 16. Retrieved from: https://fas.org/irp/agency/dod/taguba.pdf [Accessed 15 October 2019].

[11] Taguba Report, p. 16.

[12] Hersh, "Torture at Abu Ghraib".

[13] *Ibid* (quoting the Taguba Report).

discharged. But there was still the matter of the victims of the abuse and torture. Much of the activity of the prison involved functions fulfilled by private contractors. In what ways were they accountable? Were they subject to the same legal liabilities that typically attached to private companies? Or should they have been classed as soldiers in military combat? If there were different legal authorities that pointed to different answers, which should prevail, and why?

**The Privatisation of War and Public Wrongs: *Saleh v. Titan Corp et al.***

The atrocities that occurred at Abu Ghraib during the Iraq War drew attention to the horrible effects of Western intervention. The use of private companies to support the coalition forces raised significant problems of public accountability and transparency for these organisations that nevertheless executed state-led functions. The legal controversy surrounding contractor liability for detainee abuses at Abu Ghraib highlights crucial elements of Western legal style in the era of twenty-first century empire.

This controversy came to a head in *Saleh, et al. v. Titan Corp*. Some of the victims of Abu Ghraib sued CACI, Inc., and Titan Corporation, two of the private military contractors that had served the US military prison at Abu Ghraib. CACI, Inc. had provided interrogation services while Titan Corporation provided translation.[14] Two groups of plaintiffs representing detainees and their family members brought a lawsuit alleging that they (or their family members) were abused by employees of CACI or Titan at Abu Ghraib. Their complaints alleged that they were "beaten, electrocuted, raped, subjected to attacks by dogs".[15] The majority DC Court of Appeals opinion noted that these claims, which amounted to torture and war crimes, were "used sporadically" at oral argument, the plaintiffs' briefs were "in virtually all instances limited to claims of 'abuse' or 'harm'", and that the Court was "entitled … to take the plaintiffs' cases as they present them to us".[16] At the outset of the litigation, the plaintiffs had made many claims under various United States and international laws. By the time the litigation reached the DC Circuit Court of Appeals, the claims that were left were state tort claims (assault and battery, wrongful death/survival, the intentional infliction of emotional distress, and negligence) and a claim under the Alien Tort Statute, which grants to federal district courts jurisdiction "of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".[17]

CACI and Titan had argued that federal law pre-empted the state tort claims, and that the plaintiffs' allegations under the Alien Tort Statute did not meet the "violation of the law of nations" language in the statute. The federal pre-emption doctrine provides that the federal government can displace a state law in favour of a federal law or regulation when there is a conflict between the state and federal law. Derived from the Supremacy Clause of the Constitution, it has been implicated in a variety of contexts, including immigration,[18] trade secret regulation, oil and gas

[14] The US military could not provide sufficient numbers of skilled interrogators and translators for these tasks.
[15] *Saleh, et al. v. Titan Corp*. 580 F.3d 1, 17 (D. C. Cir. 2009) (Garland, J. dissenting).
[16] *Saleh*, 580 F.3d, p. 3.
[17] 28 U.S.C. Section 1350.
[18] Karl Manheim, "State Immigration Laws and Federal Supremacy", *Hastings Constitutional Law Quarterly*, 22(4), 1994, pp. 939-1018.

pipelines,[19] and the medical use of marijuana.[20] In *Saleh*, CACI and Titan argued that their actions at Abu Ghraib were legal under superior federal law, because they were undertaken in conjunction with the military operations in Iraq (and subject to the military's chain of command).

The district (trial) court decided that the pre-emption defence applied "only where contract employees are 'under the direct command and *exclusive* operational control of the military chain of command'".[21] It granted summary judgment[22] for Titan Corporation because Titan's employees were "'fully integrated into [their] military units … essentially functioning 'as soldiers in all but name'".[23] But it allowed the plaintiffs to proceed against CACI, reasoning that CACI had "retained the power to give 'advice and feedback' to its employees and because interrogators were instructed to report abuses up both the company and military chains of command" (hence, not "exclusive").[24]

The DC Circuit Court of Appeals affirmed this result concerning Titan and reversed it concerning CACI, concluding that the plaintiffs' claims against both contractors were pre-empted by federal law. It decided that CACI's "advice and feedback" to its employees did not "detract meaningfully from the military's operational control". It argued that a prior Supreme Court decision, *Boyle v. United Technologies Corp.*,[25] required this result, as well as "other … precedents in the national security and foreign policy field".[26] The Court also dismissed the plaintiffs' claims against Titan under the Alien Tort Statute on grounds that judges should be extremely cautious in recognising claims for recovery based on violations of international norms, and the allegations here did not suffice.

*Saleh v. Titan Corp.*, which decided that these contractors were protected from legal liability because such laws conflicted with contrary federal mandates, represents a significant expression of legal style that paved the way for imperial expansion in its current form. Its legal result justified Western constitutional forms and practices when confronted with alternative legal obligations. Close analysis of its techniques reveals that legal style emerges from a constitutive tension in American legal structure: judicial decision-making is presumptively illegitimate in a democracy, and so must therefore authorise itself with recourse to democratic appeals.

The majority opinion in *Saleh* accomplished this with three moves. First, it marginalised dissenting views as out of step with consensus. Second, it grounded its analysis in democratic policy making in order to reframe the legal question in a light favourable to Western legal practices and norms. Third, it highlighted its own institutional limitations to legitimate judicial inaction. Taken together, these tactics produced an imperious result. It sided with Western legal form in the face of

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[19] *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947).
[20] Robert A. Mikos, "On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime", *Vanderbilt Law Review*, 62(5), 2009, pp. 1419-1482.
[21] *Saleh*, 580 F.3d, p. 4 (emphasis added) *quoting Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 5 (D.D.C. 2007).
[22] Summary judgment is a procedural technique used to dispose of cases prior to trial. The rationale is to spare the burden on courts and the parties of time-intensive information discovery, issue-briefing, and eventual trial. The general standard that a party must satisfy is that the opposing party's alleged facts, even if proved true, would not entitle that party to legal recovery.
[23] *Saleh*, 580 F.3d, p. 4, quoting *Ibrahim v. Titan Corp*, 556 F. Supp. 2d 1, pp. 10 and 3 (D.D.C 2007).
[24] *Ibid.,* quoting *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d, p. 3.
[25] 487 U.S. 500 (1988).
[26] *Saleh*, 580 F.3d, p. 6.

potentially resistant traditions. Its attitude created (legal) threats and conquered them with a mode of reasoning that posed its resolution as the only viable option.

**Imperial Discursive Form: The Role of Legal Style**

The academic importance of the question posed by *Saleh* involves the role of legal style in justifying the advance of Western empire. Scholarship on empire traditionally has been conceived as the conquest of people for the express purpose of governing them from afar. Empire as a topical organisation of Western liberal regimes in the nineteenth century had significance both at the level of political theory and in public political discussions. Arguments in the British context were made in favour of empire to civilise those subject to rule, as well as those advocating for the benefits of empire to the home polity for those exercising the power as governing authorities.[27] Scholars have recently extended the assessment of empire as the export of constitutional forms and practices. Law is a vital site as the execution of constitutional form, which James Tully has argued "has a degree of separation … from the activities of those who are subject to it and has the compliance capacity to structure or even constitute the field of recognition and interaction of the people subject to it."[28] Western constitutional form serves imperial aims with its "legitimising metanarratives" that form the horizon of expectations for subjects of constitutional democracies, supporting the *telos* of the mission to civilise inferior people as a "universal and cosmopolitan endpoint for one and all".[29]

This essay understands the study of style as "a coherent repertoire of rhetorical conventions depending on aesthetic reactions for political effect".[30] Because styles are bound by time and culture,[31] they are reinvented, extinguished and revived across time. Imperial aims rely on recurring appeals, which embody a particular character and serve specific functions. Scholars have assessed the role of style in the advance of empire, specifying the relationship between style and empire as the mutual entailment of conquest and public democratic ends.[32] In these cases, "public culture becomes distorted by [persuasive] appeals"[33] to expand domestic influence across the globe. These ambitions stifle public criticism in a variety of ways. The persuasive appeals absolve publics of moral responsibility by making choice appear as compulsion, blur the distinction between image and reality by framing imperial projects as spectacular, and seduce both perpetrators and local collaborators by draping domination in the garb of affection.[34] These discursive acts further imperial aims even when Western powers are making amends for empire's past excess and abuse. For these reasons,

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[27] Duncan Bell has directed attention to the history of empire as the historical expression of ideas in "Republican Imperialism: J.A. Froude and the Virtue of Empire", *History of Political Thought*, 30(1), 2009, pp. 166-191.

[28] James Tully, "Modern Constitutional Democracy and Imperialism", *Osgoode Hall Law Journal*, 46, 2008, pp. 461-493, p. 466.

[29] *Ibid.* 479.

[30] Robert Hariman, *Political Style: The Artistry of Power*, (Chicago: University of Chicago Press, 1995), p. 4.

[31] *Ibid.* 96.

[32] Robert Hariman, "Three Tropes of Empire: Necessity, Spectacle, Affection", *Javnost: The Public*, 12(4), 2005, pp. 11-26. Donovan Conley and William O. Sass, "*Occultatio*: The Bush Administration's Rhetorical War", *Western Journal of Communication*, 74(4), 2010, pp. 329-350.

[33] Hariman, "Three Tropes", p. 12.

[34] *Ibid*.

ritual acts still retain ambivalence about these abuses and "recycle paternalistic and hierarchical discourses" towards colonised peoples.[35] Liberal polities can "bolster … their liberal credentials" by disavowing past violence while simultaneously pointing to heroic intent.[36]

When specifying the importance of legal style, it is important to understand the level of remove at which legal discourse operates. In explicit public appeals in favour of empire, the discourse of law can obfuscate, mystifying a public by "betray[ing] the aims of democratic communication – precision, transparency, and accountability".[37] Leaders have argued to their publics by invoking the broad authority of the law in the positivist sense of what law permits (or commands) in favour of preferred imperial policies. But discursive forms internal to legal institutions operate in a more subversive manner, often enough justifying these policies without explicitly acknowledging the imperial objectives. Like apology, legal style animates discursive form by shaping a horizon of expectations, and making legal results appear consonant with a liberal constitutional tradition.

**Reading Imperial Law as a Genre of Liberal Constitutionalism**

One particularly significant legal form is the judicial opinion, which displays the hallmarks of legal style by authorising itself through argumentative manoeuvres. The judicial opinion is a generic response to periodic irresolvable conflicts that threaten democratic social order. It responds strategically to these conflicts by provisionally resolving the tensions implicit for a democracy that delegates conflict resolution to unaccountable judges. Judges claim their authority through performance. They justify their decisions by manipulating the repertoire of familiar discursive forms, creating an imagined community subject to the decision's force. "The most important message is the one the judge performs, not the one [the judge] states."[38] The judicial opinion produces democratic legitimacy as an effect of this performance. Three structural tensions bear mention for their role in Western constitutional democracy.

First, legal style is the product of a tension between hierarchical expertise and equal decision-making power. On the one hand, judicial opinions can be productively viewed as a form of technical expertise.[39] Because lawsuits represent democratic failure in the sense that two parties were incapable of resolving a dispute (with its attendant political and economic implications), the parties litigate the dispute in a forum in which they acknowledge its legitimacy by virtue of their participation. These decisions by legal experts make reference to a host of obscure definitions, rules of evidence and appeal, doctrines, institutional precedents and statutory histories. Their competent application requires a facility with their timing, relevance and appropriateness to the legal question under consideration. They are less accessible to average citizens, and their language tends toward the opaque.

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[35] Tom Bentley, "The Sorrow of Empire: Rituals of Legitimation and the Performative Contradictions of Liberalism", *Review of International Studies*, 41, 2015, pp. 623-645, p. 625.
[36] *Ibid.* 634.
[37] Conley and Saas, "*Occultatio:* The Bush Administration's Rhetorical War", p. 331.
[38] James Boyd White, "The Judicial Opinion and the Poem: Ways of Reading, Ways of Life", *Michigan Law Review*, 82, 1984, pp. 1669-1699. This essay was adapted from White's book, *Heracles' Bow: Essays in the Rhetoric and Poetics of the Law*, (Madison: University of Wisconsin Press, 1985).
[39] G. Thomas Goodnight, "The Personal, Technical, and Public Spheres of Argument: A Speculative Inquiry into the Art of Public Deliberation", *Argumentation and Advocacy*, 48, 2012, pp. 198-210.

This posture is balanced by the presence of democratic tropes in Western legal discourse. Equality is prized in the law. Its categories apply to all who fit them. Norms of legal argument ensure equal opportunities to present evidence. Interpretive arguments refer to shared traditions and histories. There is an avowed preference for democratic process, and judges make decisions by noting that they will lead to democratic outcomes.[40] When injustice occurs, judges frequently observe that it is not their place to stand in for the people, and they often invite the people to address the supposed injustice directly through more representative institutions (such as legislation).[41] Taken together, these tropes help legitimate legal decisions, which themselves are subject to debate, discussion, and reinterpretation for the future.

Second, legal style makes use of a tension between procedural certitude and judicial reluctance to intervene. Opinions perform a conviction about the singular correctness of their chosen approach. Procedure is associated with confidence in the legal result. To perform sound legal judgment properly means to follow the proper analytical steps, giving judicial opinions a quasi-logical character.[42] Missteps of procedure are a mark of inexperience. Judicial opinions deploy generic elements consonant with this procedural faith, suppressing the possibility of contingency, offering their distinctive solution to the conflict as the one-and-only possible outcome.[43] Interpretive disagreement is articulated as grievous error, which cultivates a discourse of plural opinions with little room for persuasion.

This methodological certainty is tempered by the display of "passive virtues" that creates the appearance of judicial restraint.[44] In the American case, federal judges

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[40] Canonical examples of American constitutional law illustrate the point. In *Brown v. Board of Education* 347 U.S. 483, 493 (1954), the constitutional injury of racially segregated education laws (that were enacted by legislative majorities) was framed partially in terms of the "importance of education to our democratic society … the very foundation of good citizenship". An example from the other side of the ideological ledger proves the point. When the Supreme Court ordered the end of the recount in the 2000 Presidential election, it framed its intervention as a necessity compelled from outside circumstances: "Members of this Court … [admire] … the Constitution's design to leave the selection of the President to the people … When contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront." *Bush v. Gore*, 531 U.S. 98, 111 (2000).

[41] Justice Felix Frankfurter was one of the most well-known proponents of this kind of judicial restraint. In his dissent in *West Virginia v. Barnette* 319 U.S. 624, 651 (1943) (Frankfurter, J., dissenting), (the canonical free speech case that struck down compulsory recitation of the Pledge of Allegiance in schools), he observed that "the real question is, who is to make such accommodations, the courts or the legislature? This is no dry, technical matter. It cuts deep into one's conception of the democratic process …. A court can only strike down …. It cannot modify or qualify, it cannot make exceptions to a general requirement." Recently appointed Associate Justice Neil Gorsuch channelled this stylistic tradition in *Henson v. Santander Consumer USA, Inc.* 582 U.S. 11 (2017) (which considered the meaning of the term "debt collector" for consumer protection purposes) when he wrote that "the proper role of the judiciary … is to apply, not amend the work of the people's Representatives".

[42] See, for example, Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (South Bend: Notre Dame Press, 1973). Perelman and Olbrechts-Tyteca employ the term "quasi-logical" to refer to arguments that generate persuasive force by taking on the appearance of formal validity. Here the point is that judicial opinions appear as exercises in deduction, such that only one clear answer to a legal dispute suggests itself. I am arguing that such styles also conceal interpretive choices that have political consequences.

[43] Robert Ferguson has marked this tendency in "The Judicial Opinion as Literary Genre", *Yale Journal of Law & the* Humanities, 2(1), 1990, pp. 201-220.

[44] Anthony T. Kronman, "Alexander Bickel's Philosophy of Prudence", *Yale Law Journal*, 94(7), 1985, pp. 1567-1616.

are constrained by a series of doctrines that limit the types of conflicts that can be decided. Issues are not "justiciable controversies" if they involve political questions, if parties have not suffered a legally cognisable injury, or if a party has brought an issue before the court too early to properly decide. In addition to these avoidance doctrines, judges argue from a position of institutional limits. Judges who disagree with a colleague will often express their objection in terms of a judge's lack of professional discipline, such as rendering an opinion based on personal belief rather than textual application. Such restraint is often imposed because of an express acknowledgment of the limits of legal institutions. Law cannot do policy, it is adversarial and competitive, it is costly, and it is a place of last resort. Each of these rationales is used to justify judicial non-involvement. Their presence reassures Western constitutional democratic subjects who are wary of being bound by unelected judges, whose interpretive decisions would alter presumptively representative statutes.

In *Saleh*, the District of Columbia Court of Appeals activated these tropes in the service of American empire. The following section demonstrates that the majority opinion justified its denial of justice to the Abu Ghraib victims by producing democracy as an effect of its legal reasoning. In justifying its refusal to intervene, the *Saleh* majority posed the legal alternative as a disruption to the presumptively valid status quo. This performance was doubly ironic in two senses. It applied this reasoning to private military contractors whose operations evade traditional democratic institutions. It also displayed an interpretive attitude that was itself imperious because it refused to acknowledge its own limits and raised the possibility of excess in its application.

**Judicial Style: Legitimating Injustice as Democratic Choice**

The *Saleh* decision provides a fitting example of legal style's effects in an age marked by interminable wars and America's desire to expand its influence. The majority opinion used strategies of marginalisation and certainty to justify its holding to deny relief for the plaintiffs. These strategies permitted the majority to reframe the core legal question – whether private military contractors would be immune from the plaintiffs' suit – as a potential threat to democratic political process. It then assumed the position of institutional humility to amplify the threat, which was extended to deny any role for transnational influence in American law.

First, the majority framed possible alternative outcomes as marginal, out of step with accepted expertise. Ideologically, the tactic reconstituted the institutional norm of respect for prior authority and hierarchy. The dissent was "not just dissenting from [the majority], he [wa]s quarreling with *Boyle* where it was similarly argued that the FTCA could not be a basis for preemption of a suit against contractors."[45] The dissenting view was a marginal opinion because it misunderstood the meaning of the relevant governing Supreme Court case. It was to be treated with scepticism because it knew neither the law nor the norm of respecting precedent. This approach told a half-truth: *Boyle* decided that a private contractor could use the FTCA for a pre-emption defence. But that was not the *Saleh* dissent's point. Judge Garland had argued that according to *Boyle*, the private military contractor here faced no apparent conflict

[45] *Saleh*, 580 F.3d, p. 6.

of legal obligations. Nothing in the FTCA's text conflicted with state tort law for private military contractors.

According to Judge Garland's dissenting view, *Boyle* clearly limited the use of the pre-emption defence to instances where the state legal standard obligated the contractor to a course of action that would force it to breach its military contract. The issue in *Boyle* was a state standard about helicopter escape hatches. The *Boyle* plaintiff argued that state law required a particular type of hatch, and the defendant's contract with the government specifically required a different hatch.[46] The conflict was born of the impossibility of complying with both legal obligations. But what conflict did the majority assert here between the defendants' obligations to interrogate and translate for the military and their obligation not to abuse and torture them? It resided in the more abstract extension of tort onto the battlefield.

Clarity of legal result appeals to subjects in the Western democratic tradition because it helps predict the likelihood of state force as a consequence of private action. Here, the majority invoked clarity and authority on the basis of a critique that dissenting views were unacceptable departures from institutional norms. Invoking an idiom of certainty to substantiate this conclusion, the majority in *Saleh* declared that a "conflict" could derive from conflicting ends instead of specific legal commitments. The opinion turned away from specialised legal techniques of interpretation to justify this course. It used democratic tropes of shared democratic expression to fortify the case for military deference. Where the dissent looked to the text of the statute and the Supreme Court's prior interpretation to find that defendants had no conflicting obligations, the *Saleh* majority moved to a higher level of abstraction. It speculated (but never explicitly decided) that the defendants' conduct constituted "combat activities" and then turned to the rationale for their exemption in the federal statute.

This tactic allowed the majority to shift its interpretive focus from the technical application of statutory terms to the more public act of statutory creation. The choice permitted the Court to evade the core argument of the dissent. Instead, it highlighted the publicly shared motivation for the statute's exemption for combat activities. Mediating shared traditions permitted an argument from essential nature in support of the opinion. The legislative history – deliberations and declarations of statutory intent – were "singularly barren" but it was "plain enough that Congress sought to exempt combatant activities" because Congress thought that they should be "by their very nature … free from the hindrance of a possible damage suit".[47] Because the purpose of the statute was to free military action from the risk of tort liability, the opinion here should vindicate that essential purpose.

The strategy named both the source and content of democratic unity, reconstituting American democratic traditions as a way to avoid confronting their ugly excess. This perspective protects a vision of democracy as representative social contract. According to this vision, democracy knows what it is because it is bound by agreements to legislate democratically. This posture still raises a background question: if democratic government is legitimated through consent to legislation, why would the Court not interpret statutes by overlapping sovereigns more narrowly, so as to grant each sovereign legitimacy? The *Saleh* majority's response was to pivot to a strategy of institutional (in)competence.

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[46] *Ibid.* 21.

[47] *Saleh*, 580 F.3d, p. 7, citing *Johnson v. U.S.*, 170 F.2d 767, 769 (9th Cir. 1948).

Converting inaction into a virtue, the *Saleh* Court shifted the operative legal question. These were, in the majority's eyes, questions of appropriate restraint in war, and they did not suit juridical methods and vocabularies. Once again, the opinion resorted to democratic tropes in order to assuage sceptics concerned about whether it was clearing the way for an empire unhinged:

> "To be sure, to say that tort duties of reasonable care do not apply on the battlefield is not to say that soldiers are not under any legal restraint. Warmaking is subject to numerous proscriptions under federal law and the laws of war. Yet, it is clear that all of the traditional rationales for *tort* law – deterrence of risk-taking behavior, compensation of victims, and punishment of tortfeasors – are singularly out of place in combat situations, where risk-taking is the rule."[48]

Legal abdication here does not mean limitless war, though the opinion does not expand on the various laws that would check the kinds of gross abuse at Abu Ghraib.

The opinion framed legal process as an unpredictable force that makes unjust decisions about cases shorn for their contexts. The opinion adorned the original question with uncertain and vague legal terms – "tort duties of reasonable care"[49] implies an expansive, subjective and perhaps limitless inquiry. It is difficult to conjure a comprehensive list of one's legal duties. The mere suggestion might evoke anxiety and apprehension. Tort duties create legal relationships that punish the mentalities and motivations that are necessary for survival in war. A series of metonymic substitutions create the appearance that these lawsuits pose a grave threat to democratic action. First, the opinion substitutes "policy" for statute in order to cultivate a sense of threat to the military:

> "The policy embodied by the combatant activities exception is simply the elimination of tort from the battlefield …. And the policies … are equally implicated whether the alleged tortfeasor is a soldier or a contractor engaging in combatant activities at the behest of the military and under the military's control. Indeed, these cases are really indirect challenges to the actions of the U.S. military."[50]

The culmination of this strategy was to convert the contractors and the military into potential victims and the plaintiffs' quest for justice as a destructive force. Instead of being concerned about the victims of CACI Inc. and Titan, the opinion worried that "military personnel [might be] haled into lengthy and distracting court or deposition proceedings".[51] These proceedings could "devolve into an exercise in finger-pointing between the defendant contractor and the military…. [The suits] will surely hamper military flexibility and cost-effectiveness."[52] What began as a question of potential liability for the contractors turned into a concern to limit legal conflicts between contractors and the government.

The result was a perversion of the role of democratic institutions. "The federal government's interest in preventing military policy from being subjected to fifty-one separate sovereigns (and that is only counting the *American* sovereigns) is not only

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[48] *Ibid*., citing *Koohi v. U.S.*, 976 F.2d at 1334-35 (9th Cir. 1992).
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*. 8.
[52] *Ibid*.

broad – it is obvious."[53] Here, the Court was imagining the consequences of a lack of clarity and unified rule: "The states (and certainly foreign entities) constitutionally and traditionally have no involvement in federal wartime policy-making."[54] The *Saleh* majority represented institutional practices designed to seek the truth and provide public accountability as a mass of conflict and confusion that could threaten unified and democratically supported military action.

The *Saleh* majority's passivity extended to the last of the plaintiffs' claims – the abuse and torture claims against Titan Corp. under the Alien Tort Statute. Could plaintiffs recover for violation of international norms against torture? Again, the *Saleh* majority rejected this explicitly transnational claim based on strategies of restraint and institutional limitations. Continuing the strategy of converting plaintiffs' claims into a threat, it said that they were "stunningly broad" and it took the plaintiffs' most tenuous claim – that there was an international consensus against "abuse" – to comment that their legal theory was "an untenable, even absurd, articulation of a supposed consensus of international law".[55] Although the majority admitted some ambiguity concerning the torture allegations, it once again punted to more representative democratic bodies for that question. Congress, not the judiciary, possessed "superior legitimacy" on the question, it "has not … been silent" on the question, and it "never has created" the cause of action.[56]

**Conclusion: Threatening Ambiguity and Interpretive Sovereignty**

The cumulative effect of this approach was to justify imperious substantive legal results with a matching stylistic performance. The substantive legal outcome excused torture, thereby allowing private military contractors to evade economic damages for its conduct abroad.[57] More significantly, it dismissed contrary legal authority that could restrain US military advances, signalling that sovereign law that frustrates broad US federal policies would be accorded little respect. All these aspects are assembled in opposition to transnationalism. The theme that emerged betrayed the circular logic of a self-sealing argument: avoiding liability for private military contractors was permissible because there was no international consensus against it, and the lack of an international consensus was established by the fact that the US opposed it.

This interpretive doubling exceeds the immediate injustice that its decision potentially wrought. In giving legal (and hence, precedential) significance to an idea of conflict as a tension between incompatible policies instead of an impossibility to comply with two different legal obligations, it expressed a hostile disposition toward plural legal sovereigns. By cloaking its preference for singular unitary rule rather than multiple sources of authority, the opinion poses imperial aspiration as a democratic necessity. The contingent use of this interpretive repertoire explains how legal style

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[53] *Ibid.* 11.

[54] *Ibid*, citing U. S. Const. Article I, section 10 and a string of Supreme Court decisions that recognised the power of the federal government, and not the states, to enact foreign policy.

[55] *Ibid.* 15.

[56] *Ibid.* 16.

[57] The majority in *Saleh* took the position that the plaintiffs had more or less abandoned their torture claims in their briefing and at oral argument. The dissent had the better of it as a matter of legal argument – at the summary judgment stage, the Court must take the facts alleged by the plaintiff as true, and the plaintiffs had alleged facts that included torture.

can discursively support the quest for empire in subjects at home and marginalise resistance abroad. By framing legal ambiguities as irresolvable conflicts and victims of empire as threats, the *Saleh* majority appealed to the vanity of certitude for its judicial intervention. The antidote to this situation cannot solely be found in rhetorical practices shaped by institutions. But neither can those practices be avoided. Where certainty and domination appear under cover of democracy, may they be answered by charity and humility.

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# The pigeonhole dictated by *logos*: Behind the text in *Volks v. Robinson*

Dennis Davis

**Introduction**

It is a notorious fact that South African legal culture, underpinned as it is by a resilient mode of legal education that holds tenaciously to roots grown over the past 70 years, is extremely conservative.[1] Generations of law students have been told that the objective of legal education is that students must be taught to think like lawyers. In effect, that means that a law student must embrace a recognised and legitimate mode of reasoning and argument, one that can determine the source of legal authority, and adhere to expression that is restrained and subservient to established legal hierarchy. As Peter Goodrich has observed: "If there was to be any empirical study of law, it was to be that of the objects of legal regulation, of the market, of economic actors and actions defined in terms of ideal types, rational action and pervasively hypothetical situations."[2]

The purpose of this paper is to illustrate an alternative mode of analysis which can help to strip away these formal modes of argumentation to re-examine the manner in which a court arrives at its judgment; in this case a textual analysis of the mode of argumentation in a single judgment, that of the majority judgment of the South African Constitutional Court in *Volks v. Robinson*.[3]

In seeking to parse the text of this judgment, this paper turns to the application of an important part of the rhetorical tool kit: *logos*, *pathos* and *ethos*; and the manner in which they shape legal argumentation.[4] *Logos* as applied to judicial writing focuses on the manner in which the judgment invokes precedent derived from previous case law, the legally established rules of statutory interpretation, principles of law sourced in legal practice and, for present purposes, a set of common sense assumptions and distinctions shared between judicial writer and her audience, which are foundational to the development of the overall line of much of the judgment. *Pathos* involves the evocation of the emotions, such as pity, regret or anger, in which the judge clothes the judgment to gain the approval of the legal community and the parties who constitute the audience and which are invoked to justify the decision. *Pathos* should not be confused with purely subjective emotion. Like *logos*, it has an important public aspect in the presentation of the judgment in that it seeks to draw on shared feelings and stock responses which are sustained by a common set of cultural understandings within the specific factual context confronting the court. It is not often overtly present in judicial rhetoric, save in cases where there is public controversy or clear judicial division, as in keeping with the manner in which it is demanded that it is important to behave like a lawyer, the nod towards *pathos* must be careful to maintain a veneer

[1] D.M. Davis, "Legal Transformation and Legal Education: Congruence or Conflict?", *Acta Juridica*, 2015, p. 172.
[2] Peter Goodrich, "Rhetoric and the Law" in Michael J. Mcdonald (ed.), *The Oxford Handbook of Rhetorical Studies*, (Oxford: Oxford University Press, 2017), p. 618.
[3] *Volks NO v. Robinson and Others* 2005 (5) BCLR 446 (CC).
[4] John Harrington, Lucy Series and Alexander Ruck–Keene, "Law and Rhetoric: Critical Possibilities", *Journal of Law and Society*, 46(2), 2019, p. 302.

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Dennis Davis, "The pigeonhole dictated by *logos*: Behind the text in *Volks v. Robinson*", pp. 73-85.

of objectivity. Arguments in controversial criminal, medical or other cases involving delictual wrongdoing or, on occasion, constitutional cases that invoke strong moral or ethical controversy are clear exceptions. By contrast, *ethos* is central to the persuasive strategies of judges and advocates, as is the case with testimony from some expert witnesses in which emphasis is placed upon the practices and modes of address adopted, reinforced by the manner in which the court building and courtroom are structured.

Take, for example, the standard trope that the court applies the law and not morals, or the statement that this is not a decision that is influenced by or involves politics; here the concept of *ethos* is highlighted to full effect. The denial of any presence of anything other than forensic objectivity is central to the presentation of law as it emerges from the courtroom, a point luminously illustrated in the following comment of Erwin Grisswold, one-time Dean of Harvard Law School:

> "A courtroom is not a stage: and witnesses and lawyers, and judges and juries and parties, are not players. A trial is not a drama, and it is not held for delectation, or even public information. It is held for the solemn purpose of endeavoring to ascertain the truth–and very careful safeguards have been devised out of the experience of many years to facilitate that process. It can hardly be denied that if this process is broadcast or televised, it will be distorted. Some witnesses will be frightened some will want to show off, or will show off, despite themselves. Some lawyers will 'ham it up'. Some judges will be unable to forget that a million eyes are upon them. How can we say that our primary concern is the equal administration of justice if we allow this to be done?"[5]

In any case, a judge can probably do no more than observe the complexities of social reality through the eyes, often distorted, of witnesses and the prism of evidence that the law regards as admissible. A judge discovers reality, not in the manner in which an anthropologist might, but rather fashions facts out of a complex record of evidence presented during the legal proceedings. In a civil trial, all a court is required to do is find determinative facts on a balance of probabilities – a likelihood greater than 50 percent – that is, what is probable, not that which is necessarily actually factual.[6]

However, as is evident from the standard trope expressed by Grisswold, the creative, performative dimension of the judicial function and its method of fact and legal findings is generally ignored or accorded little emphasis; indeed, such an approach is regarded as not legal and thus unscientific, even as the "science" does not take us very far at all in determining the outcome of cases, especially the hardest cases in the highest courts.

***Volks v. Robinson***

It is necessary firstly to set out the facts of the case and then turn to parse the reasoning employed in the majority judgment in *Volks v. Robinson*. In summary, Mr Archie Shandling and Mrs Ethel Robinson were never married and no children were born of their permanent relationship, which commenced in 1985 and endured until Mr Shandling died in 2001. During the lifetime of Mr Shandling, the couple had jointly occupied a flat situated in Cape Town on a continuous basis from early 1989, until the

[5] E.N. Grisswold "The Standards of the Legal Profession: Canon 35 should not be Surrendered", *American Bar Association Journal*, 48, 1962, p. 616.

[6] See the compelling analysis for the importance of rhetoric in legal education by Gary Watt, "The Art of Advocacy: Renaissance of Rhetoric in the Law School", *Law and Humanities*, 12, 2018, p. 116.

deceased's death. Mrs Robinson remained in occupation of the flat until the end of December 2002. Mr Shandling had previously married Edith Freedman (Mrs Shandling), in 1950. Three children were born of their marriage, two sons and a daughter, all now majors, who had established families of their own in the United States of America. Mrs Shandling had passed away on 27 January 1981, due to lung cancer.[7]

The description offered by Mrs Robinson to the Court of their relationship was in broad terms accepted by Mr Shandling's executor, Mr Volks. She stated that, to a large extent, Mr Shandling had supported her financially. He gave her R5 000 per month in order to cover household necessities and would deposit money into her account whenever she needed it. He also provided her with petrol money from the law firm's account and paid for her car maintenance. She was accepted as a dependant on his medical aid scheme from January 2000.[8]

In April 2002, Mrs Robinson sought legal advice from the Women's Legal Centre concerning her rights to claim maintenance from the deceased estate of Mr Shandling. After consulting with Mr Volks in his capacity as the executor of the Shandling estate, the Centre advised her that the residue in the estate was minimal and that she should not pursue her claim. In June 2003 she received a copy of the Final Liquidation and Distribution Account, which reflected a residue of R248 533.87. In accordance with Mr Shandling's will, the residue was bequeathed to his three children.[9]

During August 2003 the Centre wrote letters to Mr Volks and to the Master of the High Court advising them that Mrs Robinson had a claim similar to that of a surviving spouse. The attorneys, acting for the estate, rejected the claim on the basis that Mrs Robinson was not a "spouse" for the purposes of the Act. Following this response, Mrs Robinson launched a two-part application in the High Court. Part A sought an urgent interdict preventing Mr Volks from winding up and distributing the assets in the estate, pending the determination of the constitutional challenge to the Act, which relief was sought in Part B of the application. The application for the interdict was not opposed and was granted by the High Court.[10]

In an amended notice of motion, Mrs Robinson sought an order declaring that she was the "survivor" of the late Mr Shandling for the purposes of the Maintenance of Surviving Spouses Act[11] (the Act), and therefore entitled to lodge a claim for maintenance under the Act. In the event that it was found that she did not qualify as a "survivor" for the purposes of the Act by virtue of not being "the surviving spouse in a marriage dissolved by death", she sought an order declaring that the exclusion of the survivor of permanent life partnerships from the provisions of the Act was unconstitutional. She contended that this exclusion violated the provisions of sections 9(3) and 10 of the Constitution, in that it discriminated unfairly on the ground of marital status (section 9(3)) and infringed her right to dignity (section 10). In this regard she submitted that the definition of the words "survivor", "spouse" and "marriage" in the Act should include a reference to survivors of permanent life partnerships.

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[7] *Volks v. Robinson*, para. 4.
[8] *Ibid.* para. 5.
[9] *Ibid.* para. 8.
[10] *Ibid.* para. 10.
[11] Act 27 of 1990.

In relation to the declaration of invalidity that was sought by Mrs Robinson, Mr Volks argued that the reading-in of words to the Act was unacceptable. He argued that the entire structure of the Act was premised on the concept of marriage and the protection of surviving spouses of such a marriage. Thus reading-in, in the form sought, did not deal properly with these provisions, nor did it fit in with the structure of the Act. Mr Volks argued further that, in the event that the Court found that the Act was inconsistent with the Constitution and thus invalid, it would not be just and equitable for an order to apply to permanent life partnerships in respect of which a partner had already died. He argued for an order which would only have prospective effect. He argued that a retrospective order would not sufficiently protect the freedom and dignity of the deceased. He also argued that the relief sought by Mrs Robinson and the Trust may affect other legislation like the Administration of Estates Act.[12]

As shall presently be seen, the most important part of the argument raised by Mr Volks was that Mrs Robinson had chosen to live with Mr Shandling without entering into a marriage although there was no legal or other impediment to them so marrying. In his view, there was no basis in law or in principle why the laws of marriage should be imposed upon the deceased, his estate, or the heirs of Mr Shandling. He argued that it would constitute an infringement of the deceased's freedom and dignity to have the consequences of marriage imposed in circumstances where there was a clear choice not to enter into a marriage relationship. As evidence of this choice on the part of the deceased, he referred to a statement that Mr Shandling made to him that "if he were ever single again he would not marry". Mr Volks also relied on the fact that Mr Shandling referred to Mrs Robinson as "my friend" in his will, whereas he referred to his deceased wife, Mrs Shandling, as "my wife".

Mr Volks drew attention to the fact that Mr Shandling, in terms of his will, had made a choice as to how his assets would be disposed of. He did this with an understanding that the laws of marriage would not apply to his estate. In the view of Mr Volks, his freedom and dignity would be violated if his choice as to how to dispose of his assets were to be overridden by a court permitting a claim for maintenance against his estate. Indeed, his right not to be arbitrarily deprived of property in terms of section 25(1) of the Constitution, the protection of property clause, would be infringed.

Mrs Robinson's arguments found favour with the High Court, which issued the following order:

> "1. It is declared that: The omission from the definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the words 'and includes the surviving partner of a life partnership' at the end of the existing definition is unconstitutional and invalid. The definition of 'survivor' in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 is to be read as if it included the following words after the words 'dissolved by death': 'and includes the surviving partner of a life partnership'.
> 2. The omission from the definition in [section] 1 of the Maintenance of Surviving Spouses Act 27 of 1990 of the following, at the end of the existing definitions, is unconstitutional and invalid: '"Spouse" for the purposes of this Act shall include a person in a permanent life partnership'."[13]

[12] Act 66 of 1965.

[13] *Volks v. Robinson,* para. 25.

**The Constitutional Court Asserts the Sanctity of Marriage**

As a consequence of this order, the dispute made its way up to the Constitutional Court. Shortly before the hearing, legal representatives of the Shandling estate informed the Court that they would not pursue the appeal. The Court decided, however, as the order of the High Court had declared legislation to be unconstitutional, it was obliged to hear the case.

At the hearing an amicus, the Centre of Applied Legal Studies (CALS) made application for further evidence to be admitted, in the form of a report aimed largely at demonstrating the vulnerability of women in existing relationships between unmarried cohabitants, and the fact that few women have a choice about whether they should marry. The rule in this regard is that evidence of this nature can be admitted if the facts contained in a report are common cause or otherwise incontrovertible; or are of an official, scientific, technical or statistical nature capable of easy verification. Justice Thembile Skweyiya, on behalf of the majority of the Court, refused to admit the report:

> "The whole of the report tendered by the amicus cannot be considered to consist merely of evidence of a statistical or incontrovertible nature, or which is common cause. It is apparent that the conclusions and solutions offered are not incontrovertible. Furthermore, Mr. Volks does not accept that the evidence sought to be introduced is necessarily incontrovertible or uncontroversial. Indeed the report in its own words notes: 'As is evident from our methodology, our findings are *not representative* but simply indicate trends which confirm our *general assumptions about cohabitation*' (my emphasis)."[14]

> "In the executive summary provided, the study was defined as 'qualitative primary research amongst poor "African" and "Coloured" communities'. Moreover, the entire study consisted of interviews with only 68 people in eight sites. This non-representative sampling, which was not quantitative but qualitative and was conducted in only eight poor communities, cannot be said to be statistical or scientific evidence capable of easy verification, nor can it be said to be incontrovertible. A more representative study might well lead to different conclusions."[15]

Given that the case brought by Mrs Robinson was based upon the constitutional guarantees of equality and dignity, the following paragraph is even more telling:

> "The evidence is not directly relevant to the issue before us. That issue is whether the protection afforded to survivors of marriage under section 2(1) of the Act should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us. It cannot be admitted."[16]

Justice Skweyiya then moved to discuss the purpose of the relevant sections of the Act, the purpose of which he considered to be the following:

> "The challenged law is intended to provide for the reasonable maintenance needs of parties to a marriage that is dissolved by the death of one of them. The aim is to extend an invariable consequence of marriage beyond the death of one of the parties. The legislation is intended to deal with the perceived unfairness arising from the fact that maintenance obligations of parties to a marriage cease upon death. The challenged provision is aimed at eliminating this perceived unfairness and no more. The obligation to maintain that exists during marriage passes to the estate. The provision does not confer a benefit on the parties in the sense of a

[14] *Ibid.* para. 33.
[15] *Ibid.* paras. 32-34.
[16] *Ibid.* para. 35.

> benefit that either of them would acquire from the state or a third party on the death of the other. It seeks to regulate the consequences of marriage and speaks predominantly to those who wish to be married. It says to them: 'If you get married your obligation to maintain each other is no longer limited until one of you dies. From now on, the estate of that partner who has the misfortune to predecease the survivor will continue to have maintenance obligations.'"[17]

Having accepted that the word "spouse" could not plausibly be interpreted to include a life partnership, Justice Skweyiya turned to the question as to whether Mrs Robinson had a cause of action on the grounds of section 9(3) of the Constitution which reads: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

The judgment then embarked on the critical framing question. In the view, of the majority of the Court, the questions before the Court could be reduced to the following:

> "The question for determination in this case is whether the exclusion of survivors of permanent life partnerships from the protection of the Act constitutes unfair discrimination. The Act draws a distinction between married people and unmarried people by including only the former. We are not concerned with the exclusion of survivors of gay and lesbian relationships, nor are we concerned with survivors of polygynous relationships.
>
> Although it is arguable whether the distinction or differentiation amounts to discrimination, I am prepared to accept that it amounts to discrimination based on marital status. That being the case, the discrimination is presumed to be unfair in terms of section 9(5) of the Constitution. The question however is whether it is indeed unfair discrimination."[18]

In determining whether the impugned provisions of the Act constituted unfair discrimination, Justice Skweyiya began by emphasising the importance of marriage as an institution: "The constitutional recognition of marriage is an important starting point for determining the question presented in this case. Marriage and family are important social institutions in our society. Marriage has a central and special place, and forms one of the important bases."[19] From this recognition, it follows according to the judge that the law is entitled to distinguish between married people and unmarried people. In this connection Justice Skweyiya cited from an earlier judgment of the Court in *Fraser*:

> "In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with."[20]

Hence, "the law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people or family life in our society".[21] Justice Skweyiya then turned to apply these findings to the case brought by Mrs Robinson. He emphasised that she had never married Mr Shandling and that:

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[17] *Ibid.* para. 39.
[18] *Ibid.* para. 50.
[19] *Ibid.* paras. 51-52.
[20] *Fraser v. Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC), para. 26.
[21] *Volks v. Robinson,* para. 54.

> "There is a fundamental difference between her position and spouses or survivors who are predeceased by their husbands. Her relationship with Mr. Shandling is one in which each was free to continue or not, and from which each was free to withdraw at will, without obligation and without legal or other formalities. There are a wide range of legal privileges and obligations that are triggered by the contract of marriage. In a marriage the spouses' rights are largely fixed by law and not by agreement, unlike in the case of parties who cohabit without being married."[22]

The distinction drawn at this stage of the judgment becomes crucial to the outcome as is apparent from the following passage of the judgment:

> "The distinction between married and unmarried people cannot be said to be unfair when considered in the larger context of the rights and obligations uniquely attached to marriage. Whilst there is a reciprocal duty of support between married persons, no duty of support arises by operation of law in the case of unmarried cohabitants. The maintenance benefit in section 2(1) of the Act falls within the scope of the maintenance support obligation attached to marriage. The Act applies to persons in respect of whom the deceased person (spouse) would have remained legally liable for maintenance, by operation of law, had he or she not died."[23]

The argument of Mrs Robinson that the only different factual matrix between her situation, being in a lifelong partnership and a marriage, was the contract of marriage, received short shrift from the majority:

> "That [argument] is an over-simplification. Marriage is not merely a piece of paper. Couples who choose to marry enter the agreement fully cognisant of the legal obligations which arise by operation of law upon the conclusion of the marriage. These obligations arise as soon as the marriage is concluded, without the need for any further agreement. They include obligations that extend beyond the termination of marriage and even after death. To the extent that any obligations arise between cohabitants during the subsistence of their relationship, these arise by agreement and only to the extent of that agreement."[24]

For these reasons, the majority rejected the equality challenge. It considered that it was not unfair to distinguish between survivors of a marriage and survivors of a heterosexual cohabitation relationship. In the context of the provision for maintenance of the survivor of a marriage by the estate of the deceased, the majority of the Court refused to impose a duty upon the Shandling estate where none arose by

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[22] *Ibid.* para. 55.

[23] *Ibid.* para. 56.

[24] *Ibid.* para. 58. In his minority judgment, Justice Albie Sachs supported Mrs Robinson's line of argument: "The critical question accordingly must be: is there a familial nexus of such proximity and intensity between the survivor and the deceased as to render it manifestly unfair to deny her the right to claim maintenance from the estate on the same basis as she would have had if she and the deceased had been married? I believe that there are in fact at least two circumstances in which, applying this test, it would be unfair to exclude permanent, non-married life partners from the benefits of the Act. The first would be where the parties have freely and seriously committed themselves to a life of interdependence marked by express or tacit undertakings to provide each other with emotional and material support. The unfairness of the exclusion would be particularly evident if the undertakings had been expressed in the form of a legal document. Such a document would satisfy the need to have certainty, at least inasmuch as it establishes clear commitment to provide mutual support within their respective means and according to their particular needs. Like a marriage certificate, the document would thus both prove the seriousness of the commitment and at the same time satisfy the need for certainty" (paras. 251-252).

operation of law during his lifetime. In short, "such an imposition would be incongruous, unfair, irrational and untenable".[25]

That left the challenge on the basis of dignity for determination by the Court. As the Court had found that it was not unfair to eschew the imposition of a duty on an estate to provide maintenance in the case of Mrs Robinson, her case based upon the constitutional guarantee of dignity suffered the same fate. Much had been made in argument about the social and economic context in which the constitutional challenge raised by this case should be located. In essence the argument ran thus: Women are generally less powerful in these relationships. They often wish to be married, but the nature of the power relations within the relationship makes this aspiration extremely difficult to attain. The reason is not hard to find: the more powerful participants in the relationship refuse to be bound by marriage. The consequences are that women are exploited to the extent that there is no compensation for the essential contributions by women to a joint household through their labour and emotional support.

In the light of these arguments, Justice Skweyiya considered it necessary to deal with the substance thereof which he did as follows:

> "I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically."[26]

Replying to the criticisms voiced in the dissenting judgments of Justices Yvonne Mokgoro and Kate O'Regan and Albie Sachs respectively, Justice Skweyiya said that the problem lay with the legislature and not the Court:

> "Both dissenting judgments make it plain that there are many ways in which these relationships can be regulated. It is not for us to decide how this should be done. In any event, this case is not concerned with the provision that should be made to ensure that partners in relationships other than marriage treat each other fairly during their lifetime. That does not mean, however, that fairness in the case of people who are married will be the same as fairness between parties to a permanent life partnership. It is up to the legislature to make provision for this."[27]

**Analysing the Character of the Majority Judgment**

It is now possible, having set out the essential steps taken in the majority judgment to arrive at the conclusion that Mrs Robinson's case (that the Act had breached her rights to equality and dignity) lacked legal merit, to revisit the application of *logos*, *pathos* and *ethos*.

The judgment is replete with examples of the manner in which legal rules are employed as well as the application of standards and policies. The judgment commences with a rejection of the evidence sought to be admitted by CALS. The rejection is justified by a strict interpretation of the applicable rules and, in particular,

[25] *Ibid.* para. 60.
[26] *Ibid.* para. 64.
[27] *Ibid.* para. 67.

that it was a limited study. But the Court had previously admitted into evidence a range of studies which were hardly uncontroversial, or which obviously passed scientific muster.[28]

But even more significant is the manner in which Justice Skweyiya defined the key issue in the case and thereby rejected the relevance of the evidence sought to be admitted in that the evidence sought to show the vulnerability of women in South Africa who were unprotected and thus vulnerable in that they did not enjoy the protective cloak of marriage: the case for the majority is about whether "the protection afforded to survivors of marriage under section 2(1) of the Act should be extended to the survivors of permanent life partnerships. The admission of the evidence would impermissibly broaden the case before us."[29]

Here we arrive, very early in the judgment, at the critical move: the definition of the legal problem to be determined and which in this judgment receives a narrow treatment, that is, social and historical context is eschewed in favour of the definition of the problem confronting the Court being a matter of statutory construction of section 2(1) of the Act. That move is characterised as being based on precedent and principle, yet it is nothing of the kind. As Justices Mokgoro and O'Regan note in their minority judgment:

> "The law has tended to privilege those families which are founded on marriages recognised by the common law. Historically, marriages solemnised according to the principles of African customary law were not afforded recognition equal to the recognition afforded to common law marriages, though this has begun to change. Similarly, marriages solemnised in accordance with the principles of Islam or Hinduism were also not recognised as lawful marriages though this too is now altering. The prohibition of discrimination on the ground of marital status was adopted in the light of our history in which only certain marriages were recognised as deserving of legal regulation and protection. It is thus a constitutional prescript that families that are established outside of civilly recognised marriages should not be subjected to unfair discrimination."[30]

The rejection of the majority of this line of entry confines the inquiry to one that not only reduces the words employed in section 2(1) of the Act to a mechanistic analysis, but also significantly narrows the constitutional inquiry in respect of sections 9 and 10 of the Constitution. Observe the way Justice Skweyiya finds that, while he cannot dismiss the existence of vulnerability of women, particularly in South Africa, the topic grid, the pigeonhole dictated by *logos*, justifies the finding that the problem is one for the legislature as opposed to the judiciary, this finding notwithstanding that the Constitution applies to all law, whether common or statutory law and that, for this reason, the Constitutional Court is the ultimate custodian of law:

> "In the case of the very poor and the illiterate the effects of vulnerability are more pronounced. The vulnerability of this group of women is, in my view, part of a broader societal reality that must be corrected through the empowerment of women and social policies by the legislature. It is a widespread problem that needs more than just implementation of what, in their case, would be no more than palliative measures. It needs more than the extension of benefits under section 2(1) to survivors who are predeceased by their partners. Unfortunately, the reality is

[28] See *S v. Makwanyane and another* 1995 (3) SA 391 (CC), paras. 120ff.
[29] *Volks v. Robinson*, para. 35, cited earlier but which bears repeating due to its critical importance.
[30] *Ibid.* para. 101 (footnotes omitted).

> that maintenance claims in a poverty situation are unlikely to alleviate vulnerability in any meaningful way."[31]

Whereas Justices Mokgoro and O'Regan based much of their analysis of marriage on the manner in which law constructs reality,[32] the majority attribute inherent qualities to marriage which extend way beyond the significance of the institution being sourced in a legal construct, albeit that it is underpinned by law. In particular, the majority cites the following with approval:

> "The vital personal right recognized by *Loving v. Virginia* is not the right to a piece of paper issued by a city clerk. It is not the right to exchange magical words before an agent authorized by the state. It is the right to be immune to the legal disabilities of the unmarried and to acquire the legal benefits accorded to the married."[33]

The majority seeks to buttress acceptance of its approach by calling into aid the mode of proof referred to as *pathos*. The attempt at employing legal rules, precedent and policy to find against Mrs Robinson, presumably in the light of two eloquent minority judgments, requires the invocation of pity and empathy. Hence Justice Skweyiya says:

> "I have a genuine concern for vulnerable women who cannot marry despite the fact that they wish to and who become the victims of cohabitation relationships. I do not think however that their cause is truly assisted by an extension of section 2(1) of the Act or that vulnerable women would be unfairly discriminated against if this were not done. The answer lies in legal provisions that will make a real difference to vulnerable women at a time when both partners to the relationship are still alive. Once provision is made for this, the legal context in which section 2(1) falls to be evaluated will change drastically."[34]

Turning to the *ethos* in the judgment, given the specific context of judgment writing, some further explication is required. Aristotle made the point that:

> "there is persuasion through character whenever the speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly [than we do others] on all subjects in general and completely so in cases where there is not exact knowledge but room for doubt. And this should result from the speech, not from a previous opinion that the speaker is a certain kind of person; for it is not the case, as some of the technical writers propose in their treatment of the art, that fair-mindedness on the part of the speaker makes no contribution to persuasiveness; rather, character is almost, so to speak, the controlling factor in persuasion."[35]

Aristotle appears to be referring to what has been called the discoursal self rather than the real self. The pattern of justification contained in the judgment, the references to existing legal authority to support the conclusions so reached, the formal writing

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[31] *Ibid.* para. 64.

[32] As the two Justices write: "Marriage, as presently constructed in common law, constitutes a contract between a man and a woman in which the parties undertake to live together, and to support one another. Marriage is voluntarily undertaken by the parties, but it must be undertaken in a public and formal way and once concluded it must be registered" (*Volks v. Robinson*, para. 112).

[33] From John T. Noonan, "The Family and the Supreme Court", *Catholic University Law Review,* 23, 1974, p. 273, cited in *Volks v. Robinson*, para. 42.

[34] *Volks v. Robinson*, para. 68.

[35] Aristotle, *On Rhetoric: A Theory of Civic Discourse*, trans., intro., notes and apps., G.A. Kennedy, (Oxford: Oxford University Press, 1991), pp. 38-39.

making use of legal prose reinforce its "legal character". All these features are external to the judge but as she incorporates them into the text, she makes them part of her discoursal self, which is how her judicial authority and credibility is reinforced. In this way these discoursal "features of the judicial text define the character of the judicial author".[36]

In dismissing the argument that Mrs Robinson had been subjected to unfair treatment on the grounds of her marital status in that she and Mr Shandling had not married, Justice Skweyiya first referred to the "objective intention" of the legislature in passing the relevant sections of the Act:

> "It must be borne in mind that the legislature, by enacting the law, in fact qualified the right to freedom of testation. It said that freedom of testation would be limited to the extent that where marriage obliged the parties to it to maintain each other, freedom of testation ought not to result in the termination of the obligation upon death. The question we have to answer is whether it was unfair for the legislature not to qualify freedom of testation further, by creating a posthumous duty to maintain on cohabitants."[37]

He then moves to invoke the Constitution as authority for his refusal, even as he, a few paragraphs later, articulates his personal view that the circumstances in which many women find themselves is a social problem: "The Constitution does not require the imposition of an obligation on the estate of a deceased person, in circumstances where the law attaches no such obligation during the deceased's lifetime, and there is no intention on the part of the deceased to undertake such an obligation."[38]

The judgment nods in the direction of recognising the social context of the institution of marriage and its relationship to the vulnerability experienced daily by women in South Africa, but this gives way to the authority of legal doctrine in the form of the Constitution and the Act as interpreted through the majority's understanding of the legislative purpose.

## Conclusion

"Like all human language, legal language is embedded in a particular setting, shaped by the social contexts and institutions surrounding it. It does not convey abstract meaning in a legally-created [sic] vacuum, and thus cannot be understood without systematic study of the contextual molding that gives it foundation in particular cultures and societies."

Mertz[39]

In 1998, Karl Klare warned about the formalistic legal culture which prevailed in South Africa and the implications thereof for a transformative constitutional project.[40] Formalism remains deeply embedded in South African legal culture,[41] even two

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[36] J. Christopher Rideout, "Ethos, Character and Discoursal Self in Persuasive Legal Writing", *The Journal of The Legal Writing Institute*, 21, 2016, pp. 42-43.
[37] *Volks v. Robinson*, para. 57.
[38] *Ibid.* para 58. Also see para. 59, where Justice Skweyiya switches to the first person and says: "I have sympathy."
[39] Elizabeth Mertz, "Inside the Law Classroom: Towards a New Legal Realist Pedagogy", *Vanderbilt Law Review*, 60, 2007, p. 513.
[40] Karl E. Klare, "Legal Culture and Transformative Constitutionalism", *South African Journal on Human Rights*, 14, 1998, p. 146.
[41] Martin Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice*, (Cambridge: Cambridge University Press, 2001).

decades into constitutional democracy.[42] In this there is striking similarity to an approach which has gained traction in the United States where rule-based analysis is increasingly deemed to be "the dominant form of reasoning" found in legal arguments made to judges. This preference for appeals to logic and legal principles stems from formalist notions that assume judges primarily make decisions grounded in logic and law. Thus, an advocate must appeal to logic and law when attempting to persuade a judge. Thus, Justice Antonin Scalia and Bryan Garner state: "Good judges pride themselves on the rationality of their rulings and the suppression of their personal proclivities […] The world does not expect logic and precision in poetry or inspirational pop philosophy; it demands them in the law."[43] Chief Justice Roberts expressed similar formalist sentiments: "Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don't make the rules, they apply the law."[44]

This paper has attempted to utilise the techniques employed in the field of rhetoric to analyse the manner in which a judgment asserts its own authority and self-contained justifications in the text and the manner in which the judge composing the text does so in a neutral style yet by way of a coercive idiom ("it cannot be denied", "it is common cause"). The judgment represents an act of closure, a cutting off of alternative realities as well as treating any opposing voice as employing non-legal language.[45] Its style and process of reasoning is reflective of the dominant South African legal culture, which not only fashions the manner in which the judgment is written, but is directed to the key audience insofar as the Court is concerned, which is the legal community that views the "law" through the same cultural prism. The manner in which the majority attributes innate legal consequences to marriage, refusing to interrogate the manner in which law is itself a social construct, is illustrative of a legal culture that eschews the challenge of legal transformation posed by the introduction of the Constitution in terms of which all legal rules need to be interrogated to test whether they pass constitutional muster.

The result of the majority judgment is to entrench the concept of marriage above all other forms of relationship. Pierre de Vos has described this judgment as moralistic and sexist, correctly highlighting this passage:

> "the law may distinguish between married people and unmarried people …. In the context of certain laws there would often be some historical and logical justification for discriminating between married and unmarried persons and the protection of the institution of marriage is a legitimate area for the law to concern itself with …. The law may in appropriate circumstances accord benefits to married people which it does not accord to unmarried people."[46]

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[42] See Catherine Albertyn and Dennis Davis, "Legal Realism, Transformation and the Legacy of John Dugard", *South African Journal on Human Rights*, 26, 2010, p. 188.

[43] Antonin Scalia and Bryan Garner, *Making your Case: The Act of Persuading Judges,* (St. Paul: Thomson/West, 2008), p. 32.

[44] As cited in Adam Todd, "An Exaggerated Demise: The Evidence of Formalism in Legal Rhetoric in the Face of Neuroscience", *Legal Writing,* 23, 2019, p. 90.

[45] Harrington, Series and Ruck-Keene, "Law and Rhetoric: Critical Possibilities", p. 305.

[46] Pierre de Vos, "Moralistic View of Marriage Leaves Unmarried Couples Unprotected", *Constitutionally Speaking*, 5 December 2016. Retrieved from: https://constitutionallyspeaking.co.za/moralistic-view-of-marriage-leaves-unmarried-couples-unprotected/ [Accessed 22 October 2019].

The passages in which the majority employ *pathos* to recognise the vulnerability experienced by women in cohabitation relationships is itself reflective of the linkages between *logos*, *pathos* and *ethos*. There is a general refusal to attribute legal consequences to this social reality, and to the extent that the majority may be so inclined, it holds that this is a function for the legislature, which is illustrative of its narrow conception of the judicial role in a constitutional state where the court is asked to interrogate all law as developed prior to the constitutional moment.

By invoking the rhetorical tool box, it is possible to peer behind the text of the judgment to see how law performs its own authority in the speech employed in the text seeking to adopt a neutral style to effect closure, notwithstanding the fact that the reasoning and conclusion of the judgment is saturated by a conservative morality that privileges the institution of marriage above a multitude of cohabitation relationships.

*~ High Court, Cape Town; Faculty of Law, University of Cape Town ~*

# When third parties are hard to find: In search of lost institutions[1]

## Romain Laufer

### Introduction: Preliminary Observations

The introduction of managerial norms in the realm of legal jurisprudence has given rise to some very vehement criticism bordering on excommunication.

Paul Martens, President Emeritus of the Belgian Constitutional Court writes, in the preface of a book entitled *The New Management of Justice and the Independence of Judges*:

> "Doesn't any lawyer attached to the essence of his discipline have a duty of insurrection in the face of this masked invader that is management? Can he welcome without protest the commodification of his office, the marketisation of his production, the commodification of his soul?"[2]

Similarly, Pierre Legendre, a French legal historian Professor Emeritus at the University of Paris 1 Panthéon-Sorbonne and Honorary Director of Studies at the École pratique des hautes études (Vème section, Sciences religieuses) writes: "Management is a word without a homeland that means whatever you want it to mean"[3] and "[g]lobalised management comes up against this huge, unacknowledgeable and unmanageable question of whether we can buy traditions, religions or the minds of peoples and convert them into market objects?"[4]

It must be acknowledged that social sciences have not been the object of such repudiation.

This difference in treatment is probably due to the essentially normative nature of the results of social sciences, whose function is to produce general knowledge about the behaviours they study, knowledge that is expressed in the form of laws or norms. These norms may readily be utilised by law when needed to decide on the legality of (past) cases under scrutiny. This complementarity expresses itself in the very names given to the corresponding disciplinary fields of study, such as "Law AND Economics" or "Law AND Society"; such developments attest to the growing importance given by law to the normativity of social sciences.

The same is not true of management, the primary purpose of which is not to produce norms but (future) individual actions, actions which, according to the

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[1] "Quand le tiers est aux abonnés absents, à la recherche des institutions perdues", *Revue Internationale de Droit* Économique, 2018, pp. 333-350.

[2] Benoit Frydman and Emmanuel Jeuland (eds.), *Le Nouveau Management de la Justice et L'indépendance des Juges,* (Paris: Dalloz, 2011), p. 5.

[3] Pierre Legendre, *Dominium Mundi: L'Empire du Management, Mille et une nuit*, (Paris: Fayard, 2007), p. 42 (quotes in this paper are translated by the author).

[4] *Ibid*. 51.

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Romain Laufer, "When third parties are hard to find: In search of lost institutions", pp. 86-97.

principles of rational-legal authority supposed to characterise contemporary societies, rely on their submission to a legal order.[5]

If the mention of the emergence of management in the field of legal normativity is the object of scandal, it is because it subverts the principle according to which social actions are supposed to be subject to a legal order whose effectiveness is guaranteed by the principle whereby ignorance of the law is no excuse, and whose efficiency ultimately relies on the monopoly of legitimate violence which, according to Max Weber,[6] belongs to the State. The contradiction implied in the intrusion of managerial norms in the realm of legal norms expresses itself in the fact that it is designated by an oxymoron, the notion of "soft law",[7] which bears witness to the fact that what results from it is less the complementarity than the confusion between law and management.

The issue of the emergence of management in the space of competing normativities will be considered successively from two points of view: (1) the next section will be devoted to describing the irresistible extension of the scope of managerial normativity, an extension that moves it from the field of complementarity — as long as the hierarchical relationship between law and management is respected — to a situation of confusion as this hierarchy is challenged and the differences which define it are transgressed; and (2) this confusion leads to a situation of uncertainty that Mary Douglas considered in an article entitled "Dealing with Uncertainty", published in 2001.[8] This article encourages us to move on from the issue of "how institutions think", which is the title and topic of the work she published in 1986, to the question of knowing "how institutions can be the object of thought", which is the subject of the following section.

**The Emergence of Management in the Space of Normativities: Experience Report**

The limits of the available space lead me to seek the most concise way of reporting the main opportunities for expanding managerial normativity that I have been able to experience as a professor and researcher since the early 1970s. The feedback on these various episodes revealed that the same five-phase master narrative was repeated over and over again: (1) transgression of a limit; (2) contestation, conflict resulting from this transgression; (3) production of a theoretical hypothesis used to account for the necessity of this transgression and its resulting crisis; (4) definition of the form taken by the expansion of managerial normativity made necessary by this crisis; and (5) negative reactions towards this theoretical approach, denial, absence of any reference to the notion of crisis.

It is to be feared, in these times of pragmatism, that the negative reactions of the fifth phase will only appear as the logical consequence of the excessively

[5] The opposition between past and future actions characterises, according to Aristotle, the opposition between forensic and deliberative rhetorical genres. However, Aristotelian rhetoric differs from modern rhetoric by the prominence attributed by the latter to forensic rhetoric, as is shown in the work of Chaïm Perelman. See "Actualité de l'empire rhétorique, histoire, droit et marketing" in G. Haarcher (ed.), *Chaïm Perelman et la Pensée Contemporaine,* (Bruxelles: Bruylant, 1993).

[6] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, eds. G. Roth and C. Wittich, (Berkeley: University of California Press, 1978), p. 56.

[7] Linda Senden, *Soft Law in European Community Law,* (Oxford: Hart Publishing, 2004); Conseil d'Etat, *Etude Annuelle 2013 du Conseil d'Etat – Le Droit Souple*, (Paris: La Documentation Française, 2013).

[8] Mary Douglas, "Dealing with Uncertainty", *Ethical Perspectives*, 8(3), 2001, pp. 145-155.

theoretical nature of the approach taken. Even in the land of Descartes, mistrust towards theory cannot be underestimated.

The most effective way to overcome it could be to suggest that the theory be considered as a fiction, a proposal that even the most sceptical would not think of refusing. During one of his courses at the Collège de France, historian Patrick Boucheron actually proposed a definition of fiction that exactly corresponds to the role that theory plays in the process described above: "Fiction is the magnifying glass that allows us to perceive — but after the fact — the warning signs of our present situation."[9]

It should be noted that it is the presence of denial and amnesia thus made possible that enables us to understand how the use of theory can provide us with a means of perceiving, after the fact, the warning signs of our present situation.

We shall only report on two such experiences, one concerning management in general, and the other marketing in particular. Both were a direct result of my participation in the specialised course on "Management of Public Organizations" as part of third-year student education at HEC business schools in 1973 and 1974.

*From a managerial viewpoint*

1. The first phase is constituted by the transgression which results from the fact of claiming to apply to the public sector methods that were deemed to come from the private sector.
2. This transgression provoked a highly ambivalent reaction, an expression of the conflict between the presence of a desire to see public management improve and the rejection of what appeared to be the intrusion of methods from the private sector.
3. The use of theory made it possible to account for both the rejection of and the need for this transgression. In this case, it was by considering the history of the three-period administrative law criterion, as described in the public law treaties of the 1950s (public authority, public service, crisis of the criterion), which shed light on why the violation of the public/private limit — which had been considered scandalous up to then (since it violated the limits defined by the administrative law criterion) — had become unavoidable (due to a crisis recognised by the law itself). This crisis could then be interpreted as a crisis of legitimacy, since it became difficult for a social actor to know with which norms he was supposed to comply.
4. The definition of management as a normative system (1980).

   The crisis concerning the administrative law criterion implies that the public/private limit is now no longer determined either by the status of the actors (public authority) or by the purpose of their actions (public service), but by the methods used, which is a procedural criterion involving management. It became necessary to define both public and private management independently of the sector, since it was the choice of methods that was thus supposed to determine the sector and not the other way around. Weberian theory opened up the possibility of considering management in relation to the

[9] Patrick Boucheron, "Avant la Représentation", *Cours du 9 janvier 2018.* Retrieved from: https://www.college-de-france.fr/site/patrick-boucheron-course-2017-2018.htm [Accessed 19 October 2019].

role that written procedure plays in the ideal type of bureaucracy. It should be noted that treating a private business as a bureaucracy corresponds to the meaning that the English word "administration" has in the expression "business administration".

Management can be defined as a method of resolving intra-organisational conflicts that consists of a set of norms and procedures conventionally accepted by organisation members. It constitutes what may be called a quasi-juridicial system insofar as this method of resolving conventional disputes remains subordinate to common law, which can always be brought into play in the last instance.

Conflict resolution in an organisation assumes the existence of an administrative language that describes all the actions that could lead to a dispute. Any administrative language requires the specification of three conditions (syntactic, semantic and pragmatic, to use the dimensions of Charles Morris's definition of the sign), three dimensions that can easily be found in the definition of management provided by Chester Barnard in his founding book *The Functions of the Executive*.[10]

*The syntactic condition* requires that, in this language, the organisation be author of the action (this corresponds to the role that Barnard attributes to the "fiction of superior authority"[11]).

*The semantic condition* assumes that organisation members think that this language represents the world well (it is the need for an adjustment between individual and collective representations of the world that leads Barnard to oppose the "formal" and "informal").

*The pragmatic condition* (which can also be referred to as the legitimacy condition) considers that those who use this language believe that their interest, the interest of the organisation and the interest of society are globally compatible (which leads Barnard to distinguish the notions of "effectiveness" and "efficiency"[12]).

Once the definition of the notion of administrative language had been established, the notion of management could be defined as the particular form taken by this language during the development of private companies, particularly in the United States, where the private sector occupied such an institutional place that it would lead, from the end of the nineteenth century onwards, to the development of educational courses in management at the Wharton School of Commerce and Finance as well as the Harvard Business School. It then became possible to characterise public management by the public character — i.e. visible in the public space — of the organisations concerned (which had become too large to be able to escape public view behind the "invisible hand" of the market which was supposed to legitimise them). Henceforth, the image of the corporation in the eyes of the public had to be managed.

[10] Chester I. Barnard, *The Functions of the Executive,* intro. K.R. Andrews, (Cambridge: Harvard University Press, 1968).
[11] *Ibid.* 170.
[12] *Ibid.* 19.

5. Negative reaction and denial.

This denial is expressed by jurists themselves, as shown by the reading of contemporary administrative law manuals. Thus, the issue of the crisis of the criterion could be elegantly raised by Yves Gaudemet, who wrote: "The search for the administrative law criterion has given rise to abundant and almost continuous reflection .... Today the discussion seems somewhat exhausted."[13] It could also be the subject of a more laborious denial by Didier Truchet,[14] who wrote: "[The contours of administrative law] are ... blurred and shifting ... You have to accept this fact, without exaggerating the practical inconvenience of this uncertainty"[15] and elsewhere: "Administrative law, for the time being, leaning on constants and open to change, retains its legitimacy and its necessity remains intact ...."[16] Indeed, this is all the more true because if "[t]he changes just described modify the contours and rules of administrative law, they are most often beneficial because they adapt and improve it".[17] While these texts bear witness to the persistence of the crisis of the criterion, the least that can be said is that they do not really encourage its study. This is a useful reminder that every history is as much about amnesia as it is about anamnesis.

*The marketing issue*

1. Transgression. The idea of a marketing professor's participation seemed impossible to colleagues setting up a "management of public organizations" major. They said that "marketing is political".
2. This conflict needed to be overcome to ensure my continued participation in our joint project.
3. The answer to this question gave rise to a theoretical book written with sociologist Catherine Paradeise and entitled *Marketing Democracy: Public Opinion and Media Formation in Democratic Societies*, which attested to the political nature of the issue.[18]

The essence of the theory was a single sentence that stated that marketing could be defined as the modern (bureaucratic) form of sophistry.

Marketing and sophistry are the subject of the same criticisms, which can be divided into five points: (1) they do not believe in the truth, there are only opinions; (2) they are mercenaries who sell their services to the highest bidder; (3) they are technicians who destroy culture, using the power of traditions instead of respecting them; (4) they are polymaths who claim to have a single technique (rhetoric) that can serve any purpose; and (5) finally, they are foreigners (as a matter of fact, if marketing can feel at home in the United States it may be because in the United States virtually everyone comes from abroad, at least marketing had not been invented by natives).

Beyond this negative content, marketing and sophistry share the same positive content: they are two action techniques which, like any action

[13] Yves Gaudemet, *Droit Administratif,* (Paris: L.G.D.J., 2018), p. 40.
[14] Didier Truchet, *Droit Administratif*, (Paris: Thémis, PUF, 2017), p. 22.
[15] *Ibid.* 38.
[16] *Ibid.* 22.
[17] *Ibid.* 21.
[18] Romain Laufer and Catherine Paradeise, *Marketing Democracy: Public Opinion and Media Formation in Democratic Societies*, (New Brunswick: Transaction Books, 2016), pp. 2-9.

technique, are deployed on three levels: (1) the level of knowledge, subjective empiricism, opinion; (2) the level of means of action: rhetoric; and (3) the level of purpose: success (radical pragmatism).

The difference related to bureaucracy, which is deployed along these same three dimensions, is manifested respectively in the form of opinion polls, media communication and, finally, cybernetics.

It remained to be shown that two worlds as different as Ancient Greece and the modern world could experience two such similar phenomena. Everything opposes these two periods, except for what can be called the ideological situation which, in both cases, corresponds to a crisis of common beliefs. Hence the need to theoretically define the common beliefs of modern times, and to account for their crisis. This is possible through the neo-Weberian notion of the "system of legitimacy" and, first of all, by the definition of three ideal types: the charismatic system, the traditional system and the rational-legal system. Each of these systems is composed of a cosmos on which is defined a dichotomy between the source of legitimate power (which plays the role of a "third party") and the place where this legitimate power is applied, this dichotomy being perceived through "special glasses". Charisma corresponds to a cosmos upon which the dichotomy between the sacred and the profane is defined, the glasses of faith allowing us to perceive this dichotomy. Tradition is characterised by the dichotomy between traditional culture and the nature that must be subordinate to it, a dichotomy that may be perceived through the glasses of respect. Finally, the rational-legal system corresponds to a cosmos on which is defined a dichotomy between nature (in the modern meaning of a nature that obeys laws) and the culture that must be submitted to it, the glasses of science allowing us to perceive the dichotomy between nature thus defined and culture.

4. The crisis of legitimacy corresponds to the confusion between the source of legitimate power and the place where this power is applied. To use Jean-François Lyotard's words in *La Condition post-moderne*, this corresponds to the end of the meta-narratives: narrations relative to the sacred, tradition or nature. From this point on, instead of starting from a principle, we must start from the beliefs people have in charisma, tradition and reason. The collection of these beliefs constitutes the elements of an argumentation that can be addressed to those very individuals who have stated them and who, as a result, are hardly in a position to resist their persuasive value. This method, which combines arguments from the fields of *Pathos* (charisma), *Ethos* (tradition) and *Logos* (reason), corresponds to what Aristotle defines as the "rhetorical technique". Marketing then appears as this dimension of managerial argumentation targeting public opinion, which becomes necessary in the event of a crisis of legitimacy, i.e. a crisis in the definition of *a priori* legitimate arguments which result from the existence of common principles accepted by all.

The question of rhetoric necessarily led to the consideration of Chaïm Perelman's work, which marks the return of rhetoric in both philosophy and law following a long period of condemnation. It is interesting to note that the history of norms recounted in *Logique juridique*[19] follows the same three periods

[19] Chaïm Perelman, *Logique juridique,* (Paris: Dalloz, 1977).

as the history of the administrative law criterion: a period characterised by a hermeneutical approach is followed by a functionalist and sociological approach, ultimately leading to the reign of the "new rhetoric".

5. The reluctance exhibited towards this approach has been reflected in several ways: for example in philosophy, by the way in which Jean-François Lyotard managed — through the notion of postmodernity — to keep the idea of the crisis of modernity at bay; in sociology, by the way in which conventionalist approaches were able to rely on the postulation of the constitution of sufficiently stable compromises and, even in management, by the way in which this technical field prefers to define itself in the categories of science, be it the science of the artificial, despite the indeterminacy of models based on open systems, i.e. entities whose limits are undetermined by definition.

It is probably because such denials become more difficult to sustain as time goes on that Mary Douglas, fifteen years after publishing a book entitled *How Institutions Think* in 1986,[20] wrote the following in an article entitled "Dealing with Uncertainty" in 2001:[21]

> "Certainty is not a mood, or a feeling, it is an institution: this is my thesis. Certainty is only possible because doubt is blocked institutionally: most individual decisions about risk are taken under pressure from institutions. If we recognize more uncertainty now, it will be because of things that have happened to the institutional underpinning of our beliefs. And that is what we ought to be studying."[22]

Thus, after writing *How Institutions Think* she indicates that it is now necessary to study the institutional foundations of our beliefs, i.e. after having reported on how we are thought by institutions, it becomes necessary to know how institutions can be the object of thought, or in other words to produce a theory of institutions within the framework of rational-legal legitimacy.

**When Do We Need to Move on from the Issue of Knowing "How Institutions Think" to the Question of Knowing "How Institutions Can be the Object of Thought"?**

It is somewhat paradoxical to consider that the crisis of legitimacy systems — a crisis that appears to correspond to the pure triumph of pragmatism expressed by the emergence of management in the space of normativities — must be translated into a demand for theory. It is therefore worth recalling how Oliver Wendell Holmes concluded an article entitled "The Theory of Legal Interpretation": "But although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."[23]

Therefore we must now apply ourselves to examination of the main premises that govern the actions of practical men, while trying to answer the following two questions: (1) Why do practical men need theory? (2) Is it possible to specify the characteristics of such a theory?

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[20] Mary Douglas, *How Institutions Think*, (Syracuse: Syracuse University Press, 1966).
[21] Douglas, "Dealing with Uncertainty".
[22] *Ibid*. 145.
[23] Oliver W. Holmes, "The Theory of Legal Interpretation", *Harvard Law Review*, 12(6), 1899, pp. 417-420.

*The need for theory*

Mary Douglas does not simply define certainty as an institution; she explains why this institutional certainty is necessary for life in society:

> "We need certainty as a basis for settling disputes. It is not for intellectual satisfaction, not for accuracy or prediction for its own sake, but for political and forensic reasons."[24]
> "The real problem is not knowledge but agreement."[25]
> "In a liberal democracy certainty has sinister aspects. It needs authority to back interpretation and control dissent."[26]

These words echo the way in which Alexis de Tocqueville writes, in a chapter of *Democracy in America* entitled "Of the Principal Source of Belief among Democratic Nations": "Thus the question is, not to know whether any intellectual authority exists in an age of democracy, but simply where it resides and by what standard it is to be measured." [27]

In modern democracies, dogmatic ideas reside in the law. As for how to measure it, it is expressed in the effectiveness of the principle that "ignorance of the law is no excuse".

*Is it possible to construct such a theory?*

It is not enough to have convinced oneself of the necessity of the existence of a shared institutional system of symbols for it to exist; it is necessary, in addition, to be able to demonstrate the possibility of its existence. We shall consider three successive objections that can be addressed to the hypothesis of the existence of such a theory: the complexity of the world that a small number of symbols must be able to account for; the large number of citizens who must agree on the same set of symbols; and finally — even more problematic — the self-contradictory nature of the very notion of institutional theory.

1. "Despite the complexity of the world"

The notion of a system of legitimacy, in its most general form, implies the existence of a shared set of symbols whose function is to resolve conflicts that may result from any social action (including conflicts relative to the question of knowing what is meant by the personal pronoun "our" in the expression "the institutional foundation of *our* beliefs"; in what follows, we shall refer to the notion of "society"). This system of shared symbols constitutes a representation of social life. It can be broken down into the following six points:

i) It is simple and formalised, so that it can be easily shared by all members of the society concerned. It is an ideal-type as understood by Weber.
ii) It may be used to code "reality", i.e. to give a normative description of social actions enforceable against third parties, making it possible to explicitly specify who is wrong and who is right in any conflict relating to these actions.
iii) The structure of this description is such that compliance with the rules of its syntax implies a promise (of happiness, justice, success, salvation, etc).

[24] Douglas "Dealing with Uncertainty", p. 146.
[25] *Ibid.*
[26] *Ibid.*
[27] Alexis de Tocqueville, *Democracy in America Volumes I and II*, trans. H. Reeve, intro. J. Epstein, (New York: Bantam Classic, 2000), p. 518.

iv) The existence of this system of symbols, which constitutes a theory of social action, is so important that it is made mandatory by law. Law enforcement is one of the main functions of modern nation-states, which in Max Weber's words have a monopoly on legitimate violence. Social theory is seen less in terms of its truth than in terms of its necessity, as enshrined in the legal principle that "ignorance of the law is no excuse". It constitutes what may be called a "normative phenomenology of common sense", or in other words, a representation of how things should appear to members of the society concerned.

v) The descriptions of the actions produced by this system must be far enough away from "reality" to be able to cover all the concrete situations of life in their diversity and change (which is shown *a contrario* by the example of "work-to-rule" situations).

vi) On the other hand, these descriptions must be sufficiently similar to "reality" to be considered as acceptable representations of this reality.[28]

If this minimal level of similarity (or recognition) is not reached, uncertainty increases: we can say that there is a crisis of the system of legitimacy. It is the occurrence of such crises that constitutes the history of the system of legitimacy, a history that makes it possible to specify what may have happened at the level of "the institutional foundation of our beliefs" for the feeling that the world is ever more uncertain to have spread.

Let us add that what allows the relationship between the shared system of symbols and the extreme diversity of the situations it governs, i.e. between the norm and the fact, is neither deduction nor induction, nor even abduction, but subsumption: whatever is considered a norm as such by the individuals concerned, conforms to that norm. This leads to a second objection, no less formidable: how is it possible to ensure the convergence of such a potential multitude of perceptions?

2. Despite the cognitive limitations that characterise citizens

While the principle that "ignorance of the law is no excuse" makes it possible to affirm the possibility of the existence of a simple theory allowing the resolution of social conflicts, it cannot, on its own, ensure that all citizens actually know it. Once again, it is law that offers us the means to further our investigation by enabling us to specify for each member of society the way in which their experience of ordinary life — the place of moods and feelings — can be related to what could be called their "normative life", as defined by their individual membership of an institutional order — an order that manifests itself in the form of a *normative phenomenology of common sense* — of which law constitutes, as we have seen, an essential component. To analyse the modalities of the encounter between these two worlds — that of ordinary life and that of normative life — we may simply consider more closely how the principle whereby "ignorance of the law is no excuse" is translated in practical terms.

[28] It seems that the six characteristics thus defined can be related to the six categories by which Norberto Bobbio defines the concept of legitimacy: (1) legitimacy; 2) legality; 3) justice; 4) validity; 5) effectiveness; 6) efficiency), by arranging them into two related lines, one being a "political" line (legitimacy, justice, efficiency) and the other a "legal" line (legality, validity, effectiveness). V.N. Bobbio, "Sur le Principe de Légitimité" in "L'idée de Légitimité", *Annales de Philosophie Politique*, 7, 1967, pp. 47-60.

The question of whether we actually know the law is one that is confronted by common man in the event of a conflict, whether with others or with oneself (which corresponds to what is known as a moral dilemma). Based on this, we either think we know the law and the temporary uncertainty that results from the conflict quickly fades away, or we become aware of our own ignorance and uncertainty appears to threaten "the institutional foundation of our beliefs". At least this would be the case if *the normative phenomenology of common sense* that is law did not offer us a way out of such an embarrassing situation. Indeed, it would be underestimating the common sense and realism of normative systems to believe that they confuse an imperative with an indicative, or the fact of being supposed to know something with the fact of actually knowing it. To make a practical connection between the ordinary world and the normative world, everyone just needs to know that they can ask for help and assistance from those who are supposed to know the law, whether they are judges or lawyers. All the certainty required by the institutional system then lies in the relationship between those who are supposed not to be ignorant of the law and those who are supposed to know it. This relationship is known as trust. It should also be pointed out that this is not just any form of trust: for the system to provide each person with the degree of certainty that is appropriate for an institution, this trust must be absolute (which corresponds well to the legal notion of irrefutable presumption) or, as it is also said, it must be blind. This is probably why Kenneth Arrow, winner of the 1972 Nobel Prize in Economics, saw fit to define trust as an "invisible institution".[29] To say that trust is invisible is to say that it escapes all empirical definitions and the relativism that characterises them: it is a dogmatic trust, quite different from the notion of "confidence".

3. Despite the self-contradictory nature of the notion of institutional theory

It should not be forgotten, however, that the very possibility of a theory of institutions comes up against another formidable obstacle: the potentially self-contradictory nature of its object. Indeed, what is institutional is by definition characterised by the fact that it is taken for granted. For its part, theory — whose etymology refers to the Greek *theoria*, which means "contemplation" — implies distancing oneself from the object under consideration. Institutional theory seems to be unable to do anything better than to destroy the object of its study.[30] In other words, the dogmatic nature of institutions cannot withstand a critical examination of the basis for our beliefs. It is hardly surprising then that the need for such a critical examination only becomes apparent when, as Mary Douglas pointed out, something has affected "the institutional foundation of our beliefs". This is what happens when a state of institutional crisis manifests itself through the multiplication of conflicts linked to the absence of *a priori* agreement on the definition of acceptable actions and the loss of trust in the distinction thought to exist between those who are supposed not to be ignorant of the law and those who are supposed to know it. This is accompanied, as we have seen, by the penetration of legal norms by non-legal norms, for example those that stem from managerial logic.

[29] Kenneth Arrow, *Les Limites de l'organisation,* (Paris: Presses Universitaires de France, 1976).

[30] It may be noted that this situation seems to echo, on the social sciences side, Heisenberg's indeterminacy principle in the field of physics.

In response to such transgressions of normative spaces, and the conflicts that necessarily result from them, we are led to produce a theory based on the notion of a system of legitimacy whose definition makes it possible to perceive — but after the fact — the warning signs of the current crisis of our beliefs, a theory whose paradoxical character is such that it can only emerge the very moment it is defeated, i.e. in times of a legitimacy crisis.

Because of its self-contradictory or, to say the least, paradoxical nature, both trying from the point of view of reason and threatening from the point of view of social order, any theory of this kind must expect to be met with denial.

**By Way of Conclusion**

To conclude, we can mention some consequences associated with the emergence of management and marketing in the space of competing normativities, first from the point of view of institutional theory, then that of management theory and finally that of the paradoxical forms that norms can take in these times of crisis.

*The history of institutionalism* may be used to verify the fit between the development of theoretical approaches to the notion of institution and the crises of legitimacy systems that make them necessary, as well as the denials that accompany them. As far as institutionalist approaches are concerned, the most common form of denial consists in adopting the point of view of conventionalism: the price paid for the fact that "the real problem is not knowledge but agreement" is the necessity to rely on a belief, a belief in the possibility of doing without any shared dogma.

A similar denial can be seen in the way in which economists of the neo-institutionalism school, for example, avoid accounting for the very history that is nonetheless implied by the prefix "neo", and for the eclipse suffered by these approaches since the time of Veblen, Mitchell and Commons, whose "old" institutionalism first developed as a criticism of what the market economy had become in the United States by the end of the nineteenth century. Similarly, interest in institutionalist approaches to law is reflected in a renewed interest in the works of Maurice Hauriou or Santi Romano, without excessive attention being devoted to the crises that led them to develop such an approach. This makes it possible to consider their theoretical propositions as solutions to the problems posed by crises of legitimacy rather than as symptoms of such crises.

*From a managerial viewpoint:* As long as there is trust between those who are supposed not to be ignorant of the law and those who are deemed to know it, management can rely on a conventional agreement relating to the syntactic, semantic and pragmatic dimensions required to define a well-functioning administrative language, the institutional value of this conventional language being ensured by the possibility of referring to common law in the event of disagreement. The crisis of legitimacy is manifested by the fact that, from now on, the answers given to each of the three dimensions of the definition of management are replaced by as many questions. The question concerning the syntactic condition is that of knowing who the author of the action is, which corresponds to the question of governance. The question concerning the semantic condition is that of knowing what happens to the representation of the action, which corresponds to the question of transparency. Finally, the question concerning the legitimacy of actions is that of the social acceptability of their consequences, which corresponds to the question of corporate social responsibility (CSR).

*From a normative viewpoint:* The crisis of legitimacy sees the emergence alongside "normal norms" that are distinct from the facts they are supposed to govern, of "paradoxical norms" that are defined by their self-contradictory character. Such is the case of transparency (which requires that one be able to show what lies behind what is shown), of the precautionary principle (which is what happens to prudence when the norms of prudence are violated), and flexible law (whose name conjures up references to Salvador Dali's "Soft Watches").

The place of marketing, its relationship with both sophistry and the crisis of the rational-legal system of legitimacy can be measured at three levels: at that of language by the fact that the word of the year chosen by the Oxford Dictionary in 2016 was "post-truth"; at the political level by the intensive use that the President of the US democracy has been able to make of the expressions "fake news" and "alternative facts"; and finally, at the scientific level by the awarding of the 2017 Nobel Prize in Economics to Richard Thaler for having given a scientific status to the notion of the "nudge".[31]

*Translated from the French by Delphine Libby-Claybrough.*

~ Hautes Etudes Commerciales, Paris ~

[31] Richard H. Thaler and Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth and Happiness,* (New York: Penguin, 2012).

# Thrasymachus' *katabasis*: Relations of power and ideological struggle in Plato's *Republic* Book I

Sergio Alloggio

> "The philosophic and the class bases of relevance are even more crucial when it comes to the area of critical approaches and interpretations. For the critic, whether teacher, lecturer, interpreter or analyst, is a product of a class society. Each child by birth, family or parents' occupation is brought up in a given class. By education children are brought up in the culture, values and world outlook of the dominant class which may or may not be the same as the class of their birth and family. By choice they may opt for one or the other side in the class struggles of their day. Therefore their interpretation of literature and culture and history will be influenced by their philosophical standpoint, or intellectual base, and their conscious or unconscious class sympathies …. In struggle is our history, our language and our being. That struggle begins wherever we are; in whatever we do."
>
> *Ngũgĩ wa Thiong'o*[1]

## Forms of Refutation, Forms of Subjugation

> "[T]his kind of answer does have some effectivity, and that it should therefore be used when the aim is to defeat ideology on the terrain of ideology, i.e., when the aim is ideological struggle strictly speaking: for it is an *ideological answer*, one which is situated precisely on the opponent's ideological terrain. In major historical situations it has happened and may happen again that one is obliged or forced to fight on the terrain of the ideological opponent, when it has proved impossible to draw him onto one's own terrain, if he is not ready to pitch his tents there, or if it is necessary to descend onto his terrain. But this practice, and the mode of employment of ideological arguments adapted to this struggle, must be the object of a *theory* so that ideological struggle in the domain of ideology does not become a struggle governed by the laws and wishes of the opponent, so that it does not transform us purely into subjects of the ideology it is our aim to combat."
>
> *Louis Althusser*[2]

It has become a well-established tradition among professional philosophers who publish on Plato to argue and take a stand on the dramatic features of his dialogues, on how literary, narrative and rhetorical devices shape and impact on his doctrines.[3] It has also become a less established (and younger) disciplinary tradition among

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[1] *Decolonising the Mind: The Politics of Language in African Literature*, (Harare: Zimbabwe Publishing House, 1981), pp. 104 and 108.

[2] Louis Althusser and Étienne Balibar, *Reading Capital* (Part I), trans. B. Brewster, (London: NLB, 1970), pp. 56-57.

[3] A first introduction to these historiographical aspects is Gerald A. Press (ed.), *Who Speaks for Plato? Studies in Platonic Anonymity*, (Lanham: Rowman and Littlefield, 2000). In her contribution to the volume, Debra Nails, "Mouthpiece Schmouthpiece", pp. 15-26, highlights some of the rewards at stake in the quarrel between developmentalists and antidevelopmentalists (in terms of professional narcissism and reproduction of Plato Studies): "… willingness to resort to developmentalism is linked to a goal he approves, 'trying to know the mind of the philosopher who wrote the dialogues.' Such a goal, however, is neither philosophical nor realizable; and the substitution of that goal for genuinely philosophical ones—trying to know how one ought to live, or what is real, or the nature of knowledge—is to idealize a *person*, the all too common result of which is to enshrine as his *doctrine* what is rather a vital corpus with contemporary power to aid our making philosophical progress on a number of fronts. It is to defer to the imagined mind of Plato, in short, to treat his words as authoritative." (p. 22)

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Sergio Alloggio, "Thrasymachus' *katabasis*: Relations of power and ideological struggle in Plato's *Republic* Book I", pp. 98-114.

academic philosophers who work on Plato to argue and take a stand on his gender discrimination, thanks to feminist readings of his works.[4] It is becoming an established disciplinary tradition among philosophy scholars (and hopefully it will happen faster than for the two aforementioned), to critically assess the extent to which Plato's philosophy manifests and is based on racist and colonial assumptions.[5] The acceptance and academic establishment of these ways of reading and treating Plato are directly connected to how both the hegemonic Platonic field, and the speculative citadel it represents, perceive and feel threatened by readings and approaches that do not share their disciplinary matrices when it comes to celebrating Plato's works as foundational moments for the history of Western philosophy as well as academic practice.

In this article I analyse what we traditionally call Book I of Plato's *Republic* to investigate how the modulation of his *dialeghesthai* takes shape through a progressive series of refutations of characters (Cephalus, Polemarchus and Thrasymachus); an argumentative modulation which, first and foremost, relies on a much larger strategy of subjugation of what those three characters represent politically and symbolise philosophically. Book I will be read as a multi-layered rite of (blocked) passage among socio-political boundaries, understood as argumentative limits whose main aim is to consecrate class divisions and division of labour within the *kallipolis*.[6]

Right from the beginning, the old Socrates leads the scene in *Republic* I, whose stage is Polemarchus' house in the Piraeus, the busy port of Athens. Cephalus, Polemarchus' father, is a metic whose family comes from Syracuse, a powerful Greek colony in southern Italy, and while he inherited some wealth as merchant owning a shield manufacturing company, he has been able to accumulate more capital than received. In fact, the aged Cephalus enjoys a privileged status among Athenian metics: he has been allowed to own land and property—quite an exception at the end of the fifth century in Athens. As such, he represents both the *moderate* use of capital and *authorised* accumulation of wealth; in short, he enjoys a good, happy life in a foreign *polis*. Cephalus embodies the paradigm of the good metic: he always pays taxes and

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[4] See for instance Nancy Tuana (ed.), *Feminist Interpretations of Plato*, (University Park: Pennsylvania State University Press, 1994). Natalie Harris Bluestone gives us a historical account of patriarchal motives within Platonic historiography in her "Why Women Cannot Rule: Sexism in Plato's Scholarship", pp. 109-130; Sabina Lovibond, "Feminism in Ancient Philosophy: The Feminist Stake in Greek Rationalism" in Miranda Fricker and Jennifer Hornsby (eds.), *The Cambridge Companion to Feminism in Philosophy*, (Cambridge: Cambridge University Press, 2000), pp. 10-28, esp. pp. 14-18; David M. Halperin, "Why is Diotima a Woman? Platonic *Erōs* and the Figuration of Gender", in David M. Halperin, John J. Winkler and Froma I. Zeitlin (eds.), *Before Sexuality: The Construction of Erotic Experience in the Ancient Greek World*, (Princeton: Princeton University Press, 1990), pp. 257-308; Luce Irigaray, "Plato's *Hystera*", in Id., *Speculum of the Other Woman*, trans. G.C. Gill, (Ithaca: Cornell University Press, 1985), pp. 243-364.

[5] George Klosko, "'Racism' in Plato's *Republic*", *History of Political Thought*, 12(1), 1991, pp. 1-13; Rachan Kamtekar, "Distinction Without a Difference? Race and *Genos* in Plato", in Julie K. Ward and Tommy L. Lott (eds.), *Philosophers on Race. Critical Essays*, (Oxford: Blackwell, 2002), pp. 1-13; Mika Ojakankas, *On the Greek Origins of Biopolitics: A Reinterpretation of the History of Biopower*, (New York: Routledge, 2016), in particular chs. 4, 5 and 6; and Michael Cloete, "Plato and the Modern African State: Some Thoughts on the Question of Justice", *Phronimon*, 9(1), 2008, pp. 85-99, for an attempt to revive Plato within the postcolonial framework.

[6] Pierre Bourdieu, "Rites of Institution" and "Social Space and the Genesis of 'Classes'" in Id., *Language and Symbolic Power*, trans. G. Raymond and M. Adamson, (Cambridge: Polity, 1991), pp. 117-126 and pp. 227-251.

takes part in religious practices; he pays his debts; and he does not complain about the exclusion he suffers from the political life of the city.[7] But his lawful conduct is the other side of the privileged status Periclean Athens granted him—a status that can instantly be revoked in the midst of civic conflicts and political struggles among city factions (*stasis*). The constitutive instability of Cephalus' position in the civic order, the permanent chance of status reversal and, therefore, the constant threat of losing his substances, inform his precarious condition as legitimate discussant when it comes to analysing and defining the conceptual structure of justice in Book I. Another aspect of Cephalus' constitutive inferiority in terms of philosophical prowess lies in his socio-economic function as merchant or tradesman (*chrematistes*) wholly devoted to the art of acquiring wealth through commercial activities (*chrematistike*), which immediately puts him in the lowest civic strata according to Plato's hierarchy of classes—Cephalus' life journey simply cannot be taken as a paradigm for the just philosophical life, and the brief cross-examination Socrates has with him is there to prove it.

The metaphorics of journey is what makes Cephalus Socrates' first interlocutor. He is an old patriarch at the end of his life in a foreign land and, as such, he can no longer embark on any upward journey from the Piraeus to Acropolis, from the cave to the sun. What he is left with is the pleasure of conversation to compensate for his lack of libido—*logos* as consoling sublimation (328d). This expedient signals—right from the beginning—Cephalus' position in the argumentative economy of Book I's philosophical battleground: he is trapped in his own comforting underworld and cannot escape it as he is physically and speculatively too weak. He has become weak because he has been spending his whole life getting rich in the Piraeus cave. However, the old Cephalus still values and yearns for philosophical conversations—a compensative erotics of conversations. His wisdom and moderation (*sophrosyne*) come from pragmatic and economic reasons; they do not show any sign of the philosopher's vocation, a professional birthmark that, Platonically, manifests itself during adolescence and ought to be actualised through constant research which, in turn, progressively decreases the emergence of the lowest drives in philosophical young souls.[8] This unactualised philosophical disposition leads Cephalus to the conclusion that the true aspect of one's happy life (*eudaimonia*) is moderation (*sophrosyne*), a virtue that—if entertained in its existential simplicity even by youngsters—will make any stage of life just, bearable and thus happy.

But this simple and direct definition of the just life and justice, coming directly from someone belonging to the unphilosophical third class, cannot satisfy Plato. What Socrates immediately objects to is the class privilege Cephalus unconsciously enjoys, that is, the social imperturbability which comes from his wealth; a wealth that for being inherited indirectly from his grandfather and directly from his father has saved him—Socrates argues—from fetishising money, as opposed to those who by becoming rich by themselves are fixated on money. The other side (*l'envers*) of this first confutation of Cephalus is Socrates and Plato forgetting the class privilege and

[7] Lysias gives us in his oration delivered in Athens in 403 against Eratosthenes, one of the Thirty, a picture of his father Cephalus consistent with how Plato describes him in Book I; see *Greek Political Oratory*, trans. A.N.W. Saunders, (Middlesex: Penguin, 1970), p. 43.

[8] The haunting role played by the proportionality of this Platonic *jouissance* among aged men should not be underestimated as Socrates' confutation of Cephalus takes place among "young men" (328d). Unless stated otherwise, I use Jowett's translation of *Republic* Book I from *The Dialogues of Plato*, 5vo., trans. B. Jowett, (London: Oxford University Press, 1871).

citizenship they themselves enjoy as material source for their freedom to philosophise. Nonetheless, Cephalus adds that his freedom from constantly accumulating wealth, the peaceful administration of inherited substances and thus absence of tactical manipulations of other people to keep one's possessions in check are the true privilege of a life without major socio-economic torments—it is true *agathon*. This peaceful form of life is what makes Cephalus certain that he could die hoping that his soul, because it is centred on *metron* (moderation), will face the judgment of his actions centred on *mesos* (the mean) without any real fear of being punished in the underworld.

To this modest yet well-rounded account of a pragmatic just life, portrayed by a man satisfied with his journey and socially regarded as wise, to this third class morality, Socrates cannot but deny Cephalus' existential fulfilment, first by rejecting what has appeared to count as justice and, secondly, through a series of paradoxical objections to it. Cephalus' move, deriving justice/*agathon* from an external substance/*ousia*, goods/*chremata* in his case, cannot be accepted by the philosopher as legitimate source of ethical self-sufficiency, even though Cephalus himself is adamant on having lived a just life as good metic in Athens—it is actually Socrates who is directly looking for *agathon* out of *ousia* in Cephalus' arguments (330d2). And once Cephalus agrees that "speaking the truth and paying your debts" (331c) cannot be accepted as a working definition for justice, for it does not cover all possible situations in life, he is shown being unable to discuss any further Socrates' *Grundfrage,* "what is justice?"

Due to his dialectical inexperience, Cephalus cannot sustain the sequence of questions posed by Socrates' paradoxical and abstract *elenchus*: What if always paying your debts puts you or your debtor in untenable positions (as if a metic could actually question the rules of the *polis* she resides in)? What if by telling the truth you actually do wrong to your friend (as if resident aliens do not face on a daily basis these unpredictable dilemmas more than full-status citizens)? What if the virtuous act of giving back what was given to you in a contract becomes the source of ethical wrongdoing—because your friend has in the meantime gone mad (as if these logico-cognitive tests can predict what one will ever do, metic or full citizen, or, as if foreigners are not exposed to and experience even more of these unexpected subtleties and erratic reversals)?

The underlying assumption here is, while abstracting from concrete situations and structural ambiguity, that the metic's practical moderation (*sophrosyne*) can only achieve the status of true justice (*dikaiosyne*) once the philosopher's test for universal consistency has been successfully passed. The good old Cephalus at this point is unable to answer any further and, once defeated, he must exit—not without laughing away, though, and entrusting his son Polemarchus with the protection of his (conceptual) capital from additional (philosophical) delegitimation.

Cephalus' form of life, symbolising those non-philosophical, third-class natures centred on *epithymia* (lust or irrational desire) who have spent their lives in material, practical or economic achievements, has proven to be useless except for materially hosting and theoretically setting the initial stage of the dialogue. His traditional conception of justice and ethical norms will be incorporated and assimilated in the hierarchical functioning of Plato's theory of justice in Books II to X. Slaves, farmers, workers, technicians, producers, artisans and tradesmen (*technitai*) are not only to be blamed for their lack of philosophical awareness, this conceptual deficiency ultimately proves why their third class is to be politically subjugated when

it comes to establishing and replicating the relations of power of the rational city. Their nature, desires and activities must be constantly curbed, perpetually educated and unquestionably directed by the philosophical first class, the only group which truly knows how to refute their partial and incomplete ethical claims about their own lives.

Polemarchus' first act in Book I is ironically using force, via his slave-boy, to keep Socrates in the Piraeus area and walk him to his house. After all, his name (*polemos* and *archon*, lord of the war) metonymically represents the Platonic second class he belongs to and anticipates the role he is going to be playing in the rest of the Book. But before even starting the confutation, the character Polemarchus is already caught in a dramatic portrayal full of historico-philosophical meanings: he is diegetically depicted with his family as a happy metic who will be, later in his life, extradiegetically imprisoned and then killed by the Thirty in 404 to 403. He represents a soul, a shade in the Piraeus Underworld whose tragic destiny has already been written off by the Peloponnesian War and its violent aftermath in Athens. It is the political struggle and the ideological conflicts between dominant factions in the city, between oligarchs and democrats, which are the historical reasons that will bring Polemarchus to his death sentence; but it is the philosophical confutation of his insufficient notion of justice as partisan acts towards friends and enemies (332b) that will bring Polemarchus to argumentative silence in Book I. His philosophical death sentence is the necessary tactical step to acknowledge his previous conceptual wrongdoings and start an existential conversion whose rebirth eventually puts him alongside Socrates to subsequently defend and fight for the Platonic *agathon*. The metic-warrior gains philosophical citizenship only and only after he has submitted to the only true definition of justice which, from now on, he will be defending on the argumentative battlefield with other good *phylakes*, the guardian-soldiers of the rational city.

Polemarchus' argument not only follows Cephalus' account of justice, it articulates its presuppositions and ties them to the common conception of male agonistic sociality in Athens (*dike* as *andreia*): one's ethical duty is part of a much larger context whose relational, reciprocal and antagonistic relations to other social groups make it paradigmatic. From Cephalus to Polemarchus, the meaning, scope and consequences of one's actions shift from the individual to the collective as the act of "re-paying" semantically moves from the legal *opheilein* (paying back a debt) to the ethical *apodidonai* (giving back) and, eventually, to the more traditional *to prosekon* (what should be done/proper conduct as duty) (332b). It is the Homeric ethical code of warriors, the tactical target in Polemarchus' confutation of Book I, a traditional set of moral principles epitomised by the maxim of "helping friends and harming enemies" and socially assumed as operative content of justice/*dikaion*; whereas the strategic aim is to reinscribe the Homeric warrior's ethics into the second-class guardians, the watchdogs employed to defend the *kallipolis*. What Plato seems to transcend in terms of moral values haunts back every aspect of both his *dialeghesthai* and *logon didonai*. From a recurring metaphorics of argumentative fighting to diegetic exclusion, assimilation and subjugation of those characters who do not comply with the specific order it requires, it is *logos agonistikos* that eventually prevails in the dialogue. What we see in Book I is a series of agonal exchanges among different characters competing for their versions of justice; a philosophical battle between forms of morality within a much larger agonistics of justice made of conflicting definitions

for what should count as just. This confrontational space of ethico-political *logoi* becomes fully evident with the Socrates-Polemarchus dialogical exchange.

In *Republic* I, Plato's *dialeghesthai* is often described as clashing and fighting on a battlefield (335e7-10; 342d2; 344d6) and throughout his dialogues dialectical disputes among interlocutors are usually compared to a combat between two or more warriors. Refuting opponents' arguments and argumentations is fighting against their argumentative power in a close-range combat. What must be emphasised here is how the philosopher's *logos dialektikos* forms and becomes part of a larger *logos agonistikos*, which Plato constantly recontextualises using the hoplitic fight (*mache*) as its paradigm. More specifically, it is the individual fight hoplites engage with each other that Plato uses as model; a short yet cruel fight which epitomises one's life.[9] In this philosophical assimilation, *l'envers* of the Athenian soldier's equipment and tactic on the battlefield, is the Thracian soldier with his lack of *taxis* (good order). This dichotomy calls for a binary taxonomy of values in terms of existential behaviour: hoplitic *sophrosyne* and virile courage (*andreia*) become for each Athenian citizen supreme examples of socio-political cohesion.[10] Often the hoplite's ordered *sophrosyne* is indirectly depicted and conveniently juxtaposed by Plato against the peltast's chaotic *eris* (disharmony): the Athenian form of life vs. the Thracian form of life, the authentic and direct close-range weaponry vs. the inauthentic indirect long-range weaponry (344d6). Among Athenians, Thracian peltasts immediately evoke barbaric and mercenary signifiers due to their lighter, guerrilla-like equipment and absence of civic trust. More specifically, Thracian soldiers, for classic Athenians, are bellicose mercenaries and Plato's quarrel with the sophists is also a dialectic fight against a *logos* based on salary, not to mention the speculative limits Cephalus embodies as *chrematistes*. The citizen-soldier fighting as fearless hoplite in the phalanx is ultimately opposed to a horde of barbaric mercenaries and becomes the paradigm for the Platonic philosopher fighting against a horde of rhetors, sophists and ideologues.

There is no space in Polemarchus' understanding of ethical life for a not-fractured ideological space between groups of friends and groups of enemies; for a military accord between soldiers from different city-states fighting to dominate Hellas. Socrates' confutative tactic to disarm him is twofold: on the one hand, he introduces individual intentions to transform friends into good people and enemies into evil people (332a-334b); on the other hand, he makes use of the distinction between appearing fair or good as opposed to really being fair or good (334c-335e) in order to completely dismantle the old warrior-morality centred on external results and agonistic *arete*. However, neutralising politico-economical conflicts into stable demarcations grounded on definitive definitions of good and bad (people) does not solve the conflicting space of politics wherein groups and classes fight with each other to hegemonise the city; it only moves it to the elemental composition of the (Platonic) soul. Furthermore, Socrates' ethics of (intrinsic) authenticity, as opposed to

[9] Nicole Loraux, *The Experiences of Tiresias: The Feminine and the Greek Man*, trans. P. Wissing, (Princeton: Princeton University Press, 1995), ch. 8 "Therefore, Socrates is Immortal" and ch. 9 "Socrates, Plato, Herakles: A Heroic Paradigm of the Philosopher"; Lucia Loredana Canino, "La Battaglia", in Platone, *La Repubblica*, Vol. 1: Libro I, trans. and comment by M. Vegetti et al., (Milan: Bibliopolis, 1998), pp. 209-221.

[10] Pierre Vidal-Naquet, "The Tradition of the Athenian Hoplite", in Id., *The Black Hunter: Forms of Thought and Forms of Society in the Greek World*, trans. A. Szegedy-Maszak, (Baltimore/London: The Johns Hopkins University Press, 1986), pp. 85-105.

Polemarchus' ethics of (extrinsic) achievements, cannot overcome the political struggle in the city unless it unambiguously produces, relies and eventually grounds itself on a phenomenology of desires and intentions capable of univocally representing them as the only authentic sources of political good actions—something that, once again, only the frozen and classist ontology of the (Platonic) tripartite soul will epistemically claim to do in *Republic* II to X.

In the end, Polemarchus agrees with Socrates that in no case harm should be done to anyone, a final agreement on what the just man should do, an agreement only produced after an *elenchus* whose consistency and correctness have been questioned by several scholars.[11] Ironically enough, this pacifist thesis is immediately followed by an antagonistic plan of action which shows Socrates and Polemarchus ready to cause harm to any opponent of their newly acquired truth: "Then you and I are prepared to take up arms against anyone who attributes such a saying to Simonides or Bias or Pittacus, or any other wise man or seer? I am quite ready to do battle at your side, he said" (335e). Socrates' tactical refutations of Polemarchus serve Plato's strategy to philosophically produce the second class of warrior-guardians (*phylakes*) who will be trained to automatically recognise enemies and friends and act accordingly—the perfect watchdogs (375c-376b). As such, first Cephalus and then Polemarchus synecdochically embody Plato's strategy towards the third and second class of his envisaged politico-philosophical order; a strategy that through their dialectical refutations aims at subjugating the social groups and classes they represent, together with any possible claim about a different approach to justice than his own.

Once the philosophical dispute on justice has reached a collective, political dimension, and once the good soldier Polemarchus has joined the Socratic battlefront, the character of Thrasymachus of Chalcedon, the scary wolf-sophist, makes his entrance through a dramatic break-in (336b-c). The historical Thrasymachus was a well-established rhetor and logographer active in ancient Greece during the second half of the fifth century, and Plato presents him in Book I as a sophist with genuine philosophical interests, in other words the true enemy of his ideological struggle for the univocal conception of justice held by the members of the first class of his *kallipolis*, the true philosophers.[12] Thrasymachus immediately requests a methodological change in the discussion; he uncovers and rejects Socrates' reductions and assimilations of one concept to another in his previous refutations. This move stops

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[11] See, for instance, John Beversluis, *Cross-Examining Socrates: A Defense of the Interlocutors in Plato's Early Dialogues*, (Cambridge: Cambridge University Press, 2000), pp. 203-219; Kimon Lycos, *Plato on Justice and Power: Reading Book I of Plato's Republic*, (London: Macmillan, 1987), pp. 31-39 and pp. 83-105; Alexander Tulin, "On the Refutation of Polemarchus: Analysis and Dialectic in *Republic I*", *Elenchos*, 25(2), 2005, pp. 277-316, esp. pp. 292-295 to see how, at the crossroad between ethical and formal argumentations, "contrariety and negation" are conveniently bended by Plato.

[12] Thrasymachus is mentioned by Plato in the list of the most skilful rhetors presented in *Phaedrus* 267c-d: "For tearful speeches, to arouse pity for old age and poverty, I think the precepts of the mighty (*sthenos*) Chalcedonian hold the palm, and he is also a genius, as he said, at rousing large companies to wrath, and soothing them again by his charms when they are angry, and most powerful in devising and abolishing calumnies on any grounds whatsoever." (Fowler trans.) Aristotle in his *Rhetoric* (1400b) mentions the onomatopoeic topos traditionally referred to Thrasymachus ("you are always bold in fight, *thrasymachos*"), and credits him with formalising some rhetorical devices (1404a, 1409) and exemplary choice of metaphors (1413a). Unless stated otherwise, when I mention Thrasymachus I always refer to the Platonic character. For a rhetorical analysis of Plato's dramatisation of Thrasymachus in Book I, including the above passages from *Phaedrus* and Aristotle's *Rhetoric*, see J.H. Quincey, "Another Purpose for Plato, 'Republic' I", *Hermes*, 109(3), 1981, pp. 300-315.

Socratic metonymical identifications of concepts to characters, his ironic recourse to myths, revelations and poetry, and, at the same time, forces him to engage in a conversation based on "clearness and accuracy" (336d). Two vocabularies face each other here: sophistical inquiry on political legitimacy against paradoxical arguing on notions, and when Thrasymachus puts forward his first account of justice as being "nothing else than the interest of the stronger (*to tou kreittonos xympheron*)" (338c), a whole new dimension of ethical relations, philosophical truths and political dynamics emerges. Laws and natural constitutions, relations of power and antagonistic classes, justice as inextricably tied to right and ideology—all these aspects will be part of the cruel dispute between the Chalcedonian sophist and the Athenian philosopher.

In fact, Thrasymachus adds to his initial thesis an important clause: "… different forms of government make laws democratical, aristocratical, and tyrannical, with a view to their several interests" (338d10).[13] He does that in order to make clear that his theorising only focuses on the actual functioning of power in relation to ruling (*to archon*) and its multiple ideological and jurisdictive mediations. The functioning of power (*arche*), beyond and underneath its different constitutional form (*politeia*), lies in the fact that the dominant group has proven to be (politically) powerful enough (*kreitton* as *kratos*) to have established itself as the ruling class which, consequently, controls the dominated through convenient sets of just (*dikaion*) norms and laws (*nomoi*). Against any archaic reminiscence of (political) power understood as a natural gift (*physei*) in terms of psychophysical attributes, which can only be inherited by superior men (*aristoi*), Thrasymachus' analysis places "the stronger" (*kreittones*) as the final (but not definitive) results of a power struggle among competing groups in the political arena, the city-state.[14] It is only in the aftermath of this collective struggle that their political power takes the shape of and reproduces itself through force, norms, laws and ideology, through both repressive and ideological apparatuses.

Chronologically speaking, the spheres of justice and right, together with their deliberative levels and institutional mediations, represent a secondary moment for any political power establishing itself as the only legitimate one. In other words, Thrasymachus' logic of power shows to Socrates that the foundational moment of (any form of collective) justice cannot be disentangled from political domination and ideological replication. To this Socrates replies, in his first wave of *elenchus*, by highlighting the potential fallibility of rulers who mistakenly make laws against their

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[13] Shorey translates as: "… some cities are governed by tyrants, in others democracy rules, in others aristocracy? … And is not this the thing that is strong and has the mastery in each—the ruling party?"; from Plato, *The Republic*, 2vo., trans. P. Shorey, (London: Harvard University Press, 1930).

[14] P.P. Nicholson, "Unravelling Thrasymachus' Arguments in *The Republic*", *Phronesis*, 19(3), 1974, pp. 210-232, esp. p. 223; F.E. Sparshott, "Socrates and Thrasymachus", *The Monist*, 50(3), 1966, pp. 421-459, esp. pp. 429-434 where he analyses how and why Thrasymachus' doctrine cannot be compared to Callicles' and concludes his argument stating that: "Thrasymachus is apparently going one step further than Callicles had. Callicles thought of power as the prerogative of those whose superiority is shown in other ways than in their hold on power. But to Thrasymachus the superiority of the unjust man is simply his superior control of the means to power (and hence to all other goods), and he is not susceptible to the arguments that brought Callicles down by appealing to his ideal of gentlemanly conduct (494e ff.). Unlike Callicles, he does not commit the error which Aristotle censures (*Pol*. 1255a5 ff., 1280a22 ff.) of supposing that superiority in one respect entails superiority in all respects. It follows from Thrasymachus' view that the wisdom and strength that constitute excellence may belong collectively to a class as well as individually to a man. In thus denying any extra superiority to the strong …" (434).

own interests, that is, laws that for being understood as just by the ruled could eventually harm the rulers. In the event of such harmful laws being followed, Thrasymachus explains that this mistake would simply signal the end of those rulers as stronger (340d-341a). What is at stake here is the production of a theoretical account of power and ruling; in short, the art of politics that "provide for the interests of their subjects" (346e)—what *Republic* II to X tries to philosophically illustrate while unfolding Plato's ideal *politeia*.

Then, Socrates' second wave, his second attempt at refuting Thrasymachus, draws on professional expertise, skills and arts (*technai*) and how each of them teleologically aims at their objects' perfection as primary interest. When Socrates is told by the Chalcedonian that each expert or skilful technician performs her ability primarily for her own interest and only secondarily for her objects, he shifts the discussion from the alleged intrinsic value of each *techne* to a new, specific one called the art of receiving pay and salary (*misthotike*, 346a-347a). He does that in order to prove that professional expertise, and the art of ruling above all, can be dissociated from monetary retribution. However, Socrates' famous *techne*-analogy overcomes only surreptitiously the brute materiality of Thrasymachus' empirical analysis: if the art of payment is a real art, salary haunts back at least one art; if it is not, receiving pay remains a constitutive element of one's *techne*.

Socrates' focus turns now to power itself, to the art of ruling in relation to the moral fabric of those who exercise it. Only the best citizens are willing to rule without profiting from their position, not caring for ambition nor money. They feel compelled to take charge of the *polis* as a necessary action to avoid the "punishment" of being "ruled by one who is worse than" them (347c). This further objection has surreptitiously moved the argumentative space from actual relations of power to ethical principles forged in an undisputable ontology, which still needs to be proven exempt from political interests, that is, interests tied to existing forms of domination. The normative force of Socrates' premise has been assumed as a cogent fact ("in very truth the true ruler/*to onti alethinos archon* is not meant by nature", 347d4-5) even though, first, he cannot bring forward any historical example and, secondly, his objection connects an alleged intrinsic divide within human souls. There is an ontological and epistemic rift between good soul, with their libidinal reluctance to be socially punished (good men do not strive for power except for …), and bad souls, where both levels of this rift prove to be viable only ideally speaking.[15] This aporetic solution, the lack of a convincing refutation of Thrasymachus' main thesis on power,

[15] The whole passage is worth reading: "And not being ambitious they do not care about honour. Wherefore necessity must be laid upon them, and they must be induced to serve from the fear of punishment. And this, as I imagine, is the reason why the forwardness to take office instead of waiting to be compelled, has been deemed dishonourable. Now the worst part of the punishment is that he who refuses to rule is liable to be ruled by one who is worse than himself. And the fear of this, as I conceive, induces the good to take office, not because they would, but because they cannot help—not under the idea that they are going to have any benefit or enjoyment themselves, but as a necessity, and because they are not able to commit the task of ruling to any one who is better than themselves, or indeed as good. For there is reason to think that if a city were composed entirely of good men, then to avoid office would be as much an object of contention as to obtain office is at present; then we should have plain proof that the true ruler is not meant by nature to regard his own interest, but that of his subjects; and every one who knew this would choose rather to receive a benefit from another than to have the trouble of conferring one" (347b-347d).

politics and ideology, will no longer be examined in the remaining pages of Book I,[16] which now show Socrates resolutely questioning the Chalcedonian on the value of conducting a just, happy life opposed to an unjust, unhappy life—where unjust simply means being stronger and excelling in *pleonexia*, the will to exceed which Plato metonymically identifies Thrasymachus with.

This last battery of Socrates' arguments focuses on how each thing (from horses to eyes, from daggers to ears) performs its own function (*ergon*) only when it achieves its specific excellence (*arete* as *dynamis*). As soon as this understanding of (non-human) virtue as performativity is transferred to the human soul, whose ultimate function is to rule over the body and its chaotic drives,[17] human life is apparently assumed to be the soul's most important function. This has two major consequences: first, the good soul rules fairly and the evil soul rules badly and, secondly, justice is assumed to be the soul's only virtue, with the immediate corollary of injustice being "the defect of the soul" (353e). The final inference of Book I is that those who have *justice* in their *soul* are just men who *live well* and therefore are *happy*, thus they are the only possible candidates for ruling. This problematic ethical deduction of the just ruler has been criticised by many commentators for presenting several fallacies.[18] What should be emphasised here is how this conception of the just ruler, which is grounded on an implicit hierarchical necessity within the soul, will be presupposed by Plato when he later defines justice as "minding one's business/rendering each his own" (*ta heautou prattein*) in Book IV.[19]

The ultimate meaning of this reduction of Thrasymachus' major thesis to ethics is Plato's philosophical attempt to seal off the huge cracks produced in the philosophical texture of Book I by the sophist.[20] The Chalcedonian, with his empirical genealogy about relations of power and sociological descriptions of constant struggles between dominant groups, offers no transcendent solutions to overcome the general agonistics in the city; there is simply no transcendental solution, no anabatic journey in his materialist sophistics[21] to save the socio-political phenomena.[22] In Thrasymachean terms, what we are left with is an endless politics of justice which is

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[16] "So far am I from agreeing with Thrasymachus that justice is the interest of the stronger. This latter question need not be further discussed at present" (347d-e).

[17] "Well; and has not the soul an end which nothing else can fulfil?, for example, to superintend and command and deliberate and the like. Are not these functions proper to the soul, and can they rightly be assigned to any other?" (353d).

[18] E.L. Harrison, "Plato's Manipulation of Thrasymachus", *Phoenix*, 21(1), 1967, pp. 27-39; Joseph P. Maguire, "Thrasymachus—or Plato?", *Phronesis*, 16(2), 1971, pp. 142-163, esp. pp. 149-153 and pp. 160-163; Harold Zyskind, "Plato's *Republic* Book I: An Equitable Rhetoric", *Philosophy and Rhetoric*, 25(3), 1992, pp. 205-221, esp. pp. 216-221; Tulin, "On the Refutation of Polemarchus", esp. pp. 296-298.

[19] "You remember the original principle which we were always laying down at the foundation of the State, that one man should practise one thing only, the thing to which his nature was best adapted; now justice is this principle or a part of it. Yes, we often said that one man should do one thing only. Further, we affirmed that justice was doing one's own business, and not being a busybody" (433a).

[20] Maguire, "Thrasymachus—or Plato?", pp. 151-152.

[21] Sophistics is the name for the sophists' theoretical practice once it is no longer understood in Platonic and Aristotelian terms. For the meaning of this shift in both philosophical philology and contemporary scholarship, see Barbara Cassin, *Sophistical Practice: Towards a Consistent Relativism*, trans. M. Syrotinski, A. Goffey et al., (New York: Fordham University Press, 2014); see also the short entry "Sophist" by Michel Narcy in H. Cancik and H. Schneider (eds.), *Brill's New Pauly: Encyclopaedia of the Ancient World Vol. 13*: Sas-Syl, (Leiden/Boston: Brill, 2008), pp. 636-640.

[22] See Sparshott, "Socrates and Thrasymachus", pp. 427-431.

made of permanent ideological struggles among conflicting classes. Plato has to fill up these cracks and, above all, neutralise the political as the primary space where the distribution of power, division of labour, ideological devices and ethical arrangements are still fluid elements as they originate from clashes between individual and collective entities, from unavoidable conflicts between rulers and the ruled. Diegetically speaking, the ethical turn at the end of Book I does not refute Thrasymachus, who has stopped engaging with Socrates before he even starts his last chain of arguments due to lack of agreement on premises and conclusions. Furthermore, the ethical deduction of the just ruler does not satisfy Socrates himself, as we read in the last lines of Book I (354a-c). However, the chief result of these last pages—underneath and beyond the tactical incoherence and inconsistencies of both Socratic and Thrasymachean preceding arguments and counter-arguments—lies in their symmetrical argumentative subjugation. The paradigmatic unjust man portrayed by Thrasymachus amounts to a silly, despotic tyrant (not very different from Callicles'), while Socrates' eristic account of the just ruler is based on an undeveloped and incomplete set of arguments that only the successive Books II to X will supplement and transcend (thus making him Plato's harmless mouthpiece for the rest of *Republic*).

**Which Hades, Whose *Katabasis*, What Sort of *Jouissance*?**

> "At least I've already spelt out in previous sessions what regression confirms. There is still the question of how to articulate it. I articulate it by suggesting that it's the choice of signifiers that gives an indication of regression …. Desire, far from being natural, is always formed by a particular position the subject takes in relation to the Other. Helped by this fantasmatic relation, man finds his bearings and situates his desire. Hence the importance of fantasies. Hence the rarity of the term 'instinct' in Freud—it's always a question of the drive, *Trieb*, the technical term we give to this desire insofar as speech isolates it, fragments it and places it in this problematic and disjointed relationship to its aim that one calls the direction of the tendency, and whose object is, moreover, subject to substitution and displacement or, indeed, to all forms of transformation and equivalents, but is also offered to love, which makes it a subject of speech."
>
> *Jacques Lacan*[23]

From being the deuteragonist and one of the most lucid interlocutors Socrates ever faces in a Platonic dialogue, at the end of Book I Thrasymachus is abruptly described by Socrates as his newly acquired friend since the sophist has "left off scolding" and "grown gentle towards" him (354a). This sudden alliance comes right after the Chalcedonian has once again mocked Socrates' conclusion about the uselessness of injustice with a sarcastic remark on his autistic chain of arguments.[24] These are the last words uttered by the untamed sophist, before he is relegated to the argumentative underworld he will be placed in, before he takes up the role of the silent shade in the philosophical Hades Plato leaves him to in Books II to X.[25] Thrasymachus' inability to

[23] *The Seminar of Jacques Lacan*, Book V: *The Formations of the Unconscious 1957-1958*, ed. J.-A. Miller, trans. R. Grigg, (Cambridge: Polity, 2017), p. 403 and pp. 418-419.

[24] "Let this, Socrates, he said, be your entertainment at the Bendidea" (354a).

[25] Thrasymachus is described as gentle interlocutor in Book V 450a-b; his other indirect occurrences in the *Republic* are 357a, 358b-c, 498c-d ("Do not make a quarrel, I said, between Thrasymachus and me, who have recently become friends, although, indeed, we were never enemies; for I shall go on striving to the utmost until I either convert him and other men, or do something which may profit them against the day when they live again, and hold the like discourse in another state of existence"), 545b, 590d.

demote the political, his unwillingness to domesticate the general agonistics in acceptable ethical terms signal, in Plato's progressive narrative, his blocked destiny he is going to be entrapped into from now on.

In terms of irony and argumentative relations of power, and compared with Socrates in the opening scene, the Chalcedonian's last entrance in Book I marks a complete katabatic reversal, as he is not going to take part in any religious and philosophical celebration at the Piraeus. Thrasymachus shall not receive any revelation from a goodness, a narrative device that in traditional katabatic plots marks the beginning of the return to the upper world. Whereas Plato depicts both Socrates' and readers' *katabaseis* at the end of Book I with an aporetic yet temporary break in the voyage, a break which only momentarily stops the underground journey to the upper world, to light, to *episteme* and true justice started in the opening pages of *Republic*, Thrasymachus' *katabasis* stops where Book I ends, there is no *anabasis* available for him: he will be ventriloquised by Glaucon in Book II or, whenever he speaks again, he is no longer the untameable wolf of Book I, but rather a friendly dog, a pale ghost relegated to the dark Underworld of non-being, *doxa* and *pleonexia*.

Compared to the philosopher-guardians of the first class, what Thrasymachus represents is a different philosophical approach to social questions as the importance of his role, range of discussion and urgency of his refutation in Book I abundantly demonstrate. Sophistics should be condemned and subjugated because, through Thrasymachus, it shows how (Platonic) philosophy itself forms and is part of a larger ideological field of struggle between dominant groups and classes in fourth-century Athens and Hellas.[26] This ideological field of struggle goes from geopolitical conflicts among regional powers (Persia, Macedonia, Sparta, other Greek city-states and colonies), to competing philosophical canons of education within the *polis* (traditional norms, Protagoras' civic artisanship, Isocrates' *paideia*, etc) and, eventually, to eristic battles among students of rhetoric, sophistics and philosophy inside and outside their schools—while each of these levels at the same time reflects and is structurally connected to specific class-interests or partial elements of them. These ideological aspects are not added to (Platonic) philosophy as external and secondary features; they are part of and mutually codetermine the extent to which (Platonic) ontology, metaphysics, epistemology, ethics and politics favour or neglect one's class-interests.

In particular, Plato's *Politeia* is a machinery of (self)legitimation for the philosopher's role in the (ideal) city, for his undisputable leading position when it comes to determine how each class and their partial and incomplete ontology, epistemology, ethics and politics must always submit to the true scientific knowledge (*episteme*) held by those *just* and *impartial* intellectuals who circularly embody it.[27]

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[26] Ellen Meiksins Wood and Neal Wood, *Class Ideology and Ancient Political Theory: Socrates, Plato, and Aristotle in Social Context*, (Suffolk: Basil Blackwell, 1978); Perry Anderson, *Passages from Antiquity to Feudalism*, (London: NLB, 1974), esp. chs. 1-3; M.M. Austin and P. Vidal-Naquet, *Economic and Social History of Ancient Greece: An Introduction*, (London: Batford Academic and Educational, 1977); Mohammad Nafissi, "Class, Embeddedness, and the Modernity of Ancient Athens", *Comparative Studies in Society and History*, 46(2), 2004, pp. 378-410; Jean-Pierre Vernant, "Class Struggle", in Id., *Myth and Society in Ancient Greece*, (New York: Zone Books, 1990), pp. 11-27; John R. Wallach, "The Platonic Moment: Political Transpositions of Power, Reason, and Ethics", in Kyriakos N. Demetriou and Antis Loizides (eds.), *Scientific Statesmanship, Governance, and the History of Political Philosophy*, (New York/London: Routledge, 2015), pp. 9-23.

[27] The Greek term *politeia* exceeds the semantic spectrum of the Latin *res publica* as it signifies not only constitutional and legal arrangements; it points, more directly, to the conscious and unconscious self-

*Republic* I is then the necessary preliminary stage for both the construction and institutionalisation of this philosophical machinery of circular consecration. The third and second class's genuine claims to philosophically represent their own class-interests (that is, their definitions of justice) must be theoretically delegitimised, and those who happen to be dialectically strong enough to challenge the first class's philosophical domination must be either assimilated or forgotten in an argumentative Hades.[28]

The opening lines of Book I, "I went down (*kateben*) yesterday to the Piraeus" (327a1), have been extensively analysed in their "symbolism of depth and descent".[29] The immediate reference here is Odysseus' *katabasis* and Plato is replacing Hades with the Piraeus, the Athenian port, as opposed to the Acropolis, the higher place from which Socrates is walking down. We know that his descent happens at night and the fourth-century Piraeus is a vibrant area where all sorts of transactions among citizens, slaves, workers, artisans, merchants, metics and barbarians take place. For the Platonic philosopher, this liminal urban space represents an irrational, ambiguous place not only in speculative terms, but it is the recurring threat of social mobility of both the *Lumpenproletariat* and the working-class that gives it a horrible chthonian aspect.[30] His way down into this metropolitan Hades is what opens the *Republic* and the official reason Socrates, together with Glaucon, descends to the Piraeus is to "offer up my

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articulation of human beings into communities through relations of power, their legitimacy and reproduction. As explained by Leo Strauss, *Natural Right and History*, (Chicago/London: The University of Chicago Press, 1953): "The classics called the best society the best *politeia.* By this expression they indicated, first of all, that, in order to be good, society must be a civil or political society, a society in which there exists government of men and not merely administration of things. *Politeia* is ordinarily translated by 'constitution'. But when using the term 'constitution' in a political context, modern men almost inevitably mean a legal phenomenon, something like the fundamental law of the land, and not something like the constitution of the body or of the soul. Yet *politeia* is not a legal phenomenon. The classics used *politeia* in contradistinction to 'laws'. The *politeia* is more fundamental than any laws; it is the source of all laws. The *politeia* is rather the factual distribution of power within the community than what constitutional law stipulates in regard to political power. The *politeia* may be defined by laws, but it need not be. The laws regarding a *politeia* may be deceptive, unintentionally and even intentionally, as to the true character of the *politeia.* No law, and hence no constitution, can be the fundamental political fact, because all laws depend on human beings. Laws have to be adopted, preserved, and administered by men. The human beings making up a political community may be 'arranged' in greatly different ways in regard to the control of communal affairs. It is primarily the factual 'arrangement' of human beings in regard to political power that is meant by *politeia* …. *Politeia* means the way of life of a society rather than its constitution …. When speaking of constitution, we think of government; we do not necessarily think of government when speaking of the way of life of a community. When speaking of *politeia,* the classics thought of the way of life of a community as essentially determined by its 'form of government'" (135-16).

[28] George F. Hourani, "The Education of the Third Class in Plato's Republic", *The Classical Quarterly*, 43(1-2), 1949, pp. 59-60; Vidal-Naquet, "A Study in Ambiguity: Artisans in the Platonic City", in Id., *The Black Hunter*, pp. 224-245; Jacques Rancière, *The Philosopher and His Poor*, trans. J. Drury, C. Oster and A. Parker, (Durham: Duke University Press, 2004), ch. 1, "Plato's Lie".

[29] Eric Voegelin, *The Collected Works of Eric Voegelin*, Vol. 16*: Order and History*, Vol. III: *Plato and Aristotle*, (Columbia/London: University of Missouri Press), 2000, pp. 105-118; Charles Segal, "The Myth Was Saved: Reflections on Homer and the Mythology of Plato's Republic", *Hermes*, 106(2), 1978, pp. 315-336; M. Vegetti, "*Katabasis*", in Plato, *La Repubblica*, Vol. 1: Libro I, pp. 93-104; John Sallis, *Being and Logos: Reading the Platonic Dialogues*, (Bloomington: Indiana University Press, 1996), pp. 313-378.

[30] Vidal-Naquet, *The Black Hunter*, pp. 7, 9, 274-275, for the socio-economic reasons behind Plato's philosophical rejection of the Athenian fleet, "maritime trade" and those who materially make them possible—see also *Laws* IV 704a-705b.

prayers to the goddess; and also because I wanted to see in what manner they would celebrate the festival, which was a new thing. I was delighted with the procession of the inhabitants; but that of the Thracians was equally, if not more, beautiful. When we had finished our prayers and viewed the spectacle, we turned in the direction of the city." (327a2-b1)

This proem presents several traditional signifiers that Plato employs and reverses in ironical terms. The traditional poetics of *katabasis*, although presenting variations in figures, meaning and motivation, relies on the literary genre of epic poetry which canonically shows a god or hero traveling to the end of the known world to descend into the Underworld/Hades, where he meets with divine creatures and souls (symbolising true knowledge and justice) who eventually transfer and share with him eschatological doctrines or crucial messages on the living and the dead, on death and life. Other recurring *topoi* are successful fights with monsters, encounters with wrongdoers, sinners and evil souls as well as blessed souls, catalogue of women and heroines, the judgment of the dead (with punishments and rewards) and, finally, the return of the hero to the upper world (*anabasis*) to disseminate the newly acquired knowledge. It is an allegoric ritualistic cycle that symbolises how previous forms of life undertake a process of purification, renewal or rebirth (self-transcendence) through internalisation of higher, dangerous or inexplicable revelations (initiation).[31] The *katabasis-anabasis* cycle became crucial for Orphic and Pythagorean traditions and Plato, like any other educated Greek, was familiar with the symbolic importance of

[31] Although the narrative structure of literary *katabaseis* was never explicitly codified in ancient Greece, stories about an exceptional hero or shaman-poet visiting the land of the dead progressively showed speculative overtones and philosophical reconfigurations: both Odysseus' *nekyia* to visit Tiresias in Hades about his destiny and Orpheus' journey to the Underworld became fundamental for the shamanistic tradition about *katabaseis*; Heracles' katabatic cycles were incorporated in the Eleusinian Mysteries; katabatic backgrounds are present in Hesiod, *Theogony* 729-46; Epimenides' legend follows some katabatic *topoi* (downward journey and the long sleep in which he met with Aletheia and Dike); several stories about Pythagoras are clearly modelled on the poetics of *katabasis*; Parmenides' poem shows a philosophical initiation that follows a katabatic pattern. See Christiane Sourvinou-Inwood, *'Reading' Greek Death: To the End of the Classical Period*, (Oxford: Oxford University Press, 1995), chs. 2 and 5; Fritz Graft and Rudolf Brändle, "Katabasis", in Hubert Cancik and Helmuth Schneider (eds.), *Brill's New Pauly: Encyclopaedia of the Ancient World*, (Leiden: Brill, 2005), Vol. 7: K-Lyc, pp. 27-29; José Luis Calvo Martínez, "The *Katábasis* of the Hero", in Vinciane Pirenne-Delforge and Emilio Suárez de la Torre (eds.), *Héros et Heroïnes dans les Mythes et les Cultes Grecs*, (Liège: Presses Universitaires de Liège, 2000), pp. 67-78; Alberto Bernabé, "What is a *Katábasis*? The Descent to the Netherworld in Greece and the Ancient Near East", *Les Études Classiques*, 83, 2015, pp. 15-34; Miguel Herrero de Jáuregui, "*Pathein* and *Mathein* in the Descents to Hades", in Gunnel Ekroth and Ingela Nilsson (eds.), *Round Trip to Hades in the Eastern Mediterranean Tradition*, (Leiden/Boston: Brill, 2018), pp. 103-123; Miguel Herrero De Jáuregui, "Priam's Catabasis: Trace of the Epic Journey to Hades in *Iliad* 24", *Transactions of the American Philological Association*, 141, 2011, pp. 37-68; Radcliff G. Edmonds III, "When I Walked the Dark Road of Hades: Orphic *Katábasis* and the *Katábasis* of Orpheus", *Les Études Classiques*, 83, 2015, pp. 261-279; Noel Robertson, "Heracles' Catabasis", *Hermes*, 108(3), 1980, pp. 274-300; Annie Verbanck-Piérard, "Round Trip to Hades: Herakles' Advice and Directions", in *Round Trip to Hades in the Eastern Mediterranean Tradition*, pp. 163-193; Ivana Petrovic and Andrej Petrovic, "Divine Bondage and *Katabaseis* in Hesiod's *Theogony*", in *Round Trip to Hades in the Eastern Mediterranean Tradition*, pp. 57-81; J.S. Morrison, "Parmenides and Er", *The Journal of Hellenic Studies*, 75, 1955, pp. 59-68; Joseph Owens, "Knowledge and *Katabasis* in Parmenides", *The Monist*, 62(1), 1979, pp. 15-29; Maria Michela Sassi, "Parmenide al bivio. Per un'interpretazione del Proemio", *La Parola del Passato*, 43, 1988, pp. 383-396; M. Vegetti, "*Katabasis*", esp. pp. 94-99; Walter Burkert, "Pleading for Hell: Postulates, Fantasies, and the Senselessness of Punishment", *Numen*, 56(2-3), 2009, pp. 141-160; Tobias Reinhardt, "Readers in the Underworld: Lucretius, *De Rerum Natura* 3.912-1075", *The Journal of Roman Studies*, 94, 2004, pp. 27-46.

otherworldly journeys. The proem of his *Politeia* immediately signals a structural continuity with older forms of shamanistic knowledge and rites of mystical initiation, which find their first philosophical formulation in Parmenides and the Pythagoreans, whose works are extensively used and deconstructed by Plato throughout his dialogues, and which also contain several katabatic stories.[32] The urban and secular reconfiguration of Socrates' *katabasis* in Book I depicts Plato's hero descending to the infernal areas of Athens to satisfy his intellectual curiosity about the new goodness of the pantheon, the Thracian Bendis, thus enjoying the official celebrations her followers have organised for the whole day.[33] What the philosophical initiand will then face is a series of dialectical encounters with more or less frightening, ignorant and misguided phantasms (Cephalus, Polemarchus and Thrasymachus) about the true account of what counts most in life, of how one should live, of what justice is. It is only when the Platonic hero has successfully defeated these phantasms and overcome the argumentative pain they caused him, that he will be able to return to the upper world and finally narrate his story about what he saw and experienced—in sum, to theorise, establish and run the ideal city on earth.

If we look at the whole scene of Book I from a different angle, it is Thrasymachus' forced, permanent and inverted *katabasis* which Plato also gives us—and one does not exclude the other.[34] The talented sophist who comes to Athens from the Megarian colony of Chalcedon in Bithynia is put in a philosophical Hades, wherein he has to endlessly endure and continually fight against the ethico-ontological reductions of his materialist logology. Banned from all speculative venues of the *kallipolis*, the Chalcedonian wolf is displaced as dialectical Cerberus waiting at the Gates of Hades for generations of philosophers to perform their cycle of ideological purification. What his *logomachia* against Socrates, the sage-hero, initiates and allows from Book II to Book X is an anabatic journey for philosophy students and lecturers of the Academy on the safe and luminous paths of institutional (self)legitimation. However, this is not an attempt to rescue either the historical Thrasymachus or the fictional Chalcedonian from where he has been relegated to: we simply do not have enough extant materials from the former to start a rescue mission

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[32] Vegetti, "Katabasis", pp. 94-96, where he lists all terminological and mythological occurrences of *katabainein* and katabatic figures in Plato's works (*Gorgias*, *Theaetetus*, *Republic*, *Sophist* and *Laws*); see Adrian Mihai, "Hades in Hellenistic Philosophy (The Early Academy and Stoicism)", in *Round Trip to Hades in the Eastern Mediterranean Tradition*, pp. 194-214, esp. pp. 197-199 for a brief outline of Plato's conceptions of the Underworld; for a more nuanced analysis of Plato's conscious use of stories about the afterlife, Radcliffe G. Edmonds III, *Myths of the Underworld Journey: Plato, Aristophanes, and the 'Orphic' Gold Tablets*, (Cambridge: Cambridge University Press, 2004), ch. 4 "The Upward Path of Philosophy: The Myth in Plato's *Phaedo*", pp. 159-220.

[33] On the historico-philosophical significance for the presence of a Thracian goddess in Athens, see Silvia Campese and Silvia Gastaldi, "Bendidie e Panatenee", in Platone, *La Repubblica*, Vol. 1, Libro I, pp. 105-131; Corinne Ondine Pache, "Barbarian Bonds: Thracian Bendis among the Athenians", in S.R. Asirvatham, C.O. Pache and J. Watrous (eds.), *Between Magic and Religion: Interdisciplinary Studies in Ancient Mediterranean Religion and Society*, (Lanham: Rowman and Littlefield, 2001), pp. 3-11; Petra Janouchová, "The Cult of Bendis in Athens and Thrace", *Graeco-Latina Brunensia*, 18(1), 2013, pp. 95-106.

[34] In *Phaedo* 107e4-108a6 we read: "And the journey is not as Telephus says in the play of Aeschylus; for he says a simple path leads to the lower world, but I think the path is neither simple nor single, for if it were, there would be no need of guides, since no one could miss the way to any place if there were only one road. But really there seem to be many forks of the road and many windings; this I infer from the rites and ceremonies practiced here on earth" (Fowler trans.).

for the latter and, incidentally, to really do justice to both, for what happens in Book I, one ought to rewrite, line by line, a whole alternative *Politeia*.[35]

In these final remarks, I would rather focus on what the character Thrasymachus symbolises in Plato's libidinal organisations of philosophical (relations of) power. It is no secret that several aspects, notions and arguments put forward by the Chalcedonian in Book I are largely incorporated, strategically employed and extensively implemented by Plato in several places of the *Republic* or other dialogues to secure the production and reproduction of the first class.[36] This can be verified every time power needs to construct and secure the ethical, social, political and economic structures of the *Republic*. Thrasymachus, as powerful *pharmakon* for the erection and reproduction of the *kallipolis,* marks the return of repressed phantasms in Plato's text. First, Thrasymachus' sophistical *jouissance* needs to be curbed, delegitimised and subjugated; only then can it be incorporated into Plato's own divided[37] philosophical *jouissance* and, subsequently, invested where it is more

[35] It would be interesting to imagine an untamed Thrasymachus arguing with Socrates in each Book of the *Republic.* Although Cary J. Nederman, "Thrasymachus and Athenian Politics: Ideology and Political Thought in the Late Fifth Century B.C.", *Historical Reflections*, 8(2), 1981, pp. 143-167, discusses the impact of Athenian historico-political climate on Plato's characterisation of the Chalcedonian, something that must be praised as almost exceptional in the Thrasymachus literature, his attempt to merge the historical Thrasymachus with the Platonic character into one single coherent author is far-fetched as the only short fragment we have from the historical Chalcedonian, the *patrios politeia* fragment, is from a speech he wrote as logographer and it does not fit easily with his major thesis on justice from *Republic* Book I. I find Mario Untersteiner, *The Sophists*, trans. K. Freeman, (Oxford: Basil Blackwell, 1954), portraying a more effective yet general account of both the historical Chalcedonian and Platonic character, especially when he writes: "Thrasymachus interprets a fact by stating it. He does not put forward any rule to be followed, but merely suggests conceptual explanations …. Whoever reads his speech attentively will see how bitterly he speaks …. We can understand, therefore, how his inner love of justice, in spite of the realistic and tragic picture of it which he had to give …. But alas, the struggle against the tyranny of a concept too vast, which is, or may easily become, that of *nomos*, must have led him to abandon the idea of either panhellenism or cosmopolitanism. His realism prevents him from rising to the great ideal of Antiphon and Hippias, but in compensation his grief, deep, hidden and reserved, makes him a man quick to feel sufferings and to represent them in such a way that others are moved by them. His rhetorical teaching takes on a deeper vibration because inspired by philosophical thought" (327-328).

[36] Nicholson, "Unravelling Thrasymachus' Arguments in *The Republic*", discusses the underlying politics of ideals between Plato and Thrasymachus, understood as his "mirror image", in the ideological struggle of Book I and subsequent Books: "*The Republic* deals with the doctrine that justice is the advantage of another, including the idea that justice for subjects is the advantage of the ruler, and not the latter solely or even mainly …. When Socrates sets out to reply to their demands in the remainder of *The Republic*, he is also making his reply to Thrasymachus, and making it by a method that Thrasymachus cannot ignore, that of μαχρολογία. Plato, unlike Socrates, seems to agree with Thrasymachus over method. He knows that he cannot 'prove' Thrasymachus wrong … and that to rebut his characterisation of justice he must resort to Thrasymachus' methods and produce a rival and more appealing characterisation. In their debate, Socrates and Thrasymachus in effect swap definitions of the key terms (art, ruling, wise, strong, happy, advantage, etc). Neither can be confuted provided that his own set of definitions is adhered to …. The importance of the debate with Thrasymachus is that it sets many themes for the book as a whole …. Thrasymachus, in fact, has set up an ideal which is the *mirror image* of Plato's (a procedure pursued in the *Gorgias* through the opposition between Socrates and Callicles). That is to say, their ideals are often the same yet turned back to front at the vital point …. Overall, Thrasymachus' tyrant is the mirror image of Socrates' Philosopher Ruler … there is nothing elsewhere in *The Republic* which leads us to abandon the line of interpretation of Thrasymachus' arguments …. Neither, I would argue, does *The Laws* 714b-d" (230-232).

[37] George Klosko, "*Thrasymachos Eristikos*: The *Agon Logon* in *Republic* I", *Polity*, 17(1), 1984, pp. 5-29:

needed, that is, the dialogical production and material securisation of both the Law and the Name-of-the-Father. Political and ideological struggles must be reduced to professional ethical training, while at the same time they covertly form the unquestionable kernel of Plato's partisan master signifier *to agathon*—as the long and unstoppable Socrates' monologue of Books II to X bears witness to.

One of the challenges we are currently facing within South African academic philosophy is the permanence of white supremacy in discourses of decolonisation and transformation. There is an ideological (pre)disposition among white philosophy scholars to promote repressive and conservative forms of decolonisation and transformation, while claiming to be engaging in progressive and transformative work within our discipline. Reading Plato's master discourse on relations of power and ideological struggle against itself, with an aim to understand how it tactically and strategically constructs its own tools against his enemies in Book I—(foreign) tradesmen, soldiers and intellectuals—could not only highlight the ways in which the white philosophy discourse extracts knowledge from the slave-student,[38] it could also show how a regressive philosophical division of labour still grounds itself on a conservative division of philosophical labour in the South African academia.

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"As many authorities have argued, one major purpose of Book I is to raise themes dealt with later in the work. If this is true, Plato does not *have* to depict Thrasymachos as a powerful philosophical thinker, with a startlingly original, fully worked out doctrine of justice. What is best in Thrasymachos' jumbled view can be left for Glaucon to resuscitate for purposes of discussion in Book II. Similarly, though the arguments with which Socrates batters Thrasymachos into silence are generally fallacious — and, as I have argued, intentionally so — they serve admirably to raise many subsequent themes of the work …. [Plato] uses Socrates' fallacious arguments in *Republic* I to unveil fundamental themes of the later Books — he uses Thrasymachos' series of arguments to present variations on a shocking, sophistical doctrine of justice" (28-29). Sparshott, "Socrates and Thrasymachus": "Plato is thus not so much acquiescing in bourgeois ideology as capturing its slogan and putting it to a fresh use. This he does with other slogans too, and his discourse incorporates an equivalent for all the catchwords that his fellow disputants have proposed. 'The interest of the stronger' becomes the interest of the ruling mind and (a fortiori) the whole against its parts; 'returning to each what he is owed', interpreted dynamically, becomes the social mobility, the apt allocation of roles, that makes 'minding one's own affairs' possible; 'helping friends and harming enemies' becomes suppressing the worse elements in oneself in favor of the better; 'not meddling' (*mê polupragmosunein*) becomes not dissipating one's energies on unsuitable tasks; 'another's good' becomes a good that is alien (*allotrion*) not because it is someone else's but because it is impersonal …. Finally, the slogan neatly inverts the way of life that Thrasymachus has recommended: instead of attending solely to one's own advantage, one attends solely to one's own potentialities." (456-458); F.E. Sparshott, "Plato and Thrasymachus", *The University of Toronto Quarterly*, 27, 1957, pp. 54-61, after poignantly analysing how six major theses put forward by Thrasymachus are in fact defended by Plato in his *Republic* and other dialogues, he concludes that "Plato in the *Republic* writes as a man whose mind and affections are deeply divided; and we are perhaps justified in saying that his own attitude to his character Thrasymachus is as ambiguous as that which he worked to produce in his readers" (61).

[38] See Jacques Lacan, *The Seminar of Jacques Lacan* Book XVII: *The Other Side of Psychoanalysis 1969-1970*, ed. J.-A. Miller, trans. R. Grigg, (New York/London: W.W. Norton and Company, 2007), chs. 1, 2, 6 and 12.

# The Gates of Tripoli: Power and propaganda in post-revolutionary Libya

Nathaniel Greenberg

**Introduction**

Standing before a map of the country pinned to a blank wall and framed on one side by the Libyan flag, Khalifa Hifter, Field Marshall of Libya's transitional government, announced to the world an "official end" to the UN-sponsored National Conference and the commencement of a new military operation to "cleanse" the country of "terrorists, gangs and outlaws".[1] Presenting himself in full military adornment, his torso positioned roughly before the Gulf of Sirte, the lifeline to Libya's oil production, Hifter asserted that "Operation Dignity" (*Ma'rakat al-karama*) did not constitute a military coup (*inqilab 'askari*) but rather was the full-expression of his "popular mandate" (*tawfid sha'bi*).[2] It was February 2014: three years since the beginning of unrest in Libya, a country that would undergo one of the bloodiest experiences of the greater region-wide phenomenon known typically as the Arab Spring. The NATO-led intervention that helped prevent an imminent assault by al-Qadhafi's forces on opposition groups to the east of Tripoli set in motion a violent civil war in which the murder of the country's long-time leader, Mu'ammar al-Qadhafi, was but one chapter in the ongoing saga. Hifter, who had returned to Libya following thirty years of exile in the United States, had originally been appointed *al-Liwa'*, or Major General, of the transitional authority in Tripoli, but he soon broke from the Islamist-led government to recruit his own army in the east of the country. The press conference on 14 February was the first public declaration of his official split from Libya's UN-backed government.

**The Television Coup**

Many observers remained unconvinced by Hifter's rhetorical dance, seeing the launch of "Operation Dignity" (*Ma'rakat al-karama*) as the beginning of precisely what the Liwa' had said it was not.[3] Reporting from Tripoli for *Al-Jazeera*, Khaled al-Mahir published a story with the headline "Hifter's Coup: Real or Media Spectacle?" in which he quotes the head of security for The Government of National in Tripoli as suggesting the timing of Hifter's announcement—on the eve of the third anniversary of the 2011 uprising and at the same time as demonstrations scheduled to follow Friday prayers—echoed the Egyptian scenario which also began by way of a

[1] See Libya Hurra, "Taharuk al-Jaysh al-Libi youm 14 Febrayir Khalifah Hiftar", YouTube, 14 February 2014. Retrieved from: https://www.youtube.com/watch?v=R5uXd3oGDTw [Accessed 15 October 2019].

[2] *Ibid*.

[3] Al-'Arab, "'Al-Liwa' Khalifah Hiftar ya'tabur al-Ikhwan sabab idtarab al-mantaqah al-'Arabiyya." *Al-'Arab*. 25 May 2014. Retrieved from: https://alarab.co.uk/اللواء-حفتر-يعتبر-الإخوان-سبب-اضطراب-المنطقة-العربية [Accessed 15 October 2019].

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"television coup".[4] Indeed Hifter's claim to a "popular mandate" closely resembled the rhetorical strategy of Egypt's Abd al-Fattah al-Sisi who held the ousting of Mohamed Morsi from office on 1 July 2013 was not a military coup per se but rather an expression of "the people's will" (*iradat al-sh'ab*).[5] Hifter's Operation Dignity had no comparable origin to that of the populist Tamarrod campaign that preceded the Egyptian coup but his direct allusion to al-Sisi's rhetoric signalled a clear affinity with the Egyptian strongman as well as the emergence of a powerful new alliance on Libya's post-revolutionary landscape.

Figure 1: Khalifa Hifter, *YouTube*, 14 February 2014

**Qadhafi's Foil**

The story of Khalifa Hifter (also spelled 'Haftar') in many ways typifies the struggle for power in the post-revolutionary Arab world. [6] A former officer in al-Qadhafi's regime, he was trained in Russia and ultimately captured in Chad in the late 1980s where he joined alliances with the National Front for the Salvation of Libya (*al-Jubha al-Watani l-Inqadh al-Libiyya*, NFSL), a group started by the Libyan dissident Muhammad Yusuf al-Muqaryaf and backed by the United States via the CIA.[7] Hifter

[4] Khaled al-Mahir, "Inqilab Haftar: Haqiqa am isti'rad i'lami?", *Al-Jazeera*, 14 February 2014. Retrieved from: https://www.aljazeera.net/news/reportsandinterviews/2014/2/14 [Accessed 16 October 2019].

[5] Egyptian President Abd al-Fattah reacted to Hifter's 14 February announcement, describing it as an expression of the "people's will," a refrain commonly used to describe the 2013 Egyptian coup to unseat the elected government of Mohamed Morsi. See "Hifter yaqabal al-tafwid ...", *CNN*, 25 May 2014. Retrieved from: https://arabic.cnn.com/middleeast/2014/05/25/libya-haftar-newupdates [Accessed 16 October 2019].

[6] Abigail Hauslohner and Sharif Abdel Kouddous of *The Washington Post* discovered that Hifter had voted while in Virginia. He spelled his name: "Hifter". See Hauslohner and Abdel Kouddous, "Khalifa Hifter, the ex-general leading a revolt in Libya, spent years in exile in Northern Virginia", *The Washington Post*, 20 May 2014. Retrieved from: https://www.washingtonpost.com/world/africa/rival-militias-prepare-for-showdown-in-tripoli-after-takeover-of-parliament/2014/05/19/cb36acc2-df6f-11e3-810f-764fe508b82d_story.html?utm_term=.2bcabd4bcc97 [Accessed 16 October 2019].

[7] Joseph T. Stanick, *El Dorado Canyon: Reagan's Undeclared War with Qaddafi*, (Annapolis: US Naval Institute Press, 2002), p. 85.

had drifted deep into the pages of Libya's troubled history when protests began against the country's long-time dictator in February 2011.[8] Retired, in essence, living in exile with a wife and children in the leafy Northern Virginia suburb of Vienna, his return to the country that March mirrored the trend of exiled septuagenarians from across the Arab world whose arrival heralded jubilation at times but also much anxiety.[9] He ascended quickly within the transitional authority, becoming ultimately Commander of Ground Forces—or Field Marshall—of the Transitional Council, but his whereabouts for the past three decades as well as his ideological posture fuelled intense debate. By the spring of 2014 following the launch of Operation Dignity, Russian, Egyptian, Saudi, Emirati and French media were routinely touting Hifter's victories in the fight against terrorism as an indication of his willingness to stem lawlessness and to restore order. Qatari, Italian, British and American media, in contrast, frequently described him as a "renegade" and a "warlord" who aspired to become "Libya's next dictator".[10] Writing for the Egyptian paper *Al-Shorouk*, Ismael al-Ashul noted that Hifter, once an officer in al-Qadhafi's regime, had participated with Egyptian forces in the crossing of the Suez in 1973.[11] The Qatari-based *Al-Jazeera* concluded its 14 February report with reference to Hifter's relationship with the NFSL, describing Hifter (without evidence) as a "founder" of the organisation's "military wing" (*al-jinah al-'askari*).[12]

For some observers, Hifter's 14 February announcement eerily resembled the opening communiqué of Mu'ammar al-Qadhafi's 1969 coup. Similar to Hifter's media stunt, the identity and ideology behind al-Qadhafi's group, which broadcast its first communiqué via radio on the morning of 1 September 1969 became a subject of intense scrutiny among Arab journalists.[13] Mohamed Hassanein Heikal, the journalist and close confidant of Egypt's Gamal Abdel Nasser, recounted how Egyptian officials listened to the initial broadcasts via *Al-Ahram*'s radio monitor in Tripoli searching for any clue of the officers' identity. The Egyptians, Heikal wrote, were ultimately able to determine the group's political identity by way of the slogan they repeated—*hurriyya*, *ishtirakiyya*, *wahda* ("freedom, socialism, unity")— which was thought to distinguish them from their Baathists in Iraq and Syria whose axiom followed in reverse order: *wahda, ishtirakiyya, hurriyya* ("unity, socialism, freedom"). The Libyan version, Heikal

[8] Hauslohner and Abdel Kouddous, "Khalifa Hifter, the ex-general leading a revolt in Libya, spent years in exile in Northern Virginia".

[9] As Yassine Ayari, a well-known figure in the Tunisian blogger movement, wrote: attempts by the older generation to regain power evinced a point of hypocrisy. "*Mon malaise vient de ceux qui font la politique*," he exclaimed. "When you critique them and when they arrest you. No! Not Marzouki", he wrote of the Tunisia's interim President Moncef Marzouki. "He is a militant of human rights. But if you pursue politics like him watch out!" See Yassine Ayari, "Caid Essebsi, Marzouki, Rached Ghannouchi, Nejib Chebbi et la malaise de Yassine Ayari", *Malhit*, 28 April 2011. Retrieved from: http://mel7it3.blogspot.com/2011/04/caid-essebsi-marzouki-rached-ghannouchi.html [Accessed 23 July 2017].

[10] Editorial Board, "Saudi Arabia's reckless prince fuels yet another civil war", *The Washington Post*, 16 April 2019. Retrieved from: https://www.washingtonpost.com/opinions/global-opinions/there-was-going-to-be-a-peace-conference-in-libya-then-other-countries-sabotaged-it/2019/04/15/7f27545e-5fa7-11e9-9412-daf3d2e67c6d_story.html?utm_term=.e557ac128171 [Accessed 16 October 2019].

[11] Ismael al-'Ashoul, "Man huwwa Khalifa Hifter?", *Al-Shorouk*, 15 February 2014. https://www.shorouknews.com/news/view.aspx?cdate=15022014&id=77be87b9-2f7f-4c63-800e-dcdfe7e4dc96 [Accessed 16 October 2019].

[12] Al-Mahir, "Inqilab Haftar: Haqiqa am isti'rad i'lami?".

[13] Eugene Rogan, *The Arabs: A History*, (London: Allen Lane, 2009), p. 359.

writes, signalled direct alignment with Nasser who held the order of the slogan to be specific because Nasser's point of view was that "you cannot have unity unless you are free, so that freedom must come first."[14]

Distinct from Hifter's communicative identity, al-Qadhafi's self-narrative was "replete with historical allusions" as Eugene Rogan observed.[15] He portrayed himself as the heir of the anti-colonial champion Omar al-Mukhtar and had thousands of Italians expelled from Libya. American and British military bases (permitted under agreements with King Idris) were closed and abandoned. Even wearing Western-style neckties (as Nasser often did) was condemned and equated with wearing the Christian (Crusader) cross.[16] Al-Qadhafi's infamous *The Green Book* (*al-Kitab al-akhdar*), which appeared first in the recently established newspaper *al-Fajr al-jadid* (1972),[17] spelled out al-Qadhafi's pseudo-utopian vision of the world. Claiming that the true Islam of the Prophet had been corrupted by historical errors and accretions, he rejected all existing notions of legitimacy and loyalty in the Islamic and Arab worlds. This included amending the Islamic calendar to begin at the time of the Prophet's death in 632 (opposed to the traditional date of the *hijra* in 622);[18] rejecting the Hadith as corrupt texts;[19] and stripping the *ulama*, once supporters of the coup against the Sanussi establishment, of all privileged posts and income.[20] Al-Qadhafi claimed his "Third International Theory" would create a stateless society "based on religion and nationalism - any religion, any nationalism."[21] He pledged funds and arms in support of revolutionary groups around the world (including the Irish Republican Army and the African National Congress) and printed new currency adorned with his likeness and the name of his new state. He adopted as the symbol of the nation a plain green flag to complement the new constitution based on his book. And on 2 March 1977, he announced the creation of a new political entity based on the teachings of *The Green Book*: "The People's General Conference", which aimed to assemble people annually based on profession and as nominated by local committees from across the country.[22] Al-Qadhafi also officially adopted at this time the title "Leader of the Revolution" (*al-Qa'id al-Thawra*) which he would retain until his death in 2011.

In sharp contrast, Hifter appears motivated by little if any ideological conviction beyond the tactical aims of his 14 February declaration. Feras Kilani, a reporter for BBC Arabic who has covered the conflict in Libya extensively pressed the *Liwa'* on this point during an extensive interview in January 2015. His "mandate", Hifter said, was "to evacuate Benghazi of terrorist groups" including Ansar al-

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[14] Muhammad H Haykal, *The Road to Ramadan,* (New York: Quadrangle/New York Times Book Co, 1975), p. 69.
[15] Rogan, *The Arabs,* p. 359.
[16] Francois Burgat and William Dowell, *The Islamic Movement in North Africa*, (Austin: University of Texas Press, 1993), p. 153.
[17] Hervé Bleuchot, *Chroniques et documents libyens (1969-1980),* (Paris: Editions du Centre National de la Recherche Scientifique, 1983), p. 82.
[18] *Ibid.* 71.
[19] See Burgat and Dowell, *The Islamic Movement in North Africa*, p. 155.
[20] Lisa Anderson, "Religion and State in Libya: The Politics of Identity", *The Annals of the American Academy of Political and Social Science*, 483, 1986, p. 70.
[21] *Ibid.*
[22] Sami G. Hajjar, "The Jamahiriya Experiment in Libya: Qadhafi and Rousseau", *The Journal of Modern African Studies*, 18(2), 1980, p. 181.

Shari'ah in Libya (ASL)[23] and the Islamic State. "When the operation in Benghazi began", he noted, "there were 7,000 ASL supporters. ISIS was second." Misrata, he claimed, was the point of origin for most of the jihadist fighters "including those with funding from Turkey and Qatar." Hifter also told Ferani that Benghazi was threatened by groups from the South: "Mali, Niger and the Sahara". And that the need to "close the southern gate", as he explained, left open the possibility of further expansion.[24]

Mobilisation of the LNA beyond Benghazi began in the fall of 2018, when Hifter's forces besieged the city of Derna which had effectively been under the control of ISIS since 2014. From there they moved to the South and the region of Fezzan, where the Islamic State also laid claim to territory. As the Libyan observer and retired Royal Airman John Oakes observed in his blog, "Berenice Stories", Hifter's position in the South allowed his forces to move towards Tripoli by way of "the old trade route from Sebha in the Fezzan to Gharian in the Jebel Nefusa", thereby bypassing Misrata forces along the coastal route.[25] The Fezzan expedition, while undoubtedly aimed at securing points of entry, also allowed Hifter to amass forces within striking distance of the capital without alerting Tripoli or the international community to the pending assault.

Discourse surrounding Hifter's Operation Dignity regularly devolved into tactical blow-by-blows or cursory descriptions of his enemies and friends. Witness France's Foreign Minister, Jean-Yves Le Drian from a 2019 interview with *Le Figaro*:

> "Since May 2014, LNA, led by Field Marshal Khalifa Haftar, conducted one military operation after another and successfully hunted ISIS and other terrorist groups from one city to the next. LNA first defeated the so-called Shura Council of Benghazi Revolutionaries, a militia alliance which included the group responsible for the attack that killed the U.S. ambassador, after two-month long battle in Benghazi. In October 2014, the terrorist group ISIS took control of numerous government buildings, security vehicles and local landmarks in Derna. LNA launched a military operation in 2015 which successfully liberated the city from ISIS, Al-Qaeda and other extremist groups."
>
> "LNA forces and local police began to impose security in previously lawless cities one by one until finally dominating all of Cyrenaica and securing the country's vital oil resources. Earlier this year, LNA mobilized its forces towards the southern region of Fezzan in response to calls made by residents who suffered from the criminal acts of local militias and Chadian armed rebel groups. The residents of Fezzan quickly embraced LNA, which enabled its forces to take control of the region in less than three months."
>
> "LNA continues its territorial expansion with its recent operation to liberate Tripoli. In addition to France, other international powers such as the United States, Russia and China have signaled their support for LNA's operation."[26]

Such public discourse was in essence obsequious, in part because most knowledge of Hifter's movement has been shaped by his own rhetorical posture. In al-Liwa's words: his ideology is his mandate. And his mandate is to eliminate terrorism. Al-Liwa' represents the absence of ideology. He is the concept of "counter" incarnate, or more

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[23] A.S.L. emerged following an internal dispute among members of the Rafallah al-Sahati Brigade—a military organisation formed to battle al-Qadhafi's forces in Benghazi. Hifter's announcement of Operation Dignity singled out Muhammad.

[24] B.B.C., "Khalifa Hifter: Qatar ikhtarat tarikhan akhar", *B.B.C.*, 29 January 2015. Retrieved from: https://www.youtube.com/watch?v=HX4ezWVeks4 [Accessed 16 October 2019].

[25] John Oakes, "Berenice Stories", April 2019. Retrieved from: https://libyastories.com/2019/04/ [Accessed 16 October 2019].

[26] Quoted in *ibid*.

precisely, Countering Violent Extremism, as the policy of fighting terrorism became known in Washington. In the current conflict it appears ironic on the surface that the Arab press routinely describe his tactics as violent and extreme, not because that is untrue or because it frames him in the same light he seeks to diminish, but because his actions are not simply tactical. For want of any information suggesting otherwise his violent posture is strategic. It is his mandate and his philosophical *raison d'être*.

**The Pragmatics of Power**

The public face of Hifter's ideology, for lack of a better term, has been fashioned to appear pragmatic insofar as his "mandate" to stabilise the country is predicated on the existence of a country in "chaos". Unverified references within Arab media to a book he was believed to have published while in the United States titled *Ru'iya siyasiyya l-misar al-taghrir bi-il-quwa* (A Political Vision for the Path of Change by Force), along with speculation about his connection to the CIA or other vested parties had the potential of inverting his pragmatic façade. But for the most part even his detractors have tended to reinforce the Liwa's self-styled identity by criticising his campaign within the parameters of its own design. "The rebel who opposes state institutions and who said he arrived in a country overrun with chaos, murder, torture and displacement has been unable to take any steps to end the daily suffering of average citizens", exclaimed the Attorney General of the GNA, Abdul Hakim Belhadj.[27] Belhadj's comments in-and-of themselves represented a remarkable twist of fate. A reformed leader of the once al-Qaeda aligned Libyan Fighting Group (*al-Jama'a al-Libiyya al-muqatala*), the fact that Belhadj was now in a position to rail against the audaciousness of a "rebel warlord" from the provinces illustrated how deep the transformation of power in Tripoli had been. But such comments also reinforced the remarkable dexterity of Hifter's communicative front. His competency was perceived in relation to the belligerence of the enemy; his leadership in contrast to the multiplicity of antagonistic forces poised against him.

In certain respects Hifter's rise echoed what Tunisian commentator Youssef Seddik described as the "magical introduction of the word 'technocrat'" onto the post-Arab Spring landscape.[28] The "technocrats" he observed of several political appointments made by an ostensibly conciliatory Islamist government in Tunisia were to be the catalyst for an "artificial catharsis".

> "By its evocation of 'technique', the word 'technocrat' had the philological merit of announcing to the ear and understanding of your average Joe (*M. Tout-le-monde*) an idea and a word so familiar that it seemed almost to be a part of our own dialect, or even classical Arabic when one thinks of the word '*teqnī*' surreptitiously tucked into the lexicon of certain tracts of literature. It was in this way that M. Ghannouchi was able to demonstrate his flair for populism …. As he said on the radio one day, during a particularly inspired moment, he would resolve the false dilemma of politics and party by assembling an apolitical party. A party of technocrats!"[29]

[27] Al-Marsad, "Belhaj: Ahrar Febrayir lan yaqabalu 'askara al-dawla illeti yas'a laha al-mutamarad Hifter", *AL-Marsad*, 3 March 2019. Retrieved from: https://www.libyaakhbar.com/libya-news/883665.html [Accessed 16 October 2019].
[28] Youssef Seddik, "M. Ghanouchi, des chevaux et des hommes!", *Le Temps*, 27 February 2013. Retrieved from: http://www.letemps.com.tn/article-74148.html [Accessed 23 July 2017].
[29] *Ibid*.

The illusion of the apolitical, pragmatic leader gained currency as being distinct from the nationalists and the Islamists in particular who had dominated the voting booth. "'They are politicians, yes, but they are professionals as well. They're technocrats,'" Seddik wrote sardonically. The problem is that "*techne* is just the first part of the word 'technocrat'. The second part means 'power'. And not just any doctor becomes a political boss unless he is named Hippocrates. Because this famous doctor does always hold power, albeit strictly over horses."[30]

The technocratic, or pragmatic visage of Hifter's post-revolutionary narrative of securitisation belied the underbelly of his campaign. Technocracy is still a kind of power but it is one that defines itself by a tactical relationship with that which it suppresses. The communications apparatus surrounding his movement maximised this dynamic: "No to the Brotherhood, no to *Dua'ish*, yes to the Libyan Army and its leader Marshall Khalifa Hifter may God protect him" read the byline to LNA's minuscule 'About' page on their Facebook site.


Figure 2: LNA Facebook Page

Sympathisers within the greater communications sphere of the pro-Hifter camp regularly contributed to this narrative identity. The dynamic became particularly stark amid the outset of the Tripoli expedition.

In early May 2019, *Al-Arabiya*, the principal organ for the Kingdom of Saudi Arabia (KSA) ran a report about recent video footage purporting to show an Iranian weapons shipment arriving at the port of Misrata.[31] This was followed by a report on 21 May that "Turkish ships … carrying large numbers of terrorists, including among them supporters (*ansar*) of *Da'ish*" were disembarking at the port of Tripoli.[32] And on

[30] *Ibid.*
[31] Al-Arabiya, "Shahid al-Aslaha iliti wasalat Misrata 'ala matan safiyna Iraniyya", *Al-Arabiya*, 2 May 2019. Retrieved from: https://tinyurl.com/y2zkjz62 [Accessed 16 October 2019].
[32] Al-Arabiya. "Shubuhat tulahiqu bi akhirat Turkiyya b-il-Libiya", *Al-Arabiya*, 21 May 2019. Retrieved from: https://tinyurl.com/y44t6jym [Accessed 16 October 2019].

31 May, citing an article in *Jeune Afrique*, *Al-Arabiya* ran a headline story stipulating that the leader of ISIS—Abu Bakr al-Baghdadi—may have sought refuge in Libya.[33]

Figures 3, 4: "RT Arabic", *YouTube,* 30 April 2019

RT Arabic, meanwhile, another staunch supporter of Hifter's campaign, aired reports like the one on 30 April in which a London-based "expert" rehashes Hifter's law and order narrative within a split screen showing, firstly, scenes of an LNA military parade (also featured on the LNA's Facebook page) and then an apparent terrorist assault on an unnamed government compound. The former is orderly, decisive and carefully choreographed. The latter is chaotic. These kinds of communicative aesthetics smartly reinforced the pragmatic and technocratic dimensions of Hifter's movement,[34] but they were also in essence "permutative" (to quote Philippe-Joseph

[33] Al-Arabiyya, "Al-Baghdadi yastanafara Tunis. Taif Za'im Da 'ish fi Libiyya", *Al-Arabiya*, 31 May 2019. Retrieved from: https://www.alarabiya.net/ar/north-africa/2019/05/31/البغدادي-يستنفر-تونس-طيف--زعيم-داعش-في-ليبيا.html [Accessed 16 October 2019].

[34] R.T., "Al-Jaysh al-Libi al-Watani…", *R.T.*, 30 April 2019. Retrieved from: https://www.youtube.com/watch?v=-xT3swtX8DI [Accessed 16 October 2019].

Salazar), that is: automatically tied to, and ironically reliant upon, the very material they sought to supplant.[35]

The permutative or derivative quality of the LNA's aesthetic was even more apparent in the group's own propaganda, including the dramatic two-minute film released via social media on 5 April 2019. Tactfully released after the LNA's successful establishment of a forward operating base just south of Tripoli, the two-and-a-half-minute video "*Al-Fath al-Mubin*" was ostensibly created as the principal piece of propaganda surrounding the Liwa's imminent invasion of the capital. Named in homage to the campaign of 'Amr ibn al-'As, the seventh century general who led an effort to 'open' the Maghreb after the Muslim conquest of Egypt in 641 CE, the phrase '*Al-Fath al-Mubin*' carried broad cultural currency in part because of its association with a popular Egyptian *musalsala* or telenovela of the same name from the early 2000s. Invocation of the story of the *sahab* or companion of the Prophet, Ibn al-'As, also appeared calibrated to rally the significant faction of Salafist fighters enlisted in Hifter's campaign. The LNA's vying for the attention of this critical population may also have directed the ostensibly strategic use of the army's ISIS-style cinematography.

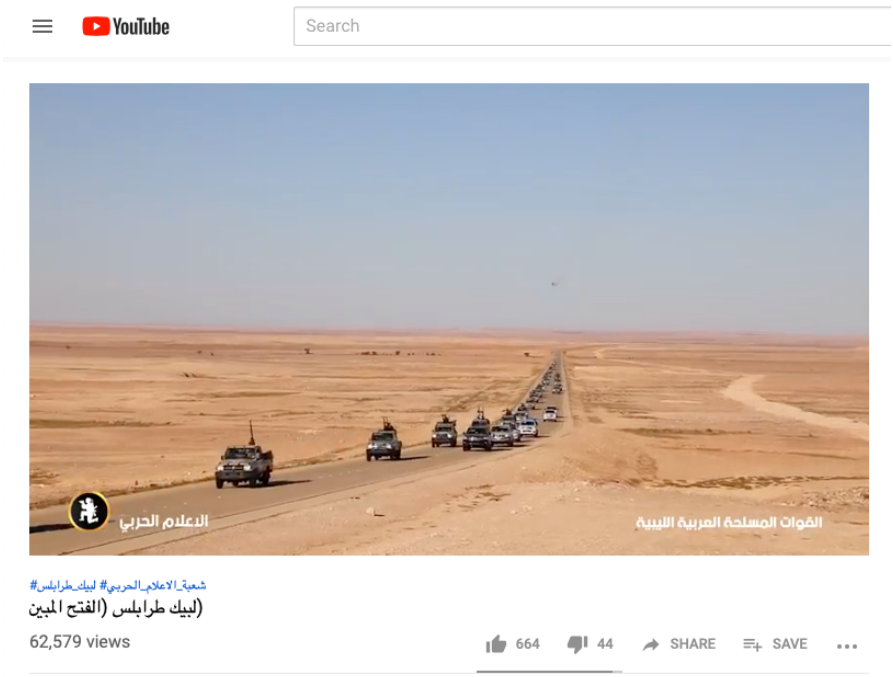


Figure 5: The War Information Division, "Al-Fath al-Mubin", *Facebook.com*, 2019

[35] Philippe-Joseph Salazar, *Words are Weapons: Inside ISIS's Rhetoric of Terror*, trans. D. Khazeni, (Yale: Yale University Press, 2017), p. 67.

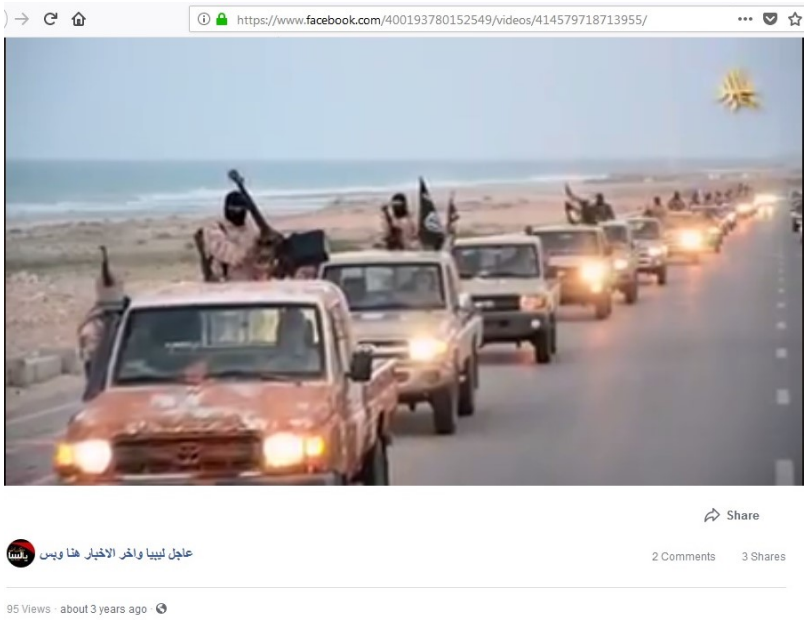


Figure 6: "Ghazwat Abu Ibrahim al-Masrati", *Al-Furqan Media Foundation / Wilayat Tarabalus*, *Facebook.com*, 2015

*Al-Fath al-mubin*, which features a massive convoy of heavily mounted pick-up trucks streaming down a highway, resembled scenes from ISIS videos like the 2015 release *Ghazwat Abu Ibrahim al-Masrati* which documented the invasion of Sirte by various ISIS aligned militias in the spring of 2015. The original scene, most likely produced by Al-Furqan Media Foundation (the principal filmmaking unit of the Islamic State) and disseminated under the *Wilayat Tarabalus* (State of Tripoli) banner, became an ubiquitous part of ISIS's Libyan messaging strategy, which, beginning with the horrific filming of twenty-one Egyptian men simultaneously executed on the shores of Sirte,[36] frequently invoked a sense of imminent arrival and holy war.

Employing a similar arsenal of aerial-drone footage, stop-motion photography and graphic design software,[37] the *Fath al-mubin* video was part of a broad effort on the part of the LNA and its "War Information Division" (*Sh'abat al-'ilam al-harbi*) to imitate and presumably counter the aesthetic appeal of ISIS communications. This included stylised battle scenes in the tradition of ISIS's *ghazwa* or military expedition genre, homages to fallen "martyrs", and video exposés of "treacherous" enemies. The LNA's War Information Division even employed mythico-aesthetic tropes similar to those invoked by ISIS and other Salafi-jihadist organisations such as the image of the lion and audio-cuts of drawn swords.

[36] *Risalat muq'a b-il-dima' ila ama al-salib* (A message signed with blood to the nation of the cross, 2016).
[37] Nabil Shufan, "Wizarat 'alam Da'ish", *Al-'Arabi al-jadid*, 29 March, 2015. Retrieved from https://tinyurl.com/yy5uksdk [Accessed 10 Oct 2019].

Figure 7: The War Information Division, #ارشيف الهلال النفطي [The Oil Crescent Archives], *Facebook.com*, 2018


Figure 8: War Information Division, "The Martyr Fadl al-Jasi", *Facebook.com*, 2018

Figure 9: War Information Division, "The Martyr Fadl al-Jasi", *Facebook.com*, 2018

Concurrent with the dissemination of the *al-Fath al-mubin* promotional video, various armed militias in and around Tripoli took to the Internet to declare their allegiance to

Hifter (Figure 10). While it was difficult to verify the timing and authenticity of such postings, the combined effect of the media assault was one of coordination and convergence—a veritable mirror of ISIS communications strategy from the sacking of Mosul to the siege of Derna.

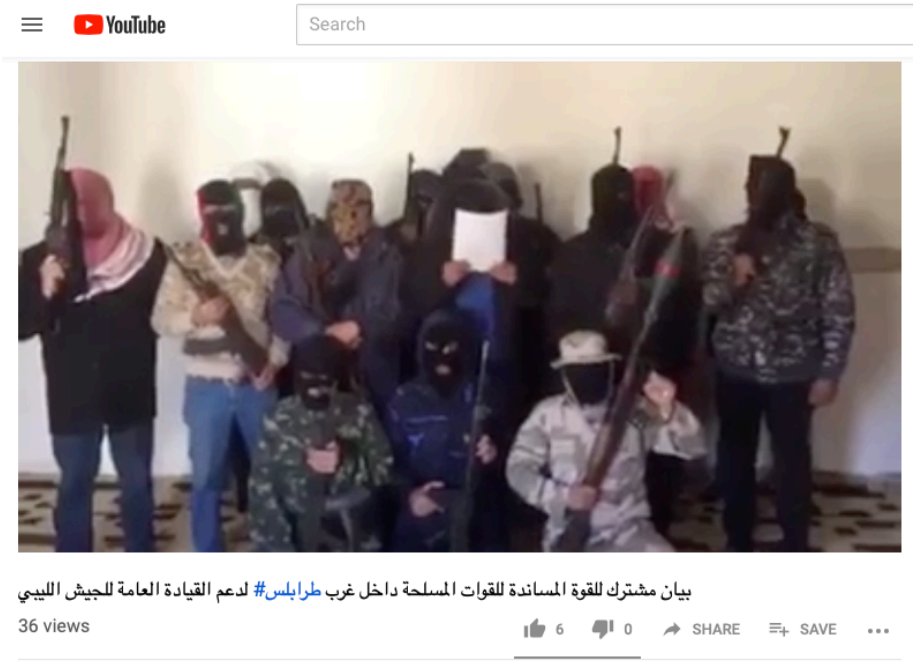


Figure 10: Pro-Hifter Militia, *YouTube.com*, 5 April 2019

But while the War Information Division of the LNA was able to mimic certain aesthetic tropes of ISIS communications, the narrative identity of the campaign diverged significantly from that of the jihadists.

Beginning with films like *Ghazwat Abu Ibrahim al-Masrati* (The Battle of Abu Ibrahim al-Masrati 2015) and continuing through Al-Furqan's most extensive Libyan production *Mawqaf al-mut* (The point of death, 2018), ISIS's messaging strategy in Libya has closely tracked the historical formula of al-Qaeda's narrative which posits the jihad as a struggle against Western imperialism, including oil exploitation, local corruption and fraternal deceit.


Figure 11: Donald J. Trump in the Wilayat Barqah production (Mawqaf al-Mut). The quote reads: "I do want to go into Libya but only if we can get the gas." Al-Furqan Media / Wilayat Barqah, "Mawqaf al-Mut", *Vimeo.com*, 2018

Figure 12: Al-Furqan Media / Wilayat Barqah, "Mawqaf al-Mut", *Vimeo.com*, 2018

Distinct from earlier al-Qaeda exemplars and in line with the aesthetics of ISIS propaganda writ large, al-Furqan's media units in Libya (Wilayat Tarabalus, Wilayat Barqah and Wilayat Fezzan) have inflected their propaganda with expressly localised rhetorical references as well as highly choreographed live-action sequences.[38] The group also employs various tropes from Islamic history in the form of Quranic inscriptions, *anashid* (chants) and other aesthetic devices, but these elements are secondary to its underlying narrative.

In this regard it could be said the LNA's counter-aesthetic runs just surface deep. The disparity becomes particularly pronounced surrounding the topic of oil. ISIS depicts Libyan oil-fields as a scene of imperial exploitation and has documented numerous attempts to sabotage the country's oil production. The LNA in contrast depicts oil-field battle scenes as a struggle for stabilisation, which becomes a key point of contention in the overall narrative identity of Operation Dignity and *al-Fath al-Mubin*. ISIS is not unaware of the rhetorical weight behind such securitisation narratives. And indeed some of its own propaganda—such as the 2016 video *al-Shurta al-Islamiyya bi-al-Medinat Sirt* (The Islamic Police of Sirte) which depicts ISIS fighters conducting traffic stops and holding police training exercises, could be considered derivative.

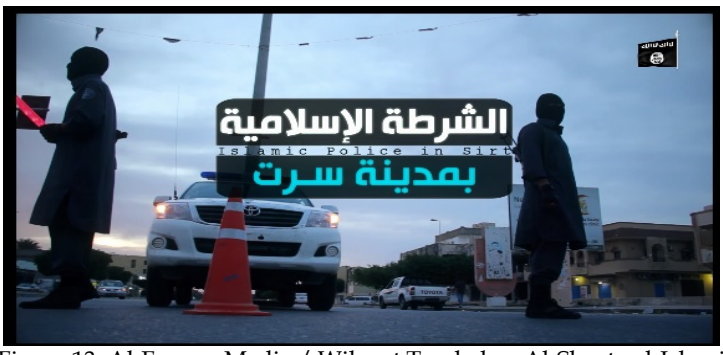


Figure 13: Al-Furqan Media / Wilayat Tarabalus, Al-Shurta al-Islamiyya bi-al-Medinat Sirt, *Archive.org*, 2016

Relentless discourse on the prospect of "chaos" (*fauda*), propagated chiefly by Hifter's camp and magnified through major media outlets like *RT* (Russian), *Al-Arabiya* (Saudi) and *Youm 7* (Egyptian), as well as local networks like *Libya al-Ahrar*,[39] created,

[38] For more on al-Furqan media and the genealogy of its aesthetic prerogatives during the reign of al-Baghdadi see Nathaniel Greenberg, "Islamic State War Documentaries", *The International Journal of Communication*, forthcoming.

[39] For more on the role of local media and its public perception, see Naji Abou-Khalil and Laurence Hargreaves, "Libyan Television and its Influence on the Security Sector", *Unites States Institute of Peace*,

ironically, an opening for hard-line militias including ISIS and Ansar al-Sharia in Libya to present their own counternarrative to the forces of destabilisation.

This dynamic was not new of course. As I have written elsewhere, the paradoxical populism of Ansar al-Sharia was predicated ultimately on the perception of disorder, despite the group's own role in propagating the dissolution of state-led authority by way of extra-official policing and illicit trade.[40] (The name Ansar al-Shari'iah means literally "Partisans of the Law"). Hifter's relative distance from the ideological debates engulfing post-revolutionary Tunisia, Egypt, Bahrain or Morocco (from constitutional reform, to *laïcité* or women's rights), did little to stem his inherent association with the perception of lawlessness or the more insidious label of "*al-taghut*" — the "false God of power".[41] So it is worth noting finally the most profound critique of Hifter has flowed not through the UN or oppositional news outlets like *Al-Jazeera* or *BBC*, but *al-Tinahsa*, the small but mighty Salafist news organisation built around the authority of Sheikh Saddik al-Ghariani, Libya's Grand Mufti and head of the Office of Fatwas (*Dar al-Ifta*). Al-Ghariani who at times has defended but also urged Ansar al-Sharia to recognise the Islamist-led government in Tripoli,[42] has been unequivocal in his condemnation of Hifter. As he proclaimed bluntly in his discourse from 10 April 2019: "Hifter with his Zionist project kills for the sake of the devil" ("*yuqatalu fi sabil al-Shaytan*").[43] His condemnation of the Liwa' stems not simply from the perception promulgated by *Al-Jazeera* and others that Hifter is doing the bidding of hostile outsiders, but that he is acting beyond the shores of the collective will. The "legal duty" (*al-wajab al-shari'i*) of every Libyan, he exclaimed in abstract terms, was to "speak with one voice".[44] The Liwa' represented a source of division. His campaign to secure the country was in fact pulling it apart.

However polished the Liwa's operational message appeared, the absence of any ideological response to the message of stabilisation as presented by the Islamists has continued to expose his strongman ethos to passionate resistance. Witnessed by the messaging strategies of Islamists and nationalists alike, however, the discourse of securitisation remains a dominant paradigm in Libya as it has across much of the post-Arab Spring world. Defining the antagonists in such a struggle and in turn defending the campaign of one hostile group over another remains up for grabs. The revolution, as it were, continues.

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2015. Retrieved from: https://www.usip.org/publications/2015/04/role-media-shaping-libyas-security-sector-narratives [Accessed 16 October 2019].

[40] See Nathaniel Greenberg, *How Information Warfare Shaped the Arab Spring*, (Edinburgh: Edinburgh University Press, 2019), p. 78.

[41] The leader of ASL Muhammad al-Zahawi regularly described Hifter with reference to the term 'taghut' which also became a kind of ideological loadstar among jihadist fighters of Algeria's long Civil War. See: https://tinyurl.com/y4s2fwx4 [Accessed 16 October 2019].

[42] Al-Quds al-'Arabi, "Mufti 'amm Libya yad'awa 'Ansar al-Sharia' l-i'lan b-rai'tahum min tahim takfir al-jaysh wa al-shurta", *Al-Quds al-'Arabi*, 8 June 2014. Retrieved from: https://tinyurl.com/y46k88bs [Accessed 16 October 2019].

[43] Al-Saddiq al-Ghariani, "Hifter kills in the name of Satan", *YouTube,* 10 April 2019. Retrieved from: https://www.youtube.com/watch?v=M3sbjOoMcds [Accessed 16 October 2019].

[44] Al-Saddiq al-Ghariani, "The words of Sheikh al-Saddiq al-Ghariani the General Mufti on the Events occurring in Libya", *YouTube,* 27 April 2019. Retrieved from: https://www.youtube.com/watch?v=M3sbjOoMcds [Accessed 16 October 2019].

# Law and rhetoric: An analysis of the rhetorical techniques employed by President Cyril Ramaphosa to restore the rule of law in South Africa

Sifiso Ngesi

**Introduction**

Cyril Ramaphosa is arguably one of the leaders who have played a pivotal role in the evolution of a democratic South Africa. Subsequent to his imprisonment by the apartheid regime, first in 1974 and again in 1976, Ramaphosa co-founded the National Union of Mineworkers (NUM) with James Motlatsi and Elijah Barayi in 1982.[1] He became NUM's first General Secretary and during his tenure he led the labour union during a 1987 miners' strike that was one the defining moments in the anti-apartheid struggle.[2] As NUM's General Secretary, Ramaphosa was instrumental in the establishment of the Congress of South African Trade Unions (COSATU), which remains the largest of South Africa's three main trade union federations, with 16 affiliates.[3]

He was later appointed chairperson of the Reception Committee that was entrusted with receiving the "Rivonia trialists" and, in January 1990, he accompanied the released African National Congress (ANC) political prisoners to Lusaka in Zambia.[4] He also served as chairperson of the National Reception Committee that coordinated arrangements for the release of Nelson Mandela. Following the unbanning of the ANC and other political parties by then President F.W. de Klerk on 2 February 1990, Ramaphosa was elected Secretary-General of the ANC at its first national conference in July 1991 in over 30 years. He became head of the ANC's negotiation team at the Convention for a Democratic South Africa (CODESA) and the ensuing multi-party talks.[5]

After South Africa's first democratic elections on 27 April 1994, he became a Member of Parliament (MP) and was elected as Chairperson of the Constitutional Assembly. By virtue of that position, he was responsible for the drafting of South Africa's internationally acclaimed Constitution. In 2009, this contribution earned him the bestowal of the National Order of Baobab in Silver.[6] Upon completion of the

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[1] Department of Planning, Monitoring and Evaluation, "President Cyril Ramaphosa: Profile", *Department of Planning, Monitoring and Evaluation*. Retrieved from: https://www.dpme.gov.za/about/Pages/President-Cyril-Ramaphosa.aspx [Accessed 11 April 2019].

[2] Thapelo Tselapedi, "Who is Cyril Ramaphosa? A Profile of the New Leader of South Africa's ANC", *Sowetan Live,* 22 December 2017. Retrieved from: https://www.sowetanlive.co.za/news/south-africa/2017-12-22-who-is-cyril-ramaphosa-a-profile-of-the-new-leader-of-south-africas-anc/ [Accessed 3 September 2019].

[3] Congress of South African Trade Union, "Cosatu Submission on: Public Investment Corporation, the PIC Amendment Bill and Related Matters, June 2019", *Department of Justice*. Retrieved from: http://www.justice.gov.za/commissions/pic/st/PIC-20190619-COSATU.pdf [Accessed 4 September 2019].

[4] Department of Planning, Monitoring and Evaluation, "President Cyril Ramaphosa: Profile".

[5] African National Congress, "Cyril Ramaphosa: Biography", *African National Congress*. Retrieved from: https://www.anc1912.org.za/cyril-ramaphosa [Accessed 4 September 2019].

[6] The Order of the Baobab is awarded to South African citizens for distinguished service in the fields of business and economy, science, medicine, technological innovation, as well as community service. The Presidency, "Order of the Baobab", *The Presidency*. Retrieved from: http://www.thepresidency.gov.za/national-orders/order-baobab-0 [Accessed 11 April 2019].

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Constitution-drafting process, Ramaphosa resigned from Parliament. At the time, speculation around his resignation was rife that he was disgruntled because he had been overlooked by then President Nelson Mandela, who made Thabo Mbeki rather than him the second most powerful person in the country.[7] After quitting active politics, Ramaphosa ventured into business, where he became one of South Africa's most successful and wealthiest business leaders.

In 2010, Ramaphosa was appointed Deputy Chairperson of the National Planning Commission (NPC), a body created to draft a long-term National Development Plan (NDP) for South Africa.[8] In December 2012, he was elected ANC Deputy President at the party's 53rd National Conference in Mangaung, in the Free State Province.[9] On 25 May 2014, he was appointed Deputy President of South Africa. In December 2017, Ramaphosa was elected the ANC's 13th President at its 54th National Conference in Nasrec, in Gauteng, narrowly beating his contender, Dr Nkosazana Dlamini-Zuma, by 2 440 votes to the latter's 2 261 votes.[10] On 15 February 2018, Ramaphosa was sworn in as President of South Africa, following the resignation or "recall" of erstwhile President Jacob Zuma.[11]

Ramaphosa ascended to the presidency at the time when the future of South Africa looked bleak. The majority of state institutions, apart from the judiciary, the Office of the Public Protector, and the Office of the Auditor-General, were on the verge of total collapse. Corruption and allegations thereof had become the norm rather than the exception. The South Africa that most South Africans, and the people of the world, had envisioned in 1994 when the country metamorphosed into a democracy, was slipping away. President Ramaphosa aptly captured the prevailing mood at the time, as he postulated in his first State of the Nation Address (SONA) that it was "the era of diminishing trust in public institutions and weakened confidence in leaders".[12] Despondent South Africans therefore saw Ramaphosa's election as a beacon of hope. Grabbing the *kairotic* moment, the newly minted president assured South Africans of the beginning of "a new dawn". He promised them "a period of change". He undertook to bring about "renewal and revitalisation".[13]

While Ramaphosa's undertakings might have been music to the ears of his interlocutors, he had to surmount a particular hurdle. As noted above, he won the ANC presidency by a narrow margin. This meant that he was hamstrung in making

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[7] Mark Gevisser, "South Africa's Cattle King President", *The New York Review of Books*, 22 December 2017. Retrieved from: https://www.nybooks.com/daily/2017/12/22/south-africas-cattle-king-president/ [Accessed 11 April 2019].

[8] Department of Planning, Monitoring and Evaluation, "Cyril Matamela Ramaphosa: The President", *Operation Phakisa*. Retrieved from: https://www.operationphakisa.gov.za/Pages/President.aspx [Accessed 4 September 2019].

[9] Deshnee Subramany, "Mangaung: The ANC's Newly Elected Top Six", *Mail & Guardian*, 18 December 2012. Retrieved from: https://mg.co.za/article/2012-12-18-mangaung-the-ancs-newly-elected-top-six [Accessed 4 September 2019].

[10] Azad Essa, "Cyril Ramaphosa Wins ANC Leadership Vote", *Al Jazeera News*, 18 December 2017. Retrieved from: https://www.aljazeera.com/news/2017/12/cyril-ramaphosa-wins-anc-leadership-vote-171218160626593.html [Accessed 29 April 2019].

[11] City Press, "Cyril Ramaphosa Officially Wworn in as President of SA", *City Press*, 15 February 2018. Retrieved from: https://city-press.news24.com/News/cyril-ramaphosa-officially-sworn-in-as-president-of-sa-20180215 [Accessed 4 September 2019].

[12] The Presidency, "President Cyril Ramaphosa: 2018 State of the Nation Address", *The Presidency*, 16 February 2018. Retrieved from: https://www.gov.za/speeches/president-cyril-ramaphosa-2018-state-nation-address-16-feb-2018-0000 [Accessed 3 May 2019].

[13] *Ibid.*

certain key policy decisions. He had no complete free rein. For example, the ANC's National Executive Committee (NEC), the organisation's highest organ and highest decision-making body between National Conferences, was/is dominated by the Dlamini-Zuma faction. Of the eighty members of the NEC, forty-seven were aligned to the Dlamini-Zuma faction.[14] This implied that these NEC members did not share Ramaphosa's vision. Indeed, they were aligned with the prevailing political order that President Ramaphosa sought to replace.

The same held true for the ANC's other important structure, popularly known as the "Top Six". The "Top Six" consists of the party's President, Deputy President, Secretary General, Deputy Secretary General, Treasurer and National Chairperson. Three of these were allies of Dlamini-Zuma, while two were close to Ramaphosa.[15] Serious allegations of corruption and related malfeasance had been levelled against the "Top Six" members belonging to the Dlamini-Zuma faction. There was therefore a strong public view, as well as an expectation, that if Ramaphosa's commitment to clean governance had any iota of credibility, he had to do something about the allegations levelled against these individuals.[16] This posed a dilemma for Ramaphosa. He had to tread carefully, because if he had bowed to public pressure and directly acted against these individuals, such an act could have been perceived as purging his foes at the Nasrec conference. Indeed, this could have had the potential of factionalising the ANC further.

In an endeavour to demonstrate to the people that he was not merely paying lip service to clean governance, on the one hand, and to preserve the unity of the ANC, on the other, Ramaphosa had recourse to the law. He set up three Judicial Commissions of Inquiry, as well an enquiry in terms of section 12(6) of the National Prosecuting Authority Act,[17] all related to the abuse and "capture" of state institutions in South Africa.[18] These commissions are known as the State Capture inquiry, the

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[14] Mike Cohen and Paul Vecchiatto, "Ramaphosa Fails to Secure Majority Control of NEC", *Times Live*, 21 December 2017. Retrieved from: https://www.timeslive.co.za/sunday-times/business/2017-12-21-ramaphosa-fails-to-secure-majority-control-of-nec/ [Accessed 3 May 2019].

[15] John Campbell, "The ANC's 'Top Six' in South Africa", *Council on Foreign Relations*, 19 December 2017. Retrieved from: https://www.cfr.org/blog/ancs-top-six-south-africa [Accessed 14 May 2019].

[16] The public view that Ramaphosa had to weed out of his party those elements who were perceived to be corrupt was epitomised by the leader of the African Christian Democratic Party (ACDP), Rev Kenneth Meshoe, who asserted in his *Reply* to Ramaphosa's 2018 State of the Nation Address that "The ACDP calls on President Ramaphosa to urgently root out corruption by starting with his cabinet. … We want to see captured ministers and deputy ministers who are entangled in a web of corruption investigated as soon as possible. Justice must be seen to be done, and done without fear or favour." See Kenneth Meshoe, "Ramaphosa Must Urgently Root Out Corruption Starting with his Cabinet", *African Christian Democratic Party*, 19 February 2018. Retrieved from: https://www.acdp.org.za/ramaphosa_must_urgently_root_out_corruption_starting_with_his_cabinet [Accessed 4 September 2019]. Also see Jason Burke, "Who is Cyril Ramaphosa? South Africa's New Leader Faces Huge Challenges", *The Guardian*, 15 February 2018. Retrieved from: https://www.theguardian.com/world/2018/feb/14/who-is-cyril-ramaphosa-south-africa-president [Accessed 10 November 2019]. Also see James Hamill, "Why the ANC itself is the Chief Impediment to Ramaphosa's Agenda", *Mail & Guardian*, 17 December 2018. Retrieved from: https://mg.co.za/article/2018-12-17-why-the-anc-itself-is-the-chief-impediment-to-ramaphosas-agenda [Accessed 4 September 2019].

[17] No. 32 of 1998.

[18] James de Villiers, "Everything You Need to Know about All the Commissions of Inquiry Currently in South Africa", *Business Insider South Africa*, 3 December 2018. Retrieved from: https://www.businessinsider.co.za/state-of-inquiry-of-commission-south-africa-2018-11-2 [Accessed 14 May 2019].

South African Revenue Services (SARS) Commission, the Public Investment Corporation (PIC) Commission, and the Mokgoro Enquiry. Both the setting up of commissions and the Mokgoro Enquiry, I submit, have been part and parcel of Ramaphosa's strategy to counter any argument or perception that casts doubt on his commitment to clean governance. Perhaps more importantly, given that Ramaphosa has limited or constrained political power to weed out corrupt elements within the ANC government, he had to devise a mechanism to attain this goal. The commissions and the Mokgoro Enquiry are therefore a well-calculated move on the part of Ramaphosa to get rid of the rotten apples, while trying not to be viewed to be settling political scores. The ultimate objective is to convey an unequivocal message that anarchy has no place in the Ramaphosa administration.

This paper analyses how President Ramaphosa employs rhetorical devices to restore the rule of law in South Africa and how he uses rhetorical techniques to mobilise South Africans to support him in this regard. Adherence to the rule of law is a *sine qua non* to ensure that Ramaphosa attains the objectives that he has set out to achieve. A country where the rule of law is upheld is conducive to economic and human development.[19] Conversely, impunity, whether real or perceived, is inimical to much-needed investment to address the country's socio-economic ills.[20]

**The Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector, including Organs of State**

The report of the former Public Protector, now Associate Professor Thuli Madonsela, titled *State of Capture,* delineates evidence of state capture having been conducted by external agents on state functionaries.[21] The report unearthed the presence of a strong, influential oligarchy that existed outside the formal structures of government, but parallel to primary functionaries in government. This illicit and clandestine relationship between public functionaries and oligarchical external agents appears to have been a drain on the state's monetary resources. Indeed, the Minister of Public Enterprises, Pravin Gordhan has painted a gloomy picture of the extent of state capture as he maintains that many state-owned enterprises "are in deep financial difficulties and will be unable to trade their way out of their difficulties".[22]

The covert relationship further led to the redirection of resources that could have been utilised for socio-economic development, from the poor and destitute to the pockets of the affluent.[23] This phenomenon has been fittingly characterised by Bhorat *et al* as the "repurposing of state institutions in accordance with a political project

[19] Alvaro Santos, "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development", in D. Trubek & A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, (New York: Cambridge University Press, 2006), pp. 253-300; Mogoeng Mogoeng, "The Rule of Law in South Africa: Measuring Judicial Performance and Meeting Standards", *Constitutionally Speaking*, 25 July 2013. Retrieved from: https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/ [Accessed 4 September 2019].

[20] Michael R. Anderson, "Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs", Paper for Discussion at WDR Meeting, 16-17 August 1999. Retrieved from: https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/ [Accessed 4 September 2019].

[21] Public Protector of South Africa, "State of Capture, Report No. 6 of 2016/17", *Saflii*. Retrieved from: http://saflii.org/images/329756472-State-of-Capture.pdf [Accessed 17 May 2019].

[22] Pravin Gordhan, *2019/20 Budget Vote: Public Enterprises* on 11 July 2019, Cape Town, Parliament of the Republic of South Africa.

[23] Peter Labuschagne, "Patronage, State Capture and Oligopolistic Monopoly in South Africa: The Slide from a Weak to a Dysfunctional State?", *Acta Academica*, 49(2), 2017, p. 52.

mounted by the Zuma-centred power elite".[24] In one of the findings of their study, researchers maintain:

> "These pre-meditated and co-ordinated activities are designed to enrich a core group of beneficiaries, to consolidate political power and to ensure the long-term survival of the rent-seeking system that has been built by this power elite over the past decade. To this end a symbiotic relationship between the constitutional state and the shadow state that has been built and consolidated."[25]

To address this unpalatable state of affairs, Madonsela's report recommended, inter alia, that the then President Zuma appoint a commission of inquiry into state capture in South Africa. In addition, the report stated that the presiding judge of the commission had to be appointed by the Chief Justice, Mogoeng Mogoeng. Then President Zuma challenged the report and approached the Pretoria High Court with a view to having it set aside.[26] The erstwhile President's point of contention was that it was his prerogative to appoint the person to head the commission and that the discharging of such power by the Chief Justice would contravene the doctrine of the separation of powers. However, Zuma's court application to have the Public Protector's recommended remedial action reviewed and set aside was dismissed with costs. The Court also refused Zuma leave to appeal.[27]

The judicial inquiry into state capture was instituted by the then President Zuma on 23 January 2018 and is headed by Deputy Chief Justice Zondo, who was appointed as per the former Public Protector's recommendation. Moreover, the commission derives its mandate from "the Constitution, relevant legislation, policies, and guidelines, as well as the order of the North Gauteng High Court of 14 December 2017".[28] The official proclamation of the commission enjoins it to inquire, investigate and make recommendations as regards all allegations of corruption and fraud in the public sector. The commission is also empowered to "where appropriate, refer any matter for prosecution, further investigation or the convening of a separate enquiry to the appropriate law enforcement agency, government department or regulator regarding the conduct of certain person/s".[29]

Since the commencement of its work on 20 August 2018, the State Capture inquiry has had more than 100 testimonies on the extent of the alleged corruption that

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[24] Haroon Bhorat, Mbongiseno Buthelezi, Ivor Chipkin, Sikhulekile Duma, Lumkile Mondi, Camaren Peter, Mzukisi Qobo, Mark Swilling and Hannah Friedenstein, "Betrayal of the Promise: How South Africa is being Stolen", *Public Affairs Research Institute*, May 2017. Retrieved from: https://pari.org.za/wp-content/uploads/2017/05/Betrayal-of-the-Promise-25052017.pdf [Accessed 10 June 2019].

[25] *Ibid.*

[26] *President of the Republic of South Africa v. Office of the Public Protector and Others* (91139/2016 [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 [GP]; 2018 (5) BCLR 609 (GP) (13 December 2017).

[27] News24, "'I was Trying to Protect State Capture Inquiry' – Zuma on Challenging Madonsela's Report", *News24*, 19 December 2018. Retrieved from: https://www.news24.com/SouthAfrica/News/i-was-trying-to-protect-state-capture-inquiry-zuma-on-challenging-madonselas-report-20181219 [Accessed 20 May 2019].

[28] J.G. Zuma, "Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State", *Government Gazette*, 25 January 2018. Retrieved from: http://www.justice.gov.za/legislation/notices/2018/20180125-gg41403_P3-StateCaptureCommissionTOR.pdf [Accessed 20 May 2019].

[29] *Ibid.*

was one of the hallmarks of Ramaphosa's predecessor's administration. On numerous occasions, President Ramaphosa has created the impression that he will use the implementation of the recommendations emanating from the State Capture inquiry as an archetype to demonstrate that lawlessness will cease to be the norm in South Africa. Referring to the commission in his 2018 SONA, he stated: "The Commission is critical to ensuring that the extent and nature of state capture is established, that confidence is restored and that those responsible for any wrongdoing are identified."[30]

In the same vein, following the resignation of the then Minister of Finance, Nhlanhla Nene – after testifying at the commission that he had been invited by the Gupta family to their Saxonwold home – Ramaphosa maintained that "[i]t is critical that the Commission has the means and opportunity to fulfil its mandate".[31] Having recourse to the argument of reciprocity, Ramaphosa intimated that all those who are implicated in state capture should be treated the same, irrespective of their social standing: "In this process, no person should be above scrutiny, and all relevant and credible accusations of wrongdoing should be thoroughly investigated." [32]

Ramaphosa reiterated these sentiments in a public engagement held in Sandton in April 2019. On this occasion, he contended:

> "In the course of this whole process there are certain things that are actionable. Those who have done things wrongly must be prosecuted. There must be jail time. Accountability is at a great premium, we must be accountable for what we've [sic] done. It must be without any fear, without any bias, without any prejudice."[33]

Ramaphosa's argument was predicated on the principle of equality before the law. Commenting on how a judge applies this principle in practice, Perelman asserts:

> "The impartial judge is just because he deals in the same way with all those to whom the same ruling applies, whatever the consequences may be. Thus he may be compared to a pair of scales or to a machine to which all passion is foreign. They can neither be intimidated, nor corrupted, nor moved to pity. *Dura lex, sed lex*. The rule is equality before the law, or to put it in another way, it is the interchangeability of justiciables."[34]

It was vitally important for Ramaphosa to assure his interlocutors that there would be adherence to the application of the principle of equality before the law, because there was, rightly or wrongly, a generally held view that there was one justice system for the political elite and another one for the populace. Ramaphosa further appealed to those who might have had information within the purview of the commission to come forward:

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[30] *Ibid.*

[31] Cyril Ramaphosa, "Ramaphosa's Statement on his Appointment of Tito Mboweni as Finance Minister", *Fin24,* 9 October 2018. Retrieved from: https://www.fin24.com/Economy/read-ramaphosas-statement-on-his-appointment-of-tito-mboweni-as-finance-minister-20181009 [Accessed 21 May 2019].

[32] *Ibid.*

[33] Amil Umraw, "'There Must be Jail Time', says Cyril Ramaphosa of Zondo Commission", *Times Live*, 4 April 2019. Retrieved from: https://www.timeslive.co.za/politics/2019-04-04-there-must-be-jail-time-says-ramaphosa-of-state-capture-commission/ [Accessed 23 May 2019].

[34] Chaïm Perelman, *Justice, Law and Argument: Essays on Moral and Legal Reasoning*, with an introduction by Harold L. Berman, (Dordrecht/Boston/London: D. Reidel Publishing Company, 1980), p. 37.

> "It is incumbent upon any person who may have knowledge of any of the matters within the Commission's mandate to provide that information to the Commission, to do so honestly and to do so fully. For the country to move forward, we need to establish the full extent of state capture, identify those responsible for doing it, and take decisive steps to prevent it happening again."[35]

The alleged corruption has not only been a matter of interest to South Africans. Even potential donors have been following how the state addresses the socio-economic malaise that arose from it, with a keen interest. It stands to reason that no investor is willing to pour its money into a country that is perceived to be corrupt.[36]

Ramaphosa aptly comprehends this sad reality and he has therefore considered it necessary to assure the international community or potential investors that his government is using the state capture inquiry to tackle corruption head-on. Indeed, in his engagement with the German President in November 2018, he metaphorically depicted the inquiry into state capture as "a cleansing process of all the bad things that have happened in our country".[37]

Similarly, speaking at the World Economic Forum in Davos, Switzerland, while on a foreign direct investment trip, Ramaphosa told his audience: "The positive thing is, while the truth comes out, it is adding to our resolve as a country and as government and as a people to fight corruption, to bring it on an end and to make sure that those who have been complicit in acts of corruption are brought to book."[38]

The impression that Ramaphosa is committed to restoring the rule of law, as well as eradicating corruption, might have been called into question by allegations that his son, Andile Ramaphosa, was implicated in questionable financial dealings with a controversial government service provider, Bosasa.[39] During the *Questions to the President Session* on 6 November 2018, the leader of the Democratic Alliance (DA), Mmusi Maimane, asked Ramaphosa to set the record straight on the alleged payment of R500 000 by Bosasa to his son, which Maimane alleged to have discovered in a sworn affidavit by the former Bosasa auditor, Peet Venter.[40] Responding to Maimane's question, Ramaphosa said: "My son has a financial consultancy business, and he consults for a number of companies. One of those companies is Bosasa. *I asked him at close range whether this money was obtained illegally or unlawfully.*"[41]

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[35] Ramaphosa, "Ramaphosa's Statement on his Appointment of Tito Mboweni as Finance Minister", 9 October 2018.

[36] Raluca Elena Iloie, "Connections between FDI, Corruption Index and Country Risk Assessment in Central and Eastern Europe", *Procedia Economics and Finance*, 32, 2015, p. 628. Retrieved from: https://core.ac.uk/download/pdf/82166526.pdf [Accessed 22 May 2019].

[37] Lindsay Dentlinger, "State Capture Inquiry Part of SA's Cleansing Process – Ramaphosa", *Eyewitness News*, 2018. Retrieved from: https://ewn.co.za/2018/11/20/state-capture-inquiry-part-of-sa-s-cleansing-process-ramaphosa [Accessed 22 May 2019].

[38] Cebelihle Bhengu, "President Cyril Ramaphosa on State Capture, Eskom and Job Creation", *Herald Live*, 25 January 2019. Retrieved from: https://www.heraldlive.co.za/news/2019-01-25-president-cyril-ramaphosa-on-state-capture-eskom-and-job-creation/ [Accessed 22 May 2019].

[39] Thabo Mokone, "Ramaphosa's Son Implicated in Dodgy BOSASA Payment, Maimane Says in Parliament", *Times Live,* 6 November 2018. Retrieved from: https://www.timeslive.co.za/politics/2018-11-06-ramaphosas-son-implicated-in-dodgy-bosasa-payment-maimane-says-in-parliament/ [Accessed 10 November 2019].

[40] Kyle Cowan, "Ramaphosa Admits his Son has Done Business with Bosasa", *News 24*, 6 November 2018. Retrieved from: https://www.news24.com/SouthAfrica/News/ramaphosa-admits-his-son-has-done-business-with-bosasa-20181106 [Accessed 27 May 2019].

[41] *Ibid* [my emphasis].

Averring that he was privy to the contract between Bosasa and his son, Ramaphosa asseverated: "*He* [Ramaphosa junior] *is running a clean business* [emphasis added] … if it turns out there was any irregularity or corruption I will be the first, I assure you Mr Maimane, I will be the first to make sure he becomes accountable. I will take him to the police station myself."[42]

Ramaphosa's audience, especially people who still recalled his role in drafting the country's Constitution, might have found his argument persuasive as it resonated with one of the fundamental tenets of the Constitution, namely, equality before the law.[43] In other words, they might have viewed him as a man of honour. Commenting on honour, Perelman and Olbrechts-Tyteca assert that "[a] man's word of honor, given by him as the sole proof of an assertion, will depend on the opinion held of that man as a man of honour."[44]

Ten days later, in his letter to the then Speaker of the National Assembly (NA), Baleka Mbete, Ramaphosa changed his story, contending that:

> "I have been told that the payment to which the Leader of the Opposition [Mmusi Maimane] referred was made on behalf of Mr Watson [the former Chief Executive Officer of Bosasa] into a trust account that was used to raise funds for a campaign established to support my candidature for the Presidency of the African National Congress. The donation was made without my knowledge. I was not aware of the donation at the time that I answered the question to the National Assembly. I thought it best to furnish this information to clear any confusion."[45]

This turn of events brought the age-old adage, "to err is human, to forgive divine", into play.[46] While some of Ramaphosa's interlocutors might have been readily willing to give him the benefit of the doubt that he had made an honest mistake, others were not persuaded or convinced. Exemplifying the latter category of Ramaphosa's audience were Mmusi Maimane and Julius Malema, who approached the Public Protector to investigate whether Ramaphosa had wilfully misled and lied to Parliament when he responded about the money paid to his son.[47]

**The Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS)**

Ramaphosa announced the setting up of the SARS Commission in his 2018 SONA.[48] Headed by retired Judge Robert Nugent, the SARS Commission was constituted on 24 May 2018 under Proclamation 17 of 2018 amid concerns over SARS missing collection targets, delayed value added tax (VAT) refunds and reports of governance

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[42] *Ibid.*

[43] *The Constitution of the Republic of South Africa*, 1996, section 9(1).

[44] Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation,* trans. J. Wilkinson and P. Weaver, (Notre Dame / London: University of Notre Dame Press, 1969), p. 305.

[45] The Presidency, "President Clarifies Response to a Parliamentary Question", *The Presidency*, 16 November 2018. Retrieved from: http://www.thepresidency.gov.za/press-statements/president-clarifies-response-parliamentary-question [Accessed 27 May 2019].

[46] Oxford Living Dictionaries, "err", *Oxford Living Dictionaries*, n.d. Retrieved from: https://en.oxforddictionaries.com/definition/err [Accessed 29 May 2019].

[47] Julius Malema is the leader of the third largest political party in Parliament, the Economic Freedom Fighters (EFF).

[48] The Presidency, "President Cyril Ramaphosa: 2018 State of the Nation Address", *ibid*.

issues. In a nutshell, the terms of reference of the commission covered the following aspects:[49]

- The adequacy and legality of steps that SARS took to address the revenue shortfalls in the last two years, including allegations of the unauthorised payment of bonuses to top executives and the withholding of refunds owed to ordinary taxpayers;
- The performance of tax administrative duties and the application of discretionary powers required or enabled by existing tax legislation;
- The adherence to tax administrative processes, and whether deviations from the established processes unfairly benefited politically connected persons and persons connected to top managers of SARS;
- The adherence to customs and excise provisions, with particular reference to tobacco products;
- The adherence to internal personnel policies and Human Relations practice, in light of the exit of senior personnel and the alleged coercion of SARS officials to resign;
- The impact of the conduct of SARS management on the public image of SARS, upholding the basic values and principles governing public administration envisaged in section 195 of the Constitution;
- The impact of any change in the operating model of SARS operations; and
- The integrity of supply chain management and tendering processes.

The first hearing of the commission took place four months after the suspension of the then SARS Commissioner, Tom Moyane, by President Ramaphosa, after he refused to step down voluntarily.[50]

In his letter suspending Tom Moyane, dated 19 March 2018, Ramaphosa postulated:

> "With regards [*sic*] to the performance of your duties, I wish to cite two areas of particular concern:
> [Y]our treatment of the report given to you by the Financial Intelligence Centre, listing your transgressions, and your failure to report to the Minister immediately not only violated the FIC [Financial Intelligence Centre] but also violated the provisions of section 195 of the Constitution which you are enjoined to fulfil in terms of section 4(2) of the SARS Act, specifically the maintenance of high standards of professional ethics, ensuring public administration is accountable, and being transparent to the public. You failed to provide related reports to the Minister of Finance, and only finally agreed to do so under pressure from the Standing Committee on Finance last week. You failed to maintain discipline at SARS as required in section 9(2) of the SARS Act or to maintain an efficient administration. You have further and thereby failed [*sic*] in your role as an accounting officer for SARS. As a result, the SARS has been fundamentally jeopardised and has lost the confidence of tax-payers."[51]

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[49] The Presidency, "The Commission of Inquiry into Tax Administration and Governance by SARS", *The Presidency*, 11 December 2018. Retrieved from: http://www.thepresidency.gov.za/report-type/commission-inquiry-tax-administration-and-governance-sars [Accessed 31 May 2019].

[50] Sibongile Khumalo, "Suspended SARS Boss Tom Moyane's Disciplinary Hearing Commences", *Fin24*, 21 July 2018. Retrieved from: https://www.fin24.com/Economy/Labour/suspended-sars-boss-tom-moyanes-disciplinary-hearing-commences-20180721-2 [Accessed 30 May 2019].

[51] Matamela Cyril Ramaphosa, "Dear Commissioner Moyane", *Politicsweb*, 20 March 2018. Retrieved from: https://www.politicsweb.co.za/documents/tom-moyane-suspended--cyril-ramaphosa [Accessed 31 May 2019]

By referring to the breach of the Constitution, as well as the SARS Act, Ramaphosa had recourse to the argument by example.[52] He invoked the Constitution as the supreme law of the land, as well as the founding legislation of a commissioner's position, with a view to underlining the gravity of Moyane's transgressions and to demonstrate why his suspension was warranted. A failure to suspend Moyane, despite such serious contraventions, could have cast doubt on Ramaphosa's commitment to restoring the rule of law. In an endeavour to amplify his argument, Ramaphosa provided another example: "In relation to the management of VAT refunds, you [Moyane] have brought the SARS into serious disrepute, failed in your duties as accounting officer for the SARS and potentially jeopardised the integrity and viability of the SARS as collector of revenue for the State." [53]

Akin to the two previous "transgressions" that Ramaphosa had alleged, this was a grave violation. Tax is more than just a source for revenue and growth. It also plays a key role in building up institutions and democracy through making the state accountable to the taxpayers.

The commission released its interim report on 18 October 2018, and one of its core recommendations was that the then SARS commissioner, Tom Moyane, be removed "without delay" and that this was a "non-negotiable prerequisite" for the process of recovery at SARS to commence.[54] Ramaphosa heeded the SARS Commission's recommendation and fired Tom Moyane on 1 November 2018.[55]

**Commission of Inquiry into the Public Investment Corporation (PIC)**

The PIC is a state-owned company that is tasked with managing nearly R2 trillion in assets, more than 98 percent thereof belonging to the government or its employees.[56] This includes the Government Employees Pension Fund, the Unemployment Insurance Fund and the Compensation Fund. The Commission of Inquiry into the PIC was appointed by President Ramaphosa on 17 October 2018 under section 84(2)*(f)* of the Constitution. The appointment of the commission was published in the Government Gazette No. 41979, under Proclamation 30 of 2018.[57] Chaired by retired Judge Lex Mpati, the erstwhile President of the Supreme Court of Appeal, the commission is entrusted with inquiring, making findings, reporting and making recommendations on the following:[58]

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[52] Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric*, p. 350.

[53] Ramaphosa, "Dear Commissioner Moyane".

[54] Judge R Nugent, "Interim Report: Commission into Tax Administration and Governance by the South African Revenue of Service", *Moneyweb*, October 2018. Retrieved from: https://www.moneyweb.co.za/wp-content/uploads/2018/10/Interim-Report-.pdf [Accessed 30 October 2019].

[55] Sarah Smit & Gemma Ritchie, "Moyane Fired, Presidency Confirms", *Mail & Guardian*, 1 November 2018. Retrieved from: https://mg.co.za/article/2018-11-01-moyane-fired-presidency-confirms [Accessed 4 September 2019].

[56] Public Investment Corporation, "Welcome to the Public Investment Corporation", *Public Investment Corporation*. Retrieved from: https://www.pic.gov.za/ [Accessed 4 June 2019].

[57] Department of Justice, "PIC Commission: Our Mandate", *Department of Justice,* 2018. Retrieved from: http://www.justice.gov.za/commissions/pic/ [Accessed 3 June 2019].

[58] Department of Justice, "Proclamation No. 30 of 2018 by the President of the Republic of South Africa: Commission of Inquiry into Allegations of Impropriety Regarding Public Investment Corporation", *Department of Justice*, 17 October 2018. Retrieved from: http://www.justice.gov.za/commissions/pic/docs/20181017-gg41979proc30-PICcomms.pdf [Accessed 1 June 2019].

1. Whether any alleged impropriety regarding investment decisions by the PIC in media reports in 2017 and 2018 contravened any legislation, PIC policy or contractual obligations and resulted in any undue benefit for any PIC director or employee, or any associate or family member of any PIC director or employee at the time;
2. Whether any findings of impropriety following the investigation in terms of paragraph 1.1 resulted from ineffective governance and/or functioning by the PIC board;
3. Whether any PIC director or employee used his or her position or privileges, or confidential information for personal gain or to improperly benefit another person;
4. Whether any legislation or PIC policies concerning the reporting of alleged corrupt activities and the protection of whistle-blowers were not complied with in respect of any alleged impropriety referred to in paragraph 1.1;
5. Whether the approved minutes of the PIC board regarding discussions of any alleged impropriety referred to in paragraph 1.1 are an accurate reflection of the discussions and the board's resolution regarding the matters and whether the minutes were altered to unduly protect persons implicated and, if so, to make a finding on the person/s responsible for the alterations;
6. Whether all the investigations into the leakage of information and the source of emails containing allegations against senior executives of the PIC in media reports in 2017 and 2018, while not thoroughly investigating the substance of these allegations, were justified;
7. Whether any employees of the PIC obtained access to emails and other information of the PIC, contrary to the internal policies of the PIC or legislation;
8. Whether any confidential information of the PIC was disclosed to third parties without the requisite authority or in accordance with the Protected Disclosures Act, 2000, and, if so, to advise whether such disclosure impacted negatively on the integrity and effective functioning of the PIC;
9. Whether the PIC has adequate measures in place to ensure that confidential information is not disclosed and, if not, to advise on measures that should be introduced;
10. Whether measures that the PIC has in place are adequate to ensure that investments do not unduly favour or discriminate against –
    - 10.1 a domestic prominent influential person (as defined in section 1 of the Financial Intelligence Centre Act, 2001);
    - 10.2 an immediate family member (as contemplated in section 21H(2) of the Financial Intelligence Centre Act, 2001) of a domestic prominent influential person; and
    - 10.3 known close associates of a domestic prominent influential person;
11. Whether there are discriminatory practices with regard to remuneration of and performance awards to PIC employees;
12. Whether any senior executive of the PIC victimised any PIC employees;
13. Whether mutual separation agreements concluded in 2017 and 2018 with senior executives of the PIC complied with internal policies of the PIC and whether pay-outs made for this purpose were prudent;
14. Whether the PIC followed due and proper process in 2017 and 2018 in the appointment of senior executive heads and senior managers, whether on permanent or fixed-term contracts;

15. Whether the current governance and operating model of the PIC, including the composition of the board, is the most effective and efficient model and, if not, to make recommendations on the most suitable governance and operational model for the PIC for the future; and
16. Whether considering the findings, it is necessary to make changes to the PIC Act, the PIC Memorandum of Incorporation in terms of the Companies Act, 2008, and the investment decision-making framework of the PIC, as well as the delegation of authority for the framework (if any) and, if so, to advise on the possible changes.

In accordance with its terms of reference, the commission submitted its interim report on 15 April 2019, and was scheduled to hand in its final report by 15 April 2019. However, in his interim report, Judge Mpati requested an extension of three months, which is 31 July 2019.[59] The motivation given for the sought extension was that the "extent of the going investigations by the Commission's forensic team into a considerable number of transactions" will need to be "concluded well in advance of the date of the submission of the final report to the President".[60]

While the motivation for the commission's extension may suggest that the process will be somehow legalistic, it may equally imply that the commission will seek to be persuasive in the formulation of its recommendations to the President. Notwithstanding the fact that the recommendations that the judge will be making to President Ramaphosa will be largely predicated on legal reasoning, the judge will have to couch them in a way that will enable the adherence of his mind with that of his interlocutor (Ramaphosa).[61] Indeed, commenting on the nexus between rhetoric and law, Perelman observes:

> "At the same time the role of argumentation and rhetoric has grown in the application and evolution of law. This reality concerns the judge more than the lawyer. The judge who is more and more compelled to motivate his decision is less and less content to provide only formal correctness but tends to give his decisions a more persuasive character."[62]

**Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act No. 32 of 1998**

On 26 October 2018, President Ramaphosa provisionally suspended both Advocate Nomgcobo Jiba and Advocate Lawrence Mrwebi from their positions as Deputy National Director of Public Prosecutions (DNDPP) and Special Director of Public Prosecutions (SDPP) respectively, pending the finalisation of an enquiry into "their fitness and propriety to hold office".[63] This was amid serious criticisms levelled against the two Advocates in the courts over whether they had acted without fear,

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[59] Department of Justice, "Extension of the PIC Commission and Amendment of the Terms of Reference", *Department of Justice*, 30 March 2019. Retrieved from: http://www.justice.gov.za/commissions/pic/docs/PIC-ms-20190330-Extention.pdf [Accessed 4 June 2019].

[60] Department of Justice, "Extension of the PIC Commission and Amendment of the Terms of Reference".

[61] Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric*, p. 14.

[62] Chaïm Perelman, *Justice, Law and Argument*, p. 124.

[63] The Presidency, "Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998", *The Presidency*, 1 April 2019. http://www.thepresidency.gov.za/sites/default/files/Section%2012%286%29%20Enquiry%20report%20-%20unabridged%20version.pdf [Accessed 5 June 2019].

favour or prejudice at all times in the execution of their duties. The terms of reference establishing the enquiry into Jiba and Mrwebi's "fitness and propriety to hold office" were published on 9 November 2018 in the Government Gazette No. 42029 of 2018.[64] President Ramaphosa designated retired Judge Yvonne Mokgoro as Chairperson of the enquiry.

The enquiry was also required to consider the manner in which Jiba and Mrwebi had fulfilled their responsibilities as DNDPP and SDPP, which included considering whether:

- [They] complied with the prescripts of the Constitution, the National Prosecuting Authority Act, Prosecuting Policy and Policy Directives and any other relevant laws in [their] position[s] as … senior leader[s] in the National Prosecuting Authority and [are] fit and proper to hold the position and be … member[s] of the prosecutorial service;
- [They] properly exercised [their] discretion in the institution, conducting and discontinuation of criminal proceedings;
- [They] duly respected court processes and proceedings before the Courts as … senior member[s] of the National Prosecuting Authority;
- [They] exercised [their] powers and performed [their] duties and functions in accordance with prosecution policy and policy directives as determined under section 21 of the National Prosecuting Authority Act;
- [They] acted without fear, favour or prejudice;
- [They] displayed the requisite competence and capacity required to fulfil [their] duties; and whether,
- [They] in any way brought the National Prosecuting Authority into disrepute by virtue of [their] actions or omissions. [65]

The enquiry was required to complete its mandate and furnish its report, together with all supporting documentation and recommendations, to the President by no later than 9 March 2019. This would have allowed the President to make his decision before the six-month time limit ended on 25 April 2019.[66] However, as matters turned out and with the indulgence of the President, the report was submitted on 31 March 2019.[67]

Having listened to the testimony of seventeen witnesses – including the prosecutors – that spanned six weeks, as well as receiving two written submissions, the Mokgoro Enquiry found that Jiba and Mrwebi were not fit and proper to hold their respective offices because they lacked "complete honesty, reliability and integrity".[68] Accordingly, Judge Mokgoro recommended that both Jiba and Mrwebi be removed from office.

The retired judge was very critical of Jiba's lack of conscientiousness in considering the reputation of the NPA before her own. The judge concluded: "We find that Jiba's conduct has the effect of seriously damaging public confidence in the NPA. We find that as a senior member of the NPA, Jiba has displayed irreverence to the courts and indifference to their processes, resulting in adverse comments being made against her."[69]

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[64] *Ibid.*
[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*

Mrwebi was found, among other things, to have acted against the interests of the NPA when he withdrew the charges against the erstwhile Crime Intelligence boss, Richard Mdluli.[70] Moreover, he was depicted as lacking an understanding of the law and how it is applied. In this regard, the Commission observed: "The courts have levelled criticisms and concerns in the manner in which Mrwebi has discharged the duties of his office and conducted himself towards the courts. Mrwebi's conduct was openly at variance with what is expected of a person in his position." [71]

The Mokgoro Enquiry concluded with the observation, among others, that NPA officials are required to be completely devoted to the rule of law, without fail, as the country depends on it. To this end, the enquiry maintained:

> "As the sole entity constitutionally mandated to prosecute on behalf of the State, in the face of the scourge of crime, the confidence that the public enjoys in the NPA is what prevents individuals from taking law into their own hands. This confidence underpins the social contract. It lies in the belief that the State can offer protection where laws are not respected."[72]

After having studied the findings and recommendations of the Mokgoro Enquiry, President Ramaphosa ended the tenure of both Jiba and Mrwebi on 25 April 2019 and duly informed them.[73] In compliance with section 12(6) of the National Prosecuting Act (No. 32 of 1998), President Ramaphosa will furnish Parliament with documentation comprising his decision, as communicated to Advocates Jiba and Mrwebi, the report of the enquiry that serves as the basis for his decision, as well as the submissions made by both advocates in response to the report.

It is a truism that some have misgivings about the value of commissions of inquiry.[74] Ostensibly to counter this line of thinking, President Ramaphosa has created an impression that the country's commissions will bring to book those who have been involved in malfeasance. Stating the ultimate objectives of the commissions that are currently underway and the ones that may be established in future, Ramaphosa once told his audience:

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[70] Richard Mdluli is alleged to have been an ally of former President Zuma. A career policeman, he has been in the service for over 30 years. His name started to appear in the public domain around the time former National Police Commissioner, Jackie Selebi, was being prosecuted for corruption and then President Zuma was fending off similar charges. See Zintle Mahlati, "Suspended Crime Intelligence Boss Richard Mdluli 'Relieved of his Duties'", *IOL*, 17 January 2018. Retrieved from: https://www.iol.co.za/news/politics/suspended-crime-intelligence-boss-richard-mdluli-relieved-of-duties-12770906 [Accessed 11 June 2019].

[71] The Presidency, "Enquiry in Terms of Section 12(6) of the National Prosecuting Authority Act 32 of 1998".

[72] *Ibid.*

[73] The Presidency, "President Removes NPA Advocates Jiba and Mrwebi from Office", *The Presidency*, 26 April 2019. Retrieved from: http://www.thepresidency.gov.za/press-statements/president-removes-npa-advocates-jiba-and-mrwebi-office [Accessed 6 June 2019].

[74] CapeTalk, "Are Commissions of Inquiry a Waste of Time in SA? Experts Share their Views", *CapeTalk*, 22 January 2019. Retrieved from: http://www.capetalk.co.za/articles/334897/are-commissions-of-inquiry-a-waste-of-time-in-sa-experts-share-their-views [Accessed 4 June 2019].

> "While these Commissions will in time make findings and recommendations in line with their mandates, evidence of criminal activity that emerges must be evaluated by the criminal justice system. Where there is a basis to prosecute, prosecutions must follow swiftly and stolen public funds must be recovered urgently."[75]

Continuing, Ramaphosa became more pragmatic:

> "To this end, we have agreed with the new National Director of Public Prosecutions, that there is an urgent need to establish in the office of the NDPP an investigating directorate dealing with serious corruption and associated offences, in accordance with section 7 of the NPA [National Prosecuting Authority] Act.
> I will soon be promulgating a Proclamation that will set out the specific terms of reference of the Directorate. In broad terms, the Directorate will focus on the evidence that has emerged from the Zondo Commission of Inquiry into State Capture, other commissions and disciplinary inquiries. It will identify priority cases to investigate and prosecute and will recover assets identified to be the proceeds of corruption."[76]

True to his word, on 20 March 2019, Ramaphosa proclaimed the establishment of the Investigating Directorate in terms of section 7(1) of the NPA Act (No. 32 of 1998). The new directorate is tasked with investigating "common law offences including fraud, forgery, uttering, theft and any other offence involving dishonesty".[77] According to the communiqué by the Presidency, the directorate will also probe:

> "any unlawful activities relating to serious, high profile or complex corruption including but not limited to offences or criminal or unlawful activities arising from the following commissions and inquiries:
> - The Zondo Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State promulgated under presidential proclamation No. 3 of 2018 in Government Gazette No. 41403, 25 January 2018;
> - The Nugent Commission of Inquiry into Tax Administration and Governance by the South African Revenue Service (SARS) established by presidential proclamation No. 17 of 2018 published in Government Gazette No. 41562 constituted on 24 May 2018;
> - The Mpati Commission of Inquiry into Allegations for Impropriety regarding the Public Investment Corporation, as published in Government Gazette No. 41979 of 17 October 2018; and
> - Any other serious, high profile or complex corruption case referred to the new directorate by the National Director, in accordance with section 28(1)(b) of the NPA Act." [78]

**Conclusion**

If one were to give President Ramaphosa the benefit of the doubt, he appears to be acutely aware of the enormity of the challenges with which the country is confronted.

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[75] The Presidency, "President Cyril Ramaphosa: 2019 State of the Nation Address", *The Presidency*, 7 February 2019. Retrieved from: https://www.gov.za/speeches/president-cyril-ramaphosa-2019-state-nation-address-7-feb-2019-0000 [Accessed 4 June 2019].
[76] *Ibid.*
[77] The Presidency, "President Cyril Ramaphosa proclaims NDPP Investigating Directorate to strengthen fight against corruption", *The Presidency*, 20 March 2019. Retrieved from: https://www.gov.za/speeches/president-cyril-ramaphosa-proclaims-ndpp-investigating-directorate-strengthen-fight-against [Accessed 4 June 2019].
[78] *Ibid.*

He equally seems to appreciate that resolving them will take some doing. He captured this in his inauguration speech subsequent to the ANC's victory in the 8 May 2019 general elections. On that day, the newly minted President stated:

> "In recent times, our people have watched as some of those in whom they had invested their trust have surrendered to the temptation of power and riches. They have seen some of the very institutions of our democracy eroded and resources squandered. The challenges that we face are real. But they are not insurmountable. They can be solved. And we are going to solve them."[79]

From a rhetorical perspective, Ramaphosa's words would have appealed to his audience because they resonated with what most of the audience had witnessed and/or were witnessing. Stated differently, Ramaphosa managed to adapt to his audience.[80] He was speaking to what he understands are the real concerns of ordinary South Africans. The President seems to have succeeded in grasping what Perelman and Olbrechts-Tyteca consider indispensable to argumentation when they maintain that "[in] argumentation, the important thing is not knowing what the speaker regards as true or important, but knowing the views of those he is addressing".[81] Indeed, by being appreciative of the views of his interlocutors, President Ramaphosa had established the "community of minds" between himself and his audience.[82] His interlocutors would therefore have viewed him as having something in common with them or as being in communion with them.

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[79] The Presidency, "Address by President Cyril Ramaphosa on the Occasion of the Presidential Inauguration", *The Presidency*, 25 May 2019. Retrieved from: http://www.thepresidency.gov.za/speeches/address-president-cyril-ramaphosa-occasion-presidential-inauguration [Accessed 7 June 2019].
[80] Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric*, p. 23.
[81] *Ibid*. 23-24.
[82] *Ibid*. 14.

# A song of forgiveness: The dialectic between the rhetoric of place and the rhetoric of self in Marlene van Niekerk's *Agaat*

Thapelo Teele

**Introduction**

Can forgiveness – a concept that is notoriously difficult to pin down, even under the best of circumstances[1] – be discovered in instances where people who forgive seem powerless to forgive; where the perpetrator does not palpably acknowledge their guilt as a perpetrator; where forgiveness seems radically impossible in light of the numerous and continual instances of the perpetrator's abuse over many years, over a lifetime, in fact? I propose that just such an instance of forgiveness is at stake in Marlene van Niekerk's novel *Agaat*,[2] and that a meaningful conversation about the existence or absence of forgiveness in the novel's circumstances – which function as an allegory for "post"-apartheid South Africa – requires an understanding of the dialectic between the rhetoric of self and the rhetoric of space as it plays out in the novel.

I argue that understanding the workings of the dialectic between the rhetoric of self and the rhetoric of space can assist in mapping out how it is capable of setting the scene for an act of impossible forgiveness.[3] Such an understanding, and the mapping through which it provides access to a scene of impossible forgiveness, requires a holistic and critical engagement with the nature of the discursive[4] relationship between the primary characters – Milla, the Afrikaner "madam", and Agaat, her "maid"[5] – from the first point of contact until the end of the novel.

I shall then proceed to engage with Jacques Derrida's thought on forgiveness in order to analyse critically whether it can be said that there is forgiveness at the end of *Agaat*. The question of this forgiveness gives rise to further questions, such as: if there is indeed forgiveness in *Agaat*, what are its conditions of possibility? I contend that when the question of forgiveness arises after a prolonged period of abuse, the conditions necessary for the revival of the rhetoric of self are ultimately at stake and these conditions, in turn, depend in a critical way on the rhetoric of space.

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[1] Audrey R. Chapman, "Truth Commissions and Intergroup Forgiveness: The Case of the South African Truth and Reconciliation Commission", *Peace and Conflict: Journal of Peace Psychology*, 13(1), 2007, pp. 51-69 highlights the difficulty of the South African Truth and Reconciliation Commission (TRC) in conceptualising forgiveness and reconciliation at intergroup levels. As a result, the TRC focused primarily on reconciliation and forgiveness at the individual level, diverting from its mandate of being a transitional justice mechanism for the country as a whole.

[2] Marlene van Niekerk, *Agaat*, trans. M. Heyns, (Portland: Tin House Books, 2006).

[3] Jacques Derrida, "On Forgiveness: A Roundtable Discussion with Jacques Derrida", in J.D. Caputo, M. Dooley and M.J. Scanlon (eds.), *Questioning God,* (Bloomington: Indiana University Press, 2001), p. 53.

[4] Jacques Lacan, "Du Discours Psychanalytique", in G.B. Contri (ed.), *Lacan in Italia/En Italie Lacan 1953-1978,* (Milan: La Salamandra, 1972), p. 51.

[5] Although one should add that the relationship is more complex than these reductions, as will become clear below, yet its essence is nonetheless captured by these colloquial signifiers.


Thapelo Teele, "A song of forgiveness: The dialectic between the rhetoric of place and the rhetoric of self in Marlene van Niekerk's *Agaat*", pp. 145-162.

**Milla and Agaat: The Discourse of Abuse**

Abuse defines the discursive relationship between Milla and Agaat. There are so many instances of Milla abusing Agaat that this entire paper could be written about these alone. I shall, however, limit myself to a few "exemplars" of abuse – those that stand out as lucid examples of the fact that the relationship is abusive through and through. At the outset, it should be noted that while Milla abuses Agaat often throughout the novel, it appears that she is also often remorseful, though this remorse is rarely in the moment, and even if it is, it is never explicitly articulated as remorse, because Milla never articulates it in the spoken word, nor indicates unequivocally her remorse in non-verbal forms of communication. Agaat thus does not know of Milla's remorse and it could be argued that the narrative arch of the abuse is throughout the novel closely constructed in relation to the inability to express remorse, as I will indicate by way of example below.

Milla finds Agaat as a neglected child in a squalid house.[6] Believing that God has called her to take Agaat in and raise her as her own, Milla proceeds not only to tranquillise the child, but also to lock her up in a windowless room for three days on the family farm of Grootmoedersdrift.[7] Her motives for taking Agaat in may very well have been sincere, but the text makes it clear that at least one other primary character, Milla's husband Jak, sees the action in relation to this motive as abusive.[8] As Milla is about to die, many years later, she reflects on this time, thinking to herself: "my child that I forsook after I'd appropriated her, that I'd caught without capturing her, that I locked up before I'd unlocked her!"[9]

Notwithstanding this, Milla – at this point in the novel's time, unable to speak – fails altogether to communicate her remorse. This is clearly indicated when she asks herself in reflection: "why only now love you with this inexpressible regret? And how must I let you know this?"[10] The discursive consequences of the prolonged abuse, and the failure to express remorse in relation to it, are at least threefold: first, they quite literally rob Agaat of the possibility of an own voice (throughout the novel Van Niekerk makes it clear that Agaat's voice in relation to Milla's is a ventriloquism, such that Milla's own discourse constantly returns to her, is repeated back to her, merely in Agaat's inflection of voice);[11] secondly, they cause Milla to forego the external expression of the elaborate vocabulary of Western Christian modernity within which it is clear that she could find the words; and thirdly, in her silence (ultimately a chosen silence, despite the involuntary deterioration of her vocal apparatus and the rest of her body), Milla all but extinguishes the possibility of forgiveness.

The scene in which Milla captures Agaat as if she were an animal conjures, on the one hand, ideas of colonial-era racism which perceived black people as animals,[12]

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[6] Van Niekerk, *Agaat*, pp. 469-70.
[7] *Ibid*. 470.
[8] *Ibid*. 637.
[9] *Ibid*. 540.
[10] *Ibid*.
[11] For instance, when Milla accuses Agaat of stealing Jakkie to breastfeed him, Agaat responds not in a discourse of her own making, but by ventriloquising the one that Milla taught her. More specifically, she repeats an idiom of sheep farming that she had learnt verbatim from the *Handbook for Farmers* from which Milla had instructed her, and says: "weaning time is the most critical time." *Ibid*. 491.
[12] Yvette Abrahams, "Images of Sara Baartman: Sexuality, Race, and Gender in Early Eighteenth-century Britain" in R.R. Pierson and N. Chaudhuri (eds.), *Nation, Empire, Colony: Historicizing Gender and Race,* (Bloomington: Indiana University Press, 1998), pp. 220-236 writes about the supposed link

and on the other hand – but in relation to the first point – it is deliberately constructed to put the reader in mind of both the imagery and the procedure of taming that are so vivid in the colonial imaginary. A wild animal is tamed through first tranquillising it and then locking it up in a cage in order that it will frustrate itself upon waking to the point that it will yield to the will of its capturer.[13]

In reflecting on these first moments of interaction with Agaat as an abandoned child, Milla asks herself years later: "what must it feel like to be Agaat […] would you be able to figure it out if she could explain it?",[14] thus articulating the extent of the abyss that yawns between them. While she asks herself these questions, which seem to be an indication of remorse coupled with curiosity, as is often the case as regards the colonised subject, she never actually asks Agaat to give her the opportunity to explain what it must be like to be her. In fact, she makes the assumption that even if Agaat could explain what it is like to be her, that she would be unable to understand her. In other words, the discursive relationship in terms of which such an explanation would be possible is foreclosed from the outset, and it remains foreclosed until the very end of the book.

The second "exemplary" incident of abuse occurs immediately after Milla has cast Agaat out of the main house into a room outside the house, in anticipation of the birth of her son, Jakkie. As if kicking Agaat out of the main house is not enough, Milla seeks to ensure that she has, on the one hand, definitively severed the previously intimate and tender relationship of mother and daughter between them, and, on the other hand, that she has robbed Agaat of the innocence of her childhood, by also forcing her to slaughter her favourite childhood lamb, which Agaat had, until then, fed full-milk with extra cream.[15] That Milla makes Agaat slaughter her favourite lamb is not a random act of abuse, for it gestures directly at the rhetorical importance of the lamb in the Judeo-Christian tradition as the symbol of innocence. Further, the lamb as an offering of sacrifice is symbolically important in that its death is supposed to mark the end of one era and the beginning of another.[16]

That the slaughter of the lamb marked a redoubled abuse is confirmed when Van Niekerk repeats the thematic concerns of the aforementioned slaughter, except this time years later on the orders of Milla's husband, Jak, that their eight-year-old son Jakkie must himself slaughter a lamb that he is besotted with.[17] This scene occurs in the context of Jakkie's eighth birthday celebration, a day on which Jakkie receives from Agaat, as a birthday gift, a Rodgers penknife from England with two blades.[18] Jak, seeing this birthday as a coming of age for Jakkie, orders Agaat to bring Jakkie to slaughter the lamb with the penknife, saying: "Agaat, go and look for your little baas and bring him here, on the spot."[19] Milla, revealing that she knows full well the traumatic effect of such a slaughter on a child, attempts to prevent this from

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between black people and animals as ideologically functioning to justify the existence of slavery for white slavers whose conscience was premised on Christian morality.

[13] Heini Hediger, *Wild Animals in Captivity,* (London: Butterworths Scientific Publications, 1950), pp. 27-30.

[14] Van Niekerk, *Agaat*, p. 554.

[15] *Ibid.* 446.

[16] Claude Lévi-Strauss, *The Savage Mind*, ed. J. Weightman and D. Weightman, (Chicago: University of Chicago Press, 1966), p. 224.

[17] Van Niekerk, *Agaat*, p. 322.

[18] *Ibid*. 321.

[19] *Ibid.* 322.

happening. She recalls the scene: "You signalled at [Agaat] with your eyes, look for him but don't find him, she looked back at you with blunt eyes. It didn't take her very long. Then you heard the crying. Across the yard she was dragging him by the ear … Jakkie straining back."[20]

On the one hand, the scene can be read as an act of resistance – it clearly is Agaat's repetition of the same cruelty that Milla had, years before, perpetrated in relation to her (it is Agaat who gives Jakkie the knife as a birthday present and so sets the scene in motion). Yet, it is this very repetition that reveals just how deeply Agaat is entrapped in Milla's discourse of abuse. Agaat not only ignores Milla's plea, but also subsequently looks at Milla with blunt eyes after having brought Jakkie by force to Jak. In its entirety, Agaat's conduct in this scene amounts to a non-verbal ventriloquism in which Milla's abusive discourse returns to her in inverted, indeed perverted, form: this is what Milla made Agaat do all those years ago, and so she must watch Jak subject her beloved Jakkie to it too. This form of ventriloquist torsion is perhaps the only form of discursive resistance – if it can be called "resistance" – of which Agaat is capable in relation to Milla during the decades before Milla's illness. Thereafter, Agaat's ventriloquist torsion persists as a defining feature of the discourse that remains between them, although it could be argued that it comes to fulfil a different function.[21]

The third incident of abuse to which I will refer is one in which Milla metes out unjustified physical abuse on Agaat when an older Jakkie has lost his confidence in himself after not getting a girl he had his sights on.[22] This incident is chilling for two reasons, the first being that Milla turns her frustration about Jakkie's lack of confidence in himself on Agaat, when the frustration has nothing to do with Agaat. The second reason pertains to the manner in which Agaat takes the abuse as if it were a normal occurrence. Indeed, it is as if Agaat is Milla's punching bag on which she often releases her frustrations and tensions in relation to the other characters. In this scene, Milla is described as having struck Agaat on her shoulders, her breasts and her face, while Agaat is described as having "[s]tood stock-still absorbing the blows without moving a muscle, without retreating a single step, without any retort."[23] After this violent scene, Milla buries her head in her hands and begins to whimper. When she looks up from her hands, she finds Agaat in the kitchen going about her business as if nothing has just happened.

When, many years later, Agaat brings up in conversation the trauma that Milla subjected her to when she made her slaughter her favourite lamb years before, Milla fails to recall it.[24] In response to Milla's failure to recall the incident, perhaps because she is aware that the forgetfulness is disingenuous, Agaat responds by saying: "Please Ounooi, don't force me to get angry, I've long given up being angry."[25] This rare instance of Agaat speaking in a voice that is authentically hers confirms that she has been trained by Milla and has trained herself, long ago, to accept Milla's violence and abuse. However, at the same time, it is also a small indication that Agaat retains, no matter how diminished, an agency of her own.

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[20] *Ibid.*
[21] *Ibid.* 321.
[22] *Ibid.* 550.
[23] *Ibid.* 551.
[24] *Ibid.* 446.
[25] *Ibid.*

This instance, it should be noted, occurs in the context of Milla's degenerative condition, which has rendered her bedridden, affects her ability to speak, and deems her ever more dependent on Agaat. During this time, Milla does not see her dependency on Agaat as an opportunity to speak to her, but instead continues with her pattern of internally expressing remorse for what she has done to Agaat – failing, as usual, either verbally or non-verbally, to articulate this remorse. On one occasion, Milla thinks to herself: "Her name is good", referring to the meaning of the name Agaat, and she continues by wondering: "would it be good for her to forgive me? … Would it be good for her to take revenge?"[26]

Notwithstanding all the important questions Milla poses to herself and to the Big Other in relation to the numerous instances of abuse that she meted out to Agaat over the years, Milla, as we have seen, ultimately chooses to remain silent about the remorse she feels about her treatment of Agaat. For even though Milla has suffered a disease that deprives her of the ability to communicate verbally, the novel nonetheless makes it clear that even in the face of the degenerative disease, Agaat makes it possible for Milla to "speak". In choosing to leave her remorse unexpressed, she effectively makes it impossible for Agaat, her ventriloquist, and for herself to come to terms with, and engage, the instances of abuse. Withholding her remorse is thus Milla's final act of abuse, poignantly illustrating that it is not only words that are weapons, as Philippe-Joseph Salazar has argued,[27] but also the absence of words that maintain the violence of the relationship of abuse.

**The Discourse of Abuse and the Rhetorical Situation**

Can a prolonged discourse of abuse entirely erase the conditions of possibility of the rhetorical situation? As long as the abuse and the related violence of the verbal and non-verbal forms of communication persist, it is clear that no rhetorical situation exists between the two characters. There is neither deliberation nor negotiation in their discourse, because there is only the dissymmetry of violence, of order and obedience, of abuse and brutality. As Lloyd F. Bitzer has argued,[28] a particular discourse exists because of a particular condition or situation that invites utterance.[29] For Bitzer the situation is the source and the ground of rhetorical activity.[30] To this effect, he explains that the rhetorical situation must exist as a necessary condition of rhetorical discourse, just as a question must exist as a necessary condition of an answer.[31] Therefore, the ability to alter reality through participation is a necessary condition for the presence of a rhetorical situation.[32]

Agaat does not truly participate as an agent in the situation or condition that determines her everyday life during the period marred by Milla's violence, nor can she alter the reality of the situation in which she finds herself. Indeed, even the way she is described throughout the novel is perpetually framed from Milla's perspective, who in a part of the novel goes as far as describing Agaat as *her* legacy, saying: "You

[26] *Ibid.* 439.
[27] Philippe-Joseph Salazar, *Words are Weapons: Inside ISIS's Rhetoric of Terror,* (New Haven: Yale University Press, 2017).
[28] Lloyd F. Bitzer, "The Rhetorical Situation", *Philosophy and Rhetoric,* 25, 1992, pp. 1-14.
[29] *Ibid.* 5.
[30] *Ibid.* 6.
[31] *Ibid.*
[32] *Ibid.*

watched her, her gestures, her phrases, her gaze. She was a whole compilation of you, she contained you within her […] that was all she could be, from the beginning. Your archive."[33]

For Tracy Symmonds, the description found in the aforementioned quotation is not only quintessential of Milla's arrogance, it is also a brutal and clear commentary on the social conditions of apartheid, in which the white mistress wooed, usurped, and promised to protect her servant under the guise of maternal generosity, only for her to bind the servant in a stranglehold of duty, love and hatred.[34] Indeed, Milla can be argued to represent in allegorical form the brute force of apartheid's attempt to capture the will of black people. In another passage, late in the narrative, it becomes clear that this proclivity is part and parcel of Milla's pathology: she acknowledges the parasitic dependency she has on Agaat – who she plots to control further – saying: "Perhaps I'll manage to usurp her will on the sly, and keep it warm in me, without her even noticing that I have it, meld it with mine so that we can have one will for these last days."[35]

Taking the aforementioned quotation into consideration, it is not only the capturing of Agaat's will, or Milla's perception of Agaat as her archive that are important, but also that Agaat cannot participate in the situation or condition that determines her everyday life for as long as the violence of apartheid, manifested in Milla-the-mistress, persists. Milla is therefore a definitive constraint on Agaat's capabilities to decide how to live her life, and who to be. Constraints on decision or action are what Bitzer calls an exigence, which he describes as an organising principle for the audience to be addressed in rhetoric, and for the change to be effected.[36] Bitzer argues that it is an exigence that can set the scene for a rhetorical situation to exist, though not all forms of exigence are rhetorical.[37] A non-rhetorical exigence functions to deem the person capable of being influenced by discourse, incapable of mediating change with another – unequal and therefore unrecognised.[38] The exigence that renders Agaat capable of being influenced by discourse, but incapable of mediating change in her own life, is Milla's discourse of abusive violence. Violence of the kind that persists in the discourse between Milla and Agaat is not a rhetorical exigence, for it functions to sustain the dehumanising inequality between speakers,[39] and therefore closes the possibility of the realm of the rhetorical from existing. At the level of allegory, *Agaat* is a novel of apartheid as the constitutive erosion, if not erasure, of the conditions of possibility of the rhetorical exigence.

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[33] Van Niekerk, *Agaat*, 554.

[34] Tracy Symmonds, "Mourning, Linguistic Improvisation and Shared histories in Marlene van Niekerk's *Agaat*", *M.A.* thesis, University of the Witwatersrand, Faculty of Humanities, School of Language and Literature Studies (Modern and Contemporary Literature), 2013, p. 11. Retrieved from: http://hdl.handle.net/10539/13129 [Accessed 19 October 2019].

[35] Van Niekerk, *Agaat*, p. 132.

[36] Lloyd F. Bitzer, "The Rhetorical Situation", *Philosophy and Rhetoric,* 1(1), 1968, p. 7.

[37] *Ibid.*

[38] *Ibid.*

[39] Gayatri Chakravorty Spivak's essay "Can the Subaltern Speak?", in C. Nelson and L. Grossberg (eds.), *Marxism and the Interpretation of Culture,* (Basingstoke: Macmillan Education, 1988), pp. 271-313 is pertinent here, because it outlines ideological and historical factors which function to obstruct those on the periphery from being heard. In South Africa, the system of apartheid was state-sanctioned ideological and historical obstruction to the voices of the non-white population being heard.

Megan Foley, writing about Aristotle's view of violence, argues that violence is a force of which rhetoric is a species if one conceives of rhetoric as a kind of force.[40] Foley argues that, for Aristotle, persuasion manifested in rhetoric, and coercion manifested in violence resemble one another, but that their fundamental difference is hinged on the question of necessity.[41] For Aristotle, the voluntary and persuasion are on one end, while necessity and violence are on another, because the former falls within the realm of deliberation while the latter does not.[42] Thus, while persuasion could be argued to resemble violence purely on the basis that they both contain elements of force, Foley stresses that the two are not identical precisely because necessity exists outside of deliberation.[43] The deliberation that Foley speaks of is in my view homologous with the mediation that Bitzer argues is a crucial component for the existence of a rhetorical situation.

Taking into account the views of both Bitzer and Foley in considering the relationship between Milla and Agaat, it is clear that there is no rhetorical situation to be found insofar as the violence, abuse and brutality persist. However, *Agaat* is written in such a way that the possibility of an emergence of discourse that allows for a rhetorical situation to arise, as the power dynamics shift between Milla and Agaat later in the novel, is never quite foreclosed. *Agaat* is, accordingly, not a novel of Apartheid as Total Domination or, to put it in the terms of late apartheid discourse, of Total Strategy.[44] The power shift between Milla and Agaat shall be addressed and critically unpacked below. For now, understanding that no rhetorical situation exists so long as violence and abuse dominate a discursive relationship is important when it comes to elaborating the discourse of violence's effects on the unequal subject from a psychoanalytic perspective.

**Residual Rhetoric between Milla and Agaat *vis-à-vis* Jak**

While the nature of the relationship between Milla and Agaat is underpinned by a violence that shuts the realm of possibility for a rhetorical situation, rhetoric – and indeed the rhetorical selves of the two characters – rears its head in the kitchen while both characters perform "the work of women": this work occurs through the deliberative efforts of Milla as the Mistress and Agaat as the Maid in relation to Milla's abusive husband, Jak, who is a representation of a patriarchy they must contend with as long as he lives.[45] Part of the novelistic brilliance of *Agaat* has to do with the way in which it articulates the complexity of the relationship between Milla and Agaat, never

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[40] Megan Foley, "Of Violence and Rhetoric: An Ethical Aporia", *Quarterly Journal of Speech,* 99(2), 2013, p. 191.
[41] *Ibid.* 192.
[42] *Ibid.* 194.
[43] *Ibid.* 196.
[44] "Total Strategy" and "Total Domination" are outlined in volume 2 of the *Truth and Reconciliation Commission of South Africa Report* (Pretoria: Government Printer, 1998), pp. 26-700 and referred to the co-ordinated efforts of the P.W. Botha government and non-government agents to prevent the perceived "total onslaught" of communist revolution from being successful.
[45] This point is highlighted in a conversation Milla has with her mother where her mother says to her: "we women may be the weaker sex, but we're actually in charge, you know that as well as I. We just work in different ways. We needn't be scared. We've got a hold of [men] where it hurts most […] a good housemaid […] live[s] for their mistress […] kitchen, co-op, consistory […] a rumour in these regions […] is the best way of keeping a man in his place […] then you can set your terms." Van Niekerk, *Agaat*, p. 145.

quite reducing it to crude narratological archetypes. An important aspect of this attention to complexity is that it enables Van Niekerk to make it clear that there remains an undeniably intimate bond between Agaat and Milla. The intermittent emergence of the rhetorical selves of the two characters is indicative of, on the one hand, the residual role of Milla the mother/Milla Redelinghuys; and, on the other, Agaat's residual role as Milla's adopted child.

It is precisely because of this intermittent emergence of rhetorical selves between the two characters in relation to Jak that *Agaat* is neither a novel of total domination nor one of domination as a discursive totality. On one occasion, whilst fighting with Milla in the kitchen, with Agaat present, Jak himself picks up on the intimacy and care of Milla and Agaat's relationship, and articulates his suspicion about it.[46] It is, for instance, impossible not to notice that Agaat, like Milla's mother before her, is perpetually looking out for Milla's well-being when Jak threatens it. For example, when Milla protests to Jak that Jakkie is too young to kill a lamb, Milla recalls that Agaat had: "plonked the coffee pot down hard in front of your nose. 'Not too much' she'd said to you, 'it's strong'. Her voice was direct. You were silent. She had silenced you. You knew the tone, for your own good you'd better not say another word, the message was clear."[47]

Subsequent to this intimate and deliberative form of communication, Milla and Agaat changed the conversation to cake, to which Jak, in frustration, responded by saying: "you two and your everlasting cake".[48] He then proceeded to get up and walk out of the kitchen: in this instance the rhetorical self of Agaat the child persuaded Milla the mother not to upset Jak to the extent that he would beat Milla, as he usually did.

On another occasion, Jak turns violent when Milla questions his spending habits.[49] As if Agaat had been listening to the exchange, she walks into the room before the violence escalates beyond what it already had, and she interrupts by speaking in what Milla describes as "her business like housekeeping voice", claiming that she walked in because she wanted to return the ash pan to the fireplace.[50] It appears that Agaat, perhaps still remembering the tenderness of Milla Redelinghuys's love, and her love for Agaat the child, comes to her rescue. Milla describes Agaat as having boldly stood in the room, the iron poker in her stronger hand, her gaze fixed on Milla – who had covered her face in shame at being seen by Agaat having just been struck by Jak – and she had said: "Sometimes […] sometimes I wish I could …."[51] In this moment, Agaat was referring to something she wanted to do to Jak, which Milla picked up on, as she often did when Agaat spoke in code to Milla about Jak. It appears that, like the aforementioned kitchen scene with Jak, his presence in any space determines their use of language, but that language also (co-)determines the space. In the scene in which Agaat had barged into the room, Milla tells Agaat to leave, and that

[46] In an accusatorial manner, he asked: "what's to become of us [referring to Milla and himself]?" He continues to ask "is that what the two of you want to know? Well, all I can say is: please be patient, your curiosity will be rewarded. Otherwise do use your imagination in the meantime, between the two of you, you can calculate the precise degree of heat at which the earth will perish." Van Niekerk, *Agaat*, p. 360.
[47] Van Niekerk, *Agaat*, p. 323.
[48] *Ibid*.
[49] *Ibid.* 459.
[50] *Ibid.* 460.
[51] *Ibid.*

it was not her business, and she recalls her disbelief as Agaat responded: "it is … it is most certainly my business."[52] This is an insistence, then, of Agaat once more asserting her rhetorical self in relation to Milla and doing so in order to stave off the threat of Jak's abuse.

Indeed, this scene, and the exchange between Milla and Agaat as if Jak was not in the room, is one of the many intimate moments that Milla and Agaat share through linguistic coding, reminiscent of a different context in which the rhetorical selves of Milla the mother and Agaat the child respected, if not loved, one another. Thus, this scene is a continuation of the pattern in which Agaat looks out for Milla. The irony here is that Agaat's rhetorical self – itself severely diminished by Milla's abuse of her – comes in aid of Milla's rhetorical self, because the violence Milla is currently experiencing is killing off any remnants of the rhetorical self of Milla Redelinghuys that may remain. It is worth noting that this pattern of looking out for one another is usually reciprocated, for indeed in this scene Milla too is looking out for Agaat, for fear that Jak may very well turn violent towards her, which is why she tells Agaat to leave the room. What is abundantly clear is that, regardless of the abuse and violence that Agaat has been subjected to at the hands of Milla de Wet (as the mistress of Grootmoedersdrift) throughout most of her adult life, and the violence that Milla herself is experiencing in her marriage to Jak, whatever small semblance of Agaat the child that remains still remembers and perhaps loves the semblance of Milla Redelinghuys that may be getting systematically extinguished by Jak's beatings.

Stated differently, in the discourse between Milla and Agaat, there remain the residues of rhetorical selves in relation to each other, indeed in alliance with each other. The rhetorical situation that arises, arises itself for the sake of what remains of the rhetorical selves of each of them. It is a rhetorical situation that arises, as it were, in a state of emergency, when Jak's superior violence threatens to annihilate these residual rhetorical selves altogether. Perhaps Agaat ultimately intervenes only for the sake of whatever remains of her own rhetorical self, because she knows that, if she does not intervene in the way that she does, and Milla's rhetorical self undergoes even further regression, she, her rhetorical self, will ultimately bear the brunt of it. Even if this is the case, Milla, as I have shown, reciprocates Agaat's rhetorical intervention. In other words, in these instances, and in these instances of rhetoric alone, Milla treats Agaat as though she is an equal, an equally worthy rhetorical self.

**Forgiveness and / or Reconciliation?**

Bearing in mind the discussions about the fundamentally abusive nature of the relationship between Milla and Agaat, the novel eventually evokes the question whether it can be said that, despite everything, Agaat forgives Milla. The question is textually foregrounded by way of Van Niekerk setting the date of Milla's death as 16 December 1996 – the official public holiday known as the Day of Reconciliation in South Africa.

The literature on transitional justice in "post"-apartheid South Africa routinely considers forgiveness as inextricably linked to reconciliation. Indeed, the TRC continues to be criticised for the way in which it Christianised the language of political

[52] *Ibid.*

reconciliation by introducing forgiveness into it.[53] By introducing this intertextuality via the date of Milla's death, Van Niekerk forces the reader to consider not only whether forgiveness *takes place* in *Agaat*, but indeed to consider this question in the context of reconciliation, prompting the reader, as it were, to consider the differences between forgiveness and reconciliation. One question that I will consider by way of the discussion below is whether the date points to reconciliation rather than to forgiveness in the novel, or whether it points to forgiveness as a pre-condition for reconciliation.

In *Agaat,* on the exact date many years back, Milla had found and captured Agaat. For all intents and purposes, Milla accordingly dies on *Agaat's* "birth" day. And yet, Van Niekerk never quite spells it out that the dying (out) of the old is a precondition for the new to be born. For this reason, Van Niekerk also leaves it to the reader to decide whether forgiveness has indeed occurred. She requires her reader actively to engage their mind, taking into account the sum total of events in the novel. Due to the pervasiveness of the discourse of abuse, however, it is difficult to say with sufficient certainty whether forgiveness is possible after so much violence and violation.

My sense is that in spelling out this date as the day that Milla dies, Van Niekerk carves out a space in the novel for thinking about the differences between reconciliation and forgiveness. In order to engage meaningfully the question of reconciliation and / or forgiveness in *Agaat*, it is necessary to engage Jacques Derrida's thought on forgiveness in the context of transitional justice processes that took place all over the world in the early and mid-nineties. The primary focus of the discussion here will be Derrida's short book *On Cosmopolitanism and Forgiveness* (2001), and the essay therein titled "On Forgiveness".[54]

Derrida takes issue with forgiveness in service of finality, regardless of whether or not the forgiveness is "noble".[55] Alex Thomson recalls Derrida's view of his homeland of Algeria in the context of President Bouteflika's inappropriate use of forgiveness for political purposes under the guise of national reconciliation.[56] Indeed, Algeria is the quintessential example to show how forgiveness in service of finality is manifested, and why it is problematic. Thomson argues that it is clear that Derrida believes in the Algerian reconciliatory agenda, and makes it clear that he desires peace for Algeria, because peace is crucial for the Algerian nation to survive. However, Derrida is troubled by a peace that would appear to come only at the cost of destroying ethics.[57] For Derrida, the issue with the idea of political reconciliation, and the kind of forgiveness it proposes, is that it can impose an amnesiac effect in relation to injustice.

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[53] Anglican Archbishop, Desmond Tutu, was elected as the chairperson of the TRC, and was quoted by T.A. Borer, "Reconciling South Africa or South Africans? Cautionary Notes from the TRC", *African Studies Quarterly,* 8(1), 2004, p. 24, as saying: "the key concepts of confession, forgiveness and reconciliation are central to the message of this report". Indeed, P.G.J Meiring "Pastors or Lawyers? The Role of Religion in the South African Truth and Reconciliation Process", *Hervormde Teologiese Studies*, 58(1), 2002, pp. 328-339, observed that the proceedings were excessively Christian, with hymns being sung at the majority of hearings, and with an opening prayer and a closing prayer by Tutu.

[54] Jacques Derrida, "On Forgiveness", in *On Cosmopolitanism and Forgiveness*, trans. M. Dooley and M. Hughes, preface S. Critchley and R. Kearney, (London: Routledge, 2001), pp. 27-58; Jacques Derrida, "On Forgiveness", *Studies in Practical Philosophy,* 2(2), 2000, pp. 81-102.

[55] Derrida, "On Forgiveness", 2001, p. 32.

[56] Alex Thomson, "Derrida's 'Indecent Objection'", *Journal for Cultural Research*, 10(4), 2006, p. 296.

[57] *Ibid*. 297.

For Derrida, it is this amnesiac effect that destroys ethics. Referring to a 2006 *New York Times* article by Craig R. Smith, Thomson confirms Derrida's concerns when he refers to an Algerian woman who was quoted as saying: "We don't have the right to talk about these things anymore […] they want people to forget."[58]

For Derrida, the consequence of forgetting is that it functions to cause further injury to victims: by requiring forgetting, a scene is set for further violence to be inflicted on the victims in the name of reducing violence.[59] As Thomson highlights, for Derrida, where reconciliation functions in a manner that requires forgetting, one has a right to make an "indecent" objection to such a form of reconciliation.[60] What makes the objection "indecent" is the fact that, as Derrida himself remarks, "of course no one would decently dare to object to the imperative of reconciliation",[61] but it is nevertheless an important objection if it requires victims to forget injustice. It is clear, then, that for Derrida remembering is a part of justice itself.

From the Derridean point of view, the indecent objection would occur where forgiveness is used in service of finality. To this effect, Derrida highlights the case of the Japanese Prime Minister making an apology and asking forgiveness from Korean and Chinese people for acts Japan committed against their countries in the past.[62] His contention here is two-fold; on the one hand, Derrida argues that the rhetoric of forgiveness is foreign to the traditions of Japan and even Korea, and on the other hand, he finds the incongruity of the Prime Minister's apology as existing within a context of what he refers to as the globalisation of forgiveness, which he describes as "[a]n immense scene of confession in progress, thus virtually a Christian convulsion-conversion-confession, a process of Christianization which has no more need for the Christian Church."[63]

He argues that this globalised forgiveness is also spectacle-oriented, and is thus "hollow, void, [and] attenuated".[64] This spectacle-orientated forgiveness has its roots in the Abrahamic religious tradition, and has been reshaped to contain elements of political calculation and strategy.[65] For Derrida, forgiveness cannot be used as a manipulative political instrument. He therefore argues that where forgiveness is used as a tool in service of a political agenda and thus in service of finality, especially through the law, such instances of manipulation render this forgiveness obscure in its limits and fragile in its foundations.[66] Derrida warns that generous gestures of offering amnesty or reconciliation, both of which are quintessential to a spectacle-orientated form of forgiveness, have nothing to do with true forgiveness for he argues "forgiveness does not […] should never, amount to a therapy of reconciliation".[67] In other words, in the Derridean taxonomy, forgiveness is more than reconciliation.

Indeed, it is on this surplus quality of forgiveness that Derrida bases his distinction between forgiveness and reconciliation. He notes that the reason why

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[58] *Ibid.* 296.
[59] *Ibid.* 297.
[60] *Ibid.* 298.
[61] *Ibid.*
[62] Derrida, "On Forgiveness", 2001, p. 31.
[63] *Ibid.*
[64] Derrida, "On Forgiveness: A Roundtable Discussion with Jacques Derrida", pp. 54 and 57.
[65] Derrida, "On Forgiveness", 2001, p. 40-41.
[66] *Ibid.* 30.
[67] *Ibid.* 40.

reconciliation is not forgiveness is because, unlike forgiveness, reconciliation requires the victim to speak and to understand and even agree with the offender.[68] Derrida argues that this does not produce pure forgiveness. He points out that the function of reconciliation can help us understand why it cannot produce forgiveness, for he notes that "it seeks to re-establish normality – whether political, social, psychological or national – by means of ecology of memory, mourning, or therapy that produces neither true forgiveness nor its concept".[69] Derrida takes issue with this forgiveness being used for political necessity because he believes that this form of "forgiveness" sacrifices true forgiveness because the former type is intended to provide a degree of security.[70] This is the quintessential example of forgiveness in service of finality.

This brings us to question the choice that Van Niekerk makes when she lets Milla die on the day that came to be known as one of reconciliation in a newly democratic South Africa. Does the name of the day on which Milla dies allude to a view that the only ethico-political possibility for Milla and Agaat, for all the Millas and all the Agaats of South Africa, is reconciliation? With forgiveness as a radical ethical surplus that remains of the order of the impossible? It is interesting that Derrida speaks of the "ecology" of memory and therapy that produces neither true forgiveness nor its concept in light of the fact that a substantial part of the novel consists of Agaat reading Milla's diary entries, once Milla is wholly dependent on Agaat as her degenerative condition renders her bedridden and unable to speak, walk or bath herself. In reading the diary entries, it is as if Agaat's reading is a form of therapy through the ecology of memory contained in the diary. It is as if, through this reading and also through the embroidery that she performs throughout the novel, perhaps even through the entire procedure of nursing Milla to her death, Agaat attempts to recuperate, or simply attempts to recollect, and perhaps also tries to re-member the residues of her rhetorical self. Whether the therapy is for her alone, or for Milla, or indeed for both of them, is unclear, but what is clear from Derrida's point of view is that this ecology of memory on its own cannot produce true forgiveness.

What is, however, also clear is that in *Agaat* there is no sign of reconciliation as an institutionalised performance premised on the idea of forgiveness, while there is certainly (and finally) only the two singularities required for pure forgiveness: the guilty and the victim. Derrida argues that as soon as there is a third party who is present to bear witness, the scene is transformed from one with the potential to produce true forgiveness to one of either reconciliation, amnesty or reparation.[71] For Derrida, forgiveness exists outside the realm of the law, and he is accordingly of the view that any power in law that purports to offer forgiveness exceeds the bounds of the law.[72] Thus, the day of reconciliation as inscribed by law, if forgiveness is its intention, exceeds the law that purported to create it.

To make the above-mentioned point clear, Derrida refers to the case of the South African Truth and Reconciliation Commission (TRC), for the commission's power and formation, like the declaration of 16 December as the Day of Reconciliation by the democratically elected government of Nelson Mandela, were derived from

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[68] *Ibid*. 49.
[69] *Ibid.* 32.
[70] Thomson, "Derrida's 'Indecent Objection'", p. 297.
[71] Derrida, "On Forgiveness", 2001, p. 43.
[72] Jacques Derrida, "To Forgive: The Unforgivable and the Imprescriptible" in Caputo, Dooley and Scanlon (eds.), *Questioning God*, p. 32.

legislation. Here, Derrida cites the words of a witness whose testimony was given in one of the eleven official languages, and was translated into English by Archbishop Desmond Tutu, chairperson of the commission. The witness said: "a commission or a government cannot forgive. Only I, eventually, could do it. And I am not ready to forgive."[73]

What would make the "I forgive you" odious, sometimes unbearable, in this political setting, and even obscene in this spectacle-oriented show of forgiveness, is its affirmation by a sovereign (in this instance a commission authorised by law).[74]

In *An African Athens: Rhetoric and the Shaping of Democracy in South Africa,* Philippe-Joseph Salazar argues that in the South African context of the TRC, the purpose of presenting a report on the findings of the Commission was to mark the beginning of what he describes as a new social contract. This new social contract is one that was negotiated and sought to set the scene for the enactment of the Constitution as the symbol for the transition to a South Africa after apartheid.[75] In Derridean terms, the TRC is a body that could be described as "a scene of confession in progress […] with no need for the Christian Church" as such, because its "Christianity" was self-generated and self-maintained.[76]

Salazar mentions that even the preamble of the South African Constitution – a preamble he argues takes the form of a syllogism – explicitly articulates that the past and present are reconcilable because of the constitutional agreement to create a nation for all who live in it.[77] This nation is one that includes the perpetrators who had previously meted out injustices against their victims in support of the apartheid regime, who now form part of the nation regardless of whether they have accounted before the law for the injustices that they perpetrated.[78] Salazar argues that the form of forgiveness that the commission purported to give perpetrators was politically motivated.[79] In Derrida's meaning, this was not true forgiveness, but rather a shadow of forgiveness put forward in service of finality – finality manifested in the political agenda of nation-building at the cost of silencing victims and creating the scene for more violence than that which has already been inflicted.

Taking both the discussions of Derrida and Salazar into account, if Marlene van Niekerk expects her reader to infer forgiveness from the date of Milla's death and the legislated name of the public holiday, that kind of forgiveness is merely a shadow of forgiveness because it is inscribed by law, and requires a third party spectator; it is a forgiveness in service of finality, and is hollow and attenuated in comparison to true forgiveness. This conclusion leaves the question of forgiveness as such as "true", and, specifically, the question of when the process of true forgiveness can be argued to begin. I propose below that the process towards true forgiveness begins at the very moment when the injustice occurs.

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[73] Derrida, "On Forgiveness", 2001, p. 43.
[74] *Ibid.* 58.
[75] Philippe-Joseph Salazar, *An African Athens: Rhetoric and the Shaping of Democracy in South Africa*, (Mahwah: Lawrence Erlbaum Associates, 2002), p. 79.
[76] Jacques Derrida, "On Forgiveness", 2001, p. 31.
[77] Salazar, *An African Athens*, p. 79.
[78] *Ibid*. 85.
[79] *Ibid*. 84.

**The Remains of Injustice and "True" Forgiveness in *Agaat***

Looking at the three considerably diverse democracies of Ancient Greece, France and South Africa, Barbara Cassin provides insight into the ways in which truth and deliberative politics are linked.[80] She notes that the amnesty decree promulgated in the Constitution of Athens post-civil war in 403BC demanded that one must "not remember" or "recall" the civil war, whereas under South Africa's Truth and Reconciliation Commission (TRC), the imperative was one of full disclosure.[81] The importance of full disclosure at the TRC was that it was a condition of the possibility for membership of a deliberative community manifested in "the rainbow nation".[82] Cassin argues that what counted as full disclosure for the TRC was not that a person declared their *injustice*, but that they *declare* their injustice.[83] At the TRC, Cassin writes, there was no search for truth (disclosure) for truth, but for reconciliation instead,[84] thus highlighting that the TRC was engaged in performative discourse.[85]

At the TRC, anything that was the object of full disclosure received amnesty.[86] Reconciliation, then, as it related to amnesty, allowed for the transformation of evil into a common good.[87] Cassin notes that such a transformation was achieved through speech, for the reassurance of speech produces a common language that allows for the passage from the "I" to the "we".[88] If the *declaration* of injustice allows for the "we" to emerge, then that declaration – a recognition of fact – belongs not to the realm of the ethical, but to that of the political.[89] Amnesty in the context of reconciliation, therefore, functions to construct a community and its institutions on a shared amnesia after disclosure.[90] To this end, Cassin, referring to Hanna Arendt's Sophistic-Aristotelian commentary, says that to consider truth in the political is to step outside the domain of the political.[91] This is to say, truth (disclosure) for truth's sake exists neither in a political setting nor in view of a political objective. History, therefore, if it is to be conceived of as a product of politics, is not the seeking of truth but rather a *declaration* of injustice.

Indeed, Thomson notes that for Derrida history is not reconciliation, but rather an infinite passage of violence in which the affirmation of violence allows for a lesser amount of violence.[92] According to this argument, the acknowledgement of the initial violence and injustice produces a mitigation of the possibility of worse violence and injustice occurring, *rather than* that there shall be no more violence at all. For Agaat, the recognition of being cast out of the house by Milla as the violence of an injustice occurs on the night she decides to bury the suitcase containing not only her childhood belongings, but also the rhetorical self of Agaat that is materially manifested in and

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[80] Barbara Cassin, "Politics of Memory on the Treatments of Hate", *Javnost – The Public*, 8(3), 2001, p. 9.
[81] *Ibid.* 15.
[82] *Ibid.* 20.
[83] *Ibid.*
[84] *Ibid.* 15.
[85] *Ibid.*
[86] *Ibid.*
[87] *Ibid.* 12-13.
[88] *Ibid.* 13.
[89] *Ibid.* 19.
[90] *Ibid.* 12.
[91] *Ibid.* 14.
[92] Thomson, "Derrida's 'Indecent Objection'", p. 297.

through those belongings.[93] The burial of the suitcase thus *marks* the incident as violent and unjust.

It is, perhaps, the recognition of the initial violence that sets the scene for the possibility of forgiveness, for even when she is subjected to more and more violence subsequent to her eviction from the house, she had already recognised the "original" violence and the subsequent violence and injustice are thereby deemed incomparable. If this line of thinking is pursued, it may also prove helpful in explaining why, when Milla strikes Agaat for Jakkie's loss of confidence in himself over a girl, she stands stock-still and absorbs all the blows[94] – indeed, perhaps no subsequent violence can match the violence of being cast out of the house by Milla.

The recognition of the initial violence and injustice tangibly manifests for Agaat when she decides to create the gravesite, a rhetorical yet heterotopic space that would be the resting place of her rhetorical self, who died on the day she was cast out by a woman about whom she had once proclaimed "Même you're my only mother."[95] As readers, we would assume that Agaat as she once was is dead and buried, but I argue that this Agaat was held in residual form by the mere existence of that grave, and was therefore diminished but not extinguished. The grave contains the remains and it is from the "place" of those very remains that Agaat is, at times, however briefly, able to speak rhetorically, in her own voice. It is, moreover, from the place of those remains that the possibility of the impossible forgiveness, literally and figuratively, arises.

If, as suggested above, it should not be inferred merely from the date on which Milla dies that forgiveness has somehow taken place, and if the question of true forgiveness remains, then it is important to discuss what Derrida understands true forgiveness to be, in order to ascertain whether it can be inferred from the subsequent narrative sequence that Agaat forgave Milla.

For Derrida, there is a paradox to forgiveness, for in even thinking about forgiveness one must ask oneself whether you forgive the person who has done you wrong, or the act that constitutes the wrong, or even whether the person and the act are the same thing. As Derrida asks: "what do I forgive? And whom? What and whom? Something or someone?"[96] From this he proceeds to ask a rhetorical question, saying: "In order for there to be forgiveness, must one not … forgive both the fault and the guilty *as such*?"[97]

When Milla casts Agaat out of the house, she is described as having taken her suitcase of childhood belongings to bury, but it is not clear whether she is angry at being cast out (the fault), or angry at Milla (the guilty), or both. What is, however, abundantly clear is that in burying her belongings, Agaat is also burying (parts of) herself. Indeed it can be said that the mountain on which Agaat buries her suitcase full of childhood belongings, and her rhetorical self too, is a cemetery and, as such, functions in the space of the novel as a heterotopia.[98] The heterotopic cemetery that

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[93] On the day in question, she "[t]ook the suitcase filled with the dresses and shoes of the child she'd been and went and buried it deep in a hole on the high blue mountain across the river. And piled black stones on top of it. And trampled it with her new black shoes and cocked her crooked shoulder and pointed with her snake's head hand and said: Now, Good, you are dead." Van Niekerk, *Agaat*, p. 689.
[94] Van Niekerk, *Agaat*, p. 551.
[95] *Ibid.* 483.
[96] Derrida, "On Forgiveness", 2001, p. 38.
[97] *Ibid.* 39.
[98] Michel Foucault, "Of other Spaces", *Diacritics*, 16(1), 1986, p. 26.

Agaat fashions for herself is outside the confines of the farmhouse and its yard. As such, it exists as a peripheral outside of the discourse of abuse as it is practised in the centre of Grootmoedersdrift. Agaat chooses this site because it is remote, so remote that she could forget about it, and yet it is still accessible enough that she could return if she pleased.

As Foucault writes, part of the reason why the cemetery can be regarded as a heterotopia belonging outside of the spaces of the living is because of the contemporary idea that its presence and proximity to those who are living brings the "illness of death".[99] From this comes a notion that death infects the living, and so it needs to be kept as far away as possible. In view of this, perhaps the decision that Agaat makes on the night of the burial is precisely to locate her symbolic cemetery as far away from her as possible so that the death of "Good" does not infect Agaat the adult, the servant, and the caretaker.

Yet, the cemetery is not only the site where the remains can be encountered (again). It is precisely also the site from which the remains can be *retrieved* – and this is exactly what happens when, just as Milla is about to die, Agaat returns to the site and recovers the buried possessions.[100] Taking into account the theory of Bitzer in relation to the exigence, which allows for the discourse of a rhetorical situation to exist, perhaps Milla's imminent death is the purest equaliser of a long-standing grossly unequal relationship marred by violence and abuse. The recovery of the remains marks this transformation as the exigence out of which the rhetorical situation arises. Thus, the situation is transformed from one lacking in rhetorical discourse, to one imbibed with rhetorical discourse. This manifests in Agaat regaining her ability to participate rhetorically in the condition or situation that determines her life.

The scene when Agaat returns to get the suitcase full of her childhood belongings is described as her returning to retrieve the suitcase that she buried "on the night of the burial of the heart".[101] What she does next is arguably one of the most peculiar occasions in the book, for she takes the belongings of her childhood and places them on Milla's bed for her to touch – Milla, at this point, is close to death and has lost her sight.[102] When Milla finally dies and her body is moved out of the room, the contents of the suitcase remain on her pillow in a rather ceremonious manner. This series of events suggests that Agaat, the rhetorically revived Agaat, rather than Agaat the violently abused servant and the caretaker, forgives both Milla Redelinghuys and Milla de Wet as guilty, *as well* as the fault. The placing of the objects that represent the fault *in the presence* of the perpetrator brings the guilty and the fault together, finally to be judged in the presence of the victim.

There is a part in the novel in which Milla, in her characteristically unspoken moments of reflection and possibly remorse wonders: "How will Agaat judge … when Agaat has the 'meaning of everything' carved on my headstone, will it be a 'last curse or blessing'?"[103] When Milla dies, it is Agaat who erects her tombstone. On it she inscribes Milla's name and maiden surname – an intentional decision that could be read to honour Milla's rhetorical self. On the tombstone, Agaat inscribes a judgment,

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[99] *Ibid.* 25.
[100] Van Niekerk, *Agaat*, p. 647.
[101] *Ibid*. 495.
[102] *Ibid.* 647.
[103] *Ibid.* 423.

which reads: "and then God saw that it was good".[104] This inscription is undoubtedly intentional considering the practical technicalities of choosing and erecting a tombstone, but is also important in that it is an explicit reference to the Book of Genesis in the Christian Bible, where God looks at his creation, and is satisfied.

Derrida concludes that "forgiveness is mad … a madness of the impossible".[105] To this effect, he invokes another example to highlight the madness of forgiveness: the victim of the worst, as I would argue Agaat is. The victim of the worst is for Derrida a person who has forgiven the perpetrator, and yet demands that they appear before a court to be tried for their crime. Agaat exhumes the original fault and casts one last judgement on Milla de Wet for what she had done to her. The trial of Milla de Wet occurs before she dies when Agaat places the belongings on Milla's bed for her to touch, and to be judged for what she had done to another Agaat all those years ago.

The victim of the worst, while also demanding justice be seen to be done, can forgive. I argue that Agaat, as described by Jakkie at Milla's funeral, is a victim of the worst who has demanded their trial, but has forgiven nonetheless. Jakkie observes her and describes her: "her cap was tighter, more densely embroidered than I remembered it, spectacles on her nose … her steps energetic …."[106] She sounds like the same Agaat of the novel, but she is different. Other than her description, the description of the funeral is important, not only because Jakkie describes Grootmoedersdrift as an abundance that never suffices – referring to the excess of food that was left over a week after the funeral – but related to that description of the farm, and more specifically represented in Milla's funereal shroud.

First, the shroud is significant because its embroidery represents the painstaking process by Milla of not only giving Agaat her first embroidery lesson many years back, but also the manner in which Milla has moulded Agaat in her own image.[107] Secondly, in relation to the first point, the shroud's weaving is metaphoric of the interwoven and "densely embroidered" nature of their lives, for it depicts significant events in *both* their lives.[108] Thirdly, the story woven on the shroud is as much their history as it is the history of South Africa,[109] that is why it is significant that, upon completion, after Agaat had painstakingly filled in, unpicked and redone patterns,[110] she proclaims to a dying Milla: "before I wash and starch it, I must first put it on and go and lie in your grave with it."[111]

At Milla's funeral, Jakkie describes the shroud as "Genesis and Grootmoedersdrift in one, a true work of art, must have taken a lifetime, every stitch in its place."[112] Both shroud and food are presented under the sign of excess, of surplus, indeed of excessive surplus: Agaat has given Milla Redelinghuys the utopia she so badly wanted to create on the farm, even if but for a day. As such, these excesses tell the story of a forgiveness that has, however painfully, taken place, or, perhaps, is still taking place.

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[104] *Ibid.* 681.
[105] Derrida, "On Forgiveness", 2001, p. 39.
[106] Van Niekerk, *Agaat*, p. 677.
[107] *Ibid.* 541.
[108] *Ibid.* 487.
[109] *Ibid.*
[110] *Ibid.* 368.
[111] *Ibid.* 584.
[112] *Ibid.* 677.

It is therefore immaterial that Agaat never speaks, and says "I forgive you". For Derrida, whether the victim of the worst says that they forgive or do not forgive is a zone of experience that remains inaccessible to others, a secret to be respected.[113] Agaat's forgiveness cannot help Milla to rest easy. Indeed one cannot, quite literally, forgive a dead person if one takes the view that forgiveness happens amongst the living. It is impossible to forgive the dead, and yet it happens that the living forgive the dead all the time.

For Derrida, forgiveness is an event; it is something of the order of the impossible that, all of a sudden, arrives on the scene of the possible. Nothing can predict it; nobody can calculate its coming. By saying it is impossible, Derrida does not mean that forgiveness does not and cannot happen, but rather that it is impossible until the very moment when it happens. Derrida makes this point clear in *On Forgiveness* when writing about what he perceives as Vladimir Jankélévitch's forgiveness of a German man, as a Jew, communicated implicitly by a lengthy exchange of letters after the Second World War ends, to which Derrida declares: "the uncrossable will remain uncrossable at the very same moment it will have been crossed over."[114]

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[113] Derrida, "On Forgiveness", 2001, p. 55.
[114] Jacques Derrida, "To Forgive: The Unforgivable and the Imprescriptible" in Caputo, Dooley and Scanlon, *Questioning God,* p. 41.

# 'With no sanction for lying'—Recollecting the potential of a few dispossessing words

Erik Doxtader

1. These were strange words, for which there was little time and about which there was not much to say. One week before the 1994 election, *the* election, South Africa's *Mail & Guardian* (backed by BP Southern Africa and the Anglo American Corporation) presented its readers with an "easy-to-read guide" on the new Constitution—"*our* document," it declared, one "forged for our specific needs on the anvil of tough and lengthy negotiations." Such a guide was necessary, the paper suggested, as it was difficult to find a copy of this "immensely important document" that "gives ordinary people powers, rights, protections that they have never had before." Noting that the Constitution had yet only been published in two languages and launched without the benefit of a media campaign, the paper contended that it was a "vital document that is too little understood". Its terms, details, and ambiguities—the "Constitution is not perfect"—needed to be grasped by "ordinary citizens".[1]

And so, over the course of eight small-print tabloid pages, the paper offered a summary (infused with more than a little explicit editorial commentary) of the chapters, including the Bill of Rights and the constitutional principles, of what it called—without any explanation, which amounted to a curious omission given the guide's articulated premise—the "transitional Constitution". For the most part unsurprising, the striking moment of this interpretative guide appears at the close, as it turns to the Constitution's final passage, "National Unity and Reconciliation", and declares that "the Constitution ends strangely with a section on the need for reconciliation", along with an instruction to Parliament "to pass an amnesty law for political crimes".[2]

The Constitution ends strangely. In its entirety? Relative to what? For whom? At a cost? The *Mail & Guardian's* judgment comes without elaboration or explanation. It smacks of a certain reservation, if not the sort of derision that signals relative inattention. What precisely are we talking about? What precisely is being said here? A strange ending, as when the words don't readily follow or properly add up, when they are out of place, estranged from that to which they are nevertheless tied? Or these words here do not quite belong here—they are a poor way to end "*our* document"?

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[1] "Get to Know Your Rights: A point by point guide to the Bill of Rights and to the new Constitution", *Mail & Guardian,* Special Section, 22 April 1994 (print), 1. Not unrelated and quite telling, the same issue of the paper includes an advertisement by Exclusive Books, one that features a political party acronym-spouting giraffe without spots and a reporter (or a member of the Civil Cooperation Bureau?) in dark glasses and a trench coat asking "Que?". The ad copy reads: "South African for beginners. Man, as a Greek chap called Aristotle once said, is by nature a political animal. Indeed. But if you have tried figuring out who's who in the zoo these days? If you don't know your ANC from your elbow, see our huge range of books about South Africa" (*Mail & Guardian*, 22 April 1994, 16). The troublesome terms of the advert become all the more problematic as one recalls the ANC's longstanding claim that apartheid was a system that set human beings into a zoo of being.

[2] "Get to Know Your Rights", p. 7.

Or these words do not fit well with *our* defining words, or they call for words that are simply not *ours,* not words that are *our* own or words that are not *ours to* give?

What "ends strangely" may or may not contain a strange end.[3] It is difficult to tell, save to say that the terms of that which settles is heard to close in an unsettling way. But, in the end, there was apparently little to be said and little need to say much more about this ending. It was self-evident or did not much matter—except that it wasn't and it did. If, in the weeks prior to the election, the media seemed indifferent if not oblivious to issues addressed in the closing section of the interim Constitution (there will be a moment in which to ask after its proper name), it was not because these matters were new or secret.[4] Indeed, they were concerns that had provoked significant attention and controversy during the long days and late nights of negotiations at Kempton Park.

In the moment, on the cusp of the election, however, the beginning promised by a strange ending did not yet have a clear referent, a referent that these last lines of the interim Constitution would soon enough call into question:

> "**National Unity and Reconciliation**
>
> This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.
>
> The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.
>
> The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.
>
> With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.
>
> Nkosi sikelel' iAfrika. God seën Suid-Afrika

[3] It's curious to look at the before and after, that is, the reading of the interim Constitution's close and the coverage of the post-election mood, one which featured dedicated attention and unquestioning celebration of "reconciliation in motion". See *Mail & Guardian*, 13 May 1994.

[4] In the weeks prior to the election, the silence is notable and puzzling. One (enthymematic) exception: an advertisement in the *Mail & Guardian* for the University of Cape Town's "Democracy and Difference" Conference, an event promising panel discussions on "Transitions to Democracy", "Demilitarization and the Recovery of Civil Society", and "Combatting the Legacy of Violence and Fear" (*Mail & Guardian*, 22 April 1994, p. 22). The more decisive conference, of course, had already occurred in February, the IDASA-sponsored event, "Dealing with the Past". For a detailed reflection on the incongruity of the silence, see Andre du Toit, "A Need for 'Truth'-Amnesty and the Origins and Consequences of the TRC Process", *International Journal of Public Theology*, 8(4), 2014, pp. 393-419.

> Morena boloka sechaba sa heso. May God bless our country
> Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika."[5]

Why concern ourselves with these words again? It is not that the 25th anniversary of the election somehow demands their recollection, more than likely as the basis for yet another "progress" report. And it is not to proclaim the timeless quality of these lines, whether as founding myth or abstract promise. It is rather that this strange ending asserts a question for now, a question that presses here and now, as apartheid remains, as it remains in the midst of a transition predicated on the continuity of law's rule. Lacking a proper name, this passage names the question on which this turn may hinge, the rhetorical question of how to undertake and sustain a critique of legal violence, a critique that interrupts the law's articulation, discloses the contingency of its founding words, and invites expression that refuses the (double) binding logic of its contract. Holding "no sanction for lying", as Walter Benjamin put it, these lines at the end of the interim Constitution hold a question of language for now, a question that has haunted the South African transition since the first tentative days of "talks about talks" (and which likely runs back to the streets of 1970s Soweto and back further into the rise of Afrikaner nationalism) and which speaks quietly to a way in words to begin again.[6]

2. Cited and recited—over and over. Though perhaps still strange (or not), there is no denying that the last section of the interim Constitution is now ever so familiar, a ready commonplace about which and with which to speak. Twenty-five years on, so very much has now been said about these or some portion of these 298 words. So much has been said in their name. Over time, and within notions of history-making that it may well trouble, these few lines have steadily provoked, steadfastly defied the "interim" of the interim Constitution in which they appeared (only a portion of which, in a somewhat different tone, were carried and placed in the pre-amble of the 1996 "final" Constitution). Nationally and internationally, they are one of the definitive referents of South Africa's "negotiated revolution", the turn that some touted as "miracle", others count as undue compromise, and others still lament as a treasonous betrayal of nation and struggle. No even half-serious history of the transition from apartheid to non-racial democracy fails to overlook these words and make some note of their role in the work of history-making. It is a given that they are important. The question is how they matter. Precisely what do these lines say? What does this passage mean? What does this closing do? There are now so very many answers to these questions, far more answers, in fact, than there are reflections on the questions themselves.

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[5] Constitution of the Republic of South Africa Act 200 of 1993. Retrieved from: https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993 [Accessed 19 October 2019]. The section titled "National Unity and Reconciliation" is reprinted here as it appears on the South African government website. Also see: https://www.sahistory.org.za/sites/default/files/constitution_of_south_africa_1993.pdf [Accessed 19 October 2019].

[6] Some of what follows draws from and deepens an earlier reading of the last lines of the interim Constitution, with a concern for the beginning of reconciliation as the history of an ongoing critique of violence. See Erik Doxtader, *With Faith in the Works of Words: The Beginnings of Reconciliation in South Africa, 1985-1995,* (Cape Town/Ann Arbor: David Philip/Michigan State University Press, 2009).

Pause, for a moment, to recall just a bit of the collection, some of what has been given and what's now taken as common cause about this passage.[7] In more or less structural terms, it is held variously to be a demonstration of the negotiation process, the expression of a necessary compromise, and the remainder of what could not be done at the bargaining table; it is read as a constitutive element of an interim Constitution, a non-derogable and undecidable constitutional norm, the close and extension of a state of emergency, a case for popular sovereignty, a mechanism for transition with legal continuity, the basis of a new jurisprudence, a means of historical interpretation and history-making, a call if not a command for reconciliation, a source and rule of law, a legal and unconstitutional mandate, not least for "amnesty", and the "cause" of the Truth and Reconciliation Commission (TRC).

Functionally, the passage has been taken as an inducement to non-violence and cooperation, a political ideal and distraction, a rich and empty promise of progress, a visionary and undue compromise, an expression of (in)sufficient consensus, an agreement that enacts and debases law, performs and confounds recognition, enables and disrupts transition, and redistributes and conserves political and economic power. It has been held up as the performance and the debasement of reconciliation itself, which has fed views as to how it is ambiguous to the point of being meaningless, a powerful expression of nation-building spirit, an embrace and departure from liberalism, and a turn to theo-religious ideas that may or may not count as dogma and which may or may not serve the interests of democracy. It has been deemed a path toward and away from justice, and a paradigm-making and rule-degrading mode of transitional justice. It has been claimed to make and break law and to shirk and embrace norms of legal accountability in the midst of a crime against humanity, not least with respect to its symbolic (non)effects and (in)attentiveness to material inequality. It has been taken as an expression of ANC hegemony and its capitulation. It has been heard to sound the end of apartheid and quietly ratify its continuation.

In terms of its ethical-political meaning, some of which is already evident, the passage is taken as far-sighted bravery and near-sighted cowardice—that is, as both heroic and tragic. It is viewed as a path out of the confines of civil war. It is held up as evidence of compromised virtue, especially as it is heard to legitimise impunity, demean those who suffered and struggled against apartheid, and betray the demands of law and common decency. And yet it is also heard as a reflection of a virtuous compromise that advances both legal culture and civility, not least as it follows from and expresses a politics that resists systemic injustice while taking pains not to avoid the same old traps of revolutionary idealism. This justification has struck some as

[7] This is not the space to catalogue. One of the most notable interpretations is the Constitutional Court's reading in the *AZAPO* case (*Azanian People's Organization (AZAPO) and Others v. President of the Republic of South Africa* 1996 (4) SA 672 (CC)). The Truth and Reconciliation Commission (TRC) itself included some passing discussion in its Final Report (see TRC, *Truth and Reconciliation Commission of South Africa Final Report,* Vol. 1, (Pretoria: Juta, 1998), pp. 48-102). Also see Lourens du Plessis, "Observations on the Amnesty and Indemnity for Acts Associated with Political Objectives in Light of South Africa's Transitional Constitution", *THRHR,* 57, 1994, pp. 950-981; Johnny de Lange, "The Historical Context, Legal Origins, and Philosophical Foundation of the South African Truth and Reconciliation Commission", in C. Villa-Vicencio and W. Verwoerd (eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa,* (Cape Town: University of Cape Town Press, 2000), pp. 14-31; Andre du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition", in R. Rotberg and D. Thompson (eds.), *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), pp. 122-140.

naïve, a wilful blindness to the ways in which this passage may have ideologically imposed unity at the cost of the diversity that it touts.

3. In all of this, it is sometimes difficult to imagine what has not been said, or what might yet be said about this passage. There are so many accounts of what this *is* and *is not*. So many contentions as to what this does or does not *do*. So many judgments as to whether and how this is *good*. Whether or not it can even be gathered, all of this expression reflects a pervasive and deep curiosity. Undeniably, something here provokes—and keeps provoking. Something here is decidedly important and thoroughly ambiguous. Something here signals that this is a place to begin. More than metonym and less than commonplace, it is the place to begin to understand a beginning—a remarkable but unsteady turn forward and backward, a recursive and ongoing transition, and an incomplete transformation. In so much of the discussion, there is a clear though not always explicit assumption that this is the point from which one must start—here is the corner piece of the puzzle.

And so often, so it goes. What happens, sometimes subtly but often quite crudely, is that a compound question is turned into a picture puzzle, a problem in which the task is to discern and fit discrete pieces to an apparent and given end. In so much of what has been said about it, this passage, a passage that inspires so many outright expressions of wonder and invites so much inquiry, has been taken and figured as an instrument, a means to a given end, a mechanism which is assessed for whether and how well it has revolved one or more problems. Quite frequently, the wonder has been used as opportunity to get in the door, at which point it has been turned into pretence and recast as an object of scrutiny, the focus of an inquiry in which a cynical turn has been represented as so much measured reflection.[8] So often, the passage's deep-seated and dynamic ambiguity is accused of being just so much ideological vagary or precarity-sponsoring inaction, an indictment that comes with a license to cut and separate the passage into "discrete" elements, all in order to assess its "actual" problem-solving power and determine precisely that for which it is responsible.

The instrumentalisation of the interim Constitution's close has been carried and sponsored by two popular readings. The first contends that this passage is not only the source but the cause of South Africa's Truth and Reconciliation Commission. On this popular view, it is a straight and unbroken line from the last lines of the interim Constitution to the first victims' hearings in East London. On this trajectory, the passage is folded into the TRC's authorising legislation, a move that obscures its larger and decidedly extra-legal history and reduces its meaning to the work of the Commission.[9]

The second reading, which is not necessarily exclusive of the first, cuts the passage into two pieces, often quite literally, and then focuses on one to the near

[8] Richard Wilson offered an early and influential example of this tack, one that has been rather robustly mimicked. See Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa,* (Cambridge: Cambridge University Press, 2001).

[9] The tendency is fed partly by the way in which the opening of the TRC's authorising legislation draws from the post-amble. For one example of this reading, see Drucilla Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (New York: Fordham University Press, 2014), pp. 54-55. On the contested and unsteady development of the TRC, see De Lange, "Historical Context", pp. 14-31; Doxtader, *With Faith in the Works of Words,* pp. 242-282.

exclusion of the other. The cut almost always happens between the fourth and fifth graphs, and most often serves to advance a consideration of the latter. The result is that it is now possible to read, for quite some time, on the implications of the passage's amnesty mandate without encountering its articulated concern for reconciliation or its contention that "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation"—these notions are simply disappeared, without apparent irony.[10]

If the first reading peddles a convenient truism and the second counts as conceptually naïve, if not rather mercenary, the point here is not to indict reading habits but to underscore the widespread presumption that the last lines of the interim Constitution are best taken as a problem-solving instrument, one that can be both used and assessed as such. The cost of this assumption may be less a cost than a set of category mistakes—or the begging of several basic questions. For one, it may extract this passage from the transition in which it appears, a transition that, at least temporarily, suspends and then troubles historical accounts of cause and effect—the force of history—and norms of historical interpretation, not least as these are complicit if not constitutive of violence. So too, the reduction of this passage to a means in the service of some end forsakes the question of its language, that is, how its terms—and a voice that seems to speak from *outside* the Constitution in which it is contained—articulate the choices that compose the conditions of (its) reading; the ways in which the language of means renders language into the very means that cover the question of language, the question of what can be said in the midst of violence, and what role the assumption and use of language plays in the conflict to which these lines are addressed. And finally, closely related, there is a hope for certainty that underlies and motivates the instrumentalisation of this passage. For a quarter century now, the literature has filled itself with *the* definitive rendering of these words, even if to say that they are definitively ambiguous. *Here* is the singular account of their role in the transition. *There* is the enduring account of their singular virtue or tragic flaw.

To line up and look across accounts of this passage is to discover how a few words have been turned and then confronted with a demand for certainty—what does this *actually* mean and actually do? What here *is* (im)possible?

4. There are things that cannot be said, things best not uttered—for now. This passage, a collection of words that move inside and outside a transition-creating interim Constitution, this passage has no proper name—or it has several, the most fitting of which constitutes a rhetorical question. And so, contrary to so many definitive renderings, it has always been difficult to say precisely what this passage *is*. That which closes the constitutive act that ends statutory apartheid resists the attribution of identity. Such a lack may well be a perfect (non-tragic) flaw.

[10] For one recent and rather overt example of this tendency, see D.M. Davis, "The South African Truth Commission and the *AZAPO* Case: A Reflection Almost Two Decades Later", in K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda,* (Cambridge: Cambridge University Press, 2016), p. 126. Similarly, Adam Sitze's "genealogy" of the TRC includes a consideration of the post-script that focuses almost exclusively on its amnesty mandate. This account, along with Sitze's concerns about the translation of *ubuntu*, shows little if any interest in the idea of reconciliation inside or outside the South African context. See Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission,* (Ann Arbor: University of Michigan Press, 2013).

This passage is not a "chapter" of the interim Constitution, at least as it was not assigned the conventional number and given how it seems to step back to declare the opening of a "new chapter". So perhaps then what we have here is a "preface", that is, what was written *after* in the name of articulating what is *prior*. Or, given its placement, perhaps this text is better called a "post-script" or a "post-amble"—a writing in the aftermath and an expression that both follows from and undertakes a movement. With these names, this text is attached to but not determined by that which precedes it, a relation that raises a question of status—this passage may be not so much a part of the whole as the part that steps back to articulate the conditions on which the whole depends, the grounds on which "this Constitution" rests and the meaning that it cannot itself express. If so, this justifies—a "fitting" name entails justification—another popular name for the passage: "epilogue". What is said in closing, for closure, an ending whose end holds the question of *logos*, an afterword about the given word.[11]

What then is the proper name of this passage entitled "National Unity and Reconciliation"? As it leaves the nation to float (does it modify unity or unity *and* reconciliation?) and then resists the popular (and academic) tendency to equivocate unity and reconciliation, this title itself suggests that the question is properly left open. Whatever this *is*, it is a provocation to reflect on the conditions of (not) belonging, a reflection that recollects apartheid's obsession with the name, the power to control the words that attribute definition, delineate identity, and enforce unity *as* differentiation. Endowed with a title—and so with standing as part of the interim Constitution—this constitutive passage is constitutive precisely as it resists a name, its name, in the name of resisting apartheid law's most basic gesture. Hence its perfect flaw—in lacking for a proper name, this passage opens the question of what stands before the law in the name of disclosing the grounds on which the law itself is constituted.

5. Whence … perhaps in the name of talking about talk. Between those who embrace and those who criticise the epilogue, there is often a common concern for history, whether in the form of recovering truth, documenting experience, resisting amnesia, or fighting revisionism. In this light, it is a bit tedious to discover how little attention is paid to the history of the post-amble itself.[12] Almost nothing is said about the conditions of its authorship or the context of its appearance. In many investigations of the TRC, the epilogue is often presented as an *ex nihilo* beginning or a *de facto* element of the Promotion of National Unity and Reconciliation Act. For those concerned with the negotiations process and the writing of the interim Constitution, the post-script is usually presented in passing, a more or less necessary and more or less complicit moment of compromise, one designed to placate more or less threatening security

[11] The interim Constitution itself refers to the passage as a "provision" with equal status to all other parts of the text. In the well-known *AZAPO* case, the Constitutional Court's majority decision used the term "epilogue", a name also favoured by Salazar. See the preface to this issue of the Yearbook, as well as his seminal work on the transition. See Philippe-Joseph Salazar, *An African Athens: Rhetoric and the Shaping of Democracy in South Africa,* (London: Lawrence Erlbaum, 2002). "Post-amble" is also quite favoured, as seen in respective works by Andre du Toit, John Dugard, Paul van Zyl, Jeremy Sarkin and David Dyzenhaus.

[12] A fuller account of the history that follows can be found in Doxtader, *With Faith in the Works of Words,* pp. 199-242. Mamdani has recently given a bit of attention to the negotiations process. See Mahmood Mamdani, "Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa", in *Anti-Impunity and the Human Rights Agenda,* pp. 329-360.

forces, or more or less ensure the continuity of rule of law and the possibility of more or less power-sharing.

The truth of these accounts obscures three qualities of the post-amble's moment. The first and most obvious is the pervasive and diverse violence in which the Multi-party Negotiating Process (MPNP) operated (and which more than once arrived at its front door). In mid- and late 1993, parts of the country were still governed by a state of emergency, largely in the name of de-escalating partisan violence, including the bloody and widespread conflict in KwaZulu-Natal. As the white right pressed its political demands, including an assurance that the new dispensation would give due consideration to the creation of a volkstaat, it admitted to stockpiling weapons and announced various plans—the configuration of forces and the specific threats changed almost weekly—to disrupt the coming election. Inside the MPNP Negotiating Council, significant parties had voiced their principled objections to the process and then taken their leave, which then heightened perceptions that the ANC and the NP were running roughshod over the decision-making rules in order to dictate the terms of the ultimate settlement. If this cut—just a bit—into the legitimacy of the negotiations, the problem was compounded by discontent from within the two main parties, a shared sense that their respective principals were giving away too much for too little. Though the outcry was not as loud as it had been in 1990, the ANC and NP leadership continued to hear that they had betrayed their own cause.

Second, the passage that would become the post-amble emerged from a negotiating process that operated outside the law and addressed a deeply contested question about the future of the law's force and effect. On the one hand, a court ruled in 1993 that parties who objected to the form and content of the negotiating process did not have standing to seek legal redress.[13] In short, it decided that the MPNP's aims fell outside the law and its decision-making rules did not amount to a binding contract. To this, the Court added, the negotiation's reliance on creating and reaching "sufficient consensus" was a process that rested on the good faith, trust, and understanding of those who chose to participate in what amounted to an exercise guided by and oriented to reconciliation.[14] On the other hand, the epilogue appeared with an answer to the question of amnesty, a longstanding matter that had bedevilled negotiators and which many took to be crucial to the election insofar as both the ANC and NP worried out loud—perhaps tactically—about whether the old security forces and police would support the new government if the transition did not include some form of protection from prosecution.[15]

Third, it is not entirely clear how the post-script was written and precisely who approved its inclusion in the interim Constitution. To be sure, it was cobbled. And to

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[13] *Government of the Self-Governing Territory of KwaZulu v. Mahlangu and Another* 1994 (1) SA 626 (T) 635-638.

[14] The filed briefs and the terms of the decision are intriguing and quite important in understanding the nature of the negotiations process and its use "sufficient consensus". For a rather detailed consideration, see Doxtader, *With Faith in the Works of Words,* pp. 181-198.

[15] There is now a debate over whether the amnesty is better understood as indemnity or whether this "redefinition" obscures a fundamental quality of the transition. Compare Sitze, *Impossible Machine*" and Doxtader, "Easy to Forget or Never (Again) Hard to Remember? History, Memory and the 'Publicity' of Amnesty", in C. Villa-Vicencio & E. Doxtader, *The Provocations of Amnesty: Memory, Justice and Impunity*, (Cape Town: David Phillip, 2003) pp. 121-155. While this is not the place to take it up, the difference in views may turn partly on the difference between analogy and metaphor. Also see Du Toit, "A Need for 'Truth'".

be sure it was not attached to the interim Constitution when the latter was approved by the MPNP's Negotiating Council—and it seems possible if not likely that it was not approved at all.[16] Beyond that, the available evidence suggests that the post-amble's two main parts were written in different places and by different people and then, in a moment that has never been openly acknowledged, combined and appended to the already ratified interim Constitution. Addressed to amnesty, the epilogue's fifth graph was likely written by two leading negotiators, the ANC's Mac Maharaj and the NP's Fanie van der Merwe. It does not appear, however, that the pair wrote the first four graphs, which may have been commissioned by a philosophically minded and high-ranking member of the ANC.[17] Set out in six of the eleven official languages, the concluding plea for divine favour has not been claimed.

The post-amble is undertaken and appears in a difficult moment, one that it may have helped to create and which breaks (and breaks from) historically given forms and terms of expression. More precisely, the epilogue reflects and expresses "language trouble", the stasis that confounds and sometimes negates the ground, meaning, and function of language.[18] This trouble is not (or not yet) a moment of choice—*stasis* is not crisis—so much as a set of questions regarding how to (re)constitute the rhetorical grounds of interaction and decision-making. The "historic bridge" named by the post-script is a metaphor that turns "Constitution" into a question, one that the Constitution itself cannot answer, particularly as the bridge spans an abyss that appears between past and future, a present moment in which trust remains depleted by deep division and shared reference remains a casualty of historical conflict. Under what conditions is it possible to hear, let alone listen to, a current or even former enemy? What, if any, commonplaces remain to support the pursuit of understanding and what norms of validity can support directed disagreement? Moreover, from deep in the abyss resonates the silence of so much "untold suffering" and a "legacy of hatred, fear, guilt and revenge". What has not been said and what cannot be expressed? How does one all at once overcome, recover, redress, and repudiate history? And, if all of this happens *on* the bridge, it cannot be forgotten that the bridge is built only as sworn enemies are able to step back from their own political vocabularies, come to other terms, and so face the charge of betrayal. How does one begin to speak beyond a cause to which one has firmly sworn and tied one's sense of self?

These questions remain without answers. As written, in the way that it was written, the epilogue speaks to the rhetorical damage done, the violence to language

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[16] There are conflicting claims on the matter and a lack of definitive evidence. There is rather clear consensus that the post-amble was not attached to the interim Constitution approved on 17 November 1993. Some sources involved in the writing of the epilogue have suggested that at least a portion of the text was written on 7 December in an ANC-National Party bilateral. This would have been after a 6 December special meeting of the Negotiating Council, though there is some question as to whether such a meeting was actually convened and what was on the agenda. Compare Doxtader, *With Faith in the Works of Words* and Du Toit, "A Need for 'Truth'". It would be interesting to re-read *AZAPO* with this ambiguity in mind, although the decision by the Transvaal court may have rendered the question of legitimacy moot.

[17] For additional details about the authorship of the post-amble, see Doxtader, *With Faith in the Works of Words,* pp. 211-217.

[18] Barbara Cassin, "Politics of Memory: On Treatments of Hate", *Javnost: The Public,* 8, 2001, pp. 9-22. Also see Giorgio Agamben, *Stasis: Civil War as a Political Paradigm,* trans. N. Heron, (Palo Alto: Stanford University Press, 2015).

that abides and the language that continues to do violence. Both recollecting the MPNP's "sufficient consensus" and articulating a legal mandate, it does so outside and inside of the interim Constitution's own language. In asking but not resolving the question of what "can now be addressed", the post-amble is far less summation than a compound and perhaps "improper" pause.

This pause is spatial, temporal, and conceptual. It is a break in procedure—its authorship defied accountability—undertaken in the name of that which it interrupts by disclosing that its promise remains precisely that—a promise. This "foundation" is not existing ground—it is not yet entirely here and it is not ready now (which may explain why the metaphor is mixed—bridges and foundations, though "footings" might have served better, not least in the name of getting to "standing"). It is interim. And, moreover, its actualisation is claimed to rest partly on the provision of amnesty, a law that mandates the suspension of the law's force and so breaks the continuity of its rule, a line that is further interrupted insofar as the post-amble is not simply a reminder but a remainder of the negotiating process from which the interim Constitution emerged. It recollects that the basis of law—and the basis of *this* law—is a sufficient consensus, a consensus deemed deficient by many and which reflects the failure of precedent, operates outside the law's rule, and grants no legal standing. Here and now, in the post-amble, the law's discourse (whether as subject-producing or a jurisprudence) begins within a beginning in which it cannot account for the conditions under which its rules are valid, justify the norms that govern its force, or provide the reasons that support its demand for obedience. If so, the post-amble's pause is an opening in which to ask after the status of law and whether its language is itself an element of the stasis that the law claims to overcome—and prevent.

The post-amble's pause unsettles the proper language of law, that is the "ordinary" language that law takes to be both property and propriety. It finds grounds to speak from within that which may foreclose expression. In the name of law, it discloses that the interim Constitution's promise of interaction and the possibility of agreement lies outside standing norms of legal (and extra-legal) accountability. It advocates a response-ability beyond the law's conventions of responsibility. In doing so, this passage that resists a proper name appears before the law, a condition and outcome of law, in the name of a beginning to which it cannot speak definitively. From precedent that can no longer serve as such to a *now* of what "can now be addressed" through the recovery of history—the telling "untold suffering" and the disclosure entailed in amnesty—it opens that chapter which is the future, a chapter which might be best entitled: the question of language as such.

6. A rhetorical question then—what is the potential of recognising (these) words? Today, it is rather difficult to find very many who want to puzzle over the post-amble's terms. There is little evident interest in taking up the question of their potential, the power of the words that compose the interim Constitution's strange ending. Indeed, these words now strike many as either too much or too little transitional justice. And few are keen to grapple with their appeal for reconciliation, a case that now seems nostalgic and which appears to trade in myth to the extent that it has little to say about the accumulation, distribution and exchange of material

power.[19] Today, from old-guard to born-free, the post-amble seems a marker of unmet expectation and a source of disappointment, especially as it is read as a capitulation to political expediency, the beginning of the TRC's incoherent (or lost) plot, and a distraction from the work of reconstruction.

If these words announced the end of apartheid and did so in a way that enacted something of that end—i.e. made some history—they did not finish the job. Apartheid was ended, and so much of it has remained, a presence that has turned the post-amble into an open wound, a violence that confounds its own promise and perhaps amounts to a crime. There was, first, the matter of amnesty, a decision to suspend the Constitution's rule and allow perpetrators a chance to remain in the fold. Related questions followed, all of which remain. Did the post-amble help justify a transition with legal continuity at the cost of exposing how apartheid functioned in and through the law? How did its ambitious call interrupt the path to liberation's proper end at the same time that its abstract terms failed to offer a coherent vision of the transition's goal, the future on the far side of the bridge? Did its words fail, not least to convert hearts and minds in the name of reconciliation and unity?

Bad law? Broken law? Without rule of law? At the cost of moral law? Flaunting the laws of good words? These questions are the rub—or perhaps the truth: the strangely ending end of the interim Constitution holds the problem of (its) legal violence, a compound problem that is often reduced—or sharpened—to the contentions that the post-amble did not adequately structure and support a legally coherent transition and/or that it failed to define and advance a moral vision of transformation.

The epilogue neither solved how to end apartheid nor resolved what was to come next. A proper reply to this contention? Precisely!

The widespread and ecumenical disappointment that would relegate the post-amble to the past—if not the trash heap—may well misrecognise its call and the current relevance of its calling relative to the question of how—and why—apartheid remains. The instrumental reading of the epilogue may not serve. And, a deontic rendering may fair no better. This contested closing may be neither a *rule* of recognition with which to determine and sustain law's identity as such nor a rule of *recognition* through which to discover, name and instantiate the moral *telos* of law.[20] Instead, it may express and embody something of what Walter Benjamin grasped as a "pure means", a non-mediating and non-instrumental power in which abides a critique of legal violence, including its own, a critique that proceeds in a question of language that may have more than a little to do with the end of apartheid. [21]

Amnesty violates the rights of victims. Reconciliation may well be (il)liberal to fault. Unity is another name for peace without justice. In these terms, the post-script

[19] The oft heard chestnut is that "reconciliation" is "symbolic" in the sense of "merely symbolic", that is, an immaterial and secondary concern. Among other things, this judgment forgets the possibility that a symbolic revolution may be symbolic "either because it signifies more than it effectuates, or because of the fact that it contests given social and historical relations in order to create authentic ones": Michel de Certeau, *The Capture of Speech and other Political Writings,* trans. L. Giard, (Minneapolis: University of Minnesota Press, 1997), p. 5.

[20] This is *the* question set out and left unresolved in the AZAPO decision.

[21] Walter Benjamin, "Critique of Violence", in *Walter Benjamin: Selected Writings, 1913-1926*, *Volume 1,* trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), p. 241; Walter Benjamin, "Zur Kritik der Gewalt", in *Walter Benjamin Gesammelte Schriften vol. II.1,* (Frankfurt A.M: Surkamp, 1999), ss. 179-204.

enables, supports, and rationalises what Benjamin and Hannah Arendt understood as legal violence.[22] Yes—there is little point in denying this and little point in making it the last word. In fact, for Benjamin, such criticism is better understood—or only comprehensible—as a premise. That is, there is no getting past this violence, no direct out, least of all from within the law itself. For all the wishes of the pacifists and those (e.g. certain Kantians) who contend for what turns out to be "formless 'freedom'", Benjamin held that the law seeks "a monopoly of violence" and does so in order to both protect its own ends and preserve itself as such, as both a means and end.[23] Thus, "if violence, violence crowned by fate, is the origin of law", Benjamin observes that "all violence as means, even in the most favorable case, is implicated in the problematic nature of law itself."[24] And it is just here, in the law's gathering of violence in the name of its self-justifying creation and preservation, that "something rotten in the law is revealed".[25] The name and form of this corruption is well-known and much discussed. It is nothing less than the exception, the state of exception in which law founds itself and through which it forgets the violence of its beginning—i.e. the contingency of its founding—in the name of concealing its endless interest to accumulate power over life and to do so for its own sake.[26]

At its heart, Benjamin's view of legal violence holds that as "all violence as a means is either law-making or law-preserving", the law embraces myth over history and covers memory with fate.[27] This well-known claim, the focus of so many important readings of Benjamin's position, may well encapsulate many of the expressed concerns over the post-amble.[28] And yet, not unlike so many readings of the epilogue, the extensive critical commentary on Benjamin's claim is curious for the way it often sets aside a crucial question of language, one that appears in the middle of his argument and which is often taken for an aside or an untoward interruption.

"Is any nonviolent resolution of conflict possible?"[29] Benjamin's answer is unequivocal, puzzling and altogether relevant to the question of the interim Constitution's epilogue: yes, though it requires "unalloyed means of agreement"

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[22] Benjamin's argument relies on the concept of "Rechtsgewalt" throughout, a concept that can be read in a number of ways, some of which are later picked up by Arendt in her work on imperialism and violence as such.

[23] Benjamin, "Critique", pp. 242, 239. As Benjamin puts it, "the law-making character inherent in all (such) violence" sets law to fear any and all violence outside of its control as a threat to itself (p. 240).

[24] *Ibid*. 242-243. The position is rooted in Benjamin's contention that, on one side, the law aims to "divest the individual, at least as legal subject, of all violence, even that directed only to natural ends" and that, on the other, that "in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself" (*Ibid.* 243, 241).

[25] *Ibid*. 242.

[26] Benjamin's famous formulation: "When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay. In our time, parliaments provide an example of this. They offer the familiar, woeful spectacle because they have not remained conscious of the revolutionary forces to which they own their existence" (*Ibid*. 244). There is a direct conceptual link here to Benjamin's famous contention in the "Theses on History" that the exception has become the norm. Of course, this position underwrites Agamben's work in *Homo Sacer*. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life,* trans. D. Heller Roazen, (Palo Alto: Stanford University Press, 1998).

[27] Benjamin, "Critique", p. 243.

[28] Two of the most important: Jacques Derrida, "Force of Law: The 'Mystical' Foundation of Authority", in D. Cornell (ed.), *Deconstruction and the Possibility of Justice,* (New York: Routledge, 1992), pp. 3-67; Werner Hamacher, "Afformative, Strike", *Cardozo Law Review,* 13, 1991, pp. 1133-1157.

[29] Benjamin, "Critique", p. 244.

whose "subjective preconditions" are such attitudes and habits as the law cannot contain: "courtesy, sympathy, peaceableness, trust…."[30] Offering "indirect solutions" to "human conflicts related to goods", Benjamin speculated that these pure means hold the potential for non-violence precisely as they "never lead to a legal contract".[31] Through the "technique" of the "conference", they compose agreement in what is "wholly inaccessible to violence: the proper sphere of 'understanding' language", a language in which, Benjamin contends, "there is no sanction (*Straflosigkeit*) for lying."[32]

No sanction for lying. Non-violent agreement: speaking with impunity. Not speaking without consequence or risk. Rather, speaking without threat of legal sanctions for "fraud", without the law's interest to "restrict the use of wholly nonviolent means because they could produce reactive violence", the pure means that could threaten law—and so turn the tables—precisely as they recollect law's contingent beginning and disclose the exception on which its power rests.[33] Such means do not appear "before" the law—Benjamin does not retreat to the very abstract idealism that he deems unable to sustain a critique of violence. They are manifest in the objectivity of stasis, that form of conflict that law fears most, precisely as it induces a "fear of mutual disadvantage" that motivates individuals "to reconcile their interests peacefully without involving the legal system."[34] Though this non-violent work may find its limit in the conflicts between "classes and nations", Benjamin holds that it is possible to take the "pure means in politics as analogous to those which govern peaceful intercourse between private persons."[35] In both, the potential for non-violent agreement *is* a critique of legal violence, precisely as its pure means establish an exception to the law's self-making and self-preserving exception, one that proceeds in terms to which the law itself has no standing to speak-sanction.

Now the last lines of the interim Constitution are recognisable—or, here they come into what Benjamin later called the "now of recognizability", a flash in language that illumines the relation between "what-has-been and now" in order to clarify and perhaps "liberate the future from its deformation in the present".[36] Precisely, this passage without a proper name constitutes an open exception, a double exception, in the name of a critique of violence. It discloses the exceptions on which (its) law is based and through which (its) law maintains itself. It emerges outside the law so as to recollect the beginning of law *and* it works inside the law so as to demonstrate the contingency of its rule in the face of apartheid's crime. And, as it emerges from the MPNP, the post-script demonstrates that law is authored at the same time that it authors a mandate for amnesty which extends the law while disclosing the law's crisis

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[30] *Ibid*.

[31] *Ibid.* 243-244.

[32] *Ibid.* 244. This crucial idea exposes the deep connection between Benjamin's 1921 Critique of Violence and his 1916 essay, "On Language as Such and on the Language of Man", in *Walter Benjamin: Selected Writings, 1913-1926, Volume 1,* trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), pp. 62-74.

[33] Benjamin, "Critique", p. 245.

[34] *Ibid*. And, insofar as this resolution unfolds outside the logic and "good faith" of the contract, it may yield violence and so threaten law's monopoly.

[35] *Ibid*.

[36] Walter Benjamin, *The Arcades Project,* trans. H. Eiland and K. McLaughlin, (Cambridge: Harvard University Press, 1999), p. 462; Walter Benjamin, "The Life of Students", in *Walter Benjamin: Selected Writings, 1913-1926, Volume 1*, trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), p. 38.

of legitimacy. And, all of this as the post-amble assumes a constitutional status at the same time that it defines the conditions on which the Constitution's constitutive power depends.

This critique of legal violence resolves nothing, but recollects the question of language that remains. It stands and moves on the bridge it names, over an abyss and running between the law to which it commits itself and from which it takes leave. It appears in the midst of stasis, the language trouble that troubles the given word and so motivates a forum given to composing the form and content of a "sufficient consensus", a process of agreement-making whose rules can be broken with (legal) impunity and an agreement that does not amount to a contract. From an extra-legal forum predicated on the need to bracket the taken for granted language of its participants, the epilogue is composed in forums outside the forum itself, in spaces dedicated to the "understanding language" that the post-script itself advocates. And, at the same time, it stands for legal continuity and takes a stand inside the law, with a mandate for amnesty, the law's foreclosure of the ability to demand standing before the law and call out the force of its established rule.

The post-amble's recollection of language is a call to gather in the midst of dispossession and to undertake the gathering of a dispossessing question, a question that troubles the taken for granted word, the word used to assume, attribute, and inflict language as instrument. It is the recollection then of a beginning, an experience in which the given word is not given, when language abides as potential. This moment is uncomfortable, all the more so for those who assume the deepest of connection between human and logos, what might well be, in Benjamin's terms, the "myth" of *zōon logon ekhon*.[37] It can also be dangerous—potentiality has been used again and again to rationalise endless delay, the promise of the beginning that never arrives.

And this then is the hinge, the fulcrum on which the bridge may balance. The rhetorical history of apartheid is a crime against humanity unfolded through the "law" of language and the "language" of law, a maniacal commitment to the word's potential as an instrument of endless division and timeless distinction, a power that was then rationalised with the promise of a reconciliation that was ever and always yet to come (the Nederduits Gereformeerde Kerk minced no words in this regard). In the early stages of transition, there was never an extended public or political discussion of the immanent connection between language and apartheid, in part because the ANC's Marxism has always lacked for a philosophy of language (a shortcoming that Neville Alexander tirelessly endeavoured to remedy), in part because the first act of a liberating government cannot be to throw (its) language into radical question (something that Mandela nevertheless did do on occasion) and in part because the TRC failed to think beyond its own quite limited understanding of reconciliation, as a concept and practice that has long, long, long been concerned with the conditions and dilemmas of coming to words.

Now, however, there may be time. For now, there may be a moment to once again hear the post-amble's turn, the movement on the bridge that law cannot direct and which opens language as a question, including the question of how apartheid's instrumentalisation of language remains and the ways in which it continues to thwart transition and transformation. If more than a few would prefer not to listen — "Ag!

[37] Erik Doxtader, "*Zōon Logon Ekhon*—The (Dis)Possession of an Echo", *Philosophy & Rhetoric,* 50(4), 2017, pp. 452-472.

This is just more time given to just more talking in the midst of the dispossession" – perhaps it is time to pause and consider the extent to which material redress hinges on a certain sufficient consensus, a coming to agreement about how to define and sustain the process of deciding what counts as a just form of (re)distribution and a sustainable system of reconstruction. For now, this is surely reconciliation's most difficult work, a call to give up given words in the name of strange endings.

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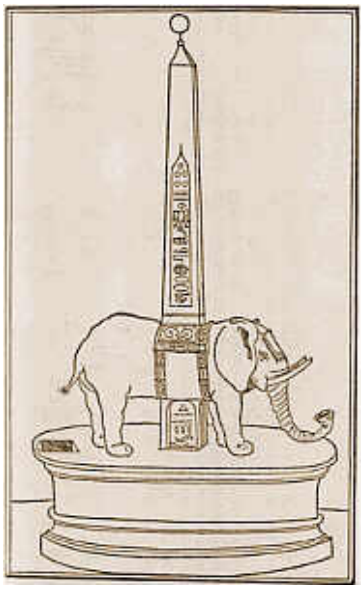

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