

# Archiving colonial sovereignty: From ubuntu to a jurisprudence of sacrifice

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A Klee painting named ‘Angelus Novus’ shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing in from Paradise; it has got caught in his wings with such a violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress.

Walter Benjamin’s IX<sup>th</sup> Thesis,  
in the *Theses on the Philosophy of History*\*\*

Walter Benjamin’s enigmatic reflection on Paul Klee’s painting ‘Angelus Novus’ urges us to question the idea of a progressive teleological view of history, and it may help us to contemplate the legacy of a colonial past, the challenges of decolonisation, and the possibility of a postcolonial future. What approach are we to take to colonial history, to its events and catastrophes? This is a pressing question, especially when brought to bear on sovereign events and catastrophes. The problem of colonial sovereignty might be observed from the vantage point of Walter Benjamin’s angel of history. Should we perceive an imperial usurpation, its establishment of a racist colonial state and transition to a postcolony as a chain of events or

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\*\*Benjamin *Illuminations* (1968).

as a single catastrophe piling wreckage upon wreckage? The difference might be that the former suggests an inexorable process of violence and counter-violence, imperial excess and anti-colonial struggle, the re-ordering of imperium and the establishment of new tyrannies in the form of 'private indirect government';<sup>1</sup> while the latter imagines a singular sovereign event that needs to be reversed if the ongoing disaster is to be arrested. Benjamin's condensed observation on history might then be extended to the colonial context to suggest that it is futile to believe that there can be recoveries from the excesses, misappropriations, violence, and domination of the various kinds of colonial catastrophe. It also suggests that we should not abandon ourselves blindly to what might be seen as the progressive or contingent forces of history, even though the forces that push us to this are very strong. The angel of history needs to realise that awaking the dead or making whole what has been smashed is an impossible enterprise. Nor should we fly blindly into the future. Meditating on Benjamin's ninth thesis is thus an apt way to begin a discussion on what it means to deal with the bloody and disastrous archive of colonial sovereignty - an archive that continues to grow skyward while our capacity to attend to colonialism as a single catastrophe becomes more and more remote.<sup>2</sup>

Colonialism is certainly not reducible to a single catastrophe. Its economic after-effects and political consequences continue to be experienced in multiple ways by the people who live in postcolonial nation states and in the erstwhile metro-poles. In white settler colonies such as Australia, Canada, New Zealand and the United States, recognition of the anti-colonial claims of the colonised

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<sup>1</sup>Mbembe *On the postcolony* (2001) ch 2.

<sup>2</sup>I use the term 'archive' after Jacques Derrida's elaboration of it in *Archive fever: A Freudian impression* (1995). Derrida emphasises how the archive resists conceptualisation. *Arkhe* at once connotes a *commencement* and a *command*. As the place where things commence it is a 'physical, historical, or ontological principle', and it is the place from where social order, law, and authority might be given. The archive, Derrida explains, is then potentially both an ontological and nomological principle, *id* 1. The archive is the privileged intersection of place and law - the topological and nomological, *id* 3. But the archive is a much more fraught concept, linked to the finitude of being, the limits of memory, and is not so much about the past as about the future. Derrida emphasises that the archive is more of an 'impression' than a concept - it is *in-finite*, indefinite, at once closing down and opening to an outside, *id* 29. For further elaboration of Derrida's use of archive in relation to South Africa, see Cornell and van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195-220.

population takes place through one or other form of indigenous or minority right such as unique forms of land rights, treaty rights, or 'domestic dependent nation' status. These are notoriously limited forms of recognition, and new forms of colonial domination and dispossession continue to emerge within their rubric.<sup>3</sup> In nation states where the conquered population has ostensibly recovered their political independence, such as in India, South Africa, or Sri Lanka, the legitimacy of postcolonial institutions, the borders of the nation state, the treatment of minority populations, and the terms and conditions of transition continue to be contested. If the wreckage of disputed sovereignties is piling up - and from Jerusalem to Jaffna, from Kashmir to the 'Kingdom of the Zulus', my sense is that it is - then we need to ask whether *indigenous sovereignty* can continue to be a concept through which an anti-colonial or postcolonial enterprise can be progressed. This raises very difficult questions, and I can only begin to identify and discuss some of their implications in this essay.

I have previously argued, in several essays, that the recognition of indigenous law as law is a condition of any genuine approach to postcolonial justice.<sup>4</sup> I do not depart from that claim. This immediately raises the very difficult question of the relationship between sovereignty and normativity. The move to distinguish sovereignty from normativity in a plural society is complex and fraught. At the heart of postcolonial emancipation is the question of which normative and epistemic system will determine the contours of freedom and emancipation. Setting aside the fruitless relativisation of values, ethics, and their epistemes, there remains the issue of what theories of being and knowledge (onto-epistemes) will inform a plural legal and social order. In this essay I explore these issues in the 'new' South Africa.

Sovereignty enters this fray as that which is at stake in self-determination. It is this privileging of sovereignty that I seek to call into question. The claim for indigenous sovereignty as a feature of decolonisation cannot simply be set aside. Sovereignty persists as the *archive* of colonialism - it is the *archç*, foundation, ground, authorisation of what is 'now'. It is also the constitutive force of the

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<sup>3</sup>See Watson 'Illusionists and hunters: Being Aboriginal in this occupied space' (2005) 22 *Australian Feminist Law Journal* 15; and Motha 'Reconciliation as domination' in Veitch (ed) *Law and the politics of reconciliation* (2006) 69-91.

<sup>4</sup>Motha 'The sovereign event in a nation's law' (2002) 13 *Law and Critique* 311-338; and Motha 'The failure of postcolonial sovereignty in Australia' (2005) 22 *Australian Feminist Law Journal* 107-125.

'new' (as postcolonial 'people' or democracy), and it is repeatedly claimed to be the phenomenon to be recovered and preserved where an anti-colonial being remains critical of postcolonial compromises. This confluence of sovereignty, normativity, epistemology, and a postcolonial political community is precisely what remains in contention in the 'new' South Africa.

There can be no doubt that indigenous populations are among the most disadvantaged on this planet. Addressing this condition would of course require that attention be given to the claims of populations and peoples that identify their (sovereign) demands as specific to a discreet group. A crucial question is whether the reassertion of indigenous sovereignty can be an antidote to colonial sovereignty and its social and economic concomitants. From the outset, then, I would seek to distinguish between indigenous sovereignty on the one hand, and indigenous normative and epistemic systems on the other. This does not mean that I think sovereignty and normativity can be utterly disassociated. Perhaps sovereignty can always only be left in contention while means are found to attend to its prevailing disasters. The fact that indigenous assertions of sovereignty can productively disturb colonial and postcolonial sovereignty is one reason why sovereignty remains a central plank of self-determination. What is not clear is whether the re-assertion of indigenous sovereignty - though it is the expression of an anti-colonial stance, and the naming of a historical wound - can avoid all of the disasters that have been performed in the name of various manifestations of sovereignty. It might be said that postcolonial peoples are entitled to their very own disasters - the condition, perhaps, of any free and independent consciousness. There is no shortage of opportunities to inhabit myth or nihilism. My objective is to chart a course between the two.

The problem of sovereignty is particularly acute in a postcolonial setting because the violence of colonial conquest is irremediable. The postcolony, however hard it may try, sees the persistence of an *infinite* colonial sovereign imposition - that is, colonial sovereignty is rendered *finite* by adjusting, archiving, transforming the social and juridical order through a national liberation struggle, but to the extent that colonial juridical, economic, and social orders persist, the colonial usurpation has an *infinite* reach.<sup>5</sup> This in-finite character of postcolonial sovereignty can be observed in South Africa. The 'new' South Africa is by now famous the world over for a transformation from apartheid, a racist juridical and social system, put in place

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<sup>5</sup>See Motha (n 4) (2005) *ibid*.

precisely at the moment when anti-colonial struggles were ripening and erstwhile imperial powers began to be forced out of direct colonial rule. Apartheid South Africa resisted anti-colonialism and consequent models of self-determination for over 50 years. But has the post-apartheid juridical order inaugurated a postcolony - that is, has South Africa been decolonised? In the South African setting there appears to be a double liberation at stake - from apartheid on the one hand, and from the cultural, social, and economic consequences of a longer colonial domination on the other. Epistemology and normativity, as I will show below, appear to be part of what remains at stake in ongoing anti-colonial struggles in South Africa. That economic dis-empowerment is neglected in many of the philosophical positions addressed below about normativity, epistemology, and sovereignty only compounds their shortcomings.

Magobe Ramose, for instance, has argued that decolonisation in South Africa has dulled the urge for the recovery of a 'lost sovereignty'.<sup>6</sup> He calls for a renewal of the struggle to recover the lost sovereignty of the 'indigenous conquered peoples of South Africa'. What are the implications of making sovereignty (and the re-ordering of the political around sovereignty) the vehicle through which the injustices of colonial conquest are addressed? What are the implications of making an authentic and originary sovereignty the condition of decolonisation? Can the notions of indigeneity and plurality be reconciled in a postcolonial setting? Ramose makes the call to reconsider the post-apartheid compromise on the basis of ubuntu as the central epistemology and ontology of the Bantu speaking peoples of Southern Africa.<sup>7</sup> I will elaborate the contours of his arguments below. Here, by way of introduction, I will briefly explain why I juxtapose Ramose's observation that the transformation in post-apartheid South Africa is prolonging a colonial usurpation, with Johan van der Walt's account of a post-apartheid jurisprudence of sacrifice.<sup>8</sup>

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<sup>6</sup>Ramose 'In memoriam: Sovereignty and the 'new' South Africa' (2007) *Griffith Law Review* 310.

<sup>7</sup>Other than when it appears in italicised form in a quotation, I have not italicised the word 'ubuntu' in this essay. The *SA Publikereg/Public Law* style guide states that '[f]oreign words and expressions are italicised, for example *Grundnorm*, *a quo* and *bona fide*'. 'Foreign' is hardly a precise or instructive category. I am assuming that 'ubuntu' is not 'foreign' in South Africa and thus should not, on the stated criteria of this journal, be italicised.

<sup>8</sup>Van der Walt *Law and sacrifice* (2005).

Both Ramose and Van der Walt are addressing what is at stake in 'putting things right' in a fractured polity. To that extent both are concerned with a 're-treatment' of the *political* community after what Van der Walt has described as the 'retreat' of the political during apartheid.<sup>9</sup> Ramose raises the stakes. For him apartheid was one aspect of a longer and deeper colonial imposition, and arriving at a compromise between radically divided communities after apartheid has not dealt with the originary violence of the imperial usurpation of sovereignty. In Benjamin's terms, Van der Walt perceives a 'chain of events', a contingent history, and Ramose sees 'one single catastrophe' that must be put right. Both writers also perceive a role for the living dead in their philosophy - a politics of reparation and restoration that makes their work comparable. For Van der Walt the sacrifice of the dead (especially where it arises as a consequence of juridical decisions) must be regarded as a temporary setting aside of their position that may be restored at a later point. This is the essence of his jurisprudence of sacrifice which I elaborate below. For Ramose, the 'living dead' and their heroic sacrifices make it incumbent on present generations to restore parity between coloniser and colonised. This parity involves the recovery of a lost sovereignty. My argument is that neither the recovery of a lost sovereignty nor a logic of sacrifice should animate post-apartheid jurisprudence. Plurality has become over-invested in re-treating the political when a more complex tension between ways of being and knowing, and unequal economic distributions are at stake. This essay seeks to draw attention to these latter concerns.

Before proceeding with a more detailed discussion of archiving sovereignty through ubuntu, or a jurisprudence of sacrifice, two further preliminary points need to be made. The first is to give some wider theoretical contextualisation to the notion of the 'political'. This is necessary, as the attempt to deal with sovereignty, by both Van der Walt and Ramose, takes place through the concept of the political. Sovereignty is archived through a re-treatment of the political, though Ramose is more explicit that his effort is to re-treat the event of colonial sovereignty - to recover a lost sovereignty. The second is to highlight the persistence in South Africa of what Ramose has termed *epistemicide* - or what more widely can be regarded as the prevailing Eurocentrism in the academy and among the South African intellectual elite. I then proceed to discuss Ramose and Van der Walt in more detail.

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<sup>9</sup>*Id* 8, 10.

## On the political

'Putting things right' in a fractured polity and attending to the problem of sovereignty in the postcolony have come to be regarded as a problem of reordering and reorienting the *political community*. Conflict and antagonism in post-apartheid, postcolonial, and post-war societies have come to be seen as a problem of the *political* as such. The intellectual currents that have informed this focus on the political include Hannah Arendt's concern to distinguish various modes of labour, work, and political life; the left's revival of Schmittian decisionism and the friend/enemy distinction as a critique of liberalism and deliberative democracy; and a largely post-structural preoccupation to imagine 'community' beyond communitarian essences after the totalitarian excesses of fascism and communism which had instituted an essential ground for being-in-common.<sup>10</sup> The political became a key focus of the political theory of democracy and sovereignty at a moment when the autonomous liberal subject had been rendered illusory by multiple critiques from intellectual and political currents such as feminism, postcolonialism, and critical race studies, and when the revolutionary subject of 'masses and classes' went the way of 'world revolution'. Power also ceased to be treated as the over-determining action of a centralised sovereign or the state. Foucault explained how power was at once constituted and resisted within the body of the subject.<sup>11</sup> The subject came to be regarded as individuated through biopolitical modes of power. The concept of the political emerged in this context as the dimension in which a variety of sovereign antagonisms would play out. Giorgio Agamben's thought attempted to bring together Foucault's theorisation of subjection, Schmitt's thought on sovereignty and the political, and Arendt's critiques of totalitarianism and human rights. According to Agamben, Foucault's attempts to de-emphasise the questions 'what legitimates power?' and 'what is the state?' removed the theoretical privileging of sovereignty but failed to explain the point of intersection between 'techniques of individualization' and 'totalizing procedures'.<sup>12</sup> Agamben's characterisation of the

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<sup>10</sup>See generally Arendt *The human condition* (1958); Schmitt *Political theology: Four chapters on the concept of sovereignty* (1985); Schmitt *The concept of the political* (1996); Mouffe *The democratic paradox* (2000); Jean-Luc Nancy *The inoperative community* (1991); Lacoue-Labarthe and Nancy *Retreating the political* (1997). The text by Lacoue-Labarthe and Nancy contains an account of how the 'political' came to be such a central plank of discussion in contemporary French philosophy in the early 1980s.

<sup>11</sup>Foucault *Society must be defended: Lectures at the Collège de France* (2003); and Butler *The psychic life of power* (1997).

<sup>12</sup>Agamben *Homo Sacer: Sovereign power and bare life* (1998) 6.

inclusive-exclusion of 'abandoned being' or 'bare life' from the political and juridical order did much to complicate the relationship between political-life (*bios*) and sovereignty. We were thus left with the concept of the 'political' as the central site where the treatment of life by power/law was contested, and where the antagonisms previously represented through class-conflict or colonial domination would be interrogated.

In this essay I question the usefulness of this preoccupation with the 'political'. I do not wish to overstate the pervasiveness of the focus on the political, nor do I wish to suggest that this focus has been unimportant, but attention to the political as an *ontological* problem distinct from the *ontic* concerns of politics is rapidly giving way to a resurgent demand to reinstitute a universal ground of subjectivity and politics. The persistent problem of a universal ground and its onto-theological properties is one problem that demands attention.<sup>13</sup> The other is the persistence of the tension between 'state' and 'civil society'. The respective autonomies of state and civil society were always contestable, but are now made more evident by the fact that public power is increasingly in private hands, that many parts of the world grapple with what Achille Mbembe has characterised with respect to African countries as 'private indirect government'.<sup>14</sup> This is not only a matter of economic power being increasingly in the hands of private individuals and corporations - that is hardly new. What is also evident is that the source of authority is not only in the hands of the traditional liberal constitutive power - the democratic constituency, or the 'people' - but in various *heteronomic* formations such as religion, tradition, and culture. The so called 'return of religion' is only a magnification of what has always been present since the era of the nation state - that the state could not give itself its own law by its own means (autonomy), and that Gods were always needed (heteronomy).<sup>15</sup> The

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<sup>13</sup>It is beyond the scope of this essay to take up this problem of universality. Some of its contours have been explored and shaped by the following thinkers, though the central questions require further research and elaboration: Butler Laclau and Žižek, *Contingency, hegemony, universality: Contemporary dialogues on the left* (2000); Badiou *Saint Paul: The foundation of universalism* (2003); Žižek *The fragile absolute or, why the CHRISTIAN legacy is worth fighting for?* (2001); Žižek *The puppet and the dwarf: The perverse core of Christianity* (2003).

<sup>14</sup>Mbembe (n 1) ch 2.

<sup>15</sup>See Nancy 'Church, state, resistance' in Motha (ed) *Democracy's empire* (2007); Fitzpatrick 'Gods would be needed ...': American empire and the rule of



concept of the political cannot carry the weight of these multiple intersecting contestations of private *as* public power, of heteronomic formations *as* public authority, and of anti-colonial challenges to the legitimacy of present sovereign formations. In the discussion that follows I hope to establish that the re-treatment of the political cannot contend with these challenges.

## A note on eurocentrism

*I was glad to hear that you were critical. For a moment I thought you were going to tell us that ubuntu is the answer.'*

This was a statement made to me by one of the participants at a conference titled 'States of Statelessness' at the University of South Africa where I presented parts of this essay in August, 2009. This is not an uncommon reaction when I mention ubuntu in South Africa. Otherwise progressive intellectuals, judges, and academics have looked politely at me, smiled, and treated my interest in ubuntu as the quaint fascination of an outsider. It has been remarked to me that ubuntu is 'a dangerous communitarian notion', that 'no one really knows what it means', that there is no 'rigorous archive from which an authoritative account can be drawn', or that 'it is a backward tradition not apt for modern times'. One of the more witty remarks was the following: 'Ubuntu - sounds like a good idea!' - ironically alluding to Mahatma Gandhi's famed remark when asked by a reporter what he thought of 'western civilisation' - 'I think it would be a very good idea', he quipped. I have not attributed these remarks as they express what I believe is a common sentiment among many South Africans, and they were sometimes said in private conversations. Besides, they only serve as a general backdrop to a more acute institutional erasure of ubuntu in the 'new' South Africa. No one has yet been able to give a comprehensive account, and I have asked some prominent constitutional lawyers, of why ubuntu seemed to have such a prominent role in the interim Republic of South Africa Constitution 1993 and in the early decisions of the Constitutional Court (discussed below), and then nearly disappeared (save one mention in a Schedule) in the Constitution of the Republic

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(international) law' (2003) 16 *Leiden Journal of International Law* 429-466. I have begun to explore some of the tensions between autonomy and heteronomy in Motha, 'Veiled women and the affect of religion in democracy' (2007) 34/1 *Journal of Law and Society* 139-62; and Motha 'Liberal cults, suicide bombers, and other theological dilemmas' (2009) 5/2 *Journal of Law Culture and Humanities* 228-46.

of South Africa 1996.<sup>16</sup> Is the presence of the notion of ubuntu in the Interim Constitution merely an indigenous flourish that got people through hard times? Was ubuntu's momentary appearance in the interim Constitution the excessive mark of an excessive demand for peace, forgiveness, and community? We will see below what a central role ubuntu played in the case of *AZAPO v The President* which articulated its significance for inspiring a relatively peaceful transition from apartheid to a post-apartheid legal order and state. Whether ubuntu will be accorded the status of epistemology, ontology, or philosophy is precisely what is at stake in whether South Africa and the minds of its intellectuals, judges, and academics can be decolonised.

Decolonising legal theory is one of the major challenges faced by the South African legal academy. Needless to say this cannot be accomplished by the laudable efforts at changing the colour and gender of personnel in law schools alone. It is certainly my experience that the mention of ubuntu attracts the suspicion that one is a reactionary communitist or a romantic nativist. I am neither communitist nor nativist, and as the reader will see below, I think much that is regressive, as with almost any philosophy, can be proposed in the name of ubuntu. But the task is to deal with that head on with an ethos of engagement that is central to the possibility of a truly plural polity.<sup>17</sup> What tends to be holding sway at present - and I discuss this at length with reference to Van der Walt's *Law and sacrifice* - is a confidence that the 'Christian, Kantian, and Millsian' respect for the individual is vastly superior to the 'indigenous communitarian' one. The root of this error, at least in the literature I deal with here, is twofold. The first is the failure to explicitly examine how asserting different 'forms of life' (human, animal, bare life, etc) are normatively and epistemologically contingent. Human, animal, or bare life, are tropes for different forms and gradations of political subjection. But if these tropes are deployed without being attentive to how this 'line drawing' (between human/animal, political/bare life) re-inscribes a sovereign operation, then the trope risks reinforcing and completing the sovereign exclusions.<sup>18</sup> Thinking

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<sup>16</sup>Some people blame the North American 'plain language' drafters - but this is a curious disavowal of ownership over the most important legal document in South Africa.

<sup>17</sup>See Connolly *Pluralism* (2005).

<sup>18</sup>For a useful discussion of the problems with the 'line drawing' I am referring to here, see Edkins 'Whatever politics' in Calarco and DeCaroli (eds) *Giorgio Agamben: Sovereignty and life* (2007) 70-91.

other-wise in this setting must involve an attentiveness to what exceeds political subjection as human, animal, and bare life. The second problem, and this is linked to the first, is the co-emergence of imperialism and modernity indexed to the European subject as the one with access to a transparent knowledge of self, and Europe's others as *affected* beings fixed in primal stasis. Let me briefly comment on each of these problems in turn.

I have heard it remarked that it is because black South Africans exist in a condition of 'bare life' that crime is accompanied by such extreme acts of violence and torture in present day South Africa. Such a claim has much in common with characterisations of the excessive disorderliness, and the kleptocratic and savage sovereignties that seem to proliferate in accounts of the global South.<sup>19</sup> Has the country/continent literally and metaphorically 'gone to the dogs'? These claims go to the heart of the problem of archiving colonialism I invoked at the outset. Is contemporary violence and disorderliness merely contingent on the brutalisations of colonialism and apartheid? Can such a question even be addressed in the register of tropes such as human/animal, political/bare life? What such accounts of violence and disorderliness seem to suggest is that once de-humanised by colonialism and apartheid, black people have not regained the humanity through which a crime can have an instrumental economic motive, or a variety of motives. Bare life cannot commit a vengeful crime and be called to account for it. Without the volition of human agency, violence committed by bare life can only be the automatic act of a being without subjective will. This extension of the figure of bare life to perpetrators of violent crime is doubly curious as, at least in Agamben's renditions of the *Muselman*, and other instances of such abjectness, this is a being that is furthest from any substantive will.<sup>20</sup> There is of course no way to generally prove or disprove the motivations of extreme violence. The liberal register of 'motive' and 'responsibility' hardly seems adequate to such large questions of being, subjection, and politics. What the discourse which characterises South Africans who commit extreme violence as 'bare life' does disclose, however, is that they are in the worst Hegelian fashion (Hegel described Africa as the continent without history) being deprived of historical agency, the capacity to be *subjects* of

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<sup>19</sup>For a useful discussion of such claims, see Comaroff and Comaroff 'Law and disorder in the postcolony' (2007) 15 *Social Anthropology* 133-152.

<sup>20</sup>See Agamben *Remnants of Auschwitz: The witness and the archive* (2002).

historical contingency, and the status of responsible agents of human action even if it is of the worst kind.

The emptying of the political capacities of the majority of South Africans on the basis of their exclusion from the apartheid order is explicitly asserted by Van der Walt in *Law and sacrifice*, albeit with reference to the apartheid period:

they [the majority of South Africans] remained expelled even when they continued physically to live in white South Africa. They had no civil rights to speak of and no freedom of movement. There were strict rules as to where they could go and when they could go there. And when they failed to observe these rules, their last remnants of *bios* (political life) turned into a matter of mere *zoç* (bare life or life as such). As the Sharpeville massacre and many subsequent killings would make quite clear, they could be killed for not observing the rules of apartheid without this killing constituting a crime. Black people who lived in South Africa had the status of Agamben's *homo sacer*.<sup>21</sup>

Can it really be said that black people were expelled from humanity, rendered *homo sacer*, by the extreme violence and degradation imposed by the apartheid regime?<sup>22</sup> Black people during apartheid could be killed with impunity, or 'be killed without being sacrificed' in Agamben's enigmatic formulation. Let us assume that Van der Walt intends that having 'the status of bare life' in the eyes of the colonial or apartheid state is distinct from actually being bare life or *homo sacer*. However, the drawing of lines between political and bare life, between human and animal, *bios* and *zoç* in the context of apartheid raises more questions than it answers. Have the majority of South Africans recovered their political life and agentive capacities? On what basis did this recovery take place? Was it (humanity, citizenship?) merely given back to them? Did the recovery of political life merely happen through the adoption of new political institutions and constitutions? Was the abjectness of the 'status of bare life' simply about formal rights of political citizenship or is much more at stake? If forms of life such as 'bare life' are to be

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<sup>21</sup>Van der Walt *Law and sacrifice* 124.

<sup>22</sup>Agamben's argument in *Homo Sacer* is that bare life can be killed but not sacrificed - that is, bare life ceases to figure in either sacred or profane modes of valuing life. Bare life is cast beyond sacred or profane mediation and instrumentality. Van der Walt disputes the possibility of non-sacrificial killing later in ch 5. I am less interested in whether Agamben's arguments about sacrifice can be validly extended to the South African setting. My concern is with the designation of the majority of South Africans as bare life during apartheid - a designation I regard as spurious. And if they are not bare life, then their political sacrificeability seems to follow without further discussion being necessary.

deployed in the process of generating a post-apartheid theory of law, then these questions need to be addressed. I want to suggest that characterising black South Africans during apartheid as bare life is far from helpful. It has the potential to deface the revolutionary struggles many South Africans engaged in against apartheid. Apartheid was toppled with the force of an eloquent, strategic, organised, and sometimes violent will. This capacity to resist colonialism and apartheid goes to the heart of whether Europe's others are regarded as having the full capacity of selfhood - of being conscious beings of action, thought, and invention whatever the status accorded to them by their masters.

As Ferreira da Silva points out, the culture that is associated with contingency (historical progress) and universality is posited as the one that is presumed to have access to 'transparency' (*internal* self-determination) - and, importantly, this is a transparency that is distinguished spatially from Europe's others (externality).<sup>23</sup> Contingency (historicity) and universality have survived the death of the subject.<sup>24</sup> Ferreira da Silva argues that the post-enlightenment, European production of 'Man' is posited through an onto-epistemology that is enabled by the racial subjection of Europe's others. The Cartesian 'I' is self-determining, but must account for the difference that it confronts in a global, spatial terrain of power and representation. The distinction is then wrought between internally determined (regulated, and produced) beings, and the external *affected* racial bodies. The *internal/temporal* versus *external/spatial* opposition is then central to the global hierarchy of racial difference:

Hegel's *transcendental poesis*, which consolidates self-consciousness as an interior/temporal thing, the transparent 'I', the one that always already knows that it houses that which is not itself, also renders the nineteenth century deployment of the racial both possible and necessary. Without that other moment in which 'being' is always less than, farther from, an 'other being', that is, exteriority/spatiality, the ontological priority of the interior/temporal thing would be meaningless ...<sup>25</sup>

This colonial ordering of being is at the heart of characterising the majority of South Africans as bare life, but this is done at the expense of the African as a resistant being with political will. Johan van der Walt's account of the crime of apartheid deprives its victims of the

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<sup>23</sup>Ferreira da Silva *Toward a global idea of race* (2007) 20.

<sup>24</sup>*Id* xxxiv.

<sup>25</sup>*Id* 20.

capacities and potentials through which they might find lines of flight from the ongoing formations of human degradation. If legal theory is to have anything to say about politics or the political, then it must be attentive to these lines of flight.

Conceiving of the challenge of plurality as a problem of the political without addressing the Eurocentric episteme of post-apartheid jurisprudence is a serious shortcoming of Van der Walt's *Law and sacrifice*. Turning this around is not just a matter of translating certain concepts from an indigenous idiom to a more familiar European one. ubuntu, for example, has been transposed as dignity in a Kantian idiom.<sup>26</sup> The challenge is to establish a truly multiplicitous philosophical and juridical idiom beyond what can be 'tolerated' within the limits of translatability.

## Remembering sovereignty

Conscious perhaps of the theological roots of sovereignty, and with an explicit reference to the sentiments of mourning, Magobe Ramose begins his essay 'In memoriam: Sovereignty in the "new" South Africa' with a prayer.<sup>27</sup> For Ramose, speaking of sovereignty in the new South Africa is a requiem mass - a gesture that marks a death, while asserting the need to resurrect a sovereignty that has been buried, displaced, and mis-recognised. There is a firm refusal here to allow the 'lost sovereignty' of all peoples conquered in the 'unjust wars of colonialism' to remain a memory. Recovery and restoration are claimed as the twin exigencies of justice and as the 'necessary means to the construction of peace in South Africa'.<sup>28</sup> Despite asserting the oneness of the 'human race', Ramose's concern is to revisit the bounded reasoning, the racial logics, the epistemicide, that saw the erection of differences and distinctions between civilisations and cultures during the period of colonial conquest. The process of de-colonisation, in Ramose's view, is not yet concluded, and certainly was not achieved through the elimination of Apartheid and the guarantee of civil rights since April 1994.<sup>29</sup> While those who pushed a compromise in the early 1990s argued that they were

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<sup>26</sup>See Cornell 'A call for a nuanced constitutional jurisprudence: *Ubuntu*, dignity, and reconciliation' (2004) 19 *SAPR/PL* 666-75.

<sup>27</sup>Ramose, 'In memoriam: Sovereignty in the "new" South Africa' (2007) 16 *Griffith Law Review* 310.

<sup>28</sup>*Id* 311.

<sup>29</sup>*Id* 319.

averting a civil war, Ramose's claim is that since colonisation South Africa has been 'practically in a state of war'.<sup>30</sup> In his view it was gullible and misleading to think that apartheid was the fundamental problem. This is why freedom was reduced to the guarantee of fundamental rights.<sup>31</sup> The morality and political legitimacy of the colonial 'right of conquest' was left untouched. Ramose thus challenges the reasoning that asserted, from the Freedom Charter onwards, that 'South Africa belonged to all who lived in it'.

The question of indigeneity is placed front and centre in this discourse on the problem of decolonising South Africa. On this basis the 'Coloured' and Indian communities in South Africa are 'for reasons of history ... distinguished from the indigenous conquered peoples of South Africa'.<sup>32</sup> The 'Coloured', we are told, need not make a choice between their 'relatives' or a new identity. They are human beings and that humanity should drive them to seek 'justice' for the unjust wars of colonialism. The Indian on the other hand 'cannot have the same historical consciousness on the loss of sovereign title to territory as the indigenous peoples conquered in the unjust wars of colonisation'.<sup>33</sup> Despite these differences and distinctions the 'Coloured' and the Indian can share in the same historical consciousness as the indigenous peoples. According to Ramose, this has generally not been the case, and it is because of this lack of historical consciousness about the loss of sovereignty, that the constitutional recognition of the civil rights of everyone has been more attractive.<sup>34</sup>

A post-conquest South Africa, Ramose argues, must attend to the failure to recognise that the sovereignty of indigenous communities has been deprived through an illegitimate war and usurpation. Abiding by community in African culture requires that the three dimensions of the living, the living dead, and the yet to be born are taken to be the critical ethical concern. Thus the survival of customary kingship, and the memory of the heroes and heroines who fought against colonialism requires that parity - *horizontality* - be restored between the 'indigenous conquered peoples and that of the successors in title to the questionable 'right of conquest'. The

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<sup>30</sup>*Id* 320.

<sup>31</sup>*Ibid.*

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*

<sup>34</sup>*Id* 321.

'reaffirmation' of such 'horizontal reasoning' is a necessary condition for a genuinely autochthonous constitution.<sup>35</sup> The examples Ramose draws on to make this point are the primacy of 'KwaZulu' in KwaZulu-Natal, the existence of a Zulu King, and the parity that is demanded for African customary law in relation to the 'law of the land'. He concludes by arguing that:

Hierocratic reasoning should not be permitted to prevail unless it recognises horizontality as the basis and reason for its existence, and thus as its indispensable complement. 'African customary law' is living testimony to the prevailing conflict of values between the successors in title to the unjust wars of colonisation and the indigenous peoples conquered in those wars.<sup>36</sup>

The demand for the restoration of 'equilibrium' and for 'authentic liberation' can be concretised, though space will not permit me to explore all of its implications here. Highlighting two significant issues must suffice for now: the subordinate status accorded to Indigenous, Bantu, or customary law in the *Constitution of the Republic of South Africa*, and the racial ideology that converted parliamentary supremacy to constitutional supremacy in the transition to a post-apartheid legal order. For Ramose:

Ubuntu ... represents the epistemological paradigm that informs the cultural practices, including the law, of the Bantu-speaking peoples. Excluding it from the constitution is tantamount to denying the Bantu-speaking peoples a place in the constitutional dispensation of the country. The current Constitution is, therefore not the mirror of the legal ideas and institutions of the indigenous conquered peoples of South Africa. It follows then that a truly South African Constitution is yet to be born. On this reasoning, Act 108 of 1996 [the Constitution], has, perhaps inadvertently, set the stage for the struggle for a new constitutional order in South Africa.<sup>37</sup>

What is sought is not the retrieval of an 'authentic' past but 'parity' between the various conceptions of law of the conquered and the conqueror.<sup>38</sup> Moreover, Ramose stresses that there is no reason

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<sup>35</sup>*Ibid* 326.

<sup>36</sup>*Ibid* 327.

<sup>37</sup>Ramose 'The king as memory and symbol of African customary law' in Hinz and Pateman (eds) *The shades of new leaves: Governance in traditional authority, a Southern African perspective* (2006) 351-74 at 366.

<sup>38</sup>*Ibid*. To that extent the claim that sovereignty must be recovered might be seen as a strategic claim to secure onto-epistemic parity for the law of the colonised peoples. But this is ambiguous in Ramose's writings.



to suppose that the objection of ‘traditionalism’ in relation to African law can be made from anything but a position of ignorance. As he points out, it is only arrogance and ignorance that form the basis for suggesting that ‘traditional leadership in Africa is equal to static and dogmatic resistance to change and adaptation’.<sup>39</sup> Drawing on tradition and modernity for fashioning values and laws fitting for contemporary times must at least begin from the parity of legal ideas and institutions between conquered and conqueror. It is precisely this parity that has been denied by the Constitution and its high priests.

Examining the move to constitutional supremacy ushered in by the new Constitution of 1996, Ramose asks why the turn to ‘colour-blind’ majority rule engendered fear of a black constituency. The reason behind the conversion from parliamentary to constitutional supremacy, despite the principle of anti-racism in the constitution, is ‘racialist thinking’: ‘The fact that the conqueror considered the black majority as a race, coming into the constitutional process, was itself racist thinking’.<sup>40</sup> There was a fear that the putative ‘black race’ would have unanimity on all matters and thus threaten all ‘other’ interests if they were granted legislative or Parliamentary supremacy. Rather than signalling the return of sovereignty to the colonised population, the terms of the transition from apartheid to post-apartheid is viewed by Ramose as yet another inscription of a colonial racial logic. Parliamentary sovereignty - and the consequent threat of majoritarianism - was dealt with by the introduction of constitutional supremacy. Equality and civil rights would be guaranteed by the constitution - as would the ill-gotten gains of several centuries of colonial violence and usurpation. This might be seen as a pragmatic political sacrifice. What is particularly disappointing, now, is that the onto-episteme that enabled that compromised is threatened with erasure.

The case that epitomises the post-apartheid order of sacrifice is *Azapo v The President*.<sup>41</sup> This case is also a productive place from which to begin a consideration of how the dismissal of ubuntu symbolises the emergence of a jurisprudence of sacrifice in the ‘new’ South Africa. Sacrifice was a key feature of democratic transition. Consider the Constitutional Court’s answer to the question of why the state should not be responsible for the actions of its agents when amnesty is granted to an individual. Why should the state avoid

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<sup>39</sup>*Id* 370.

<sup>40</sup>*Id* 367.

<sup>41</sup>1996 8 BCLR 1015 (CC); 1996 4 SA 672 (CC).

responsibility from delictual claims for the actions of its agents as the applicants claimed? The answer lies in the emergence of an order of sacrifice. The state can either compensate the victims of killings, torture and other violations of human rights or state funds can be directed towards the social and economic well-being of the living, and of future generations. According to the Constitutional Court in *Azapo*, the negotiators who brought into being the Constitution:

could have chosen to saddle the state with liability for claims made by insurance companies which had compensated institutions for delictual acts performed by the servants of the state and to that extent again divert funds otherwise desperately needed to provide food for the hungry, roofs for the homeless and black boards and desks for those struggling to obtain admission to desperately overcrowded schools. They were entitled to permit the claims of such school children and the poor and the homeless to be preferred.<sup>42</sup>

The new democratic order, according to the Epilogue to the interim Constitution, would be a 'reconciliation between the people of South Africa and the reconstruction of society'. It is worth paying attention to this account of reconciliation. This is not a reconciliation between previously conflicted polities, coloniser and colonised, or between the beneficiaries of apartheid and the disenfranchised of that system. It is not reconciliation of a fractured society coming together to form a unified whole (again). It is not a restoration of a lost sovereignty. To the extent that sovereignty is archived at the instance of transition from apartheid to post-apartheid, it is the re-membering, the re-constituting of a polity that did not exist. It is precisely a *sacrificial reconciliation* - a case of becoming reconciled to what will be forgone when amnesty is granted for political crimes, when property rights are guaranteed despite the unjust conditions of accumulation, when redistribution will be balanced with social and economic stability. And so reconciliation must be understood through its verb - to *become reconciled* to a particular liberal constitutional project. It is not a reconciliation of the law of the conqueror and conquered, or of their respective and multiple philosophical traditions. Indeed, the status of ubuntu philosophy is such that it might even be said, as Ramose has argued, that the 'struggle for reason' in Africa remains. If reconciliation is to be the restoration of sociality, then we must still ask, what is being restored? What is this sociality? For now, let us turn to look more closely at the emergence of a logic of sacrifice as a post-apartheid theory of law.

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<sup>42</sup>*Id* para 44.

## From ubuntu to the sacrificial order of post-apartheid South Africa

The Constitutional Court in *Azapo* refused to hold the state delictually liable for the actions of its servants if they had been granted amnesty. The logic for holding the state liable would have been that - despite the instrumental reason for granting amnesty to individuals who disclosed the truth of a particular act, omission or offence - the state that benefited from his endeavour is an entity that can nonetheless pay compensation to the victim. The Constitutional Court acknowledged that such an option was available, but saw that the negotiators of post-apartheid transition did not wish the 'new' state to be incapable of providing for the needs of the poor or the homeless.<sup>43</sup> One claim to justice was sacrificed in the name of not forgoing what was claimed to be its 'opportunity cost'. Law as sacrifice does not amount to very much more than that. Providing a particular denial is acknowledged, then its setting aside, its status as a 'dismissed aspiration', is not a 'dismissal' but a 'being-set-beside' for the time being. This is how Johan van der Walt more generally characterises post-apartheid law.<sup>44</sup> For Van der Walt, 'adjudication as such is sacrificial'<sup>45</sup> - and so the logic of sacrifice must also extend to the *Azapo* case on 'amnesty'. However, his account is specifically developed with reference to the horizontal application of fundamental rights in the South African Constitution.

Van der Walt's account of the logic of sacrifice arises out of a conception of community or the 'political' as a plurality that is never subsumed in any form of commonality. There is, however, the curious imposition of the enforced commonality of the law of sacrifice. For Van der Walt, legal and political decisions involve a conflict of privatised interests which are re-presentations of multiple possibilities and potentialities. This sense of plurality, then, is understood 'strictly in terms of difference and otherness'.<sup>46</sup> A decision in a 'serious case' where opinions, convictions and political possibilities are in fundamental conflict occasion a 'retreat of plurality'.<sup>47</sup> Indeed pluralit, or the political, retreats from such a decision. To the extent that 'law' decides, it is the event of the

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<sup>43</sup>Indeed, 'victims' were later granted a once-off payment of 'reparations' that would in most cases be less than their delictual claim.

<sup>44</sup>Van der Walt *Law and sacrifice* 11-13, 15.

<sup>45</sup>*Id* 233.

<sup>46</sup>*Id* 8.

<sup>47</sup>*Id* 9.

destruction of plurality, or the retreat of the political. It is also, I want to insist, the enforcement of another commonality. The task as Van der Walt sees it is to 'retrieve the retreat' of the political.<sup>48</sup> In terms of this logic, Van der Walt names apartheid as an instance of the withdrawal of plurality which took place without any regard for the retreat of the political. Post-apartheid law and legal theory is then named as its opposite, as a 'constant regard for and acknowledgement of the sacrificial destruction of the otherness that conditions plurality'.<sup>49</sup> Sacrifice is thus inevitable according to this logic. The difference between apartheid and post-apartheid law is that the sacrifice is acknowledged in the latter.

Van der Walt's treatment of reconciliation takes its bearings from a Kantian conception of law and freedom. Here reconciliation is the impossibility of the liberty of one individual's freedom being reconciled with that of another under a general law of liberty.<sup>50</sup> An antinomy of freedom is derived from this - one where the possibility of freedom is always conditioned by an 'imminent threat' of its destruction.<sup>51</sup> The logic is a familiar Derridian one - the enduring antinomy of the 'possibility that derives from the impossibility'.<sup>52</sup> And so, only the unforgivable can be forgiven, hospitality exposes the host to the conditions that destroy hospitality, and justice is an exposure to the undecidable: 'one does nothing if one does not do the impossible'.<sup>53</sup> Reconciliation is then the constant possibility and impossibility, the hiding and exposure, closure and disclosure of a political reality.

Van der Walt uses the metaphor of the 'flipping coin' which must be airborne for as long and as often as is possible.<sup>54</sup> For Van der Walt the legal decision and social development is 'a matter of chance'. Hence the metaphor of 'flipping a coin':

once we accept that there is nothing normatively necessary in the evolution of societies, that social development is a matter of chance or sheer historicity, the legal decision, however normatively founded in a particular social context, inevitably becomes a matter of chance.<sup>55</sup>

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<sup>48</sup>*Id* 10-13.

<sup>49</sup>*Id* 12.

<sup>50</sup>*Id* 234.

<sup>51</sup>*Id* 238-239.

<sup>52</sup>*Id* 237 n 16.

<sup>53</sup>*Ibid*.

<sup>54</sup>*Id* 244.

<sup>55</sup>*Id* 243.

This is a logic, when brought to bear through a theory of law as sacrifice, that ultimately has nothing normative to say about the death of the other. At the heart of this conception of the legal decision, of apartheid/post-apartheid, indeed of the contingency of human relations, is a lack of historical understanding of colonialism and its social organisation. Overall, post-apartheid 'law as sacrifice' is an exemplary instance of the political limits of 're-treating the political'. The enterprise of re-treating the political manifests the exhaustion of emancipatory potential in the concept of the political itself.

As I suggested at the outset in my comments on the political, the post-communist tendency to direct emancipatory struggles through the reconstruction of the polity, the growth of a politics of recognition, and the favour accorded to the ontological over the ontic, have led to a point where the political is granted a primacy over normativity. This practically Hobbesian absorption of the subject within sovereign calculations, the subordination of the part to the whole, has ironically resulted in a theory of law that has relinquished normativity. Thankfully, the legal and social order need not be left to this norm-less sacrificial order, or bare contingency. The problem of normativity must also confront the issue of epistemicide that I highlighted earlier. To examine that, let us consider the treatment of ubuntu in the post-apartheid theory of law and sacrifice.

Van der Walt discusses ubuntu in the context of considering the Constitutional Court's decision in *The State v Makwanyane*.<sup>56</sup> I shall not rehearse in detail the multiple ways by which the judges in that case determined that the death penalty was contrary to the Constitution. Suffice it to say that the Constitution does not explicitly prohibit capital punishment. The judges therefore drew on, *inter alia*, the provisions which guarantee the respect for life and dignity, sections 9 and 10 respectively, and the prohibition of 'cruel, inhuman or degrading treatment or punishment' (s 11). A number of judges also drew heavily on the concept of ubuntu as it was set out in the Epilogue to the interim Constitution and in other sources.<sup>57</sup> Admittedly, none of the judges give

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<sup>56</sup>(1994) CCT 3/94.

<sup>57</sup>Chaskalson P para 131; Langa J para 223 (acknowledging that the Constitution does not define ubuntu); Madala J at para 237 (the concept carries the notion of humaneness, social justice and fairness - and contra Langa J, the concept is supposed to be 'well enunciated in the Constitution', para 243-44; 'and ubuntu ... calls for a balancing of the interest of society against those of the individual, for the maintenance of law and order, but not for dehumanising and degrading the individual', para 250), Mohamed J para 263 as quoted above; Mokgoro J para 307-8:

the concept of ubuntu a particularly comprehensive treatment. But what would it mean to be sufficiently comprehensive, especially in the deployment of a value, such as ubuntu, or humanity, reasonableness, forgiveness, conscionability or any one of a myriad of animating or transcendent principles of the law? Ubuntu was invoked by the Constitutional Court as one of the sources for authorising the unconstitutionality of capital punishment in South Africa.

Van der Walt is particularly derisory about the Court's treatment of ubuntu in *Makwanyane*. Chaskalson P is criticised for his 'lack of jurisprudential rigour' and lack of reference to African literature or jurisprudence on ubuntu,<sup>58</sup> Mandala and Mokgoro JJ for 'thin and jurisprudentially vague' substantiations of ubuntu,<sup>59</sup> Langa J for deploying 'commonplace' and 'trite' understandings of ubuntu,<sup>60</sup> and Mohamed J is inelegantly derided for giving an 'utopian rendition of ubuntu [which] would have had John (*imagine all the people*) Lennon scrambling for new verses.<sup>61</sup> One senses a degree of contempt, if this is not putting it too strongly, for a judiciary that has sought to include indigenous values and concepts without a substantial account of these notions from some 'valid' literature. Justice Sachs' acknowledgement of the fact that judges are limited to some extent by the submissions made by Counsel in proceedings, and notwithstanding this, his attempt to ground the treatment of ubuntu in a non-exhaustive literature and indigenous cultural practices on punishment, is dismissed by Van der Walt as 'disingenuous'<sup>62</sup>, and only giving the 'impression' of grappling with the principles of African law.<sup>63</sup> It is not difficult to imagine why barristers appearing before the Constitutional Court may not be particularly well versed on ubuntu. How much exposure, under

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'Generally, ubuntu translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa ubuntu has become a notion with particular resonance in the building of a democracy'; Sachs J para 374 (the latter will be discussed in what follows).

<sup>58</sup>Van der Walt *Law and sacrifice* 109.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Id* 110-111.

<sup>61</sup>*Id* 110.

<sup>62</sup>*Id* 113.

<sup>63</sup>*Id* 111.

apartheid, or indeed even now, do law students and practitioners have to non-European principles, philosophies, or values?

Van der Walt's attack on the reasoning of the Judges in *Makwanyane* is carried out in the name of 'rigorous jurisprudence': 'a rigorous jurisprudence must be dissatisfied with the feel-good flavour of a jurisprudence that has done little more than add a local, indigenous and communitarian touch to the Christian, Kantian or Millsian respect for the individual that informs Western jurisprudence'.<sup>64</sup> Why does the 'local, indigenous, and the communitarian' hold such a 'flickering light' in the face of the 'Christian, Kantian and Millsian' ground of the western legal subject? And if Christianity in particular is to be so readily invoked, one wonders what submissions were made to the court on that basis, or indeed on the basis of Kant or Mill? Is it not a particular 'culture' - perhaps even a particular civilisation - that is being reasserted here? Universality, Gramsci taught us, is always a hegemonised particularity. In a postcolonial context, where decolonising the legal system and the minds of its lawyers, judges, and intellectuals is at stake, would it not have been more apt to congratulate the court for offering a (African) philosophical basis for rejecting the death penalty? This is particularly so given the extent to which arguments in cases regarding the constitutionality of the death penalty tend to rely so heavily on consequentialist rather than principled arguments. But for the court to have been congratulated, the commentator would have to grant ubuntu the status of philosophy. An onto-epistemology for forgiveness, reconciliation, and even for something as specific as outlawing the death penalty is available in the 'new' South Africa. Judges of the Constitutional Court, and constitutional drafters (in the context of the interim constitution) began to recognise that. It remains for intellectuals to decolonise their minds.

According to Van der Walt, the vague ideas about ubuntu apparently deployed by the court tell us nothing about the constitutionality of capital punishment.<sup>65</sup> A 'rigorous jurisprudence' would surely want to engage with specific norms inspired by ubuntu and the profile of punishment in African culture '*before* reaching any conclusions on the meaning of ubuntu for the question of the constitutionality of capital punishment'.<sup>66</sup> Despite such commanding insight into what 'rigorous jurisprudence' in this context might entail, Van der Walt has exempted his own survey from this standard.

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<sup>64</sup>*Ibid.*

<sup>65</sup>*Ibid.*

<sup>66</sup>*Ibid* (original emphasis).

Virtually all of the assertions and characterisations about ubuntu in his own account are drawn from the *Makwanyane* decision which he impugns for a lack of rigour.<sup>67</sup> Despite the insubstantial account of ubuntu philosophy, the following dramatic conclusions are drawn:

having engaged at least somewhat with the communitarian substance of the concept of ubuntu, would a rigorous jurisprudence not approach this investigation with a nagging suspicion that individual life may actually be less worthy of protection in traditional African cultures than it is in Western cultures? Would this investigation not proceed in trepidation for fear of what it might find, fear that it might find that African cultures often or at least sometimes exacted a fine of a number of head of cattle as punishment for murder, on the one hand, and capital punishment for the theft of cattle, on the other?<sup>68</sup>

For those familiar with the staggering excesses of European imperial endeavours, in part at least inspired by the theological and political philosophies of western cultures, there will be no such fear or trepidation! For those familiar with how Christian anti-Semitism and the European enlightenment matured into the holocaust of European Jews there will be no such fear or trepidation! Another difficulty with this statement is that a discussion of capital punishment, on which there are multiple accounts in various cultural and legal systems and discourses, is the setting for Van der Walt's discussion of ubuntu. The Court's treatment of capital punishment in *Makwanyane* ranges widely, including to the US and European jurisdictions. The lesson to be drawn from the African examples could have been read as the desire to restore balance and 'equilibrium' to society rather than the interpretation that life was cheap in African cultures, and that such would always be the case.

Van der Walt draws his 'nagging suspicion' about (some) African traditional practices of punishment from Justice Sachs' account in *Makwanyane*. He is not suggesting that the Courts or 'post-apartheid' jurisprudence should entirely steer clear of the concept of ubuntu.<sup>69</sup> But on the basis of the account of ubuntu in *Makwanyane* he is prepared to give instructions on how South African jurisprudence should approach the concept of ubuntu, and indeed reduces the concept to the 'feudal and hierarchical':

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<sup>67</sup>The several references on page 113 to 'African culture', or sayings in African languages are not linked to ubuntu as such.

<sup>68</sup>*Id* 111.

<sup>69</sup>*Id* 114.



continued use of ubuntu in South African jurisprudence would require a good deal of critical inquiry and honest critical thinking to distil from the feudal, hierarchical, and thus vertical trappings of this concept a different understanding of constitutionality in terms ... of the radical equality that [Jean-Luc] Nancy contemplates when he refers to the horizontality of mortals.<sup>70</sup>

Ubuntu is thus reduced to a rather impoverished notion of 'communitarianism'. Van der Walt asks whether such ubuntu sayings as 'a person is a person through people' (the Shona version being 'I am because we are; I exist because the community exists'), demonstrates that being-more-than one, being singular plural in Nancy's terms, 'degenerates into a communal whole'.<sup>71</sup> In other words, his question is whether the concept of ubuntu is nothing more than the expression of a feudal and hierarchical setting of social stasis where communal needs supersede the individual. His is not an intervention in the name of any individualism, but in the pursuit of the 'horizontal' of social relations which he draws from the notion of 'being singular plural' - the ontology of co-appearance of singular beings - set out by Jean-Luc Nancy. One need not only be enamoured with the Kantian and enlightenment injunction that 'we should dare to know' in order to take up the challenge of a critical inquiry into ubuntu. It should necessarily follow from the urgent need to decolonise South Africa.

In what follows I will attempt to engage with some of the interrogatories that Van der Walt has issued in relation to ubuntu. Ubuntu cannot be reduced to a communitarian ethic where the individual is subordinated to the ethical, political, and moral horizons of the community. More comprehensive accounts of ubuntu are readily available, but they receive no attention in *Law and Sacrifice*. In what follows I will draw again on Ramose's account with a view to addressing some of the mis-characterisations of ubuntu in Van der Walt's account. It is not accurate to claim, for instance, that ubuntu is a 'vertical' or 'hierarchical' concept. The philosophy of ubuntu does contain a striving towards 'wholeness' or togetherness, but there is no reason to present this as an 'absolute', as predetermined hierarchical whole or feudal stasis. Of course, it is pointless to suggest that African culture, like any other, does not feature hierarchy, or to discuss whether this or that 'culture' values life more than another. These are spurious inquiries in themselves and I shall not dwell further on these matters.

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<sup>70</sup>*Ibid.*

<sup>71</sup>*Id* 115.

It is clear from Ramose's account of ubuntu that the 'wholeness' of society should not be read as stasis or fixity. If anything, what is clear about the concept of be-ing in ubuntu, is that 'Ubu-' is 'marked by uncertainty' because it is 'by definition motion involving the possibility of infinite unfoldment and concrete manifestation into a multiplicity of forms and organisms'.<sup>72</sup> 'Ubu-' expresses the notion of 'be-ing in general', the widest generality of be-ing.<sup>73</sup> 'Umu-' shares a similar ontology, but is more specific. 'Umu-', joined with '-ntu', *umuntu*, marks the emergence of *homo loquens* and in 'common parlance means the human be-ing: the marker of politics religion and law'.<sup>74</sup> The inquiry into being, experience, knowledge and truth is conducted by umuntu - but this is 'an ongoing process', an 'activity rather than an act'.<sup>75</sup> Hence 'ubu-' is regarded as 'be-ing becoming'.<sup>76</sup> This is crucial to our inquiry. It implies a notion of be-ing as incessant motion.<sup>77</sup> Umu-ntu/ubu-ntu in incessant motion can then be expressed with the emphasis on the 'verbal' rather than the verb '-ntu'. Ubuntu is then a 'verbal noun' - that is to say, in grammatical terms, it is a 'gerund' ('a form of verb functioning as a noun' - in English ending in -ing and used with a verb - OED).<sup>78</sup> This is a disruption of the regular western opposition between being and becoming. 'Be-ing becoming' places the emphasis on *motion*, and is thus against the fragmentation of being.<sup>79</sup> The association of 'being' with order and 'becoming' with chaos is broken by the 'flow' (the Greek verb, *rheo*) of 'be-ing becoming'. The general view is that the 'apparent structure of language determines the sequence of thought'.<sup>80</sup> As language breaks the silence of be-ing, 'be-ing becoming' must be understood in and through the 'rheomode' language.<sup>81</sup> This has implications for how the legal subject is conceptualised, and can be explained at that more concrete level.

The logic of ubu-ntu follows that of a rheomode language. A rheomode language places emphasis on the gerund (the verb

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<sup>72</sup>Ramose *African philosophy through ubuntu* (2002) 50.

<sup>73</sup>*Id* 41.

<sup>74</sup>*Ibid*.

<sup>75</sup>*Ibid*.

<sup>76</sup>*Ibid*.

<sup>77</sup>*Ibid*.

<sup>78</sup>*Id* 41-42, 82.

<sup>79</sup>*Id* 42-43.

<sup>80</sup>*Id* 43.

<sup>81</sup>*Id* 45.

functioning as a noun - the '-ing' in be-ing), and opposes the 'subject-verb-object' linguistic structure.<sup>82</sup> Of course this linguistic structure which privileges the name/noun as the acting moving subject has been undone by many philosophers, including by Jacques Derrida in his work on the 'trace' which marks and exceeds the appearance of all signification, as well as in his deconstruction of the metaphysics of 'presence'. These insights are incorporated by Ramose.<sup>83</sup> The 'subject-verb-object' structure asserts an ontology where subject/object are distinct entities and the verb acts as mediator. It is in this way that what Ramose terms the 'fragmentation of be-ing' takes place. It is through this ontological structure that western legal thought attributes rights and duties to the 'nounized legal subject'.<sup>84</sup> Ramose's account of law through ubuntu articulates a shift from the 'noun' to the 'verbal noun', the gerund.<sup>85</sup> Though there is not the space to pursue a comparison here, this task is comparable with Derrida's attempt to undo *ipseity* - the impossibility of the 'self-same', the 'I can', or auto-nomy.<sup>86</sup>

The whole-ness that the philosophy of ubuntu is supposed to inspire is thus not the absolute of community-as-law or communitarianism. Rather whole-ness through ubuntu is the recognition that be-ing is not fragmented as the subject/noun 'be!' as it is in (some) western Ontologies.<sup>87</sup> Ubuntu philosophy undoes the abstract human subject of western legal thought.<sup>88</sup> It eschews the re-presentation of the subject as the abstract representation of the 'subject-verb-object' structure of language/law. It does so by de-centring the nounal subject from the fragmentation subject/object. African law:

is law without a centre since the legal subject here is an active but transient participant in the be-ing, that is, the musical flow of law ... ubuntu law is not only the ontology of the do-ing subject. It is contemporaneously the epistemology of the discern-ing subject continuously harmonising the music of the universe. In this sense, ubuntu philosophy of law is a dynamology. Law here is thus dynamic because it is in the first place rheomodic.<sup>89</sup>

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<sup>82</sup>*Id* 46.

<sup>83</sup>*Id* ch 6 101 n 13.

<sup>84</sup>*Id* 82.

<sup>85</sup>*Ibid*.

<sup>86</sup>Derrida *Rogues: Two essays on reason* (2005) ch 1-3.

<sup>87</sup>Ramose *African philosophy through ubuntu* 46-7.

<sup>88</sup>*Id* 92.

<sup>89</sup>*Ibid*.

The subject is then not obliged to live 'within the law' as with the western legal subject, but to 'live the law'.<sup>90</sup> The object of law inspired by ubuntu is to maintain equilibrium.<sup>91</sup>

Drucilla Cornell and Karin van Marle have commented on how ubuntu might be regarded as an interactive ethic that stands behind the law in the 'new' South Africa.<sup>92</sup> On their account, ubuntu is not only an account of being or existence. It is also an 'ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other'.<sup>93</sup> They distinguish ubuntu from communalism or communitarianism - terms that suggest the privileging of community over the individual - arguing that what is at stake in ubuntu's ontic orientation is the 'process of becoming a person', and how one is given a chance to become a person.<sup>94</sup> This accords with Ramose's account of ubuntu as 'be-ing becoming'. Community is then not some static entity 'outside' the individual: 'The community is only as it is continuously brought into being by those who "make it up"'.<sup>95</sup> Cornell and Van Marle explain how this ontic orientation of ubuntu can be deployed so that freedom can be understood as indivisible. With the Constitutional Court's decision in *Makwanyane* in mind, they explain how a society that allows the death penalty institutionalises a form of a vengeance as the field in which we must all operate. A conception of freedom drawn from ubuntu 'is not freedom from; it is freedom to be together in a way that enhances everyone's capability to transform themselves in their society'.<sup>96</sup> Given ubuntu is an 'ontic orientation within an interactive ethic, it is indeed a sliding signifier whose meaning in terms of a definition of good and bad is always being re-evaluated in the context of actual interactions, as these enhance the individual's and community's powers'.<sup>97</sup> While some might call this imprecise, unpredictable, or a dangerous basis on which to curtail state violence (such as the death penalty), Cornell and Van Marle argue that the

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<sup>90</sup>*Id* 93.

<sup>91</sup>*Id* 93-94.

<sup>92</sup>Cornell and Van Marle 'Exploring *ubuntu*: Tentative reflections' (2005) 5 *African Human Rights Law Journal* 195-220 at 205.

<sup>93</sup>*Ibid*.

<sup>94</sup>*Id* 206.

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

<sup>96</sup>*Id* 207.

<sup>97</sup>*Ibid*.

'bloatedness of ubuntu' is actually its strength.<sup>98</sup> One person's freedom may still be destroyed by the community. This will endure as long as there are competing freedoms, and especially in the realm of punishment. But ubuntu is an African principle of transcendence which provides a mode of attending to the moral fabric of an aspirational community.<sup>99</sup>

## Conclusion

The emancipatory purchase of the philosophy of ubuntu in the context of decolonisation is considerable. Ubuntu has certainly shown its potential, evidenced by its deployment in the interim Constitution and the early decisions of the Constitutional Court, to help to restore some equilibrium in a fractured society. But this is where the engagement with ubuntu, and with Ramose's writings must be undertaken critically. Ramose claims that 'authentic liberation' must involve a restoration of sovereignty, the restoration of title to land which was taken during the unjust wars of colonialism (94-5). While I have attempted here to be attentive to the philosophy of ubuntu as it has been articulated by Ramose and others, I by no means accept the conclusions Ramose reaches concerning the possibility of the recovery of a lost sovereignty.

The de-centring of a nounal conception of being, be-ing in a rheomode language, also requires that the being of sovereignty be accorded the same treatment as that of all be-ing. The problem of postcolonial sovereignty is not specific to the Bantu speaking peoples of South Africa. As I stressed at the outset, the sovereign disaster is universal. One of the key constitutional dilemmas the world-over has been the challenge of departing from a monistic and essentialist conception of sovereignty. In a liberal legal order this is expressed through the tension between legislative and constitutional supremacy. Ramose seeks onto-epistemological parity and political equality for what he terms the 'indigenous conquered peoples of South Africa'. He has elected, perhaps strategically, to articulate this in terms of a quest for sovereign parity. But both in ubuntu and some western ontologies (such as those set out by Jean-Luc Nancy), such a singular presence of sovereignty is impossible, and hence a 'lost sovereignty' is unrecoverable.<sup>100</sup> The trace of the usurpation of old sovereignties, and the inscription of new ones can certainly be

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<sup>98</sup>*Ibid.*

<sup>99</sup>Cornell 'Ubuntu, pluralism, and the responsibility of legal academics to the new South Africa' (2009) 20/1 *Law and Critique* 43-58 at 48.

<sup>100</sup>Nancy *Being singular plural* (2001); Nancy *The inoperative community* (1991).

memorialised and archived (in all senses of the latter term). But a pre-colonial sovereignty, or sovereignties, must not be monumentalised.<sup>101</sup> The being of sovereignty is itself an in-finite plurality.

In more concrete terms this problem of recovering sovereignty has been confronted by feminist and anti-capitalist thinkers like Andrea Smith.<sup>102</sup> Smith addresses the political dilemmas of according priority to tackling violence against women as a mode of colonial genocide in nation-states such as the United States. Native feminist activists have confronted the issue of whether recovering pre-colonial sovereignty will return a more pristine community where women are not violated and denigrated in the way they are in colonial societies. The question has been whether racial justice should be prioritised over gender justice - the argument being that the latter would follow from the former. Smith points out the falsity of these claims - and her arguments have a much wider bearing on the question of postcolonial sovereignty. The attention to sovereignty can often be at the expense of attending to the very real violence that has been 'internalised' and is committed across boundaries of coloniser and colonised, but also within colonised communities: 'Unfortunately, we continue to perpetuate this colonial violence through domestic/sexual violence, child abuse, and homophobia. No amount of reparations will be successful if we do not address the oppressive behaviours we have internalised'.<sup>103</sup> Moreover, the violence of exclusion arising out of any concept of the nation needs to be interrogated. Smith questions whether self-determination for indigenous people needs to be equated with nation-state sovereignty. She calls for the creation of other forms of governance which do not conform to domination and control.<sup>104</sup>

Postcolonial sovereignty is in-finite. It must be rendered finite in order to inaugurate a new social and juridical order. But its reach is also infinite - it cannot be fully departed from. There is no past without its disastrous 'future perfect', no present without its anterior trauma, and no future that is not already undone. The problem of postcolonial politics today must be understood in terms of this in-finite character of colonial sovereignty. We must also understand the postcolonial problem of sovereignty as not only pertinent to the erstwhile colonies, but also to the political dilemmas of a wider

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<sup>101</sup>I take the phrase from Johan Snyman 'Interpretation and the politics of memory' (1998) *Acta Juridica* 312.

<sup>102</sup>Smith 'Native American feminism, sovereignty, and social change' (2005) 31 *Feminist Studies* 116-132.

<sup>103</sup>*Ibid* 127.

<sup>104</sup>*Ibid* 128-30.

world. Contesting and re-inventing sovereignties needs to be much more mindful of the problems of global justice.

The following questions emerge out of the present study as needing further attention. How will a suppressed onto-epistemology contend with existing hegemonic orders? What is the relationship between particular epistemes and the demand to universalise freedom and equality? How can the logic of sacrifice be viewed differently? What mode of politics would be better suited to acknowledging political antagonism without surrendering to dubious accounts of the loss of political subjectivity? In grappling with the competing epistemological approaches to the question of being, plurality, and normativity, legal theorists, judges and lawyers need to be attentive to how institutional structures and individual juridical decisions are hegemonised particularities. Contending with this hegemony must involve a politics that reflexively competes among a variety of positions in an agonistic struggle in which there will be winners and losers. Pretending otherwise is neither politically responsible nor theoretically sound.