

**DECONSTITUTING TRANSITION:
LAW AND JUSTICE IN POST-APARTHEID SOUTH AFRICA**

by

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DECLARATION

I declare that this thesis, unless specifically indicated to the contrary in the text, is my own original work.

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ABSTRACT

The aim of this study is to suggest, by selective example, a form of jurisprudence which relates to and may have a salutary effect upon law and justice in post-apartheid South Africa. I describe three ways in which South Africa can be regarded as negotiating a transition – from apartheid to post-apartheid, from modern to postmodern and from colonial to postcolonial. I argue for a jurisprudence which directly concerns itself with each of these three overlapping and mutually informing modes of transition: an approach to law and justice which is post-apartheid, postmodern and postcolonial. Since my account of law and justice engages with all three transitions, it has the potential to bring about a positive transformation in the conservative legal theory currently in favour with the judiciary.

I suggest that the positivist approach followed by the judiciary during apartheid led in most cases to a removal of ethics from the legal universe and a diremption of law and justice. I contend further that the current approach of the judiciary still bears the hallmarks of positivism, in its continued adherence to the ‘literal approach’ to constitutional interpretation and its misunderstanding of the role of morality in adjudication. I argue that positivism, with its potential to produce injustice, should be abandoned in favour of an approach based on a postmodern epistemology which incorporates a concept of justice which is both substantive and avoids the pitfalls of natural law: the historical exhaustion of classical teleology and the failure of religious transcendence to command widespread respect. The postmodern theorists I draw on, Michel Foucault, Jacques Derrida and Jean-Francois Lyotard, cumulatively point to the failure of the Enlightenment to ground legal practice upon the universalising faculty of reason. Postmodern jurisprudence, informed by postcolonial theory, postulates justice as an ethic of alterity and is able to reintroduce ethics into law in a manner which avoids the critique of Enlightenment epistemology.

Having set out the jurisprudential views of these theorists, I turn to the activity of constitutional interpretation to demonstrate the way in which the judiciary’s current approach to interpretation could be positively transformed through the introduction of interpretative techniques related to poststructuralism and specifically deconstruction. I argue that interpretation is an activity necessarily

informed by values and that the indeterminacy of the language of the Constitution provides the interpreter with choice. Provided the choice is ethically motivated, interpretation is a transformative activity.

Having concluded the expository section of this dissertation, I provide a close reading of two Constitutional Court judgements, *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* and *S v Makwanyane and Another*. These judgements, decided under the interim Constitution, are arguably the most important judgements of the Constitutional Court to date. They represent sites of the judiciary's internal struggle to respond to the requirement for a new epistemology and practice of interpretation, which provide the means to adjudicate justly and also suggest ways in which to justify its decisions. My study is largely restricted to these two cases, and although I refer to other cases for their bearing on particular issues, I do not aim at a comprehensive survey of the Constitutional Court's record to date. Nevertheless, this study concludes with some provisional remarks about the record of the Constitutional Court since its inception and suggests possible ways in which the jurisprudence I have argued for may be pursued in furtherance of justice.

CONTENTS

Chapter One – Transitions	1
1.1 Apartheid/ Post-apartheid	3
1.2 Modern/ Postmodern	10
1.3 Colonial/ Postcolonial.....	19
1.4 Qualifications, Objections, Supplements.....	20
 Chapter Two – Modern Law/ Postmodern Justice	 35
2.1 Positivism	38
2.2 Postmodernism.....	43
2.3 The Rule of Law	62
2.4 Postmodernism and The Rule of Law	69
2.5 The Myth of Liberalism’s Rule of Law	77
 Chapter Three – Just Is? Constitutional Interpretation	 82
3.1 Constitutional Interpretation in South Africa	84
3.2 From Literalism to Hermeneutics	93
3.3 Determinacy and Indeterminacy in South Africa	108
3.4 Poststructuralist/ Deconstructive/ Postcolonial Interpretation	112
3.5 Practical Suggestions	120
3.6 Interpretation as Violence	126
 Chapter Four – Corrective Justice: <i>AZAPO</i> and the TRC	 127
4.1 Narrative and Corrective Justice	127
4.2 <i>AZAPO</i> and Legal Modernity	134
4.3 Justice, Reconciliation and the TRC	160
 Chapter Five – In Execution of Justice: <i>Makwanyane</i>	 172
5.1 Literary Representations	172
5.2 Newness?	178
5.3 Marginality, Anxiety, Ex-centricity, Madness	184
5.4 <i>Ubuntu</i>	189
5.5 <i>Ubuntu</i> . Tradition and Nation	198
5.6 Death as Penalty	208
5.7 Public Opinion, Counter-Majoritarianism and Democracy	215
5.8 Conclusion	223
 Chapter Six – Widows and Orphans	 225
6.1 Exclusions and Deconstructions	227
6.2 Reconciliation and Justice	234
 Bibliography	 237

Chapter 1: Transition(s)

“South Africa is a deconstructing country” (Derrida 1999: 284).

Philosophy (including ethical and legal theory), Richard Rorty contends, is necessarily ethnocentric: “*We must start from where we are*” (Rorty 1989: 198, emphasis in original).¹ As a Hegelian observation about the situatedness of criticism and philosophical activity generally, this seems like a reasonable thing to say.² However, if “where we are” happens to be present day South Africa, Rorty’s remark starts to sound less helpful, given that claims about ‘where we are (now), where we are going (in the future) and where we should be are inter-imbricated, varied and contradictory, the subject of widespread discursive contestation characteristic of the transitional moment, a moment characterised by Homi Bhabha in the following terms:

South Africa represents, in an acute and tragic and problematic way, the opportunity to see transformative elements at work in the construction of a new historic destiny, where the question of race and cultural difference is foregrounded. (Bhabha in Artwell 1993a: 112)

This dissertation both investigates and joins the heterogeneity of voices, arguing that to understand the various contrary forces which prevail in and construct the context of these arguments enables reflexivity and ethical transformation.³ My aim is to advance (and in many cases, since the theoretical positions discussed are not new, defend) and illustrate a cluster of claims, which I set out in ascending order of

¹ Rorty’s view is ethnocentric in the sense that it reflects scepticism about the philosopher’s ability to transcend the contingent practices which happen to be in place in a particular community in any given moment. He is not advocating ethnocentrism in the narrow sense of valorising one set of cultural practices above another as justification for some kind of imperialist intransigence.

² Hegel’s ethical certainty and his ability to approve legal judgements depends on making judgements using the standards of the community. While I would accept the idea of an appeal to the *ideal* of the community – the community ‘always still to come’ in Derrida and Lyotard’s sense – as Drucilla Cornell rightly argues “the appeal to the community ineluctably slides into an appeal to totality” (Cornell 1992a: 35). Hegel’s community and the values of *sittlichkeit* supply the element missing from Kant’s formalist account of ethics in order to provide substance to the ethical judgements. But a community is a totality in the sense that it excludes those who do not fit – the other of gender, race, sexual preference etc. In South Africa, appeal to ‘the community’ as an ethical foundation is an appeal to a heterogenous cacophony, a polyvalence in relation to which no consensus exists.

³ Gunatilleke formulates the task as follows:

An evaluation of how developing countries manage their transition is itself an exacting moral task ... there must be a profound understanding of the historical processes in these societies, a

controversy. My first claim is to the effect that, six years on from its first ever democratic elections, South Africa is in the process of negotiating a transition, or rather a series of related and mutually informing transitions which combine in contemporary social conditions. In this introductory chapter, I set out three ways in which South Africa can be regarded as transitional (the transitions are from apartheid to post-apartheid, modern to postmodern and colonial to postcolonial respectively) and show the way in which law informs or is informed by each. Second, I shall argue that law has the potential both to transform itself and South African society from the injustice of apartheid to a more democratic, and so more just society. Third, I shall demonstrate that the transformation of law and society is unlikely to take place for so long as the judiciary continues to follow either positivism or its current unstructured and vaguely theorised value-oriented approach. I suggest, in Chapter Two, that what I will term “postmodern jurisprudence” offers a politically and epistemologically superior practice of adjudication and source of values to those currently followed by the judiciary.

Fourth, I shall argue in Chapter Three that if the potential of the current legal system, a form of legal liberalism with a written constitution, to transform both itself and society is to be activated, a more epistemologically radical practice of judicial interpretation is required than those currently in favour with the judiciary. Fifth, I shall demonstrate in Chapters Four and Five that postmodern and postcolonial theory may inform analysis of legal texts, particularly court judgements, with the effect of elucidating contradictions, hidden reasons, supplementary meanings and other undeclared possibilities, all of which have a potentially transformative significance.⁴

Finally, I want to show how literary analysis may, in appropriate circumstances, supplement both legal theory and practice and is particularly consonant with the theoretical positions I advocate. If this seems disjunctive, impure or unfocussed, let me now acknowledge that I see considerable merit in syncretism. Law is a social phenomenon; its transformative possibilities are not simply a question of what Gayatri Spivak calls “mere philosophical justice” (Spivak 1987: 162). In other words, the problem of legal justice cannot be divorced from its social conditions of possibility. Since social conditions are comprised of a number of interconnected

capacity to see the ethical issues in relation to these processes, and a sensitivity to the inner struggle of a society in the midst of an unprecedented transition. (gunatilleke 1983: 8)

practices, discourses and institutions – law, literature, politics and philosophy being four – it stands to reason that a study of law should reflect the influence of the other social discourses. I am not suggesting that law, literature, politics and philosophy are indistinct genres, but rather that to combine them, to experiment with and blur their distinct contours can lead to something new. As Rorty explains, “one way to create new genres is to stitch together bits and pieces of old genres” (Rorty 1998: 315).⁵

1.1 Apartheid/ Post-apartheid

As a newly emergent neo-liberal democracy, South Africa has faced, and still faces, the formidable challenge of reconstructing society in response to the legacy of exclusion and oppression bequeathed to it by the apartheid government, a regime notorious not only for its segregationist policies but also for severe and consistent coercion of the disenfranchised majority, systematic repression of particular parties and individuals, and gross injustices such as extra-judicial executions, ‘disappearances’, systematic torture and secret detention. In J.M. Coetzee’s assessment of apartheid, “the whites of South Africa participated in various degrees, actively or passively, in an audacious and well-planned crime against Africa” (Coetzee 1992: 342). Ironically the “crime” of apartheid was largely, though not exclusively⁶, committed through the instrumentality of law: the National Party disenfranchised blacks soon after it took power in 1948; it outlawed liberation organisations such as the ANC and the PAC; it detained thousands under the Internal Security Act and declared States of Emergency.

Given that the law operated as an instrument of oppression, augmenting and strengthening inequalities of wealth and power between racial groups, it is

⁴ This dissertation does not attempt an analysis of all the Constitutional Court cases decided thus far or even all the most important cases. Its focus lies elsewhere.

⁵ Both Lyotard and Derrida experiment freely with new combinations of genres. Lyotard calls this practice “paralogy”. Rorty wants to distinguish syncretism from genius: “But even the most successful syncretism cannot hope to imitate the truly heroic philosophical achievements: the one’s that let us see everything from a new angle, that induce a gestalt switch” (Rorty 1998: 10). I am not convinced, however, that experimentation with genres could not induce a change in perception of the kind Rorty has in mind. As Richard Shusterman argues: “By simultaneously celebrating their borrowing and their originality [syncretism] undermines any dichotomy between creation and appropriation, between making works and remaking them in making them work better” (Shusterman 1997: 140).

⁶ As Richard Abel notes, the National Party government “was fully prepared to jettison law in favour of force: withholding services to drive blacks off land, detaining thousands without trial, killing and wounding hundreds, and using the military to occupy townships. It wantonly tortured, less to extract information than to humiliate and cow” (Abel 1999: 70).

unsurprising that the apartheid government proclaimed fidelity to the rule of law (Abel 1999; Dyzenhaus 1998). The doctrine of parliamentary sovereignty dictated that parliament was supreme. There was no written constitution, no bill of rights, and judges, who were appointed by the National Party, mostly supported apartheid, applying the law in a manner which left no doubt as to their political allegiances (Dugard 1978; Corder 1984; Dyzenhaus 1991).⁷

The recognition that the law can be used for evil should not preclude the acknowledgement that it can also be used to resist evil and to effect conditions conducive to social justice.⁸ During apartheid, opposition groups challenged actions of the government in the courts with some success. Admittedly, where legal challenges did succeed, these cases were usually followed by legislative enactments overturning judicial pronouncements. There nevertheless survives, after forty years of apartheid, a pervasive optimism about law's potential to transform the conditions of South African society into something just. I want to call the role of law in securing the transformation of South African society from apartheid to an increasingly just form of democracy, "transitional justice".⁹ The study of transitional justice has traditionally more or less limited itself to the question of successor justice: the accountability of former authoritarian regimes for gross human rights violations committed during their subsistence, incorporating the implications of pursuing various strategies to achieve corrective justice¹⁰ after transition (Kritz 1995; McAdams 1997; Neier 1998; Minow 1998; Van Zijl 1999). Contrarily, the concept of transitional justice I wish to explore

⁷ Raymond Wacks, on the basis of Dworkin's assertion that judges do not exercise a discretion and that in South Africa "[a]n exclusively white judiciary applies unjust laws of an exclusively white legislature to an unconsenting majority" (Wacks 1984: 281), urged the judiciary to resign in protest. As John Dugard (1984) rightly pointed out in response, the judiciary has discretion in its interpretation of legislation and this in itself created the potential for judicial activism and reform.

⁸ Marxists and certain critical legal studies scholars are wont to dismiss law out of hand on the basis that it is simply a vehicle for oppression. Although I agree that law is a discourse of power, resistance is always possible. Injustice can never be fully wiped out, yet it can be progressively ameliorated.

⁹ I realise that, as definitions go, this might seem a little indeterminate or less than comprehensive. I will argue shortly that indeterminacy is, under certain conditions to be valorised and that attempts at comprehensiveness or at least closure are something to be avoided. In any event, the term "transitional justice" will accrue further valences throughout this work.

¹⁰ Since at least the time of Aristotle, political justice has been divided into the categories of distributive justice and corrective justice (Aristotle, *Nicomachean Ethics* Book V, v.4, 281). The former is concerned with the distribution of divisible goods from the common store while the latter is concerned with the award of damages which simultaneously quantifies the wrongdoing of one party and the suffering of the other party in a bipolar (voluntary or involuntary) transaction, in short, the recovery of a *status quo ante*. Ernest Weinrib (1988) insists on a complete separation of these two categories of justice, but I do not believe there to be any insurmountable gap between the two, since the measure of compensation under corrective justice depends on a criterion of justice that is applicable

embraces law's participation in the full spectrum of political justice, including corrective justice and distributive justice, relevant to South Africa's transition to democracy and social justice (Roederer 1999a). Accordingly, I do not restrict myself to commenting on questions of successor justice.¹¹ This is not to deny that dealing with the past is crucial to a successful transition. It is merely to assert that the past is ineluctably bound up with the full spectrum of intersubjective dealings occurring in the present and future and that the institution of law is creative of social conditions at all times. Successor justice may be viewed as a subset of transitional justice as I have defined it.

For the sake of context, it is worth providing a brief overview of the events leading up to the 1994 elections. By the late 1980s the ANC had come to understand that the government could not be overthrown and that an attempt to mobilise the population for armed struggle would be disastrous. At the same time, there was a growing realisation within the government and its supporters that apartheid was not viable. Apart from the diminished sense of security following the 1984-1986 uprisings, international sanctions, refusals by foreign banks to roll over loans, and sports and cultural boycotts sent a message to white South African leaders that they would never be accepted internationally until minority rule ceased. Most significantly, the government came to realise that the very structures of apartheid were imploding (Herbst 1997).¹² A further crucial development was the collapse of communism worldwide, symbolised by the fall of the Berlin Wall in November 1989. The demise of the USSR and concomitantly Soviet-style Marxism was a major determinant in South Africa's transition from authoritarian rule. It led to a re-evaluation of the revolutionary and antinomian rejection of liberal rights discourse which had been stigmatised by Marxists as the unmediated expression of normative bourgeois authority and economic domination in a legal order, binding together at a political and ideological level a social order predicated on massive inequalities of wealth and opportunity (Pashukanis 1978; Sugarman 1983). Moreover, liberal democratic powers such as the United States and Sweden were influential on the African National

across the board to all intersubjective dealings coming within the sweep of an all-encompassing system of justice (Rosenfeld 1992: 187).

¹¹ Nevertheless this question is an important one and I devote Chapter Four to it.

¹² As F.W. de Klerk later admitted "[I]f our old policy, which was so unpopular in many circles, could work, then we would have surely clung to it. But as responsible leaders charged with the governance of the country, we came to the conclusion that the policy we had planned simply could not work ..." (De Klerk interviewed on Talks with ANC, BBC Summary of World Broadcasts, 9 May 1990, part 4).

Congress and the discourse of human rights played a practical and ideational role in the resistance to authoritarian rule.

As a result of the failure of either the South African Defence Force or *Umkontwe we Sizwe* to win an outright military victory as well as the contingent vacillations of the political settlement negotiated by political elites between 1989 and 1994 (Wilson 1996), an interim justiciable Constitution came into force in South Africa on 27 April 1994¹³, establishing the framework for the Government of National Unity. The Constitution, which has been described as post-liberal¹⁴, contains a bill of rights, which is a chapter on fundamental human rights¹⁵. From April 1994, hundreds of racist and otherwise oppressive statutory provisions were repealed by the Government of National Unity and others, such as section 277(1) of the Criminal Procedure Act, 1977, the death penalty provision, were challenged as offending constitutional rights. Moreover, the postamble of the interim Constitution provided for the granting of amnesty to perpetrators of gross violations of human rights, where such acts were politically motivated, in exchange for telling the truth about such acts. The Promotion of National Unity and Reconciliation Act¹⁶ was passed to give effect to the postamble by providing for the implementation of the Truth and Reconciliation Commission, a quasi-judicial body that was to act as a forum for the hearing and mediated distribution of narratives of victims and perpetrators of gross human rights violations.

The political moment following the transition from apartheid to liberal democracy raises questions about the operation of law during this period: What legal acts have transformative significance? What is the relation between a state's response

¹³ Section 251 of the Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁴ Karl Klare argues that the South African Constitution "intends a not fully defined but nonetheless unmistakable departure from liberalism" (Klare 1998: 152) toward an empowered democracy, which provides social as well as political justice. Klare distinguishes the social democratic aspirations of the Constitution – equality, redistribution and social security – from other essential and not strictly liberal features such as multiculturalism, close attention to gender and sexual identity, emphasis on participation and government transparency, environmentalism and the extension of democratic ideals into the public sphere.

¹⁵ Chapter 3. The Bill of Rights is intended to do more than place negative restraints on governmental interference with liberty. Positive duties imposed on the state include combating poverty and promoting social welfare, assisting people in authentically exercising and enjoying their constitutional rights and facilitating and supporting individual self-realisation. The final Constitution commits the government to promote democratic values, human rights and equality (Preamble and sections 1(a), 7(2) and 39(1)(a)); to overcome the legacy, specifically the socio-economic legacy of apartheid and to adopt reasonable legislation to ensure access to socio-economic welfare in such areas as housing, healthcare, food, water, social security and child protection (sections 26, 27, 8 and 29) and to protect the environment (section 24).

¹⁶ Act 34 of 1995.

to its repressive past and its prospects for creating a liberal order? What role can law, in South Africa traditionally a conservative institution legitimative of the *status quo*, play in radical and fast-moving transition given its imbrication and partial genesis in the values of the previous regime?¹⁷ Most importantly, what role can law play in effecting justice during this period and what is the nature of transitional justice? The legal responses analysed here occur within the bounded period following the constitutional settlement negotiated between the African National Congress and the National Party, the period between the operative date of the interim Constitution¹⁸ until the present day. Indeed, although this dissertation is not speculative in scope, it seems unlikely that South Africa will emerge from political transition, however defined, for some time. The two cases to be reviewed here were decided within the ambit of operation of the interim Constitution, a “deliberately and avowedly transitional instrument” (Du Plessis and Corder 1994: 1), effective during the period April 1994 to February 1997, when the final Constitution¹⁹ became operative. My remarks are not limited to the period of operation of the interim Constitution, however, since even up to the present day South Africa experiences the material and normative volatility of the transition to democracy.²⁰ The transitional period delineated here has so far offered complex challenges in relation to law and justice, such as the problem of successor justice, the writing of successive constitutions and the rewriting of a manifestly unjust legislature and common law to bring it into conformity with the new liberal democratic order and its legal discourse of rights. These will be among the issues addressed in this dissertation.

In times of transition, law’s function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of

¹⁷ Klare asserts in relation to post-apartheid legal practice that

progressive U.S. lawyers find South African interpretative or jurisprudential conservatism puzzling. One has the indelible impression of a disconnect or chasm between the Constitution’s substantively transformative aspirations and the traditionalism of South African legal culture jurisprudential conservatism (as defined here) may induce a kind of intellectual caution that discourages appropriate constitutional innovation. (Klare 1998: 170, 171)

¹⁸ The Constitution of the Republic of South Africa, Act 200 of 1993, which came into effect on 27 April 1994.

¹⁹ The Constitution of the Republic of South Africa, Act 108 of 1996, which came into effect on 4 February 1997.

²⁰ As Fiona Ross writes, “South Africans refer to the present as “the transition”, a time characterised by radical change and the anticipation of an end to it marked by the emergence of a qualitatively different kind of society from that which preceded it” (Ross in Wilson 2000: 92).

political upheaval, law maintains order even as it breaks with it, enabling transformation. In dynamic periods of political flux, legal responses generate a paradigm of transformative law (Teitel 1997) and with it a shift in the conception of justice. Transitional justice arises within a distinctive political context, a shift in political orders - "justice changes its spots" (Krog 1998: 66) – culminating in South Africa in the miraculous advent of non-racial democratic government. Krog's metaphor is an apt one: in transition the determinacy of meanings, representations, definitions, taxonomies and species within the old order open themselves to the creation of new meanings within the context of a new but not fully established order. In transition, existing classifications and conceptions - institutional, political and legal - revealed through political struggle as privilegings or preferences which are neither natural nor neutral, are suddenly subject to review and reversal.

The operation of post-apartheid liberal legality cannot be separated from questions of nation and nation-building. The Constitution and the Constitutional Court judgements construct and enforce nation-building and provide it with operative effect, even as discourses of nationalism provide law with efficacy (Fitzpatrick 1995). Law serves as an instrument of nation-building, subordinating particular orders to the generality of the nation, whilst the myth of the liberal nation provides modern law with an existential purchase which is nonetheless compatible with its transcendent generality. Law also denies a ground to other forms of authority which could derogate from the state by either prohibiting them outright or having them operate "subject to" the law.²¹ South Africa's transitional regime inherited a debilitated state suffering from a legitimisation crisis, with unstable and impaired institutions.²² In constitutional terms, the crisis was manifested in a general and well-founded scepticism concerning rights discourse, the judiciary and the infrastructural potential of the courts to respond to the demands of the new rights-based political dispensation. These problems were exacerbated by the bureaucratic character and power base of the new South African state. Programmatic nation-building has provided the exercise of state power with a degree of legitimation by identifying the exercise of such power, which occurs in

²¹ Although Gramscian notions of hegemony, in which law is seen as an ideology that expresses and maintains structures of inequality, might seem appropriate in relation not only to Afrikaner nationalism during apartheid but also to current nation-building, the relationship between state law and local norms in South Africa cannot simply be polarised in terms of dominance and resistance. Wilson (2000: 86) points out that local law (administered by township courts) in certain cases co-operates with state law, so that the relationship is rather one of "shifting patterns of dominance, resistance and acquiescence".

large measure through legal channels, with popular conceptions of culture and community in order to construct metaphors of unity and to cement collective moralities. For example, African nationalism and human rights discourse are conjoined in the term *ubuntu*²³, which features not only in the interim Constitution, but also in the judgement of the Constitutional Court as a prominent justification for its decision on the constitutionality of the death penalty. Moreover, in the quasi-legal proceedings of the Truth and Reconciliation Commission, discussions of truth led naturally into questions of reconciliation, national unity and nation-building. Law's complicity in the discourse of nation-building should not be uncritically adulated however. Stephen Toulmin notes that in the twentieth century the systems of logical structure and political organisation underpinning nationalism have become "*unfruitful and dysfunctional*" since they are insufficiently adaptive to the relations between sciences and states. Toulmin argues that:

a belief in the omniscience of the autonomous sovereign nation often works for the benefit of the current rulers, and against the interests of those who are "subject" to those self-appointed betters. Worse, those who develop a consciousness of "nationhood" late in the day are open to a pathological nationalism, which insists on anachronistic forms of unqualified sovereignty. (Toulmin 1990: 185, 195, emphasis in original)

I am not suggesting that disenchantment with the nationalism of post-independence African regimes should detract from the significance of liberation struggles carried out in the name of nationalism. However, it is necessary to be open to the possibility that oppression is inherent in nationalist structures and discourses, such as law, which construct them.²⁴ Nation-building's discursive manufacture of consensus and

²¹ The criminal justice system continues to be in crisis, lacking legitimacy and far from competent (Sarkin 1996a).

²³ *Ubuntu* has been interpreted in many ways and is for this reason rhetorically malleable. In human rights discourse it refers to such concepts as humanity, mutuality, community and compassion. It is no doubt impossible to provide an all-encompassing definition, in the sense that it is used by different language games differently, however the following definition has a broad application: "*Ubuntu* is seen as a benign expression of the community, representing a particularly reified and romanticised vision of the "Rural African Community" based on reciprocity, respect for human dignity, social welfare, empathy and solidarity" (Wilson 1996: 11).

²⁴ Partha Chatterjee makes the point that by transforming nationalism into a new state ideology, postcolonial countries subjected themselves to a global process of rationalisation based on external norms, a process governed by the logic of global capitalism dominated from the top by a few leading industrial countries (Chatterjee 1986). In V.S. Naipaul's *A Bend in the River* (1979), the triumph of nationalism in the third world is represented as not only suppressing very real tensions but also of eliminating the last hope of resistance to it. I shall argue that where nationalism manifests as domination, the authority of nation-building discourse in its legal articulation – in the constitution and

solidarity, incorporating the idea of the nation as a liberatory horizon with the populist resonance of a claim to justice, is in dramatic tension with differences between individuals and groups within South Africa. What is required is a reading of legal texts which incorporates nation-building rhetoric in a way that elucidates the

operative tension ... between the pedagogical and the performative ... the way in which structures of authorisation, as in the idea of the nation, or the idea of transformation ... are themselves constituted in and through forms of performativity which will question their grounds or their foundations. (Bhabha in Attwell 1993a: 110)

In spite of the fact that the South African legal system both during and after apartheid aligned itself with a normative liberalism (Wilson 2000: 95), the transitional period cannot be captured within prevailing theorising about the role of law in the liberal state. The transitional jurisprudence described in this dissertation examines the way in which law, as a discourse of power, has mediated and constructed political transition, rather than simply enforcing and perpetuating an existing liberal state. Persistent dichotomous choices arise as to law's adjudicative and constitutional role in periods of political change: backward versus forward, retroactive versus prospective, continuity versus discontinuity, individual versus collective, law versus politics. I shall demonstrate the ways in which the various legal mechanisms have mediated these antinomies, with a particular emphasis on the nature and role of constitutional interpretation and adjudication during this period.

1.2 Modern/ Postmodern

There is another, broader sense in which South Africa faces transition. South Africa participates in a period of worldwide paradigmatic transition from modernity to postmodernity (Santos 1995; Toulmin 1990; Mootz 1993; Herwitz 1999; Hunt 1990). In this regard, one can and should distinguish between several facets of postmodernism, a notoriously ambiguous concept.²⁵ Postmodernism gives the

in constitutional court judgements – may be resisted by challenging the determinacies of new representational systems.

²⁵ Cataloguing the various meanings of the term "postmodernism" throughout the immense profusion of literature in which it appears makes, as Kwame Anthony Appiah observes, "the task of pinning Kuhn's *paradigm* look like work for a minute before breakfast" (Appiah 1992: 140). The difficulty is exacerbated by the refusal of figures, such as Richard Rorty, generally regarded as postmodern to be

impression of a certain chronological progression, a temporal periodisation announcing the end of a previous stage, epoch or style, the culmination of modernity. On the other hand, postmodernism claims to have overcome an historical period (modernity) or an epistemology (modern) or a cultural and historic movement (modernism). For the purposes of this dissertation, it is sufficient to distinguish between two meanings of postmodernism: the cultural era and the epistemology.²⁶ Firstly, postmodernism is the cultural era in which we live, the era of postmodernity, which is distinguished from an earlier era of modernity (Harvey 1989; Lyotard 1984). Postmodernity is identified with the mass forms of communication and the commodification of intellectual products and symbolic forms. It is an era of mass culture and mediatization, in which culture and cultural artifacts are adapted to or created for the forms of mass communication. It features intensive mediatization of messages and symbols, lack of mass participation by individuals except as consumers of these symbols, and the effacing of substance by surface, fragmentation, and diffusion. Postmodern culture and technology is ethically ambivalent. The Internet serves as an example: it offers possibilities for lobbying, learning, participating in the struggles of others and permitting timely and effective communication. On the other hand, the spread of "computer mediated communication" in developing countries such as South Africa produces an insidious English language corporate "MacCulture".²⁷ The internet's commercialism will continue to exist in dynamic tension with its pioneering role in supporting freedoms (Walch 1999). Globalisation is a facet of postmodernity which impacts on the potential for economic well-being and

classified as such (Cooper 1998: 61). In certain cases theorists claim to be ignorant of the term 'postmodernism'. Foucault says: "But neither do I grasp the kind of problems intended by this term – or how they would be common to people thought of as being "postmodern" ... I do not understand what kind of problem is common to the people we call "postmodern" or "poststructuralist" (Foucault 1998: 448).

²⁶ James Boyle writes:

it seems to me useful to distinguish between postmodernism as a kind of arch cultural schtick and postmodernism as an earnest epistemology whose natural habitat is the Modern Languages Association annual conference. The cultural form, which I shall refer to as "pomo," is built on kitch quotation and the flight from ponderous sincerity, on the juxtaposition of contradictory styles and modes so that each impliedly mocks the other. (Boyle 1999: 497)

²⁷ The global export of that uniquely American unit of cuisine, the hamburger, as an example of postmodern colonialism is charted by the aptly named Rick Fantasia (1995), who provides an interesting account of the trials and tribulations of MacDonalds's expansionism in France, including its successful resort to legal action.

social justice for countries like South Africa, which subsist at its perimeter.²⁸ Certain narratives of globalisation proclaim the struggle and triumph of the market economy, the achievement of advanced capitalism and technological innovation seeking a world free from restraints on the opportunity to invent and invest. Other accounts point to a darker side of globalisation, claiming that it represents a new and insidious form economic and cultural domination, what Susan Silbey calls “postmodern colonialism” (Silbey 1997). With the exportation of cultural, economic *and legal* forms, the West is able to shape the culture and economies of developing countries.²⁹ Silbey observes the following structural homology between liberal legalism and contemporary accounts of globalisation:

Indeed, the narratives of globalisation reproduce large pieces of liberal legalism’s accounts of itself. Each relies on methodological individualism. They share a common conception of the world – markets, science and liberal law – as the cumulative outcome of individual will and agency. The narratives of the market and of liberal legalism also share the conceptual logic of the commodity form. (Silbey 1997: 230)

The South African Constitution is an amalgam of the written constitutions of the United States and Europe and was heavily influenced by constitutionalists of ‘first world’ countries. Liberal legality provides legal forms as an infrastructure for first world capitalists to create market economies for expansion of their wealth and power that accompanies modernisation and democratisation. The West shapes the culture and economies of developing countries by offering legal forms through which exchange takes place. This is not to suggest that Western constitutions might not be ameliorative for a country like South Africa, inasmuch as they facilitate social justice. The problem with importing Western legal forms is its seeming incommensurability with the opening statement of this chapter: that ethics and justice must be local. With the importation of foreign legal forms and concepts, local innovation becomes colonised by market forces. Of course, it is not simply a question of colonial domination, since there is a variation and invention in local uses of uniform products. As Michel de Certeau observes, indigenous peoples make of “rituals, representations

²⁸ I follow Anthony Giddens’s definition of globalisation as “the intensification of worldwide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa” (Giddens 1990: 64).

²⁹ For example, the International Monetary Fund and the World Bank demand efforts at democratisation and formal appearances of the rule of law as conditions of their providing aid.

and laws imposed on them something quite different from what their ... [originators] had in mind" (de Certeau 1984: xiii). Even so, given the conservative approach of the current United States judiciary, with its chief spokesperson Justice Scalia advocating a "jurisprudence of tradition", wholesale adoption of these practices should be resisted as too reactionary to facilitate transformation in South Africa (Balkin 1990).³⁰

Jürgen Habermas (1992) refers to the colonisation of lifeworlds, the proliferation of media-produced images and messages which become the resources of ordinary people despite the fact that these images are independent of and at odds with people's daily lived experiences. People live in worlds in which their emotions, desires and rationalities are produced independently of their experience. Law is part of this symbolic communicative aspect of postmodern colonialism because the media are saturated with legal images and issues. American television drama, preoccupied with law and crime, is a staple of South African television entertainment, and the sexual subplots and struggles for power that animate its representation of legal practice are made without distinguishing the artificiality of the genre.³¹ The broadcasting in South Africa of CNN and BBC programming, with its extensive coverage of American and European trials, portrays a theatrical version of the legal process, a spectacle which bears little relationship to reality and where, like Baudrillard's simulations, the sign of justice is its own pure simulacrum (Baudrillard 1983). Nevertheless, within South Africa the televising of the hearings of the Truth and Reconciliation Commission furnished a more dramatic medium for theatricalising the new official history than the untelevised courtroom, and undoubtedly contributed to public participation in that process.³²

Theorists of the metropolis are deeply divided about the possibility of moral regeneration and justice in the postmodern world. Geoff Mulgan (1997) provides an optimistic account of the postmodern world transformed through global communications, time-space compressions and the intensification of global capitalism. His concept of 'connexity' captures both the consequence of globalisation,

³⁰ Nevertheless, the split between practitioners and academics, the latter group being theoretically far more radical, has meant that visiting United States academics like Frank Mitchelman and Karl Klare have provided some useful contributions by way of interpretative and adjudicative strategies.

³¹ Broadcast of American series such as *L.A. Law*, *Ally McBeal*, *Law and Order* and latterly *The Practice* has altered the public's perception of the civil and criminal justice system, so that these symbolic representations of law have become the common forms of discourse and benchmarks of expectation about law among lay public.

³² As Foucault remarks, "whatever one says, television has played a major role. People come to see that there is a new history, and so forth" (Foucault 1998: 456).

including the compression of space and time and the fact that our interdependencies must be the basis for a new moral order. Mulgan is optimistic in that he regards the proliferation of consensual relationships, longevity and lifestyle choice as enabling consensual self-organisation and participation. Zygmunt Bauman (1996), on the other hand, presents postmodernity as a dystopic moral collapse in which the metropolis is populated exclusively with dysfunctional types: the flâneur, the game player, the vagabond and the tourist. The moral vacancy of these characters causes Bauman to ask pessimistically “What chance of morality? What chance of polity?” (Bauman 1996: 32). He is unable to imagine redemptive possibilities for the moral regeneration of the alienated subjectivities of the postmodern. However, I am reluctant to transpose uncritically either of these stances onto the regional conditions of South Africa. Neither theorist provides a sustained analysis of the systemic interdependencies of the first and third worlds and one suspects that the racial and economic specificities of South Africa render the typologies developed by Mulgan and Bauman unsusceptible to an easy grafting from metropolis to periphery. The possibility of justice in South Africa may well depend as much on doing things differently from the metropolis as simply following its lead.³³

The second, theoretical sense of postmodernism has to do with its epistemological critique of Enlightenment metaphysics. The credibility of modern metanarratives, schemas that can claim ultimate truth at the end of enquiry, has faced profound challenges in the light of social, economic and cultural changes in the late twentieth century (Lyotard 1984, Smart 1992; Vattimo 1992). Lyotard notes that whereas modern philosophy attempted to legitimate discourses by appealing to metanarratives, postmodernity is characterised by a legitimacy crisis resulting in an “incredulity towards metanarratives” (Lyotard 1984: xxiii-xxiv). Following the loss of faith in metanarratives, discursive practices have been affected in two important ways.

³³ Patrick Bond (2000) suggests “de-globalisation” as a strategy for breaking the ideological stranglehold that first world neoliberalism and its sponsors have enjoyed over third world countries like South Africa. This might involve

the relative delinking of African and other third world economies from the international capitalist system. This was envisaged as a means of partial, tactical withdrawal from a hostile international system, to enable weaker ‘peripheral’ economies to escape the effects of exploitative ‘core’ capitalism, in the era of so-called ‘single integrated global economy ... the strategic aims in this proactive approach, through regionalisation, to transform current mode(s) of globalisation are: the defense of economic, social and cultural pluralism, the (re)creation of economic diversity and revived independence with/in fundamental interdependence, and South-South and South-North co-operation based on common interests. (Bond 2000: 302)

For a start, the discursive practices predicated upon the assumption that real forms of existence are absolute and fixed have been challenged. The view that discourse can mirror reality by describing the essences of real existing entities is being dissembled. The deconstructive texts of various thinkers have seriously questioned the notion of representation and the effects this has on meaning and the “truths” people speak about themselves, demonstrating the way in which power operates through discourse and that representational determinacy constitutes domination (Foucault 1972 and 1990; Derrida 1976). Secondly, the modern view that a single form of reason could guide humanity towards social progress has been largely discredited. An uncoupling of one (European, androcentric, etc.) type of rationality has resulted from the various forms of rebellion to the multi-faceted subjugation of Western modernisation and a polyphony of oppressed voices – an “indefinable wail” (Krog 1998: 56) - has successfully eroded a sustained belief in the purity of its reason (Nicholson 1990).

Atrocities such as apartheid (and of course the Holocaust), whose protagonists claimed to be rationalising society, have demonstrated the mercurial status of (Enlightenment) reason.³⁴ Adorno and Horkheimer observe in the “dark” writers of the eighteenth century, especially Sade, this crucial feature of Enlightenment reason, namely that reason is “neutral as regards to ends”, it stands at the disposal of any end whatsoever: “reason is – by virtue of its very formality – at the service of any interest” (Adorno and Horkheimer 1944: 87). A further effect of the noted scepticism towards metanarratives is its denial of universalism. Stephen Toulmin notes that the “‘modern’ focus on the written, the universal, the general and the timeless – which monopolised the work of most philosophers after 1630 – is being broadened to include once again the oral, the particular, the local and the timely” (Toulmin 1990: 186). In the postmodern conception, meaning is particular in accordance with Wittgenstein’s view of language as comprising a variety of language-games, with the rules specifying the use of terms in these games differing significantly across and even within contexts.

Francis Fukuyama’s *The End of History and the Last Man* (1991) has given rise to great controversy and criticism. With vast historical sweep and theorising in the grand tradition, Fukuyama argues for an implicit directionality to Western history and contends that its end point, liberal democracy, is utopian. Continuing where Kant and G.W.F. Hegel left off, Fukuyama attempts to defend a coherent and universal

³⁴ The likening of apartheid to Nazism was a frequent refrain during the heyday of apartheid (Dugard 1997b: 284).

History of Humanity leading inevitably to liberal democracy. The arrival of liberal democracy marks the end of History: “the modern liberal democratic world is free of contradictions” (Fukuyama 1991: 139) and “at the end of history there are no serious ideological competitors left to liberal democracy” (Fukuyama 1991: 211). This dissertation will have little truck with Fukuyama’s brand of proselytising, nor with its racial and patriarchal affinities. Fukuyama fails to take his own advice that “we should be careful to distinguish transitional conditions from permanent ones” (Fukuyama 1991: 211). Many perceive South Africa’s emergence as a liberal democracy with a similar sense of utopian finality; now that we have been informed that oppression has been removed from the legislature and that there is in place a Bill of Rights ‘guaranteeing’ liberty, socio-economic redistribution and social justice it might seem sufficient to allow liberalism to be completely implemented and further refined. However, whilst it is unlikely that anyone would deny that liberalism is an improvement on apartheid, it is certainly not final or just in any absolute sense.

The Enlightenment universalism of liberalism, the political dispensation of post-Apartheid South Africa, purportedly unaffected by political context and insistent on the foundationalism of rationality (evidenced in Rawls’ “original position”) cannot legitimate the discourses of political and epistemological transition.³⁵ Moreover, the modern conception of law and justice is both misconceived and inadequate to the task of providing a just transformation.³⁶ The following formulation of justice is typical of the modern outlook, both in its proselytising tone and its abstraction from cultural particularity:

The truth is – and it is a truth which will bear a great deal of reiteration – that it is of the essence of both notions of justice in particular and morality in general that to appeal to such considerations is to appeal to principles logically independent of all particular and group interests or tastes (Flew 1978: 114).

³⁵ “Berlin 1953, Budapest 1956, Czechoslovakia 1968, Poland 1980 (I could mention others) refute the doctrine of historical materialism ... May 1968 [the Paris student riots] refutes the doctrine of parliamentary liberalism. The passages promised by the great doctrinal syntheses end in bloody impasses. Whence the sorrow of the spectators in the end of the twentieth century.” (Lyotard 1988: 179-180)

³⁶ I am not, however, suggesting a complete abandonment of the Enlightenment project in favour of postmodern theory. No such radical separation of these epistemologies is possible. Against those whose writing indicates that the break between the modern and postmodern is as clear as night and day, I would respond that, like night and day, the difference is not clear where it counts – at the boundary. My task is to reject the objectionable facets of modernity and radicalise its useful concepts. In this way postmodernism can avoid rigid conceptual polarities and flat totalizations in its attitude to modernity.

I want to argue against this modern formulation, with its echoes of John Rawls' postulated Original Position, for the postmodern formulation of justice as contingent and particular. As Alasdair MacIntyre argues, the search for transcultural and universal justice is doomed:

Morality which is no particular society's morality is to be found nowhere. There was the-morality-of-the-fourth-century-Athens, there were the-moralities-of-thirteenth-century-Western-Europe, there were numerous such moralities. but wherever was or is morality as such? (MacIntyre 1984: 265, 266)

A similar claim is made by Michael Walzer: "Justice is relative to social meanings" (Walzer 1983: 312). I want to defend postmodernism (including poststructuralism) as an effective and viable theoretical resource in the radical project of transformative legality specific to South Africa.

The European Enlightenment emphasised the capacity of science and rationality combined with faith in unilinear progress and liberal democracy, to lead towards the ideals of civilisation and the emancipation of humanity (Giddens 1990; Hall 1992). On this account, law is accorded a privileged position as the guardian of the boundary between state and citizens and between citizens *inter esse*, the boundaries constructed through the creation of legal rights. Law is state law, the expression of the sovereignty of the nation-state. Law is invested with a supreme rationality in order to establish itself as a mechanism of social ordering by means of a value-neutral procedure of adjudication which transcends the contingencies of contesting interests. Law is self-validating by virtue of its disassociation of itself from the originary violence of its imposition through a pedagogical reversal in terms of which it is rhetorically reordered as an effect of the popular will. Once legitimated in this way, it is in a position to justify the constitutional arrangement of society's political institutions and offices. Law becomes entirely self-referential, its function imbued with values which arise internal to its own operations, as with Dworkin's *Law's Empire*, where the judge searches for values from within the legal tradition (law as integrity). Alan Hunt observes that in the discourse of the Enlightenment law has four interlocking projects:

that of totality (the rational organisation and ordering of the whole of society); unity (the sovereignty of the nation-state); civilization (the suprcession of a

dangerous and unordered past – law versus self-help and feuding); and finally the project of ‘the subject’ (the constitution of the subject as legal citizen and citizen as legal subject endowed with self-responsibility and legal liability). (Hunt 1990: 518)

Law is invested with these roles both in apartheid and post-apartheid society. During apartheid, law performed all these functions and was only seen to be unjust because its founding violence was continually repeated through acts of violence which could not be hidden by rhetorical manoeuvring (Derrida 1987; 1992a). Postmodernism seeks to displace and decentre law’s aspirations to totality, focussing on the plurality and particularity of social life. One might take, for instance, the construction of subjectivity by law during apartheid. Less than two decades ago, a white government minister solemnly informed his colleagues that in the previous twelve months 518 people formerly classified as ‘Coloured’ became ‘White’, two Whites became Chinese, one White became Indian and five Coloureds became ‘African’, all in accordance with Proclamation 46 of 1959 (Ormond 1985: 24, 25). Such was the inexactness of this taxonomy that in 1984 one so-called White person was reclassified for a fifth time. Lest this be considered flighty but inconsequential, we should remember that such changes in classification might easily require a change of residence, partner and employment. All but the white minority were subjected, without being subjects in the Kantian sense.

Post-apartheid legality is equally concerned with totality (exemplified by phrases such as “I find it difficult to comprehend how, on any rational use of language...” and “the rational and humane adjudicatory approach is entirely consistent with...” (*Makwanyane* para’s 194B-C and 382 A-B)); unity (“All constitutions seek to articulate the shared aspirations of the nation” (*Makwanyane* para 362 I-J)); civilization (“as a civilized society” and “actions must be informed by the high values which reflect the quality of this nation’s civilization” (*Makwanyane* para’s 203 I-J and 232 E-F)) and the constitution of the legal subject as citizen (the Preamble of the 1996 Constitution stipulates one of its main aims to be to “Improve the quality of life of all citizens and free the potential of each person”, thereby constituting not only citizenship but also the public/ private divide).

I argue contrary to these rhetorical assertions that rationality is social and instrumental; that it operates as a vehicle of power and is only totalising by virtue of its exclusions. The Constitution does not reflect the shared aspirations of the nation

but rather those of the elite who negotiated it. The law's civilising pretensions are undermined by the bogus evolutionary assumptions on which such a conception rests. The law's creation of the legal subjectivity may be deconstructed to reveal subjects who have rights but lack equality and material wellbeing.

In fact, far from ensuring freedom, the rules, structures and mechanisms of legal modernism such as rights litigation and the rule of law are revealed by postmodernism to be conduits of power and mechanisms of subjection and domination.³⁷ The law operates in part as a mechanism of legitimation of the state in the "New South Africa". Postmodernism questions traditional resort to indeterminate systems of rights and adversarial procedural remedies. Rights discourse has not only failed historically to deliver on its transformative promises, but it also ignores the institutionally pervasive and systemic nature of oppression.³⁸

1.3 Colonial/ Postcolonial

The appropriateness of the absorption of postmodernism, an essentially European discourse, into South African legal theory must be tested against the ethically and politically fraught circumstances of South Africa's transition. Postmodern theory, if it is to be effective in South Africa, must respond to the unique contours of its regional context as differentiated from its metropolitan sources.³⁹ In short, we must understand postmodernism in the light of South Africa's postcoloniality. The reception of postcolonial theory into South Africa announces a third transition (after apartheid-post-apartheid, modern-postmodern): the transition from colonial to postcolonial.⁴⁰ Where colonialism tracks the incursion of imperial

³⁷ Although, as Ian Law argues: "The utilisation of the capacities and ideas of modernity have facilitated both racism and anti-racism. Slaves, free blacks and many other groups have developed emancipatory strategies based on appeals to *reason and rights*" (Law 1999: 207).

³⁸ In a comprehensive survey of the field, Gerald Rosenberg is of the (rather extreme) view that "courts can almost never be effective producers of significant social change" (Rosenberg 1991: 338).

³⁹ David Atwell, seeking to differentiate postmodernism of the metropolis from a postmodernism of the South remarks in this regard "there is postmodernism and there is postmodernism" (Atwell 1993b: 22). See also Herwitz 1999.

⁴⁰ The social formation of apartheid South Africa was regarded as "colonialism of a special type":

At the heart of this concept was the theoretical and strategic assumption of the (latent) unity of the post-1910 South African nation. South Africa was approached in struggle as a late-colonial society in which coloniser and colonised inhabited and belonged to a shared political and geographical terrain without assuming that the coloniser had a home elsewhere. (Gerwel 2000: 278)

European settlers into South Africa and their subsequent conquest and control of the indigenous populations, postcolonial theory engages in a retrospect of exclusionary forms of reason and universality composed by Western modernity and complicit with imperial expansion and colonial rule. Postcolonial theory contests the authority of colonialism's systems of domination, decyphering systems of representation designed to validate institutional subordination and silence the voices of the colonised. This is not to fix the moment of introduction of the postcolonial with the transition from apartheid to post-apartheid.⁴¹ South Africa's history is interpellated by narratives of colonialism, with apartheid featuring as a recent incarnation of practices undertaken in many parts of the colonial world.

The postcolonial orientation with which this dissertation is concerned, relies on strategies derived from postmodernism (and poststructuralism) in order to argue for the historical contingency of colonial forms of knowledge, such as the currently dominant liberal legal discourse. For example, a Derridean critique of the binary underpinnings of legal discourse may be used to elucidate and relativise the metaphysics of colonial modes of thought which run through it. Through resistance to ethnocentric determinations and intervention in the mechanics of the colonial constitution of the other, poststructuralism may be utilised to recuperate agency for the subaltern and reintroduce forms of knowledge (traditional African jurisprudence for example) marginalised or "damaged" through the epistemic violence of the coloniser. I would suggest that a deconstructive, or to use Gayatri Spivak's term, "catachrestic", rearticulation of the dominant legal texts (the Constitution and the judgements of the Constitutional Court) will force a reconsideration and fracturing of current forms of legal knowledge and social identities authored and authorised by Western modernity.

1.4 Qualifications, Objections, Supplements

So far I have suggested that the jurisprudential approach appropriate to South Africa's transition be one that responds directly to its defining and combining features: a jurisprudence sensitive to the political instability of post-apartheid society

⁴¹ Nicholas Visser is at pains to point out that "[t]he transition that occurred in South Africa between 1990 and 1994 is not the only, not even, for those who not subscribe to CST, necessarily the most convincing occasion for dating the end of colonial rule over South Africa" (Visser 1997: 83).

and incorporating the insights of postmodernism and postcolonialism. It charts the quest for a new jurisprudential paradigm which is politically radical but at the same time avoids the deficiencies of the “old Left”. This approach to legal analysis is philosophical not in the sense of imposing an ahistorical, transcendental discourse which claims to articulate criteria of validity for the legal system, but rather in an attempt to articulate the possibility of law’s furtherance of justice within the historical and cultural context of South Africa.

Practical Intervention

Legal philosophy which suggests the possibility of intervention in political and/or legal processes will only have value if it contains certain practical injunctions or strategies which if pursued could lead to change. Since one of my stated ambitions is to suggest the possibility of and means to achieve socio-legal transformation, it must accordingly be practical. This work will attempt to be practical in the sense in which Stephen Toulmin speaks of philosophy relating directly to matters of practice: matters of life and death, guilt and innocence, specifically in the legal system. Toulmin writes:

Taking ‘philosophy’ in this *practical* sense, as a contribution to the reflective resolution of quandaries that face us in enterprises with high stakes – even life and death - ... it is time for philosophers to come out of their self-imposed isolation and re-enter the collective world of practical life and shared human problems. (Toulmin 1988: 352, emphasis in original)⁴²

My approach will also attempt to intervene in the practical dilemmas of law in a “timely” fashion in the sense in which Toulmin, following Aristotle, notes that “our chance of acting wisely in a practical field depends upon our readiness ... to take decisions *pros ton kairon* – that is “as the occasion requires” (Toulmin 1990: 190).⁴³

⁴² Toulmin goes on to argue “nor is it an accident that more and more philosophers are now being drawn into debates about environmental policy, or medical ethics, judicial practice or nuclear politics ... one might argue that these practical debates are, by now, not “applied” philosophy but *philosophy itself*” (Toulmin 1990: 190, emphasis in original).

⁴³ Against critics who argue that although some philosophy has the potential to intervene practically, postmodern philosophy, including deconstruction, by virtue of any of the objections set out in the later section of this chapter does not include this practical possibility, Derrida’s responds:

I would say only this: If it were true about deconstruction, why have so many people been so anxious and angry about it for such a long time? They could have said ‘well, its OK, its

Objections

Having described the three senses in which South Africa could be regarded as being in transition, and having set out what I want to call transitional jurisprudence (that is, not a comprehensive theory of law-in-transition, but rather a mode of reading and understanding existing texts to trigger politically transformative possibilities), I want now to raise and rebut potential objections to my project. Objections range from blanket refusals to countenance “any theoretical orientation prefixed by *post-* whether hard or soft, strong or weak, excessive or moderate” (Visser 1997: 94) and absolute disavowals to the effect that “postmodernism in a postcolonial context such as South Africa, burdened by cleavages of race and class and the historical inheritance of Western imperialist control, is a moral dead end” (Rich 1984: 389), to more sophisticated criticisms. The most frequently bruited charge against postmodernism is that it is politically disabling, a charge raised by political progressives and most often by Marxists. The following charge of Terry Eagleton’s is typical:

[Postmodernism] has almost nothing to say about the great liberal motifs of justice, equality and human rights, since these sit uncomfortably with its nervousness of the ‘autonomous subject’ and fetishism of difference And if there are no longer autonomous subjects, then there can be no talk of justice. All the vital questions over which classical political philosophy has agonised – your rights against mine, my struggle for emancipation against yours – can be simply dissolved away. (Eagleton 1994: 8, 9)⁴⁴

In fact, postmodernism has a great deal to say about justice, equality and human rights, claims about which can be made without positing the autonomous subject of liberalism. Attacks of the kind made above are nothing more than fevered

something good for the library, for the university’. But I think they are so nervous about it because they realise that there is some practical injunction here – an injunction that is sometimes difficult to understand, sometimes very difficult to translate, but that makes everyone uneasy. I think this is very practical, very political (Derrida 1999a: 285).

⁴⁴ Peter Dews likewise expresses the inherent limitation of the politics of postmodernism as exhibiting a “continuing lack of clarity about the political consequences of its characteristic positions ... [and] little attempt to think through the ultimate compatibility of progressive political commitments with the dissolution of the subject, or a totalizing suspicion of the concept of the truth” (Dews 1987: xv). Perhaps even more worrying is the attitude to postmodernism of Edward Said, who refers without disapproval to “ideas like post-Marxism and poststructuralism, varieties of what the Italian philosopher Gianni Vattimo describes as “the weak thought” of “the end of modernity” (Said 1993: 399).

figments of foundationalist paranoia which seek to construct a straw man in order to garner support for an ailing and untenable foundationalist project.⁴⁵ Far from undermining political commitments, I will argue in the following chapters, poststructuralist views of subjectivity, identity and human agency actually help and promote them (see Butler 1993, 1994). Against Eagleton's claim that postmodernism has nothing to say on the question of emancipation, Derrida notes:

I refuse to renounce the great classical discourse of emancipation. I believe there is an enormous amount to do today, in all domains and in all areas of the world and society ... there is no ethico-political decision or gesture without what I would call a 'Yes' to emancipation, to the discourse of emancipation and even, I would add, to some messianicity. (Derrida 1996: 82)

There has been a paucity of discussion on postmodern theory in South African legal discourse: no mention of it in the judgements of the Constitutional Court and very little in the legal academy.⁴⁶ What discussion there has been often reflects an alarming misapprehension of postmodernism/ poststructuralism's methodologies and aspirations in the legal arena. Dennis Davis, in many ways an admirable and politically progressive legal scholar, argues that deconstruction "can become an excuse for a form of arcane analysis that squeezes politics out of any such enterprise" and (more bizarrely) "it becomes a home for positivists of yore who wish to give politics as wide a berth as LC Steyn advocated some 30 years ago" (Davis 1999: 178, 179). Moreover, Davis' ironic characterisation of poststructuralist discourse as a "model of clarity" implies that deconstruction's avoidance of political engagement is bolstered by the opacity and obscurantism of its lexicon and discursive style.

I want to deal separately with each of Davis' objections: that it is non-political, that it is a haven for positivists, and that its unclear style detracts from whatever force it can muster. I take Derridean deconstruction as an example of poststructuralism, since deconstruction is the butt of Davis' remarks.⁴⁷ Davis is one of a long line of commentators who have accused postmodernism and deconstruction of moral

⁴⁵ Foundationalism is, broadly, the view that verifiable knowledge can be established when reality is observed from the 'correct' epistemological position.

⁴⁶ It is not untypical for legal theory as traditionally politically and philosophically reactionary as South Africa's to lag behind the main flow of intellectual development. To a certain degree legal theorising in the academy has become more radical since 1994. This work is an attempt to accelerate its development still further.

⁴⁷ Deconstruction names the activity employed in order to open up a text, by activating ambiguity, inconsistency and indeterminacy to reveal both what it contains and what it excludes.

agnosticism and political indifference that borders on the reactionary. On the contrary, however, deconstruction has been responsible for the acknowledgement that the assumptions, principles and aims of institutions such as law are structured and delimited by the terms that they employ and the assumptions that guarantee and legitimate them. This critique is inherently political since it formulates the task of a progressive intervention in the operation of the law and so in the workings of state and private institutions. The aim of deconstruction is to “transform the modes of writing, approaches to pedagogy, the procedures of academic exchange, the relation of languages, to other disciplines, to the institution in general, to its inside and its outside” (McCarthy 1989: 17). And as Paul Jay points out, since this touches on the material structures and relations of power in institutions of Western culture, it must be understood as a political practice. He claims further that

deconstruction is always invoked or used *by* someone with a political point of view, and it is in this sense that it cannot be kept pure from such appropriation ... there is no way that ‘deconstruction’ can exist outside of the political, since there is no ‘deconstruction’ that can exist outside of our arguments about what it is and how it might or might not function, and toward what ends. (Jay 1992: 70)

This means, as Jay concedes, that “how deconstructive thinking is exercised, and to what ends, is ultimately dictated to by the politics of each critic” (Jay 1992: 91).⁴⁸ This means that deconstruction can be used in the service of just about any political stance against any other, a realisation which has spurred certain Marxist critics to demonise deconstruction on the grounds that it may be used against Marxism.⁴⁹ Equally, however, deconstruction has been appropriated by Marxists, such as Spivak, and by socialists, such as Nancy Fraser. Furthermore, and to anticipate arguments made in the following chapter, a Derridean approach to democratic adjudication emphasises the undecideability of decision-making: undecideability is required to make possible the concepts of political decision and ethical responsibility. Chantal Mouffe remarks that in this sense deconstruction is “hyperpoliticizing” in that the interminable choice of the political decision is essential to deconstruction’s

⁴⁸ In relation to the deconstruction of legal texts, J.M. Balkin notes that “deconstructive readings of legal texts can be a tool for analysis for the right as well as for the left” (Balkin 1987: 782).

⁴⁹ Aijaz Ahmad asserts “in its unconditional war against political Marxism, in its antipathy towards working-class organisations and against *organised* politics of the Left, and in its advocacy of a global

conception of democracy (Mouffe 1996: 9). Derrida insists that deconstruction does not correspond to a “quasi-nihilistic abdication before the ethico-politico-judicial question of justice” (Derrida 1992a: 19). Deconstruction is not nihilistic, neither does it ignore politics; on the contrary it posits the greatest, most unattainable, infinite duty to the other.⁵⁰

Davis complains that “deconstruction should lead to a more fruitful enquiry than playing like Derrida” (Davis 1999: 179). Deconstruction does observe and activate the disconnection of the signifier from the signified and thus in turn sets the sign adrift (hence the concept of “play” (Derrida 1978) to appear in different contexts (hence “iterability” (Derrida 1988a)) in which it appears to bear different meanings.⁵¹ But it is a myth that postmodern theorists are simply engaged in a release of *jouissance* and a Nietzschean affirmation of amorality. Deconstruction incorporates an ethics of alterity which prevents it from simply being viewed as inconsequentially ludic.⁵² As Cornell remarks “deconstruction keeps open the ‘beyond’ of currently unimaginable transformative possibilities precisely in the name of justice” (Cornell 1992a: 182). I would suggest that exactly these possibilities of the imagination would be relevant to South Africa in transition – a “philosophy of the limit” that recognises

hermeneutics of suspicion, it [deconstruction] unwittingly *contributed* to openings for resurgence of a fully fledged right-wing intelligentsia” (Ahmed 1994: 97, emphasis in original).

⁵⁰ Derrida writes: “The fact that law is deconstructible is not bad news. We may see in this a stroke of luck for politics, for all historical progress” (Derrida 1992a: 14). And as Charles Yablon elaborates “the indeterminacy of legal language must be used as a way of revealing and analysing the power exerted and the pain inflicted by legal processes, not as a way of denying that power and pain” (yablon 1992: 262).

⁵¹ Derrida asserts:

This field is in effect that of *play*, that is to say, a field of infinite substitutions only because it is finite, that is to say, because instead of being an inexhaustible field, as in the classical hypothesis, instead of being too large, there is something missing from it; a center which arrests and grounds the play of substitutions One cannot determine the center and exhaust totalization because the sign which replaces the center ... is added, occurs as a surplus, as a *supplement*. The movement of signification adds something, which results in the fact that there is always something more, but this addition is a floating one because it comes to perform a vicarious function, to supplement a lack on the part of the signified. (Derrida 1978: 289, emphasis in original)

⁵² George Steiner emphasises the ludic nature of postmodern gaming when he writes: “We are in a cosmic casino. Nothing but rhetorical games, more or less amusing, more or less profound” (Steiner, interviewed in *Le Monde*, 11 January 1991). In South Africa, however, the stakes of the game are high. The casino is Sun City: upwards of five hundred slot machines whirring twenty-four hours a day, benevolently accepting the sacrifices of worshippers at this magnificent temple of Mammon and a resounding slap in the face of the poor who occupy the lands for miles around. Dirk Klopper has noted the irony of Thabo Mbeki addressing a session of the OAU Conference of Ministers at Sun City in a speech titled “We have Come Home” in 1995 (Klopper 1999: 24-26).

the inevitable nature of the restrictions we face, yet at the same time takes seriously the possibility of transgression.

Contrary to popular belief, there is no necessary contradiction between the postmodern perspective and the practical implementation of a radical politico-legal agenda (Hunt 1990; Binder 1991; Hutchinson 1992). Although postmodernism eschews universal, essential or ahistorical grounds on which to anchor epistemic justification, this does not mean (as is sometimes concluded⁵³) that this is the end of the theoretical enterprise. Whilst postmodernism rejects the metaphysical privileging of grand theory, which is in any event inappropriate to transitional circumstances⁵⁴, it does not deny the value of politico-legal theorising. Rather it insists that such theorising pay attention to the structural circumstances of the social milieu it is considering. The postmodern account of politics and law must grapple with extant forms of power, in the knowledge that the construction of social reality is itself a construct of power. With the identification of the operations of power lies the possibility of resistance. Because the postmodern subject has no unified essence, but is instead a plurality of contingent social, political and epistemic relations, subjectivity is alterable through the rearticulation of these relations. Agents are only contingently allied in more or less stable arrangements. Opposition is always possible since hegemony is never stable (Deutsche 1991: 20,21; Laclau and Mouffe 1985: 27-30).⁵⁵ Moreover, postmodernism cannot capitulate or retreat from the task of struggling towards the experience of justice. The postmodern theories of justice discussed in this work provide non-foundational means with which to theorise the turbulence of change and in particular, conceptions of justice whose example acts as an inspiration for transformative efforts. Against modernist protestations that to attempt transition and transformation without a hegemonic narrative leads to arbitrariness, contingency and the possible recurrence of tyranny and oppression, it

⁵³ Anthony Giddens, for example, writes of postmodernism that “moral questions become completely denuded of meaning or relevance in current social circumstances” (Giddens 1991: 207).

⁵⁴ As Roederer observes: “Each society’s transformation is in some sense a unique response to its unique past and present situation. Thus it is doubtful that a grand theory of transition will emerge from the field and if one did emerge it is doubtful that it would be very useful to society’s in transition” (Roederer 1999a: 78).

⁵⁵ Postcolonial theory, especially its poststructuralist guises, mostly rejects totalising abstracts of power as falsifying situations of domination and subordination. In Homi Bhabha’s theory of power and contest, for instance, the process of procuring the consent of the oppressed and the marginalised to the existing structure of relationships through ideological inducements, necessarily generates dissent and resistance, since the subject is conceived as being constituted through incommensurable solicitations and heterogenous social practices.

should be noted, following Hutchinson, that “there will never be a guarantee against tyranny – *nothing* can deliver us from that” (Hutchinson 1992: 790).⁵⁶

I can only attribute Davis’ charge that deconstruction is complicit with legal positivism to a serious misreading of Derrida and postmodern theory generally. One of the obvious aspects of postmodernism is its attack on all aspects of positivism (Douzinas and Warrington 1994). As Alan Hunt explains

The most important implication of postmodernism’s epistemological challenge to legal scholarship is that it confronts the central preoccupation of legal positivism, the dominant strand within liberal legalism, with the search for tests of legal validity ... In challenging the very possibility of grounding the validity of law, the epistemological critique mounted by postmodernism thus goes to the very heart of the project of liberal legalism (Hunt 1990: 520)

Postmodernism calls on legal theorists to be reflexive and to confront “the ways in which their own analytic and literary practices encode and conceal value positions that need to be brought to light” (Agger 1991: 121). Postmodernism wants to insist that legal positivism misrepresents social reality, or privileges a certain representation to the exclusion of others, so that it is political whilst all the while denying its politics. Except to say that, for instance, Derrida’s idea of justice is something apart from the rights and remedies available under the existing legal system (since justice is an ethical relation that cannot fully be encoded under the existing legal system, that is, under existing statutes, rules and precedents⁵⁷) is incompatible with positivism, I will say no more about postmodernism’s divergences from positivism here; I deal with it in the next chapter.

Davis’s third objection is to the effect that the work of postmodernism’s major figures and those directly influenced by them is so dense and obscure that it is largely inaccessible to all but the dedicated or masochistic, and this prevents postmodern theory from achieving a broad and political influence.⁵⁸ Even worse, this leads to a

⁵⁶ To transpose this insight into the activity of adjudication: there is always a choice, ethical and political between options, better or worse. To deny that this ethical choice exists at all, as positivists are prone to do, is itself an ethical stance.

⁵⁷ Derrida observes that “between science and the act itself, the decision, there will be a gap, there is a heterogeneity between knowing and going” (Derrida 1999a: 280).

⁵⁸ It has become *de rigeur* for analytically minded theorists to criticise poststructuralist discourse for its rococo formulations and linguistic prolixity. Brian Palmer, writing in a tone which forcefully suggests his insistence on discursive clarity, asserts: “Much writing which appears under the designer label of poststructuralism/postmodernism is quite bluntly *crap*, a kind of academic wordplaying with no possible link to anything but the pseudo-intellectualised ghettos of the most self-promotionally avant-

charge of elitism stemming from the paradox of postmodernism's insistence on giving a voice to the previously marginalised, and not privileging the voices of the powerful over the voices of the powerless, but then writing in a form and style largely inaccessible to the powerless. Barbara Christian argues in this vein that

[p]oststructuralism's technical language – its graphs, its algebraic equations, its exegetical drive – has often at least one immediate effect upon Third World readers for whom the latinized compounds of deconstructive terminology evoke the horrors of the missionary education and its interpellation of subordinate subjectivity: and that is to silence them in their work as theorists. (Christian in Slemon and Tiffin 1989: xi)

Arguments in favour of the dense postmodernist style include, first, the contention that it is more responsive to the complexity of what is being addressed and, second, that it is worthwhile being deliberately playful, because this enables readers to assume a central role in making sense of the text, releasing the subject from the prison of language, to provide the opportunity to construct or read the text differently and to resist power/ knowledge determinations. More specifically, certain strands of postcolonial theory draw on the indeterminacies of language in order to present colonialism as transactional rather than merely conflictual by breaking down the binary opposition coloniser/ colonised in recognition of a heterogeneity of forms of power.

Whilst I am sympathetic to the arguments in favour of linguistic and semantic complexity on the basis that it addresses the heterogeneous quotidianity of South African social experience, and whilst I think that the best postmodern theorists (among whom I include Derrida and Lyotard) make productive use of it, I would concede that much postmodern theory is gratuitously obscure, incoherent and undisciplined.⁵⁹ Part of the answer for the legal arena, I will argue in Chapter Three, is to re-educate practitioners and academics to provide the kind of knowledge necessary to read and participate in the language of postmodern theory. As Spivak observes,

garde enclaves of that bastion of protectionism, the University" (Palmer 1990: 199). For further examples of this kind of objection, see Michalowski 1993 and Katz 1999.

⁵⁹ For discourse to adopt a mode of address which, because of its style or register, has the effect of confusing its audience cannot in itself be just. Justice, Derrida insists, requires one to address oneself to the other in the language of the other; to foreswear one's own way of thinking, talking and looking at things in order to understand the other in all her singularity and uniqueness. Accordingly, if one is addressing a group of academics familiar with poststructuralist vocabulary one might justly adopt a more complex style. Since, however, political commitment requires one on certain occasions to address non-academic audiences, it is only just to adopt a different, simpler register.

postmodern theory “asks for, as it were, to use a very old term, a transformation of consciousness, a changing mindset” (Spivak 1990a: 20), a new curriculum in education and otherwise. Nevertheless, education does not prevent pretentious opacity. I would argue, however, that the substance of postmodern themes may be separated from the elitist style of certain poststructuralists (though perhaps not completely successfully and not the without semantic changes that translation necessitates). This work represents such an attempt.

Synopsis

At this stage I would like proleptically to advert to the key themes of the following chapters. Chapters Two and Three are explicitly expository, whilst chapters four and five interrogate two texts of post-apartheid law to determine what insights the application of post-apartheid theory might elucidate. Rejecting comprehensive programmes and universal positions, Chapter Two compares modern legality generally and legal positivism specifically with two postmodern, poststructuralist theories of justice (those of Derrida and Lyotard) and what one might term a theory of injustice (Foucault).⁶⁰ Thereafter, the compatibility of these postmodern theories with the doctrine of the rule of law is investigated, demonstrating in addition that liberal justification functions to legitimate and disguise the exercise of power, and that the rule of law, operating in tandem with the liberal fiction of popular consent, may structurally legitimate the current government, rather than presenting opportunities for transformation. I nevertheless seek, contrary to the arguments of many postmodern theorists, to develop a postmodern formulation of the rule of law which both incorporates rule-following and provides for the possibility of change.

A postmodern approach to constitutional interpretation is developed in Chapter Three, in the light of issues of indeterminacy and contradiction, and is contrasted to the approach to interpretation historically and currently taken by the South African judiciary. In accordance with the professed requirement of practicality and timeliness, the chapter will begin with a description of modern modes of interpretation in order to demonstrate the “shift in consciousness” which a

⁶⁰ The homogenising of these theorists under the banner of poststructuralism is not unproblematical, but I follow Spivak (1990a: 18) in doing so here.

transformation to more epistemologically progressive interpretative modes necessitates.

Chapters Four and Five will provide a rereading of two Constitutional Court judgements⁶¹, chosen not only because they are regarded as paradigm cases of post-apartheid adjudication, but also because their range of themes and concerns spans the spectrum of South Africa's transition: life, death, public opinion, democracy, nation-building, interpretation, amnesty, foreign jurisdictions, love, the future, the past, punishment, politics and much else besides.⁶² These themes traverse a number of different and contradictory judicial "moods" – intrepidity, anxiety and ambivalence – as the court interprets the constitution to give content to a new chapter in South African common law.

Chapter Four will investigate the issues surrounding law's mediation of successor justice and the Truth and Reconciliation Commission, including the Constitutional Court's ruling in *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others*⁶³, in the light of postmodern justice theory. It examines the manner in which the TRC has provided a forum in which victimhood could be addressed by the inclusion of previously marginalised narratives which tampered with the authority of apartheid's dominant story-lines by, in Spivak's words, "reversing, displacing and seizing the apparatus of value-coding" (Spivak 1990b: 228). I argue that the TRC has potentially the effect of shifting the position of the oppressed from victim to participant in the structures and processes of post-apartheid society.

Chapter Five deals with the Constitutional Court's abolition of the death penalty in *S v Makwanyane and Another*⁶⁴. Death represents for South Africa the violence of the past and the extreme experience of the turbulence of the future and in abolishing capital punishment the Constitutional Court confronts the ethics of life and death amidst the anxiety of political turbulence. In the course of my examination of

⁶¹ I do not mean by this that I intend to provide a deconstructive reading of these texts in the sense of a Derridean reading, replete with imaginative play and enticing neologisms. I am not able to provide such a reading convincingly. Moreover, I would tend to agree with Rorty that "Derrida seems inimitable: I have yet to read a Derridean reading of anything, written by somebody other than Derrida himself, that was not contrived, wooden and humourless" (Rorty 1998: 329).

⁶² Ironically, the guilt and innocence of the litigants are among the themes omitted from the court's deliberations, this issue having been decided by the court *a quo*. Nevertheless, guilt and innocence do feature prominently in both judgements, in the form of group guilt and innocence.

⁶³ 1996 (8) BCLR 1015 (CC).

⁶⁴ 1995 (6) BCLR 665 (CC).

the court's interpretation of the Constitution, I shall suggest not only that the Constitution could have been interpreted differently (which certain of the judgements deny), but also that there may be reasons for the judgements which are suppressed beneath the romanticism of nation-building and humanism.

Above all, I wish to show that modern jurisprudence, and in particular the formalist application by the South African judiciary of purportedly neutral rules both during apartheid and subsequently, is incompatible with the normative complexity and contingency of the transitional period. In certain important aspects, reflected in the cases under analysis, the judiciary recognised that this was so. Moreover, I want to demonstrate that postmodernism, in combination with postcolonial theory, is of relevance to a theorising of South Africa's transition and, perhaps most importantly, that the postmodern ethics of alterity, the duty to give voice to the marginalised (colonised) other, might be seen as a much needed means of infusing law (legal theory *and* practice) with ethics.

Literary Supplements

During the course of my analysis I refer from time to time to literary texts, prose and poetry, in an attempt both to supplement imaginatively the rhetorical exclusions of legal discourse and to problematise its oppressive systems of representation. Although my discussion of literature is proportionately small, perhaps ten pages in all, I feel obliged to justify its inclusion in view of two vociferously stated objections: that literary discourse is separate from and irrelevant to philosophy and that it is separate from and irrelevant to law. The roots of the first objection go back to Plato's *Republic*, which banished poets for their failure to promote virtue. Thereafter, philosophers of a scientific bent, such as Kant and Husserl, have sought to exclude literary modes from philosophical discourse on the basis that literary language is dangerously vague and confused and that its rhetorical flavour serves to obscure or derail completely rational argument. Other philosophers such as Nietzsche and Kierkegaard have availed themselves of literary styles, a practice justified by arguments to the effect that the literal and metaphorical are inseparably admixed, so that purging language of the metaphorical is a doomed project and second, that scientific discourse is itself a rhetoric competing for allegiance. I believe imaginative descriptions contained in literature can provide a window of possibility through which

philosophers can gaze in their explorations of the ramifications of philosophical positions. Moreover, philosophers often run up against the limits of language and, to use Wittgenstein's expression, turn their spades. Contrary to positivism, what cannot, Wittgenstein argues, be said – the ethical – may perhaps be most closely alluded to in poetry. From the Derridean perspective philosophy becomes one articulation of textual traces or differences among others, so that, as David Wood (1990) points out, if philosophy's distinctness is understood in terms of its other modes of writing, its relation to other literary texts becomes more central.⁶⁵

The objection that law and literature are separate disciplines and have little to do with one another refers to a polemic similar to that in the philosophy and literature debate. At one extreme, stand legal theorists whose ambition it is to transform the law into a science by ridding it of aesthetic and rhetorical tropes. On the other end of the spectrum law and literature scholars argue that literary works not only reflect and register contradictions in law, they imaginatively reshape them. American realist Oliver Wendell Holmes and the law and economics school that succeeded him wanted to deny a moral foundation to the law and sought instead to base it on social realities. Holmes attempted to develop a science of law which would dislodge the supposedly timeless principles of moral philosophy and he argued against the traditional humanists' view that literary works provide a foundation of eternal values (Holmes 1899). Subsequently Richard Posner has sought to differentiate law and literature by arguing that while law is a science, a "technique of government" (Posner 1986: 1392), literature is a distinct and quasi-religious realm of the humanities, devoid of instrumental or didactic purposes, whose only significance for law is its masterful deployment of linguistic style. What early legal pragmatists like Holmes failed to address is the rhetorical nature of scientific discourse or the representative makeup of the scientific communities pursuing truth. In Holmes' day, for example, racial inferiority was a matter of consensus in the scientific community and justified the reasonableness of cases such as *Plessy v Ferguson*⁶⁶. However, for James Boyd White, a law and literature scholar, the study of literature "can lead us to a new kind

⁶⁵ It is a mistake to conclude that Derrida reduces philosophy to literature or vice versa, an accusation that Derrida himself (1996: 79) firmly denies.

⁶⁶ This is a United States case in which the infamous "separate but equal" doctrine was affirmed. Scientific rationality acted as a justification for legalised racism throughout apartheid. The tradition of scientific racism is present as a contemporary aspect of the academy. Certain theorists in socio-biology, although avoiding words like "superior" and "inferior", make invidious comparisons between the races

of criticism of law, based ... upon a literary and rhetorical interest in the kind of community this language and its practices constitute". This kind of criticism is only possible if

it is recognised that the judicial opinion is a form of life – a manifestation of character and an establishment of the community – that can be judged ethically and politically: as authoritarian or democratic; as recognising or erasing the experience of others; as open or closed to the possibility of other voices, other languages than its own. (White 1989: 2046, 2047)

Literature is able to transform imaginatively historical contradictions and so as a representational activity has a performative aspect (Thomas 1991: 537). Brook Thomas observes:

Literary paradoxes ... have the potential to stimulate an audience to generate new ways of constructing evidence, evidence that does not easily fit into accepted public opinion, evidence that is not deemed admissible in existing courts of law. If accepted, such evidence can alter a society's sense of justice. (Thomas 1991: 538)

I have in the selection of literary texts in this work privileged dialogical over monological texts, as an antidote to the single-voicedness of legal determinacies. I include these text only as supplements to my discussion of legal theory but as supplements which point to the inability of any particular representation, including my own, to be truly representative.

Exclusions

I want to conclude this introduction by saying what this work, brief forays aside, will not be or be about: it will not attempt to lay down a blueprint in accordance with which law may successfully steer South Africa through a multi-faceted and difficult transitional moment. Postmodern theory anyway rejects attempts to create large-scale totalising theories in order to explain or create social phenomena. It rejects the notion that there is a complete and coherent 'real world' waiting to be discovered by theory. Instead, the legal theory set out in this work has a much more modest task

based on a biologically based hierarchy. Astoundingly, these theorists continue to pass editorial muster and be published (Fairchild 1991).

– uncovering assumptions, illuminating contradictions and making contextual suggestions for law's contingent improvement.⁶⁷ I want to offer provisional remarks which might present new ways of reading current practices to address the limits and potential of law as a form of social ordering, a critique which could be embraced as a corrective to the over-investment in law characteristic of the Enlightenment and the discourses of liberalism. Accordingly I resist the temptation to provide closure, which is contrived, arbitrary and generally conducive to established power relations (Hutchinson 1992).

Nor will this work be about the injustice of the law during apartheid and the evil of the judiciary during this period. That is to say, it is not my intention to stand on the shore of the new South Africa to vituperate against the receding tide of apartheid's legal practices. Obviously, in the course of an analysis of a transition from point A to point B, it would be unreasonable not say something about each of these subtending markers. There are moments where I cannot avoid, for instance, excoriating the attitude of the judiciary during this period – its cynical permissiveness and its complicity with injustice. But on the whole I have attempted to concentrate on the transfigural possibilities of post-apartheid legal practice, rather than engaging in an analysis of the ethical deficiencies of the old legal system. This is, I realise, a difficult position for a critic arguing for an ethical transformation in the law to defend, but there it is: I am more interested in the potential of present conditions to foreground justice in the future – not unlike, I suspect, many South Africans.

⁶⁷ As Alan Hutchinson remarks, "Jurists are not the grand architects of law; they are more its humble odd-jobbers" (Hutchinson 1999: 216).

Chapter 2: Modern Law/ Postmodern Justice

“When we discover that we have in this world no earth or rock to stand or walk upon but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity but to learn to sail” (White 1984: 278).

There is at present a renewed interest, evident both in the judiciary and the academy, in the role of values in law. Since 1994 there has been an increasingly persuasive call for a return to ethical values and moral principles in all aspects of South African life and legal theory. Even as the legal system experiences a transformation in form, with the introduction of a written Constitution, a Constitutional Court and various new fora and mechanisms to resolve in novel ways the disputes left over from the previous regime, there emerge a variety of attempts to revitalise the operations of the legal system. As Alfred Cockrell writes, “the explicit intrusion of constitutional values into the adjudicative process signals a transition from a ‘formal vision of law’ to a ‘substantive vision of law’ in South Africa” (Cockrell 1996: 3). It is hardly surprising, given the judiciary’s perceived lack of discretion in interpretation under the doctrine of parliamentary sovereignty and the minimisation of the role of values under the modernist jurisprudence of positivism followed by the judiciary during apartheid, that the judiciary has since 1994 exhibited profound confusion as to the source of values in accordance with which the Constitution is to be interpreted. In general the court has adopted a somewhat monolithic communitarian view, arguing that the Constitution encapsulates the shared ethics of the South African nation. Judge Mokgoro, for example, has said: “In interpreting the Bill of Fundamental Rights and Freedoms ... an all-inclusive value-system, or common values in South Africa can form a basis upon which to develop a South African human rights jurisprudence” (*Makwanyane*, para 307). Sachs J states in the same vein. “[i]n broad terms, the function given to this court by the Constitution is to articulate the fundamental sense of justice and right shared by the whole nation as expressed in the text of the Constitution” (*Makwanyane* para 362 C-D).

Such Hegelian appeals to the community do supply a grounding and substance for ethical judgements, but it should be recognised that a community exists by what it rejects as well as what it includes. The community is a totality in the sense that it excludes those who do not fit the categories in which it demands that its members be

classified – women, ethnic minorities and others, “those that are ‘other’ to the established norms of the *nomos*” (Douzinas and Warrington 1994: 201). As Drucilla Cornell (1992) shows, for Hegel to construct a community with binding ethical standards, it is necessary to construct a “logic of identity”, a ‘home’ which, necessarily and violently, excludes those who do not conform. Since the appeal to community consensus has the effect of excluding, I want to argue that another formulation or source of ethics for law needs to be evolved.

It is a central argument of the first half of this chapter that the incarnation of modern law hegemonic during apartheid cannot morally reanimate South African legal theory. I specifically argue against those proponents of positivism who assert in spite of the apartheid experience that positivism does allow for the infusion of morality into post-apartheid law (see, for instance, Cockrell 1996; Fagan 1999) and that, even if I were wrong about this, the kind of morality that positivism is compatible with is insufficient to meet the requirements of the South African transition. The jurisprudence of positivism, which based the legitimacy of law on the formalism of legality and consequently reduced the significance of ethical considerations, contributed to, even facilitated, law’s construction of and complicity with apartheid (Dugard 1971; 1978; 1981; Davis 1985; Dyzenhaus 1991; 1998).⁶⁸ Positivists from Austin to Hart attempted to exclude or minimise the influence of moral values and principles in law. Positivism concerns itself with the development of a science of law, based on empirically verifiable phenomena, devoted to questions of validity, and presenting law as a coherent, closed and formal system guaranteed internally through the logical interconnection of norms and externally through the rejection of value and content as non-systemic. Where morality is permitted a role in the positivist conception of law, it is present only contingently, by accident of history,

⁶⁸ Lalu and Harris describe law’s collusion with injustice as having taken place under the rubric of “a positivist and reductively ahistorical metalanguage” (Lalu and Harris 1996: 26). Legal positivism has its roots in the Enlightenment project of rationalising society through the universal application of purportedly neutral rules. However as Peter Fitzpatrick notes, the origins of racism lie in the same Enlightenment project, with its claims to universality which exclude others as qualitatively different. The colonised were placed beyond the equation of universal freedom and the universalism of the law, which proclaimed its innocence of racism, was based on this exclusion (Fitzpatrick 1987:119). Legal positivism empowered the judiciary to participate in the oppression of a silenced majority, facilitating the construction of Apartheid South Africa’s dual system of common law, Roman-Dutch law and African law, embodying racist evolutionary narratives. Whites married freely, once and forever: Africans bought and sold wives. Whites exercised sovereign, individual rights over land: Africans held collectively and as subjects. And so on. (Chanock: 1995).

rather than mandating the necessary incorporation of morality. Under the positivist conception law retains its sanctity by denying the moral and political nature of its operation. Alan Paton's description of law and its relation to justice reflects exactly this conception: the law is represented as a moral enterprise because it excludes morality from its operation.⁶⁹ Douzinas and Warrington characterise positivism as exhibiting a

distrust of administrative discretion and of judicial creativity; the antipathy towards administrative tribunals; legal pluralism and non-judicial methods of dispute resolution; the insistence on the declaratory role of statutory interpretation and the 'strictness' of precedent; the emphasis on the 'literal' rule which allegedly allows the exclusion of subjective preference and ideological disposition. (Douzinas and Warrington 1994a: 4)

I am prepared to concede that this description of positivism does not cover every variety of positivist theory or at least that some positivists might dispute the definition on the basis of its generality. On the whole, though, I believe that the passage captures the features of positivism during apartheid, many of which linger on in new guises.

My argument is that the sense of outrage that follows the injustices of the legal system during apartheid must be related to the radical divorce that modernity decreed under the guise of positivism between law and ethics, legality and morality, justice as process and justice as substance. The question is whether a contemporary critical and reconstructive concept of justice can be developed for the South African legal system after the end of the grand narratives of modernity and all attempts to ground justice as a principle of universal application. That is to say, can a concept of justice be found to mediate between the various conceptions of the good or of ethical action after the modern attack on the Good and the postmodern attack on the absolute power of reason?⁷⁰ I believe it can. The discrediting of the modern view that a single form of

⁶⁹ I investigate Paton's conception of law and justice briefly in the final section of this chapter and more fully in my discussion of *Cry, The Beloved Country* in Chapter 5.

⁷⁰ I reject the modern conception of natural law as a source of values: the claim that there is a small number of fundamental principles, universals, ideals or standards that every posited legal system ought to include. Classical teleology has become historically exhausted and religious transcendence today fails to command widespread or uniform acceptance. Christine Sypnowich, for example, argues that "the thick conceptions of morality deployed by anti-positivists, such as some idea of natural law set moral criteria which is (sic) intrinsically contentious" (Sypnowich 1999: 192). As Douzinas et al observe:

Natural law and natural rights theories per se are not of great purchase in late modernity. They retain their place in the curriculum mainly on account of their age, infinite manipulability and

reason could guide humanity towards social progress marks the beginning of an ethical awareness of the need to postulate a non-foundational concept of justice which will provide the scope to criticise current legal practice, whilst being all the time historically contingent and particular. I suggest that the postmodern theories of justice of Derrida and Lyotard influenced by Emmanuel Levinas's ethics of alterity constitutes such a concept of justice.

1.1 Positivism

In the first half of this chapter, I criticise the various strands of positivism in order to demonstrate their collective unsuitability as a jurisprudence for contemporary South Africa. I shall then briefly discuss Foucault's critique of legal modernity in an effort to show that, despite the arguments of certain positivists, the introduction of a liberal rights-based jurisprudence does not necessarily provide the structure for a just legal system. Thereafter I investigate the contributions of Derrida and Lyotard as attempts to formulate a concept of justice which would avoid the pitfalls of the modern conception. Although Foucault points to the dystopic underside of modernity rather than advancing a theory of justice per se, I have included an analysis of Foucault alongside Derrida for reasons alluded to by Rorty in the following passage:

As ... Foucault helped us to see, today's chains are often forged from the hammers that struck off yesterday's ... this sequence of hammers into chains is unlikely to end with the invention of hammers that cannot be forged into chains – hammers that are purely rational, with no ideological alloy. Still the chains might, with luck, get a little lighter and easier to break each time. (Rorty 1998: 320)

pedagogical usefulness. Their latest mutation in the theory of fundamental human rights is of great ideological and rhetorical force, but of little specific content. (Douzinas et al 1991: 19,20)

Recently natural law has been used as a basis for acts of violence against school children in South Africa in contravention of relevant legislation. In March 1999, the principle of a private Christian school defended his continued illegal assaulting of pupils at his school, remarking "Who is more important? The Bible teaches us that God is ultimate even over the government" (Pete and Du Plessis 2000: 98). This natural law justification was to form an important basis for subsequent constitutional challenges against the legislation prohibiting corporal punishment in schools. Many of what are taken to be unimpeachable sources of natural law are seemingly incommensurable with with justice. As J.M. Balkin observes in another context, "Jesus might have advised his followers to turn the other cheek and to have their enemies, but this approach is not necessarily what justice requires or a particularly good strategy for achieving a just result" (Balkin 1994: 1164).

If the value of Foucault is his demonstration of the ubiquity of power and oppression, Derrida and Lyotard point (albeit in different directions) to means of resistance whereby oppression might be lessened over time.

Mindful of John Dugard's persuasive arguments in the 1970s and 1980s illustrating that positivism's separation of law and morality enabled his complicity with apartheid – Dugard rightly argued that positivism was committed to a mechanical or phonographic theory of the judicial function – the judiciary and academics alike have tended, with notable exceptions (Cockrell 1996; Fagan 1999) to reject positivism in favour of a value-orientated approach, albeit poorly conceived and vaguely defined. In *Matinkinca v Council of State, Republic of Ciskei*⁷¹ Heath J referred to “the outdated legalistic or positivistic approach” (at 408G). This stance was echoed in *S v Mhlungu*⁷² where Sachs J referred disparagingly to “a purely technical, positivist and value-free approach to the post-Nazi Constitution in Germany” (para 11, 913G).⁷³ Against this general disavowal of positivism, residual positivists reply by claiming, first, that positivism never intended to separate law from morality and only ever insisted that law is not necessarily connected to morality and moreover, now that South Africa has a written Constitution, with a Bill of Rights and a political climate in which there are genuine efforts to include morality into the law, positivism is sanguine about law's inclusion of values (Cockrell 1996: 32, 33; Fagan 1999: 95). Second, argue the positivists, positivism does not insist on a mechanical and discretionless approach to legal interpretation and positivism permitted judicial discretion and *jurisgenesis* all along (Cockrell 1996: 35; Fagan 1999: 85). In what follows I analyse various positivist theorists in order to argue that positivism either attempts to exclude morality or else renders morality formal rather than substantive, and that any discretion that positivism allows is far more an exceptional and reluctant concession than the rule.

For John Austin (1954), law is the command of the sovereign backed by sanctions, stressing the subjection of persons by the sovereign through coercion, a conception of the law particularly resonant in considering the role of the law during apartheid. In attempting to define legal terms, Austin establishes an empirical model of a legal system which presupposes a single logical system in which value plays no

⁷¹ 1994 (4) SA 472 (Ck).

⁷² 1995 (3) SA 867 (CC).

part. It is the legal system's exclusion of substantive values which legitimates it, which supposedly makes it just. Just how narrowly Austinian jurisprudence could be interpreted is evidenced by the dictum of Austin's most successful editor, Jethro Brown:

Justice as a concept in jurisprudence, is conforming to [positive] law – if not conformity to established rules of law, or to the spirit of the law in its totality, then according to a law which judges make and apply retrospectively. (Brown, cited in Sugarman 1991: 47)

Hans Kelsen explicitly adopts the epithet “science” for his study of the logical hierarchy of legal norms, a coherent, closed and formal system which comprises a legal grammar guaranteed internally by the logical interconnection of norms and externally by the rejection of non-systemic material such as content, value and history (Kelsen 1934). Kelsen's formalism⁷⁴ is clear from the idea that at the base of the pyramid of norms is posited a *grundnorm* which sets out the conditions of all other norms, which are accordingly qualified as valid and objectively legal. H.L.A. Hart too, constructs his theory as a discourse of truth and as a system of formalist coherence. Law is separated from both morality and coercion and presented as a coherent and self-referential system of rules; rules refer to other rules and their systemic interdependence determines the existence and normative value of any particular term.

Hart, diverging from Austin, defines the law not as commands, but as a system of rules⁷⁵, thereby achieving the final transition from a morality of value to the legality of a norm. Hart seeks to demonstrate that law is distinct from other forms of social ordering such as morality and coercion. Advanced systems of law are accordingly neutral toward all political regimes and whilst morality and politics may determine the content of law at any particular moment (so that, as Cockrell and Fagan

⁷³ For academic arguments in favour of the abrogation of positivism, see Botha 1994, Van Reenan 1995 and Devenish 1998.

⁷⁴ For the sake of clarity, I define formalism as an approach to law which advocates a mechanical, syllogistic application of law to facts, in accordance with which the application of a legal rule leads to determinate results due to the constraints imposed by the language of the rule (Schauer 1988).

⁷⁵ Hart writes:

“There are ... two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must generally be obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials (Hart 1961: 113).

point out, the Constitution represents the distillation of a particular moral and political compromise), neither morality nor politics can determine or effect its underpinning structure. Justice, for Hart, is not directly involved with moral rules and so not substantive. Justice is identified with the formal equality of treatment of similar cases and with the application of the same general rule to the various cases without prejudice or interest. The self-referentiality of Hart's rules also enables the possibility of 'pure' procedural justice since an outcome is just if it conforms to the process defined by rules as constituting a just form of adjudication. What moral content the law does contain, what Hart refers to as the "minimum content of natural law", is characterised by its extreme formalism; it comprises simply what Hart regards as the basic standards of civility needed for species survival.

Dworkin takes positivism a complex and sophisticated step further. For Dworkin, law is not just about rules as Hart suggests, but includes principles and policies, and its operation involves the interpretative actions of judges who creatively construct the "right answer" to legal problems. Judges develop and apply political and moral theories that present a law in the best possible light. Legal tradition is assumed to possess an internal integrity and this allows the construction of principles of morality which can then be used to resolve hard cases. Contra Hart, judges do not ever have interpretative discretion: judges determine the right answers to "hard cases" by finding a "fit" between possible interpretations and the principles of the legal community. Dworkin seems to be prepared to reintroduce moral considerations into the law, but instead his theory represents a juridification of morality – his assertion of the moral legitimacy of the law witnesses a separation of legality and morality. Ethics are banished to the realm of the private and subjective, with the normative discourse of the public realm filled by law. Moreover, as Warwick Tie (1999) argues, politico-moral facts exist as facts by virtue of their consistency within a particular cultural context. Individuals are free to pursue their particular conceptions of the good only within the hegemonic conceptions of those institutions. Although Dworkin claims to be able to imagine a form of law beyond the existing legal system, one which guides "the impure present law gradually transforming itself into its own purer ambitions ... better in each generation than the last" (Dworkin 1986: 406), the existing social context "continues to apply a non-negotiable background against which the subjectivity of Dworkin's super-judge decides the right answer" (Tie 1999: 46).

I now return to the earlier responses of Cockrell and Fagan to the abrogation of positivism: that positivism can and does factor morality into its operations (insofar as “the rule of recognition can incorporate as criteria of legal validity conformity with moral principles or substantive values” (Hart 1958: 250)) and that positivism, or at least those strains of Hart and Joseph Raz, permits discretion in rare cases of ambiguity.⁷⁶ My response to the first assertion is that it is not sufficient for law to incorporate accidentally whatever moral criteria may exist for identification of the law. I disagree strongly with the positivist assertion that there is no *necessary* connection between law and morality. Positivism’s aspirations toward neutrality tend to make the law complicit with a hegemonic morality (or immorality) even as it pretends to hold no moral stance at all. The argument that the new constitutional dispensation has “delivered positivism from evil” is simply false since the new constitutional document requires interpretation. The argument that the Constitution contains values does not address the central point that the words and rules of the Constitution need to be interpreted to give effect to them in adjudication. Moreover, the interpretative process is inherently moral and political in that there is always more than one possible meaning or rule which can be applied in any particular case, so that choice (Derrida’s “undecidable”) is a defining political feature of interpretation. Hart and Raz argue that in the majority of cases both words and rules are tools with clear meaning and application. I disagree. In all cases there is undecidability: a choice to be made between rules and meanings, which can obviously not be made with reference to values in the constitution which is itself the subject of interpretation. Legal interpretation must aspire to justice and this requires in each case having recourse to values outside of the law: this is what gives justice its necessarily critical character. But it is precisely the area outside of the law that positivism’s internalism wants to reject as being none of its business. However, for those who want to

⁷⁶ Hart asserts:

There will be points where the existing law fails to dictate any decision as the correct one, and to decide cases where this is so the judge must exercise his law-making powers. But he must not do this arbitrarily: that is he must always have some general reasons justifying his decision and he must act as a conscientious legislator would by deciding according to his own beliefs and values. But if he satisfies these conditions he is entitled to follow standards or reasons for decision which are not dictated by the law and may differ from those followed by other judges faced with similar hard cases. (Hart 1958: 250)

Raz also concedes that law will on occasion be indeterminate, failing to identify a ‘right answer’ to a particular legal question (Raz 1979: 70-79).

challenge the dominant political theory with which positivism is infused, for the unrepresented and excluded from the community from which law purports to draw its values, for those who experience law not as rationality and rights but as victims of the exercise of power and as the recipients of legal force, positivism has no place. For those people the cheerful communitarianism of *Law's Empire* does no justice to the misery of exclusion.⁷⁷ In the next section I suggest that it is this assumed positivity of positive law, the sense that law is necessarily a medium which will provide justice, that postmodernism denies.

1.2 Postmodernism

In this section I examine the ideas on law and justice of three postmodern (poststructuralist) theorists: Michel Foucault, Jean-Francois Lyotard and Jacques Derrida. These theorists contribute to what has been termed postmodern jurisprudence: the attempt to create the conditions of possibility for reason(s), ethics and law once all the strategic moves of modern philosophy and jurisprudence to ground them on some single principle, form or meaning have been discredited (Douzinas et al 1991: 18). Space does not permit me to include other theorists who have contributed to debates on law and justice and who might also be labelled postmodern, such as Nietzsche and the neo-pragmatist communitarian Richard Rorty. I have decided to include Foucault, Lyotard and Derrida because they cumulatively point to the central flaw of the Enlightenment concept of law and justice, its violent exclusions and marginalisations, and (in the case of Derrida) to a strategy for its resolution.

Foucault

⁷⁷ Dworkin's positive attitude to law is reflected in the following passage:

What is law? ... Law's empire is defined by attitude, not territory or power or process ... It is an interpretive self-reflective attitude addressed to politics in the broadest sense. It is a protestant attitude that makes each citizen responsible for imagining what his society's public commitments to principle are, and what these commitments require in new circumstances ... Law's attitude is constructive: it aims, in the interpretive spirit to lay principle over practice to show the best route to a better future, keeping the right faith with the past. It is finally a fraternal attitude, an expression of how we are united in the community though divided in project, interest and conviction. That is, anyway, what law is for us: for the people we want to be and the community we aim to have. (Dworkin 1986: 413)

Foucault points to the failure of the legal system as conceived by the Enlightenment to live up to the failure of its own emancipatory pretensions. He depicts the legal system of modernity as a “negative utopia”, a seemingly humane but ultimately coercive product of Enlightenment rationality gone awry. Foucault challenges the idea of progress in law, the idea for instance, that South African law, by its adoption of a Bill of Rights and the judiciary’s self-professed quest for humanitarian values, is becoming increasingly humane and less coercive. Foucault argues to the contrary that the rights to privacy, dignity and autonomy are rendered ineffective by a ubiquitous system of coercion and discipline. Foucault challenges the “classical juridical theory” of the social contract theorists, who view power solely in terms of state power and ignore the way in which power is exercised non-centrally “at the capillaries”. According to social contract theorists, of whom Hobbes is Foucault’s main focus, the exercise of power by the state is justified as a product of the free choice among individuals in a state of nature. On this model the state is the result of a contract, so that the state is legitimate to the extent that it satisfies the mandate of individuals who participate in the contract. Power comes to be understood only in terms of the state over the individual; in all other realms the individual is free. But for Foucault the individual is not free; following Nietzsche’s argument against the existence of the coherent subject beneath the individual’s attributes, Foucault heralds the “death of the subject” (Foucault 1994). There is no subject that pre-exists the imposition of power through legal and other social discourses.⁷⁸

For Foucault, social contract theory is not primarily concerned with individual freedom but with social control. A Foucauldian analysis of the South African tradition to liberal democracy would run as follows. Under apartheid, a centralised government socially engineered and divided its citizens through the operation of Roman-Dutch law overlaid with positivist theory which for the most part denied judicial discretion and separated law from morality. Domination mostly took place through a web of criminal laws, harsh punishments such as the death penalty, and extra-legal exercises of force. Parliament was sovereign and it was easy to view power as largely repressive. Under the classical juridical model, with the change of government, the

⁷⁸ According to Foucault “[m]y objective ... has been to create a history of the different modes by which in our culture human beings are made subjects” (Foucault 1982b: 208). What Foucault’s genealogy reveals is that “The individual is no doubt the fictitious atom of an “ideological” representation of society; but he is also a reality fabricated by the specific technology of power that I have called a discipline” (Foucault 1979: 194).

individuals in South Africa, in accordance with the free social contract, vest the new government with authority to repeal offensive racist legislation and to create new civil and criminal laws, set up schools, build houses, roads and other infrastructure, provided always that its actions are legitimated only inasmuch as they accord with the provisions of the Constitution. Law is equivocal in this matter: it speaks of individual freedom but tends to legitimate state power. The social contract model has undergone various permutations, but its formulations have always been placed in the service of state interests:

Finally, in the eighteenth century, it is again this same [juridico-political] theory of sovereignty, reactivated through the doctrine of Roman law, that we find in its essentials in Rousseau and his contemporaries, but now with a fourth role to play: now it is concerned with the construction of parliamentary democracy. (Foucault 1980: 103)

Foucault's claim is that rights discourse operates as a way in which the individual can be coerced or dominated by the state. The liberal state and its legality are mechanisms whereby large numbers of people are rendered docile so that they can be classified, organised and dominated not only by the state but also by private interests (as is the case, for instance, when clients are obliged by corporate institutions to submit to biometric analysis).⁷⁹ Rather than the fundamental human rights set out in the Bill of Rights acting as trumps against state interference, Foucault claims that the legal system, even (perhaps especially) one that incorporates liberal rights, legitimates the use of state power:

The system of right, the domain of the law, are permanent relations of these relations of domination, these polymorphous techniques of subjugation. Rights should be viewed, I believe, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates. (Foucault 1980: 86)

Legal rights may be both a form of domination and a smokescreen for domination – power, in order to be effective, must disguise its operation. According to Foucault current political theory remains mired in a premodern notion of power as a repressive force by the state, wrongly assuming that the absence of state power translates into freedom for the individual. For Foucault, power must be reconceived not as

⁷⁹ For a discussion of the invasiveness of this kind of technology, see Macquire 2000.

repressive state power but as disciplinary power consisting of normalising techniques and disciplinary strategies issuing from a plurality of sources including hospitals, schools, schools, factories, prisons and the military. This network of power relations is a seamless and omnipresent web that positively constitutes the individual as subject: “In fact power produces; it produces reality; it produces domains of objects and rituals of truth. The individual and the knowledge that may be gained of him belong to this production” (Foucault 1979: 194).

Whilst South African jurists were busy establishing the formal rights of liberty and equality, on a Foucauldian reading the disciplines have and will continue to erode these formal liberties by creating a carceral society, a “panopticon” in which the individual is monitored.⁸⁰ Schools, hospitals and military barracks come to resemble prisons, all of which share a common interest in shaping the subject. But whereas premodern law worked by virtue of a sanction, the disciplines and their regulatory apparatus work through normalisation.⁸¹ The disciplines shape a person in a way the law is incapable of doing, by continually subjecting the individual to normalising modes of regulation. Not that Foucault argues that law is replaced by the disciplinary system; rather, law begins to conform to and become part of the disciplinary system, which is itself encoded in the form of laws and regulations:

I do not mean to say that law fades into the background or that the institutions of justice tend to disappear, but rather that the law tends to operate more and more as a norm and that the juridical institution is increasingly incorporated into a continuum of apparatuses (medical, administrative and so on) whose functions are for the most part regulatory. (Foucault 1990: 144)

I will describe in Chapter Four how the law’s co-operation with the disciplines (religion and other forms of administration) combine in the Truth and Reconciliation Commission, which appears, from a Foucauldian perspective, to be a regulatory mechanism by which the construction of emergent subjectivities has taken place as a function of the combined discourses of law, religion and nation-building. The Truth and Reconciliation Commission also reflects the Foucauldian insight that with the

⁸⁰ The alternative sentence to murder, subsequent to the death sentence being abolished in *Makwanyane* is of course a long term of imprisonment.

⁸¹ For example, the Constitutional Court in *Christian Education South Africa v The Minister of Education* 1998 (12) BCLR 1449 (CC) declared unconstitutional the continued resort to corporal punishment in schools, in defiance of the South African Schools Act 84 of 1996. For a discussion of

increasingly regulative and administrative nature of law, it becomes consequently less punitive. The granting of amnesty in exchange for 'truth' can be seen as an example of this trend, as is, I will argue in Chapter Five, the abrogation of the death penalty. Both of these examples take place under the guise of a humanitarian impulse on the part of the judiciary and operate to legitimate both the law and the new regime. But for Foucault, humanism is merely a façade for the imposition of power through the law.

Foucault's central argument is that, paradoxically, jurisprudence should not focus so heavily on law, that is, on legislation and juridical proclamations, and should rather examine the way in which modern law has been melded with the disciplines, enabling the expansion of both law and the disciplines. For this reason, in my consideration of the *AZAPO* and *Makwanyane* cases, I have tended to move from an analysis of the judgement's text to a broader exploration of the political context and attendant social thematics in order to investigate not only the meaning(s) of the judgements but also how the normative rhetoric of the court compares with and stands up to existing modes of social performativity.

While I certainly believe that Foucault's analysis generates insights into the law in post-apartheid South Africa. I must ask further whether it provides normative grounds for a program of legal reform. On the whole, a Foucauldian analysis would seek to show that while South Africa's transition from apartheid to liberal democracy seems like political progress (the introduction of democracy and a written Constitution containing a Bill of Rights, the provision of an apparatus for dealing with "the conflicts of the past", the humanitarian reform of penal policy), but is in fact an excuse for repression and discipline. That is, the social changes made in the name of humanity (and freedom, equality and truth) have led to the creation of a society which is just as coercive as the unsubtle coercive practices of apartheid, though the domination is more nuanced. In relation to judicial practice, it may be asserted that the jurisprudence of positivism was during apartheid a technology of power which facilitated state oppression by eliminating ethics from its practices and so leaving the state to its own designs. The vague and directionless value-centred approach of post-apartheid legal theory seems to reintroduce morality into law, but the unclarity of the approach leaves the judiciary free to apply new forms of oppression conducive to

the various litigious challenges to section 10(2) of the South African Schools Act, see Pete and Du Plessis 2000.

specific forms of nation-building and social reconstruction. In some moods, Foucault seems only to be pointing to the *possibility* of oppression (“My point is not that everything is bad, but that everything is dangerous” (Foucault 1982a: 231)). However, the scope of Foucault’s suspicion is so wide-ranging that it attaches not only to rationality (the instrumentality of rationality, following Adorno and Horkheimer) but also the idea of justice:

I will be a little bit Nietzschean about this ... [I]t seems to me that the idea of justice is an idea which in effect has been invented and put to work in different types of societies as an instrument of a certain political and economic power. (Foucault 1984: 6)

Liberal democratic legality suggests that resort should be had to the Constitution and the legal system to provide limits on the extent to which the individual can be controlled and dominated. However, Foucault’s point is that one cannot use judicial mechanisms and principles such as the law or the Constitution specifically as a defence against discipline because the law is part of the disciplinary network. For Foucault, resistance must take place in accordance with a ‘new form of right’ that is neither disciplinary nor based on juridical principles. Foucault’s suggestion is an ethics of self-mastery in which the subject recreates herself through an aesthetic process: “we have to create ourselves as a work of art” (Foucault 1982a: 351).⁸² Foucault stipulates the political implications of this strategy as follows:

The political, ethical, social and philosophical problem of our days is not to try to liberate the individual from the state, and from the state’s mechanisms but to liberate us, both from the state and from the type of individualisation which is linked to the state. We have to promote new forms of subjectivity through

⁸² There are examples of this kind of aesthetic self-styling in post-apartheid South Africa. Performance artist Steven Cohen recreates the parameters of identity politics that is both public and private by exhibiting aspects of homosexual sexual practices in public. In a radical politicisation of aesthetics, he challenges inherited social norms and representations, as well as the rhetorical assurances of constitutional rights by styling himself in a way radically at odds with conventional modes of representation. Virginia MacKenny notes:

Steven Cohen is testing the veracity of the ideal. In his piece *Crawling, Flying, Voting* (1999) he spent five hours in the queue crawling to the voting station garbed in a ‘little black number’, diamante necklace, full make-up, a feather headdress and fetish shoes endowed with gemstone horns which rendered walking impossible. He was not just making a spectacle of himself, he was testing if the system could accommodate the diversity it claimed – testing “what identity you have to present to officialdom”, challenging his own and others’ cowardice (MacKenny 2000)

the refusal of this kind of individuality which has been imposed on us for several centuries. (Foucault 1982b: 216)

Foucault's analysis often seems to verge on defeatism, in that it seems to overstate the ubiquity of oppression.⁸³ Colin Gordon acknowledges that readers often get the impression of "a paranoid hyper-rationalist system in which the strategies – technologies – programs of power merge into a monolithic regime of social subjugation" (Gordon 1980: 246). However, for Gordon, this is a misreading since Foucault distinguishes a disciplinary society from the fantasy of a disciplined society "populated by docile obedient normalised subjects". Foucault's assertion concerning the ubiquity of power should not be misconstrued as suggesting the omnipotence of power. Wherever dominance is imposed, resistance will inevitably arise: "there are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where the relations of power are exercised" (Foucault 1980: 142). However, since resistance cannot take place through recourse to juridical principles (since law is part of the disciplinary network), resistance takes place at the point of the application of power: the body. Foucault suggests an "ethics of the self", an aesthetics of existence at the level of the ethical as "an antidote to the normalising tendencies of modern societies" (MacNay 1994: 142).⁸⁴ Although I can only focus briefly on the efficacy of Foucault's ethics of self-stylisation as a strategy of resistance in detail, my chief concern is that its normativity (its advocacy of rigorous rules of conduct and stipulation of sartorial and other existential requisites) is in conflict with the performativity of many forms of life in South Africa.⁸⁵ That is to say, the modes of subjectivity constructed through discourses prevalent in South

⁸³ According to José Merquior, Foucault's "cratology" tends towards pancratism: it reduces all social practices to unspecified patterns of domination, so that disciplinary power is conceived as a fully installed disciplinary force (Merquior 1991).

⁸⁴ Arts of existence are:

those intentional and voluntary actions by which men not only set themselves rules of conduct, but also seek to transform themselves, to change themselves in their singular being, and to make their life into an *œuvre* that carries certain aesthetic values and meets certain stylistic criteria. (Foucault 1985: 10, 11)

Foucault's exemplum of embodied aesthetic self-fashioning – the Baudelairean dandy – is a radical construct, an individual who rejects established models in order to create something radically new. "What must be produced" urges Foucault "is something that doesn't yet exist and about which we cannot know how and what it will be ... the creation of something entirely different, a total innovation" (Foucault 1991: 121, 122).

Africa are seemingly incompatible with or precluded from the project of radical self-transformation suggested by Foucault. Because Foucault installs “a direct unequivocal relation between subjection and subjectification” (Dews 1984: 87), it is difficult to imagine how the agency required to effect an aesthetics of resistance might be attributed to the most oppressed in South Africa, the black working classes.⁸⁶ As Rainer Rochlitz argues, Foucault seems to retreat into an elitist and amoral aestheticism, “a project for all privileged minorities, liberated from the material reproduction of society” (Rochlitz 1992: 255).⁸⁷

In any event, although a Foucauldian analysis usefully alerts us to the possibility of continued repression in South Africa, he does not suggest a programme of legal reform, through the inclusion of an ethics uncontaminated by Enlightenment conceptions of reason, law and justice. Since it is to the recognition of oppression and the possibility of its resistance *within legal theory and practice* that his work is devoted, I turn now to Jacques Derrida’s theory of law and justice.

Derrida

What emerges as a distinctive feature of positivism, particularly in its South African articulation, is its denial of any necessary relationship between law and its infinite others. Modern jurisprudence attempts to define law by excluding the non-legal, the other of law. It describes the essence of law, constructing a unified and coherent system, which is rooted in the metaphysics of truth rather than the politics and ethics of justice. Meaning is determinate and truth is linked to empirically observable facts. The proclaimed unity of law is linked with the legitimation of power. Power is legitimate if it follows the law and if the law follows reason. Law is simply positive law and only has contingent connections to human morality and ethical standards. As Douzinas and Washington suggest, what this in fact entails is a

⁸⁵ On the distinction between normativity and performativity, Schlag (1990) argues that in many cases the location of individuals within particular language games precludes their susceptibility to normative arguments.

⁸⁶ Although, as I argue in a subsequent chapter, Judith Butler (1993, 1994) suggests the poststructuralism can indeed effect agency and so the political project of transformation.

⁸⁷ Just as it is difficult to imagine an affirmative response from the black proletariat in South Africa to Foucault’s “[b]ut couldn’t everyone’s life become a work of art?” (Foucault 1984: 350), it is likewise difficult to see how Foucault’s complementary strategy of dissolving the limits of discursive thought and its ordinary modes of experience through transgressive physical experiences (*épreuves*) might be useful to the politically oppressed, to whom Foucault’s advocacy of sadomasochistic sex and hallucinogenic drugs as “limit-experiences” would surely be incompatible with political resistance.

collapse of justice and law in legal thinking: although it envisages a separation between what is legal and what is just, it also manages to conflate the two, reducing the discourse of justice to the discourse of law (Douzinas and Warrington 1994b: 412), reflected in Brown's formulation of justice set out above. Justice becomes nothing more than law. Critical theories of law – Realism, Critical Legal Studies, feminism, race theory – have demystified the positivist mentality of neutrality in law: law cannot be apolitical or amoral because it so clearly represents a dominant view, the colonisers over the colonised, the oppressors over the oppressed. However, a distinction can be made between these theories, whose major concern has been internal critique, the politics of positive law (which often contains arguments concerning the foundations of the legal system, for example, that constitutional supremacy has a greater potential to realise justice than parliamentary sovereignty), and the postmodern legal space, which has been labelled the “jurisprudence of identity” (Douzinas and Warrington 1994b: 412) and which denies the possibility of foundations altogether. This postmodern jurisprudence is partly metadiscursive, not only about the nature of law, but also about the way in which discourses of law and legal theory shape our understanding of law. More radically, though, it is concerned with absolute otherness or alterity as the focal point for an ethical understanding of law and justice. Derrida maintains that law is an element of the process which is calculable, while justice is incalculable. Justice cannot simply be enshrined in a rule, because it demands a relation to the other, not just an appropriation of it; justice is thoroughly particular (Derrida 1992a).

Derrida develops a concept of justice that relates and contrasts positive law, and more particularly the concrete rules of law with the transcendent (or quasi-transcendent) mystery of justice. But before examining Derrida's work on law and justice, a synopsis of Derrida's deconstructive method, with which it is inextricably bound, is required and follows hereafter. Having extended Saussure's structuralist insight by claiming that words signify relationally, Derrida concludes that meaning is never fully present and enclosed within rigid boundaries, since each term leaves “traces” in related terms. Accordingly meaning is diffuse, “disseminated”, open-ended. All terms get their meaning by “differing” from other terms, so meaning is always “deferred” (a play on the terms “differ”/“defer” (Derrida 1982)). As a result, meaning is always in flux or “play”: “Essentially and lawfully, every concept is inscribed in a chain or in a system within which it refers to the other, to other

concepts, by means of the systematic play of differences” (Derrida 1982:1). There can be no closure to a text (defined broadly, to include, for example, the “text” of Western philosophy). Instead of closure there is “intertextuality” in which texts refer to other texts; hence Derrida’s famous dictum that “there is nothing outside of the text” (Derrida 1976: 158). Derrida condemns the belief that the full meaning of a term can ever be fully present, enclosed and mastered, which he terms “the metaphysics of presence”. Derrida uses the term “logocentrism” to describe the Western tradition’s obsession with the metaphysics of presence, the idea that the Truth can be grasped completely by naming it with the correct terminology, a term which accurately describes the modern approach to constitutionalism (Derrida 1976: 10-15). He characterises logocentrism as the search for a “transcendental signified”, an absolute end point where meaning is fully determined forever. Against this, Derrida argues that any closure achieved is fallible, temporary and constructed and therefore “deconstructible”. Also, terms are “iterable”; they can appear repeatedly in different contexts giving rise to new meanings (hence the difference in the meaning of “man” in “humankind”, “manhood” and “manly”). Derrida argues that the logocentric project of searching for the transcendental signified is involved whenever a theory is constructed around rigid hierarchies and binary oppositions such as subject/object, male/female, speech/writing, rational/irrational and so on. Since most, if not all, theories are constructed on the basis of these opposing concepts, such theories or texts may be *deconstructed*, read against themselves to challenge their structural hierarchies because

we are not dealing with the peaceful coexistence [of binary terms] but rather with a violent hierarchy. One of the two terms governs the other...or has the upper hand. To deconstruct the opposition, first of all is to overturn the hierarchy at any given moment. (Derrida 1981: 72)

In *Force of Law: The “Mystical Foundations of Authority”* (1992a), Derrida defends deconstruction against the charge that it is indifferent to political and ethical issues, particularly justice. Unlike positivist jurisprudence, which errs by conflating positive law with justice, deconstruction views justice as being beyond the legal system, something apart from the rights and remedies available under the existing legal system. Justice is an ethical relation that cannot be fully encoded in the form of statutes, rules and legal precedents. What requires to be determined is whether the

rule of law as previously defined (the constraining of judges' adjudicative activity by authoritative sources of law such as statutes and common law precedents) is completely incompatible with Derrida's theory of law and justice and, if incompatible, whether a new formulation of the rule of law could meaningfully be advanced instead of abandoning the doctrine altogether.

Justice, for Derrida, is the aporetic duty to recognise and treat the other on the other's terms, even though this demand is "incalculable", excessive and infinite and so incapable of fulfilment. This "call for justice" (Derrida 1992a: 16) in the face of the other has Levinasian overtones, a debt which Derrida acknowledges on the issues of the infinity and incalculability of the debt to the other. In contrast to justice, positive law is a system of rules, which is used in the process of calculating the legal merits of competing claims, the particularities of which are subsumed under general rules. Derrida follows Pascal (himself following Montaigne) in the notion that the legal system is founded not upon reason or justice but upon an interpretative act of violence. Montaigne recognised that law is *nomos* (convention) and hence derives from custom, whose grounds are invisible. It may be asked of any particular law, what its authorisation is. It may be answered: "The Constitution", which leads to the rejoinder "What is the authority for the Constitution?", and so commences an infinite regress, as the chain of authority is followed backwards in time. It must finally be admitted that law is based on nothing other than custom. The founding law (for instance the South African Constitution) is merely a construct installed by an act of violence. Law is self-grounding in that it arises by means of an "autobiographical fiction", a performative act which is a "coup de force" (Derrida 1992a: 13). The Constitution, as legitimator of all laws, cannot itself be legally legitimated: it is neither legal nor illegal, rather it is extra-legal, which is to say, in the South African case, that there was no legal authority for the constitutional negotiations which took place between 1989 and 1994, within the historically specific domain formed by the prevalent relations of power. Rather, the Constitution came about as a resolution to the longstanding and violent struggle for political power between opposing political forces. Derrida has pointed out elsewhere that there is a tendency for the creative establishing act to be forgotten, so that a higher moral justification (God, reason, natural law) is thought to ground the state and the law within it. This may constitute a failure to realise that law is groundless (or self-validating) and self-perpetuating (Derrida 1992b: 191-94). As a result there is an illegitimate tendency to collapse

justice into positive law. Law's foundation is groundless and "mystical": "Here the discourse comes up against its limit: in itself, in its performative power itself. It is what I here propose to call mystical. Here a silence is walled up in a violent structure of the founding act" (Derrida 1992a: 14). There is no point at which justice has been reached and so a judgement can never be said to be just. Justice is an *aporia*, an "experience of the impossible" (Derrida 1992a: 16) against which the legal system may be measured.

Justice can never be fully served by judging in accordance with existing rules of law, since such a decision will fail to observe the demands of the other. However, this does not mean that existing law must simply be disregarded; rather, law and justice converge at the moment of judgement in an impossible attempt to translate the infinity of justice into the finity of law. Justice is experienced as the negotiation of three aporias, subsets of the aporetic impossibility of facilitating justice in accordance with positive law. The first *aporia* is the "*epokhe* of the rule" (Derrida 1992a: 22), which arises because a judge must follow the law in accordance with precedent but must also be free to decide each case on its own merits and so to reject precedents, to suspend rules which restrict the judges choice to decide justly. Consider by way of example whether two provisions of the interim Constitution's bill of rights, section 9, which provides for the right of every person to life, and section 11(2) which provides that no person shall suffer "cruel, inhuman or degrading punishment", render a statutory provision permitting the death penalty unconstitutional. In fact, these provisions could be interpreted either way, depending on the interpretation that the deciding court places on the provisions in question.⁸⁸ But whichever way the court interprets, such an interpretation, if it is legally correct, will be an interpretation of the words in the two provisions. Two judges who make contrary decisions on this issue will nevertheless both be following the same rules. As Derrida argues:

To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if nothing previously existed of the law, as if the judge himself invented the law in every case. (Derrida 1992a: 23)

⁸⁸ The Constitutional Court decided the question of the constitutionality of the death penalty in *S v Makwanyane and another* 1995 (6) BCLR 665 (CC), interpreting these constitutional provisions as being contradictory to the death penalty. I analyse this judgement in some detail below.

A fresh interpretation is required in every case because every case is different and cannot be subsumed under the generality of an existing rule. Law is contingent and particular, not general:

Contingency is the limit of legal judgement and the limit of its reason. While contingency may be subject to laws it must always escape legality. The contingent is particular: it is accident or change...and its reason is finite, mutable and only ever probable. (Goodrich et al 1994: 1)

The constitutional provisions referred to only defer the question of justice, in the sense that the constitution was itself, in a sense, the outcome of a litigation between two parties, an “out of court” settlement in the face of increasingly costly proceedings. The Constitution is based on nothing other than the violence of resolution as opposed to justice. Just as the constitution constituted a choice based on historical contingency, so justice is deferred to particular interpretations of it, endlessly deferred. It is perhaps possible to say that rules are determinate without determining any particular decision, since it is in the interpretation of the rule at the moment of decision that justice and the law come together.

The second *aporia* is “the ghost of the undecidable” (Derrida 1992a: 24). Legal judgement involves dividing an issue (legal/illegal, right/wrong) on the basis of learning, reading, understanding and interpreting a rule and a calculation, a weighing-up of competing outcomes. There is undecidability between two or more possible significations or two or more contradictory and determinate rules, but also because there must be a bridging of the gap between justice – infinite, incalculable and without rules – and law, which is finite, contingent and rule-bound: “they are two but they are one ... law must be inspired by justice, it is part of its concept, and justice must command the production of determined laws” (Derrida 1999a: 284). Since justice resists formulas, no particular form of law can be just. Nevertheless, a judgement is called for.

The third *aporia* is “the urgency that obstructs the horizon of knowledge”. Justice is required immediately at the moment of dispute, and whilst judgement takes place on the basis of a calculated determination, in order for justice to be rendered the decision would need to be based on infinite information and unlimited knowledge. Since time is constrained, deliberation must be interrupted and the decision will

always be premature. Derrida quotes Kierkegaard: "The instant of decision is a madness" (Derrida 1992a: 26), a "leap into the decision" (Derrida 1999a: 281).

Deconstruction, Derrida assures, is emancipatory:

each advance in politicization obliges one to reconsider and so to reinterpret the very foundations of law such as they had been previously been calculated or delimited ... Nothing seems to me less outdated than the classical emancipatory ideal. We cannot attempt to disqualify it today, whether crudely or with sophistication, at least not without treating it too lightly and forming the worst complicities. (Derrida 1992a: 28)

The deconstructive project becomes to "reinterpret the foundations of law"; justice will involve focusing attention on the limits of given discourses, or language games and is as such concerned with negotiating the being of an age (Cornell 1992a). By permitting the voices of the marginal and by exposing the subordinations of the unheard, one is better poised to determine present discursive limits and to expose new horizons of justice. The law can be changed so that its foundations more adequately reflect the demands of justice. This is evident in South Africa: with the passing of the Statute of Westminster in 1931, the South African parliament became sovereign, a development described as "a revolutionary break with the past, with [colonial] subordination" (Hahlo and Kahn 1960: 150). Under the Westminster constitution, successive South African governments facilitated, through the sovereignty of parliament, the disenfranchisement of the majority and the opprobrious policies of apartheid. Parliamentary sovereignty continued to operate until the demise of the tricameral constitution and the inception of the interim Constitution and later the final constitution. First, the sloughing off of colonial domination, then the abolition of apartheid. Derrida says of South African constitutionalism: "there is a history of law and hopefully progress ... I think that the abolition of Apartheid is, of course, not the end of things, but the beginning of something else, a process, an endless process" (Derrida 1999a: 284). Moreover:

it is in the name of justice that you are improving your constitution, and it is because these constitutions are inadequate to justice that you will have to improve them, to adjust them to the social progress of this country [South Africa]. (Derrida 1999a: 284)

South Africa is for Derrida, an example of a country that produces constitutions, legislation and judicial precedents, and, aware of residual injustice in each, revises them, to exorcise them of racism and inequality, in furtherance of justice. The law is constantly being deconstructed. There is “a deconstructive force – which compels you, compels us, to adjust the law, adjust the constitution, to do justice, to experience the infinite gap” (Derrida 1999a: 285). Decisions are made and constitutions are constructed in the name of justice.

Lyotard

Lyotard agrees that the application of justice is thoroughly particular. The breakdown of grand narratives and the failure of bureaucratic capitalism has resulted in a “legitimation crisis” in relation to the universalising discourses of modernity such as law, which has left in its wake a diffuse and complex web of small narratives, or language games as Lyotard (following Wittgenstein) terms them. Like Derrida, he insists that subjectivity is constructed by and through discourse. The individual is constructed by her participation in these language games.⁸⁹ Each of these games has its own set of rules and its own concept of justice and no set of rules ought to apply beyond the scope of its own local game.⁹⁰ We might say for instance that apartheid constitutes one language game and liberal democracy of post-apartheid South Africa another, and that each have their own rules (Lenta 2000). Justice is local and imminent within each game and there is no transcendental principle of justice that applies to all language games all of the time. Rather than a single hegemonic principle of justice (such as the Rawlsian decision procedure) we should instead embrace the idea of a “multiplicity of justices, each one of them defined in relation to the rules specific to each game” (Lyotard and Thebaud 1985: 100). Paradoxically, however, the multiplicity of language games is ensured by a single overarching principle of justice, which operates as a referee to ensure that no single principle of justice is hegemonic: “And the justice of multiplicity: it is assured paradoxically by a principle of universal value. It prescribes the singular justice of each game” (Lyotard and Thebaud 1985:

⁸⁹ There are many different language games – a heterogeneity of elements. They only give rise to institutions in patches – local determinism...Each of us lives the intersection of many of these.” (Lyotard 1984: xxiv)

100). This prescription is paradoxical since Lyotard has already denied that there is a metadiscourse covering all language games.⁹¹ In view of the above, it is difficult to imagine him approving of any state legal system (which he would view as a metadiscursive or metalinguistic dictatorship) except perhaps if its laws were so minimalist that the only universal law was that of the multitude of language games.

The modern approach, exemplified by Kant and Rousseau, relies on a grand narrative of autonomous subjects freely reaching consensus in a social contract. Lyotard rejects this approach on the grounds that people are not free and autonomous but are instead determined by the narratives in which they are situated.⁹² Accordingly, “[t]his implies the very opposite of autonomy: heteronomy ... It also implies that it is not true that a people can never give itself its own institutions” (Lyotard and Thebaud 1985: 34). Individuals (judges for instance) are free to make changes within the context of their narratives, but are not autonomous in the sense that they could “step out” of their narratives to create institutions independently of the language games in which they are situated, simply through the use of their reason. Importantly, Lyotard observes that justice consists in “working at the limits of what the rules permit, in order to invent new moves, perhaps new rules and therefore new games” (Lyotard and Thebaud 1985: 100). Deconstruction is also exactly about working at the limits (Derrida would say “margins”) of what the rules permit, to determine possibilities which exist in discourse, so that these possibilities may be articulated in the name of justice.

Justice does not revolve around issues of truth and reason for Lyotard and so choice must rather be based on opinion. Since there are no grounds for judging, Lyotard concludes that when a person makes a normative judgement, she judges without criteria. This is so because the prescriptive and the descriptive constitute different orders of discourse, and the prescriptive cannot be derived from the

⁹⁰ Some postmodernists have argued that the modern regulatory state has become dysfunctional by interfering with or dominating the functioning of other subsystems or language games (Luhman 1986; Lyotard 1984).

⁹¹ The paradox is acknowledged in Lyotard’s laughter at his new role as “the great prescriber” (Lyotard and Thebaud 1985: 100).

⁹² Lyotard compares people in society to members of the Amazonian Casinahua tribe, whose lives are framed by shared narratives. The teller of the narrative reveals his name only after the end of the story, so that the story comes before the individual; the self is constituted as a product of the collectively shared narrative. This is also true today, where television news reporters give their names at the end of the report.

descriptive.⁹³ For example, the prescriptive claim that “the death penalty ought to be enforced” does not follow from the descriptive claim that “the death penalty has the assent of the people”.⁹⁴ There is no overarching principle of justice and so, like Derrida, Lyotard concludes that decisions must be made on a case-by-case basis. The idea that there are no criteria for justice, does not mean that there are no *rules* however. For Derrida, there are existing rules, but these are not criteria for justice; these rules need to be interpreted afresh for each new decision. Likewise Lyotard admits that there are existing rules which regulate language games, but that justice consists in inventing new moves, new rules and new games. Western philosophy consists of a multitude of rules developed over centuries, many of which are contradictory. Lyotard’s selective appropriation of certain rules over others (parts of Aristotle’s theory of judgement, Kant’s aesthetics and Levinas’ ethics) and the appearance of those rules, modified and in new combination, suggests that he has made use of rules – although the rules Lyotard relies on do not lead inevitably to his conclusions. Lyotard’s conclusions are surely the result of a judgement leading from the existing rules in the text of Western philosophy. Accordingly, in positive law there are rules and prescriptions, but on their own these rules are insufficient to provide justice. For both Lyotard and Derrida, although there exist discursive rules, there are no rules relating to the use of discursive rules which would lead to justice. This is because justice does not only come from rules, but from an ethical confrontation with the other. As Derrida says, “justice exceeds law and calculation” (Derrida 1992a: 28). For Lyotard, positions are ungrounded, lacking in justification: the different positions must battle it out in “agonistics” against other positions. It is for this reason that the giving of reasons by judges is so important; it enables the dialectic of opinion to continue.

If there is no overarching principle, then on what ethical grounds can a decision be made? Lyotard, following Levinas (as Derrida does), suggests that the individual is the addressee of a prescription, without knowing the source of the obligation. We experience an imperative “Be just!”, a call to do justice to the ‘other’

⁹³ I think Lyotard is rather too positivist about this. John Searle (1964) argues that strict adherence to the separation of the descriptive and the prescriptive is wrongheaded since prescriptive phrases are not arrived at by logical inference but by custom.

⁹⁴ The issue of majoritarianism versus justice arose in *S v Makwanyane and Another* 1995 (6) BCLR, where the court rejected an argument that public opinion was dispositive of the issue. The court, following Acting Justice Kentridge, held at paragraph 200 that it “would be abdicating from its constitutional function [if it were] simply to refer to public opinion”.

which cannot be grounded in a descriptive claim. The obligation is “contentless”: it does not provide criteria or subjective grounds for our choices but simply tells us that we must decide. Judgement must be exercised not through reason, but through opinion guided by an ethical commitment to do justice to the other.⁹⁵

In *The Differend* (1988), Lyotard retains the idea of a multiplicity of language games advocating incommensurate political solutions, such as apartheid or liberal democracy. There is no overlapping consensus for choosing between these language games. Within and between these language games there is little rational dialogue, but rather “agonistics”, a kind of verbal jousting. Differing conceptions of justice, local to each language game, are heterogenous, so that the hegemony of one version over another will lead to the silencing of the party dominated by the controlling narrative. Once one rejects any reasoned appeal to a consensus of truth-seeking interests in the socio-political sphere. (on the basis that such notions belong to an outmoded – ‘enlightenment’ – metanarrative of reason, progress and truth), it is not at all farfetched to suggest that in South Africa, apartheid and the liberal democracy that has followed it constitute two disparate language games, with heterogenous conceptions of justice. The apartheid legal system, a positivist legal framework underpinned by the doctrine of parliamentary sovereignty, required the judiciary to interpret and apply statutes and not to question its authority. This system served as a normative political tool to further a Social Darwinist vision of justice based on racial subjugation. In the post-apartheid Constitutional legality, it is the Constitution (or more accurately the constitutional court), rather than parliament, that is supreme,⁹⁶ with the judicial review of the constitutional court determining the constitutionality of legislation through the liberal discourse of rights.

Lyotard is careful to point out the danger that consists in denying an individual a forum and/or a language in order either to voice a grievance or to defend a claim that a grievance has been committed. For example, the wrong perpetrated against people of colour in South Africa during apartheid does not merely consist in the fact of segregation and systematic (and often violent) oppression, which constitutes violation under the law, but also in the fact that legal discourse denied victims the

⁹⁵ “There is no politics of reason, neither in the sense of a totalizing reason nor in that of a concept. And so we must make do with a politics of opinion.” (Lyotard and Thebaud 1985: 82)

⁹⁶ Constitutional supremacy is established by section 4 of the interim Constitution which provides as follows: “This Constitution shall be the supreme law of the Republic and any law or act inconsistent

words in which to express their claims. Victims were excluded from having a voice that could be heard on terms which the system would understand. Lyotard describes the case of a *différend* as “the case where a plaintiff is divested of the means to argue and becomes for that reason a victim” (Lyotard 1988: 9). This is not a comprehensive definition, however, since a defendant could just as easily be denied a means to argue. Therefore: “a *différend* would be a case of conflict, between at least two parties, that cannot be equitably resolved *for lack of a rule of judgement applicable to both parties*” (Lyotard 1988: 9 emphasis added). A *différend* must be distinguished from a litigation which is a dispute occurring between individuals participating in the same game of justice, so that damages can be proved or disproved in a litigation under law. Where there is a dispute involving two heterogenous concepts of justice, the *différend* is silent because it cannot be recognised (as law reduces the *différend* to a kind of mute silence because it cannot be recognised by those who caused it to exist in the first place). The possibility of such a *différend* arose in the context of South Africa’s political transition, in the question of whether and to what extent the apartheid government and its agents could be held accountable for acts committed in pursuance of a conception of justice radically at odds with that of the successor regime. The prosecution of perpetrators of apartheid atrocities in accordance with the discourse of human rights constitutes the domination of one game by another. For Lyotard the task is to voice the *différend*, to find its elusive formulation and to encapsulate it in words:

In the *différend*, something “asks” to be put into phrases, and suffers from the wrong of not being able to be put into phrases right away... This state includes silence, which is a negative phrase but it also calls upon phrases which are in principle possible. (Lyotard 1988: 13)

The quest is to give voice to the silenced claims of the oppressed and marginalised. However, without criteria and with only the prescription to preserve the purity of each game, how is judgement to be conceived? Lyotard relies on Kant’s notion of the reflective judgement, where a particular representation seems to evade criteria and categories, sending the mind into a free play of faculties, where the imagination and understanding attempt to bring order to the experience. When the Sublime is

with its provision shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.”

experienced there is a feeling that cannot be easily put into words. The feelings triggered in the reflective judgement are subjective, but they can also be held in common by an idealised community of people who can compare judgements with each other. Matters of taste cannot be formulated by a determinate standard, but one can still discuss aesthetics in the absence of objective criteria. Lyotard's aesthetic conception of judgement seems far removed from the law and politics.⁹⁷

There are many differences between Lyotard's and Derrida's formulation of justice and its relationship to positive law. Derrida thinks that the rules of positive law may be used to pursue justice (although the two will never reach equivalence), whilst Lyotard's irreducible pluralism is disparaging of positive law's pretensions as a metadiscourse: "'justice' ... can only be in spite of the law" (Lyotard 1988: 30).⁹⁸ In liberal legality, claims are assessed by a supreme "tribunal" in relation to whether *damnum* is to be permitted to become *injuria*. The determination takes place in a discourse of rights, in which "right" is that which is prior to the good, the universal which precedes and presides over contingent particularities. To translate all claims into the language of rights is already to have performed an act of reduction and to have affirmed the authority of this discourse to contain all other phrases; hence the *différend*, where the discourse of the other is excluded. Whereas for Lyotard, the challenge is to "activate the differences" in order to produce an endless proliferation, rather than a selective refinement, of language games and visions of the just.

1.3 The Rule of Law

Nearly all commentators in the field of transitional studies assume that adherence to the doctrine of the rule of law is required for a successful transition to

⁹⁷ This concept has provoked the indignation of many post-Kantians, particularly those with Hegelian, Marxist or rationalist traditions of thinking justice, who regard the postmodernist and poststructuralist interest in the aesthetic as a metaphor for or supplement to politics as pointing as pointing to its lack of credentials, if not to its latent aestheticisation of politics. Herwitz (1999: 19) describes Lyotard's politicisation of aesthetics as an "adulation of opacity ... which is the object of overcapitalisation". Eagleton (1990: 398) comments on Lyotard's argument as follows: "Thus suspended in vacant space, the prescriptive or political is left to the mercies of intuitionism, decisionism, consequentialism, sophistry and casuistry."

⁹⁸ Lyotard rejects in law the possibility that it can further justice since he sees it as a metadiscourse that acts as a tribunal for judging the claims of other language games. This is necessarily unjust since it imposes the justice of one language game upon others in violation of the 'multiplicity of justice'. Derrida observes, however, that such radical pluralism might lead to injustice: "one cannot, for all that, plead *simply* for plurality, for the mobility of screening places or of the subjects who occupy them. For

democracy (Kritz 1995; Mendez 1997; Teitel 1997; Orentlicher 1991; Halmai and Schepple 1997; McAdams 1997).⁹⁹ The rule of law is depicted as an ideal which reintroduces and maintains order during the political turbulence of transition from prior oppressive and violent rule.¹⁰⁰ The rule of law is often conflated with justice, inasmuch as without it transformation will be compromised by unfettered and obstreperous political and social pressures. Neil Kritz, for example, writes:

The rule of law requires an independent judiciary isolated from political pressures. This generally means that judges are not removable from their posts. Even if judges were easily purged, it might take years to train a qualified class of new lawyers and judges to replace them on the bench. (Kritz 1995: xxv-xxvi)

In what follows, I investigate the doctrine of the rule of law to determine whether it is compatible with the transitional jurisprudence as I defined it in Chapter One and specifically whether it is compatible with the postmodern theories of law and justice that I have discussed in the previous sections of this chapter. It is my concern to reject the idea of the rule of law as “antipolitics”, which although setting the law at a remove from the immoral political values of apartheid, also removes the law from the values required not only to change the law, but also society in general. I want to suggest that the rule of law cannot be set apart from political values, so that all that remains to be decided is which values to incorporate. I agree with Dyzenhaus that “[t]he idea that the rule of law can be conceived as antipolitics is then thrown into question because the choice of conceptions of the rule of law for South African judges during apartheid was so obviously a political one” (Dyzenhaus 1998: 22). I shall argue that the concept of the rule of law as antipolitics only makes sense within the positivist approach.

The notion of the rule of law is at the core of modern political self-understanding and has its genesis in ancient Greece, thereby implicating much of the Western tradition of legal and political philosophy. The antimony between justice and

certain socio-economic forces might once again take advantage of the marginalisations and this absence of general form” (Derrida 1992c: 99, 100, emphasis in original).

⁹⁹ By transitional studies, I mean the study of and theoretical contribution to debates surrounding the question of successor justice as I have defined it in chapter one.

¹⁰⁰ The rule of law is one of the ‘founding values’ in chapter one of the final Constitution. Section 1 reads: “The Republic of South Africa is one, sovereign, democratic state founded on the following values: ... (c) Supremacy of the constitution and the rule of law”. The sections that follow might be viewed as an attempt to provide a just interpretation of “the rule of law” as it appears in this provision.

the rule of law are evident in the contrasting visions of political order in Plato's writings. In Plato's *Republic*, justice is realised in the rule of philosopher-kings, however in Plato's *Laws* a rule-governed society is presented. The rule of law was later to emerge as a mainstay of liberalism.

The idea of the rule of law is that the substance and application of the law should meet certain standards. At its most basic level, it refers to rule by law rather than force; agents of the state must act in accordance with the law. However, the rule of law was also extended to include obedience of subjects, which has often been used to justify absolute obedience to the state and the limitless authority of the state to eliminate disobedience. Traditionally the rule of law has been linked to the ideas of due process, procedural justice and legal formality, all of which refer to the idea that justice should meet certain procedural requirements so that the individual is able to obey the law. For John Locke, an early exponent of the rule of law, the chief advantage of civil society over the state of nature is the assurance of "established, settled, known law", applied by a judge who is both "known and indifferent", who does not produce judgements that are "varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough (Locke 1980: 75).

In liberal democracies in ordinary times, the rule of law entails that the actions of government in general and judges in particular are constrained by authoritative sources of law such as statutes and common law precedents.¹⁰¹ F.A. Hayek writes that

government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its ... powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. (Hayek 1944: 72)

Hayek argues that the focus of the rule of law on procedural rather than the substantive justice keeps state interference to a minimum so as to enable individuals

¹⁰¹ Margaret Jane Radin describes the philosophical underpinning of modern approaches to the rule of law as consisting of the following assumptions:

(1) law consists of rules; (2) rules are prior to particular cases, more general than particular cases, and applied to particular cases; (3) law is instrumental (the rules are applied to achieve ends); (4) there is a radical separation between government and citizens (there are rule givers and appliers, versus rule-takers and compliers) (5) the person [applying the rules] is a rational chooser ordering her affairs instrumentally. (Radin 1989: 792)

to make private economic decisions in accordance with capitalist efficiency. The rule of law requires that legislation do no more than provide a formal framework for private initiatives, and it is most vulnerable when the welfare or socialist state threatens to “engulf the private sphere”. For Hayek, the redistribution of wealth requires discretionary powers on the part of the government which makes for arbitrariness in the law (Hayek 1960: 214-216).

In the eighteenth century, particularly in the work on Montesquieu, the rule-governed nature of legislative authority was enhanced through the separation of the powers of government into the legislative, executive and judicial branches. In the nineteenth century the linkage of the rule of law doctrine with the separation of powers found its most influential expression in A.V. Dicey’s *An Introduction to the Study of the Law of the Constitution*, in which it was argued that the rule of law was dependent on the guaranteed autonomy of the judiciary.¹⁰²

Does the rule of law’s emphasis on the formal and procedural conflate justice with form and procedure and play into the hands of positivists? Or can the rule of law incorporate a substantive idea of justice? Objections to the rule of law have been raised on the basis of the ideological role played by procedural justice. On this view, procedural justice is not only protected at the expense of substantive justice but provides an ideological justification for it. I raised this objection in my earlier critique of positivism. The rule of law, proclaiming the morality of procedures, thereby occludes (or at least sutures) the inclusion of substantive morality (Sypnowich 1999: 183). Certain positivists, Hobbes for example, emphasised the procedure and formality of the rule of law to such a degree that the notion is not regarded as setting out standards for the law to meet, but as the standard imposed by law that, regardless of moral content, individuals must obey. Such authoritarian versions of positivism have been displaced in the more recent formulations of Hart and Raz, who permit the intrusion of morality on an exceptional basis; nonetheless, the positivist idea that law is empty of any necessary moral content remains. Indeed, Justice Scalia of the United States Supreme Court uncompromisingly suggests that “there are times when even a bad rule is better than no rule at all” (Scalia 1989a: 1179).

¹⁰² Dicey, a dogmatic positivist contended that members of parliament are not by nature outrageous people who would abuse their position and noted further that outrageous laws would not be obeyed in any event (Mootz 1993: 275), all of which is completely contradicted by the apartheid experience.

The application of the rule of law doctrine during a period of radical political change raises dilemmas. During this period South African society struggles to transform its political, legal and economic systems, while at the same time legitimating its exercise of state power through adherence to existing rules of law. The recent history of newly liberal and democratic societies like South Africa shows that adherence to the rule of law can facilitate general domination through positivist commitment to a theory of adjudication mandating the mechanical application of determinate rules of law to particular cases. But if the rule of law requires adherence to settled law, to what extent are periods of transition compatible with the rule of law? In such periods what does the rule of law mean? Part of liberalism's answer is to draw a line under apartheid legality at the inception of the Constitution.¹⁰³ However, the rule of law requires observance of previous rules, created and utilised under apartheid for illiberal purposes, many of which constitute South Africa's common law. Here the value of legal change is in tension with the value of adherence to settled precedent.¹⁰⁴ The interim Constitution, unlicensed by the rules of the previous system is contrary to the rule of law, whilst, paradoxically, liberal legality revives the doctrine for its own political ends.

The tension between the rule of law's adherence to rules created in the past and the requirement of a break with the past is exemplified in a debate between E.P. Thompson and Morton J. Horwitz. Despite conceding on one hand that law serves as an instrument of domination and in a more particular Marxist vein, that it reinforces class relations, Thompson argued famously that if the rule of law is to have an ideological function, camouflaging substantive injustice, it must be seen to, and therefore must actually, further values which are in fact valuable and which are capable of being realised in however partial a form. Thompson argued that law

¹⁰³ Although it would be a mistake to regard South African liberalism as viewing the interim Constitution as closing the door on the past. Contrarily, the interim Constitution is intended to provide "an historic bridge" which promises to span the temporal gap between apartheid and the country's increasingly uneasy celebration of its newness. Indeed if the constitution is to act as a barrier to the evils of the past, then it is a "porous or rather chiasmatically invaginated temporal frontier" (Dawes 1997: 10).

¹⁰⁴ The ideal of the rule of law as legal continuity is captured by the principle of *stare decisis*, a predicate of adjudication in the Roman-Dutch legal system which continues to be applied. The duty to follow precedent continues to apply under Constitutional legality and was reiterated in *Shabalala v Attorney-General of Transvaal* 1994 (6) BCLR85 (T) 95 C-E. Liberal judges during apartheid found the rule of law frustrated their efforts to provide justice. In *Nxasana v Minister of Justice and another* 1976 (3) SA 745 (D). Judge Didcott lamented: "Under a constitution like ours, Parliament is sovereign ... Our courts are constitutionally powerless to legislate or veto legislation. They can only interpret it and then implement it in accordance with the interpretation of it" (at 747G).

mediated against class domination through legal forms, common law rights, which could be utilised by the working class against the ruling class. Consequently Thompson concluded that “the notion of the rule of law is itself an unqualified good” (Thompson 1975: 267).¹⁰⁵ In reply, Horwitz argued that the rule of law thwarts social change:

I do not see how a Man of the Left can describe the rule of law as ‘an unqualified human good’! It undoubtedly restrains power but it also restrains power’s benevolent exercise...[I]t ratifies and legitimates an atomistic conception of human relations. (Horwitz 1977: 566)

In order to determine the worth of the rule of law doctrine to South Africa’s transformatory aspirations, it is necessary to examine various formulations of the rule of law with a view to establishing a progressive formulation.

During apartheid the judiciary followed a ‘thin’ version of the rule of law, equivalent with the principle of legality. This positivist formulation demands clear and fixed rules and strives to maintain a sharp demarcation of the judicial and legislative authority. This is not so much an amoral stance as a moral position that defends a legalism of strictly rule-bound adjudication as the most morally defensible account of the judicial function. It celebrates the systemic virtues of regularity, predictability and certainty over concerns with substantive values. It argues that the rule of law should be understood as being about the application of rules and that all that is required is conformity with past decisions. The role of the judges in upholding the rule of law involved ensuring that officials who implement a statute do so in accordance with the legislator’s intention as set out in the public record (Dyzenhaus

¹⁰⁵ There have been examples in South African legal history both prior to and during apartheid of the courts reaching the most just of the possible decisions open to them. In the 1920 Appellate Division case, *Dadoo, Ltd v Krugersdorp Municipal Council* 1920 AD 530, the issue to be decided was whether an Indian could evade a statutory provision in an 1885 law of the Transvaal legislature prohibiting Indians from owning property in the Transvaal. The majority of the court held that Dadoo’s device for evading the prohibition, forming a private company to own land, was legitimate. Chief Justice Innes held: “It is a wholesome rule of our law which requires a strict construction to be placed upon statutory provisions which interfere with elementary rights. And it should be applied not only in interpreting a doubtful phrase, but in ascertaining the intent of the law as a whole” (p552). Moreover, the constitution of the rule of law as legality has resulted in a judicial prevention of the legislature from circumventing formal legal processes – to substantive effect. In *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A), the Appellate Division held that parliament had failed to legislate in accordance with the formal processes prescribed in the South Africa Act of 1909. (At issue was the attempt by the National Government to remove coloured persons from the common voters’ role by enacting a statute by a simple majority at separate sittings when the South Africa Act required a special procedure for such a removal).

1991: 57; 1998: 16.17). Under this conception of the rule of law it is possible, as in apartheid South Africa, for the legal system to comply with the rule of law and still be undemocratic and unjust in general and in particular instances (Hutchinson 1999: 199).

Some formulations of positivism adopt 'thicker' versions of the rule of law, arguing that while rules and their objective and impartial application are crucial, law consists of more than rules. On this account, the existence of pre-announced, objectively knowable and impartially applied rules must be supplemented by a substantive account of justice. For jurists such as Dworkin, behind and within rules is a political morality that guides and constrains judges. The primary task of judges is to detect and cultivate the politico-moral principles which are to animate legal rules. Accordingly, judges are authorised to deal with substantive values, but only provided that they do so in a neutral and objective way, which separates the personal and the political: "law ... is deeply and thoroughly political... but [it is] not a matter of personal or partisan politics" (Dworkin 1984: 146).

Positivists, whether committed to a 'thin' or 'thicker' version of the rule of law, generally adhere to the formalist belief that "rules can rule" in the sense that

legal reasoning is a sufficiently detached and determinate enterprise which is capable of generating correct and predictable answers to social disputes in a way that marks it off in a non-trivial and meaningful sense, from open-ended political wrangling ... [since] without adequate determinacy in legal discourse, judicial arbitrariness will become the order of the day and adjudication will collapse into a series of ad hoc and unprincipled encounters. (Hutchinson 1999: 200)

It is my contention, however, that in justifying the exclusion of substantive morality from the adjudication process, positivists postulate a false antithesis: the mechanical application of determinate rules versus unprincipled anarchy. What is required is a formulation of the rule of law that provides for judges to have recourse to rules of law, while still taking into account substantive moral values; this is a formulation that is both procedural and ethical. It is with the intention of discovering or formulating such a version of the rule of law, that I return to postmodern theories of justice.

1.4 Postmodernism and the Rule of Law

A feature of much postmodern legal thought, particularly its poststructuralist variant, is its flat rejection of the rule of law. Many postmodern scholars view language as indeterminate and social practices as historically contingent. Consequently, it is sometimes concluded, there is no firm foundation upon which a theory of rule-governed behaviour can rest. The rule of law is seen as a casualty of postmodernism to the extent that it requires determinate objective rules that function as guides for insular and secure interpretative subjects (Mootz 1993: 251).¹⁰⁶ In this section I examine whether it is necessarily the case that postmodernism requires the abandonment of the rule of law, or whether the rule of law can be salvaged (that is, reconceived in a way consonant with postmodern thought) by re-examining the operation of rules and rule-following. I again look to Foucault, Lyotard and Derrida for inspiration.

Foucault conceives of the law as a discourse of domination and consequently cannot be said to be in favour of the rule of law:

Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the *rule of law* finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination. (Foucault 1984: 85, emphasis added)

Foucault's antipathy towards legal rules is echoed by certain Marxist and socialist critics and more recently by the Critical Legal Studies movement, which no doubt derives its inspiration in part from Foucault. Allan Hutchinson, a critical legal scholar, argues:

The Rule of Law is a sham; the esoteric and convoluted nature of the legal doctrine is an accommodating screen to obscure its indeterminacy and inescapable element of choice. Traditional lawyering is only a clumsy and repetitive series of bootstrap arguments and legal discourse is only a stylised version of political discourse. (Hutchinson 1989: 40)

¹⁰⁶ Mootz (1993) argues that the rule of law *is* compatible with postmodernism on the grounds that there is no conflict between Gadamerian hermeneutics and the Rule of law. However, Gadamer's

Critical legal scholars conclude that while the ideal of a government of laws, not persons, has appeal, rules cannot and do not rule. They argue instead that the rule of law provides ideological cover for the fact that rules can never impose sufficient constraints on judges and that adjudication will always be an exercise in arbitrariness.¹⁰⁷ In other words, adjudication is more about reason in the service of power than power in the service of reason. On this account, rules do not constrain judicial decisions but merely provide “a variety of rationalisations that a judge may freely choose from” so that “the ultimate basis for a decision is social and political judgement” (Kairys 1984: 244-247).

For Lyotard also, the rule of law fails in its ambitions to provide justice. Law’s pretensions to be metadiscursive and to resolve competing but incommensurable claims fails, since there is always a remainder that could not be represented within the discourse of law: the *differend*. Lyotard observes:

The plaintiff lodges his or her complaint before the tribunal, the accused argues in such a way as to show the inanity of the accusation. Litigation takes place. I would like to call a *differend* [*différend*] the case where the plaintiff is divested of the means to argue and becomes for that reason a victim ... A case of differend between two parties takes place when the “regulation” of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom. (Lyotard 1988: 9)

The case of a *differend* arises in law, where a legal tribunal forces the litigants to a dispute to recount their versions in accordance with the idiolect of the law, which can recognise the claims of one party only. Consequently:

The victim does not have the legal means to bear witness to the wrong done to him or her. *If he or she or his or her defender sees “justice done,” this can only be in spite of the law ...* The justice which the victim calls upon against the justice of the tribunal cannot be uttered in the juridical or forensic

hermeneutics unacceptably contains vestiges of Enlightenment metaphysics; he is an historicised and egalitarian Hegelian.

¹⁰⁷ Duncan Kennedy argues:

It is true that there is a distinctive lawyers’ body of knowledge of the rules in force. It is true that there are distinctive lawyers’ argumentative techniques for spotting gaps, conflicts and ambiguities in the rules, for arguing broad and narrow holdings of cases, and for generating pro and con policy arguments. But these are *only* argumentative techniques. There is never a “correct legal solution” that is other than the correct ethical and political solution to that problem. (Kennedy, quoted in Price 1989: 276)

discourse. But this is the genre in which the law is uttered. (Lyotard 1988: 30, emphasis added)

In short, law's professed status as a metalanguage does violence to the heterogeneity of phrases and so cannot provide justice, which insists on a plurality of language games, with no language game dominating any other: a multiplicity of justices and the justice of multiplicity (Lyotard and Thebaud 1985: 100). It is not that Lyotard has a problem with rules or rule-following; it is more that he insists that different rules apply to different language games and that rules from one language game should not dominate the rules of another language game.¹⁰⁸

To summarise: both Foucault and Lyotard regard the rule of law as a form of domination. With Foucault, law is a discourse of domination, a vehicle for the operation of power alongside the disciplines, with their polymorphous technologies of power and forms of institutionalisation. For Lyotard, the rule of law is the domination by one language game (juridical and forensic) of others, and so always involves the injustice of exclusion. And so we find ourselves between the scylla of positivism's procedural and formal legality, with its denial of value and judicial agency at one extreme, and the charybdis of Foucault and Lyotard's resolute disavowal of the rule of law as a domination or exclusion at the other extreme. Positivists strive to complete the foundationalist project of demonstrating that legal rules and their adjudicative application are based on something less contingent than the circumstances of a particular case and the political views of the judiciary. Lyotard and Foucault, taking the opposite view, throw out legal rules altogether. I have already asked whether there is a less dichotomised position which permits legal rules and rule-following, and allows for judicial discretion, which posits procedure and allows for the intrusion of substantive values, and which acknowledges the violent nature of law, but suggests a means of its amelioration. I suggest that Derrida provides such a formulation.

Like Foucault and Lyotard, Derrida is quick to acknowledge the violence of law. The choice inherent in decision-making is "violent, polemical, inquisitorial", whilst the idea of law contains within it the notion of "enforceability", an act of force which gives law effect (Derrida 1992a: 4, 6). There is a violence at the origin of law:

¹⁰⁸ This is not to suggest that Lyotard believes that justice can be achieved simply by following rules. He specifically warns: "Justice here does not consist merely in the observance of the rules; as in all games, it consists in working at the limits of what rules permit, in order to invent new moves, perhaps new rules and therefore new games" (Lyotard and Thebaud 1985: 100).

The very emergence of justice and law, the founding and justifying moment that institutes law implies a performative force, which is always an interpretative force: ... in the sense of law that would maintain a more internal, more complex relation with what one calls force, power or violence ... Its very moment of foundation or institution ... the operation that amounts to founding, inaugurating, justifying law (*droit*), would consist of a *coup de force*, of a performative and therefore interpretative violence that in itself is neither just nor unjust. (Derrida 1992a: 13)

Law is instituted through a founding act of violence, which is itself neither just nor justified by law. Justice is deferred to each subsequent application of legal rules where “the same problem of justice will have been posed and violently resolved, that is to say buried, dissimulated, repressed” (Derrida 1992a: 23). There is violence in the origin of law, throughout its operation (acts of interpretation and decision and in its effects (Yablon 1992; Cover 1986; Derrida 1992a). In *Force of Law: The “Mystical Foundation of Authority”* Derrida seems to acknowledge (though not by name) Foucault in his observation “that the essence of law is not prohibitive but affirmative” (Derrida 1992a: 7, 8) as well as Lyotard’s *différend*:

It is unjust to judge someone who does not understand the language in which the law is inscribed or the judgement pronounced, etc. We could give multiple dramatic examples of violent situations in which a person or group of persons is judged in an idiom they do not understand very well or at all ... The violence of an injustice has begun when all the members of a community do not share the same idiom throughout. (Derrida 1992a: 18)

Law is violent, excluding and marginalising. However, argues Derrida, there is no possibility of justice without it: “It is impossible to think of justice without including in it the injunction to determine justice by the law, that is, to produce just laws” (Derrida 1999: 284).

Although Derrida is adamant that a decision, if it is a “decision of the just ... must follow a law or prescription, a rule” (Derrida 1992a: 23), there is a seeming inconsistency between the generality of legal rules (designed to regulate a multitude of heterogeneous cases) and the specificity of justice:

How are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other, or myself *as* other, in a unique situation, with rule, norm, value or the imperative of justice

which necessarily have a general form, even if this generality prescribes a singular application in the first place? ... justice always addresses itself to singularity, to the singularity of the other. (Derrida 1992a: 17, 20)

To summarise once more: for Derrida, justice is to be pursued through the law. The law consists of rules (and norms and values). Rules must be followed, but they are too general to provide justice, which is contingent and particular. Legal rules are therefore necessary but insufficient for achieving justice. Judges must follow rules, but they must reinterpret these rules afresh in relation to each new case. Derrida states the *éphoke* of the rule as follows:

I must be free and responsible for my actions, my behaviour, my thought, my decisions ... But this freedom or this decision of the just ... must follow a law or a prescription, a rule. In this sense, in its very autonomy, in its freedom to follow or to give itself laws, it must have the power to be of the calculable or programmable order, for example as an act of fairness. But if the act simply consists in applying a rule, of enacting a program or effecting a calculation, we might say that it is legal, that it conforms to law, and perhaps, by metaphor, that it is just, but we would be wrong to say that the decision was just ... To be just, the decision of a judge, for example, must not only follow a rule of law or a general law but must also assume it, approve it, confirm its value, by a reinstating act of interpretation, as if nothing previously existed of the law, as if the judge himself invented the law in every case ... each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely. (Derrida 1992a: 23)

Can we say that Derrida is a proponent of the rule of law or that the Derridean conception of law and justice is compatible with the rule of law? If we answer in the affirmative, then a different account of what “rules rule” can mean must be advanced. For the undecideability in the interpretation of rules, the fact that rules may have many possible meanings, for instance, would seem to endanger the idea that rules themselves rule (that is, rule apart from interpretations of them in accordance with the traditional formulation). J.M. Balkin observes:

Most of us assume that the rule of law requires that legal materials will essentially be determinate in meaning; that there will be a privileged interpretation of a legal text. If a text had many meanings, and no one “authentic” or privileged meaning, it would be impossible to treat like cases alike according to general and knowable universal principles equally applicable to all citizens. Moreover if a text had many equally valid

interpretations, no interpretation would have an exclusive claim to legitimacy and command the respect of all citizens. (Balkin 1987: 777)¹⁰⁹

For Derrida, while rules do not rule in the sense of existing as canonical directives whose meaning is available without interpretation and which, through their generality can impersonally dispose of particular cases to just result, judges are constrained in the sense that they cannot get completely outside of rules and exercise an entirely free choice. They are simultaneously unconstrained in the sense that they are not obliged to reach any particular decision as the result of a commitment to resolve disputes through rule-application. Judges do not stand outside of rules, but inhabit the rules in a particular way: they are constrained in the sense that their decisions must follow from existing rules. Judges do not have complete adjudication (their interpretation is of an existing rule which they “follow”), but the rule is not by itself completely determinant of a decision in a particular instance. Accordingly, judges “are freely restrained and restrainedly free” (Hutchinson 1999: 211).

Judicial interpretation is not the literal or “common meaning” interpretation advocated by many positivists – the claim that words and rules have a core of meaning which resides in the text itself and which is elucidated by the interpreter.¹¹⁰ For Derrida the interpreter must negotiate the aporia of the undecidable: the judge starts with the rule, but in interpreting the rule, in choosing between significations and different rules the outcome of which will determine the case, the judge must negotiate the unbridgeable gap between legal rules (calculable and finite) and justice, the incalculable and infinite duty of responsibility of the other. Justice is

¹⁰⁹ Balkin argues that the rule of law is not only compatible with, but also dependant upon deconstruction, on the basis that “the Rule of Law presupposes that texts rule, and not the persons who created them” (Balkin 1987: 783). This is so because authorial intent does not constrain possible interpretations of the text in which the rule appears. Therefore it is the rule that rules rather than the person that drafted the rule. From the Derridean observation that “It is the text as read, not the text as written, that becomes law”, Balkin concludes that “the Rule of Law presupposes that texts rule, and not the persons who created them” (Balkin 1987: 778, 779). However Balkin does not deal with the objection that it is the indeterminacy of legal texts which prevent rules from ruling, since it is the agency of the interpreting judge which determines which rules are to be chosen and which meanings are to be accorded to the rules. A possible circumvention of this objection, I suggest, is to redefine what “rules rule” means, to rule away from the liberal conception of the rule of law to which Balkin is bound.

¹¹⁰ I criticise the “ordinary meaning” approach to interpretation in the next chapter. For a recent example of this approach, see Fagan 1999: 95, 97 (“I intend to say just what these words ordinarily mean, given the convention of the English language”). My criticism is along the lines that meaning is contextual and changes according to the context (“iterability alters”). The so-called “conventional meaning” of words in a particular context is the result of a consensus reflecting a dominance of power which has the effect of excluding. Fagan wishes to deny the play of meaning, the fact that meaning is intertextual.

infinite because it is irreducible, irreducible because owed to the other, owed to the other before any contract because it has come, the other's coming as the singularity that is always other ... its demand of gift without exchange, without circulation, without recognition or gratitude, without economic circularity, without calculation and without rules, without reason and without rationality. (Derrida 1992a: 25)¹¹¹

Derrida draws heavily from Levinas in seeing justice as an ethical relation between persons. Simon Critchley states this idea of justice well:

The other person stands in a relation to me that exceeds my cognitive powers, placing me in question and calling me to justify myself Justice arises in the particular and non-subsumptive relation to the other, as a response to suffering that demands an infinite responsibility. (Critchley 1996: 32, 34)

Derrida's substantive conception of the rule of law reflects a movement away from a purely Greek conception of the law as based on the omniscience of scientific rationality, defined by its quest for absolute truth, which overtakes the concrete situation of ethical responsibility in the same gesture. Justice as responsibility for the other unfolds face to face, outside the rational order – that is, outside the Greek social order where men walk side by side and do not meet face to face. In Greece, responsibility is no longer a personal affair. It is institutionalised and defined by conformity to civil law. Responsibility is a question of obeying the city's laws – Plato's *Crito* bears witness to this. On the Greek version of the rule of law, the individual is no longer bound to welcome the widow and the orphan, or the stranger in her midst. The Derridean conception of justice incorporates the responsibility to the other, the higher law within civil law, both Greek and Jewish.¹¹² Justice mandates two

¹¹¹ Alan Hutchinson, in what is otherwise a strongly Derridean account of adjudication, suggests that ethics enters adjudication if judges observe the "requirement to act in good faith" (Hutchinson 1999: 212), a limited and indeterminate ethical injunction to "do the right thing" (Hutchinson 1992) which allows for the infusion of ethics, but does not compel particular outcomes: it too requires to be interpreted.

¹¹² The dependency of the Jewish on the Greek reflects, as Geoffrey Bennington notes, "the unavoidable necessity of speaking alterity in the philosophical language of the Greek *logos*: if Jewish thought is other than Greek thought, it cannot be absolutely external to it, but folded, along the nonenveloping figure of invagination into this nonidentical same which has been one of our most constant themes" (Bennington and Derrida 1991: 303, 404). Rorty comments "one might ask whether the only way ... out of the metaphysics of presence is to become, as Derrida puts it, jewgreek and and greekjew" (Rorty 1998: 342).

duties: the duty to “the Law” which is the subject of Mandela’s admiration (Derrida 1987) and the duty to pursue it through positive law.¹¹³

Unsurprisingly, the judiciary in post-apartheid South Africa have been vocal in its support of the doctrine of the rule of law (Cameron 1997; Goldstone 2000).¹¹⁴ The tenor of these urgings to respect the rule of law is that South Africa is now a liberal democracy with a constitution which provides a “framework” within which justice may be pursued. I think that, provided that it is not suggested that justice is instantiated within the Constitution or that the duty of the judiciary and the citizenry is to uphold the law rather than or at the expense of justice, the rule of law is to be supported in South Africa. Judges ought to decide cases with reference both to legal rules and to the idea of justice. In relation to South Africa’s transition from repressive rule, what is just and appropriate has depended, and will continue to depend, on the contingent demands of the society which follows prior injustice. The rule of law has a valuable role to play in facilitating South Africa’s transition and “rather than grounding legal order, it serves to mediate the normative shift in justice that characterises these extraordinary periods” (Teitel 1997). Indeed, I agree with Hutchinson that “it might be that, in certain circumstances of crisis and upheaval, the judiciary are temporarily best placed to effect large-scale changes in a potent and telling manner” (Hutchinson 1999: 216). A Derridean formulation of the rule of law

¹¹³ Does Derrida’s distinction between justice as a higher law and positive (human) law make the Derridean conception a version of natural law? Certain commentators have argued that that Derrida’s idea of justice is Platonic in the sense of being a transcendent standard against which positive law may be compared (Balkin 1994). Accordingly justice makes itself present as a transcendent (yet occasionally immanent) standard by which one can judge. Merold Westphal (1994) argues that Derrida is a natural law theorist who envisions this Platonic concept of justice as a Kantian regulative idea, shorn of the metaphysical and epistemic warrants in which the Platonic and Kantian concepts have been mired. Westphal believes that Derrida successfully divests his concept of justice of unwanted metaphysical claims. Justice so conceived is quasi-transcendental in that it does not exist wholly apart from various contexts, yet it remains categorically binding, infiltrating itself into the act of into the act of judging:

Still, the idea of justice in itself functions as a quasi-regulative idea for Derrida. It is not something that exists outside of every human context, and it is not an ideal essence to which we can give a fixed and final meaning. It is a bit like what Kierkegaard had in mind when he spoke of “thoughts which wound from behind”. Though we cannot get them out in front of us where they are fully present to us and we can master them, they nevertheless insinuate themselves into our thinking, disturbing its complacency in ways that we can neither predict nor control. They ambush our absolutes. On Derrida’s view it is precisely as deconstruction that the idea of justice in itself wounds our legal systems, both as theory and practice, from behind. (Westphal 1994: 252)

¹¹⁴ Furthermore, in the final years of apartheid certain members of the judiciary advocated compliance with the rule of law on the basis of law’s transformative potential – sometimes, ironically, by sealing off the judiciary from the pressures of politics (see, for instance, Chaskalson 1989).

provides for form and procedure (to ensure “fairness”) whilst at the same time insisting on the intervention of ethics from outside positive law, thereby allowing for transformation of the law.¹¹⁵

1.5 The Myth of Liberalism’s Rule of Law

What is the relationship between a Derridean formulation of the rule of law and the version included in currently dominant liberal theory in South Africa? The liberal (modern) formulation of the rule of law is a myth, or rather it is a myth within a myth (Mootz 1993; Schlag 1997). The rule of law is one of the mythic devices of liberal self-presentation and argument which is in fact discordant with liberalism’s self-advertisements as a freely chosen enterprise. The popular narrative of the liberal democracy with a written Constitution, such as South Africa’s, recounts a story of a sovereign people who, in a foundational moment, establish their own state by setting out in a written Constitution the powers and limitations of their government. In turn, the authority of the Constitution stems from the consent of the people. This narrative, expressed in the constitutional mythology of liberal justification, revolves around central ontological identities: “The Constitution”; “The Founding”; “The People” and “The Consent of the People” (Schlag 1997). The consent of the people is the mythic fact of consent to the constitution and so to a limited government that provides legitimacy to the liberal state and its actions. In South Africa the constitution is the paramount norm, hierarchically superior to any other authority, and invoked in many ways – as icon, symbol, argument and most importantly rule – to perform many actions that inspire, control and justify. The rule of law in the narrative functions as a chain of consent, so that each successive rule mechanically devolves out of and is justified by the constitutional *grundnorm*.

While the abstract, disembodied subjects of liberalism (Rawls’ people in the original position) may consent of their own free will to liberal governance, actual citizens must be induced to consent, or rather coerced to conform to the mythic

¹¹⁵ Derrida writes in relation to the opposition to the unjust positive law of apartheid: “To oppose the law, to then try and transform it: once the decision is made, the recourse to violence should not take place without measure and without rule” (Derrida 1987: 39). It is not the case that an unjust system of law must be abandoned completely, as Wacks (1984) suggests, but rather that it must be reformed. Derrida’s idea of justice offers the ethical stimulus for transformation which is, of course, denied to positivists

representations of liberal justification.¹¹⁶ The consumer of liberal justification must come to view the mythic subject as a fitting representation of herself and thus come to view the Constitution and the legislation and judicial precedent emanating from it, as something to which she chooses to submit. How is such consent obtained? Schlag observes that liberal rhetoric “will by turns frighten, shame, seduce and even romance the consumer into taking on the identity and the perspective of the liberal subject” (Schlag 1997: 26). A recent example of liberal justification in South Africa, employing all of these rhetorical devices in support the rule of law, is provided by High Court Judge Edwin Cameron (Cameron 1997). Cameron refers with approval to Alan Paton’s poetic definition of liberalism as

a generosity of spirit, a tolerance of others, an attempt to comprehend otherness, *a commitment to the rule of law*, a high ideal for the worth and dignity of man, a repugnance of authoritarianism and a love of freedom. (Paton, cited in Cameron 1997: 504, emphasis added)

Paton, however, despite being a liberal, is also a positivist, whose equation of law and justice echoes the most conservative “justice as procedural legality” stances of the apartheid judiciary. The following quotation from *Cry, the Beloved Country* serves as an example:

The judge does not make the Law. It is the People that make the Law. Therefore if a Law is unjust, and *if the Judge judges according to the Law, that is justice, even if it is not just*. It is the duty of a judge to do justice, but it is only the People that can be just. Therefore if justice be not just, that is not to be laid at the door of the judge, but at the door of the People which means at the door of the White People, for it is the White People that make the Law. (Paton 1948: 136, 137, emphasis added)

The passage is as succinct a summary of positivism’s internal contradiction as one could find anywhere: the law is just even it is not. Consequently the judiciary does not have to attempt to be just in order to be just, *ergo* the authority and legitimacy of the unjust laws of apartheid are established.¹¹⁷ For Paton and for traditional liberal theory

¹¹⁶ The interim Constitution was negotiated and agreed between the African National Congress and the National Party, neither of which were democratically elected. This notwithstanding, the preamble of the interim Constitution nevertheless contains the phrase “We the People”.

¹¹⁷ I discuss Paton’s brand of liberalism and liberal legality in greater detail in chapter five.

the rule of law implies a duty to positive law, which is vested with sanctity independently of whether or not it acts to promote substantive justice.

Cameron justifies the liberal concept of the rule of law on the basis that without law there would be no way to curb the “tide of criminal depredation” and “violent crime” (Cameron 1997: 505). He attempts to frighten readers into accepting liberal legality.¹¹⁸ The rhetoric obscures the weak and unargued move that there is equivalence between legality and the rule of law, in other words, that allegiance to the rule of law means allegiance to positive law. The version of the rule of law Cameron advocates is exactly Paton’s ‘justice as procedural legality’, in contrast to the Derridean formulation outlined above which incorporates procedural legality and recourse to justice that is external to the law. Cameron is convincing not because his argument is convincing, but because his rhetoric strikes fear into the reader’s heart (in the form of the ever-present threat of crime) on the one hand, while offering “freedom” on the other.

It is not difficult to appreciate why liberal rhetoric should be so convincing to South Africans after a lengthy and violent struggle that stopped just short of civil war. Apart from fear and shame, liberal justification also employs a political romance which enacts a narrative of reconciliation. Liberal justification promises to resolve a series of binary oppositions which have permeated philosophy, politics and life itself. It promises to reconcile the individual with the community, the concrete with the universal, reason with authority, ethic with interest and ‘is’ with ‘ought’ (Schlag 1997: 29). Furthermore, liberal justification promises reconciliation not just conceptually, but politically in institutions, socially in culture, and emotionally in our personal lives. It promises to reunite liberal citizens with each other. Liberal justification promises to reconcile these oppositions through the rhetorical trope of self-rule or self-government: “In the liberal justification, the paramount norm is ruling. It rules us. But, it has been chosen by us. In a fundamental sense the paramount norm is us. We are in short ruled by ourselves” (Schlag 1997: 29). Liberalism’s romanticised promises of reconciliation are captured in the postamble of the interim Constitution:

¹¹⁸ Cameron must nevertheless keep silent about law’s own violence. By railing against criminal, that is, non- or il-legal, violence, law pretends “to exclude any individual violence threatening its order and thus to monopolise violence, in the sense of *Gewalt*, which is also to say authority. Law has an “interest in a monopoly of violence” ... This monopoly doesn’t strive to protect any just and legal ends (*Rechtswecke*) but law itself” Derrida 1992a: 33).

This Constitution provides a historic bridge between a past of a deeply divided society characterised by strife, untold suffering and injustice, and a future founded on the recognition of human rights ... [t]he 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... 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.

Since the interim Constitution is shown in its preamble to be a declaration of "We the People", it is rhetorically suggested that the citizens of South Africa have consented to its contents, including its reconciliatory sentiments and the granting of amnesty. The effect is to convince citizens about something that has already taken place, namely the fiction of their consent. The choice for the liberal state must appear the reasoned choice of a coherent, self-directing, autonomous individual subject. It is therefore ironic that the addressee of liberal justification must be frightened, seduced and romanced into complicity. The consumer of liberal justification is already ensconced in the circles of liberal justification, a construction of the liberal text: she is herself already a mythified construction. The effect of the liberal version of the rule of law is to extend the myth of consent forever into the future.

Derrida does not so much reject liberal democracy as simply refuse to instantiate justice in any currently existing liberal democracies such as South Africa's (although he does not dismiss it either). There is a gap between any currently existing liberal democracy and its mythological constructions (successive constitutions and rules of positive law, necessary and violent stabilisations in the play of meaning that is the flux of history¹¹⁹) and a democracy guided by the futural or projective transcendence of justice – *la démocratie à venir* (Derrida 1996: 83) – an ethical concept of justice always still to come, partially present in the public realm but never

¹¹⁹ Douzinas et al observe:

Not that Derrida denies that we do need truths – we always need our fictions. He never promises us the end of the age of truth and metaphysics ... Derrida's position is one of vigilance. He keeps examining the fields of emergence of our truths and reminding us that they should never be allowed to pass as natural, eternal or normal. Deconstruction suspects that 'deep truths are purchased by deep violence, by excluding what contaminates the system of truth, by disturbing what disturbs its unity, by swatting away those who trouble the guardians of truth with bothersome questions'. (Douzinas et al 1991: 51)

fully so. Allegiance to the rule of law is the commitment to positive law's quest to instantiate justice more fully, to narrow the gap in South Africa between law and justice, between existing social conditions and myth. Deconstruction issues the injunction for rules, procedures and institutions to become more representative and democratic (Derrida 1992c) so that romantic and fear-inducing rhetoric will become less necessary.

Chapter 3: Just Is? Constitutional Interpretation

“[Supreme Court Justices] have not been reading their Derrida” (Schauer 1990: 231).

Interpretation is translation. Words in the Constitution, generally abstract and indeterminate, are explained with reference to other words, which effect a move from the abstract to the concrete and from the universal to the particular. Interpretation is a declaration of significance, but also contains connotations of conveyance and transformation and of motion, meaning being added or subtracted and the *status quo ante* being transformed.¹²⁰ J. Hillis Miller observes that etymologically (from *transfere. translatio*) translation means to be “transported across the borders between one language and another” (Miller 1996: 206). Sanford Budick similarly asserts that translation “necessarily marks the border crossing where, if anywhere, one culture passes over to the other, whether to inform it, to further its development, to capture or enslave it, or merely to open a space between the other and itself” (Budick 1996: 11). Although constitutional interpretation does not involve the transfer of words and meanings between different languages (it is intra- rather than inter-lingual translation¹²¹), it does involve a translation between idioms and contexts as it substitutes new words to give effect to existing words in new contexts, disturbing and reconstructing the rhetoric of the original in a manner which both undermines and recreates its logical systematicity. If social conditions (including identity) are constructed through language, then interpretation’s additions or subtractions of meaning have the potential performatively to transform social conditions, to cross borders temporally and materially and to effect agency (Spivak 1993: 179).

This chapter will investigate the manner in which the current interpretation of the Constitution, the linking of signifiers to signifieds by the judiciary, however temporary, might be transformed to effect, to a greater degree, justice. This will involve steering a course between two poles of interpretation theory. At one extreme, adherents to ‘literal interpretation’ are of the view that the words of the Constitution

¹²⁰ As Barbara Johnson points out, translation “has always been the translation of *meaning*” (Johnson 1985: 24, emphasis in original). The idea that interpretation can be faithful to the original, that is, mean the same thing, ignores the heterogeneity that contaminates “pure meaning” from the start, occluding the prospect of faithful interpretation (*fidus interpres*).

¹²¹ In his famous essay on translation, “On Linguistic Aspects of Translation”, Roman Jakobson classifies translation into three types: intralingual, intersemiotic and interlingual. Constitutional

have a single, consistent and univocal meaning which, in the absence of manifest ambiguity and contradiction, the interpreter can read off straightforwardly and unproblematically.¹²² The opposite view, which may be termed the 'radical indeterminacy' thesis, holds that the words of the Constitution have no particular meaning and therefore may be given any meaning at all: interpretation is an expression of the Nietzschean will to power. The interpretative approach of the judiciary during apartheid was a variant on 'literal interpretation', an epistemologically conservative approach reflecting, because on its own terms constrained by, apartheid politics. The 'radical indeterminacy' approach, by contrast, might at first seem the antidote to the strictures of literal interpretation in that it offers a judiciary attempting to span the divide between the constitutional document and social justice, the freedom to do so. It allows critics the opportunity to unmask legal doctrine for the social construct that it is, and it assumes that in the absence of a formalist view of language as an a-contextual reference to social reality, law can only function as an expression of political power.

I believe the indeterminacy critique to be only partly correct. It is true that the neutrality and objectivity which decision-making under the modern conception claims to provide is illusory. What the radical indeterminacy critique misses, however, "is the stubborn fact that our way of being-in-the-world is – contingently – to construct certainty all over the place" (Winter 1990: 1449). Not only do lawyers rely on rules, but the rules are determinate of outcomes, often violently so. Given this, I want to argue that although rules are in some sense determinate, their meaning is not final or settled, and that they may therefore be differently interpreted to direct or resist their imposition of force. I therefore reject both the belief that meaning has foundations in objective correspondence with reality and the opposite view that meaning can be nothing more than the result of arbitrary and unconstrained subjectivity. Legal meaning is possible because of a temporary stability of context, which is the result of situatedness within history, tradition and community. The temporary stabilisation is in fact a violent halting of the play of meaning in the flux of history, a violence which is naturalised as neutral and apolitical. Within this temporary stabilisation, the epistemic

interpretation is an example of intralingual translation, which Jakobson defines as "an interpretation of verbal signs by means of other signs of the same language" (Jakobson 2000: 114).

¹²² Like Hart and Raz, Frederick Schauer argues that there can be 'literal' meaning and a-contextual reference, so that law may be conceived in formalist terms (Schauer 1988: 509). These jurists ignore

and the political are mutually entailed in a manner which disguises the law's own constructedness and so is imperceptible to the participant – hence the 'literal' or 'common meaning' approach.¹²³

I shall argue, as I did in the previous chapter, that an interpretation is always "of" a text, where "of" suggests some kind of non-trivial link (provided through history, tradition, context and otherwise) between the text and its interpretation. In other words, the words of the Constitution will always bear more than one interpretation, but not an infinite number. Judges are free to interpret the words of the Constitution in a number of ways, but they are also constrained by the words themselves. In order to argue this, I shall begin with the literal language approach favoured during apartheid and progress through what I consider to be increasingly progressive theories of interpretation, arriving finally at a version of the indeterminacy thesis which allows for political transformation, without succumbing to the nihilism with which the radical indeterminacy critique has been charged. I do not want to argue for the radical indeterminacy approach, since, as I have indicated, the judiciary is always and rightly in some sense constrained. The chapter will conclude with some practical suggestions about the manner in which the approach to interpretation I suggest might be given effect.

3.1 Constitutional Interpretation in South Africa

South Africa's negotiated settlement included a written constitution and the promulgation of a justiciable Bill of Rights, a bridge¹²⁴ across which, it is hoped, the

the fact that culturally relative values and culturally relative assumptions – the values that undergird imperialism for instance – have combined to produce 'literal' meaning.

¹²³ The seeming neutrality of the 'common meaning' approach provides its adherents with a defense against the charge of ideological bias, something that everyone has, but few are prepared to admit to. As Eagleton points out "nobody would claim that their own thinking was ideological just as nobody would habitually refer to themselves as Fatso ... Ideology like halitosis is in this sense what the other person has" (Eagleton 1991: 3). Eduard Fagan, in the course of defending the 'ordinary meaning' approach, avers:

I had thought that my note was concerned merely with the importance of respecting the ordinary meaning of language, even if (particularly if?) that language is contained in the Constitution. I was therefore a little surprised to discover that I was in the process propounding an ideology which would be welcomed by 'conservative practitioners' and used by 'those with more mysterious motives' (at 511). (Fagan 1997: 173)

I would respond to Fagan that the 'common meaning' approach to interpretation is ideological whether or not he intends it to be so: ideology is inadvertent as much as it is considered.

transition from authoritarianism to democracy will be facilitated.¹²⁵ As the then Deputy President, Justice Mahomed wrote in *Makwanyane*, referring to the interim text:

The South African Constitution ... represents a decisive break from and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution.¹²⁶

Edouard Fagan describes the impact of the introduction of the Constitution in similarly enthusiastic terms:

The Constitution represents and embodies within it the fundamental transformation of South African society. It replaces the policy of apartheid and introduces for the first time in the history of the country, a democratic order based on a universal franchise. (Fagan 1998: 261)

The possibility of justice within South Africa's legal system lies mainly, for better or for worse, with judges.¹²⁷ One consequence of the choice of constitutional supremacy over parliamentary sovereignty¹²⁸ has been an increase in the power of the judges. Constitutions are not self-enforcing and depend on the judiciary to give them content. The increased participation of the judiciary in the creation of political norms makes for a judicialisation of politics, whilst the new role of the judiciary makes serious inroads into theories which argue for law's autonomy from politics: there is a politicisation of the judiciary (Corder 1994; Du Plessis and Corder 1994: 71; Sarkin 1997), perhaps even, if taken to extremes, a "juristocracy" (Davis 1995: 104). What distinguishes the transitional constitutional paradigm is its constructive relation to the political order in flux. To the extent that the interim and final Constitutions reflect a

¹²⁴ The metaphor of a bridge appears in the postamble of the interim constitution and is extended by Mureinik in his discussion of that document (Mureinik 1994).

¹²⁵ Dennis Davis observes that the 1993 Constitution "heralded a legal revolution" (Davis 1996: 509).

¹²⁶ *S v Makwanyane* 1995 (6) BCLR 665 (CC) at para 262. Similarly Justice Kriegler has observed that "the Constitution ushered in the most fundamental change in the history of our country. It made everything new" (*S v Mhlungu* 1995 (3) SA 867 at 832).

¹²⁷ Karl Klare notes that "[a]djudication uniquely reveals the ways in which law-making and, by extension, legal practices generally, are and/or could be a medium for accomplishing justice" (Klare 1998: 147).

¹²⁸ Etienne Mureinik writes "Parliamentary sovereignty teaches that what parliament says is law, without the need to offer justification to the courts. In South Africa, since parliament was elected was

critical response to the legacy of apartheid, transitional constitutionalism provides an opportunity for justice.¹²⁹ Substantive justice depends on the judiciary as much, if not more, than the legislature, and there is an urgent requirement for the judiciary to produce an endogenous jurisprudence commensurate with the demands of the 'New South Africa'.¹³⁰ Since the power of the Constitutional Court¹³¹ vests, in accordance with constitutional theory, in the manner in which judges read, determine, interpret or otherwise understand the Constitution, it is vital to comprehend this process. A number of questions present themselves: What does it mean to read the Constitution? What is it that judges do when they interpret the Constitution? Why is there so much controversy over how it should be interpreted? What is the relationship between the intention of the drafters of the Constitution, the Constitution as text, and the meanings ascribed to it? Constitutional interpretation is the subject of great controversy, not only within the academy and legal profession, but also publicly as it appears on the front pages of the evening news, where the ethical issues relating to the new political order – capital punishment¹³², amnesty for apartheid criminals¹³³, universal legal representation¹³⁴, corporal punishment¹³⁵, pornography¹³⁶, sexual preference¹³⁷ – are retried. To some extent, disagreement with the Constitutional Court's decisions is "simply a case of whose ox has most recently been gored" (Tribe in Adams 1988: 176), but this is only to point to the significance of constitutional interpretation: unlike literary interpretation, constitutional interpretation has immediate material consequences for litigants; it is literally a matter of life and death (Cover 1986; Derrida 1992a; Yablon 1992). Even the most 'civilised' orders do violence in their day to day operations: meaning is frequently written "in the medium of blood" (Cover 1983: 47).

elected only by a minority, the doctrine taught also that what Parliament said was law, without a need to justify even by those governed by the law" (Mureinik 1994: 32).

¹²⁹ Sarkin remarks that the newly conferred power of judicial review enables the courts to limit the power of the State, including the manner and degree to which the organs of government intrude on the lives of the citizens (Sarkin 1998: 642).

¹³⁰ Alfred Cockrell notes that "the Constitutional Court has been faced with the task of creating a theory of constitutional review from nothing" (Cockrell 1996: 1). Similarly Currie notes that the Constitutional Court "presides over a record of constitutional jurisprudence that it has created itself" (Currie 1999: 144).

¹³¹ The Constitutional Court was inaugurated in February 1995.

¹³² *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC).

¹³³ *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* 1996 (8) BCLR 1015 (CC).

¹³⁴ *S v Vermaas; S v Du Plessis* 1995 (7) BCLR 851 (CC).

¹³⁵ *S v Williams and Another* 1995 (7) BCLR 861 (CC).

¹³⁶ *Case v Minister of Safety and Security* (1996 (3) SA 617 (CC).

A central question for legal agents in the transitional period is how most effectively to orchestrate a program of transformative constitutionalism,

a long term project of constitutional enactment, interpretation and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political institutions and power relationships in a democratic, participatory and egalitarian direction. (Klare 1998: 150)

One commentator has remarked that the introduction of the Constitution has enabled a transition from a formal vision of law to a substantive vision of law in South Africa, a paradigm shift which introduces a new legal context in which considerations of justice may consciously and justifiably be included in legal texts (Cockrell 1996: 3,9,10). This may be so, but only provided it is acknowledged that the Constitution is nothing apart from interpretations of it, so that for transformative constitutionalism to become a reality, the activity of interpretation must be carried out in accordance with the demands of transformation and, above all, justice.

Constitutional Court judges are confronted by the competing demands of interpretative freedom and interpretative restraint. On the one hand there is a promising constitutional text, redolent with expansive phrases and magnificent hopes of overcoming past injustice and moving towards a democratic future. On the other, it is argued that the meaning of the Constitution is not infinitely malleable and open-ended, and that there must be some constraints on the interpretation of the text. It is argued that judges must be unfettered in their pursuit of justice, but equally that they must act "in accordance with" the Constitution. This tension is reflected in the following statement by Acting Judge Kentridge in *State v Zuma*:

While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's personal intellectual and moral preconceptions. But it cannot be too strongly stressed that *the Constitution does not mean whatever we might wish it to mean.*¹³⁸

The starting point of the debate on constitutional interpretation, perhaps the only one on which all disputants agree, is that for all interpreters, the words on the

¹³⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

pages of the Constitution are the same. Thereafter, however, controversy rages. In addition to the aims I have already mentioned, this chapter shall seek to identify the institutional restraints that operate within legal interpretative practice in South Africa; to examine the way in which the tradition of interpretative activities influences current practice; and to investigate the assumptions and values of those who confer authority. The importance of understanding the historically and culturally contingent contexts in which interpretation is possible cannot be overstated, especially in the current liberal era, in which the idea of the free and autonomous interpreting individual and the “common-sense” or “plain meaning” view of language are dominant elements of liberal ideology worldwide (Balkin 1990).¹³⁹ Against this conception of interpretation, I am particularly interested in claims made about the indeterminacy of language and the impact of this indeterminacy on constitutional discourse.¹⁴⁰

Although I alluded to the effect of the indeterminacy of language on the rule of law in the previous chapter, it is as well to provide a summary here. In a liberal democratic society dedicated to the virtues of the rule of law, a central jurisprudential concern is that of unelected judges imposing their political understanding on society. This is known as the counter-majoritarian dilemma.¹⁴¹ The legitimacy of the judicial

¹³⁸ *State v Zuma* 1995 (4) BCLR 401 (CC) at para 17 (emphasis added).

¹³⁹ J.M. Balkin, referring to current trends in American constitutionalism, writes that

the federal judiciary and in particular the Supreme Court of the United States – appear to be more conservative than they have been for many years, and indeed are likely to remain so for the foreseeable future ... Its intellectual leader, Justice Scalia, has even called for a constitutional jurisprudence of tradition, coupled with a return to an interpretative theory of plain meanings for statutes and original intention with respect to the Constitution. (Balkin 1990: 1866)

The conservatism of the US judiciary and the theoretical bifurcation between the judiciary (most epistemologically conservative) and the legal academy (mostly epistemologically radical) is also documented by Steven Winter (1990: 1443 – 1447). The charge of judicial conservatism is equally sustainable in Great Britain (Douzinas and Warrington 1994a). Indeed, the denial of context in the creation of meaning by advocates of the “common meaning” approach in South Africa (such advocates have often studied in Britain) reflects how Britain, without its empire can still maintain cultural authority in postcolonial societies and the ways in which Eurocentric assumptions about race and rationality return time and again to haunt the production of legal writing in postcolonial settings like South Africa. South African articulations of current Anglo-American interpretative conservatism abound. Ziyad Motala, for example, warns that “judges should not, when faced with a text that is clear on its face, project their own preferences or values, nor create fringe meanings, but must instead uphold what the constitution requires” (Motala 1997: 153).

¹⁴⁰ Singer explicates the requirements of determinacy and the features of indeterminacy in the following words: “A legal theory or set of legal rules is completely determinate if it is comprehensive, consistent, directive and self-revising. Any doctrine or set of rules that fails to satisfy any one of these requirements is indeterminate because it does not fully constrain our choices” (Singer 1984: 14).

¹⁴¹ Dennis Davis writes that “[w]ithin this conception, a judicial system which is empowered to test the validity of legislation approved by the majority in terms of substantive constitutional values is viewed as profoundly anti-democratic. It represents the politics of an unelected and unaccountable judicial elite

process turns on the power of the law to constrain, direct and limit judges in the exercise of their power according to the law. This in turn depends on the capacity of language (featured in the Constitution, common law precedents and statutes) to constrain, direct and limit judicial decision-making. However, according to the radical indeterminacy thesis, language is indeterminate, unstable and incapable of expressing rules and principles that constrain judges.¹⁴² The capacity for indeterminacy is exacerbated by the generality and level of abstraction of the language of the Constitution. As Jeremy Sarkin observes,

[w]ords used in a Bill of Rights are often vague, and the interpretation of expressions such as 'life', 'liberty', 'equality', 'security of person' and 'equal protection' by individual judges is greatly affected by the judge's economic, political and social values. (Sarkin 1996b: 72)¹⁴³

Consequently, conclude proponents of the radical indeterminacy thesis, the doctrine of the rule of law fails.¹⁴⁴ Rules themselves do not guide, determine or direct what results flow from them; the judge does. In short we do not have rule by law but rule by the politics of judges: the cat is out of the bag (Levinson 1982). As I argued in the previous chapter, I believe the radical indeterminacy theory is wrong about judges not in some sense being constrained by rules, and wrong about indeterminacy eviscerating the rule of law, resulting in nihilism and anarchy. However, indeterminacy, in the qualified form that I propose (perhaps I should refer to it as undecidability¹⁴⁵), presents opportunities for change and transformation.

immune from the wishes of the majority" (Davis 1994: 103). I return to the counter-majoritarian dilemma and point to its possible resolution in Chapter Five.

¹⁴² Legal texts, particularly constitutions, are frequently shot through with apparent and actual gaps, unanswered questions, conflicting provisions, ambiguities and obscurities.

¹⁴³ Sarkin quotes as authority Michael Mandel: "You do not have to read the thousands of pages of contradictory judicial opinions on their meaning to realise that the words of the Charter neither restrain nor guide the judges" (Sarkin 1996b: 73).

¹⁴⁴ Singer writes: "Determinacy is necessary to the ideology of the rule of law, for both theorists and judges. It is the only way judges can appear to apply the law rather than make it. Determinative rules and arguments are desirable because they restrain arbitrary judicial power" (Singer 1984: 12).

¹⁴⁵ Deconstruction found its first adherents in the legal academy among members of the critical legal studies movement, who were already committed to the radical indeterminacy critique and who mistook Derrida's notion of "the play of relative indetermination" (Derrida 1988a: 144) for radical indeterminacy, an interpretation of deconstruction Derrida explicitly refused:

I do not believe I have ever spoken of "indeterminacy", whether in regard to "meaning" or anything else. Undecidability is something else again ... [U]ndecidability is always a *determinate* oscillation between possibilities (for example of meaning, but also of acts). These possibilities are themselves highly *determined* in strictly *defined* situations (for example, discursive – syntactical or rhetorical – but also political, ethical etc.). They are pragmatically

South African judges have not, until very recently, showed much awareness of indeterminacy or its effect on the interpretative process and even when they have, its effect has been largely misunderstood or underestimated. The most common response to indeterminacy in South Africa has been denial. The theory of statutory interpretation developed by Justice L.C. Steyn (1981) and the South African judiciary, adhered to by South African jurists until recently, is literalist-cum-intentionalist in nature. According to Steyn, interpretation of statutes is an exercise in determining the intention of the legislature (the drafters) as manifested in the words of the text: if the language is clear and unambiguous, the intention of the legislature is also readily ascertainable. Departure from the literal or “plain” meaning is only possible if language is ambiguous or obscure, in which case interpretative aids over and above the linguistic constituents of the text, (for example the intention of the legislature at the time of enactment), may be invoked. This methodology became known as the “golden rule” of statutory interpretation.¹⁴⁶ In *S v Marwane*, Miller JA had the following to say about the interpretation of Bophutatswana’s¹⁴⁷ Bill of Rights:

Whether our Courts were to regard an Act creative of a Constitution as it would any other statute or as an Act *sui generis*, when construing a particular provision therein, they would give effect to the ordinarily accepted meaning and effect of the words used and would not deviate therefrom unless to give effect to the ordinary meaning would give rise to glaring absurdity; or unless there were indications in the Act (considered as a whole in its own peculiar setting and with due regard for its aims and objects) that the legislation did not intend the words to be understood in their ordinary sense.¹⁴⁸

Moreover, according to Galgut J in *Government of the Republic of Bophutatswana v Segale*:

determined. The analyses that I have devoted to undecidability concern just these determinations and these definitions, not at all some vague ‘indeterminacy’” (Derrida 1988a: 148).

Derrida’s description emphasises the pragmatic limitations of interpretation produced by institutional restraints such as grammar, politics and ethics.

¹⁴⁶ The golden rule requires that the literal meaning of words of a statute must be adhered to unless this would lead to an absurdity of the same sort or is at variance with the intention of the legislature (Du Plessis 1986: 109).

¹⁴⁷ Bophutatswana was formerly an “independent homeland” created as such by apartheid architects to provide for supposed self-determination by blacks within designated areas (approximately 13% of South Africa’s total geographical area was allocated to approximately 80% of the population for this purpose). As part of race-based segregation, the idea of homelands died with apartheid and these areas have now been reincorporated into South Africa.

¹⁴⁸ *S v Marwane* 1982 (3) SA 717 (A) at 749 D-E.

The task of the Courts is to ascertain from the words of the statute in the context thereof what the intention of the Legislature is. If the wording of the statute is clear and unambiguous they state what that intention is. It is not for the courts to invent fancied ambiguities and usurp the functions of the legislature.¹⁴⁹

Dyzenhaus (1991) characterises the interpretative approach of judges during apartheid as the “plain fact” approach. According to this approach, the judicial duty when interpreting a statute is to look to those parts of the public record that make it clear what the legislators as a matter of fact intended. In accordance with positivist theory, this allowed judges to determine the law as it is, without permitting considerations of substantive justice to intervene.¹⁵⁰

In the 1970s and 80s, John Dugard (1971, 1981) argued that the judgements of South African courts in politically controversial cases contained unarticulated political premises which tended to confirm rather than subvert the apartheid order. Dugard criticised the judiciary for their unduly narrow approach to their interpretative function – a “mechanical” or “phonographic” approach that denied the creative role in judicial law-making (Dugard 1971: 182). Many judges of this period professed to being constrained from adjudicating justly by what they regarded as clear and unambiguous language to the contrary in statutory provisions. Indeed it seems as if the literalist-cum-intentionalist approach to interpretation, which as far as possible rejects choice in favour of the formalist application of the rule itself (the rule as meaning prior to interpretation), could lead to a diremption of the judicial function

¹⁴⁹ 1990 (1) SA 434 (BA) at 448G.

¹⁵⁰ Dyzenhaus suggests as an example of the “plain fact” approach, *Minister of the Interior v Lockhart* 1961 (2) SA 587 (A), in which the Appellate Division declared valid a proclamation dividing the city of Durban into group areas. Whites were allocated the best areas while only poorer areas were available to Indians. Although the court *a quo* upheld the challenge on the grounds that there was no explicit authorisation for the treatment of different races on an unequal footing, the Appellate Division per Judge Holmes found that such authorisation was “clearly implied”. According to Dyzenhaus, the court drew this necessary implication from what it considered the intention of the legislation to be:

the judge supposed himself to be legally required to decide a controversial case of statutory interpretation in accordance with the intentions which in fact explained the statute, whatever his personal and moral views about the statute. This understanding of the judicial duty is ultimately based in a political theory about the relationship between judiciary and legislature. That theory says that judges act appropriately when they defer to certain facts of the matter about legislative intention and thus they should adopt interpretative tests which seek to find such facts before resorting to other sources of legal authority, most notably in the common law. (Dyzenhaus 1998: 19)

and the pursuit of justice.¹⁵¹ For many judicial adherents of positivism, justice was the business of the legislature alone, and the task of the judiciary was simply to declare the intention of the legislature. Mr Justice Munnick, commenting on the “total onslaught” thesis of the 1980s stated that

the law may appear to be unjust, for example, in relation to detention without trial, but judges have to assume that factor weighed against the demands of what was referred to as the supreme law – in other words, the safety of the State.¹⁵²

In his rejection of positivism, Dugard and other left wing commentators (Du Plessis and Corder 1994; Corder 1984; Davis 1985) demonstrated that context has an effect on interpretation; that the ascription of meaning is context specific and value laden.

In its first judgement, *S v Zuma and others*,¹⁵³ the Constitutional Court rejected the literalist-cum-intentionalist approach to interpretation, arguing, somewhat confusedly, in favour of a generous approach to interpretation. The majority of the Constitutional Court in the subsequent case of *S v Mhlungu and others*¹⁵⁴ rejected the literal meaning approach in favour of a purposive approach, correctly arguing that a literal approach might produce unjust, perhaps absurd, results. In that case, Justice Mahomed averred, “my interpretation is to be preferred because it gives force and effect to the fundamental objects and aspiration of the constitution [and] because it is less arbitrary in its consequences” (at 815). Nevertheless, Justice Mahomed’s judgement was not unanimous and, in a minority judgement, Justice Kentridge held that “when language is clear it must be given effect, ... I find it difficult to see what meaning other than that which I have suggested, can reasonably be given to the language used” (at 828). The divergence of opinion between these two judges reflects the current ambivalence of the judiciary towards questions of interpretation. Indeed, the literalist-cum-intentionalist approach is still on occasion followed by the judiciary.

¹⁵¹ As late as 1992, the Appellate Division stated authoritatively that an appeal court “does not enquire whether the trial was fair in accordance with ‘notions of basic fairness and justice’” (*State v Rudman* 1992 (1) SA 343 (A) at 377B, per Acting Justice Nicholas). The Constitutional Court recently overturned this judgement, observing that section 25(3) of the interim Constitution requires “criminal trials to be conducted in accordance with just those ‘notions of basic fairness and justice’” (*S v Zuma* 1995 (2) SA 642 (CC)).

¹⁵² *The Argus*, 12 May 1981

¹⁵³ 1995 (4) BCLR 401 (CC).

¹⁵⁴ *S v Mhlungu* 1995 (3) SA 867 (CC).

In *Christian Lawyers Association v Minister of Health*,¹⁵⁵ McCreath J resolved to make a determination on the basis of the meaning of the word “everyone”. In coming to the conclusion that the word “everyone” should be given the same meaning wherever it appears in the legislative text, the court was concerned to ascertain the intention of the drafters of the Constitution.¹⁵⁶

3.2 From Literalism to Hermeneutics

Central to the rejection of positivism and formalism is the recognition that social phenomena have meaning for social agents who are constantly interpreting the situations in which they find themselves (whereas the positivist-scientific model presupposes a subject whose activities can be generalised and understood as context-free operations (Rabinow and Sullivan 1979)). This has resulted in the revival of a hermeneutic approach to human action, calling on social science to acknowledge the claim that explanation of human behaviour must include interpretation of the meanings of social actions from the perspectives of those performing them. Philosophers who had earlier in the twentieth century claimed that human sciences were interpretative endeavours – Dilthey, Collingwood, Heidegger and especially Wittgenstein – were sources of influence, emphasising that an understanding of social phenomena should be concerned with explicating the historical or cultural context or “form of life” through which such phenomena have meaning. In particular, German philosopher Hans-Georg Gadamer has been influential in pointing to the limitations of human horizons and the prejudices and preconceptions that shape individuals’ understanding of others, casting doubt on whether “texts” can ever be grasped on their own terms (Gadamer 1979: 103). As Giddens asserts, “the recovery of the hermeneutic tradition is one of the most significant occurrences in recent trends of development” (Giddens 1987: 56). However, if access to reality is conditioned by specific beliefs about counts as knowledge, then modern epistemology, conceived in Kantian terms as the search for apodictic grounds for universally applicable knowledge, appears to impossibility.

The shift to interpretation in social enquiry challenged key premises of rationalist epistemology. For the Enlightenment, and particularly for subjectivist

¹⁵⁵ 1998 (4) SA 1113 (T).

¹⁵⁶ At 1122B, 1122F-G and 1123B-C.

rationalists like Descartes and Kant, knowledge and truth were grounded on the self-conscious and reflecting subject who has the ability to perceive reality itself. They claimed that rational consciousness has privileged access to the content of reality and can thus develop a set of criteria, rules and categories for distinguishing valid from invalid truth claims in an absolute, non-contextual manner. Consciousness transcends the contingencies of history and culture and is declared the legislator of its own eternal rules that are the foundation of knowledge and truth. In this conception, objectivity and reality can be approached only by a subject able to transcend the contingencies of history and context and to achieve a neutral viewpoint.

Current philosophy's suspicion of Enlightenment epistemology and metaphysics has motivated an 'interpretative turn' in legal scholarship. However many commentators on South African jurisprudence (A. Fagan 1995, 1999; E. Fagan 1996; Motlala 1998) and practitioners alike adhere to the 'common-sense' view of language. According to this view "words are essentially names of things and the meanings of words are securely fastened ... onto things the words denote" (Graff 1982: 405). Modern jurisprudence has consistently regarded legal discourse as a neutral medium which merely reflects social events. This is only possible given a conventional understanding of language as a transparent vehicle for expressing meaning. Such an understanding is not only associated with the apartheid legal system, but is, as I have mentioned, more widely linked to the conservatism of the western liberal judiciary worldwide.

The traditional view of language is that linguistic categories have a direct correlation to that to which they refer. The 'common sense' or 'plain meaning' approach to language suggests that representational terms – signifiers – have a direct correlation with the concepts presented – their signified meaning. Increasingly however, legal theorists have been compelled to acknowledge that the idea that meanings reside in language is mistaken. Linguists and literary theorists alike have demonstrated that words are only conventional symbols or sounds that bear no necessary relation to the "real world" of objects, and that language constructs rather than reflects reality. In the 1960s Saussure theorised language as a synchronic system in which the relationship between the word and its referent was arbitrary and the meaning of signs arose not from their relationship to the external world, but from its relationship to the signs in that system (Saussure 1966). Contrary to the subjectivist, phenomenological understandings of language as an instrument in the hands of

conscious subjects. structuralism favoured an objectivist understanding of language as preceding and defining the characteristics of the conscious self. Linguistic theory proved influential in the development of a new framework to replace discredited epistemological claims, a framework explicated in terms of a social inter-subjectivity constituted by and through language (Rorty 1979; Habermas 1984). Wittgenstein persuasively argued that arbitrary symbols, governed by arbitrary rules, serve to create meanings that appear clear and certain, but only to those who accept the conventions of the language game in which those systems and rules operate (Wittgenstein 1953). Wittgenstein viewed language not as a hermetic system in which meanings are generated but rather as integral to and constitutive of “forms of life”.

Legal realists were perhaps the first to reject the formalist claim that the legal system could produce neutral decisions because the judiciary were involved in an apolitical exercise – the interpretation of plain meaning of words in the law. Realists recognised that there was no literal or plain meaning and that language was contextual, a view which seems to be accepted by most commentators on South African legal theory (Dugard 1971, 1981; Davis 1985, 1996, 1998; Sarkin 1997; Klare 1998; Naudé 1999). On the contextual approach to interpretation, the judge who purported to apply the plain meaning of a word would be “committing the fallacy of reification – abstracting meaning from its context and purpose and treating it as though it were an external thing, capable of value-free investigation” (Boyle 1985: 711). According to many legal realist accounts of law, the seeming interpretative decisiveness of judges (in deciding the interpretative questions of which law is relevant to a particular case, how that law is relevant and how the evidence, precedents and law themselves are to be understood) is itself arbitrary. Judges interpret the meaning of laws, precedents and the texts of the constitution in line with their personal political prejudices, or even in line with temporary whims and feelings. However, the shift from ascertaining the plain meaning of words to ascertaining the purpose and intention of the legislature can be equally reified. It should be recognised that it is not possible look to purposes and intentions without delving into the political struggles which produced the law.

The rejection of positivism in legal scholarship has caused legal theorists to rethink the nature of interpretation. Owen Fiss recognises that adjudication is interpretation, but defines this as the process in which the judge comes to understand the meaning of a text (Fiss 1982: 739). Although he acknowledges the potential for all

social activity to be interpreted, and while he promises that links could be developed between law and the social sciences in this regard, Fiss insists that, rather than exploring these links, judges are “to read the legal texts, not morality or public opinion, not, if you will, the moral or social texts” (Fiss 1982: 740). This approach seems to exclude many areas of interpretation: oral arguments of lawyers, the testimony and demeanour of witnesses, inspections in loco and community standards and morals. In other words, there are many texts to be interpreted during the course of adjudication and meaning cannot be confined to any one text: there is intertextuality. It becomes apparent that a text cannot have one single “correct” or plain meaning from the fact that different witnesses give different accounts of the same facts, and that different judges, hearing the same case, often give radically divergent judgements. Judges and witnesses have to choose between different perceptions of the same facts; not between truth and falsehood, but between alternative accounts.

The central dilemma in the theory of legal interpretation today is related to the proposition that words have no “plain meanings” or objective referents and that meaning is therefore indeterminate. However, there is a serious concern amongst practitioners and jurists that indeterminacy is bad for business. By abandoning formalism and positivism, the twin spectres of nihilism and subjectivism are raised, thereby threatening the legitimacy of adjudication and ultimately the rule of law itself. Michel Rosenfeld writes:

In the broadest terms, the crisis affects a loss of faith concerning the availability of objective criteria permitting the ascription of distinct and transparent meanings to legal texts. Moreover, this loss of faith manifests itself in the intensification of the conflict among the community of legal actors, the dissolution of any genuine consensus over important values, the seemingly inescapable indeterminacy of legal rules and the belief that all dispositions of legal issues are ultimately political and subjective. (Rosenfeld 1992: 152)

Sanford Levinson (1982) observes that traditionally, law was viewed as a science of extricating meaning from words which enabled one to believe in law as a process of submission to the commands of authoritative texts (the rule of law), rather than the creation of wilful interpreters (the rule of men). For example, the authority of the written, stable Constitution, which controls and transcends political activity because of the fixed but abstract nature of its language, is now a paramount fixture of South African political thought. Although within legal theory there is a rejection of

originalist constitutional interpretation (the notion that legal texts may be interpreted by recourse to the meaning intended by the drafters to be placed on the language), legal scholars are loath to abandon the belief that there is something in the text which may be extracted through the correct methodology. This view results largely from a failure (and sometimes wilful refusal) to take into account developments in philosophy and literary criticism which suggest the radical instability and indeterminacy of the meanings of texts at all times. This indeterminacy results in a gap between transformatory jurisprudential theses and the language of judicial opinions (Schauer 1990: 231).¹⁵⁷

Quests for essential or privileged meanings of texts have been increasingly abandoned by theorists who view interpretation as construction in which the reader plays an active role in creating a meaning or meanings which the text does not have prior to a reading of it. Postmodern theorists such as Derrida, reject the idea that meaning is discovered and view the search for truth as an error which presumes privileged foundations. For these theorists, there is no finality in interpretation and there can be no finally determined meanings.

Sanford Levinson suggests that indeterminacy renders an interpretation merely an exercise of power; legal texts can be read to serve political purposes. For Levinson, this is alarming in that “the principal social reality of law is its coercive force *vis-à-vis* those who prefer to behave other than as the law ‘requires’” (Levinson 1982: 386). If many interpretations of the Constitution are possible, then it must be recognised that judges, in choosing one out of a number of interpretations, are (however subtly) espousing their political visions in their judgements. Fiss argues, against adherents to the radical indeterminacy thesis, that theorisations which recognise indeterminacy are nihilistic and incommensurable with justice:

The nihilist would argue that for any text – particularly such a comprehensive text as the Constitution – there are any number of possible meanings, that interpretation consists of choosing one of these meanings and that in this selection process the judge will inevitably express his own values. All law is

¹⁵⁷ I discuss the Constitutional Court’s sometime rejection of philosophy in Chapter Five. There have, however, been occasions where the court has been prepared to discuss philosophical considerations, though mostly in an unsatisfactorily cursory and piecemeal fashion. Examples include the judgement of Ackerman J in *Ferreira v Levin NO: Vryenhoek v Powell NO* 1996 (1) SA 984 (CC), quoting at length from Isaiah Berlin’s *Four Essays on Liberty* (1969), at paragraphs 52 and 53 and quoting from Karl Popper’s *The Open Society and its Enemies* (1962) in footnote 36 and footnote 56. Mahomed J quotes Kant in *Azanian Peoples Organisation (AZAPO) and others v President of the RSA and others* (at para 21G-H).

masked power...it is impossible to speak of one interpretation as true and the other as false. It is impossible to speak of law with the objectivity required by the idea of justice. (Fiss 1982: 740-742)

As Stanley Fish observes, the debate is polemically cast as a choice between positivism – or the idea that meaning is embedded in texts and can be read without interpretative subjectivism – and the idea that because texts have many meanings (or none), the judge is free to impose or invent whatever meaning serves her partisan purposes (Fish 1984: 1325).

Much legal scholarship has been directed at the threat of indeterminacy and towards developing a hermeneutic¹⁵⁸ approach to issues of interpretative justice, attempting to discover within the processes of legal interpretation, a set of constraints that can lift a judge's understanding of the law above the level of the personal and subjective.¹⁵⁹ Fiss' solution to the dilemma of indeterminacy is to posit "disciplinary rules" as a source of constraint for the determination of meaning. Disciplinary rules intervene between text and reader and derive from the institutional setting of the interpretative activity. These rules permit a measure of objectivity required by the idea of law, where the interpretative community recognises such rules as authoritative and thus confers authority on them. Objectivity is therefore limited to the interpretative community, but, so the argument goes, this is the only kind of objectivity that can be hoped for. It should, however, be noted that the idea of an interpretative community does not provide a politically neutral referent. Paul Brest (1982) argues that objectivity is an illusion – since the legal interpretative community is predominantly male, middle-aged and relatively wealthy – supposedly cultivating "our" public values. It is for this reason vital that cognisance be taken of the relationship between the composition of the dominant legal interpretative community (the judiciary) and the outcomes of its interpretations.

In post-1994 South Africa, Constitutional Court judges are appointed by the President "in consultation with the cabinet and the Chief Justice".¹⁶⁰ The first four post-apartheid judges were appointed from within the ranks of the existing judges and

¹⁵⁸ *Hermeneuein*, a Greek word, means to interpret, to understand the meaning of texts. The term derives from Hermes, the messenger of the gods, the mediator between the divine and the secular, whose tasks included interpreting the wishes from the former to the latter. Hermeneutics in a general sense is the theory and practice of explication and interpretation.

¹⁵⁹ As Hutchinson puts it: "Constitutional scholars have become absorbed in the quest for the hermeneutic grail – namely the search for an appropriate set of methodological principles with ethical principles" (Hutchinson 1989: 165).

represent the “more progressive sector of the old judiciary”. whilst the five new appointees were also “progressive lawyers” (Sarkin 1997: 136,137) and supporters of the African National Congress. It is not surprising perhaps, that the various judgements of the Constitutional Court indicate its willingness to allow parliament to determine policy with little judicial interference (Sarkin 1998: 644). This is not to suggest that the judiciary has been cynically partisan in following government policy contrary to what it believed to be just, but merely that judges are prefigured by, and constituted through, their position within a variety of language games. Language games have rules and judges are similarly positioned concordant with government policy within the various games (economic, social and ideological) which constitute them. It is understandable that their common positioning might lead judges to reach consensus or near consensus on the determination of meaning and to agree on a politics of justice similar to that of the government. I am not suggesting crude psychological determinism, but simply that judges and other individuals do not autonomously choose either their political beliefs or determinations of meaning. Judges with similar political views and legal training are likely to agree on a determinate meaning of a rule. They are more likely to agree that a certain meaning is the common or plain meaning and that a rule may be neutrally applied. Language games are infused with relations of power, forces which are constantly shifting and to which the subject is necessarily subjected.¹⁶¹ A language game is a site of struggle, where certain rules and articulations are preferred or privileged over others, so that such privileging will seem natural and neutral to the subjectivities constructed by and dominated through them.

The point is that interpretative conventions, such as Fiss’s rules themselves reflect the background and experience of those privileged to constitute the legal interpretative community and serve to isolate interpretative judgements from public scrutiny.¹⁶² Joel Bakan notes that the judicial internalisation of disciplinary rules merely validates the authority of the legal elite because conventions of legal cultures

¹⁶⁰ Section 99(3) of the interim Constitution.

¹⁶¹ “There are two meanings to the word *subject*: subject to someone else by control and dependence, and tied to one’s identity by a conscience or self-knowledge. Both meanings suggest a form of power which subjugates and makes subject to” (Foucault 1982b: 212, emphasis in original).

¹⁶² Hugh Corder, who traces the role and attitudes of the South African Appellate judiciary from 1910 to 1950, notes that a critic of the judiciary in South Africa is faced with the following obstacle: “the sensitivity displayed by South African judges and authorities ... and the aura of infallibility, which in the eyes of many observers surrounds the South African judiciary, form considerable inhibitions for the South African researcher” (Corder 1984: 2)

reflect their perspectives which are invariably those of dominant social groups with an interest in maintaining the status quo. It is impossible to insulate the judiciary from socially contingent practices and forces. As Balkin (1991) notes, the apparent univocality of legal texts is often a function of the ideological instantiation of the interpreter. Moreover, interpretative communities do not exist *a priori* but are continually constituted and reconstituted in a process of ongoing ideological struggle. Such communities are themselves divided and dissensus may be the norm.

A further operation of the hegemonic process is the creation of cultural traditions. Resort to cultural traditions and effective histories of texts as a source of constraint for interpretation of legal texts share the inadequacies of looking to contexts and language games in that they efface the social struggle involved in the construction of these boundaries. Ronald Dworkin's hermeneutics suggests that the ideal judge (Hercules) should make reference to the community's political and legal principles – its traditions – which will constrain the judge's interpretation of what justice and fairness mean in that context (Dworkin 1986). Dworkin makes an analogy between the task of legal interpretation and that of writing a chain novel, a work of collective authorship, with each chapter being written by a different individual author. He correctly points out that attempts to fathom or understand authorial intentions cannot constrain interpretation, since authorial intention is complex, manifold and is itself subject to multiple interpretations. Instead, each author is constrained by the previously written chapters and must ensure that the chapter she writes "fits" with the preceding chapters and contributes to the preservation of the integrity of the novel. "Fit" implies that the chain novelist must find an interpretation of the meaning of the text that can cover all or most of the elements of the text under study and show how they all work together to compose a unified whole. Of course, it may happen that two interpretations of the text fit equally well. As a standard for adjudicating between these two equally fitting interpretations, Dworkin introduces the standard of "best light": the interpreter must decide which interpretation reveals the work or practice to be the best instance it can be of the "form or genre to which it is taken to belong" (Dworkin 1986: 52). The criterion of fit and the standard of "best light" constitute Dworkin's conception of law as integrity, which means for the judge that she must look for the continuity of principle that underlies the different decisions in the history of the legal tradition, and that she must choose between different possible interpretative principles by finding that principle or set of principles that allows legal

practice to be the best it can be. Of course, judges may differ in their views of what makes past decisions and precedents the best law it can be, such differences issuing from the judges' moral and political values. Hence, though political differences will enter into legal judgements, our legal interpretations will be as constrained and objective as they can be.

Dworkin's approach is intertextual and while it is formal and procedural, it is not purely abstract since the substantive values of the community of legal actors cannot simply be severed from the process of interpretation. Under closer scrutiny however, Dworkin's theory of law as integrity fails to provide an acceptable solution to the interpretative crisis of indeterminacy. One reason for this failure is that, as Alan Brudner has pointed out, the criterion of fit is too indeterminate to allow Dworkin's principle of integrity a sufficiently concrete meaning (Brudner 1990: 1156,1157). The requirement of fit and integrity is reducible to an appeal to coherence made in an interpretative universe that has been stripped of intelligible criteria and coherence (Brudner 1990: 1158). Furthermore, Dworkin's allegiance to the legitimacy and binding authority of tradition fails to provide room for any critical reflection on the construction of that tradition or the legacy of those principles, rendering it "impervious to the ways in which coercive and non-reciprocal relationships within a society shape its culture" (Brenkman 1987: viii).

The hermeneutics of Hans-Georg Gadamer has been heralded as offering a particularly postmodern solution to indeterminacy in translation (Dallmeyr 1992; Mootz 1993; Feldman 1994). Gadamer emphasises the role of context in the shaping of parameters within which meaning is appropriated from a text. It is impossible to read meaning 'out of' a text apart from the assumptions and prejudices of the interpreter, since these undertakings both enable and constrain it. The context in which the reader approaches the text conditions the reader's grasp of it. The context is historically and culturally contingent and includes historical and social, rather than subjective and voluntaristic factors. The context in which the interpretation of a text takes place includes the historical growth and transmission of that text: interpretation is tradition-bound. Judges are not free to read what they want into or out of a legal text; their current context, present needs and the history of legal interpretation cumulatively act to constrain their interpretation (Hoy 1985: 141).

For Gadamer it is not the case that judges impose their subjective political visions in interpretation; rather, interpretation changes in accordance with the change

in historical and cultural factors that influence and constrain the judge's readings. Interpreters do not simply choose a meaning from numerous possible meanings engendered by the text; it is rather that the text engages with the reader's understanding of the world. Gadamer's metaphor for this process of mediation is the "fusion of horizons", a process of 'coming-to-understand' which is not a matter of the unprejudiced appropriation of a text, but a fusion of one's horizons of meaning and expectation with that of the text.

On this version, tradition is an unshakeable ethical bond constraining interpretation. Moreover, Gadamer does not deny that some authentic and firm given (text or law) is the basis of all interpretations. Although new interpretations are always possible, they are linked to the truth of tradition. Under the Gadamerian conception "the self same and unchanging truth can always be understood differently and there are no grounds for saying that it is understood better by one of its finite bearers than it is by any other. The absolute never assumes absolute and canonical form" (Caputo 1987: 111). Despite Gadamer's arguments, tradition is not a seamless web and values are not shared; instead there is dissensus and polyphony.

Stanley Fish emphasises cultural and historical context as limiting (or defining) the interpretative process. Fish argues that there is a level of observation or discourse at which meanings are obvious or indisputable and that these are not properties of the world, but properties of the world as it is given to us by our interpretative assumptions. What we see is a product of our mental and verbal categories, categories which are the very possibility of our perception and so seem to be part of the world itself. Moreover, interpretative assumptions are historically and culturally contingent. The interpretative act is performed at so deep a level that it is indistinguishable from consciousness itself (Fish 1979: 245). For Fish there exist no texts or meanings in texts independent of or prior to our interpretation. What is in the text is a function of interpretative activity. There is no need to look to external sources of constraint in legal interpretation, such as the disciplinary rules posited by Fiss. The fear of unbridled interpretation upon which this search is based is groundless because to be inside a context is "to be already and always thinking with and within norms, standards, definitions, routines and understood goals that both define and are defined by that context" (Fish 1984: 1332). The assumptions and categories of understanding embodied in the practice of legal interpretation, internalised through training and

socialisation for that practice, already constrains the interpreter who only apprehends the text in the light of these.

In Fish's view, the shared understanding of the general purposes of the legal enterprise and its underlying rationales will ensure both rational adjudication and readings of legal texts that yield determinate results. Of course, this does not mean that institutional interpretations of a given text must have one tendency rather than another (Fish 1983: 275). Rather, a picture of legal practice is presented that gives central place to tradition, and which both limits and permits transformation. Disagreements about meaning are possible not because a text has any number of meanings, but because different persons may be reading according to the assumptions of different circumstances. These conflicts, however, are always being settled and "the means of settling them are political, social, institutional in a mix which is itself subject to modification and change" (Fish 1984: 1336).

What are the means referred to? On what basis are the merits of competing claims decided? Not all concerns within religious, political or moral groups have a say in the evaluation process. Following both Derrida and Lyotard, certain voices are excluded or at least marginalised so that they will not be valued equally with others. To say that the interpretative process is regulated by institutional assumptions is to recognise the struggle generated by competing conceptions and particular forms of social experience.¹⁶³ In legal interpretation the legitimacy of certain articulations is affirmed at the expense of others. To conclude resignedly that the interpretative arena is constructed through competing political claims, as Fish does, is to concede the right of those whose privilege and might has permitted them to participate and dominate the interpretative process, to continue to do so. What is required is not only the admission that meaning is contextually constructed, but also an investigation of the historical and cultural contingencies of such contexts.

The problem with Fish's account is that context takes on a rigid and monolithic form. Postmodernism suggests that discourse is neither singular nor consensual. Context is not a singular structure but a dynamic of multiple and competing discourses; context does not present itself neutrally with one voice. Instead, individuals are located in a world of multiple, overlapping and often

¹⁶³ Davis observes that the interpretation of a legal text is dependant on "political struggle and political experience [which] introduce new and different contexts, themes and meaning into the work" (Davis 1996: 508).

contradictory discourses. Context does not, as Fish suggests, present a stable referent in which meaning appears self-evident, obvious and a matter of common sense. Contexts are multiple and multivalent, reflecting the claims and demands of competing audiences and making divergent sense of the texts under interpretation, so that confrontation with contradiction and ambiguity is unavoidable. M.L. Pratt notes that

there is always doubt, conflict, disagreement, because interpretations are always there in multiplicity, denying each other the illusion of self-containment and truth ... People and groups are constituted not by single unified belief systems, but by competing, self-contradictory ones. Knowledge is interested, and interest implies conflict; to advance an interpretation is to insert it into a network of power relations. (Pratt 1986: 52)

Context does not provide consensus. On the contrary, context reflects dissensus and plurality, which must be confronted by all judges, regardless of training, institutional constraints and the governing conventions that they accept. Interpretations may reproduce conventions and assumptions which make interpretation possible, but this does not exclude the possibility of the continuous potential for transformation that interpretation provides: there is always more than one voice and one possibility to choose from. For Derrida this possibility provides the impetus for the intervention of deconstruction, in which the excluded or marginalised possibility may be recognised. For Lyotard, however, to speak of privileging the other is not really to face the irreducible pluralism of the postmodern: interpretative dissensus and plurality are closer to the mark.

Brian Langille (1988) presents an important account of legal interpretation based on the later Wittgenstein's theory of language and rule-following. Arguing against critics who cite Wittgenstein as authority for the proposition that language itself cannot constrain interpretation because it is always malleable and open to the politics of context, Langille maintains that "in Wittgenstein's world, indeterminacy is not the result because our language has 'the determinacy of an activity'" (Langille 1988: 488). The recognition of indeterminacy does not require a reference out to political context, since meaning (determinacy) is a function of the use of language within a language game, the idea of practice as "bedrock". Language only has meaning within language games and the "forms of life" in which these games are embedded. Understanding is likened to an activity or technique, and the criteria for

understanding lies in behaviour; the use of language within a particular language game. There can be no (external) foundations for understanding because interpretation involves language and language is an activity. For Wittgenstein, obeying a rule is not a product of thinking or conscious choice, but of acting: “When I obey a rule, I do not choose. I obey the rule *blindly*” (Wittgenstein 1953: para 219). In the end knowledge of rules is simply knowing in what manner to act, and explanations simply run out. Wittgenstein writes,

[h]ow am I able to obey a rule? – if this is not a question about causes, then it is about the justification for following the rule in the way I do. If I have exhausted the justifications I have reached bedrock, and my spade is turned. (Wittgenstein 1953: para 117).

This is not a point about “community consensus” or “custom” regulating the way in which rules are followed. It is a grammatical point about the necessary background conditions for the existence or use of concepts at all. What makes language games possible and permits rule-following, is not simply agreement in definitions, but “agreement... in judgements” (Wittgenstein 1953: paras 241, 242). Wittgenstein’s “linguistic naturalism” (Pears 1986: 179) may be seen to promote a form of conventionalism, but, argues Langille, it is neither arbitrary nor a matter of consensus of opinion. Wittgenstein’s conventionalism is prior to any form of conscious agreement. What makes language games, like legal practice, possible is not simply agreement in definitions, but agreement in judgements; not in opinions but in forms of life. Agreement in judgements is a necessary precondition of language; it is the background which makes language possible. Langille concludes by observing that the Wittgensteinian idea regarding rule following, and thus human rationality as being grounded in the bedrock of practice, is central to the understanding of law and is at the core of the recent non-sceptical “turn to interpretation”.

The problem with Langille’s account is that it provides no reason for being sanguine with respect to the determinacy of judicial activity or the bedrock of adjudicative practice. That the ossification of meaning within context is cause for alarm escapes Langille, who is content to retreat into the quietism of stasis: “This is just the way things are” (Langille 1988: 493). Wittgenstein provides the following description of rule-following:

Then can whatever I do be brought into accord with the rule? – Let me ask this: what has the expression of the rule-say a sign post-got to do with my actions? What sort of connexion is there here? - Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react to it.

But that is only to give a causal connexion; to tell how it has come about that we now go on by these signposts; not what this going by the sign really consists in. On the contrary; I have further indicated that a person goes by a signpost only in so far as there exists a regular use of sign-posts, a custom. (Wittgenstein 1953: paras 198, 199)

This would indicate that judicial action upon encountering a rule, a sign-post say, is explained by the fact that judges have been trained to react to the sign in a particular way and that judges go by these signposts only in so far as there exists a custom; rule following is therefore, not a mental process but a form of activity. However, to say that legal rule following is a form of activity, something that lawyers do, explains nothing about the nature of the activity in question or its possible consequences. Moreover, discourse, language games, support particular configurations of power and facilitate practices of domination.¹⁶⁴ For instance, legal language games have reflected and reinforced understandings of the human which posit the white male as the norm and the language that privileges this agent as neutral, objective and universal.¹⁶⁵ Liberal legal discourse shares the logocentric bias of western philosophy; it presumes a Cartesian “truth” of human nature, an ontological transparency, present to one’s conscious:

We can think of a system of law as a community’s attempt to realise human ends. This presupposes a description of the good and the bad in human nature: what people want from their lives and what their limitations are. The description necessarily involves privileging of certain aspects of human

¹⁶⁴ The point is forcefully made by Foucault in the discussion between Foucault and Chomsky in “Human Nature: Justice versus Power” in Elders 1974 at 135-197.

¹⁶⁵ An interesting example of this kind of normative racist Eurocentricity is embodied in the legal fiction of “the reasonable man”, the prevailing jurisprudential yardstick for legally acceptable behaviour. Although South African law has identified the reasonable man as a South African individual (despite approving references to the English definition of the reasonable man as “the man on the Clapham omnibus”), the standard applied has been predominantly a gendered and ethnocentric construct that implicitly naturalises a white, masculine perspective and correspondingly denigrates anything directly or analogously associated with a feminine or black position, a standard self-evidently inappropriate to South Africa’s multi-cultural society. Here the linguistic form of absolute neutrality and clarity determines what is real for us. This domain unfolds as the social order under the authority of the neutralised “reasonable man”. Who is this reasonable man? We cannot see him; he is faceless though no less authoritative.

nature over others. Later we justify our system by claiming that it is the best, given the natural constraints of the human condition. (Balkin 1987: 762)

Contrary to the Cartesian conception, however, it has been argued that subjectivity is constituted within discourse – a terrain in which power is always contested and shifting – and subjectivity is created and recreated in this context. The “conventionalism” to which Wittgenstein refers is culturally and historically particular and so contingent, in the sense that things could be and have been different.¹⁶⁶ It is precisely the contingency of current social practices which allows for the possibility of reform, since reform derives from other forms of life and from the margins of society as the means with which to challenge and destabilise the “common” or “obvious” in existing language games. It is not sufficient to declare passively with Langille that “[t]his is just the way things are. There is as much stability as there is” (Langille 1988: 493), since what is, can be and should be resisted. Where norms and customs achieve social predominance in a given historical period, they seem to be common-sense assumptions, and the form of life for which they are framework conditions, constitutes an hegemony. However, hegemonic structures are contingent and unstable. Social relations are constructed and transformed through discourse which is never complete and never totalising. Opposition is always possible within alternative practices, structures and spaces (Deutsche 1991: 20; Laclau and Mouffe 1985: 30).

If rationality is social in character¹⁶⁷ then it is also political. A “form of life” comprises the social experience of equality and domination and thus any use of language can only be understood within the framework of domination and oppression in which the language concept or rule is embedded (Coombe 1989: 640). This means, if one is committed to justice, that resistance is required together with an understanding of how “the use, the context, the activity, the purpose, the game which is being played” (Langille 1988: 496), exacerbate rather than alleviate suffering, disparity and disempowerment. Resistance may only take place through an experience

¹⁶⁶ Eagleton remarks that Wittgenstein cannot avoid metaphysical illusions merely through recourse to the context of social life. If the point is that language is internally related to its social conditions, then the political character of those conditions is contained in language. Eagleton remarks that “Wittgenstein’s philosophy is reactionary not in its referring of beliefs and discourses to social activity, but in its assumption that such referring constitutes a liberation from the metaphysical” (Eagleton 1986: 107) because metaphysics is established exactly at the level of social discourse where objectification, reification and logocentricism are practised and experienced.

of alterity, a recognition of one's duty to the other and an attempt to understand those who are marginalised.

Justice involves focussing attention on the limits of legal discourse, and thereby negotiating with the being of an age. By permitting the voices of the marginal and the voices of the unheard, it is possible to break through present discursive limits and expose new horizons of justice (Pavlich and Ratner 1996). Whilst it is true that "it is only within a practice, culture and form of life that meaning is possible" (Langille 1998: 501), justice is possible because there are not only discourses other than law, but also differentiations within legal practice: meaning is never singular and transparent, but multivalent; it is always contextually and therefore socially specific. Therefore, although Langille correctly insists that there is no critique beyond the current "form of life" from which concepts can be critically analysed, critique does not depend on a transcendental observation point because "the form of life in which we *are* situated is not a singular hermetically sealed system, but a constellation of shifting conjunctures of multiple discourses which itself provides resources which make criticism both possible and meaningful" (Coombe 1989: 642).

3.3 Determinacy and Indeterminacy in South Africa

Daniel Herwitz (1999) makes a strong case for determinacy in his persuasive appeal for binding rules and criteria to enable the reconstruction and development of institutions and other material conditions of life in South Africa. Although Herwitz's focus is on socio-economic rules rather than legal rules, his arguments on the related issues of rule-following, determinacy and indeterminacy are instructive for the treatment of these issues within the locality of South Africa. This section investigates Herwitz's scepticism towards (though not total abandonment of) the application of a postmodern epistemology in South Africa and attempts to address some of the concerns raised.

Herwitz argues that "the epistemic norms of poststructuralism, played out in their postmodern context of their northern practice, exhibit a deficit of direct relevance to the question of a southern venture" (Herwitz 1999: 24). Furthermore, language games of justice in the South should be concerned with reconstruction and

¹⁶⁷ Peter Winch correctly notes that "human rationality is essentially social in character" (Winch 1972: 60).

transformation of the material conditions of forms of life in areas such as education, jobs and housing. All of this requires construction, rational planning and rules, which need to be determinate in order to be efficacious. Wittgenstein is cited as authority for context-related determinacy. Herwitz writes:

“Stand exactly here and get the job done”, we might remark in the spirit of Wittgenstein. South Africa must speed up (development) time and set clear and achievable efficiency criteria, not slow it down and resist these determinations on life. (Herwitz 1999: 26)

The point seems to be that the North, in which the social rationality of modernity has ensured development of superior institutional and economic conditions, makes the mistake of taking for granted developed material conditions and rejects the rationality (determinacy) which made it possible. The South, however, does not have this luxury, since what is required is that people obey rules and rebuild¹⁶⁸, although Herwitz does concede that South Africa needs postmodern/ poststructuralist theory “to provide multiple readings and responses...to explain the nature of...[South African developmental] policy and to articulate styles of critique and resistance to policy” (Herwitz 1999: 29).

Linda Hutcheon expresses a similarly sceptical view of the conflation of postcolonial reconstruction and postmodern critiques when she writes: “those radical postmodern challenges are in many ways the luxury of the dominant order which can afford to challenge that which it securely possesses” (Hutcheon 1995: 131). Indeed, some critics view postmodernism as itself the dominant Eurocentric, neo-universalist imperial discourse, despite postmodernism’s complicity with postcolonialism in its characterisation of modernism as elitist, imperialist and totalising (Hutcheon 1995).

Material conditions and their relationship to questions of ideology and representation are at the heart of the most rigorous debates in recent postcolonial theory. Inasmuch as language is deployed to theorise the colonial encounter, the material and experiential worlds have receded and the structures of colonialism and strategies for its opposition are registered representationally in the contradictions and indeterminacies of its enunciations. This trend has elicited considerable protest from

¹⁶⁸ According to its critics, the reason poststructuralism cannot help in the Southern enterprise is that it purportedly undermines the social consolidation that must take place if we are even to be able to speak to one another about standards of justice. This is an important charge, one which an argument

those who point to disparities between the structure of language and forms of social practice, arguing that the discourse of text-based postcolonial theory presents the World according to the Word (Mohanty 1984; Ahmed 1995; Miyoshi 1993). In that it seems to recommend change at the level of discourse and consciousness, rather than at the level of material – economic and social – circumstance, poststructuralism is perceived to be open to the charge that it is politically conservative because it is insufficiently dialectical; because it refuses to discriminate between “world” and “text”, between the “material” and the “discursive”, it might be argued (as I think Herwitz does) that it lacks theoretical purchase on the interdependence and mutual conditioning of the two (Soper 1994).¹⁶⁹ However, these arguments themselves have no purchase on a position which eschews the vocabulary of materialism and idealism. There is simply no common discourse and all one can do is to charge poststructuralist “idealism” with lacking the conceptual apparatus for making distinctions between, or changes to, the various modalities of social life.¹⁷⁰ However, whilst I concede that poststructuralism cannot do all the theoretical work in the formulation of rules for development its capacity for conflict and resistance, its introduction of the ethics of humanity and otherness, provide supplements to determinate on which justice depends.

I agree, with certain qualifications, that South Africa requires modernisation and reconstruction and that rules and criteria (including legal rules and criteria) are necessary for this purpose. I find it difficult to embrace uncritically the suggestion that “the subaltern must gradually become more completely part of the fabric of modern life: more familiar with its gadgets, involved in its institutions, brought into its schemes, enfranchised under the umbrella of its goods” (Hervitz 1998: 98). For one thing, the suggestion connotes an element of subsumption and western imperialism. The fabric of modern life, it strikes me, is in places torn, worn out and shabby - cloth unfit for postmodern development workwear. Take technology for instance:

advocating poststructuralist theory in the South cannot ignore. I deal with it towards the end of this chapter.

¹⁶⁹ Nancy Fraser also challenges what she calls “the limitations of fashionable neostructuralist models of discourse analysis that dissociate “the symbolic order” from the political economy, and so lack the bivalency required to integrate the social and cultural and the economic and discursive” (Fraser 1997: 5,6).

¹⁷⁰ Furthermore, as Geoff Bennington argues, “any philosophy which gives itself world and language as two separate realms separated by an abyss that has to be crossed remains caught, at the very point of the supposed crossing, in the circle of dogmatism and relativism that it is unable to break” (Bennington and Derrida 1991: 103).

television, film and the internet operate cumulatively as potent vectors of such values as individualism, hedonistic self-gratification, consumerism and shallow-thinking. The gadgets, institutions, schemes and goods of modernity can operate either as implements of western imperialism¹⁷¹ (and so perpetuate in Andre Gunder Frank's now famous phrase "the development of underdevelopment") or as potent tools of development.¹⁷² It all depends on whether these facets of modernisation are utilised in a manner facilitative of human enhancement and this depends on an ethical interrogation of the use to which these instruments will be put.

Periods of paradigmatic transition are periods of fierce competition among rival epistemologies and knowledges, periods of radical thinking which are both reconstructive and deconstructive. Not only are meaningful rules being created within contexts, but the very contexts themselves are being contested. The "bedrock" of practice experiences seismic shifts, and is constituted and reconstituted in accordance with the vacillations of political transition. Context is always contingent, but in political transition of the kind faced by South Africa, context is itself being interpreted and negotiated at an extraordinary rate, its cultural and historical contingency all too apparent. Since meaning is contextually specific it is also socially specific. The meaning of "stand exactly here" depends upon where exactly one is standing.

The effects of the legal system for persons who are privileged enough to participate in them are not the same as those which these practices have for persons who merely endure or are victimised by them. Contexts and communities adduced to serve as foundations for law are not simply given but produced by exclusions of the constructions of meanings and significance that the marginalised give to their experience. Context is not a self-present source of meaning but the derivative effect of

¹⁷¹ E. Roy Ramirez remarks that it is important "not to confuse it [development] with modernization" and attempts to forge a new concept of development characterised by a "constant vigilance not to let forms of oppression pass for liberty, commercial pseudo-culture and the consumption of fantasies for superior culture, diverse manifestations of plunder for progress ... economic inequalities for justice or fear for peace" (Ramirez 1986: 25).

¹⁷² Ramirez also offers an ethical critique of and alternative to what he calls "technological determinism", the belief that technology – whether imported or produced nationally – is both necessary and sufficient for development: "In the same way that development cannot be restricted to economic growth, so development cannot be reduced merely to a technical matter. It involves a culture's identity, self-confidence, important degrees of independence, the search for its own answers, the satisfaction of basic needs, an openness to the future, social and mental changes that transform members of a society capable of sustaining, at its own pace and by its own means, more human forms of life" (Ramirez 1988: 48). In addition, Partha Chatterjee comments in relation to post-colonial countries that "no matter how skillfully employed, modern statecraft and the application of modern technology cannot effectively suppress the very real tensions which remain unresolved" (Chatterjee 1986: 147).

representational practices in which some elements of social life are said to constitute context to the exclusion of others. Gary Peller writes:

The metaphysics of contextual presence accordingly reverses the metaphor of subjective priority into one of objective priority. Thus meaning does not flow intrinsically from the words or intent of the subject, but extrinsically from factors which are outside the subject which seem to constitute subjective meaning. The inside, the text, is seen to originate in the outside the context. The outside as a self-present and undifferentiated source or origin thus is taken as a transcendental object, existing prior to and separate from the social construction of the context. (Peller 1985: 1224, 1225)

Peller correctly observes that context is a discursive construction of situated social agents, and that rhetorical strategies shape the way “context” is defined in the discourse concerning legal interpretation. The contexts of South African constitutional law and politics are being constructed through the rhetorical strategies of constitutional theorists and judges, some of which I unpacked in Chapter One. South Africa requires reconstruction of its practices and institutions through rules, but these rules must be deconstructed to reveal the contingency of their own construction.

3.4 Poststructuralist/ Deconstructive/ Postcolonial Interpretation

Foucault and Derrida, abandoning hermeneutics proper, focus instead on how institutions, power and practices work and what their effects are on “the generality of our lives, so as to alert us to the cost of the practices and open us to the possibilities of change” (Dreyfus 1984: 81). Understanding is not a series of rules but a set of strategies and tactics. Deconstruction suggests that there is no authentic reading or meaning of a given text. Deconstruction questions the grammar of reading and interpretation. Derrida’s critique suggests that every “identity” necessarily suppresses an alternative identity. All meaning has a “surplus”, that which is oppressed along with that which is articulated. All meaning is deferred; there is never a conceptual closure because language can never offer a “*total and immediate* access to the thoughts that occasioned its utterance” (Norris 1991: 44, 46, emphasis in original). What strategy of reading and interpretation does deconstruction propose? Deconstruction “is a matter of taking a repressed or subjugated theme ..., pursuing its various textual ramifications and showing how these subvert the very order that

strives to hold them in check” (Norris 1991: 39). Deconstruction strategically activates the meaning, hidden or suppressed by the rhetorical flow of the text by reading it against the grain and so denying and subverting privileged discourses: “Deconstruction tears a text apart, reveals its contradictions and assumptions” (Rosenau 1992: xi).¹⁷³

For Derrida, the distinction between hermeneutics and postmodern/poststructuralist interpretation is the difference between rabbinical and poetical interpretations (Derrida 1978: 64-78). Hermeneutics is rabbinical in that it emphasises the Book of Law that has been handed down; as commentary and elucidation, interpretation is always secondary. Poetic interpretation is “the joyous affirmation of the word and the innocence of becoming, the affirmation of a world of signs without fault, without truth and without origin which is offered to an active interpretation” (Derrida 1978: 292). For all hermeneutics, the work itself is privileged as a material and semantic self-referential totality, complete in itself and distinct from what is outside. Furthermore, interpretation as the dialogue between present and past presupposes a theory of historical continuity, and coherence is a sign of the desire for presence. Foucault, Hayden White and Paul Ricoeur have demonstrated that modern history as continuity and progress is a construction of scattered events into a narrative, the introduction of plot and story into disjunctive occurrences. History is a rhetorical creation, an act of fiction constructed in relation to a discontinuous series of events. Consequently the effort to derive ‘truth’ and ‘meaning’ from history and tradition seems problematical.

In poststructuralism, the text as intertext replaces the sovereignty of the work; it is created through a continuous affirmation and denial of other texts. The text is a shifting tissue of signs and every text opens up to every other text, which it both affirms and denies. Every text is infiltrated by codes, conventions, conscious and unconscious practices, and opens itself to a poetic interpretation which can never be solely semantic. Interpretation is not the retrieval of authorial intention, of the immanent meaning of a text or of the meaning given in tradition or context. It exploits every connection, “every associative bond, every phonic, graphic, semiotic and semantic link, every relation of whatever sort that exists among signifiers, in order to set forth the powers of repetition in all its productivity, inventiveness and freedom”

¹⁷³ I provide a fuller account of the theory of poststructuralism and Derridean deconstruction in the previous chapter and so do not repeat it here.

(Caputo 1987: 192). Authorship and intentionality cannot be used as principles of unity and coherence for the text, since the text, as a collection of material traces, is cut off from its authorship. Iteration renders intention disjointed and never fully present to the actor. These characteristics are necessarily present in the law as text.

Hermeneutics has moved some way towards a non-metaphysical tradition by accepting the linguistic nature of all understanding and experience. Hermeneuts, having made this important discovery, view language as a depository of meaning, a site of dialogue and shared understandings. For Derrida, difference and 'tracing' which give language meaning also prevent such meaning from ever being final: the sign as a mark of presence/ absence gives language the ability to communicate, but also prevents any final closure of meaning. There can never be consensus because there is always a lack or an excess which cannot be retrieved by an act of interpretation that looks only to semantic completeness. Lyotard, of course, rejects any reasoned appeal to a consensus of truth-seeking interests, which "do violence to the heterogeneity of language games" (Lyotard 1984: xxv). For Lyotard, the community which endows language with meaning is an obstreperous illusion. In his reformulation of the sublime there is a demand for community, but not the projection of a particular form of community as if it were universal: "the universality called for by the beautiful and the sublime is only an Idea of the community for which no proof will ever be found, that is no direct presentation, but only indirect presentations" (Lyotard 1988: 242). The imposition of a particular meaning on society would amount to what Lyotard terms terror, the domination of one language game by another.

Derrida, at least, does not deny that society requires determinate meanings – these are necessary fictions. However the various versions of presence and determinacy in the law – written constitutions, statutes and common law precedents – are only partial stabilisations in the temporal continuum of history, which is not a single or general history, history as meaning but rather "histories different in their type, rhythm, mode of inscription – intervallic, differential histories" (Derrida 1981: 58) which cannot be totalised. Derrida encourages determinations of meaning, recognising that judging is essential; at the same time he is vigilant, examining the emergence of truths, and warning that they should not be allowed to pass as natural, eternal or normal. Deconstruction is not simply an interpretative method which seeks only to destabilise meanings by systematically unveiling contradictions embedded in writing and inverting binary oppositions that circumscribe texts. Contrarily, the

deconstructive process implies an ontology of the unbridgeable gap between self and other (or at least the infinite postponement of the complete reconciliation between self and other), which is supplemented by an ethic of inclusion of and care for the other – an ethic which “must always be attempted and renewed but which can never be satisfied because the meaning of inclusion and of care can never sufficiently be determined to the extent that the self always remains somewhat estranged from the other” (Rosenfeld 1992: 158).

Although for deconstruction, meaning is never permanently fixed, it is not arbitrary (in the sense of being the capricious result of unconstrained subjectivity) either, because its ontological and ethical features are inscribed in history, leaving their mark in a succession of concrete historical formations – successive written constitutions, judgements and commentaries for instance – which constrain the range of possible legitimate meanings without ever imposing a single, fully determinate meaning. Hence, ontology and ethics “constantly open and close possible paths of interpretation without ever settling on any single, distinct, clearly articulated and exhaustively circumscribed meaning” (Rosenfeld 1992: 159). Intertextual interpretative practice does not culminate in aimless conflict and hopeless indeterminacy; it cannot avoid conflict but instead reveals particular conflicts which invite a *finite* range of possible solutions. Deconstructive practice certainly leads to indeterminacy, but does not justify every conceivable meaning. The indeterminacy that results is a constrained indeterminacy that results from the interplay between semantic path openings and closings guided by the actual historical succession of intertextual forms of attempted reconciliation between self and other.

Poststructuralist textual analysis and deconstruction is, as I have mentioned, important in South Africa’s postcolonial context. The postcolonial interpreter must be wary of essentialist colonial and anti-colonial narratives, both in the Constitution and legal judgements, and must deconstruct them to show their complicity with the master-slave narrative of imperialism. This is especially crucial at this juncture of South Africa’s history when the myths fostered in relation to reconstruction – tradition, nationhood and citizenship – are invoked to suppress existing heterogeneity. In this way, the postcolonial interpreter is called on to rewrite the colonial and postcolonial situation, to uncover the ideological and discursive construction of difference, and to evoke a conception of interpretation which shatters the coherence of the ‘original’ and the ‘invariable identity of sense’. Postcolonial interpretation, in

Derrida's words, "will not be readings of a hermeneutic or exegetic sort, but rather political interventions in the political rewriting of the text and its destination" (Derrida 1985: 32). Deconstructive interpretation in the postcolonial context involves an act of reading which links the past and the present, rather than being a simple forgetting of the past; it invokes what Benjamin would call "citation" and not "absolute forgetting".

Consistent with deconstruction, the pre-transition South African judiciary's "plain meaning" approach to legal interpretation (the ascription of distinct and transparent meanings to texts) is both misplaced and dangerous, since a text is not a pure presence that immediately and transparently reveals a distinct meaning intended by its author.¹⁷⁴ One can appreciate that meaning often does seem indisputable but this is to ignore that every writing contains an attempt, only partially successful, to reconcile identity and difference, unity and diversity, self and other. A text might give the impression of rendering plain or obvious meaning, but such impression is the product of ideological distortion, suppression of difference and subordination of the other.¹⁷⁵ In fact, there is no such thing as 'plain meaning'. Judges are situated within the context of legal culture which takes as its 'objective' what is only conventional and contingent. Moreover, resort to the jurisprudence of original intent, whereby the meaning of legal texts can be determined by reference to the transparent, self-evident intention of the framer of the text, can only lead to reification which prevents genuine intertextual determination of legal relationships. Equally, the singular adulation of the supposedly self-present purpose of a text results in an unwarranted isolation of a particular writing so as to sever the intertextual links which are the indispensable precondition of the generation of meaning.

Hermeneutic attempts at overcoming indeterminacy in legal interpretation are unsuccessful, or at least inadequate. Fiss's claim that interpretative rules can be developed by reference to the intersubjective perspective of an interpretative community is only possible through the suppression of difference and the subordination of the dissenting other. The interpretation of interpretative rules in liberal legality celebrates and validates the authority of the legal elite because the

¹⁷⁴ There is a connection between this naively representational theory of language, based on the classical conceptions of author, meaning and text-as-mimesis and the "civilising" ideology of liberal humanism (Niranjana 1992: 51).

¹⁷⁵ Klare writes that "if cultural coding sets limits (however implicit or unconscious) on the types of questions lawyers ask and the types of evidence and arguments they deem persuasive, surely this sets limits on the type of answers legal culture can generate?" (Klare 1998: 168).

conventions of legal culture reflect their perspectives, which are invariably those of dominant social groups with an interest in maintaining the status quo.

Hermeneuts such as Stanley Fish and other neo-Wittgensteinians argue that determinacy is contextual. Dworkin and Gadamer are of the view that consensus of meaning is possible through a dialogue between the interpreter and the tradition of the text (the history of legal precedents). Assuming that these theorists are correct about the role of context and tradition in producing meaning, it is worthwhile evaluating the context and tradition of the South African legal system. John Dugard writes: "The apartheid order was a legal order. Most of the injustices perpetrated by successive governments between 1948 and 1990 were committed in the name of the law" (Dugard 1997b: 270). These injustices included deprivation of citizenship and imprisonment, influx control laws, mass arrest and imprisonment, detention without trial and racial prejudice in all areas of social life. The judiciary under apartheid, containing many judges openly sympathetic to the National Party, colluded with the dictates of the oppressive regime.¹⁷⁶ Even where the judiciary was not sympathetic to the government, the hegemonic conception of law - conservative and premised on the belief in law's autonomy from politics - allowed political values to influence the judicial process in an unexamined manner.¹⁷⁷ Nearly all social relations were invested with legal significance through statute and the dynamism of common law, a web of legal relations which enabled apartheid. Meaning appeared determinate in this context but, following Fish, plain meaning was "made" - fashioned or contrived - through the force of rhetoric, which is to say that legal context itself is a rhetorical construct. The manufacturing of plain meaning also involves a dynamic process of incorporation and rejection. So, context is politically and historically contingent, happily so, since this acknowledges the possibility of alternative choices and of change. It could have been otherwise and it still can be. Similarly, the appeal to dialogue with tradition as a source of the production of meaning should, as Raymond Williams observes, be tempered with the recognition that

¹⁷⁶ "In the intervening thirty years, the courts and the organised legal profession subconsciously or unwittingly connived in the legislative and executive pursuit of justice ... There were, nevertheless, many parts of the profession that actively contributed to the entrenchment and defence of apartheid through the courts" (TRC Report: Volume 4, Chapter 4, p 101, Paragraph 33).

¹⁷⁷ In certain cases South African judges were prepared to agree that equal concern and respect was a commendable ideal, but concluded that it was outweighed by other considerations, including public

[w]hat we have to see is not just 'a tradition' but a *selective tradition*: an intentionally selective version of a shaping past and pre-shaped present, which is then powerfully operative in the process of social and cultural definition and identification. (Williams 1977: 115)

Williams argues that the selection of certain meanings and the concomitant exclusion of others is presented and successfully passed off as *the* tradition or *the* significant past and is thus one of the decisive processes within any hegemony. Hermeneutic approaches engage in the construction of "a cultural tradition in the guise of a unified realm of meanings and values separated from social relations of domination and power" (Brenkman 1987: viii). South Africa's legal tradition, the history of its legislative practices and common law precedents, is replete with constructed meanings which reflect the values of apartheid politics.

I am not suggesting that context and tradition be ignored in the practice of legal interpretation. On the contrary, they present fruitful points of departure from which transition may take place, provided they are addressed in their historical specificity, rather than as idealist devices that repress history and the voices of its antagonists.¹⁷⁸ Legal texts produced during apartheid need to be deconstructed to reveal their privilegings and rewritten in an attempt to reconcile self and other in accordance with the ethical demands of justice. We need to rewrite the past in the present with an eye on the future, which contains the possibility of justice. In this sense deconstruction is both emancipatory and utopian, in the sense of "using the imagination to explore new modes of human possibility and styles of will and to oppose the necessity of what exists on behalf of something radically better that is worth fighting for and to which humanity is fully entitled" (Santos 1995: 573). Once rewritten in the present, newly determinate rules must be deconstructed again, since the promised reconciliation of self and other is infinitely postponed. Determinacy is a necessary but insufficient condition for reconstruction: it is necessary to have rules and criteria to direct reconstructive efforts, but these rules will be provisional and deconstructible. Adorno remarked in *Minima Moralia* that "it is part of morality not to

safety (the protection of a racist status quo). For an example of this kind of reasoning, see *Omar v Minister of Law and Order & Others*, 1987 (3) SA 859 (A).

¹⁷⁸ As Justice O'Regan pointed out in *Prinsloo v Van der Linde* in relation to the interpretation of the equality clause in the Constitution, "given the history of the country we are of the view that discrimination has acquired a particular pejorative meaning relating to the unequal treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority was denied" (*Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) at para. 31).

be at home in one's home." (Adorno 1978: 39). It is in this sense that deconstruction offers transitional justice: we are always in transit to the promised utopia; the mistake is to think that we have arrived. The process of transition is a busy one – deconstruction followed by reconstruction followed by deconstruction – so that as Santos remarks "*the other part of morality is to be at home in what is not one's home*" (Santos 1995: 575, emphasis in original).

I take seriously warnings about the Southern application of poststructuralist/postmodern theory developed in Northern climes (Herwitz 1999; Santos 1995; Said 1993). As a cultural metaphor, the South is a product of colonialism and expresses all forms of subordination and suffering brought about by capitalist modernity: exploitation, suppression, silencing. The North, on the other hand, is the seat of imperialism, and its rationality reflects a discontinuity with the South.¹⁷⁹ Edward Said argues that resistance to European theory, which universalises even as it excludes the South, can take place, first, through a reorientation/ rewriting of history that sees Western and non-Western experiences as connected and so mutually defining, and second, by an imaginative and perhaps utopian vision which reconceives emancipatory theory and performance and third, by engaging in a "sort of migratory, and anti-narrative energy" (Said 1993: 337). Santos, who takes up Said's suggestion by positing the three utopian *topoi* of the Frontier, the Baroque and the South, argues that it is necessary to learn to go South, to side with the victim, but more than that, to become the victim. Postmodernism of the South must allow the South a voice, since what most prominently identifies the South is that it has been silenced. The epistemicide undertaken by the North was accompanied by linguacide, so that the South was doubly excluded from discourse in being presumed not only to have nothing to say, but no language to say it in. Only once the South has been given a voice through which to articulate its suffering can the moment of continuity of oppressor and victim, formulated by Hegel and later Gandhi, occur. Such a

¹⁷⁹ Jürgen Habermas, asked if his theory could be of any use to socialist forces in the Third World and if, on the other hand, such forces could in turn be of any use to democratic socialist struggles in advanced countries replied: "I am tempted to say 'no' in both cases. I am aware of the fact that this is a Eurocentric limited view. I would rather pass the question" (Habermas 1985: 104). Santos reads this ambivalence as an indication that Habermas' communicative rationality, in spite of its pretence at universality, excludes four-fifths of the world population (Santos 1995: 579, 580). In addition, Said notes that despite the seeming universality of theoretical application of the work of French theorists, all but Deleuze and Guattari, Todorov and Derrida have been silent on questions of racism, anti-imperialist resistance and oppositional practice in the Empire. This raises suspicions "that they [European theorists other than those just mentioned] are part of the same invidious 'universalism' that connected culture with imperialism for centuries" (Said 1993: 336, 337).

reconciliation is not possible except by developing a new ethics, an ethics not colonised by science and technology, but rather a new ethical principle, “the caring that puts us at the centre of all that happens and renders us responsible for the other” (Santos 1995: 581).

3.5 Practical Suggestions

Following my earlier argument for the need for intervention in legal praxis, I shall make two practical suggestions which would help to create the conditions necessary for the kind of interpretation I have proposed in the previous section of this chapter. My suggestions are, first, that judges must, apart from giving as full a consideration to the issue as possible¹⁸⁰, also set out in full the reasons for their judgements. Second, if judges are to interpret legal texts deconstructively, they will need to be educated as to the means and the manner in which a deconstructive interpretation would be carried out. This section expands on each of these suggestions.

Comprehensive Reasons

Judges must be encouraged to provide, as comprehensively as possible in the written texts that form their judgements, reasons, in accordance with the new “culture of justification – a culture in which every exercise of power is expected to be justified” (Mureinik 1994: 31). The fullest possible provision of reasons will provide the fullest possible opportunity for unearthing relations of power through deconstructive activity. Currently, however, in certain circumstances, South African courts may refuse a litigant who approaches it, relief, without such litigant being given a hearing and with no reason being given for the refusal, a practice recently upheld in *Mphahlele v First National Bank of South Africa Limited*¹⁸¹. Iain Currie defends the Constitutional Court’s current “decisional minimalism”, its approach to

¹⁸⁰ The idea that judges should give as thorough consideration as possible to the issues under adjudication is more contentious than it sounds. Scott Altman (1990) argues that although judges should always be candid (that is, not duplicitous), introspection in the act of judging renders law less constraining and subject to a greater degree to legal “houdinis” who view legal rules as deconstructible binds that rarely limit discretion. I think Altman may well be right about this, although unlike Altman, I believe that this is, subject to certain qualifications, a good thing.

adjudication which avoids, where possible, first order reasoning and large scale theorising. In defence of decisional minimalism, Currie cites Cass Sunstein as follows:

When people disagree on an abstraction – Is equity more important than liberty? Does free will exist? – They often move to a level of greater particularity. This practice has an especially notable feature: it enlists silence on certain basic questions as a device for producing convergence despite disagreement, uncertainty, limits of time and capacity, and heterogeneity. Incompletely theorised agreements are a key to legal reasoning. They are an important source of social stability and an important way for people to demonstrate mutual respect, in law especially but also in liberal democracy as a whole. (Sunstein, cited in Currie 1999: 149)

To me, nothing could be more misguided than decisional minimalism or the consensus manufactured at the cost of avoiding existing dissensus.¹⁸² For poststructuralists like Derrida and Lyotard, avoidance of inevitable conflict is counter-productive and pernicious. The production of silence is generally achieved through exclusion of dissent and otherness, for which the political history of apartheid acts as an example. Moreover, if dissensus operates to destabilise the social stability in a liberal democracy, this is only problematic if liberal democracy is regarded as the end of history. If competition of reasons activates latent inconsistencies in a liberal democratic society, then so much the better. Judges make value-laden choices in the routine course of legal interpretation and are responsible for the social and distributive consequences of their choices.¹⁸³ It is only through judges providing in their reasons the political values which motivate their decisions, that open agonistics between conflicting positions can be ensured. As Hutchinson observes, “the existence of

¹⁸¹ 1999 (2) SA 667 (CC). In this case the applicant challenged the constitutionality of the Supreme Court's practice of refusing petitions for leave to appeal without giving reasons for the appeal.

¹⁸² I agree with many of the arguments that Roederer advances in defence of comprehensive reasoning in his response to Currie's article. Roederer observes that “the shallower a decision is, the more difficult to determine whether a judge really has responsibly engaged the issue” and responding directly to Currie: “In his article, Currie is flirting with the idea of a culture of under-justification, of not giving full reasons. These are the beginnings of a culture of judicial insulation ... To the extent that that attitude is proposed for judges, lawyers and/or aspiring lawyers at the level of judgement, I think it is wrong-headed. If this attitude is instilled, it cuts off even the possibility of communication” (Roederer 1999b: 494, 511, 512).

¹⁸³ Section 39(1)(a) of the final Constitution provides that the judiciary must, in interpreting the Bill of Rights, “promote the values that underlie an open and democratic society based on human dignity, equality and freedom”. Section 35(1) of the interim Constitution contains an almost identical provision. The injunction is both indeterminate and potentially contradictory – equality and freedom, for instance, make notoriously uncomfortable bedfellows. The provision does not specify what the values that

disagreement need not always be a fearful sign of democratic crisis; it might simply represent a productive exchange over democracy” (Hutchinson 1999: 218). Chantal Mouffe continues in the same vein:

Indeed, the specificity of liberal democracy as a new political form of society consists in the legitimation of conflict as the refusal to eliminate it through the imposition of authoritarian order. A liberal democracy is above all a pluralist democracy. Its novelty resides in its envisaging the diversity of conceptions of the good, not as something negative that should be suppressed, but as something to be valued and celebrated. (Mouffe 1996: 9)

My advocacy of judicial provision of reasons should not be viewed as an advocacy of the ideas of reason and rationality shared by Enlightenment theorists. Although postmodernism (at least the variety I have been defending) denies the availability of an Archimedean point such as Reason, that transcends particular modes of argumentative enunciation, this does not mean that reason-giving should be abandoned. On the contrary there exists all the more reason to give reasons. Traditionalist jurists are simply mistaken when they assert that non-foundationalist accounts of law and adjudication “reject reason-giving altogether, putting in its place power, or play, or conventions” (Sunstein 1992: 779). Postmodern jurisprudence opens up a clearing space for reasons, once the strategic moves of legal modernism have been dispensed with.¹⁸⁴

Stephen Toulmin (1990) cogently argues that this “scientific rationalism” or logical rationality, typical of the second phase of modernity, was intellectually perfectionist, morally rigorous and humanly unrelenting but “left too little room for cultural or personal idiosyncrasies” (Toulmin 1990: 200). As opposed to this often pernicious concept of rationality, Toulmin advocates recovery of an ideal of rationality that was current before Descartes, a conception embraced by Renaissance humanism, whose central demand was that all thought and action be reasonable.¹⁸⁵

underlie an open and democratic society are. This provision, rather than guiding the interpreter one way or another, primarily operates to alert the interpreter to the inevitability of interpretative dissensus.

¹⁸⁴ Alan Hutchinson rightly asserts that “adjudication is based on reason insofar as it is constructed in and through the very judicial arguments that it is intended to guide” (Hutchinson 1999: 211). The fact that reasons are expressions of power only adds to the urgency of their provision, in order that they may be analysed, followed in the future or resisted as unjust.

¹⁸⁵ Critics of postmodernism, who charge it with rejecting reason *tout court*, fail to recognise that there is more than one concept of rationality and reason. Terry Eagleton, for instance, remarks that “the activity of arguing the toss over what we are unsure of is known as reason, for which postmodernism has in general a somewhat low regard” (Eagleton 1994: 10).

Reasonableness on this understanding means both developing modesty about one's capacity, and self-awareness in one's presentation – a practice completely alien to the judiciary prior to 1994 – and toleration of social, cultural and intellectual diversity. Consequently, provision of reasons will evidence the degree to which the judiciary *speaks* to the condition of the parties before it and *listens* to the condition of such parties with equal care (Toulmin 1990: 199). Since proving reasons is inherently practical and humane “we enter into a realm of legitimate uncertainty, ambiguity and disagreement” (Toulmin 1990: 200). In general, the legal profession needs to be more candid with itself and society about the politics of interpretation: it needs to be more reasonable.¹⁸⁶

An example of the salutary effects of reason-giving by the Constitutional Court is the judgement of Ackerman J in *Ferreira v Levin NO*¹⁸⁷. Although Ackerman's reliance on the “comprehensive liberalism” of Kant is unconvincing, it is a comprehensively reasoned and argued judgement, with which commentators are in a position to critically engage. Roederer observes this feature of the judgement:

One virtue of Ackerman J's opinion is that whether or not we agree with him, we know where he stands and it is easier to identify in what respects, if any, he has gone right and in what respects he has gone wrong. His colleagues on the Court know his views and so do lawyers, academics and citizens (should they wish to read the opinion). Perhaps he will change his views based on the responses he has received. Perhaps some will change their views based on the arguments he put forward. (Roederer 1999b: 494)

Education

It might be objected that it is all very well to suggest that deconstructive readings might transform constitutional law into “the dynamic product of a relentlessly jurisgenerative process of social and cultural construction” (Winter 1990: 1509), but that naïve normativity (simply suggesting to the judiciary that they should

¹⁸⁶ The Constitution explicitly insists on the supplying of reasons. Section 33(1) of the interim Constitution (section 36(1) of the final Constitution) provides that the rights in the Bill of Rights may be limited only to the extent that the limitation is reasonable and justifiable. In other words, the Constitution provides that the application (or non-application) of the fundamental human rights pivots on the question of reasonableness and depends on the judiciary to supply reasons for their decisions. To its credit the Constitutional Court in *Makwanyane* noted that “there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis” (at para 104 D-G).

change their practice) will be insufficient to actually change judicial practice. South African judges, mired largely in a 'plain meaning' approach despite rhetorical gestures towards the value of context (and the value of value), are unlikely to be receptive to, let alone persuaded by, arguments on the basis of indeterminacy, whether they relate to the unascertainability of the framer's intent, the polysemous character of language or the contextual nature of meaning. The first reason for this is that the post-apartheid judiciary is anxious (I develop the notion of "anxiety" in Chapter Five) to defend its actions in a transitional moment in which no value consensus exists. This leads to a tendency to appeal to meanings of words regarded as conventional by the majority of people likely to read or be affected by its judgements. Deconstructive method guarantees its own marginalisation because the homeostasis of judicial cognitive modes is unlikely willingly to employ methods designed to effect radical destabilisation. And even if the judiciary was prepared to do so, then it would need to be trained to read and write in a more deconstructive or philosophical mode.

Accordingly, South African judges and lawyers need to be informed and educated about the insights of postmodernism and poststructuralism in relation to the plasticity of language, the intertextual nature of meaning, the emancipatory possibilities of interpretation and the ethics of justice. Unselfconscious and unreflective reliance on the culturally available interpretative tools and insights received from the apartheid era, retard the actualisation of the judiciary's professed ambitions for transformation. The main reasons for the ascendancy of the formalist/positivist approach in South African law are

the emphasis on narrowly construed "private law" subjects in the training of law students; and aversion to the teaching of policy matters as part of the law syllabus at universities; a belief that good lawyering was largely a matter of textual exegesis and technical expertise...and an oft cited judicial belief that matters of policy were more appropriately left for the legislature. (Cockrell 1996: 7)

In short, everything turns on education. The introduction of the constitutional text is insufficient to create a new legal context, as is evident from Sarkin's observation that the various Constitutional Court judgements indicate that the court is prepared to allow parliament to govern without judicial interference (Sarkin 1998: 644). The

¹⁸⁷ 1996 (1) SA 769.

postmodern insight that subjectivity is situated within and constructed through discourse, indicates that judicial subjectivity is constructed, amongst other ways, through education (Kennedy 1983).¹⁸⁸ Derrida advises: “As to South Africa, I would say that philosophy, provided it is taught in a certain way, is the most urgent thing today in this country ... to know what the constitution is, and what it should be, is philosophy. an act of philosophising”. Derrida goes on to recommend for South Africa “a new form of teaching in which philosophy would be present in history, in literature, *in law for certain*, in medicine...” (Derrida 1999: 285, 286, emphasis added). The Constitutional Courts’ consistent rejection of the philosophical nature of interpretation and philosophy generally¹⁸⁹ prevents it from reconceptualising its role and its ability to fulfil its own transformative ambitions. The rejection of philosophy, of which jurisprudence is after all a branch, is a failure not only to consider conceptions of justice in their fullness, but also to appreciate the philosophical construction of law historically, and so can only result in conservatism. Through education, at schools and universities, and through journals consulted by the judiciary, the approach of legal professionals may be transformed. Judges should be provided with epistemologically radical theoretical tools which could enable them to provide reasoned justifications for politically progressive decisions.

¹⁸⁸ Kennedy is frustrated with the system of legal education in the United States inasmuch as it reflects and supports, in the manner of an auto-poietic subsystem, a hierarchy of power. Those who have power at each level in the hierarchy tend to bully those with less power. Students who have been ‘educated’ in this fashion become incorporated into and accepting of this hierarchy and tend to imitate their teachers’s forceful and aggressive actions towards their underlings. Subjectivities constructed through this cycle are likely to be deferential towards the attitudes and beliefs of superiors and less critical toward accepted beliefs and attitudes with the legal field. Although I cannot illustrate it here, I believe Kennedy’s analysis to be correct in relation to the South African legal education, although it appears that the emphasis of legal education in South Africa is now changing. To produce judges who are willing to challenge current legal orthodoxies and are theoretically equipped to do so, requires a shift in the focus of legal education from black letter rote learning towards critical engagement and attention to writing skills (Motala 1996). long a deficiency in legal education in South Africa. But cf. Woolman *et al* (1997) for a partial and qualified defence of South African legal education.

¹⁸⁹ Davis notes that the formalist nature of South African legal education has resulted in little creative use of philosophy in South African legal scholarship (Davis 1998: 132). More extremely, there has been considerable judicial hostility towards any recourse to philosophy in the law, notably by Justice Kriegler in *Makwanyane* (p. 51 above) and recently in *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) where the court held “Nor is it the function of this court to decide the issue on religious and philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to section 11” (at 1118).

3.6 Interpretation as Violence

In this chapter I have set out a number of reasons for fundamentally rethinking the political nature of legal interpretation. Perhaps the most powerful statement about the politics of interpretation is made by Robert Cover who argues that the literature dealing with interpretative practices ignores the central fact that “legal interpretation takes place in a field of pain and death” (Cover 1986: 1601):

Legal interpretative acts signal and occasion the imposition of violence upon others. A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organised, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another. (Cover 1986: 1601)

Derrida has observed that interpretation is itself a violence (Derrida 1992a: 13), a wrenching of one signification apart from others. Charles Yablon, in his deconstruction of a legal summons, reminds us that although the language of a summons may be indeterminate, this does not mean that it lacks meaning or force (Yablon 1992). If I receive a summons and I ignore it, I can be arrested and imprisoned (if it is a criminal summons) or summary judgement may be taken against me (if it is a civil summons). Following Derrida and Cover, the indeterminacy of legal language must be used to reveal and analyse the power exerted and pain inflicted by the legal process, while at the same time offering more just alternatives. In the following chapters, I examine the legal language of two Constitutional Court judgements as examples of the force of law and its potential to effect not only pain and death, but also reconciliation, freedom and, perhaps, (always perhaps) justice.

Chapter 4: Corrective Justice: *AZAPO* and the TRC

“Law, in whatever name, protects privilege ... The sole authority of the law is in its capacity to enforce itself. That capacity expresses itself in Trial. There could be no law without trial. Trial is the point of law. And punishment is the point of the trial – you can’t try someone unless you assume the power to punish him. All the corruption and hypocritical self-service of the law is brought to the point of the point in the verdict of the court. It is a sharp point, an unbelievably sharp point”.¹⁹⁰

“Justice is truth in action”.¹⁹¹

4.1 Narrative and Corrective Justice

E. L. Doctorow’s *The Book of Daniel* is concerned, in part, with a trial and its aftermath; with the power of law as discourse and the legal system as institution. It is the story of and by Daniel Isaacson, whose Marxist parents were executed for treason against the United States, and who must somehow redeem or avenge their murder. It is a *Bildungsroman* – the story of Daniel’s struggle for manhood - and a *Künstlerroman* – the story of a writer constructing an identity in conflict with his society. Daniel’s narrative is an epistemology, a mode of knowing: telling leads to understanding. The knowledge that Daniel’s narrative delivers is that reality is a function of power and the institutionalised discourses which constitute it. The book – both a self-composition and an act of cultural hermeneutics – reflects an awareness that power must be challenged by (counter)narratives which disrupt the “official” account of events. Hence the book’s often jarring disynchronicity and discontinuity, calculated to destabilise the linearity and totalising unity of official history. The story is Daniel’s attempt to recompose history after a great wounding. Doctorow fictionally reopens the real life case of the Rosenbergs (the Isaacsons in the book) in order to provide a “rehearing” or “rewriting” of the case, exploring its subject-matter from multiple contexts: the New Left radicalism of the 1960s, the Old Left radicalism of the 1930’s and the larger biblical story of the prophet Daniel and his struggle with exile and persecution. The central idea of *The Book of Daniel* is that only a

¹⁹⁰ E.L. Doctorow, *The Book of Daniel*, London: Pan Books, 1971, p. 190

¹⁹¹ This remark was made by Benjamin Disraeli in a speech to the English House of Commons on 11 February 1851.

deconstructed narrative can destabilise the hegemony of official history enough to open up new possibilities for interpretation. Indeed, that the book constitutes such a deconstruction shows Doctorow's passion for justice (Parks 1991: 456).

As with Daniel's narrative, the Truth and Reconciliation Commission (hereafter "the TRC") is an attempt to engage with the past in order to understand the present. (The characters in *The Book of Daniel* represent the polemics of the South African debate on institutionalised negotiation of the past: the revolutionary, Artie Stemlicht, rejects the past in the name of the present and the future; Daniel's sister, Susan, lives too much in the past and dies for it; Daniel rewrites the past from and for the present). In the TRC, equally, narrative seeks to disclose and challenge the hegemony of institutionalised discursive practices. The telling of narratives by victims and perpetrators in the TRC is a kind of locus of battle, as it were, for justice. It is a forum where the "regimes of power", as Foucault says, have been challenged. The function of the narratives of the participants has been to disrupt or dismantle the "regimes of truth", including their repressive effects on all areas of intersubjective relations in South African society. The narratives have prevented the power of the previous regime from monopolising the compositions of truth, and from establishing a monological control over contemporary culture, which would deny the existence and validity of the "other" and of "difference". The TRC presents the opportunity for a culture of polyphony and conversation, because it allows for the speaking and hearing of the many voices which constitute culture. It is the dual function of these narratives to provide disruption and restoration (one of the many modalities of reconciliation), that permits us to view the TRC as an engagement with justice.¹⁹² Derrida comments that "if the testament is always made in front of witnesses, it is also to open and enjoin, it is to confide in others the responsibility of a future. To bear witness, to test, to attest, to contest, to represent oneself before witnesses" (Derrida 1987: 37). Ironically, issues of narrative representation and its epistemological claims – I am thinking of historiographic arguments by Hayden White, among others, concerning the impossibility of separating "facts" from the acts of interpretation and narration that constitute them – mean that the notion of truth, understood in the absolute sense

¹⁹² In October 1998, narrative polyphony and 'objective history' clashed after the TRC published its findings. The ANC's executive committee rejected the TRC's report and launched last-minute legal proceedings in an attempt to block the publication of the report and to have parts of it repressed. F.W. de Klerk similarly applied to have certain sections of the report which were critical of him excised. The actions of both parties constitute an attempt to garner history for themselves.

of a direct correspondence between factual narratives and actual events, must be sacrificed. Instead, the TRC unravels narratives and attempts to give the subaltern a voice in history. It is a deconstructive resource that provides an alternative narrative of apartheid which exposes the fabrications and exclusions in the writing of the archive; it challenges the authority of the received historical record and restores the effaced signs of subaltern consciousness.¹⁹³ Accordingly the presence of “truth” in the TRC’s title must be understood as referring to narrative disruption and restoration: the substitution of narrative for veridicality.

Transitional justice in South Africa has required (and still requires) an acknowledgement of and engagement with an unjust past, as society reconstructs itself through an opposition between present self and past other. In Chapter One, I explained that “transitional justice” for the purposes of this work signifies a conception of justice applicable to the full spectrum of intersubjective relationships and activities occurring during the period of South Africa’s political and epistemological transition. This includes specific legal responses and solutions to acts of injustice past and present, whilst still allowing for focus on the transformative possibilities of legal discourse – broadly conceived to incorporate the TRC – for enabling a just and ethical future. Admittedly, this is a broader definition of transitional justice than most theorists will allow, since they would limit most of their theorising under this heading to the choices made, and quality of justice rendered, by leaders replacing authoritarian predecessors presumed responsible for gross human rights violations and other criminal acts. In the South African instance, the manner in which the successor (ANC) government has chosen to deal with those who committed atrocities under the apartheid regime is considered to be a facet of transitional justice by several studies in this area. Their dealings in this matter are, however, only one component of transitional justice as I have more broadly defined it. For the sake of clarity I shall term this facet of transitional justice “corrective justice”, although, as will become clear, this definition is discordant with various other definitions of corrective justice to date.¹⁹⁴ So be it: if transition is not quite revolution, it is a time of

¹⁹³ I leave open the vexing question of whether we can even speak about the subaltern as having ‘a voice’ over and above the heterogeneity of its echoes for treatment in the next chapter.

¹⁹⁴ Many theorists prefer to refer to “restorative justice” rather than “corrective justice”, presumably because corrective justice has come to be associated with the resolution of disputes through the formal adjudication of the courts. Charles Villa-Vicencio, for instance, writes:

consequential and necessary change, constructed in part through a revision of taxonomy and nomenclature. Needless to say, I harbour no illusions about the potentially partisan significations to which the term “corrective justice” may give rise.

In this chapter, I am primarily concerned with a close reading of the discourse and logic of the Constitutional Court in the case of *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa*. The case is important for a number of reasons¹⁹⁵: it was the first to challenge a statute enacted by South Africa’s democratically elected parliament; and it concerned an issue on which South African society is still deeply divided. The *AZAPO* judgement contains most of the principal ordering logics and arguments utilised in the South African correctional justice debate, which is concerned with the efficacy and justice of criminal prosecution and selective amnesty as a response to sufficiently serious, politically motivated crimes committed between March 1960 and May 1994.¹⁹⁶ It is my contention that the court’s approach and theoretical stance, although ostensibly consistent with the modern approach to rule-following and justice, is crucially contradictory; and that it is through this fissure in the structure of the court’s reasoning that justice, conceived in ethical terms, makes its appearance unannounced. That, subject to necessary detailing and qualifications, is the primary conclusion of the present chapter.

It is unsurprising that South Africa, like many new democracies, has been engulfed in controversy in seeking to hold the former, autocratic regime accountable for injustices perpetrated during its existence. Many survivors of such atrocities crave retribution against identifiable perpetrators and public acknowledgement of what occurred. Still others place a higher priority on moving ahead with their lives, rebuilding trust across previously divided groups and engaging in material reconstruction, including the strengthening of democratic institutions (Minow 1998: 4). Many people have felt that a priority must be set on the punishment of

Reaching beyond the confines of judicial punishment as an end in itself, truth commissions are essentially instruments of *restorative justice*. Restoration is aimed at victims, perpetrators and communities in a situation of political transition from undemocratic rule to the first phases of democracy and the affirmation of human rights. (Villa-Vicenzio 2000: 68)

Although I see that the use of the term ‘restorative justice’ is an attempt to distinguish it from court-based or retributive justice, I have elected to continue to use the term ‘corrective justice’ and develop a specific formulation of it. To retain the traditional term in a new context is to both rely on and challenge traditional meanings and patterns of activity.

¹⁹⁵ In Dugard’s opinion “*AZAPO* is the most important case to have come before the Constitutional Court to date – and here I do not exclude the death penalty case” (Dugard 1997a: 268).

wrongdoers, whilst others argue that amnesty and absolution are required if nation-building is to be regarded as an important social activity.

This chapter constitutes a meditation on South Africa's constitutional, legislative, judicial and otherwise legal (or quasi-legal) response to the injustice of apartheid as the country negotiates its past. The chapter investigates the sufficiency and wisdom of South Africa's solution, measuring it against a conception of correctional justice already alluded to and to be further developed in due course. I am mindful of an earlier reservation I expressed in Chapter One about pursuing closure on questions of justice, including correctional justice. No institutional response can ever adequately compensate for the manifold murders, acts of torture, abduction and other acts of extreme injustice. Closure is not possible on this question and even if it were it would no doubt be extremely insulting to those whose lives have been destroyed or irrevocably damaged. On the other hand, silence on this issue is also an unacceptable offence, implying, shockingly, that the perpetrators had succeeded in rendering contemporary complicit with an oppressive regime. Although legal and other institutional responses will always be insufficient, inaction by institutions means that perpetrators have succeeded in paralysing the means to justice. As Baudrillard has written in another context "[f]orgetting the extermination is part of the extermination itself" (Baudrillard cited in Young 1993: 1).

The South African response to the question of corrective justice, the TRC, has widely and correctly been characterised as a political compromise. It represents a middle path between the prosecution of apartheid criminals and a general amnesty for members and agents of the previous government. The TRC and the solution it embodies – a frank account by perpetrators of atrocities committed during, and in most cases in furtherance of, apartheid, in exchange for criminal and civil indemnity – was profoundly influenced by the military stalemate between the opposing government and ANC forces (Bundy 1999; Roederer 1999a). The South African liberation movement did not succeed in removing the apartheid government by military means: the government retained control over a formidable police and military force and was able more or less, to contain the effects of ANC mobilisation. It was rather the international campaign to isolate South Africa by means of economic and other sanctions and boycotts that, while detrimental to all aspects of South African

¹⁹⁶ A period bounded by two key moments in South Africa's history: the Sharpeville Massacre and the inauguration of Nelson Mandela as President.

life, placed the National Party under considerable pressure to change its policies. By the late 1980s the major parties to the South African conflict realised that matters had reached an impasse that only negotiations could solve.

The agreement to grant amnesty to apartheid criminals has to be understood in the context of the political settlement arrived at between 1990 and 1993. The debate over amnesty impeded constitutional negotiations and it was only at the last moment, at the behest of a veiled threat from South African Police generals, that agreement was reached to include provision for amnesty as a postamble. It reads:

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 the legacy of hatred, fear, guilt and revenge ... can now be addressed on the basis that there is a need for reparation but not retaliation ... 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 conflicts of the past.¹⁹⁷

The postamble also invested authority in parliament to determine, at its discretion, "the mechanisms, criteria and procedures" through and in accordance with which amnesty would be granted. Pursuant to the provisions of the postamble, parliament enacted the Promotion of National Unity and Reconciliation Act¹⁹⁸, which established the TRC and the procedures according to which it would facilitate "the granting of amnesty to persons who make full disclosure of all the relevant facts associated with a political objective." hold hearings to establish the fate or whereabouts of victims, recommend "reparation measures" in respect of such violations, and finally compile a report which would include recommendations for the prevention of future atrocities (section 3(1)).

Most commentators view the pursuit of justice and the discovery of the truth (which, in this context, may be said to mean the ascertainment of a fuller account of the past by incorporating narratives previously withheld, excluded or marginalised) to be two very different, mutually exclusive activities (Dugard 1997a; Mendez 1997; Wilson 1996; Minow 1998; Cohen 1995). The possibility of corrective justice in

¹⁹⁷ The postamble can be found after section 251 of the interim Constitution.

countries negotiating democratic transition is seen by most commentators as limited to the prosecution of perpetrators of gross human rights in the primary adjudicative institution of the (western) legal system, the courts, which are charged with meting out punishment to deserving wrongdoers. This is so despite the fact that countries emerging from late twentieth century authoritarianism have scarcely used their criminal justice systems to address the crimes of previous regimes (Siegel 1998: 432; Moellendorf 1997: 290). Conversely, although it is widely accepted that criminal trials will not match a well staffed and independent truth commission in finding out about a long and complex history of terror and that a truth commission's quest for the truth may be beneficial to and facilitative of reconstruction and reconciliation, it is often assumed that by granting amnesty as an incentive, justice is traded for truth (Siegel 1999: 449). Traditionalists may even concede that justice calls for truth, insofar as truth is instrumental for a just determination, but would then insist that it also and centrally calls for accountability. (What they really mean is *punishment* – the TRC's *quid pro quo* for amnesty is precisely the provision of an account). Accordingly debates in this area have been polarised around the twin issues of truth and justice: Should truth or justice take priority? If accountability is the aim of justice, does it require prosecution and punishment? I aim to show that truth and justice (as reconceived) are not mutually exclusive and that, contrarily, the concepts of justice I want to elucidate in relation to the aims and objectives of the TRC affords both an investigation into wrongdoing and an opportunity to court justice.¹⁹⁹ In order to illustrate this, I shall compare the merits of criminal prosecution with the TRC's mechanisms, in the light of a challenge to the constitutionality of the amnesty procedure of the TRC and various critical responses to the ensuing judgement of the Constitutional Court. Apart from the two questions above, my focus will be directed at answering the following: do the aspirations of the TRC represent "second best" goals in the face of practical constraints? Or do the TRC's objectives signify an admirable, perhaps ethically preferable response? Is it possible that the TRC points to an inevitable residue of justice which exceeds the reach of the modern, formally constituted legal system? In what follows I intend to argue that the TRC affords greater benefits to South African society and the individuals in it than do trials.

¹⁹⁸ Act 34 of 1995.

4.2 *AZAPO* and Legal Modernity

The argument that the TRC presented an unjust solution to the issue of corrective justice became the focus of judicial deliberation soon after the commencement of the TRC, when relatives of slain victims, enraged by the abrogation of their right to retribution, instituted legal action claiming that the amnesty provisions of the Promotion of National Unity and Reconciliation Act fell foul of their constitutional rights. In *AZAPO*, relatives of anti-apartheid activists – Steve Biko, Griffiths Mxenge and others – sought to set aside section 20(7) of the Act (which provided for the granting of amnesty) on the grounds that it was inconsistent with section 22 of the interim Constitution, which stipulates that every person shall have the right to have justiciable disputes settled by a court of law. The Constitutional Court held, in an eloquent judgement written by Justice Mahomed, that the postamble to the constitution, providing for amnesty, trumped section 22 of the interim Constitution and that references to “amnesty” in the Act should be given their widest possible interpretation and accordingly be construed as authorising criminal, civil and state indemnity. The court expressed sympathy for victims’ demand that acts of wrongdoers be “prosecuted and effectively punished for their callous and inhuman content in violation of criminal law” (para. 16) and noted further that “every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity”. However, it decided that the need for punishment of perpetrators was outweighed by victims’ right to “public investigation, verification and correction” (para. 17). With a fuller account of misdeeds, the court held, victims would be able to expose their grief publicly and to receive collective recognition of their suffering. Mahomed DP also acknowledged that without a political agreement on amnesty, the continued prospect of retaliation would render nugatory continued efforts to effect democratic transition.

Critics of the *AZAPO* decision, both for and against the court’s final decision, have detected central inconsistencies in the logic of the judgement, contradictions which have been regarded either as the inevitable result of the judiciary’s

¹⁹⁹ David Dyzenhaus suggests that the TRC provides justice that is “reconstructive”, a form of justice which seeks institutional transformation through an examination of the wrongs of the past and which “seeks to establish democracy in South Africa” (Dyzenhaus 1998: 6, 180).

development of an autochthonous jurisprudence or signs of a choice of political expediency over justice, depending on where such commentators stand on the amnesty issue. The court's upholding of the validity of the postamble in view of its inconsistency with the right to have a legal hearing seems curious given the fervour with which liberal rights discourse is currently adulated. For certain liberal commentators, resolution of such inconsistencies is clearly provided for in the Constitution; more particularly, a right included in the chapter entitled "Fundamental Human Rights" (Chapter 3) must surely take precedence over another provision in the constitution which is not, after all, *fundamental*.²⁰⁰ Moreover, the court's almost cursory acknowledgement and final rejection of international law as a factor is regarded with some dismay by those who view South Africa's increasing immersion in circuits of information and legitimation as a good thing. In some ways, I think that the judgement may be viewed as an implicit (it could obviously not be made explicit) acknowledgement that justice is not co-extensive with the foundationalism of modern jurisprudence. Indeed, it is precisely the need to provide a historically contingent, anti-essentialist (in other words, postmodern) form of justice, which results in a rupturing of the modern register of the court's theorising. Those theorists who view the *AZAPO* judgement as an abrogation of the liberal theory of justice are basically correct; they are, however, mistaken in their belief that liberal legality is co-extensive and/or coterminous with justice.

Moellendorf's Critique of AZAPO

One such theorist is Darrel Moellendorf. In a comment on the *AZAPO* case, Moellendorf (1997) questions the moral status of the court's reasoning. He begins by noting that to justify the granting of provisional amnesty simply by observing that amnesty assurances in the interim constitution were the result of a compromise, is insufficient to establish its ethical credentials. He goes on to observe, quite rightly, that fundamental legal and political decisions should be consistent with what morality requires; he then points to examples of the divergence of law and ethics during apartheid, and what Lyotard calls the *différend* involved when, during apartheid, the

²⁰⁰ The Concise Oxford English Dictionary defines "fundamental" as "Of the groundwork, going to the root of the matter, *-serving as base or foundation, essential, primary, original, from which the others are derived*" (emphasis added).

idiom of the courts precluded legal justification by liberation activists, notwithstanding the moral rectitude of their actions. All well and good so far. But immediately thereafter Moellendorf claims that, in the context of the *AZAPO* case, justice would amount to legal recourse by victims against perpetrators in accordance with the “fundamental rights...to seek redress [in the ordinary courts of law] for harm suffered” (Moellendorf 1997: 285). The claim is a startling one given the previously acknowledged separation of law and justice during apartheid. What Moellendorf – in an expression of triumphal liberalism – means is that although law and morality diverged during apartheid, the democratic inclusion of fundamental human rights in the Constitution has ensured their happy reconvergence. Moellendorf’s other central claim, also stemming from broadly liberal concerns, is that the dictates of justice demand that wrongdoers should be punished.

In an earlier discussion of the South African legal system during apartheid, I mentioned that the hegemonic jurisprudence of positivism had based the legitimacy of law on the formalism of legality, hence the decline in the relevance of ethical considerations. The positivist understanding and explanation of the operation of law is logically and politically premised on the absence of morality; indeed, the law as a whole is presented as a moral enterprise because it excludes morality from its operation. All of which provided successive apartheid governments with a justification for perpetrating grossly immoral acts (the Immorality Act will serve as an ironic example). Does the introduction of human rights reintroduce ethics into the law as Moellendorf thinks? Certainly not – as I believe the following re-examination of modernity’s delinking of law and morality reveals. Alastair MacIntyre (1984) observes that modernity has witnessed a profound “moral catastrophe”, a radical breakdown in ethical concord and a systematic annihilation of the classical communities of value and virtue. With the absence of shared purpose, the modern concept of law combined freedom, reason and morality against the background of a polyphony of values. The genesis of modern law can be traced to the Cartesian meditations and the inward turn. For Descartes, while the phenomenal world of reality is external to the subject, it can be approached on the analogy of the subject’s self-understanding. Behind every *cogito* (I know) there is an *ego* (I), “the apodictically certain and last basis of judgement upon which radical philosophy must be founded” (Husserl 1967: 10). Kant searches for the universal preconditions of moral actions and discovers them in the free and rational action of the autonomous

agent who follows the law posited in the categorical imperative out of a pure sense of duty and respect: “Act in such a way that the maxim of your will will always be valid as the principle establishing the universal law” (Kant 1956: 30). Kantian autonomy makes man the law’s subject in a double sense: he is simultaneously the subject that provides the law and subjected to the law. Within the legal system, laws are considered justified if they are prescribed by those who are subjected to them. Duty and respect are equally important for both law and morality; moral action follows from the law of the universal imperative of reason and legality is obedience to the laws of the state. Kant views the social contract not as a historical covenant but as a requirement of reason that lies behind state law. For Kant the metaphysical foundations of morality have no history, although, following their universal formulation, they seem to meet the condition and needs of modernity.

The Kantian concept of autonomy and moral law depends for its concretisation upon a universal and rational community, a *communis rationis*, which acts as a heuristic principle and as the historical and empirical horizon for the autonomous subject. We are autonomous in the sense that we follow the law we give ourselves, but this law must be valid for all. However, readings of Paul de Man and others have shown (de Man 1979; Schlag 1997) that the contractual derivation of authority and the constitution is as fictional as individual autonomy; both are based on the rhetorical strategy of metalepsis (the reversal of cause and effect) in which what comes after (the subject) is presented as the source of law. As discussed in Chapter One, the community of reason – the “we” implied by the categorical norm – can never be co-extensive with the community that legislates within the nation-state. The “we” of the rational community to which the subject must refer becomes a mirage once any of the empirical characteristics of the legislator and subject are added to it. The requirement that law’s subjects and subjected must be the same individuals cannot be satisfied. Nevertheless though, it would seem that one particular type of positive law, human rights, *appears* to satisfy the Kantian injunction that the law should represent the whole of rational mankind. Of course this is not the case, since abstract human rights, and the abstract human nature on which they rely, bear no relation to the concrete empirical fact of social reality.

Moellendorf’s ambivalence, if not scepticism, concerning the ethical status of the negotiated settlement as a whole, and in particular as a compromise - “there are compromises and there are compromises” (Moellendorf 1997: 283) - reflects the

Kantian view of the social contract as the result not of a historical covenant, an act of violence, but as a requirement of reason that lies behind state law. Although Moellendorf seems to be in favour of compromise under certain circumstances - "Some compromises are morally justified given the balance of forces and the moral costs and benefits of trade-offs. Others cannot be justified because of the costs associated with them. The latter may involve compromises to fundamental principles" (Moellendorf 1997: 283) - what he really means is that the compromise, if there is to be one, should provide for the right to adjudicate in court, since this is a 'fundamental right' which should not be compromised. But why is this a fundamental right? Why must this right take precedence over other rights, such as the right to 'truth'? And is the right to litigate commensurate with the requirements of South Africa's transition? Moellendorf claims to be sanguine about compromise, but refuses to do so where it is most important: in relation to competing rights and interests. Moellendorf's position is reminiscent of Kant's preference for consistency over moderation or compromise and his (Kant's) deriding of "political moralists" who 'debase' morality by making it serve partisan interests. Instead, he wants politics to serve morality, as Moellendorf does ("Fundamental legal and political decisions should be consistent with what morality requires" (Moellendorf 1997: 284)). For both Kant and Moellendorf, the "moral politician", or moral judge, is one who upholds fundamental human rights as the "limiting condition" of what is legally and politically permissible. The result is to moralise politico-judicial relations by insisting that "a true system of politics cannot therefore take a single step without first paying tribute to morality" (Kant 1977: 117, 118, 125). What Hegel criticises Kant for, and what I find objectionable in Moellendorf, is that this elevation of morality as the judge of law and politics translates into a kind of extremism that rules out policies based upon the prudential reconciliation of interests (Smith 1986: 128). Although Moellendorf claims not to oppose compromise, his formalist conception of justice renders him quite unable to do so. When he says that "legal and political decisions should be in accordance with what morality requires", "what morality requires" is exactly what is in question. Moellendorf's equation of morality/justice with formal rights, actionable only through litigation, means that for him people have the right of access to court no matter what the broader social concerns are, whereas I am arguing that justice must start with the broader social concerns and that what is moral depends on what these concern are.

Moellendorf's ahistorical view ignores the historical contingencies and practical requirements of South Africa's transition. As Dullah Omar, ANC negotiator during the negotiations and former Minister of Justice, explained "without an amnesty agreement, there would have been no elections" (Omar cited in van Zyl 1999: 650). Furthermore, Moellendorf's equation of the protection of fundamental rights with justice completely ignores the structural nature of injustice in modern society. The South African Bill of Rights states that: "[e]veryone is equal before the law"²⁰¹ and "everyone has inherent dignity"²⁰². The claim is that human nature is abstract and universal and parcelled out in equal shares to everyone throughout South Africa. However, once empirical and historical material is introduced into this abstract human nature, the disparities between the abstract legal subject of Kantian discourse and the concrete human being in the world emerge. The discourse of human rights is seen for what it is: an indeterminate discourse²⁰³ of, first, rebellion and, later, legitimation that has little purchase as a descriptive tool of society and its bond (Douzinas and Warrington 1994: 148). The community of human rights is universal but always virtual; the humankind of universal nature does not exist empirically, a fact which some commentators regard as a simple failure to return the cat to the bag. Devenish, noting that "all men and women are ... created equal", wistfully notes: "it is regrettable that of all the noble principles of democratic philosophy, equality has proved the most intractable to convert from merely an ideal to the hard world of reality" (Devenish 1999: 56). It is both regrettable and inevitable: all men and women are not born equal and are subjected to the domination of power relations throughout their lives. Human rights, through abstract guarantees of liberty and equality, rhetorically mask the operations of power in South Africa and efface the current material strictures and inequalities.

Moellendorf's equation of justice with the rights of individuals to seek redress through the courts of law for wrongdoing (Moellendorf: 285) is typical of modern jurisprudence. If modernity has been an era of profound "moral catastrophe", in no other field has the abandonment of ethics occurred so extremely as it has in law. At the same time, law is proposed as the main substitute for the absent value consensus and the emptied normative realm. In modern jurisprudence, the law is public and

²⁰¹ Section 9(1) of the final Constitution and 8(1) of the interim Constitution.

²⁰² Section 10 of the final Constitution.

²⁰³ See the divergence of judicial interpretation of the "right to life" (Section 11) in *Makwanyane*.

objective: rules ascertainable objectively, without the effects of individual preference, prejudice and ideology. Its procedures are technical and its personnel neutral. Any contamination of law by value will compromise its ability to turn social and political conflict into manageable and technical disputes about the meaning and applicability of pre-existing public values. This insulation of law from ethico-political considerations allegedly makes the exercise of power impersonal and guarantees the equal subjection of citizens and state officials to the dispassionate requirements of the rule of law. And since adjudication is presented in common law jurisdictions, such as South Africa, as the paradigmatic instance of law, the demand for justice is equated with the moral neutrality of the judicial process. The modern conflation of law and justice lies behind demands by Moellendorf and others, that criminal prosecution be preferred (at least as a first choice) over truth commissions (Orentlicher 1991; Roederer 1999a; Siegel 1998: 450). In the modern conception, justice becomes identified with the administration of justice and the requirements and guarantees of legal procedure and the "interests of justice" are routinely interpreted as the interests of adjudication (Douzinas and Warrington 1994: 151). In substantive terms, justice loses its critical character; it becomes an institution transformed from the utopian or "mystical" tool of denunciation of socio-political immorality into a legitimatory narrative of modern law. In modern jurisprudence, morality has vacated the normative universe, which is now exclusively inhabited by the prescriptions and decrees of legislative institutions. Consequently, justice is not directly involved with values, a fact represented in the symbol of the blindfolded goddess holding the scales of justice. Justice is presented as a "cold virtue, sometimes a cruel one" (Heller 1987: 11) which "lacks the warmth of morality" (Lucas 1980: 63). The blindfold, which ostensibly guarantees impartiality, also precludes both sight of and insight into the contingent circumstances of litigants and so reinforces the modern characterisation of the legal process as blind calculation from which the ethical relation between litigants, and the ethical relation of the adjudicator to the parties, is excluded. Indeed, it seems as though it is the scales, rather than the woman holding them that renders judicial decisions.²⁰⁴ That justice is rendered as a woman in this early symbol, used

²⁰⁴ As Adorno observes "in [law], the principle of equivalence (the identity principle in other words) becomes the single overriding principle. Incapable of responding to dissimilarities, it becomes the surreptitious promotion of inequality" (Adorno, quoted in Van der Walt 1998: 81).

before women can vote or own property, let alone act as lawyers or judges, attests to the irrelevance of the corporeal person who holds the scales (Sypnowich 1999).

Moellendorf's identification with the modern legal paradigm forces him to equate morality and liberal legality (fundamental human rights) - "such rights are fundamental to the just functioning of a legal system" (Moellendorf 1997: 287) - which precludes his viewing truth (narrative polyphony) as anything but secondary and, moreover, as being without value outside of the context of legal formality: "Notice that the value of truth here is quite different than in standard courtroom cases. In such cases, the truth is instrumentally valuable because of its service to justice" (Moellendorf 1997: 287). Moellendorf's view of amnesty and punishment is equally Kantian. He observes:

The moral argument that a policy like amnesty is justified by such goods [psychological goods for victims and perpetrators] must be a consequentialist one. The amnesty provision is necessary for the truth and the truth is valuable because of the great goods of well-being it yields. (Moellendorf 1997: 287)

This assessment may be correct. Indeed, utilitarians like Bentham, for instance, are only in favour of punishment if its imposition results in an overall maximisation of happiness. Bentham begins his chapter on "Cases Unmeet for Punishment" in *An Introduction to the Principles of Morals and Legislation* by observing that "all punishment is mischief; all punishment in itself is evil" and that according to the principle of utility, punishment ought to be allowed only "insofar as it promises to exclude a greater evil" (Bentham 1970: 158). For instance, greater evil would be avoided "where the mischief that it produced [would be less than] what it prevented" (Bentham 1970: 155). For Moellendorf, the beneficial consequences of amnesty to post-apartheid society cannot justify the violation of the fundamental rights of particular individuals. He writes in this regard: "Although the achievement of the goal would be a great good, one cannot simply weigh that good against the violations of rights of individuals ... [q]uite the contrary, this right limits what might be done in pursuit of the goal (Moellendorf 1997: 287). Prevalent in Moellendorf's position on punishment is the extreme deontologism of limiting punishment, almost whatever the consequences, that is manifested in extreme observations such as the following: "it is difficult to imagine how a policy goal of promoting well-being could ever outweigh punishing those guilty of genocide" Moellendorf 1997: 287). These words closely

echo, perhaps unselfconsciously, Kant's deontological rejection of utilitarian considerations in penology when he writes that the "law concerning punishment is a categorical imperative, and woe to him who rummages around in the winding paths of a theory of happiness looking for some advantage to be gained by releasing the criminal" (Kant 1965: 99). However, whereas Kant leaves open the possibility of imagining an advantage in the abrogation of punishment, Moellendorf more or less forecloses on any reasonable possibility of so doing. Indeed, it is anything but difficult to imagine that the goal of providing psychological and other consolation to apartheid victims through the facilitation of accounts of atrocities by perpetrators and victims might properly be preferred to punishment of the guilty.²⁰⁵

One might even say, remaining within rights discourse, that given the history of apartheid, victims have a right to know what happened and that, if through granting amnesty and receiving accounts of the past, these victims were enabled to negotiate the reconstruction of society and face the challenges of the future, amnesty should be granted.²⁰⁶ Moellendorf does recognise that fundamental rights are not absolute and that they "might be outweighed by other rights claims or if the background conditions of justice cannot be achieved without doing so" (Moellendorf 1997: 287). Having made this concession he is unable presumably because of his deontological leanings, to take the acknowledgement to its logical endpoint: that justice cannot be the outcome of punishment when punishment is imposed only to

²⁰⁵ Chapter nine of volume five of the Report of the Truth and Reconciliation Commission documents the healing and reconciliatory effects of the narratives provided by both victims and perpetrators. Ms J Msweli testifies:

I want the people who killed my sons to come forward because this is a time for reconciliation. I want to forgive them, and I also have a bit of my mind to tell them. I would be happy if they could come before me because I don't have sons today ... I want them to tell who sent them and to come and kill my sons. Maybe they are enemies, maybe they are not. So, I want to establish as to who they are and why they did what they did. (TRC Report, Volume 5, Chapter 9, p378)

²⁰⁶ Rosemary Jolly and Derek Attridge (1998: 6) describe how in

witnessing the proceedings of the Truth and Reconciliation Commission, one notices with interest that victims testifying are as anxious to know more about the details of their victimisation as they are to request reparation from the state; in some cases, when asked what they wanted from the Commission, those testifying requested only information and not reparation. While retribution satisfies a certain sense of symmetry, the witnesses anxiety about their victimisers' motives and further details of crimes committed exceeds any closure retributive justice on its own can offer.

satisfy the desert of the perpetrator²⁰⁷, or to satisfy an abstract right of the victim, eschewing contemplation of the consequences of punishing or of granting amnesty. This is so because, in relation to any action with inherent ethical impact, consequences matter - which is not to say that the needs and wishes of individuals should *necessarily* be sacrificed for the common good. Far from it. I do not believe that the debate concerning the ethics of the TRC should be simplistically polemicalised in deontological/utilitarian terms. Whilst Kantian claims to a transcendental realm of reason before and outside experience are unconvincing, the utilitarian concept of justice as the calculation of consequences is equally (albeit differently) unpersuasive. Utilitarianism mandated that competing versions of the good were to be translated into a common measure of pleasure and pain, confirming the reduction of all types of use and moral value into a system of universal exchange. Utilitarianism believed in the possibility of translating incommensurable claims, expectations and desires into a practical equation, a calculus of felicity, that would strive to achieve the greatest happiness for the greatest number. Utilitarianism's failures are well known; it suffices to say that the allegedly neutral calculus of diverse pleasures and pains became an excuse for the imposition of self-serving calculations by those who operated it. This is most powerfully portrayed in Dickens' *Hard Times*, in which utilitarianism is seen as imprisoning human beings in a dreary industrial landscape of brick terraces and foul chimneys where they are enslaved by machines and reduced to numbers.²⁰⁸

The politically and historically contingent context of the South African transition must be influential over its success, so that to legislate in universalist terms about the ethics of amnesty and punishment is not to do so in the spirit of justice, if justice is conceived as incorporating ethical relations and in turn ethical relations are recognised as subsisting between specific individuals faced with problems not (always) of their own making. The choices that individuals make are constrained by the limitations of discourse and context which prefigure them so that even to talk about the ethical dimensions of particular actions must incorporate an investigation into the particular context. Moreover, if questions of ethics exist only in relation to

²⁰⁷ Following Kant, the criminal "must *first* be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or his fellow citizens" (Kant 1965: 100, emphasis in original).

²⁰⁸ The moment of recognition of the limits of utilitarianism is poignantly played out in a scene in which Mrs Gradgrind, on her death bed, epiphanically becomes aware of the exclusion of value from her life which strict utilitarianism has effected – only to die before she has an opportunity to articulate

actual individuals in context, justice cannot be blind to the idiosyncrasies of their situation as it is in the modern conception. Situatedness is one of the “background considerations of justice” (Moellendorf 1997: 287) as Moellendorf puts it. It may be that (as I am in fact arguing), in the circumstances of the South African tradition, the demands of victims that punishment be inflicted are outweighed by the needs of all individuals in society to engage in reconstruction (of institutions, subjectivities and ethical relations). The requisite co-operation between individuals may demand *reinscription* of the ethical in intersubjective dealings which the operation of the TRC went a good distance towards providing. Before I detail the ethical dimensions of the operations of the TRC, and then advocate a particular postmodern conception of justice furthered by it, I need to explain why the consequences of punishment (since I have said that consequences are important) are, on the whole, undesirable and, secondly, what are the implications of imposing the legal idiom on those who are not conversant in it and who have been victimised by their exclusion from the legal system.

Penal jurisprudence has been the subject of philosophical interest since at least Plato, who in the *Republic* understands the presence of crime in society to be “the result of a defective culture and bad breeding and a wrong construction of the state” (*Republic* VIII, 552e), and for whom punishment facilitates “correction, intimating that the penalty corrects or guides” (*Protagoras* 326 d-e). It is not my intention to provide an account of the history of the jurisprudence of crime and punishment from Plato’s account of punishment as an educational remedy for the “evil condition of the soul”, Aristotle’s proto-Kantian conception of punishment as the just desert following the voluntary assumption of wickedness, Hegel’s view of punishment as the symbolic negation of the crime, through to the consequentialist concerns of Beccaria, Bentham and beyond.²⁰⁹ Suffice to say that three primary purposes of punishment may be identified: the utility value of punishment as deterrence, the rehabilitative value of punishment, and punishment as retribution (Pauley 1994: 1). The idea that punishment would deter future crime is incompatible with a wealth of empirical evidence to the contrary, to which the Constitutional Court referred in *Makwanyane*

this recognition (Dickens 1969: 225). Lewis Mumford remarks, not without irony, that in nineteenth century England, it was opium that became the religion of the workers (Mumford 1934: 179).

²⁰⁹ That account is more properly the subject of a separate study, one which has in part been carried out by Matthew Pauley (Pauley 1994) in his rigorous account of the jurisprudence of crime and punishment from Plato to Hegel.

in its rejection of deterrence as a justification of the death penalty. Neither is there forceful evidence to support the proposition that punishment is a rehabilitative treatment for criminals. Indeed, if we are to take Foucault's *Discipline and Punish* seriously, we must acknowledge that the panoptic structure points to a disciplinary rather than rehabilitative purpose. Power attains its highest degree of intensity in a penal institution. Foucault observes that "[w]e still have in appearance, a legal system which punishes the criminal. In fact, we have a justice that proves itself innocent of punishing by pretending to treat the criminal" (Foucault 1990: 248). Louk Hulsman, professor of penal law at the University of Rotterdam, has advocated the abolition of the penal system on the grounds that it is constructive of delinquency and ends up incapable of realising the social finalities it supposedly pursues. For Hulsman, every reform is illusory and the only coherent solution is abolition. Instead of punishment and shame, he argues, conflicts should be regulated through procedures of arbitration and non-judicial conciliation.

Perhaps the strongest argument against both the retributivists and utilitarian advocates of deterrence is that they tend to view individual actors as fully responsible persons who have, and who freely exercise, the ability to choose between good and evil. On the poststructuralist view, this is simply mistaken; subjectivity is constructed through the modalities of power coursing through discourse. To be a subject is always to be subjected. Consequently to treat criminal action as the product of the autonomous will is not only unjust, it is a complete misdiagnosis of a problem resolutely inscribed in the social fabric. To its great credit, the court in *AZAPO* acknowledged that the evils of apartheid were the product of discourse and context when it noted that "[t]he wicked and the innocent have often both been victims" (para 17h).

On the question of the nature of modern legal discourse and the exclusory effects of the modern legal idiom, as it pervades legal proceedings, it should be noted, following Foucault, that legal language is crucial to the exercise and maintenance of power and domination (Foucault 1980). Its linguistic register exists to represent and preserve the special status and knowledge of particular groups and institutions – legal and legislative institutions – and as a consequence to devalue and exclude those who are unfamiliar with it. The exclusivity, distance and reification that characterises modern legal discourse can be seen as a system of "covert strategies to discourage opposition to the authority of legal meaning" (Higgins 1997: 362). Not only does

legal discourse employ an authoritative specialist register whose lexicon and syntax reflect the historical influence of alien and obsolete dialects, it employs it in a hierarchically ordered, alienating institutional space – courtrooms. Modern legal discourse privileges selected terminologies and semantic forms which results in an exclusive system of meaning. Moreover, given the essentially combative nature of both civil and criminal proceedings, one is tempted to agree with Foucault's assertion that

the court, with its triple division into two disputing parties and the neutral institution, which comes to the decision on the basis of some concept of justice, which exists in and for itself, seems to me a particularly disastrous model for the clarification and political development of popular justice. (Foucault 1980: 29)

It has been a frequent criticism of the western pattern of triadic adjudication, particularly in its Anglo-American guise (adopted in South Africa), that it is far more preoccupied with winning and losing than with justice. Litigation is often either the result of or precursor to resentment and feuding. Minow observes:

reconciliation is not the goal of criminal trials except in the most abstract sense. We reconcile with the murderer by imagining he or she is responsible to the same rules and commands that govern all of us; we agree to sit in the same room and accord the defendant a chance to speak, and a chance to fight for his or her life. But reconstruction of a relationship, seeking to heal the accused, or indeed, healing the rest of the community, are not the goals in any direct sense ... [which is to] seek the separation of the adjudicated wrongdoer from others through sentencing to prison or death. (Minow 1998: 26)

In my view, the demands of reconstruction facing South Africa have necessitated an attempt at reconciliation rather than the creation of pariahs by parvenus. Not that it is necessary to be consequentialist in rejecting separation (the separation of incarceration) in favour of reconciliation since, as I intend to argue, the latter is, for other reasons, ethically preferable to the former.

In the *AZAPO* judgement, Mahomed DP went further than simply upholding the granting of amnesty to perpetrators for criminal and civil liability. He also defended the indemnification of the state in respect of delictual claims against the previous state. The court's rationale was that the limited resources of the state could not be distributed on a basis preferential to the delictual claims of victims since this

would divert desperately needed funds from other areas of reconstruction, such as education, housing and health care, and that in any event the TRC would effect reparations on a more equitable and cost-effective basis. Moellendorf, who as we have seen, seems to equate injustice with the invasion of fundamental rights, asks “why, for example, would civil liability, within some upper limit, in cases of gross human rights abuses be inconsistent with the broader aims of reconstruction?” (Moellendorf 1997: 291). Again, the question fails to take into account the circumstances of victims, most of whom are impoverished blacks, who cannot afford the exorbitant costs of legal services in South Africa: legal services are a privilege of the wealthy minority. Although the Constitutional Court has given full effect to the constitutional right to free legal representation for indigent accused in criminal trials²¹⁰ (although most accused continue to be unrepresented), there is no corresponding right to legal representation for civil litigants. Most victims would, therefore, not be able to afford legal representation and would be unable to claim compensation. Furthermore, injustice is not limited to gross human rights violations, nor can it be translated into existing delictual classifications. Victims of human rights violations are not the only victims of apartheid. Many of the lawfully prescribed practises of apartheid relating to systematic discrimination and persecution on racial grounds fall outside of the legal categories by virtue of which a claim is delictually actionable. Following Moellendorf’s suggestion of compensation through the courts would not only incur huge legal costs, but would have the effect of preferring certain categories of persons, according to a taxonomy developed by an elite, and would exclude a victimised majority on whom the effects of oppression are most wide spread.

Part of Moellendorf’s failure to perceive the fundamental interconnectedness of corrective justice and redistributive justice – he wants corrective justice, in the form of civil and criminal litigation, to be unaffected by broader redistribution policies – presumably follows from an adherence to Aristotle’s formal separation of political justice into the categories of distributive and corrective justice (Aristotle,

²¹⁰ Section 25(3) of the interim Constitution provides: “Every accused shall have the right to a fair trial which shall include the right ... (e) to be represented by a legal practitioner of his or her choice or, where substantial injustice would otherwise result, to be provided with legal representation at state expense, and to be informed of these rights”. Section 35(2)(c) of the final Constitution contains a corresponding provision. In *S v Ramuongiwa* 1997 (2) BCLR 268 (V) the court held that the right was equivalent to the rule set out in *S v Khanyile* 1988 (3) SA 795 (N); that an accused has a right to

Nicomachean Ethics, Book V.v.4, 281). To illustrate the unfeasibility of this formal division of justice, I offer the contemporary legal formalism of Ernest Weinrib (1988) as an example. Weinrib defends and elaborates on the Aristotelian separation of the two forms of justice. He indicates that the two forms are irreducible and that, accordingly, particular juridical relationships come within the sweep of corrective or distributive justice but never both. As understood by Weinrib, corrective justice involves the award of damages which simultaneously quantifies the wrongdoing of one party and the suffering of the other party in a bipolar private transaction. The award of damages undoes, or erases, the interference of delicts, and purports to reinscribe the initial equilibrium between individuals, linked only externally through legal relations, rather than the internal interpersonal links such as those forged through an ethic of care. Corrective justice, argues Weinrib, deals with the immediate relationship of person to person and is completely removed from politics, since it merely seeks to restore the initial equilibrium between a perpetrator and victim regardless of the actual wealth, merit or virtue of the interacting legal actors. However, whereas corrective justice is concerned with the recovery of the *status quo ante*, distributive justice requires the allocation of benefits and burdens of social cooperation in proportions set by applicable criteria of distribution. Also, and consistent with Weinrib's analysis, distributive justice, unlike corrective justice, can never be completely severed from politics, so that deciding on a criterion of distribution for the purposes of achieving equality requires a political decision.

Applying Weinrib's forms of justice to the particularities of countries engaged in transition to democracy is impossible. Contrary to Weinrib's formulation, corrective justice in South Africa – the choice of criminal prosecution or other institutional modes such as the TRC – is a political choice as are the criteria according to which compensable and non-compensable claims may be distinguished. It is only by taking distributive and corrective justice to their highest level of abstraction that we can regard them as separate, since in context each does affect the other; as is the case where allowing delictual claims against the state detracts from the common store to be distributed by more equitable criteria of distribution. Corrective justice for Weinrib promotes the *minimal* harmony of mutual non-interference through the spread of material equality between individuals linked

representation, not in all cases, but in cases where "the call for representation is most demanding and the lack of it most debilitating" (at 815D).

through external bonds of legal relations. The conception is of a static universe of purely abstract egos who remain entirely independent from each other and who scrupulously refrain from interfering with each other as a consequence of their adherence to a regime of negative rights and duties. This atomistic, apolitical vision of legal interaction is compared by Weinrib to the undeniably political features of distributive justice to support the conclusion that the two forms of justice are separate and different. In fact, it is only by suppressing alternate political visions of the proper role of corrective justice – by insisting on the external legal links between agents, to the exclusion of the internal ethical relations between actors and by promoting the minimal harmony of non-interference rather than the maximal harmony of the self's ethical regard for the other – that Weinrib can insist that corrective justice is not political and that it is completely separate from distributive justice. Alan Brudner (1990) notes that Weinrib's formulation is problematic because it elevates one among many possible, historically grounded and ideologically determined versions of what is entailed by corrective and distributive justice as the universal and ahistorical essence of those forms of justice. Weinrib's depoliticisation of corrective justice is achieved through the enshrining of a particular ideological position which is not only subject to debate, but also actually incompatible with the contingencies of the South African transition, which is, of course, intensely political. Weinrib's insistence on the existence of an unbridgeable gap between corrective and distributive justice is not as universally applicable as he thinks; at least under some conceptions of justice there need be no insurmountable gap between corrective and distributive justice. It is only by asserting that corrective justice is concerned with a regime of negative rights (freedom from interference, for instance), and that distributive justice necessarily involves a positive respect for Kantian notions of equality and personhood, that he can regard the two forms as separate. However, nothing precludes the extension of corrective justice to cover a regime of positive rights or, in other words, a legal system in which private legal actors are charged with positive duties towards one another. Certainly, I am not suggesting that corrective and distributive justice are one and the same thing; there are differences between the two concepts, for example the former is backward-looking whereas the latter is essentially forward-looking.

There is another sense, however, in which distributive and corrective justice may be harmonised under a unified system of justice or even under the ambit of a particular institutional mechanism which is "characterised by its possession of an

internal congruence and harmony that binds all its compact parts together in a simple whole which is greater than the sum of its parts” (Rosenfeld 1992: 187). Such an institution is the TRC, which aims to reconcile self and other within the realm of social relationships in South Africa, in order to promote the maximum harmony of engagement with otherness *and* (potentially) to facilitate these goals through payments from state funds – reparations – in order, ritualistically, to efface the encroachment of a wrongdoing self upon a suffering other. The corrective and the distributive become thoroughly entangled in the concrete task of reconciliation and redistribution. Neither the Kantian ethical formalism at the root of fundamental human rights nor the legal formalism of Weinrib have any persuasive force in relation to the contingent concerns of the South African transition, whether because the visions they offer are so highly abstracted that they are indeterminate when it comes to practical application, or because they offer an irreducibly arbitrary political and ideological account under the guise of universalism.²¹¹

International Law and ‘Civilisation’

It has been argued by certain commentators that the court in *AZAPO* failed adequately to consider the ways in which international law bears on the granting of amnesty by successor regimes (Dugard 1997a; 1997b; MacAdams 1997) and, more radically, that its finding in favour of amnesty was actually in opposition to international law (Motala 1996). Whilst many international scholars argue that both international treaties²¹² and international law oblige a successor regime to hold its predecessor responsible for acts that constitute crimes under international law (Bassiouni 1992; Orentlicher 1991; Motala 1996; Edelenbos 1994), in fact, the rules and rulings of international law are more contradictory and unsettled than might at first appear to be the case. Evidence in favour of the contention that international law mandates prosecution includes article 4 of the Genocide Convention of 1948, providing for an absolute obligation to prosecute offenders; decisions of the inter-American court of the Commission of Human Rights, holding that the amnesties

²¹¹ On the casting of a particular political and ideological formulation of law as universal, Anatole French once observed that the law forbids both rich and poor to steal bread and sleep under bridges.

²¹² The treaties referred to in this regard include the Genocide Convention of 1948, the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973, the Geneva

granted by Argentina and Uruguay were incompatible with the American Convention of Human Rights; comments by the UN Human Rights Committee that amnesties covering acts of torture are “generally incompatible with the duty of states to investigate such acts”;²¹³ and various other declarations and statutes for international criminal proceedings promulgated by the United Nations. The court in *AZAPO* rejected the contention that international law prescribes prosecution: first, they found that article 1(4) of the Additional Protocol to the Geneva Conventions, which related to armed conflicts in which people were fighting against racist regimes in exercise of their right of self-determination, was inapplicable to South Africa because the struggle of the South African liberation movements was for equality and not self-determination (the court is surely mistaken here: the struggle was for both these things); and second, that international law not only fails to prohibit amnesty but rather encourages it. In support of the second point, the court cited Article 6(5) of the Additional Protocol II of 1977, which seems to encourage amnesty by providing that “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” (para 30D).

From the above it should be clear that international law presents a contradictory and inconclusive set of rules governing the question of amnesty and prosecution. Also, silence on the question of amnesty in the most recent international legislation, the Statute of the International Criminal Court adopted in Rome in 1998, means that the interpretation that international law currently permits amnesty is certainly possible (Dugard 1999). Indeed, it is difficult to imagine that international law has not internalised and incorporated the approximately seventeen truth commissions established since 1974 (Hayner 1994) to enquire into the past of particular societies in transition to democracy – many of which have enjoyed marked success. I would refer to the following statement by Lord Lloyd in the *Pinochet* case:

Further light is shed on state practice by the widespread adoption of amnesties for those who have committed crimes against humanity, including torture. Chile was not the first in the field. There was an amnesty at the end of the

Conventions on the Laws of War of 1949 and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984.

²¹³ General comment no 20 (44) (art.7) UN doc. CCPR/C21/Rev1./Add3., para 15 (April 1992).

Franco-Algerian war in 1962. In 1971, India and Bangladesh agreed not to pursue charges of genocide against Pakistan troops accused of killing about one million East Pakistanis. General amnesties have become common in recent years, especially in South America, covering members of former regimes accused of torture and other atrocities. Some of these have had the blessing of the United Nations, as a means of restoring peace and democratic government ... It has not been argued that these remedies are as such contrary to international law by reason of the failure to prosecute the individual perpetrators.²¹⁴

My view of international law largely echoes my comments on human rights above. International and supranational law, including international treaties and principles of human rights, potentially address all states and all persons individually and meaningfully. However, international law is a contradictory and indeterminate discourse of legitimation which retains what little relevance it has in late modernity mainly on account of its age, manipulability and pedagogical usefulness. God, as the author of natural law, has been replaced in modernity by international law and institutions as the source of fundamental natural rights. The international institutions that mediate between nations, such as the UN, despite their rhetorical affiliation with supranational loyalties, serve largely as conflictual arenas for ethnocentric vituperation and the promotion of parochial interests (Goulet 1995: 187). International law is, as Douzinas and Warrington note, “a species of regulation that attracts a healthy dose of suspicion as to its legal character” (1991: 20). International law is so indeterminate that applying it to particular situations, such as the question of amnesty, renders it capable of being construed in either way, for or against, so that I think it quite proper for it not to have been determining in this case.²¹⁵ The *AZAPO* court, operating within modern discourse, felt itself unable to suspend the rule and so simply opted for the interpretation which favoured its view of amnesty.

A founding text of international law, the Declaration of the Rights of Man, was initially an attempt to make the discourse of universal rights part of the foundation myth of modern France. Thereafter, as Lyotard notes, it is difficult to know whether the law is French or pan-human (Lyotard 1988: 147). Through the Kantian notion of autonomy, premised on the power of the rational legislature to

²¹⁴ *R v Bow Street Metropolitan Stipendiary Magistrate. Ex Parte Pinochet* [1998] 3 WLR 1456 (HL), 1490 B-C.)

²¹⁵ Moreover, the Constitutional Court has recognised that in spite of the provision in section 35(1) of the interim Constitution that recourse “may” be had to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide.

impose its law on the universe, including the colonial third world, a gap is opened between the legislators/subjects and the colonial subjected. The empire expands the community of those subjected to the law of the nation and makes it co-extensive with the whole world. However, the colonised others, subjected to imperial law, can never become its legislators and so are never autonomous in the Kantian sense. The discourse of universality is necessarily a White Mythology: the postulation of autonomy as the principle of universal legislation is achieved only through exclusion, disenfranchisement and subjection without the subjecthood of the other (Derrida 1982; Spivak 1987). Notice, for instance, the evaluative nature of Orentlicher's description of the purposes of international law, thus: "International law itself helps assure the survival of fragile democracies when its clear pronouncement removes certain crimes from the realm of certain countries' "internal politics *and thereby places these crimes within the scope of universal concern and the conscience of all civilised people*" (Orentlicher 1991: 2540 my emphasis). How are we to understand this reference to "civilised people"? Civilisation is related to an early distinction between the civil and the savage: to be a civilised meant to be a citizen of the city, as opposed to the savage, outside it, or the more distant barbarian roaming the lands beyond.²¹⁶ It was in France that the concept of civilisation developed in its dominant Enlightenment sense of the secular development of modern society and an end point in the historical view of the advancement of humanity. Civilisation expressed the culmination of the process of "an achieved condition of refinement and order" (embodied in the people to whom Orentlicher refers) and the process itself (Young 1995: 32). Civilisation was allied with a particular concept of culture, developed as part of the Enlightenment stress on education as enculturation. This radical egalitarian position, traced back to Locke, underlies the Enlightenment claim of the equality of all men: if equality does not actually exist in the present, enculturation enables at least potential equality. Both culture and civilisation are invoked to describe what the African lacks.²¹⁷ J.S. Mills' essay *Civilisation*, of 1836, formalised

²¹⁶ Ever since the Roman empire's *Civis Romanus sum*, the idea of Romans and barbarians, superior self and inferior other, is connoted by the word "civilised". Walter Benjamin famously commented that "no document of civilisation is not at the same time a document of barbarism" (Benjamin 1973: 258), referring not only to the barbaric acts of history done in the name of civilisation, but also to the necessary interdependence and entanglement between civilisation and barbarism that is supposed to set them apart.

²¹⁷ As V. G. Kiernan comments in his study of European military, commercial and spiritual domination, "colonising countries did their best to cling to a conviction that they were spreading

the categories of civilisation and barbarism as a hierarchy of the historical stages of man, bringing history and geography together in a generalised scheme of European superiority that identified civilisation with race. The pinnacle of this conflation came in Pritchard's theory of racial difference, in which he posited that the first people had been black and then identified the cause of subsequent whiteness as civilisation itself (Pritchard 1973). Civilising has become one of the great euphemisms of colonial conquest and the othering of the colonially subjected. e.e. cummings' characteristically astute evocation of American anti-Japanese sentiment engendered during World War Two through nationalistic othering in *YgUDuh*, ends: "Lidl yellah bas/ tuds weer goin/ DuhSIVILEYEzum" (cummings 1960: 52). Orentlicher's equation of "universal concern" with "the conscience of civilised people", legitimates the agenda of the West, including colonial domination. International law is revealed as another discourse of colonialism and imperialism through which colonial Africa generally, and apartheid specifically, was constructed and sustained.

Beyond Communitarianism

It is tempting to suggest in the face of the colonial imposition of international law, that following communitarianism, any just negotiation of the past must be in accordance with the political values emergent in the South African community, rather than imposed from the outside. However, the idea of a single South African community is only a fictionalised reification, rhetorically constructed for the purposes of nation-building. Although justice must be particular and contingent, the pluralism of South African society suggests multiple communities and dissensus rather than consensus, so that there can be no "subject that is authorised to say "we"" (Lyotard 1985: 81).²¹⁸ Furthermore, communities only exist by virtue of what they exclude –

through the world not merely order, but civilisation, which implied other peoples were not civilised yet, but were capable of becoming so" (Kieman 1988: 311).

²¹⁸ One of the paradoxes of communitarian approaches is that communitarians fail to offer a convincing definition of community, as Raymond Plant (1998: 98, 99) has recently observed. Walzer seems to assume that the moral community, with its shared understandings is co-extensive with the legal, juridical, national or political community; that, following Galston, the community of shared meaning is co-extensive with the nation state. However, unlike countries like Iran and other nation states with a strong sense of community, in South Africa there is dissensus within the society which forms a juridical whole. "deep cleavages here which may not be resolvable by appealing to shared understandings" (Plant 1998: 99).

the oppressed and the marginalised – so that justice involves not only what is inside the community, but what is outside of it.

Nevertheless, it is disappointing that so many commentators would wrest debates about just solutions away from the forms of life to which they relate, in furtherance of “universal justice which transcends the requirements of political expediency” (Dugard 1997b: 287). Moellendorf, Dugard and Fagan (1998) are doubtful about the justice of the negotiated political compromise and would instead see the issues of the day decided on the basis of ahistorical transcendental “principles”. Although deconstructing discourses of power constructive of the status quo is, on my estimate, a pressing agenda, these theorists – who, like Orentlicher, would delink the issue of amnesty from its context - fail to recognise the situated nature of justice, which assumes different forms and different contexts.²¹⁹ Such commentators, who seem to view compromise as the abrogation of principle, fail to recognise that justice is about hard choices between alternatives that are restricted by context; they do not acknowledge that compromise is often just and that failure to compromise is one of the major failings of modernity. As Christopher Roederer explains

it is simply not fair to criticise the South African compromise if the compromise resulted in the more just of the only two politically viable options available ... Sleeping with the enemy is not so condemnable if you are both in the hospital and there is only one bed. (Roederer 1999a:94)

Compromise is the inevitable result of a politics of pluralism; it signifies consent only to the degree that difference must be accommodated within the polity.²²⁰ The problem with Dugard and Moellendorf’s insistence on liberal principles acting as a foundation for South Africa’s political transition, is a problem with the procedural formalism of liberal doctrine generally: it tends, as Stanley Fish observes in *The Trouble with Principle* (Fish 1999), to trivialise the actual content of passionately held positions and the manner in which disagreement may be resolved: through agonistic jousting, horse-trading, give and take. Fish dislikes principles for all the reasons that make them problematic for navigating the South African transition: they are abstract,

²¹⁹ Comparing the merits of transitional courts and truth commissions, Roederer acknowledges that “[m]uch depends on context” (Roederer 1999a: 92).

universal, neutral, formalistic and inflexible.²²¹ He also rightly insists that abstractions such as justice and equality must be further specified and concretised. This would enable rival concepts of justice to fight it out at the level of practical application.²²² In fact, it might plausibly be argued by both the ANC and the National Party that neither compromised their *principles*, most of which – freedom, equality, justice – they shared. What were compromised were practical issues concerning amnesty, political representation and constitutional clauses. I would argue, however, following Fish, that it is only at this level that concepts like justice and equality have any relevance at all.²²³

Thus far I have been concerned mainly with defending the decision (though not, in any unqualified way, its reasoning). I have defended the processes and methodology of the TRC, including the granting of amnesty over the (fundamental) constitutional right to prosecution and punishment and its rejection of international law as mandating prosecution. I have also argued that the court's critics have based their objections on mistaken modern theory which, amongst other things, conflates law and justice and so equates prosecution with justice, and the TRC with injustice. I have advocated a postmodern concept of justice which is more ethical and accordant with the court's decision, although not, I think, with its reasoning as a whole. My argument demands more than a defence of *AZAPO* and the TRC: in what follows I provide a more detailed argument explaining why I believe the *AZAPO* court's judgement and the TRC to be just. Before I do so, I think it important to mention that another, less sympathetic reading of the *AZAPO* judgement is possible. Sarkin has argued that the judgement is one of "various judgements [that] indicate that the court will allow Parliament to determine policy and govern with very little judicial interference" (Sarkin 1998: 644). Support for Sarkin's contention can be found in a

²²⁰ As Deborah Posel has pointed out, the TRC, "as itself the product of a political compromise ... was seen as a crucial vehicle in attempts to stabilise and reproduce the politics of transitional justice" (Posel 1999: 5).

²²¹ Notwithstanding this, I shall argue in the next chapter that principles do have a role to play in South Africa's transition provided they are always *future*, rather than regarded as instantiated in present circumstances.

²²² Chaskalson P comments in *Makwanyane*: "Principles can be established but the application of those principles to particular circumstances can only be done on a case by case basis" (at para 104 D-E).

²²³ Whilst I broadly agree with Fish's anti-foundationalist epistemology, I would distance myself from the conservative ends to which he enjoins himself. For Fish, the contingent cultural beliefs which constitute the self are elevated to transcendental *a priori*s in the sense that it becomes impossible to determine whether they are valid or useful and so to criticise any particular form of life. My understanding of context is that it is more multivalent and fractured than Fish allows and that critical self-distancing is actually part of the way in which we are bound up in the world.

dictum by Mahomed DP, where he observes in relation to the choice between prosecution and the TRC that “it is an act calling for a judgement falling substantially within the domain of those entrusted with law-making in the area preceding and during the transition period” (para 21G). The identity of the law-makers referred to is confirmed as being Parliament when Mahomed subsequently opines that “the State is best equipped to determine what measures may be most conducive for the facilitation of such reconciliation and reconstruction” (para 31G). I think it would be unwise to rush to the conclusion that this is a statement of unqualified judicial deference, rather than an acknowledgement of the powers and responsibilities of government. Certain of the court’s comments in the preceding *Makwanyane* judgement on the nature of the role of the judiciary as *jurisgenesis* (law-making), rather than being merely declaratory, render this verdict unlikely. It may well be that the court in *AZAPO* deferred to the wishes of the new government and that the Westminster system’s separation of the powers of judiciary and executive is largely nominal. Complicity between these two branches of the state is, after all, nothing new. What the court’s judgement does, at the very least, is justify the executive decision to choose amnesty.

It might reasonably be argued that the equation made by the court between justice and prosecution is thoroughly modern in its nature and that it balances justice, so defined, against the need for the discovery of truth and reconciliation for victims and the well-being of society as a whole. Mahomed DP certainly seems to be insisting on a gap between justice and truth when he comments on the choice “between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future...between a correction in the old and a creation of the new” (para 21 E-F). The alignment of justice with punishment and correction, and the implicit suggestion that reconciliation, transition and reconstruction, however worthy, are something other than just, is certainly in accordance with the modern conception of law and justice. However, to concede the court’s allegiance to this conception is also to concede that its decision will be just: the modern conflation of law and justice insists that the outcome of technically correct legal proceedings is justice. But if the court’s decision, on its own terms, is just, how can the abrogation of prosecution and punishment, which the court has already defined as justice, be just? Logically, it cannot be just to be unjust. Finding in favour of the TRC cannot be conceived by the court as an injustice. No: either the court’s reasoning is inconsistent (as its words suggest) or the TRC has always been a candidate for justice. The

judgement must, by implication, be an acknowledgement that truth (and amnesty) is at least in this case tantamount to justice²²⁴, and also that the liberal legality of the judicial process – in the form of prosecution – is not only not equivalent to justice; but in this case would be unjust. The implied acknowledgement by the court of the gap between law and justice and the concomitant recognition of the possibility of justice external to formal liberal legality (in the form of the TRC) – although admittedly authorised and legitimated by and through such legality – represents an exciting moment of judicial self-regard. In one sense, the judgement represents the modern legal system's recusal of itself, in the face of a demand for a particularly and contingently arrived at justice: a triumph of justice over law, contingent over universal. In which case, it remains only to decide whether the decision is in fact just, or more just than the alternative.

When I say that the legal system and its judicial mouthpiece recuses itself in relation to the question of corrective justice (that is, prosecution and punishment), I mean that it implicitly acknowledges both the crisis of legal form and the demand for ethics. The tragic diremption of law and justice during apartheid points to the failure of liberal legality as a tool of ethical transformation; the law at the moment of South Africa's political and epistemological transformation reaches crisis, where crisis in this context denotes *krinein*, a turning to new directions in the law and jurisprudence, rather than any prophesied catastrophe of modern law's implosion.²²⁵ What the TRC represents, and what the *AZAPO* judgement confirms, is a change in legal form in relation to the law's construction and mediation of political transformation. Whereas, during apartheid, the political function of law was the separation of people on the basis of the sterile taxonomy of race, through the creation of dual legal systems, separate and unequal, political necessity now demands that law operate to the opposite effect: to reconcile those previously divided in order to create an atmosphere conducive to reconstruction. Judge Mahomed notes that "for the society traumatised by such conflict to reconstruct itself is a difficult task since the erstwhile adversaries of such a conflict inhabit the same sovereign territory. They have to live with each other and work with each other" (para 31 F-G). In order for the legal system to

²²⁴ In relation to the equivalence between truth and justice, Roederer perceptively notes that "[if justice is thought to include the search for the truth of past injustices ... then in many cases truth and reconciliation hearings have a better chance of ... [facilitating justice] than would a normal court of law" (Roederer 1999a: 93).

reconcile the racially divided self and other, it has needed most importantly to abandon its self-declared impartiality and neutrality, and to involve itself with legal subjects *qua* individuals with value systems, and ethical relations (or lack thereof) viewed internally between people. Justice has had to take off its blindfold, drop its scales and start paying attention to those features of legal subjects which make them human. The TRC is a manifestation of political exigency forcing the law to reconceptualise justice in ethical terms: it is in the words of Justice Mahomed “an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations” (para 21F).

In short, the *AZAPO* judgement is judicial recognition of the fact that modern legality, in the form of conflict resolution through litigation within the paradigm institution of modernity, the court, is not up to the task of reinscribing ethical relations in the intersubjective dealings which constitute political reconstruction. The legal system does not, however, perish. Just as apartheid’s structure depended on the sanctions of law, so post-apartheid transitional South Africa experiences an equally pervasive colonisation of the social by legalised relations of power. A new form of law is born in the TRC, not only in the form of a new institution, but also in the form of a new mode of conflict and grievance resolution, which is designed to construct a new subjectivity for a new South Africa. The collapse of the legal expression of the public/private divide is evident as the public functionaries – the commissioners and their advisers – are commandeered from the traditionally private realm of worship and confession. Parliament ignores the distinction between rule and discretion, the hallowed basis of the doctrine of the rule of law, as it couches its delegation of authority to the commissioners of the TRC in wide terms, notably in section 20(2) of the Promotion of National Unity and Reconciliation Act, which sanctions amnesty for “an act associated with a political objective.” The range of actions which might be considered to have a political objective in this over-politicised country seems limitless.

²²⁵ Derrida describes the moment of *krinein* as “the dramatic instance of a decision that is still impossible and suspended, imminent and threatening” (Derrida 1992c: 31, 31).

4.3 Justice, Reconciliation and the TRC

I have already analysed in Foucauldian terms, the disciplining effects of punishment. I must concede, then, given the regulatory and normative nature of the Christian discourse of the TRC, the effects of this institution's discourse as constitutive of a new subjectivity: how, through the discipline of the TRC, the reconstructed, reconstructing agent is produced. Foucault remarks that "power produces; it produces reality; it produces domains of objects and *rituals of truth*. The individual and the knowledge that may be gained of him belong to this production" (Foucault 1979: 194). Modern law reflects "new methods of power whose operation is not ensured by right, but by technique, not by law but by normalisation, not by punishment but by control, methods that are employed and in forms that go beyond the state and its apparatus" (Foucault 1990: 89). The TRC is evoked by all aspects of this description: its exclusion of rights in favour of more direct interconnection, the absence of punishment, its infusion of emotively normative religious admonition, the structural incorporation of the clergy. There is also the actively confessional tenor of the TRC, encouraging the cathartic relation of buried narratives. Foucault tells of a trial which took place in France in 1978, where a rapist refused to respond to questions by the judge concerning his motive for committing the crimes. He admitted his guilt and was willing to accept punishment, but refused to reveal his motives. Both the judge and the jury wanted an admission of depravity. When the accused refused to respond a juror cried out "For heaven's sake, defend yourself!" (Foucault 1988: 125). As Foucault explains, much more is expected of him (the criminal). Beyond admission, there must be "confession, self-examination, explanation of oneself in relation to what one is" (Foucault 1988: 126). And so it might be argued that the non-punitive, confessional idiom of the TRC is a new form of domination, more subtle and insidious than the blunt repression once doled out by the all-powerful apartheid government, simultaneously repressive and constitutive of participants.

Foucault's argument that the criminal justice system does not merely punish criminals, it creates them, could also be extended to the TRC – either that its discourse created "perpetrators" and "victims" and so failed to reconcile the two or else, according to Breyten Breytenbach, that it rewrites history as the emerging nation

requires.²²⁶ This may be true in part, but it is not the whole story.²²⁷ Certainly there is an ontological fixity about the application of the two terms, but it is temporary. Perpetrators who are granted amnesty testify about their wrongdoing in the past and then are free(d) to participate in the future, rather than punished to constitute themselves as criminals in overcrowded gaols. Victims narrate their suffering as past other rather than present self. Temporal disjunction and its mitigation are important individuating features of the TRC. Accordingly, I would question Foucault's (normative as opposed to ontological) claims about subjectivity, in relation to social practices, such as the TRC, through which subjects are constituted. For Foucault, since processes of subjectivation are also processes of subjection, some people are authorised to speak authoritatively because others are silenced. So for instance, Judith Butler, following Foucault, argues that the constitution of a class of authorised subjects entails the creation of a domain of de-authorised subjects, pre-subjects, figures of abjection and populations erased from view (Butler 1994).

But is it really the case that no one can become the subject of speech without others being silenced? Is the TRC not exactly a counter-example, productive of an ontology based on the justice of alterity, a subjectivity created on the proximity of self to other, a reconstitution of victims and culprits in order "to become active, full and creative members of the new order" (para 18G)? I would argue that the subject authorisation of the TRC has in fact acted to ameliorate the asymmetries in current practices of subjectivation in South Africa. It is necessary to look elsewhere for an explanatory narrative of reconciliation and subjectivation as these concepts apply to the TRC.

A trenchant Hegelian reading of reconciliation as it applies to the TRC has been provided by Daniel Herwitz (1998). The concept of reconciliation – conceived,

²²⁶ Breytenbach, sceptical about the TRC's achievements, writes:

Hardy meets and marries Kathy, the daughter of Alex Boraine, an old friend from earlier times when the struggle against injustice was noble. Alex is now one of the dogs of God; together with Archbishop Tutu he chairs the Inquisition called Truth and Reconciliation Commission: misery and devastation and iniquity and treachery and pain are staged before a bench of the pure and beamed into the living rooms of the population. So that memory may be excavated, shaped and corrected, where needed to serve as backbone to the new history of the new nation. (Breytenbach 1998: 27)

²²⁷ This charge is open to the response that it is retribution rather than the TRC's granting of amnesty that is likely to manufacture victims and perpetrators, even if in reverse of apartheid identities: "If former victims don the mantle of victors and seek comprehensive retributive justice in either its no-

as it is in the TRC, in Christian terms - emerges in philosophy in Hegel, who views history teleologically as a dialectic of thesis and antithesis, identification and alienation, culminating in the harmony of synthesis. Hegel conceives of history as being about humanity acquiring knowledge of itself through conceptual development. In his parable of the master and slave, both derive identity dialectically and dependently, each in relation to the other. The master achieves his identity by positing himself as the slave's self-consciousness, depriving the slave of enjoyment of his own work and constituting the identity of the slave, who exists "phenomenologically" only as other to the other, at the level of mere materiality. The master's realisation of his dependency on the slave – that he is "slave to the slave" – prompts a reversal in which each party, understanding itself to be incomplete, changes himself and his relation to the other, becoming more like the other. Reconciliation of master and slave is the result of self-awareness and mutual recognition, a higher state of consciousness. It is the happy culmination of modernity, the end of history, the formation of the nation-state.

One is tempted, in the case of the TRC, to endorse a dialectical account of subjectivation over one in which subjectivity is constructed only through exclusion. Edward Said, comparing Foucault's account with that of Fanon's distinctly Hegelian explanation of the relations between coloniser and colonised, notes that "Foucault's work moves further and further away from serious consideration of social wholes, focussing instead upon the individuals as dissolved in an ineluctably advancing 'microphysics of power' that is hopeless to resist", so that while Fanon presses his philosophical arsenal into anti-authoritarian service, Foucault "swerves away from politics entirely" (Said 1993: 335, 336). Said is, I think, wrong about Foucault regarding power as irresistible: one only needs to think of Foucault's suggested redeployment of Greek aesthetic self-styling and Baudelairean *dandysme*, as well as his "queer theory", to be reminded that Foucault does advocate programmatic resistance to power. But, since in Foucault's 'cratotomy' power manifests microphysically, so that resistance, also, takes place at the bodily rather than political level, Said is right about Foucault's lack of engagement with the broader social

nonsense revolutionary form or its liberal democratic form, then they may instantly transform former perpetrators and beneficiaries into current victims" (Bhargava 2000: 65).

dialectics of West and South, coloniser and colonised.²²⁸ In addition, many writers who have analysed the oppressed consciousness, whether its cause is bound to overt colonialism, economic exploitation or racial discrimination (Fanon 1965; Memni 1991), reach the common conclusion that the oppressed acquire a vested interest in their own servitude. As a defence mechanism, the colonised internalise demeaning stereotypes thrust upon them by their colonial masters, so that in time their identity is constituted through such stereotypes, and this acts to reinforce the experience of oppression. Charles Taylor argues in a Hegelian fashion that

non-recognition or misrecognition ... can be a form of oppression, imprisoning someone in a false, distorted, reduced mode of being. Beyond simple lack of respect, it can inflict a grievous wound, saddling people with crippling self-hatred. Due recognition is not just a courtesy but a vital human need. (Taylor 1992: 25)

Similarly, Axel Honneth has argued that the denial of recognition in the form of insult or degradation

does not represent an injustice solely because it constrains the subjects in their freedom for action or does them harm. Rather such action is injurious because it impairs these persons in their positive understanding of self – an understanding acquired by intersubjective means. (Honneth 1992: 189)

The TRC has been instrumental in expelling the internalised self-image, itself a long and painful process, evidenced by exhibitions of public grief and anger during the hearings. There was a palpable sense of ritualistic cleansing in the hearings; an excising and exorcising of an oppressively imposed identity of inferiority. This process has enabled those formerly considered objects to become subjects, deserving of equal inclusion within programs of distribution. Denis Goulet notes that in the case of dictatorships

on both counts, voices and benefits, the majority of a nation's populace is excluded. Not surprisingly therefore, the majority seeks to change both its political rulers and their development strategies. Hence new forms of *non-elite participation* in the transition ... become necessary ... the touchstone of development is whether people previously treated as mere objects known and acted upon, can now know and act upon, thereby becoming subjects of

²²⁸ Foucault has gone as far as denouncing any attempt to offer general diagnoses and general remedies for the ills of society as "totalitarian" (Soper 1994: 16).

their own social destiny. People who are oppressed or reduced to the culture of silence do not participate in their own humanisation. Conversely, when they participate, thereby becoming active subjects of knowledge and action, they begin to reconstruct their properly human history and engage in process of authentic development. (Goulet 1995: 91, 92)

The TRC provides an opportunity for participation by the formerly excluded non-elites in the reconstitution of their humanity so that they can be included in development and reconstruction initiatives.

There are problems with Hegel's account however. It is, as Herwitz remarks, a eurocentric

fantasy of the West told by itself and for itself: a story written by the *master* in his own transparent and self-adulating script. In the actual world, the effects of reversal do not produce reconciliation or even solidarity, but instead the mere fact of recognition. (Herwitz 1998: 106)

A similarly dialectical conception pervades Derrida's view of the individual subject as someone who has no solid identity and is rather a bundle of heterogeneous and not necessarily coherent impulses and desires. Multiple forms of interaction with the world construct individuals as a "play of difference that cannot be completely comprehended" (Young 1989: 232).²²⁹ "Othernesses" are internalised within the self in a dialogical mode (Taylor 1994: 32). When victim and perpetrator, white and black, interact in the TRC, through the mutual relation of narratives, cross-questioning and other verbal and non-verbal reactivity, they are caught in a game of constructing (race and gender) identities that has meaning only in terms of the social processes of identity construction and otherness, and that also bears the burden of historical construction. Individuals are heterogeneously constructed subjects internalising "othernesses" by virtue of their intricate relations with each other and the world. The TRC provides an institutional setting in which the shifting relations between self and other, understood dialectically, may be internalised, in appreciation of Derrida's call to render "delirious that interior voice that is the other of the other in us" (Harvey 1996: 356). The collection of narratives still emerging from the TRC has enabled the construction of a narrative identity, both at the level of history (and the

²²⁹ Hence the postmodern riddle of political subjectivity in South Africa – what do a Christian clergyman, an ANC politician, an embezzler and a consumer have in common? They can all be the same person.

identity of the South African “nation”) and at the level of the individual life. However, since so many stories, often contradictory, have been woven from the same material, identity is rendered somewhat unstable, and so able to accommodate contingency and revisability. Although certain narratives may be committed to the possibility of a certain closure of meaning and identity, each will inexorably and productively be breached through the play of difference and contestation. Narrative, and the meaning and identity to which it gives rise, is after all a representation of power, to be resisted through counter-narrative and contestation. Unlike Hegel’s account, here reconciliation is only promised, never final.²³⁰ In the TRC, sameness and difference between parties may be questioned, explored, but never finally resolved as “the logocentric rule dividing master from slave gives way and the borders constructed by the *euro*-tribe collapse – to sceptical result” (Herwitz 1998: 106).

The TRC directly facilitates the encounter between self and other, and through the ethical nature of the discourse of reconciliation, this contemporary legal or quasi-legal institution negotiates the demand for justice. Martha Minow writes of truth commissions that “justice reappears in the idea that its pursuit is to heal the victims and reconcile opposing groups ... the individual needs to repair the basic ways of making meaning and bounding the self to others” (Minow 1998: 63,64). How does the TRC effect a reconciliation of self and other in the context of political transition? Perpetrators and victims, sitting facing each other, present their narratives to each other: previously unheard accounts and significations, suppressed connotation and denotations dangerously supplemental to the official truths propagated by the apartheid government. The TRC affords victims the opportunity to cross-examine amnesty applicants during hearings and so reverse their previous roles. The TRC also introduces the demands and expectations of third parties, commissioners such as Archbishop Tutu, who is, from the perspective of victim and perpetrator, a third person whose actions remove the dispute from the domain of interpersonal hostility

²³⁰ Chantal Mouffe comments in this regard:

To believe in the possibility of such a consensus even when it is conceived as an infinite task, is to postulate that harmony and reconciliation should be the goal of a democratic society. In other words it is to transform the pluralist democratic ideal into a “self-refuting ideal”, since the very moment of its realisation would coincide with its destruction. As conditions of possibility for the existence of a pluralist democracy, conflicts and antagonisms constitute at the same time the condition of impossibility of its final achievement. (Mouffe 1996: 11)

and place it within institutional confines. The TRC is not concerned with just the “I” and “thou”, but also with the public aspect of the intersubjective encounter, which is mandated not only through televising the hearings²³¹ (the viewing public, for whom the spectacle of the TRC is present to them while they are not present to it), but also through the commissioners, who represent the public. The public aspect of the ethical relationship is created by the fact that the third party (commissioner) is other than a neighbour, whilst herself a neighbour and also neighbour of the other. Thus, the ethical response to the other (facilitated through the proximity and positionality of victims and perpetrators) is also and inevitably an address to the community: “The other is first the brother of all other men” (Levinas 1991: 158). Because the TRC facilitates the encounter with otherness, it is implicated in the attempt to act morally – the processes of the TRC are implicated in the arising need for justice.

Justice is necessary, that is, comparison, coexistence, contemporaneity, assembling order, the visibility of faces, and thus intentionality and the intellect, the intelligibility of a system, and thence also a co-presence on an equal footing as before a court of justice. (Levinas 1991: 157)²³²

In the hearings of the TRC, individuals are both legal subjects – victims and perpetrators, claimants and respondents, with the right to testify, the right to hear the previously unspoken, the right to reparations and the duty to disclose – and individuals with irreducibly unique faces, names and stories, urged by religious leaders to forgive each other and to re-establish the bonds of neighbourliness once established by the Good Samaritan. Justice occurs in the processes of the TRC through the bringing together of the limited calculability and determinacy of rights and obligations and the ontological fixity of the legal nomenclature with the infinite openness and contingency of alterity.

The TRC has attempted to provide, or at least begin the process of providing, what I shall now term corrective justice, which relates to the correction of imbalances not only in cultural representation and symbolism, but also in the socio-

²³¹ Minow writes “the fact of the broadcast may enable viewers to share in the process of acknowledgement, mourning and sympathetic listening ... If the broadcasting extends across the nation, it can create a shared experience for a much divided nation” (Minow 1998: 75). Foucault identifies publication as a feature distinguishing trials from truth commissions. He says of the legal process that knowledge of it is limited to the judge and the immediate audience, so that the public remains ignorant of legal proceedings. Consequently, “justice is a secret” (Foucault 1996: 242).

²³² Levinas here uses “justice” to refer to the legal process, where “law” would refer to the Torah.

economic – material and institutional – sphere.²³³ Nancy Fraser (1997) draws a useful analytic distinction between two different understandings of justice. The first is socio-economic justice, which is rooted in the politico-economic structure of society. Examples include exploitation, economic marginalisation and the deprivation of adequate material resources and institutions. The second understanding is cultural or symbolic. Here injustice is rooted in social patterns of representation, interpretation and communication. Examples include cultural domination (being subsumed under patterns of representation, classification and interpretation associated with another, alien or hostile, culture), non-recognition and disrespect. Importantly, the distinction is purely analytical. In practice the two are intertwined: material economic institutions have a constitutive, irreducible cultural dimension in which significations and norms proliferate. Conversely, discursive cultural practices have a constitutive politico-political dimension – they are underpinned by material supports. Rather than being two separate spheres of justice, they are interimbricated so as to reinforce each other dialectically. Representations and interpretations unfavourable to some are institutionalised in the state and economy, whilst economic and material disadvantage impedes equal participation in the making of public spheres and in everyday life.

According to Fraser, the remedy for cultural injustice is some sort of cultural or symbolic change, what she terms “recognition”. I have argued that the TRC upwardly revalues disrespected identities by providing a forum in which identities established during apartheid may be destabilised and decentered, and new identities established and positively valorised. The TRC in this sense enables recognition. The remedy for economic injustice is some kind of political-economic restructuring, which could include, in the South African context, redistribution of income, strategic provision of institutions and materials and community development. The problem is that claims for recognition and claims for redistribution seem to have contradictory aims. Claims for recognition promote group differentiation. These claims take the form of calling attention to, or in the case of the TRC, performatively creating through narrative, the putative specificity of some group (victims, blacks) and then affirming its value. Redistribution claims generally demand the abolition of

²³³ My conception is quite different from Ernest Weinrib's formalist concept of corrective justice as the promotion of the minimal harmony of non-interference by agents who are connected only through external links. My concept of corrective justice is political whereas Weinrib's is not.

economic arrangements that undergird group specificity, for example in calls for ‘colour-blind redistribution’.

Recognition is, of course, not the same as reconciliation. Reconciliation can only, I believe, take place through deconstruction. Deconstruction would address the question of respect by transforming the underlying cultural valuational structure. By destabilising individual and group identities and differentiations, deconstruction not only raises the self-esteem of currently disrespected groups, but by destabilising the binary black/ white code which gives racial specificity its cultural significance, it changes everyone’s sense of self and opens the door to the possibility of the reconciliation of self and other. Critical race theorists have objected that deconstruction, although usefully emasculating liberal subjectivity, equally undermines attempts to construct a subaltern subjectivity capable of agency. Henry Louis Gates Jr. objects to the disempowering logic of subject-disavowal of deconstruction which would seek to deny the force of assertive black identity:

The classic critique of our attempts to reconstitute our own subjectivity as women, as blacks etc. is that of Derrida ... [T]he Western male subject has long been constituted historically for themselves and in themselves. And while we readily accept, acknowledge and partake of the critique of *this* subject as transcendent, to deny the process of exploring and reclaiming our subjectivity before we critique it is the critical version of the grandfather clause, the double privileging of categories that happen to be *preconstituted*. Such a position leaves us nowhere, invisible, and voiceless, in the republic of Western letters ... Consider the irony: precisely when we (and other Third World peoples) obtain the complex wherewithal to define our black subjectivity in the republic of Western letters, our theoretical colleagues declare there ain’t no such thing as a subject, so why should we be bothered with that? (Gates 1989: 15)

Moreover, racial difference and racially specific subjectivity is not incompatible with Derridean deconstruction; *différance* does not undercut racial specificity. Derrida questions any notion of a neutral human subject and he reserves no position of originary neutrality from which to rethink racial difference. What Derrida does argue is that the other, as the other race (“blackness”), has throughout history been subsumed under logocentric identity. Blackness is made the other of the same. Deconstruction offers the possibility of disrupting the fixity of the (Western) logocentric classification, by problematising it through the reintroduction of traces supplemental to it. Arguments of critical feminist and critical race theory that

deconstruction forecloses on political engagement are based on a misunderstanding of poststructuralism as a disabling negative discourse that can only deconstruct but never reconstruct (see, for example, Carusi 1991). I want to argue for a conception of deconstruction which allows for an ethical subject who can recognise and problematise the tyrannies of identity (de Kock 1993; Radhakrishnan 1987). Deconstruction is not simply an undercutting of political agency and notions which further it instrumentally since, as Thomas McCarthy notes “while it is necessary to interrogate and revise received notions of liberty, equality, justice, rights and the like, to dissemble without reassembling them may be to rob the excluded, marginalised and oppressed groups of an important recourse” (McCarthy 1989: 157).

Whilst I believe that the TRC has gone some way towards the deconstruction of logocentric identity and the reconciliation of racial self and other – I emphasise again that such deconstruction is an ongoing process and that reconciliation is never final – it cannot take place without material and economic redistribution. Redistribution, in the form of reparations, was intended, ritualistically and primarily symbolically, to obliterate the encroachment of a wrongdoing self upon a suffering other. I say “symbolically” because the reparations to be paid out to victims were as much symbolic of the new regime’s intentions of economic redistribution as a payment in lieu of suffering. And so it has proved: the failure to pay reparations (except in isolated instances) has been mirrored, since 1994, by the ANC government’s failure to redistribute income, by the cutting of its spending drastically and by its distortion and final abandonment of the Reconstruction and Development Program in favour of GEAR’s neo-liberal policies. Indeed, it is difficult not to sympathise with sociologist John Saul when he writes:

A tragedy is being enacted in South Africa ... For in the teeth of high expectations arising from the successful struggle against a malignant apartheid state, a very large percentage of the population – many of them amongst the most desperately poor in the world – are being sacrificed on the altar of the neo-liberal logic of global capitalism.²³⁴

The government’s abandonment of the RDP has signified a failure to effect “widescale land reform, massive employment creation through public works, housing and municipal services, enhanced social welfare [and] community development”. The

²³⁴ This passage appears in an article by John Saul in the *Mail and Guardian*, 23-29 June 2000.

ANC government has done nothing to resist the ideological hegemony and economic stranglehold that neo-liberalism enjoys globally and has instead hoarded “for themselves the bulk of globalisations benefits” (Bond 2000: 117, 199). I recognise that it would be rash, in this “post-socialist” era, to equate justice with Marxism or with any other brand of socialism, which is underpinned by a metanarrative claiming to provide foundational grounding in a philosophy of history. I would suggest, nevertheless, that the door be left open for empirical narratives which are fallible, revisable and non-foundational, but still provide a historiography²³⁵ which allows for questions of racial identity (sameness and difference) and reconciliation to be contested and resolved within a narrative which challenges the ideological and economic hegemony of neo-liberalism, if not in the name of Marx, then at least in his “spirit” (Derrida 1994).²³⁶

The TRC has juxtaposed the official history of apartheid, promulgated by the previous regime, with alternative representations which foreground the postmodern epistemological questioning of the nature of historical knowledge. It has reintroduced excluded voices into history and problematised the identity of self and other and the relationship of each to the other. By the end of *The Book of Daniel*, we have witnessed many Daniels – Daniel the graduate student, Daniel the child, Daniel the sexual “tormentor”, Daniel the social theorist, Daniel the grieving brother. So too, the TRC has demonstrated the complexity and fracturedness of identity and experience. *The Book of Daniel* concludes with multiple endings: in one ending Daniel goes back to the house of his executed parents and finds in the poor quality of the life of the black inhabitants, a suffering that precludes his wallowing in personal pain. In another ending, he attends his sister’s funeral where Kaddish is offered for

²³⁵ I take this suggestion from Fraser and Nicholson (1989), who advocate it as a “middle position” between Critical Theory and Postmodernism, since it allows for progressive political commitment without succumbing to the pitfalls of foundationalism. Attempts at this kind of compromise have not received uniform treatment by South African commentators. Whilst Leon de Kock advocates a weak form of postmodernism espoused by Judith Squires (de Kock 1995b: 69), Nicholas Visser regards these efforts to compromise as attempts to formulate “a postmodernism without the troubling presence of its serial figures and their most salient theoretical assertions” (Visser 1997: 87). It is perhaps unsurprising that a Marxist critic like Visser would insist on the auratic presence of a founding father permeating didactic theory. Visser’s dismissal out of hand all strains of postmodernism, poststructuralism and postcolonialism occludes the potentially fruitful collaboration of Marxism and poststructuralism pursued by Spivak and others.

²³⁶ Derrida argues for the necessity of fighting “against a ‘new censorship’, if I may put it in this way, that threatens liberal societies; to fight against accumulation, concentration and monopoly; in short against all quantitative phenomena that might marginalise or reduce to silence anything that cannot be measured on their scale” (Derrida 1992c: 99). On the whole, I agree with Richard Rorty when he says

the dead. In another ending, Daniel sits in the Columbia university library writing his dissertation. The book questions notions of closure, totalisation and grand narrative, suggesting that justice consists in, among other things, rethinking the representations by which we understand the world so that we can face the future.

Chapter 5: In Execution of Justice: Makwanyane

For to the Judge is entrusted a great duty, to judge and to pronounce sentence, even sentence of death ... Because the land is a land of fear, a Judge must be without fear so that justice may be done according to the Law; therefore a judge must be incorruptible.

The judge does not make the Law. It is the People that make the Law. Therefore if a Law is unjust, and if the Judge judges according to the Law, that is justice, even if it is not just.

It is the duty of a judge to do justice, but it is only the People that can be just. Therefore if justice be not just, that is not to be laid at the door of the judge, but at the door of the People which means at the door of the White People, for it is the White People that make the Law.

In South Africa men are proud of their Judges, because they believe they are incorruptible. Even the black men have faith in them, though they do not always have faith in the Law. In a land of fear this incorruptibility is like a lamp set upon a stand, giving light to all that are in the house.²³⁷

A judge knows everything. He's the vicar of the god of justice, as the priest is the vicar of God, he's privy to the confessional of the court, where witnesses and experts and accused tell what Harald and Claudia would never have learnt. The knowledge, it's the basis of justice isn't it? To know all is to forgive all? – no, that's fallacious. The man's dead, shot in the head. He's here under the ground of the city where this court is the seat of justice.²³⁸

5.1 Literary Representations

In both Alan Paton's *Cry, the Beloved Country* (1948) and Nadine Gordimer's *The House Gun* (1998) the judicial dramaturgy of a murder trial and possible death sentence is played out against a backdrop of widespread social violence.²³⁹ The novels are written half a century apart and are, of course, products of their time. Paton writes in the heyday of white liberal optimism, at a time when race relations had not yet petrified into the intransigence of National Party politics. Paton's novel offers the redemption of liberal humanism combined with the transcendence of Christianity as a solution to racism and social injustice. Gordimer, on the other hand, writes from and about post-apartheid South Africa, in which guilt, violence and punishment are suffused in fraught but indeterminate relations around the question of the death penalty, in a society in a state of what Adorno in 1959 called "coming to terms with the past" (*Vergangenheitsbewältigung*). What are interesting in these novels for my

²³⁷ Alan Paton, *Cry, the Beloved Country*, pp 136, 137.

²³⁸ Nadine Gordimer, *The House Gun*, p 261.

present purposes are their contrasting representations of law and justice, their differences pointing to a transitional shift not only in politics and in perceptions of the legal institution, but also to variances in modes of representation generally.

Paton is, as the above quotation reflects and as Stephen Watson has pointed out, for the law's absolute deification (Watson 1982: 32). He invests the legal system of his time with the inscrutable indubitability of a divine institution, presided over by God-like judges. Paton's description of the law, justice and the judiciary bears all the hallmarks of liberal legality's ideal: the sanctity of the office of the judge and courtroom; judicial avoidance of engagement with incorrigible legislation and political expediency; the purported disinterestedness and impartiality of the judiciary as compensation for the substantive injustice of the law, finding expression in the oxymoron of unjust justice, a contradiction as mystically inexplicable as the Holy Trinity itself.

It is because of his adherence to the liberal concept of the law that Paton is precluded from viewing it as a discourse of power whose multiple discursive strategies and binaries are constitutive of a racially divided and unjust society. As a consequence of his liberal individualism he is unable to appreciate the impossibility of a judiciary that is untarnished by the form of life in which judicial subjectivity is moulded. Unable to grapple directly with the systemic nature of racial oppression, of which he is profoundly aware, Paton turns inwards, creating a personal tragedy shot through with emotionalism and mysticism, out of what he correctly perceives to be the root of political turmoil at that time: the detribalisation of blacks by whites and the lawlessness and moral corruption which this enforced social disintegration has caused. Paton's solution is an amalgam of Christianity and liberal humanism: brotherly love, which transcends racial boundaries and inequalities. However, as J.M. Coetzee has observed, inter-racial fraternal relations depend on the overcoming of oppressive power-relations:

fraternity by itself is not to be had, no matter how compellingly felt the impulse on both sides. Fraternity ineluctably comes in a package with liberty and equality What price is to be paid? The very lowest price is the destruction of the unnatural structures of power that define the South African state. (Coetzee 1992: 97)

²³⁹ For Paton, the various stages of the trial are acts in a "drama" (p170), while for Gordimer "justice is

Moreover, the values of the Christian vision – humility, respect for persons, compassion, brotherly love – enable the oppressed to participate in their own subjection; Christianity is an institution whose values occlude political resistance. One might invoke Nietzsche’s bitter invective against Christianity:

Christianity [...] knows that it is in itself a matter of absolute indifference whether a thing be true, but a matter of the highest importance to *what extent* it is believed to be true ... Sufferers have to be sustained by a hope which cannot be refuted by any actuality [...] - So that *love* shall be possible, God has to be a person [...] Love is the state in which man sees things most of all as they are *not*. The illusion-creating force is there at its height, likewise the sweetening and *transforming* force. One endures more when in love than one otherwise would, one tolerates everything [...] – so much for the three Christian values faith, hope and charity: I call them the three Christian *shrewdnesses*. (Nietzsche, *The Anti-Christ*, quoted in Novak 1996: 114, 115, emphasis in original)

Paton never disputes the authority of the law: it is always the capitalised “Law”, its purity sustained by its artificial separation from the political process which give it content and efficacy. The death penalty consequently has the force of law and must be applied:

There is nevertheless a Law, and it is one of the most monumental achievements of this defective society that it has made a Law, and has set judges to administer it and has freed those judges from any obligation whatsoever but to administer the Law. But the judge may not trifle with the law because it is defective. If the Law is a Law of a society that some feel to be unjust, it is the Law and the society that must be changed. In the meantime there is an existing Law that must be administered and it is the sacred duty of a judge to administer it (p 171).

Despite its manifest contradictions – in what way can the administration of unjust law be considered sacred? Or rather: how can the formal and procedural be venerated at the expense of the substantive? – Paton’s exposition of liberal legality and the judicial function was the dominant view of the legal system during apartheid. It insists on the disinterested neutrality of the judges as administrators, applying the law rather than interpreting it afresh on each occasion. Paton’s concept is positivist in its denial of judicial agency and its ascription of legitimacy despite injustice. It is this that enables the liberal judge to acknowledge the link between “the disaster that has overwhelmed

our native tribal society” (p171) and the accused’s act of murder, but at the same time exonerate himself from the duty to take this into account in sentencing. Paton’s Christian compassion does not extend to a structural critique of the colonial institution of law. It cannot do so since it has throughout the colonial incursion been imbued with a Christian inviolability. Douzinas and Warrington explain:

Traditionally the Establishment, especially in its specifically English manifestation, had assumed that the common law system was the greatest gift from God to the chosen people The results of wild imperialistic self-aggrandisement – silence, deportation and death – were not permitted to destroy the serene countenance of the common law. (Douzinas and Warrington 1994: 10, 11, 237)

With the benefit of hindsight, we now know that the judiciary was not impartial; that it was politically partisan (as any judiciary is) and that the law was responsible for the determination of unjust social relations. Gordimer’s *The House Gun* reflects not only the benefit of hindsight but also of a new written constitution, which locates the issues of murder and the death penalty within the wider locus of the physical and psychic violence of post-apartheid society. The novel is, in part, a reversal of the hierarchies of apartheid: the murder is perpetrated by a white man (Duncan) and rather than being directly politically motivated, it is a dostoyevskyan crime of passion in a society in which, as Gordimer says in an interview, “violence seems to seep through, like some kind of stain, so that it forms the connection of their lives” (Gordimer quoted in Kossev 2000: 1). Where Paton’s escape from injustice involves a moving inward – the sacred transcendence of the individual in his relations with the racial other – Gordimer moves outwards, from violence as an expression of personal trauma to the collective inheritance of a murderous past. Gordimer repeatedly acknowledges the systemic nature of violence. The psychiatrist appearing for the defence testifies:

the act that the accused admitted he committed did not take place in a vacuum. Just as there may be the unconscious restraint which comes from the moral climate, there may be the unconscious sanction of violence, in its general use, general resort to it ... It is necessary to keep in mind this context in which the events which led to the act, and the act itself took place (p 227).

And later:

But that is the tragedy of our present time, a tragedy repeated daily, nightly, in this city, in our country. Part of the furnishings in homes, carried in pockets along with car keys, even in the school-bags of children, constantly ready to hand in situations which lead to tragedy, the guns *happen to be there* (p 267).

Gordimer also attests to the problematics of representation, the difficulty and necessity of interpreting the individual actions that have multiple causes in order to apportion liability in a way that might be termed “just”:

there is no such act as the simple act of murder. To kill is only the definitive act arising out of many others surrounding it, acts of spilled words, presumptions, sexual congress, and, all around these, muggings in the streets (p 247).

In *The House Gun*, Gordimer excoriates Paton’s brand of liberalism in her portrayal of the impotence of Duncan’s parents, Harald, who is a Christian, and Claudia, a doctor who represents humanism linked with scientific rationality. They are, as Yeats would say, murderously innocent “‘liberal-minded’ whites who were not racist but stood by while the crime of apartheid was perpetrated, not willing to lose their privileged place within that society”(Kossew 2000: 6). Gordimer’s post-apartheid society reflects the uncertainty of transition: it is disturbed and dislocated, a society in which the former order of authority has been destroyed and is in the process of being replaced. It is characterised by “a struggle between speechlessness and speech” (Clingman 2000: 140) in which the range of identities and the enunciative modalities foregrounding them are being renegotiated: “the order of resemblance [is] reversed”. New forms of identity are reflected in syncretist constructions and imaginative oxymoron: Motsamai, the black advocate, is a “black diamond” (p202). He is also the “man who brings from the Other Side the understanding of people in trouble” (p207), and who “becomes the accused’s other self” (p210). Post-apartheid, postcolonial society reflects a newness that is also an anxiety: sexual and racial identities are reconstituted in new combinations, as apartheid’s structures of representation and legitimating strategies – the exclusionary forms of reason and universality composed by a Western modernity compliant with colonialist rule – are deconstructed to sceptical result. In short, Gordimer suggests “a world of new relationships growing out of the old; though they in some sense replicate the previous social structures, they

do so through significant differences or accents, requiring new forms of codification and understanding” (Clingman 2000: 150).

All of which sets the stage for a re-examination of legal discourse and its construction of social reality, which never materialises. Gordimer, although she once referred to herself in the days of apartheid as a “radical” (a label of some validity at the time), now seems to be firmly located in the neo-liberal camp. Her description of the constitution as “the shared morality of the nation” merely echoes the rhetoric of the constitutional court: the idea of a moral consensus is incongruent with the heterogeneity of South African pluralism. Indeed, one wonders how this kind of nation-building discourse can be squared with earlier admonitions that the “essential gesture” of the white South African writer “can be fulfilled only in the integrity Chekov demanded: ‘to describe a situation so truthfully [...] that the reader can no longer evade it’ (Gordimer quoted in Marais 2000: 159).

In the end Gordimer echoes the logic and reasoning of the Constitutional Court in *Makwanyane* in its decision to abolish the death penalty, which is part of her subject matter. Both Gordimer and the Court are sceptical of public opinion, which Gordimer refers to as “talk-show democracy” (Gordimer 1998: 240) Both regard the constitution as the mirror of the nation. There is an acknowledgement of the inherent contingency of judging and the margin for error (the verdict is in some respects a misreading of the evidence). Both describe South Africa as a “civilised country”, calling up the bogus evolutionary assumptions on which such a concept rests in order to suppress and silence the expelled and excluded. Gordimer is careful to acknowledge the continuing social inequalities and whilst her perceived need for the rehabilitation of the murderous individual (the white colonial, the black freedom-fighter) is admirable, it is unclear whether this rehabilitation is on the level of personal psychic rejuvenation, attunement to neoliberalism, and the eschatology of its legalism, or whether there is any demand for resistance to the new determinacies: a rehabilitation that is also a debilitation. In the wake of the Constitutional Court’s pronouncement, Gordimer writes:

The Last Judgement of the Constitutional Court has declared the death penalty unconstitutional. The firm and gentle tone of the Judge President has the confidence of a man who while he is conveying a ruling arrived at after several months weighing scrupulously the findings of a bench of independent thinkers,

himself has been given grace. *There is a serenity in justice.* (p284, emphasis added)

Here Gordimer seems to reproduce Paton's sacramentalising of the judicial process. She too venerates the judiciary, attributing to it "scrupulousness", "independence" and "grace". The description of the court's judgement as "The Last Judgement" is suggestive of the finality of a divine revelation, the judge interceding between God and his people to deliver the final word. "The Last Judgement" is for Gordimer no doubt symbolic; but the instantiation of the symbolic in the literal, in the death *sentence* or a sentence contrary to it, is to make legal judgements prematurely just. Lyotard writes:

These can only be symbols, like the last judgement. In what genre of discourse, in what phrase family would the supreme tribunal be able to render its judgement upon the pretensions to validity of all phrases, given that these pretensions differ according to the families and genres to which they are attached? A convenient answer is found in the use of citation (metalanguage) which makes all phrases pass under the single regimen of cognitives. (Lyotard 1988: 31)

5.2 Newness?

In *S v Makwanyane and Another*²⁴⁰ the Constitutional Court struck down - obliterated - the death penalty. The title of this chapter announces a triple genitive that will be my central focus: a three-fold functioning of the word "of". First, it signifies the subjective or possessive genitive, indicating that the chapter will interrogate the particular mode of judicial activity in *Makwanyane* - the execution of execution - in order to determine what claims to justice may be made for it. Second, and related, I intend to investigate the claim that the court killed justice, in the sense of deciding in a way that signified its deliberate avoidance of public opinion; in that it acted undemocratically and in so doing reached an unjust decision. Third, "execution of justice" recalls the technical and administrative functioning of the modern legal system against which I argued in the previous chapter: the balancing of opposing claims on a strictly procedural, purportedly neutral and manifestly non-ethical basis, denying contingency and the particularity of the litigants, and proclaiming the application of the general rule in a value-neutral manner. Finally, the title suggests the

physical event of execution, a violent termination of life and of meaning, which arrests inter-subjective conversation with undeniable finality.

The court's judgement, though boldly contrary to "public opinion", evokes an ambivalence about the nature of judicial subjectivity and the judiciary's role in constitutional democracy. It is at once a schizophrenic espousal of two concepts of justice, one ethical and one procedural, analogous to those evinced in *AZAPO*, set up in an awkward tension which elides the potential fruitfulness of their possible collaboration. The mood of the judgement is not simply one of ambivalence, there is anxiety too: anxiety in Foucault's sense of asking "by what right, by what acts and who are they, those who judge?" (Foucault 1996: 254), as the subjectivity of the judge after apartheid is counterpoised against that of the accused, each problematised, disputed and decentred as the legitimating criteria of old vanish like the ground beneath the feet of the condemned at the moment of hanging. The nature of the political transition means that, in many cases, yesterday's criminals are today's heroes, just as yesterday's judges are today's villains.²⁴¹ Suspended in a space devoid of value consensus, the court concedes in token the fragility of judging without foundations but refuses to translate this concession into practice; it refuses to concede, in other words, the "madness" that is the moment of decision, the risky negotiation of the aporia of the undecidable.

The judgement is in another sense a matter of anxiety. Homi Bhabha (1994: 213) suggests that when we think of power-knowledge, the role of anxiety should be considered. Bhabha speaks of "a necessary anxiety in constructing a transformative, postcolonial knowledge" and of the representational doubleness of identity within the postcolonial world, which requires that

the experience of anxiety must be incorporated into the analytic construction of the object of critical attention: narratives of the borderline conditions of culture and disciplines. For the anxiety is the effective address of 'a world [that] reveals itself as caught up in the space between frames; a doubled frame or one that is split'. (Bhabha 1994: 213, 214)

Anxiety is a mode of transition and transformation, a transitive sensibility which incorporates a kind of vertiginous groping. When Lyotard discusses the possibility of new language games of justice "promoting justice with no models" (Lyotard: 1985,

²⁴⁰ 1995 (6) BCLR 665 (CC).

52-53), so that judging takes place on a case-by-case basis, I would think that judgement is anxious in Bhabha's sense. Anxiety emerges from the judge's exposure to risk in the decision-making process. It may be a sign of danger, a sense of something being revived or destroyed (in *Makwanyane* both things occur), but it is also hopeful, a sign that something new is emerging (Sarup 1996: 113). What is promised in *Makwanyane* is the possibility of newness, created through a transformation of a racist and phallogocentric adjudicative practice that is underpinned by modern political foundations – scientific rationality as the basis of colonial legal practice, for example – into the subjective and political multivalence of radically plural democracy and the reintroduction of the previously marginalised area of power-knowledge: traditional African jurisprudence. Lyotard remarks that justice consists in inventing “new moves, perhaps new rules and therefore new games” (Lyotard and Thebaud: 100) and in *Makwanyane* as with Lyotard the possibilities of transformative moves and rules emerge as possibilities only – they are never activated. Instead, the judgement remains largely faithful to the positivist epistemology of the apartheid judiciary and its literal mode of interpretation, which although appealing to values, does so, on a Foucauldian reading, only to mask the operations of positivism, the judicial technology of power.

The judgement, by turns daring and timid, proclaims a justice of alterity even as it denies the political and philosophical mode of its own undertaking. How is it possible to reconcile the following dictum of Judge Kriegler:

In answering that question [the nature of constitutional interpretation] the methods to be used are essentially legal, not moral or philosophical ... The incumbents are judges not sages; their discipline is law, not ethics and certainly not politics. (para 207 E-A).

and this comment by Judge Sachs:

We are not called upon to decide between these positions [the various stances on the death penalty]. They are essentially emotional, moral and pragmatic in character and will no doubt occupy the attention of the Constitutional Assembly. Our function is to interpret the text of the Constitution as it stands. Accordingly, whatever our personal views on this fraught subject might be, our response must be a purely legal one. (para 349)

²⁴¹ For an elaboration of the latter proposition, see Dugard 1978, Corder 1984 and Dyzenhaus 1991.

with Mahomed J's observation that "the death sentence must in some measure manifest a philosophy" (para 271 I-J). Paradoxical exclusions of this kind are present throughout the judgement and emanate from a continued adherence to positivist legal tradition, inspired by the possibilities of formalisation and by the perceived success of the natural sciences.²⁴² Against the claim that adjudication is essentially unphilosophical, one might extend Schopenhauer's remark that "without death there would hardly be any philosophising" (Schopenhauer 1966: 463) to say that without philosophising there is not much one can say about death, or by association, about life, so that adjudication – the attempt to resolve competing claims from all facets of life – must be philosophical. That the constitutionality of the death penalty concerns and gives rise to political and philosophical questions seems to me a relatively timid and uncontroversial claim, at least prior to the enunciation of particular questions and answers. In fairness the court does not deny that life and death are philosophical subjects, only that adjudication is not a philosophical activity. But to argue that law must blind itself to the ethical and philosophical features (however contentious) of its subject-matter in order to engage in a complex but "blind" weighing up and still term the result "justice" is, as I have argued previously, a *non-sequitur* characteristic of modern legality.

The court generally excludes philosophical and political criteria from the adjudicative process and although there are moments where it reverses its denunciation, in these instances political and philosophical reasoning is marginalised, that is, such reasoning is not consciously and centrally included in the court's reasoning. As a result, the court's approach to life and death is philosophically rather anaemic, primarily reasoning as though life and death were polar opposites, their meanings inter-related only negatively by virtue of their mutual exclusivity. For example, whilst the court's reasoning reflects the relatively uncontroversial understanding of death as the absence of life in a physical and analytical sense, and that there can be no direct apprehension of death by the living – as Levinas asserts "Nothingness is impossible" (Levinas 1989: 42) – I would insist that life is lived in apprehension of the death of others.²⁴³ It is through witnessing the fact of death that we accept death as "the phenomenon which definitely circumscribes our finitude"

²⁴² This is suggested by, for instance, comments such as: "The described sources of public opinion can hardly be regarded as scientific" (Mokgoro J, para 305 G-H).

(Van Niekerk 1999: 409). “Death,” as Gordimer wryly observes, “is the penalty of life” (Gordimer 1998: 139). Death also spurs interpretation, a hermeneutics of experience. Life is interpreted through death and in contradistinction to it and, rather than the two things denoting two distinct and incomparable modes – existence and non-existence – representations and interpretations of life are coloured by representations and interpretations of death and vice versa, not only thematically and at the level of the symbolic, but also as trace: “Wake. Wake!” (Llewelyn 1990: 96). There is a point in the judgement at which apartheid’s heroic dead are resurrected, not simply as corpses (although that too), but as spectral witnesses or perhaps litigants joined but not active in the adjudication, present as testimony to a gruesome past and as catalyst for the re-introduction of African jurisprudence.

The decision of the court – its declaration that the death penalty is unconstitutional – is politically progressive, given that many established constitutional democracies, such as the United States resolutely stick to their guns (or electric chairs or lethal injections) in retaining capital punishment.²⁴⁴ Generally, where the judgement is at its most politically progressive it is at its most epistemologically reactionary, showing no awareness of the indeterminacy of rights discourse and remaining steadfastly faithful to the Enlightenment concept of constitutionalism, with its metanarratives of rationality and progress, and the modern project of nation-building. The judgement is at its most innovative in the judgement of Judge Sachs, whose intrepid reconstruction and incorporation of traditional African jurisprudence, going some way towards the decolonising of a eurocentric legal tradition, is strategically aligned with Enlightenment constitutionalism, nourished perhaps by its spirit of optimism. According to Sachs J

constitutionalism was a product of the age of enlightenment. It was associated with the overthrow of arbitrary power and the attempt to ensure that government functioned according to established principles and processes in the light of enduring values ... Constitutionalism in our country also arrives simultaneously with the achievement of equality and freedom, and of openness, accommodation and tolerance. (paras 389-391)

²⁴³ That death is an authentic characteristic of life is an insight central to Heidegger’s analysis of existence as existence-to death (“Sein Zum Tode”) (Heidegger 1962: 274 - 311).

²⁴⁴ Although certain states, such as California, have declared capital punishment unconstitutional.

The utopian ideal of the future is brought forward into the present without so much as a sideways glance at the social injustice and inequality which have manifestly evaded remedy by the new constitutional dispensation. Where continuing injustice is conceded elsewhere in the judgement, the means of its amelioration is treated as being simply a question of completing the rollout of democratic constitutionalism. Langa J remarks: "It may well be that for millions in this country, the effect of the change has yet to be felt in a material sense. For all of us though, a framework has been created in which a new culture must take root and develop" (para 221 B-C).

Concomitant with Enlightenment constitutionalism, South Africa emerges in *Makwanyane* as nascent nation, fostered by the court's proselytising discourse of nation-building, with its cultural signifier *ubuntu*, at once universal and particular, awash with significations. It is a signifier which does not so much float as is buffeted through the nebulous altitudes of the rights discourse of the ten judgements²⁴⁵, simultaneously constituting the nation and evading capture, through the play of difference and deferral which finally eludes the unity and absolute presence of its meaning.

As I did in the case of *AZAPO*, I intend to demonstrate that the reasons provided by the *Makwanyane* court were insufficient and unconvincing; its rejection of the concept of law as philosophical and political, despite the judgement's manifestation of a clear philosophical and political stance, suggests a lack of awareness and an insecurity about its role within a constitutional democracy and unwillingness to justify politically progressive decisions with a transformative and equally progressive interpretative strategy. To be fair, the court does in places concede the contingent status of judging, articulates a concept of justice as otherness²⁴⁶, and makes an innovative attempt to decolonise South African legal practice through the reintroduction of traditional African jurisprudence, encouraged by interpretations of the notion of *ubuntu*. My intention in this chapter is to elucidate the political philosophy of the court through an analysis of its reasoning, in order to determine, not only its weaknesses, but also its strengths, with a view to articulating its claims to justice and the potential of those claims to be convincing.

²⁴⁵ Judge Chaskalson's judgement is assented to by the other nine judges, although each judge handed down a separate judgement, either accentuating facets of Chaskalson P's judgement or adding to it.

²⁴⁶ Judge O'Regan, for example, declares that the role of the judiciary in interpreting the bill of rights is "to protect those who are marginalised, the dispossessed and the outcasts of our society" (para 332 G-H).

5.3 Marginality, Anxiety, Ex-centricity, Madness

The subaltern enters the text of the judgement, perhaps inevitably, from the margins, or more accurately from beneath: the downtrodden enter from underfoot. It is in footnote 78 of the judgement of Judge President Chaskalson, who provides the court's unanimous judgement, that the most crucial aspect of the application of the death penalty is revealed: "the overwhelming majority of those sentenced to death are poor and black". The subaltern "enters" in the sense that s/he "emerges" or "is translated into". By using the transitive verb "enters", I do not intend to attribute agency to the subaltern, just as when I use the descriptive noun "subaltern" I do not mean to construct an essentialised category of South Africa's oppressed that has an effective voice clearly and unproblematically – univocally – intruding on the text, audible above the persistent and multiple echoes of its heterogeneity. The introduction of the subaltern does not (yet) effect agency for the postcolonial subject and any assumption on the part of the subaltern must be argued for.²⁴⁷ In any event – in this event – the subaltern first appears in a footnote. Paratext has always been central to historiographic practice, to the writing of a double narrative of the past in the present. Footnote 78 provides an historical account, nothing more than a reference, of the oppression and extermination of blacks during apartheid, the extreme force of law metonymically represented by poverty and negritude. The function of the footnote is extra-textual, referring to a world outside the judgement, a world towards which the courts have long proclaimed a benign neutrality and for which they must now concede a history of malign partisanship. This reintroduction is mediated through an intertextual allusion rather than by direct reference to the fact of unequal conviction and sentencing: reference is made to the brief of Lawyers for Human Rights. The paratext operates on a discursive level; linear reading is disrupted by the presence of the lower text on the same page, a hermeneutic disruption which calls attention to the footnote's own doubled form and to a substantive bifurcation. The footnote opens a space in which to offer a supplement to the upper text, the text of South African legal history, with all its marginalising universalism. It disrupts our reading – our creating –

²⁴⁷ Gayatri Spivak contends that over-determinations in Europe's construction of its colonised others obliterated their subjectivity, leaving no space from which the subaltern could speak (Spivak 1995). This appears to overestimate social constraint while occluding ways in which multiply constituted subjects refuse a position as object of another's representation.

of a coherent totalising narrative; it fractures the text and provides an opportunity for the other of legal discourse to emerge from the margins. The footnote as margin (one could just as easily refer to the silent, silenced centre of what has gone before) is the asymmetrical iteration of the trace of the other in its precarious subjectivity (Spivak 1995: 25). It presents a paradox of represented yet resisted authority, a textual voicing of the other, the struggle for justice. At the same time it invokes a feeling of anxiety in Bhabha's sense referred to above, a tension between centre and margin, simultaneously an undermining and a novation, but more contestation than dialectic. As Bhabha notes, "to reveal such a margin is ... to contest claims to cultural supremacy ... The marginal or minority is not the space of a celebratory, or utopian self-marginalisation. It is much more a substantial intervention" (Bhabha 1990: 4). The footnote as margin is also, as Derrida (1982: 122) reminds us in a footnote, a site of deconstruction: "deconstruction ... takes place on the *margins* of philosophy: in titles and footnotes". Linda Hutcheon, commenting on postmodernism's and postcolonialism's shared preoccupation with what she terms "ex-centricity", observes that "in granting value to (what the centre calls) the margin or Other, the postmodern challenges any hegemonic force that presumes centrality, even as it acknowledges that it cannot provide the margin without acknowledging the power of the centre" (Hutcheon 1995: 132). For post-colonial theorists, poststructuralism's double-talking, ironic mode of address becomes a rhetorical strategy for working within existing imperialist discourses and contesting their hegemony at the same time.²⁴⁸ In the case of *Makwanyane*'s footnote 78, the centre's claim to authority is subverted through the introduction of the quintessence of the death penalty's application from the margins, evocative of the paratextual denaturalising of the precedence and authority of the centre in Derrida's paratextual classic *Glas* (1974).

There is, as I have mentioned, another kind of anxiety in the judgement which accompanies acknowledgements by the court of the inevitable "arbitrariness" of judging, at some deep level in the practice of a legal system supposedly grounded in technical, scientific dispute resolution, a practice which denies the ethics of the particular in favour of the neutral application of the rule. Judge Chaskalson writes of the arbitrariness with which the judge's discretion to impose the death penalty is applied, evidenced by the fact that "out of thousands of persons put on trial for murder

²⁴⁸ The location occupied by such criticism has been glossed by Gyan Prakash as "neither inside nor outside the history of Western domination but in a tangential relation to it" (Prakash 1993: 16, 17).

only a small percentage are sentenced to death” (para 48 D-E) and “poverty, race and chance play roles in the outcome of capital cases and in the final decision as to who should die” (para 51 F-G). The disposition of individual judges, including their political affiliations and the race and class of the accused, cumulatively affect capital punishment cases:

The differences that exist between rich and poor, between good and bad prosecutions, between good and bad defences, between severe and lenient Judges, between Judges who favour capital punishment and those who do not, the subjective [read: political] attitudes that might be brought into play by factors such as race and class, may in similar ways affect any case that comes before the courts and is most certainly present in all court systems. (Chaskalson P, para 54 C-E)

At a stroke, the court abrogates the modern conception of legal justice, conceived of as being executed through the formal and structural symmetries of adjudication and administered by disinterested and objective arbiters. Judge Chaskalson continues: “Imperfection in criminal trials means that error cannot be excluded” and such imperfection is not limited to criminal trials but “will be present in any system of justice” (para 54 E-G). The modern judge - Dworkin's Justice Hercules say – must ask himself (female judges are a novelty even in the post-apartheid legal system – the male/female ration in *Makwanyane* was 8:2): “Monsieur John Doe, you have your moods, your mother-in-law, your little life. Can you take it upon yourself, such as you are, to kill someone?” (Foucault 1996: 245). The judgement evinces a growing incredulity toward the possibility of a justice-producing legal metadiscourse as well as the recognition of the fact of judges' situatedness within multiple heterogenous language-games and the concomitant absence of the archimedean judicial viewpoint. Judge and accused are suddenly suspended in shifting and ethically ambiguous relations to each other, with the issue of the authority of the judge to judge and sentence increasingly called into question. The discrediting of modern legality qua justice renders the act of judging anxious, an anxiety “[w]e have to accept ... in the ordinary criminal cases that come before the courts, even to the extent that some may go to gaol and others similarly placed may be acquitted or receive non-custodial sentences” since “if it is discovered, the prisoner can be released or compensated; but the killing of an innocent person is irremediable” (para 54 F-H). It is useful to compare the court's revelation of the inherent arbitrariness of judging with the liberal

position articulated by Montesquieu who writes that liberty “is in perfection when criminal laws derive each punishment from the particular nature of the crime. There are then no arbitrary decisions; the punishment does not flow from the capriciousness of the legislator, but from the very nature of the thing” (Montesquieu 1949: 149). Contrarily, the court in *Makwanyane* realised that punishment derives as much from the circumstances of the criminal as from the crime itself.

The death sentence is the relegation of the accused to the horror of the void, the ultimate absence, non-being, and since legal discourse has been exposed as lacking the necessary transcendence to guarantee justice, “sentencing is the prerogative of the judge alone”. This is so not merely in the banal sense of a designation of an administrative function, but in the sense in which Foucault writes: “Today the judge, grasping and uncertain, assumes responsibility for the decision” (Foucault 1996: 247). Judge Chaskalson notes that the South African law has traditionally mandated that “due regard must be paid to the personal circumstances and subjective factors which might have influenced the accused’s conduct”, but has consistently denied that factors such as race and financial status play a role in the outcome of decisions. The court’s theoretical commitment to equality and universality of application of legal rules, unaffected by the political prejudices of individual judges and without reference to the contingent circumstances of litigants, is incompatible with the inevitably political and philosophical nature of adjudication. Before and during apartheid, the judiciary was permitted to exhibit political partisanship of the most reactionary kind by denying the political nature of legal practice. The judiciary could profess neutrality and impartiality, whilst acting in accordance with their political stances.²⁴⁹ At last, in *Makwanyane*, law is political (or in the words of the American realists: “Law is politics”). As Foucault points out, “We judge the criminal more than the crime. And it’s the knowledge we gain of the criminal which justifies whether we inflict such and such a punishment” (Foucault 1996: 25). The law has never been “blind” and the judiciary’s failure to be candid about this has resulted in

²⁴⁹ The much earlier murder case of *Rex v Mbombela* 1933 AD 269 is the paradigm case in this regard. The accused, an eighteen year old rural black man, had killed a child in the *bona fide* belief that it was an evil spirit (“tihiloshe”). In his judgement, De Villiers JA wrote:

I have no doubt that by the law of this country, there is only one standard of the “reasonable man” It seems to me, therefore, that the standard to be adopted in deciding whether ignorance or mistake of fact is reasonable, is the standard of the reasonable man, and that race, or the idiosyncracies of the superstitious, or the intelligence of the person accused, do not even enter into the question (at p 273, 274).

injustice being perpetrated under a veneer of neutrality: with moral and political concerns safely excluded from the courts reasoning, the court can act in a politically definite manner whilst legitimately excluding the politics and philosophy that is doing the work from its reasoning, thereby permitting the exercise of power to continue unchallenged. The modern legality of apartheid excluded blacks from constituting a legal personality, capable of representation within the quotidianity of the “civilised legal process”; black skin signified the absolute alterity of law. In *Makwanyane*, finally, the subaltern is written back into the text, questioning the form, structure and the discursive power of the law and the legal system. It is an anxious but promising moment in the performance of the judicial drama. The final remarks in a debate between Foucault, Jean Laplanche and Robert Badinter articulate this anxiety fluently:

Badinter: But it is anguishing to judge. The judicial institution can only function to the extent that the judge is liberated from his anxiety. To succeed, he must know in the name of what values he condemns or absolves. Until a recent period everything was simple. The judges were comfortable. But today, in this uncertain society, in the name of what does one judge, by means of what values?

Foucault: I feel that it is dangerous to allow judges to continue to judge alone, by liberating them from their anxiety and allowing them to avoid asking themselves in the name of what they judge, by what right, by what acts, and who are they, those who judge. Let them become anxious, like we become anxious when we meet so few who are disturbed. The crisis of the function of justice has just been opened. Let's not close it too quickly. (Foucault 1996: 254)

This exchange perfectly captures the *geist* of the South African judiciary in the transitional period: the acknowledged imperative to be just, despite the obsolescence of formerly secure foundations and the absence of generally agreed concrete interpretations of abstract values referred to in the Constitution.²⁵⁰ Section 35(1) of the interim Constitution reads: “In interpreting the provisions of this chapter [the Bill of Rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality”. The provision is question-begging, since the values referred to are themselves not self-evident and, once

²⁵⁰ Alfred Cockrell writes: “We would expect the transition to a substantive vision of law to be traumatic ... the judgements of the Constitutional Court in 1995 exhibit many of the signs of such trauma” (Cockrell 1996: 3).

ascertained, would require interpretation, as does Section 35 itself. How are we to interpret “an open and democratic society”? How are we to define “freedom and equality”, given that in many cases these two principles often stand in a contradictory relation to each other? These questions can elicit no easy answers: application of constitutional rules is not a matter of consent, but of choice between competing rules and significations, an anxious process certainly; as Derrida more extremely phrases it, “the instant of decision is a madness” (Derrida 1992a: 26), a Kierkegaardian leap of faith in attempting to reach a decision in the face of the undecidable, since the necessity of reaching a decision brings a premature end to the process of rendering infinite justice to the other. Jeremy Sarkin begins to address the dilemma of transforming a multiplicity into a determinate singularity of a hermeneutic decision by observing that

the values underlying an open and democratic society and their relative weight are by no means a matter of consensus. In the United States, for example, which could be considered an open and democratic society based on freedom and equality, the death penalty is permitted by the Supreme Court. (Sarkin 1996b: 79)

It is unfortunate that, given the court’s acknowledgement that the judiciary has never applied rules mechanically but has in fact interpreted them in relation to the contingent circumstances of each case to give effect to political values, the *Makwanyane* court could not now do likewise, and openly, by providing reasons, give effect to the values it esteems. The problem was never that the South African courts judged in accordance with the values they upheld, but rather that they were not candid about these values, so affording no opportunity for contestation, which is the essence of democratic constitutionalism. Instead, many of the judges in *Makwanyane* denied the political nature of judgement, thereby avoiding, as Robert Badinter observes, the anxiety of judging. I turn later in this chapter to a theory of democratic adjudication which, although not a cure for the anxiety, diagnoses it as an essential feature of democracy.

5.4 *Ubuntu*

Ubuntu features centrally in *Makwanyane* as a value which undergirds the ideal of an open and democratic South African society. Six of the ten judges mentioned it as a specifically South African value incompatible with the death penalty. This section will discuss possible interpretations and applications of *ubuntu*, showing how it permeates the reasoning of the court, and will also attempt to find value in it.

Ubuntu is referred to in the postamble of the interim Constitution, of which the concluding paragraph reads: “there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not victimisation”. It figures throughout the judgement as the ultimate floating signifier, with a proliferation of not always compatible meanings: community and the interdependence of the members of the community (Langa J at para 224 G-H); humanity (Madala J at para 244 and 245); humanity, humanitarianism, communitarianism (Mahomed J at para 263 A-B); humaneness, personhood, morality, compassion, respect for human dignity, “conformity to basic norms and collective unity” (Mokgoro J para 308 A-C and para 309 F-G) and as a metonymy for the possibility for the possibility of a “traditional African jurisprudence” (Sachs J para 373 A-B). In some of the judgements *ubuntu* is associated with social justice and nation-building. According to Madala J the concept is evocative of the ideas of “humaneness, social justice and fairness”. Judge Mahomed attributes the inclusion of *ubuntu* in the constitution to its ability to encapsulate the “shared aspirations of the nation” (Mahomed J at para 262) whilst Mokgoro J opines: “In South Africa *ubuntu* has become a notion with a particular resonance in the building of democracy” (para 308 B-C).

Such indeterminacy in signification has prompted pessimism about whether *ubuntu* can be regarded as a useful jurisprudential tool. For instance, in that it seems to reflect an attribute of both the individual and the community, and the individual within the community, individual and community melded together symbiotically, it is unclear how *ubuntu* could be invoked in cases of adjudication where the interests of the individual and the community collide, in order to justly resolve this kind of conflict (English 1996). Nevertheless, there is something objectionably glib about Richard Wilson’s broad Althusserian formulation of *ubuntu* as

another always-already there element of pan Africanist ideology. *Ubuntu* should be recognised for what it is: a polysemous ideological concept which

conjoins human rights, reconciliation and nation-building in the populist terms of a relatively benign African nationalism. (Wilson 1996: 14, 15)

My objection stems from an internal inconsistency in the definition of *ubuntu*: the reduction of *ubuntu*'s indeterminacy to human rights, reconciliation and nation-building seems to provide a closure that Wilson wants to deny. Semantic presence is also suggested by the phrase "always already there" which indicates the tying of *ubuntu* to an origin, to an authorising instance, which seeks to deny the iteration and difference suggested by its "polysemous" nature. All attempts at definition are reductive, certainly, and I think Wilson is right to link *ubuntu* to human rights, reconciliation and nation-building - but this is only the beginning.

If freedom from precision and closure has induced scepticism in some critics about the jurisprudential possibilities of *ubuntu*, I would suggest that the very multivalencies of the notion may be valorised to rearticulate and respond to apartheid and its aftermath in South Africa. I want to read *ubuntu*, as postcolonial theory suggests, as being both indelibly marked by the cognitive modes of imperialism – the binaries of African and European, colonised and coloniser – and deconstructively, cultivating its indeterminacy in ways which are attentive to "the more complex, cultural and political borders that exist on the cusp" (Bhabha 1994: 173) that is the South African transitional moment. Mark Sanders (2000: 20) notes the doubleness of invoking *ubuntu* as part of the rhetoric of nation-building: it is a function of a "postcolonial" logic, reflecting a desire no longer to be colonised politically or culturally, "but a logic which, at every turn, risks repeating what it seeks to reverse: the coloniser's repression of social and cultural formations". There is a danger that indulging in nostalgia about pre-colonial African cultures will reinforce the myth that there is a single African culture and that the continent lacks diversity in its difference.

It is difficult to locate *ubuntu* on the political spectrum. Progressives are quick to recognise in it the dangerous sentimentality that yearns for a *status quo ante* in which men were men and women were women and the oppressed were seldom seen and never heard. On the other hand, *ubuntu* resonates with a utopian romanticism, the characteristic weakness of the progressive. Many critics will no doubt regard *ubuntu* simply as a term in the liberation lexicon, used in the interests of mobilising the South African peoples after apartheid, galvanising them into reconstructive activity and inviting their complicity with the new regime. In this mobilisation, notions of ethnic identity such as *ubuntu* are invoked, whilst indigenous cultural heritages that were

denigrated and despised during apartheid are affirmed as authentic traditions. Recuperations of this kind, such as Judge Sachs' genealogy of the death penalty in traditional African jurisprudence, are not, I will argue, made in the interests of discovering uncontaminated origins or claiming ethnic purity, but are rather attempts to write marginalised tradition back into the centre, if only to receive equal critical and deconstructive attention. While articulations of *ubuntu*, both in the law and elsewhere, have been repudiated by many as atavistic and essentialist, I want to argue that such attempts cannot be dismissed as a retrograde and impossible attempt to revive an irrecoverable past. Whereas, for instance, Fanon recommended the construction of an insurgent black subjectivity, with cultural affirmation being avowed as a necessary moment in creating a combative position,²⁵¹ he repudiated attempts to create a new black culture, anticipating a time when national cultures would be transcended by a new universalism (Parry 1997: 18). Disenchantment with post-independence African regimes should not blind us to the possibility of envisaging an alternative to dominant western values which are orientated towards the task of reclaiming and renegotiating the conditions for community, from the conditions of apartheid power whose presence denied community.

One might make an analogy between *ubuntu* and the Western liberal principles of equality and freedom: like them, *ubuntu* is an abstract principle, like them it is open to multiple interpretations and like them, where it is relied upon to decide a litigation, it must be concretised and contextualised to be efficacious. In *Makwanyane*, *ubuntu* is deployed in the Constitutional Court's rejection of the death penalty. It is the first elaboration on *ubuntu* in South African law and perhaps the most comprehensive exposition anywhere. I wish to analyse the development (or "cultivation", in terms of a metaphor to be developed) of *ubuntu* to understand how it can be seen as contrary to the death penalty.

The *Makwanyane* judgements assume that the meanings of *ubuntu*, incorporating humanism, communalism and an "ethics of reciprocity" (Sanders 2000: 20), are sufficient authority for establishing its incompatibility with the death penalty, just as it is regarded as self-evident that the constitutional prohibition of "cruel, inhuman or degrading treatment or punishment" (section 11(2)), or alternatively the

²⁵¹ Fanon writes "This rediscovery, this absolute valorisation almost in defiance of reality, objectively indefensible, assumes an incomparable and subjective importance ... the plunge into the chasm into the past is the condition and the source of freedom" (Fanon 1967: 43).

rights to “life” (section 9) and “dignity” (section 10), are self-evidently contrary to the imposition of the death penalty.²⁵² I disagree on both counts, believing the concretising move from abstract principle to concrete social reality must be argued for, rather than merely asserted. Failure to do so constitutes a denial of judicial agency (Klare 1998: 173), which is understandable given the court’s reluctance to face its new-found anxiety and its ambivalent self-regard, but not justifiable on these grounds.

The association of traditional African values, such as *ubuntu* (which constitutes a form of life, a reified and romanticised vision of the rural African community, as much as a principle) with democracy, both in the postamble of the interim Constitution and in the judgement of Judge Mokgoro, is foreshadowed by Nelson Mandela’s location of constitutional democracy in pre-colonial African societies. Mandela writes:

I listened to the elders of the tribe telling stories about the good old days, before the arrival of the white man. Then our people lived peacefully under the democratic rule of their kings and their *amapakhati* and moved freely and confidently up and down the country without let or hindrance. Then the country was ours ... The structure and organisation of early African societies *fascinated* me ... The land, then the main means of production, belonged to the whole tribe, and there was no individual ownership whatsoever. There were no classes, no rich or poor, and no exploitation of man by man. All men were free and equal and this was the foundation of government. Recognition of this general principle found expression in the constitution of the council ... there was much in such a society that was primitive and insecure and it could certainly never measure up to the demands of the present epoch. But in such a society are contained the *seeds of a revolutionary democracy* in which none will be held in slavery or servitude, and in which poverty, want, and insecurity shall be no more” (Mandela, quoted in Derrida 1987: 24, emphasis in original)

The socialist sentiment of this vision is certainly discordant with South Africa’s current neo-liberalism and participation in global circuits of late capitalism, but in a sense it is supposed to jar: it is a vision of the future as past. Derrida notes two important themes in the passage. The first is fascination: that which holds one’s stare, “looks at you, already concerns you and orders you to continue responding, making you responsible for the look” (Derrida 1987: 23). Later in the same essay, Derrida elaborates “we must respect the other for himself, in his irreplaceable singularity”

²⁵² All references to sections of the Constitution in this chapter are to the interim Constitution, Act 200 of 1993, unless specified otherwise.

(Derrida 1987: 37). In *The Force of Law*, Derrida comes to define justice in similarly ethical terms as an “incalculable” demand to treat the other on the other’s terms and an unconditional duty to have regard for and recognise the other, an infinite duty without expectation of reciprocity:

The deconstruction of all presumption of a determinant certitude of a present justice, itself operates on the basis of an infinite “idea of justice” because it is irreducible, irreducible because owed to the other, before any contract, because it has come, the other’s coming that is the singularity that is always other. (Derrida 1992a: 25)

Can the postmodern justice of alterity, of irreducible otherness, be included under the umbrella of *ubuntu*’s possible significations? Asmal et al define *ubuntu* as implying both “compassion” and the “recognition of the humanity of the other” (Asmal et al 1997: 21). However, should not Asmal et al’s definition be read as implying “the *common* humanity of self and other”, an ethical responsibility based on commonality and sameness, rather than otherness? In short, is not *ubuntu* simply a form of humanism, perhaps we can say renaissant humanism, the humanism of the much vaunted “African Renaissance”?

Postcolonial assertions of “Africanness”, assenting and affirming a denied or alienated subjectivity, are seemingly incongruent with postmodern/poststructuralist challenges to the coherent autonomous subject. Postcolonialism is generally eager to participate in the deconstruction of humanism, where this subject is also the imperialist or liberal subject. As Spivak (1988: 202) notes “there is an affinity between the imperialist subject and the subject of humanism”. Postmodernism deconstructs universalist – liberal and humanist – discourses of the self, what Foucault has called the “founding subject”, so that, in Althusser’s words, the subject becomes “decentred” (Althusser 1971: 219).²⁵³ To briefly restate the postmodern (de)construction of the subject: there is no innate faculty of reason that will “out” itself and no Cartesian ego that somehow predates its immersion into a particular language and culture. The self is always embedded in and constituted through language. This stance is anti-humanist in the sense that it rules out attempts to locate a common core of humanity which exists in every person; on the contrary it is non-foundationalist or, in terms favoured by Rorty, “anti-foundationalist”, holding that the

²⁵³ Foucault also speaks of the “decentering” of the subject (Foucault 1972: 13).

individual and culture are radically contingent. It is for this reason that postmodernism claims that all attempts to find a transcultural, ahistorical account of justice and morality have failed and that universalising discourses such as liberal legality may be deconstructed to reveal the causes of this failure.

Although postcolonial theory tends to be enthusiastic about the deconstruction of liberalism and the subject of liberal humanism, it is generally antagonistic towards efforts to deconstruct (postcolonial theorists would likely substitute “eviscerate”) the newly emergent and previously marginalised subjectivity of the subaltern, whose agency it is seeking to enable. While sympathy is due to postcolonial theory’s efforts at upwardly re-evaluating African subjectivity, where postcolonialism rejects poststructuralism, it does so by positing a set of antitheses – antifoundationalism versus political engagement, identity versus difference and deconstruction versus reconstruction. However, far from undermining postcolonial commitments, poststructuralist conceptions of subjectivity, identity and human agency actually enable and promote them. Against the claim that the poststructuralist view of the subject undermines the postcolonial project by rendering it inconceivable that there is any subject that could resist or challenge imperialism or liberalism, poststructuralism argues that the subject is a discursive position that can indeed act oppositionally or rewrite the script of history (see, for instance, Butler 1993, 1994). The poststructuralist proposition that there exists no subjectivity that is not always already an effect of a power discourse matrix, does not preclude (neither should it) the important acknowledgement that people have “critical capacities”: they are not pre-programmed pawns but are able to engage in novel actions and to modify social conditions (Fraser 1997: 214). In other words, poststructuralism is sanguine about the proposition that oppositionality and political contestation is a mode of our form of life.

One of the reasons postcolonial theory feels that poststructuralism disables the resisting subject, is its habit of privileging linguistic metaphors, seemingly objectifying the subject as a “site of signification” and as a “permanent possibility of a certain resignifying process”. Suppose, however, we put aside these linguistic metaphors and ask whether humanism and *ubuntu* could be conceived in postmodern terms. Stephen Toulmin, for instance, writes that “the stage in Western culture and society we are now entering – whether we see it as the third phase in modernity or as a new and distinctive postmodern phase – obliges us to reappropriate values from

Renaissance humanism that were lost in the heyday of Modernity” (Toulmin 1990: 200, 201). But Toulmin is suggesting that humanism be incorporated into the postmodern era, not, as I believe, that it needs to be reformulated in accordance with postmodern theory, that is, in non-foundationalist and contingent, rather than universal, terms, while still maintaining some kind of transcendental status. Appiah has such a reconceptualisation in mind when he writes

what I am calling humanism can be provisional, historically contingent, anti-essentialist (in other words, postmodern) and still be demanding. We can surely maintain a powerful engagement with the concern to avoid cruelty and pain while nevertheless recognising the contingency of that concern ... maybe then we can recover within postmodernism – the concern for human suffering for victims of the postcolonial state ... while rejecting the master narratives of modernism. (Appiah 1992: 155)

Appiah adds that this concept of humanism “transcends obligations to churches and nations”. Steven Winter similarly contends that

postmoderns are deeply humanistic, but it is not because they reject a Hobbesian ontology of human nature in favour of a more uplifting narrative ... The deep humanism of postmodernism inheres in its affirmation that our values need not be underwritten by anything more than our own actions ... In contrast, the rationalist anxiety for some foundation more secure and more real than our actions is antihumanist; it is what Nietzsche identifies as a form of self-hatred, a “fatality” that he aptly describes as nihilism. (Winter 1992: 806)

If we reconceive of humanism/ *ubuntu* in this postmodern sense, then we might be in a position to develop a view of collective identities such as “Africanness” as at once discursively constructed *and* complex, as enabling of collective action *and* amenable to decentering, in need of reconstruction *and* deconstruction – paradoxical certainly, but all the better for it. To return to Asmal et al’s definition of *ubuntu* as the “recognition of the humanity of the other”, where humanity is conceived in non-essentialist postmodern terms as a concern for suffering and victimhood, then we are not far from drawing a loose equivalence between *ubuntu* and say, Derrida’s concept of ethics/justice as otherness, which is also notably opposed to cruelty and pain. Lesiba Teffo, for instance, claims that adherents of *ubuntu*

appreciate the difference in their humaneness. *Ubuntu* means allowing the other ... to be and to become. The *Ubuntuist* concedes that without the other,

she or he would not be human Africans who venerate tradition for fear of innovation and who ignore differences for the sake of an oppressive sameness are not true to themselves. (Teffo 1999: 167)

If I am right in redefining *ubuntu* in postmodern terms, then I would argue that on this basis *ubuntu* is opposed to the death penalty: the death penalty is unjust because it destroys irrecoverably the relationship between self and other as the other is finally eliminated.

At this point, I would anticipate a two-fold objection to my interpretation of *ubuntu* in postmodern terms as follows: that the merits (that is, the potentially salutary effects) of theorising *ubuntu* in postmodern terms notwithstanding, the quotidianity of South African social experience is set at a considerable distance from the pristine space of a postmodern ethics of alterity – a space solely occupied by ethical responsibility. Instead, the objection continues, *ubuntu* within the South African context designates ethical relations between members of a community, a communal form of life based on an “ethics of reciprocity” (Sanders 2000: 20), which is manifestly not the same thing as Derrida’s ethics, which denies the necessity of reciprocity. My reply is to the effect that although *ubuntu* cannot be interpreted to mean anything I want it to mean, the fact of its polysemy allows for the interpretation I want to ascribe to it and, furthermore, even if my interpretation runs contrary to its usually allocated meaning, the idea is to utilise interpretation as a mode of transformation, which calls for the accrual of novel resonances.²⁵⁴

A second objection, more of a query perhaps, might be that in the introduction I undertook to discuss not only the possible relationship of *ubuntu* to the death penalty, but also the role that *ubuntu* actually played in the *Makwanyane* decision in its dismissal of the death penalty and in its development of a traditional African jurisprudence. And that, in the case of both these things, the discourse of nation and nation-building played a predominant role. It is to this task that I now turn.

²⁵⁴ Douzinas and Warrington write: “texts could often be read explicitly against the grain of ‘authorised’ readings without in any way doing violence to the actual linguistic artefacts in question” (Douzinas and Warrington 1994a: 17). In the other judgement in which the Constitutional Court had recourse to *ubuntu*, *AZAPO*, *ubuntu* was held to be contrary to retribution and promoting of reconciliation. I would suggest that this is so in part because *ubuntu*’s indeterminacy has the effect of breaking up the binary sense of political antagonism. Linguistic indeterminacy operates to disrupt the logic of oppositionality in apartheid thought, the proliferation of significations providing the impetus for a theoretical commitment to reject fixed subject positions as ontologically faulty and dyadic polarities as epistemologically unsound. Indeterminacy, as both Bhabha and Spivak have shown, posits relations between groups as transactional and dispenses with conflict as adverserality.

5.5 *Ubuntu*, Tradition and Nation

It could convincingly be argued that it is *ubuntu*'s positioning within discourses of nationalism and nation-building that enables an understanding of the Constitutional Court's ruling against the death penalty and is centrally motivational for Judge Sach's development of a traditional African jurisprudence. I want to tease out a link between *ubuntu*, African nationalism and the death penalty and to show how their interaction was manifested in the court's decision. I return first to the Mandela quotation above and to Derrida's extrapolation of a second theme (the first being "fascination", connoting an ethics of otherness),

that of the seed: it furnishes an indispensable scheme for interpretation, it is by its very virtuality that the democratic model would have been present in the society of ancestors, even if it was not to be revealed, developed as such for reflection until afterward. (Derrida 1987: 23, 24)

It is my contention that *ubuntu*, as a signifier which embraces this model of traditional society, is this seed and that the *Makwanyane* court recognised this, including it as one of "the values which underlie an open and democratic society", in terms of which the court is directed to interpret the constitution following section 35. Derrida expresses the paradox of interpreting the present in the light of the past in order to pursue an ideal which exists only in the future, in the future perfect tense: the accomplishment of real democracy in the future "will only have taken place in the past of this non-Western society under the species of virtuality". The seeds of traditional African society "prefigure, they make visible ahead of time, what still remains accessible in its historical phenomenon, that is to say, the 'classless' society and the end of the end of the 'exploitation of man by man'" (Derrida 1986: 25).

In the *Makwanyane* judgement there is a sense of the seed of *ubuntu* growing throughout each successive judgement in which it is referred to. In the first judgement, that of Judge Chaskalson, the seed is simply present but dormant, effective through its presence alone. *Ubuntu* is stated to be manifestly contrary to the death penalty. In the judgements of Justices Langa, Madala, Mahomed and Mokgoro, the seed germinates, pushing out the first tender shoots of its multiple and unstable

significations. Only in the final judgement, does it start to resemble a young jurisprudential sapling. Sachs J, declaring that

the secure and progressive development of our legal system demands that it draw the best from all streams of justice in our country ... [which] means giving long overdue recognition to African law and legal thinking as a source of legal ideas, values and practice ... [in order to] restore dignity to ideas and values that have long been suppressed or marginalised. (paras 364 and 3650)

Sachs J then goes on to conduct a genealogy of the death penalty in traditional African jurisprudence developed prior to and during colonialism, concluding that

the relatively well-developed judicial processes of indigenous societies did not in general encompass capital punishment for murder. Such executions that took place were frenzied extra-judicial killings of supposed witches, a supposedly irrational form of crowd behaviour that has unfortunately continued to this day in the form of necklacing and witch-burning. (para 381 E-G)

He describes the imposition of the death penalty as a colonial imposition, exemplified by the governor of Natal's ire at the failure of the Zulus to impose the death penalty:

Hearken to Shepstone on November 25, 1850, substituting capital punishment for the native system of cattle fines in the case of murder: "Know ye all ... a man's life has no price: no cattle can pay for it. He who intentionally kills another, whether for Witchcraft or otherwise, shall die himself. (para 380)²⁵⁵

Sachs' linkage of the death penalty with colonialism and the imperialism of Western legal discourse is undeniable and it is a matter of historical record that it bolstered slavery,²⁵⁶ colonial expansion and apartheid in South Africa.²⁵⁷ However, Sach's claim that indigenous African jurisprudence had no death penalty is less convincing.

²⁵⁵ Sachs J cites Donald R. Morris, 1995, *The Washing of the Spears – A History of the Rise of the Zulu Nation Under Shaka and its Fall in the Zulu War of 1879*, Cape Town: Jonathan Cape, pp 174-5.

²⁵⁶ Hahlo and Khan note that during the seventeenth and eighteenth centuries "[t]orture was used to extract confessions, especially with slaves and where the death penalty was passed" (Hahlo and Khan 1960: 202).

²⁵⁷ When the four separate colonies were united into the Union of South Africa in 1910, the statutory position in relation to the death penalty was fractured, however the Criminal Procedure and Evidence Act of 1917 provided uniformity and clarification, setting out the extent of capital crimes in South Africa (Kahn 1989). This statute made the death penalty mandatory for murder. Sarkin observes that it was the rise to power of the National Party that saw a proliferation of capital offences on the statute book. The extension of use of the death penalty during the 1950's coincided with an intensification of

His genealogy lacks depth and breadth of reference: only nine sources are referred to; the authors of the historical accounts referred to are ethnically and culturally external to their subject and most are uninvolved in the internal mechanism of the traditional African legal practice under investigation. It is unclear, for instance, whether the execution of witches is extra-judicial or illegal, that is, whether the death penalty was not imposed by the judiciary for the simple reason that proof of a witch's existence in some extra-judicial forum constituted sufficient evidence for an immediate, extra-judicial and legally sanctioned execution, perhaps on the basis of the immediate danger to society. It would be useful to ascertain whether the protagonists of the extra-judicial killings were ever brought to trial. More research needs to be carried out and Sachs J is the first to admit this.²⁵⁸

On the question of the value of *ubuntu* as a tool for interpretation and a point of entry into constitutional discourse for the marginalised African legal tradition, commentators are divided. Klare enthusiastically contends that

these passages are the most legally innovative aspects of the court's judgement ... [in that they explain] their opposition to capital punishment in philosophical terms and also specifically in terms of the evils of the apartheid system and of the need to create a new culture of democracy for the future. (Klare 1998: 173)

Conversely, Wilson, commenting specifically on Sachs' judgement writes:

This interpretation of capital punishment seems both highly implausible and an act of wilful naivety on Sach's part. The Constitutional Court is still seeking to legitimate its position as the sovereign institution in the land ... they sought to express the new culture of rights in a popular idiom. In so doing they participated in a wider process of connecting rights and reconciliation to nation-building and engendering social cohesion through an appeal to Africanist unity. (Wilson 1996: 12)

At the risk of seeming over-accommodating, I agree completely with Klare and also, partly and qualifiedly, with Wilson.

political oppression, so much so that by 1969, there were eleven capital crimes" (Sarkin 1996b: 73). See also Kahn 1970.

²⁵⁸ Sachs J prefaces his investigation of traditional African jurisprudence by noting both the controversial nature of the subject matter and the lack of evidence and resources at his disposal with which to determine the matter (at para 374).

In the course of colonialism and during apartheid, the physical violence of European colonials was matched by epistemic violence as a range of indigenous knowledges were either weakened, marginalised or killed-off completely – epistemicide within a heterogenous project to constitute the colonial subject as other. Spivak, commenting on this process of colonial “othering” remarks that

in the constitution of the Other of Europe, great care was taken to obliterate the textual ingredients by which such a subject could cathect ... - not only by ideological and scientific production, *but also by the institution of law*”. (Spivak 1995: 24, emphasis added)

African customs and laws were either obliterated – executed – or relegated to a position parallel, but subjected and inferior. On Spivak’s reading, traditional African legal theory is “subjugated knowledge” and follows Foucault’s definition of it as “a whole set of knowledges that have been disqualified as inadequate to their task or insufficiently elaborated: naïve knowledges, located low down on the hierarchy, beneath the required level of cognition or scientificity” (Foucault 1980: 82). This process of epistemic othering offers an account of how white colonial law was established as *the* normative legal discourse. The identity of traditional law is its difference: a negative identity.

The reintroduction of *ubuntu* and African jurisprudence in *Makwanyane* is a writing of black experience back into the text of South African law, the voicing of the marginalised other. Neither Sachs J nor I am suggesting that traditional African values and modes of socialisation should as a matter of course be privileged over those reflected in the legal theory of the current Constitutional Court. Nevertheless, there are discrepancies, and judgements are needed. Teffo, for instance, despite declaring that he is “sensitive to the powerful feminist lobby in this country ... I fully support their cause ... education requires that gender distinctions be minimised to those areas where such distinctions are vital and necessary”, proceeds to endorse as one of these areas the situation in which “[t]he more women a man has, the greater his stature in the community ... in the past a weaker chief would donate a young woman from his own kraal or from the tribe to the powerful chief in order to forestall the possibility of attack and invasion” (Teffo 1999: 155, 156). Now, it seems to me that whatever the strand of feminism Teffo is sensitive to, it would be hostile to the idea of women being utilised in quite so proprietorial and instrumental a fashion. If this is the

traditional African view of gender relations, it should be opposed. The point is not that African values must take precedence over Western values, but that its values and principles should be allowed to compete democratically and on equal terms with Western values in legal discourse.

I would also like to reiterate my opposition regarding any suggestion that South Africa retreat into the “glorious past” of African civilisation. The rejection of postcolonial, (post)modern life to return to the past should be regarded as “absurd sentimentalism” (Buchanan, cited in Palmer 1986: 373) because changes have already occurred and the past cannot be recaptured. Western and African legal cultures are mutually imbricated within a history of colonial incursions, definitional strategies and resistance to both. As Appiah contends, “[i]f there is a lesson in the broad shape of this circulation of culture, it is surely that we are all already contaminated by each other, that there is no longer a fully echt-African culture awaiting salvage” (Appiah 1992: 155). The romanticised rural culture captured by the concept of *ubuntu* is not a practical possibility in the present, it is *the future perfect* “will only have taken place”.

The rhetorical incorporation of *ubuntu* into legal discourse is also part of nation-building. As Benedict Anderson has argued, the formulation of a shared national past, the reactivation of shared histories and imagined communities, is at the same time the basis of the assertion of a shared national future (Anderson 1991). With the advent of modernity, the concomitant collapse of the self-perpetuating order of fixed identities (brilliantly understood in MacIntyre’s *After Virtue*) led to the “grand separation” of the elite and the masses. To bring about reconciliation, the kind of consensus and public-spiritedness evinced by the ancient *polis* needed to be recreated. However, since the conditions necessary for the *polis* experience (devotion to public goods at the expense of private interests and the elevation of the citizen over and above the private man) are no longer part of the modern world, they had to be created artificially (Smith 1986: 131). The reproduction of society in this new structure was a task that had (and still has) to be planned, managed and monitored. The methods applied to this task are, first, Foucault’s panopticism, which enabled close control of conduct through surveillance backed by confinement and second, related but different strategies, captured by Weber’s concept of legitimation and Talcott Parsons’ “central value cluster”, which entailed efforts to conceal repression by the elite through representing the specific order of a given society as tantamount to order itself and the introduction and perpetuation of such order as a mission to which these

lives ought to contribute if they are to acquire meaning. In order to ensure the effective deployment of these strategies, elites had to represent the social order which made their privilege secure, as a function or requisite of society or as a condition of its survival, in other words as a condition of group immortality. The most successful expression of this strategy is nationalism (Bauman 1992: 105).

In the discourse of nation-building, the establishment and preservation of the nation is hailed as an extreme value, hovering above the short lives of its members, provided that it can demonstrate an exposure to threat, in the face of which members need to unite to ensure their survival. For South Africans, the main threat is the past itself, apartheid and the legality through which it was orchestrated, which found its most violent expression in the death penalty. The following dictum of Judge Didcott distinguishes the death penalty as a feature of the previous order:

South Africa has experienced too much savagery. The wanton killing must stop before it makes a mockery of the civilised, humane and compassionate society to which the nation aspires and has constitutionally pledged itself. And the state must set an example by demonstrating the priceless value it places on the lives of its subjects, even the worst. (para 190)

In this passage the calculated and clinical punishment of execution is analogised to the brutality of apartheid violence, past and present dichotomised through their characterisation as “savagery” and “civilisation”, self and other through the romanticised rhetoric of nation-building. Langa J similarly observes:

The history of the past decades has been such that the value of life and human dignity have been demeaned. Political, social and other factors created a climate of violence resulting in a culture of retaliation and revenge. In the process, respect for life and for the inherent human dignity of every person became the main casualties. The State has been part of this degeneration, not only because of its role in the conflicts of the past, but also by retaining punishments which did not testify to a high regard for the dignity of the person and the value of every human life. (para 218G-I)

What is evident from this passage is not only the polemicising of past and present, but also the abstraction from the particularity of retaliation and revenge to respect for life and dignity of every person. This rhetoric of nationalism yokes together individuals divided in the past through their subsumption within universal and absolute values that were previously denied. Sachs J argues that the right to life is not only contrary to

the death penalty but is also an asset “the emerging nation could squander at its peril ... the time to guard against future repression was when memories of past injustice and pain were still fresh” (para 388 F-G). What is missing from all these accounts of the death penalty as an abrogation of the abstract and universal discourse of human rights, are descriptions of the manifold particular injustices, not primarily a violation of rights, but a violation of individuals, bodies, which opposed the apartheid state. Even Mokgoro J fails to capture the particular nature of injustice when she describes the death penalty as “an intimate part of a system of law enforcement that imposed severe penalties on those who aspired to achieve the values enshrined in our constitution today” (para 310 A-B). The victims of apartheid are unspecified and the impression that emerges is one of incommensurability between regimes rather than a structural division between sovereign and subject. O’Regan J directly articulates the death penalty as an instrument of political oppression and provides particular instances in which to ground it. She writes:

The death sentence was imposed sometimes for crimes that were motivated by political ideals. In this way the death penalty *came to be seen by some* as part of the repressive machinery of the former government. Towards the end of the 1980’s there were several major public campaigns to halt the execution of people who were perceived to be political opponents of the Government. There is no doubt that these campaigns to prevent the execution of amongst others the ‘Sharpeville 6’ and the ‘Upington 26’ were partly responsible for the Government’s decision in 1990 to suspend the implementation of sentences of death. (para 333 A-C, emphasis added)

Even though the passage states the politics of capital punishment more directly than in other judgements, it is notable that the judicial subject is dissociated from the opinions expressed. Although Judge O’Regan is inarguably correct that there was not universal recognition of the politically oppressive function of the death penalty, it is difficult to see why “came to be seen by some” is favoured over “was” or “was in my opinion”. Why the reticence by the judiciary to describe capital punishment as political injustice? Of the 392 paragraphs of the judgement, only a handful relate indirectly to capital punishment as political oppression during apartheid, whilst only one paragraph relates directly. Part of the reason is the complicity of the apartheid judiciary during apartheid with National Party politics, manifested in the politicised application of the death penalty. Various studies (see, for instance, Dugard 1978) show that certain judges had been appointed recurrently to preside over political trials and that some

judges were more disposed than others to imposing the death sentence, strongly indicating political bias on the part of the judiciary. It is also impossible to deny that people of colour were the primary target. Dugard writes:

It is impossible to divorce the racial factor from the death penalty in South Africa. Of the 2740 persons executed [between 1910 and 1975], less than 100 ... were white; no white has yet been hanged for the rape of a black; and only about six whites have been hanged for the murder of blacks. Conversely, blacks convicted of murder or rape of whites are usually executed. (Dugard 1978: 127)²⁵⁹

By demonstrating that while South African judges during apartheid professed to follow the law as if it were an autonomous set of neutral principles divorced from politics, their interpretation and application of legal principles was typically a function of their political affiliations, the law/politics distinction is deconstructed, thereby erasing any rigid boundary between the two (Litowitz 1997: 90). As I discussed above, the judiciary feels unable to extend this recognition to its own activities for fear of sacrificing its own legitimacy. What I want to focus on here, however, is that a central reason for the abolition of the death penalty was the execution of those oppositional to the National Party government, since those who were executed implicitly died as patriots, martyrs to the new national cause.

The death penalty cannot survive because it is instrumentally responsible for the elimination of those individuals who preceded, fought for and are now incorporated into the new South African nation. "What is la Patrie?" asked Maurice Barrès and answered "The Soil and the Dead" (Barrès 1902: 8). The members of the nation accede involuntarily: they are born onto its soil and riveted into its chain. The nation as the soil and the dead is the unconscious, unchangeable point of beginning, the point of origin (*ursprünglich* as Heidegger would say) that is and must have been

²⁵⁹ See also Van Niekerk 1969 and Rhadamanthus 1970. A similar bias characterises the application of the death penalty in the United States. Of 500 prisoners executed between 1977 and the end of 1998, nearly 82% were convicted of the murder of a white person, even though blacks and whites were victims of homicide in approximately equal numbers. A black person who kills a white person in the United States is eleven times more likely to receive a death sentence than a white who kills a black (www.amnesty.org). A former Illinois prosecutor recently admitted that the District Attorney's office ran a contest to see which prosecutor would be the first to convict defendants whose weight totalled 4,000 pounds. Because most of the defendants were black, the competition was known as "Niggers by the Pound". There are many other recent racist stories of this kind. In the trial of William Andrews in Utah, a crude drawing by one of the all-white jury was discovered depicting a hanged man and the words "hang the niggers". The judge refused Andrew's attorney's petition for a mistrial and his subsequent request to question the jury over the note (Brook 2000: 4-9).

already in place. In this light, *ubuntu* is the transcendental and absolute truth of the nation, but also vulnerable to attack. It is both *la vérité* and *une vérité française*: a universal stipulation of the conditions for social justice and a particularly South African truth which appoints its addressees in advance, so that reception is involuntary. Bauman observes the central contradiction of nationalism: that it promotes particularity while striving towards universality. *Ubuntu* has both particular connotations – Africanness and negritude (Wilson 1996: 13) – and universal connotations – humanism and human rights. Derrida similarly asserts:

Whether it takes a national form or not, a refined, hospitable or aggressively xenophobic form or not, the self-affirmation of an identity always claims to be responding to the call or assignation of the universal. There are no exceptions to this law. No cultural identity presents itself as an opaque body of an untranslatable idiom, but always on the contrary, as the irreplaceable *inscription* of the universal in the singular, the *unique testimony* to the human essence and to what is proper to man. Each time it has to do with the discourse of *responsibility*: I have, the unique “I” has, the responsibility of testifying for universality. Each time the exemplarity of the example is unique. (Derrida 1992c: 72, 73)

It is at this point, Bauman observes, that rational argument grinds to a halt and sentiment takes over where reason surrenders (Bauman 1992: 109). Notice Judge Mahomed’s tone in the following passage:

“The need for *ubuntu*” expresses the ethos of an instinctive capacity for enjoyment and of love towards our fellow men and women; the joy and fulfilment involved in recognising their innate humanity; ... the richness of the creative emotions which it engenders and the moral energies which it releases both in the givers and the society which they serve and are served by. (para 263 A-B)

There is unlikely to be a more emotive expression of the existential discovery of a shared human “attribute”. That love should feature in the text is an allusion to the Immorality Act, passed in the 1950s, prohibiting sexual relations between masters and slaves. Coetzee writes:

This was the most pointed of a long string of laws regulating all phases of social life, whose intent was to block horizontal forms of intercourse between white and black. The only sanctioned intercourse was henceforth to be vertical, that is, it was to consist in giving and receiving orders. (Coetzee 1992: 97)

Nevertheless, love is a particularly fugacious word, the evanescence of which sits uncomfortably with the court's concern with enlightenment constitution and its suspicion of evidence that is not "scientific" (para 305 G-H).²⁶⁰

A likely reason for the particularities of past injustices not being discussed at all in the judgement is that, as nation-building discourse, it is a question of 'sweeping away' the old differences that stand in the way of new uniform standards promoted by the powers that back it. Divisions of the past are suppressed in favour of national unity, manifested in the dual forms of humanist universalism and particular Africanness. The reason why the death penalty must be abolished is because nationalism precisely guarantees the immortality of the group. As Bauman shows,

durability is to be secured not for life in general, but for a specific form of collective life; and this means a specific structure of domination, a certain allocation of privileges, a given distribution of freedom and dependency as well as of the chances of individual immortality - ... to give the group its distinctive identity and the meaning to its survival. (Bauman 1992: 104)

In short, modernity's political answer to the individual's fear of death is the immortality of the group, the nation, in which the individual's mortality is effaced through participation in and perpetuation of the nation. The *Makwanyane* judgement reflects a recognition that the state's imposition of capital punishment qua "act of mortality" is too transparently incongruous with the construction of the nation as precondition for group immortality. Bauman, reminding us of Lyotard's suggested conception of modernity, not as a socio-political system, but as a *mode*, permits us to view *ubuntu* as expressing a certain rhetoric of sensibility whereby

thought acts itself as *history*, that is to say that it transcends the present by decomposing it, simultaneously, as the over-determined residue of the past, overflowing with meanings, and an under-determined preamble to the future, waiting for a meaning yet to be given ... the present is incomplete (im-perfect) not yet quite what it *could* be if fully developed, not yet quite what it should be if it duly set itself free from the past that drags it down. (Bauman 1992: 109)

²⁶⁰ Robert Hollinger notes "the Enlightenment ideal of the moral and epistemological unity of mankind, which was to provide the tools for 'relieving man's estate' (Bacon) without theoretical limit. This led to the notion of a scientific culture in which everything was grounded in scientific doctrine or method, or committed to the flames as sophistry and illusion as Hume put it" (Hollinger 1985: x).

The concept of *ubuntu* operates in exactly this way, hearkening back to an idyllic pre-colonial era of communalism and democracy which denies victory to the injustices of the present by being posed as an ideal for the future, “still always to come” in Derrida’s sense. *Ubuntu* is both overflowing with meanings, which are recurrent in the judgement, and yet still to be concretised – still to be finally determined. It is simultaneously universal and immutable and particular and contingent, or more accurately: a particular and contingent claim to the universal and immutable.

5.6 Death as Penalty

I turn now to consider execution as a strategy of penology. The court’s attitude to the application of the death penalty closely follows the approach of the social contractarians and other liberal theorists of the Enlightenment – Hobbes, Locke, Rousseau, Montesquieu and Beccaria. That the court should follow the approach of these theorists comes as no surprise, for it is in the eighteenth century that Rousseau and his contemporaries concerned themselves with the theoretical composition of parliamentary democracy, and it is during this period that the discourse of rights arose to mediate relations between citizens and the state. Given the *Makwanyane* court’s eagerness to proclaim the legitimacy of liberal democracy and rights discourse, it is natural that the judges should be located within the emancipatory discourse of the Enlightenment. What is less clear is why the approaches to capital punishment of Hobbes, Locke, Rousseau, Montesquieu and Beccaria should be favoured over Kant and Hegel, both firmly in favour of (judicious, judicial) invocation of capital punishment.

Of the three justifications for punishment mentioned in the previous chapter – retribution, rehabilitation and deterrence – rehabilitation is the most obviously incommensurate with the death penalty, since “the death penalty is absolute in the sense that it abolishes the criminal at the same time as the crime” (Foucault 1996: 241). The judges in *Makwanyane* reject retribution as a justification for the death penalty on the grounds that it

smacks too much of vengeance to be accepted, either on its own or in combination with other aims as a worthy purpose of punishment in the enlightened society to which we South Africans aspire and that the expression of moral outrage which is its further and more defensible object can be

communicated effectively by severe sentences of imprisonment. (Didcott J, para 185 A – C)

Chaskalson P claims that “[r]etribution is one of the objects of punishment, but it carries less weight than deterrence” (para 129 G-H), and that punishment need not be identical to the offence but should instead be symbolic. Kentridge J notes:

This too [the argument from retribution] I regard as an argument of weight. But as a civilised society it is not open to us, in my opinion, to express our moral outrage by executing even the worst of murderers any more than we could do so by the public hangings or mutilations of a bygone time. (para 203 I-J)

In summary, most of the *Makwanyane* judges see some value in retribution, but insist that deterrence is the determining consideration in its judgement of the death penalty.

The horror of revenge as a motive for execution is first expressed by Plato in *Protagoras* and permeates through to the penal theory of the Enlightenment. Hobbes specifies in *Leviathan* that “we are forbidden to inflict punishment with any other design than for the correction of the offender or direction of others” and disapprovingly describes revenge, which effects neither correction nor deterrence, as “‘vain-glory’, against reason, against nature ... commonly called *cruelty*” (Hobbes 1985: 210). Although he sometimes appears to stand in the Aristotelian retributive tradition (“whosoever voluntarily doth any action, accepteth all known consequences of it” (Hobbes 1985: 338)), the purpose of punishment for Hobbes is primarily as deterrent and corrective. Hobbes claims that the death penalty should be reserved for crimes most dangerous to the public, such as treason, for which he sees execution as a deterrence.²⁶¹ The similarities between Hobbes’ attitude to execution and that of the *Makwanyane* court are manifold: both regard the primary goal of correction and rehabilitation rather than retribution. Both view the instigation of the death penalty without regard to these aims as cruelty. In *Makwanyane*, although the court regards capital punishment as invasive of the right to life (section 10) and the right to dignity (section 9), the primary right regarded as being invaded is section 11(2): the right not to be subjected to cruel, inhuman and degrading punishment. Also, just as Hobbes sanctions the death penalty for treason, so the *Makwanyane* court specifically excludes from its order the conditional set out in section 277(1)(b) of the Criminal

²⁶¹ “Punishment of the Leaders and teachers in a Commotion ... can profit the Common-wealth by their example” (Hobbes 1985: 390).

Procedure Act, namely “treason when the Republic is in a state of war”. Foucault refers to the sovereign’s qualified right to exercise the death penalty when its existence is in danger as “a sort of right of rejoinder”: a rejoinder from which no response is possible or even required (Foucault 1990: 135).

Rousseau takes up the subject of the death penalty in his chapter on “The Right of Life and Death” in *The Social Contract*. For Rousseau, implicit in the desire for self-preservation is the need to form a commonwealth and create a sovereign with power ultimately to put citizens to death if they transgress the law. This sentiment is similar to those expressed by Hobbes and Locke, but Rousseau qualifies it by stipulating that “the state has no right to put to death, even for the sake of making an example, any one whom it can leave alive without danger” (Rousseau 1973: 209). Montesquieu writes in a seemingly retributivist vein that “man deserves death when he has violated the security of the subject so far as to deprive, or attempt to deprive, another man of his own life” (Montesquieu 1949: 184), but this is qualified by his assertion that in

moderate governments ... the love of one’s country, shame, and the fear of blame are restraining motives, capable of preventing a multitude of crimes ... the civil laws therefore have a softer way of correcting and do not require so much force and severity. (Montesquieu 1949: 81)

At other times the *Makwanyane* court opposes what it considers to be the cruelty of the death penalty with “the altruistic and humanitarian philosophy which animates the Constitution enjoyed by us nowadays” (Didcott J, para 177 F-G). There is a strong resemblance between the court’s descriptions of the “dehumanising environment” of death row in which the condemned prisoner becomes one of “the living dead”, who “broods over his fate. The horrifying spectre of being hanged by the neck and the apprehension of being made to suffer a painful ... death is ... never far from mind” (Didcott J, para 178 A-B), and Beccaria’s emotionally charged appeals for the abolition of the death penalty based on descriptions of “cold-blooded barbarity, ... the germs of the weak, ... barbarous torments ... [and] the filth and horror of prison” (Beccaria 1963: 10). If the *Makwanyane* court’s focus on rehabilitation and deterrence at the expense of retribution is utilitarian, then it is the humanitarian utilitarianism of Beccaria, rather than Bentham’s formulation which

expressed a willingness to accept extremely severe punishment for the sake of deterrence and reformation.²⁶²

The *Makwanyane* court rejects out of hand arguments in favour of the death penalty based on the retributive approaches of Kant and Hegel. In response to the argument that “a murderer forfeits his or her right to claim protection of life and dignity”, Chaskalson P argues that “rights vest in every person, including criminals convicted of vile crimes” (para 136 A- 137 E). Langa J similarly claims that the rights of “the worst among us” must be respected (para 229 H-I). Kant insists that a murderer must be put to death since by killing another one is “unfit to be a citizen” and so one deprives oneself of the right to life (Kant 1965: 99, 102). The murderer is executed not for the sake of correction or deterrence but because the death penalty can establish an *equality* between the crime and the punishment. G.W.F Hegel also advocates the death penalty from a retributive perspective. For Hegel the negation of the crime is negated by an act which the crime itself requires to be complete as a negative act. Moreover, deterrence is an insufficient justification for punishment, since it fails to erase the crime and so is unable to negate the negation. As Peter Steinberger puts it, punishment, “the negation of the negation ... is in effect a statement, a declaration that the act of the criminal is a crime and that Right, although apparently annulled by crime, is in fact universal and eternal” (Steinberger 1983: 861). On what grounds does the *Makwanyane* court reject the Kantian and Hegelian positions? Largely, it would seem, on the basis that such an approach is *inhumane* and *uncivilised*. It is ironic then that Judge Sachs refers to Theophilus Shepstone’s declaration opposing attempts by the indigenous peoples of Natal to circumvent the abolition of the death penalty in Kantian/Hegelian terms: “a man’s life has no price ... He who intentionally kills another shall die himself” (para 380 E-F). It is ironic because the colonial mission is a self-professedly “civilising” one, proclaiming its humaneness even in the act of slaughter.

In Foucault’s chronicle of the shift in penal strategy, he notes that prior to and during the eighteenth century, the sovereign exercised a “power of life and death” over his citizens, a right of deduction or appropriation of “things, time, bodies and ultimately life itself; it culminated in the privilege to seize hold of life in order to suppress” (Foucault 1990: 136). Thereafter power is transformed from a negative

²⁶² “It may sometimes be of use ... to stretch a little beyond that quantity [of punishment] which on other accounts would be strictly necessary” (Bentham 1970: 171).

force of suppression (the classical juridical model) to a concept of power as productive, normative and administrative. Turning specifically to the death penalty Foucault notes that as

soon as power gave itself the function of administering life, its reason for being and the logic of its exercise – *and not the awakening of humanitarian feelings* – made it more and more difficult to apply the death penalty. How could power exercise its prerogatives by putting people to death when its main role was to ensure, sustain and multiply life, to put this life in order? ... Now it is over life, throughout its unfolding, that power establishes its domination; death is power's limit, a moment that escapes it; death becomes the most secret aspect of its existence, the most 'private'". (Foucault 1990: 138, emphasis mine)

Death is the limit of this productive power and also its antithesis. In the mid-to-late nineteenth century new forms of knowledge were brought to bear on the body (and the mental life) of the offender which caused a shift in the method of punishment from capital punishment to the method most commonly applied in contemporary society – confinement, isolation, regulation, examination and normalisation. Where the juridical system purports to guarantee liberty and privacy, the disciplines busily erode these rights.²⁶³ Applying this idea to the South African situation, the claim is that whilst since 1994 jurists have been establishing the formal rights of equality, liberty and fraternity, these rights have been eroded through the simultaneous creation of a carceral or panoptic society. Foucault writes:

The [social] contract may have been regarded as the foundation of law and political power; panopticism constituted the technique, universally widespread, of coercion ... The 'Enlightenment' which discovered the liberties also invented the disciplines. (Foucault 1979: 222)

Whereas the law prior to the Enlightenment was effective by virtue of sanction, the disciplines and their regulatory apparatus work mainly through normalisation, by shaping individuals by continually subjecting them to normalising modes of regulation.

²⁶³ Foucault observes: "The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday physical mechanisms, by all those systems of micropower that were essentially non-egalitarian and asymmetrical that we call the disciplines" (Foucault 1979: 222).

In *Makwanyane* the court expressed a preference for life imprisonment over capital punishment, arguing that life imprisonment not only provides for the possibility of correction/ rehabilitation, (although this also verges on irony if as most of the judges suggest, “life” really means a lifetime of incarceration or a duration very close to it) but also has sufficient retributive and deterrent effects. Chaskalson J insists that a “very long prison sentence is also a way of expressing outrage and visiting retribution on the criminal” (para 129 A-B), and Kriegler J claims that “the death penalty has no demonstrable penological value over and above that of long term imprisonment” (para 212 C-E). Judge Mahomed writes

Retribution has indeed constituted one of the permissible objects of criminal punishment ... I have however some serious difficulties with the justification of the death sentence as a form of retribution ... I find it difficult to hold that the death sentence has been demonstrated by the State to be “justifiable in an open and democratic society based on freedom and inequality”. (para 296 B-H)

I want to argue that a Foucauldian analysis is helpful in analysing transitional South African constitutionalism and is borne out by examples external to the *Makwanyane* case. Rights contained in the Constitution’s Bill of Rights may be limited where such limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.²⁶⁴ But judicial discretion to limit the right might result in its abrogation in certain instances. For example, section 14 of the Constitution provides that everyone has the right to privacy. However, and notwithstanding this right, all persons applying for identity documents are compelled to submit to having their fingerprints taken.²⁶⁵ My argument is not that constitutional rights should be unlimited – I agree with Stanley Fish, for instance, that in the absolute sense, there’s no such thing as free speech and it’s a good thing too. Rather I want to show that subjectivity is constituted in post-apartheid South Africa through the administrative classification which accompanies the nation-building process through the creation of types. The constitution constitutes by providing the illusion of freedom and liberty, all the while facilitating both the repression and the constitution of the individual.

²⁶⁴ Section 36 of the final Constitution. A corresponding provision is contained in section 33 of the interim Constitution.

²⁶⁵ This is in accordance with section 10 of the Identification Act 68 of 1997. A similar legislative provision applies to the mandatory taking of fingerprints for motor vehicle driving licences.

Although Foucault has been criticised by postcolonial theorists for failing to provide a formulation of power that accounts for Europe's dominating relations with its colonies, I think a Foucauldian analysis may valuably be undertaken in this instance. Shepstone's Kantian (retributive) approach to punishment in 1850 is distinguishable from the *Makwanyane* court's predominantly utilitarian (rehabilitative, preventative) approach in 1995, not because of a move away from the inherent value of the subject; indeed, the Constitutional Court's adulation of rights discourse, in terms of which individuals are invested with a personhood of intrinsic worth would seem to demand a retributive approach. Raymond Koen, objecting to the predominance of utilitarian concerns in recent penal decisions of the judiciary, argues that

[r]ights theory requires that punishment takes seriously the unique individualism of each human being, including those who have committed offences and hence to respect each as a bearer of rights. This translates into a retributive or desert theory of punishment, in terms of which offenders are punished simply because they deserve to be punished. (Koen 1999: 189, 190)

Koen does not, however, deal with the influence on South African constitutionalism of the social contractarians, such as Locke and Rousseau who, greatly influenced by Beccaria, viewed the purpose of punishment as primarily didactic. There can be no doubt that Locke and Rousseau have greatly influenced post-apartheid liberal democratic constitutionalism, even if for these theorists, rights derive from the social contract, rather than directly from the individual.

The answer to the question of why the retributive approach to penology was downplayed in *Makwanyane* has, in fact, little to do with the rise of liberal rights discourse in South Africa. As early as 1961, the Appellate Division, while still holding that retribution "is by no means absent from the modern approach" to punishment, accepted that it had lost ground to prevention and correction.²⁶⁶ Since that time retribution has in the eyes of the judiciary been secondary to prevention and correction.²⁶⁷ More to the point, South Africa was during apartheid the paradigm case

²⁶⁶ *R v King* 1961 1 231 (A) 236.

²⁶⁷ Ten years later the same court expressed the view that "retribution has tended to yield to the aspects of correction and prevention, and it is deterrence which has been described as the 'essential', 'all important', 'paramount' and 'universally admitted' object of punishment" (*S v Matthee* 1971 3 769 (A) 771 D). This approach was confirmed by the Appellate Division (*S v Khumalo* 1984 3 SA 327 (A) 330 E and *S v P* 1991 1 SA 517 (A) 523 D-F. Soon after *Makwanyane*, the Constitutional Court again

of a panoptic society, in which life from cradle to grave was administered and controlled. An enormous bureaucracy was required for such an artificial social separation. Why does the constitutional court not take the opportunity to follow a retributive approach? One reason is that South Africa follows the growing worldwide trend to abolish the death penalty in order to create the conditions for an increasingly panoptic society. The change in political regimes signals a break in the epistemic regime which, although promising humanitarian values, actually increases the level of panopticism and decreases the level of severity of punishment in accordance with the transformation in Europe since the end of the nineteenth century, “of the judicial system to a mechanism of oversight and control” (Foucault 2000: 32). The nation-building project – classificatory, homogenising, normalising, and unifying – is the apogee of panopticism (Bauman 1992: 105).

The judicial recourse to values appears as an appeal to humanitarianism, but on a Foucauldian reading it is simply a cover for the epistemic technology of positivism which continues to dominate judicial practice. Positivism and its chief interpretative mode, literal interpretation, permits law to establish in South Africa “[a] new mechanics: isolation and regrouping of individuals, localisation of bodies; optimal utilisation of forces; monitoring and improvement of the output; in short, the putting into place of a whole *discipline* of life, time and energies” (Foucault 2000: 55, emphasis in original).

5.7 Public Opinion, Counter-majoritarianism and Democracy

I want now to turn to the issue of public opinion and the degree to which it should justifiably influence judicial decisions in a constitutional democracy such as South Africa’s: what is known as the counter-majoritarian dilemma. A startling feature of the court’s decision to abolish the death penalty in *Makwanyane* is that it was seemingly contrary to the will of the majority of South Africans. Although evidence placed before the court, to the effect that the majority of South Africans were in favour of the death penalty, was neither conclusive nor beyond dispute²⁶⁸, the court was prepared to assume that public opinion advocated retention of the death penalty

referred to this “perceptible shift in approach and attitude towards punishment” (*S v Williams* 1995 (7) BCLR 861 (CC) 881G.

and were nevertheless prepared to abolish it. In doing so, the court adopted the view that justice was not equivalent simply to enacting the wishes of the majority. The court thereby opened itself to the charge of acting undemocratically. *Makwanyane* introduces into South African case law a debate over the legitimacy of judicial review: the counter-majoritarian dilemma, which has divided and enlivened constitutional theory in recent times. The debate concerns the right of judges who are neither elected into office by the majority, nor directly accountable to the majority, to make decisions which are contrary to majoritarian policies. The question is: how can a non-elective judiciary be justified in a democratic regime (Bickel 1986: 16)? Judge Chaskalson, delivering the unanimous judgement of the court deals with the question of public opinion as follows:

Public opinion may have some relevance to the enquiry, but in itself it is no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to parliament, which has a mandate from the public, and is answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution. By the same token the issue of capital punishment cannot be referred to a referendum, in which the majority view would prevail over the wishes of the minority. The very reason for establishing the new legal order and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and weakest among us, that all of us can be secure that our own rights will be protected. (para 88)

In that the court expresses a distinction between democracy and majoritarianism and points to a concept of democracy which incorporates the protection of minorities, outcasts and the marginalised, a kind of ethic of alterity, it is refreshingly progressive, poignantly acknowledging that today's centre is yesterday's margin. It is all the more disappointing then that such a progressive statement of the judicial function – the protection of an ethically substantive concept of democracy as duty to the other – should be followed by such a conservative approach to constitutional interpretation. Justice Kriegler specifies that the methods to be used by the court are “essentially

²⁶⁸ Chaskalson P noted that public opinion was “disputed” (at para 87) as did Didcott J: “We have no means of ascertaining whether that is indeed so” (at para 188).

legal, not moral or philosophical” (para 207 E-F) and that “the incumbents are judges, not sages; their discipline is law, not ethics or philosophy and certainly not politics” (para 207 A-B). Judge Sachs, writing of various stances within South African society on the death penalty, and on the various values which animate the debate on capital punishment, writes:

We are not called upon to decide between these positions. They are essentially emotional, moral and pragmatic in character and will no doubt occupy the attention of the Constitutional Assembly. Our function is to interpret the text as it stands. Accordingly, whatever our personal views on this fraught subject may be, our response must be a purely legal one. (para 349 D-E)

The court’s repeated insistence on the distinction between law and politics and law and philosophy seems to deny that jurisprudential stances contest and contrast with each other and suggests that judgement is a straightforward application of commonly agreed legal principles to the facts. The impression left, as Klare has noted, is a denial of agency, by a court which “was no doubt anxious to affirm that it fully internalises the desirability and appropriateness of judicial deference to the popular will in the first democratically elected South African government” (Klare 1998: 173). There is, therefore, a pronounced discord between the court’s articulation of its new function as a buffer against Mill’s “tyranny of the majority” and its attitude to judgement, denying the contested nature of contrary positions, the aporetic undecideability of decision-making and the almost total denial of semantic indeterminacy.

Although the court agreed in principle with the “generous” and “purposive” approach adopted in the previous Constitutional Court case of *S v Zuma*,²⁶⁹ the court mostly argued that the words in the Bill of Rights have a determinate and self-evident meaning which is contained in the text itself, reflecting a metaphysics of presence which denies choice in the interpretative process; hence the exclusion of politics and philosophy; hence the modern insistence on the formal and mechanical application of “purely legal” rules, closely mirroring Paton’s expression of the judicial function in 1948. All of which is immediately undermined by the political and philosophical nature of the subject matter, which absolutely resists non-political, non-philosophical treatment. Most judges in *Makwanyane* relied on the classically literalist or “common-sense” arguments: the view expressed by positivists such as Hart that the text

²⁶⁹ 1995 (2) SA 642 (CC).

expresses itself, lays bare its meaning, univocally, and only in the rare cases where there is more than one applicable rule or where there is a penumbra of manifest ambiguity can resort be had to texts external to the constitution, such as the *travaux préparatoires*. Several of the judgements rested on the purported incompatibility of capital punishment with the right to life (section 9) in addition to other rights. In this regard, Kriegler J opines “Whatever else section 9 may mean in other contexts ... at the very least it indicates that the state may not deliberately deprive any person of his or her life” (para 208 B-D). This attitude is even more bluntly expounded by Sachs J:

This court is unlikely to get another case which is emotionally and philosophically more elusive and textually more direct. Section 9 states: ‘Every person shall have the right to life’. These unqualified and unadorned words are binding on the state ... the right to life is not subject to incremental invasion. (para 350E – 351G)

The problem with this argument – that the Constitution’s protection of “life” self-evidently and necessarily entails that capital punishment is unconstitutional - is that it is less of an argument than a bald assertion. As Klare rightly observes, as an argument it is both circular and unpersuasive. The question is *whether* capital punishment should be forbidden and this requires some intermediate steps of reasoning, some justification, which will require the espousal of moral and political arguments. It is the case, for instance, that the state deprives persons of their right to life every day through its failure to redistribute wealth adequately, through the cessation of development programs initiated under the RDP. This is not to say that there are not important differences between capital punishment and death following economic choices of the state. These cases are clearly distinguishable and should perhaps make a difference which is reflected in law. But to make this distinction is to advance political and philosophical arguments. Kant, for instance would agree that everyone has the right to life but would insist on the death penalty being applied in the case of murder. Klare comments on the *Makwanyane* court’s approach that “[t]o argue thus is to efface juridical power and responsibility, and to attribute constraining power to texts that they do not possess” (Klare 1998: 175).

The argument is that the court in *Makwanyane*, despite at times articulating a defensible philosophical and political stance on adjudication, succumbs to a perceived pressure to legitimate the new South African democracy by denying choice and

agency – and so claiming more or less mechanically to follow the letter of the law – even as it decides the issue contrary to the wishes of the majority. The denial of interpretative agency manifests not only in the literalist approach to language, but also in the court’s extensive reliance on analogical reasoning, drawing parallels with decisions in foreign jurisdictions, rather than engaging in first order reasoning. The decision is characterised in the words of Cockrell, by “the absence of a rigorous jurisprudence of substantive reasoning” in favour of “a quasi-theory so lacking in substance that I propose to call it ‘rainbow jurisprudence’” – glib, ephemeral, lacking in substance and seemingly intent on denying the existence of conflict in substantive reasoning” (Cockrell 1996: 11). The tension between the progressive formulation of justice and democracy and the unpersuasive and epistemologically conservative approach to justification features throughout the judgement: in the inconsistency between banishing philosophy and politics from the arena of adjudication and admissions that the issues involved are emotionally and philosophically complex (Sachs J, para 350 E-F) and that the death sentence “manifests a philosophy of indefensible despair” (Mahomed J, para 271 I-J). There is a disparity between the dominant literalist approach and a radical approach to interpretation which refers both to intertextual allusion and the “interplay” of meaning between different sources, suggested by the following dictum of Mahomed DP:

What the Constitutional Court is required to do in order to resolve an issue is to examine the relevant provisions of the Constitution, their text and context; the interplay between different provisions; legal precedent relevant to the resolution of the problem both in South Africa and abroad; the domestic common law and public international law impacting on its possible solution; factual and historical considerations bearing on the problem ... the balance to be struck between different and sometimes conflicting considerations reflected in its text. (para 266 G-I)

I venture to argue that the court cannot reconcile its aspirations toward justice with a mode of interpretation and adjudication which will justify its decision, primarily because it has not fully thought through the seeming antithesis between democracy and majoritarianism, or to put it another way, it has not fully theorised a concept of democracy which incorporates substantive *and* procedural considerations, rather than a merely procedural conception of democracy, which would allow for contestation and conversation rather than slavish submission to “public opinion”.

Before I make some tentative observations on a formulation of democracy which might facilitate this, some initial remarks need to be made about the nature of public opinion. Most of the judges in *Makwanyane* dismissed public opinion on the basis of its transience and ephemerality. For instance, Mokgoro J distinguishes between “enduring values” and “fluctuating public opinion” en route to rejecting the latter’s influence. Derrida notes that “[o]ne can also fear the tyranny of shifts in opinion”, and observes the phenomenon of “opinion sometimes lagging paradoxically behind the representative agencies” (Derrida 1992c: 86); in *Makwanyane* the State agreed that the death penalty should be declared unconstitutional in contrast with public opinion (para 11 C-D).

Moreover, as Duncan Kennedy (1997) argues, public opinion is not formed independently of the heterogenous and hierarchical powerlines of the institutional dissemination of knowledge and disciplinary pedagogy and its adjuncts and of the imbrication of techniques of knowledge with strategies of power. To put it simply: public opinion is a function of, or at least contaminated by, the various sources of institutional authority in society – media, religion, professions and the arms of government. This follows Foucault’s assertion that subjectivity is constituted through the operation of power within discourse. Similarly Derrida, writing about the representation of public opinion in newspapers argues that “the newspaper or daily *produces* the newness of the news as much as it *reports* it” and similarly on televised representation: “this ‘democratisation’ never legitimately represents. It never represents without filtering or screening – let us repeat it – a ‘public opinion’” (Derrida 1992c: 89, 98). I have argued in a previous chapter that the words “We the People” with which the South African Constitution begins is an example of *metalepsis* – a rhetorical reversal of cause and effect. In the same way, public opinion (cause) is falsely represented as being crystallized in the Constitution (effect), rather than public opinion being constituted through constitutionalism. Poststructuralism tends to challenge and reverse the represented succession of causal events by showing in this instance that the Constitution and the representative structures of the people in fact operate to produce public opinion. I am aware of the limits of construing and problematising causality in this way, but I agree with Spivak that

we can’t throw away thinking causally ... One can’t judge without causal thinking. But then to ground the cause that one has established for the analysis

into a certainty is what the poststructuralist would question. The poststructuralist would say that generally causes are produced as effects of effects. (Spivak 1990a: 23)

Alan Hutchinson (1999) suggests a formulation of democratic adjudication which is both procedural and substantive. The procedural aspects of democracy - a framework for conversation, contestation, the right to assert and to reply – are crucial to democracy. Derrida argues that it “is necessary to maintain formal rigour, for without it, no right is protected; and so it is necessary to invent more refined procedures, a more refined legislation” (Derrida 1992c: 99). However, to define democracy only in procedural terms is falsely to cast the government as representing the will of the people and to demonise courts as undemocratic. Moreover, as the court noted in *Makwanyane*, the will of the majority does not reflect a shared sense of justice; it reflects an aggregate of vested interest or a common (often misplaced) fear.²⁷⁰

Hutchinson, commenting on the recent Canadian judgement of *Re Quebec Reference*²⁷¹, notes the court’s observation that the Constitutional text is to be understood in the light of foundational principles of democracy, the rule of law and respect for minority rights. (In South Africa, as I have noted previously, this interpretative injunction is contained in the constitutional text: section 39 of the final Constitution mandates interpretations of the Bill of Rights which “promote the values which underlie an open and democratic society based on dignity, equality and freedom”). In the Canadian case the court regarded the principle of democracy as an essential interpretative consideration, but conceded that the meaning and demands of this principle are far from self-evident or universally accepted – hence, presumably,

²⁷⁰ Hutchinson makes two important distinctions: first, legislative outcomes are not majoritarian in the sense that individual legislators rarely claim to adopt the same stance on issues as the majority opinion and second, majoritarianism does not provide any substantial protection against legislative action of minorities. The attitudes and opinions of the majority have long been treated with scepticism both in jurisprudence and philosophy generally and with good reason. In a referendum in Colorado, for example, 53.4% of the voters approved an amendment which would ban the passage or implementation of any gay-rights protection and overturn an executive order prohibiting anti-gay discrimination in state employment (Viljoen 1996: 666). Thoreau argues in *On the Duty of Civil Disobedience*: “A wise man will not leave the right to ... prevail through the power of the majority. There is but little justice in the actions of the masses of men” (Thoreau 1996: 192). John Hart Ely has also pointed out the perniciousness of appealing to majority of opinion: “Now think again about consensus as a possible source, and the message will come clear; it makes no sense to employ the value judgements of the majority for protecting minorities from the value judgements of the majority” (Ely 1980: 69). On the issue of the death penalty, Ronald Dworkin argues that the case against the death penalty “is just as strong in a community where a majority of members favour it as in a community of people revolted by the idea” (Dworkin 1987: 24).

the counter-majoritarian dilemma. The court in this case held that democracy is not simply concerned with the process of government. There is also an essential substantial component, a cluster of values which include “commitment to social justice and equality”. The court went on to concede that the meaning of these values and how they affect each other is never fixed, but is a feature of the continuing debate over what democratic commitment entails: “a democratic system of government is committed to considering ... dissenting voices and seeking to acknowledge and address these voices in the laws by which all in the community must live” (para 68).

For democracy, procedure is important, even essential. Derrida speaks of a “right of response”, a right that allows the citizens to be more than a fraction ... of a passive consumer “public”, necessarily cheated because of this” (Derrida 1992c: 106). Hutchinson agrees, but notes that “democracy has both a substantive and procedural section ... this holds that there are certain outcomes that cannot be tolerated in a society that claims to be just” (Hutchinson 1999: 206, 207). Values are important to democracy in that democracy is about making choices between political values: “what counts as ‘democratic’ is contingent and ahistorical ... it will always be a contested and contestable issue – law is politics” (Hutchinson 1999: 209). Derrida also distinguishes between democracy and public opinion which invokes the false privileging of consensus. False because the impossibility of establishing a consensus is crucial to understanding democratic politics. For Derrida, justice can never be completely instantiated in the institutions of any society and deconstruction forces us to keep democratic contestation alive. Democracy points to the necessity of antagonism and contestation, the aporia of undecideability and decision. With undecideability there can never be complete satisfaction that the “right” choice has been made. There is at once a risk and a chance which is the condition for the construction of politics (Mouffe 1996: 9). “Public opinion” can never be the same thing as justice since it is a temporary result of a provisional hegemony, a stabilisation of power which always entails some form of exclusion. A deconstructive approach to democracy acknowledges “the fact that difference is the condition of the possibility of constructing unity and totality at the same time that it provides it essential limits” (Mouffe 1996: 10). Mouffe argues that radical and plural democracy informed by deconstruction will be more amenable to multiplicity and heterogeneity within a

²⁷¹ (1998) 161 DLR (4th).

pluralist society. She argues that what distinguishes a modern pluralist democracy is “the presence of institutions that permit these agents to be limited and contested” (Mouffe 1996: 11).

Both the procedural and substantive aspects of democracy are present in what Derrida calls *le droit de réponse*: the right of reply and contestation but also the right of response, indicating a sense of responsibility which is simultaneously ethical, political and legal. Judgement by the court is a profoundly ethical activity, a political choice between options with a remainder. For Derrida this choice is ethical in that it involves an ethical *relation* between persons in Levinas’ sense of subjective experience as always already engaged in a relation of responsibility to the other (Critchley 1996: 33). Deconstruction is concerned with the suffering of other human beings and the obviation of suffering should be reflected in the justification (reasoning) of the court’s decision. For Derrida, democracy is the political form that best provides justice: not a liberal democracy currently in existence such as South Africa’s (although not not South Africa’s), but a democracy “guided by the *futural* or *projective* transcendence of justice” (Critchley 1996: 36, emphasis in original) – the democracy of *ubuntu*, an ideal always still to come and to which South Africa’s democracy must direct itself.

5.8 Conclusion

The court in *Makwanyane* was too anxious to face the “madness” of judging. Anxiety is a facet of political transition, in which the exigencies of moral and social reconstruction may displace open self-reflexivity. It is not that I find the court’s interpretation of the Constitution unconvincing, but simply that its reasons are unpersuasive. The Constitution stipulates that the court must interpret it in accordance with the principle of democracy. On a deconstructive reading of democracy, the death penalty is unethical. It is an abrogation of the duty to the other. It is an annihilation of the other that affords to response. Equally, another facet of democracy for Derrida, is the moral and political obligation towards the other’s suffering. In that the “death-row” phenomenon is so barbaric, it offends against deconstruction’s belief that “cruelty is the worst thing there is” (Critchley 1996: 33). In a recent interview Derrida asks in puzzlement,

Why is it so that for instance all the Western democracies have abolished in Europe the death penalty, while the United States, which presents itself not only as a great democracy but the mother of democracy in the world, doesn't abolish the death penalty. Not only doesn't abolish the death penalty but practices in a way that is absolutely massive, cruel and unbelievable. (Derrida 1999b: 2)

Stephen Clingman reminds us that "South Africa is a country that in some sense has been built on murder" (Clingman 2000: 156). The abolition of the death penalty is thus a symbolic repudiation of the violence characterising apartheid society. In this context, the court's preference for rehabilitation over retribution is understandable, in that instead of a life for a life, there seems to be a possibility for moral and social re-education – for dispersion, relocation and re-alignment. There is, however, a problem with the analogy between the individual act of murder and the violence of the past: the prison is a world apart, removed from society, a place from which the prisoner cannot hear what others in society must – "the resulting profusion of voices that must make South Africa's future, transcending the past by building new relations beyond the fixed geometry of the old, offering a new vision of possibility" (Clingman 2000: 156). Finally, if the abolition of the death sentence is a *symbolic* judicial act against violence, Foucault's warning is apposite: "The intensity of feelings that surrounds the death penalty is intentionally maintained by the system, since it allows it to mask the real scandals" (Foucault 1996: 249). Against Gordimer's contention that "There is a serenity in justice", I refer to Patrick Cullinan's poem "Triumph" in which he rightly castigates every strategy of detachment without continued commitment as follows: "Then you praised indifference/ Calling it: the triumph of/ Serenity" (Cullinan 1999: 16).

My contention is that if we must follow Paton and Gordimer in describing law and justice in religious terms, then justice is messianic: always still to come.²⁷² Justice can never be completely encapsulated in a judicial proclamation, since its determination will always exclude. Consequently, a further deconstruction of post-apartheid society's legal discourse and institutions needs to take place, to compel it ethically to address its other, the inheritance of its past, the real scandals, like the oppressive effects of patent law in depriving AIDS victims of drugs. As Adorno observes "[a]s long as the world is as it is, all pictures of reconciliation, peace, and quiet resemble the picture of death" (Adorno 1973: 381).

Chapter 6: Widows and Orphans

““Perhaps” one must always say perhaps for justice” (Derrida 1992a: 27).

In making a judgement about the effects of constitutionalism and legal theory deployed within the new paradigm²⁷³ of post-apartheid liberal democracy, in other words, to determine whether the Constitution has made good on its promises as a historic bridge between past injustice and future justice, a number of questions present themselves for urgent reply: has the Constitution and the Constitutional Court’s interpretation of it furthered reconciliation? Have the Constitutional Court’s judgements reintroduced ethics into the law or is post-apartheid law, contrary to the Constitutional Court’s proclamations reclaiming humanitarianism, equality and freedom for the law, simply a cover for a new insidious form of domination? In other words, has the violence of the law become tempered with concerns about substantive justice?

It is not possible on the basis of my analysis of the *AZAPO* and *Makwanyane* cases, no matter how influential these may be, to pronounce on the overall performance of the Constitutional Court and although I have referred to other cases, such allusions have been brief and generally restricted in scope to their bearing on particular issues. To judge the Constitutional Court fairly, and more importantly, to provide a sense of the injustice still present within the law, would require close readings of the kind that I have offered in the previous two chapters, in order to unearth new significations and point to bifurcations of reasoning that might reveal transformative possibilities. In addition, the cases I have alluded to are insufficient for a diagnosis of post-apartheid adjudication for reasons other than the fact that they are two out of over one hundred judgements. *AZAPO* and *Makwanyane* were decided

²⁷² This conception of justice is Derrida’s. See for instance Derrida 1996.

²⁷³ I have so far deliberately steered clear of the phrase “paradigm shift” to describe South Africa’s transition to democratic constitutionalism. I have done so for a number of reasons. First, the expression is grossly over-used for this purpose and generally seems to be used to denote a new form of practice and mode of thought concomitant with the democracy and the new Constitution, when in fact the phrase “paradigm shift” has meanings both more varied and more specific than this. Thomas Kuhn’s discussion of “paradigms” and the notoriously large number of meanings he assigned to the word, which he used to describe the history of science, makes conscripting it into the service of legal theory a little daunting. Nevertheless, Kuhn’s theory of paradigm shifts has been used to explain radical developments in the law. I do not deny Kuhn’s point that rationality is paradigm dependent and that the end of apartheid has ushered in a homeostatic gestalt that has destabilised and in some cases changed irrevocably old modes of practice. For a discussion of the uses of Kuhn’s theory of paradigms for legal theory, see Winter (1990). For an example of the phrase “paradigm shift” being applied to the South African context, see Esterhuysen (2000: 149), Devenish (1998: 335-337).

under the interim Constitution which ceased to be of effect in February 1997. These cases cannot therefore be argued to represent the approach of the Constitutional Court from the effective date of the final Constitution without the necessary evidence and argument.

Moreover, I have argued that *AZAPO* and *Makwanyane* were correctly decided. Where I have been critical of the court's reasoning in these cases I have been so primarily on the grounds that the court has failed fully to articulate its reasons, under-theorising or theorising falsely in order to present its decisions as the only reasonable decisions in the circumstances. The effect of this has been to deny or omit alternative possibilities without sufficient argument so as to present the Court's decisions as more objective and neutral (and consequently less partisan) in order to provide legitimacy to judicial decision-making in a transitional moment in which little consensus exists on the question of values. In order to pronounce more fully on the actions of the Constitutional Court I would have to provide a reading not only of cases decided under the final Constitution but also of cases decided in a way that is substantively unjust. The primary purpose and main strength of deconstruction and other postmodern critiques for law is to provide readings which intervene in the text of judgements which have been decided unjustly – that is, decided in a manner which marginalises or effaces the other – in order to present alternative ways of reasoning and viewing evidence which would permit a court committed to justice to decide such cases differently. Such an intervention would have the effect of diverting or refracting the discursive power and violence of legal discourse to salutary effect.

This concluding chapter seeks to indicate briefly and by selective example the possibilities for such intervention in the future with reference to cases with which I have so far not dealt, either fully or at all. I shall not engage in any comprehensive way with the discourse of other judgements but will rather restrict myself to pointing to directions which further work could follow. I shall also say something, however incomplete, in judgement on the law and about the possibility of legal justice in post-apartheid South Africa.

6.1 Exclusions and Deconstructions

New National Party of South Africa

*New National Party of South Africa v Government of RSA and others*²⁷⁴ is an example of a case both recently and unjustly decided by the Constitutional Court. The case concerned a challenge to the Electoral Act, which required a bar-coded identity document as a prerequisite for voting in the 1999 elections. The constitutionality of the Act was challenged on the basis that approximately 2.5 million predominantly rural African people (some ten percent of the electorate) had no form of identification, by virtue of their ignorance of the requirements or their lack of financial and other means. It was averred that the relevant government department lacked the resources necessary to process applications for identity documents timeously, with the net effect of depriving a large proportion of the population of the right to vote. Yacoob J, delivering the majority judgement, although acknowledging the right to free and fair elections under section 19(2) and the right to universal suffrage under section 1(d) of the final Constitution, held that the statutory requirement to obtain a bar-coded identity document did not infringe these constitutional rights. Seemingly in violation of constitutional supremacy, in accordance with which legislation promulgated by Parliament is to be held accountable under the Constitution, Yacoob J held:

Decisions as to the *reasonableness* of statutory provisions are ordinarily matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of the courts in a democratic society. Courts do not review provisions of Acts of parliament on the grounds that they are *unreasonable*. They will only do so if they are satisfied that the legislation is not rationally connected to a legitimate government purpose ... *Reasonableness* will only become relevant if it is established that the scheme though *rational*, has the effect of infringing the right of citizens to vote. (para 24 B-E, emphasis added)

This is a striking passage. The court distinguishes between reasonableness and rationality: reasonableness has to do with questions of substantive justice, whereas rationality relates to a measured linkage of means to ends, where the ethical status of the means is not to be questioned by the court. It is a further example of the separation of ethics and legality, that, as I have argued throughout this study, characterises

²⁷⁴ 1999 (5) BCLR 489 (CC).

modern adjudication. The insistence on form – the doctrine of separation of powers – and the artificial separation of reason and rationality, ironically justifies the judiciary’s collusion with the substance of parliament’s decisions.²⁷⁵ The court’s failure to consider the ethical dimensions of the requirement for identity documents “reveals the similarity in approach between this judgement and those in the rather darker days when the trust of the executive constrained review activity” (Davis 1999: 174). The fact that there is “nothing irrational, arbitrary or capricious about the bar-coded ID serving as the main identification instrument” should not lead to the Court’s ultimate conclusion that excluding ten percent of South Africans from voting is just, especially when it is conceded that “the reasons why people have not registered are probably complex and varied and at best for the appellant, not determinable at this stage” (para 47 A-C). Rational coherence is no justification since, as Foucault and Adorno and Horkheimer have argued, rationality is instrumental and bifurcated; the Nazis were rational but evil.²⁷⁶

The dissenting judgement of O’Regan J draws attention to the injustice of the majority judgement in *New National Party of South Africa*. O’Regan J argues that given that the “South African democracy is still in its infancy and requires nurturing and care to ensure it [democracy becomes fully established ... it needs to draw all citizens into the political process” (para 119E-122C). Judge O’Regan rightly argues: “Given the constitutional obligations imposed upon Parliament to enhance democracy by providing free and fair elections, it seems incongruous and inappropriate that this court should be able to determine whether *citizens* have acted reasonably but not *Parliament*” (para 126 D-E, emphasis in original). In contrast to Yacoob J’s decision that it is reasonable to expect all South Africans to comply with identity document

²⁷⁵ The Constitutional Court ruling in November 2000 that, on the basis of the doctrine of separation of powers Judge Willem Heath could not continue to head the successful corruption unit, weakens the unit and its efforts to rid the country of corruption. According to the *Mail and Guardian*: “In most modern democracies, including South Africa, judges are motivated in a variety of activities not directly related to judicial office, such as commissions of enquiry and in the case of Judge Johan Kriegler, the Independent Electoral Commission” (“Replace Heath with Weltz”, *Mail and Guardian*, 1-7 December 2000, p28).

²⁷⁶ Foucault notes that Nazism was conceived not by erotic genius but through petit-bourgeois rationality: “Nazism was not invented by the erotic madmen of the twentieth century but by the most sinister, boring and disgusting petit-bourgeois imaginable ... the concentration camps were born from the conjoined imagination of a hospital nurse and a chicken farmer” (Foucault 1996: 188). As it happens, concentration camps first appeared during the Anglo-Boer War in South Africa – but Foucault’s point about ‘ordinary’ middle class rationality having the potential for evil on a large scale is well made.

regulations. O' Regan J observed that concepts such as reasonableness tend to exclude:

South Africa is a diverse society. Some of its citizens are fully literate and live in wealth and comfort, many however are disadvantaged educationally and materially. What is reasonable for one group of citizens may be quite unreasonable for another. It is not clear to me how the test established by the majority can accommodate sensitively the realities of South African society ... the test may be evasive of application in relation to those citizens who are unaware of legislative provisions which qualify the right to vote. (para 126 F-H)

The point is that universally encompassing concepts like 'reasonableness' and categories like 'the reasonable man' or 'reasonable expectations' almost invariably exclude:

[t]he most tenacious subjection of difference is undoubtedly that maintained by categories ... Categories organise the play of affirmations and negations, establish the legitimacy of resemblances within representation, and guarantee the objectivity and operations of concepts. They suppress the anarchy of difference, divide differences into zones, delimit their rights and prescribe their task of specification with respect to individual beings ... They appear as archaic morality, the ancient decalogue that the identical imposed on difference. (Foucault 1977: 186)

With the application of the legal concept of 'reasonableness' concrete individuals are turned into legal subjects, unique and unchangeable characteristics are subsumed under types, singular and contingent events transformed into model 'facts' and scenes in impoverished narratives with the limited imagination of evidence and procedure (Douzinas and Warrington 1994a: 231). As the law ascribes fixed and repeatable identities and expectations to those brought before it, it necessarily negates the singularity of the other. Legal rules – Lyotard's normative sentences – distinguish between those they represent as their addressees and others, silencing the call to responsibility of the other.

New National Party of SA also expresses the philosophical limitations of human rights. The subject of human rights enforces her entitlements without great concern for ethical considerations and without sympathy for the other. When the transition is made from the legal rights-bearing subject to concrete persons in the world, the abstractions of human rights discourse prove of little use against the

concrete claims of power. The majority judgement rationalises the exclusion of rural blacks on the grounds that they too have the *right* to vote, even if their circumstances prevent them from doing so. The community of human rights is universal but imaginary; it does not exist empirically and has limited value as a transcendent principle. In the universal community upon which the law is based, the other can easily be turned into the same.

It is tempting on the basis of *New National Party of SA* to view the new system of constitutional rights, with its penal and other reform, in a Foucauldian light, that is, as being worked out in favour of an upper and aspirant middle class, possessing wealth, prestige and political clout. The same set of socio-economic relations, on the other hand, creates conditions for surveillance, imprisonment and repression as a way of containing social unrest and as a means of placating and training a workforce. However, if the Foucauldian view is accepted, what is to be made of Derrida's claim that South Africa is in the process of deconstructing its Constitution and legal system:

law must be inspired by justice ... That is why it is important to have constitutions ... here in South Africa you first had a previous constitution, then a provisional constitution, then a last provisional constitution and you will have to improve the one you are producing now ... even if there are regressions and so forth ... it is in the name of justice that you are improving your constitution. (Derrida 1999a: 284)

The phrase "in the name of justice" is exactly what is at stake; while for Derrida justice is a simultaneously transcendental and imminent ethic of alterity, for Foucault it is a construct, a feature of a broader system of oppression. There is some validity in applying both formulations to post-apartheid South Africa. Although Foucault's view of the whole process is too Manichaean, Derrida's description is overly rosy. It is anyway unnecessary to choose between a liberal democratic order positively deconstructing itself in furtherance of justice and the hellish picture of ubiquitous coercion. The record of South African constitutionalism is a mixed one, showing real libertarian and equalising trends beside configurations of power and coercive cultural and racial traits.

The Constitutional Court has been both just and unjust as Derrida acknowledges it must be. It has been both inclusive (the decriminalisation of gay sex serves as an example) and exclusive. Cases of exclusion need to be reviewed, amended, deconstructed, as in some cases they have been. In immigration cases, for example, the courts have tended to resist granting rights, both substantive and, until recently, procedural to asylum seekers and aliens seeking residency. Although the Constitutional Court has not yet decided an immigration case, in cases decided under the interim Constitution by the Supreme Court, the court ruled that applicants were not entitled to written reasons for the Home Office's refusal to grant residency on the basis that aliens have no rights under the Constitution and that whatever standing they have is as receivers of privilege.²⁷⁷ In *Xu v Minister van Binnelandse Sake*, the Court held that "the Constitution affirms precisely that an alien does not have any right to come into the Republic or stay therein. That right is explicitly given to "every citizen" and not to any "person" ... The Aliens Control Act provides explicitly in section 26(5) that the applicants can be dealt with as prohibited persons" (para 67 E-H). The Xu Court found that the applicant had no interest in continued residence in South Africa, that "it is in the State's absolute and unlimited discretion who it wishes to tolerate in its territory" and that refusal to provide reasons did not breach the *audi alterem partem* (hear the other side) rule. However as Jonathan Klaaren (1996: 612) points out, the Xu court's reading of the term "interests" in section 24(c) – denying that an alien has any interest in an application for temporary or permanent residency – is perverse: "we do not know what happened to Yuandau Xu or his fellow aliens K.H. Tsang, Alexander Nikolaev Naidenov and Mr Parekh. But it seems more than likely that their losses in front of the court directly affected their interests: their careers, their families and their lives within the communities" (Klaaren 1996: 612).

The immigrant or asylum seeker is Kafka's man from the country in "Before the Law": A foreigner comes before the law and asks to be admitted and given sanctuary. The immigration officer demands: "Justify your requests. Give reasons why you want to come in". The man answers "I am in fear" or "I have been persecuted and I need assistance". The immigration officer looks at the man and tells him that he cannot come in, but will not tell him why or engage in any further

²⁷⁷ See for example *Xu v Minister van Binnelandse Sake* 1995 (1) BCLR 62 (T), *Naidenov v Minister of Home Affairs* 1995 (7) BCLR 891 (T) and *Parekh v Minister of Home Affairs* 1996 (2) SA 710 (DCLD).

discussion. The gatekeeper remains silent but firm. The asylum seeker is denied the means to have his fear and pain considered because he is denied the status of legal personality and so, before the law he cannot be a victim: he is always already a “prohibited person”. The immigrant is silenced, despite the court’s averment that it has not declined to hear the other side. The court can say this because for it there is no other side. Lyotard has termed this denial of the victim’s voice an ethical tort, a *differend*; it is an extreme form of injustice in which the injury suffered by the victim (the fear/ pain which motivates the application for residency and the subsequent injustice of having the application refused without the provision of reasons) is accompanied by a deprivation of the means to prove it. The idiom and rules used to judge *Xu* and the other cases referred to will be the idiom and rules which prevent the victim from testifying to the injustice and so the outcome is necessarily unjust. The asylum seeker experiences the judgement as performative; it acts violently upon his body and feelings.

Were the ‘alien’ cases to which I have referred to comprise the entire record of such cases under the Constitution, there would be cause for considerable pessimism about justice in this area. However, in the subsequent case of *Tettey and another v Minister of Home Affairs and another*²⁷⁸ a Ghanaian applicant who had applied for a temporary residence permit, had had his application rejected by Home Affairs without reasons being given. The Court held that the discretion of Home Affairs in relation to residence applications was not absolute since the constitution guarantees to every person the right to procedurally fair administrative action and that

to the extent that *Xu*, *Tsang*, *Parekh* and *Naidenov* supra may be taken to convey that an alien who applies for residence within the republic has no rights, interests or legitimate expectations that may be effected by a decision to refuse to issue such a permit, and that the minister has an absolute and exclusive discretion to decide whether he or she would permit an alien’s presence in the territory, the said cases do not, with respect, reflect the law as it exists under the Constitution.

Moreover, Mthiyane J cited *Chandra v Minister of Immigration*²⁷⁹ for the proposition that although the Home Office has a discretion about whether to grant such applications, “the presence of discretionary power does not preclude the application of

²⁷⁸ An unreported decision in case number 3101/ 98, delivered on 16 October 1998 in the Durban and Coastal High Court.

the rules of natural justice; to require that the minister can, in the exercise of his power, observe the rules of natural justice, invokes no encroachment” (*Tettey*, quoted in Purshotam 1999: 33-34).

The *Tettey* case can be seen as representing a moment of legal deconstruction. During apartheid, the regime’s influx control policy meant that many black South Africans were stripped of their South African citizenship and relocated to the desolate ‘homelands’, requiring possession of a pass to move beyond their confines. When apartheid ended, the offending legislation was abolished. With the onset of nation-building it is the other of the nation rather than the racial other within the nation that has been excluded.²⁸⁰ Each of these exclusions has been deconstructed and remedied and although exclusion still exists, it would be churlish to deny that the law in this area is becoming more just.

Soobramoney and Grootboom

Another example of law moving in the direction of substantive justice is in relation to socio-economic rights. In *Soobramoney v Minister of Health (KwaZulu-Natal)*²⁸¹ the Constitutional Court interpreted a provision limiting the state’s duty to provide healthcare services to “within its available resources” (section 27(2)), narrowly. As Moellendorf (1998: 331) observes, “[t]he narrowest interpretation of

²⁷⁹ (1978) 2 NZLR 559 (SC) at 573.

²⁸⁰ Zygmunt Bauman observes that

nationalism was also invariably a bid for the sole and exclusive rights to a territory, a population, a populated territory ... Promotion of homogeneity had to be complemented by the effort to brand, segregate and evict the ‘aliens’ – already a prey of another national elite, converts of another nationalism, and altogether poor prospects for assimilation into the fought-for uniformity. Drawing the boundary between the natives and the aliens, between the prospective nation and its enemies, was an inseparable part of the self-assertion of the national elite. There was a codicil, however: to acquire and retain an overwhelming grip over the minds and acts of the present or prospective nationals, this boundary-drawing could not be seen for what it in fact was. (Bauman 1992: 105, 106)

According to research published in 1998 by Human Rights Watch entitled *Prohibited Persons: Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa*,

Although South Africa, since the first democratic elections in 1994, has made remarkable progress towards establishing a free and democratic society based on respect for human rights of its own citizens, foreigners have largely failed to benefit from these developments and remain subject to serious abuse. Anti-foreigner feelings have also increased alarmingly. (quoted in Purshotam 1999: 34)

²⁸¹ 1997 (12) BCLR 1696.

“available resources” is, however, incompatible with the understanding of the Court in the certification judgement where it allows that recognising socio-economic rights may require court orders with budgetary implications”. However, in the recently decided *Government of RSA and others v Grootboom and others*²⁸², the court explicitly distinguished socio-economic rights as rights rather than mere policy goals. The case deals with the state’s obligations under section 26 of the Constitution which gives the right of access to adequate housing, and section 28(1)(c), which affords children the right to shelter. The court held that in appropriate circumstances the state must give effect to these rights. The court issued a declaratory order which required the state to devise and implement a programme that included measures (including sanitation and housing) to provide relief for those desperate people who had not been catered for.

Ubuntu

Needless to say, not every amendment to the Constitution or addition to the common law is, in Derrida’s words “inspired by justice”; some constitute “regressions” (Derrida 1999: 264). A notable regression has been the omission of *ubuntu* from the text of the final Constitution, due, according to Davis to “the fact that the overseas expert, while a talented drafter in his own right, clearly employed a Canadian drafter’s manual” (Davis 1999: 65), this is an example of what Susan Silbey (1997) has referred to as “postmodern colonialism”. The Constitutional Court’s unsettled method and its vacillation between literal interpretation and a value-oriented contextual approach, means that the effect of the omission is unclear; it is at least imaginable that the omission might lead to an abandonment of the development of *ubuntu* and perhaps African jurisprudence more generally.

6.2 Reconciliation and Justice

The law has been instrumental in fostering reconciliation both at the level of political parties and on the interpersonal level. Jakes Gerwel (2000: 281) writes: “South Africa, notwithstanding the complex divisions and differences of various sorts,

²⁸² CCT 11/00. Judgement was handed down on 4 October 2000 and is currently unreported.

levels and intensities that may exist within it, is decidedly not an unreconciled nation in the sense of being threatened by imminent disintegration and internecine conflict". Gerwel is surely correct about political stabilisation having taken place, although it is a mistake to suggest that reconciliation is equivalent to a stabilisation of power relations. Gerwel continues: "Decisions, differences and conflicting interests of various kinds, levels and intensity occur throughout this society ... None of these can be said to threaten the legal, political or constitutional order. South Africans act out their differences within the framework of the constitution" (Gerwel 2000: 282, 283). Again Gerwel mistakes politically determinate relations for reconciliation. It may be that differences must be worked out through the law, in accordance with constitutional rights. But it is also true that constitutional rights cannot completely provide justice. Gerwel seems to want to deny the necessity of including the personal as a modality of reconciliation:

It is, put in perhaps over-simplified terms, unrealistic to expect everybody in such a complex organisation as a nation to love one another ... Institutionalised commitment to consensus-seeking, cultivation of conventions of civility and respect for contracts have become the mechanisms of solidarity in contemporary society, replacing the organic idiom 'love for neighbour' that might to a greater extent have made older, less complex societies cohere. (Gerwel 2000: 283)

As a description of modern liberal society Gerwel's description of civility and legality's replacing a deeper interpersonal ethic is correct. To say, however, that an ethic of regard for the other which transcends the calculated rationality of civility is unrealistic is to concede too quickly that the notion of responsibility is confined to the realm of the institutional and ontological: a reduction of other to self. Responsibility on this reading is not responsibility to widows and orphans, but a responsibility for civil concerns. If Levinas is correct, civic responsibility reduces all others to representations: we face no one. It is an entry into a blind social order, the domain of truth, which not only defaces the other, but anaesthetises us. Reconciliation, like justice, is predicated on personal responsibility and transcends what is real and knowable:

No justice ... seems possible or thinkable without the principle of some *responsibility*, beyond all living present, within that which disjoins the living present, before the ghosts of those who are not yet born or who are already

dead, be they victims of wars, political or other kinds of violence, nationalist, racist, colonialist, sexist, or other kinds of exterminations, of the oppressions of capitalist imperialism or any forms of totalitarianism. (Derrida 1994: xix)

I agree with Gerwel that law and constitutionalism has helped to avert civil war and reduce racial hatred by creating space for conflicts to be resolved. However, I would add to what he says that legality and constitutionalism is necessary but insufficient for reconciliation and justice.²⁸³ South Africa has reached neither reconciliation nor social justice. In order to be divested of the remaining forms of totalitarianism further legal texts must be analysed, deconstructed and reconstructed²⁸⁴ in “[y]et another effort” (Sade 1991: 297).²⁸⁵

²⁸³ Balkin (1994: 1155) notes that “human law must always, even in its best moments, be merely a heuristic, a catch-as-catch-can solution to the problem of responsibility rather than a fully adequate solution to the problem of responsibility”. According to Gerwel however “[t]he South African Constitution and the process through which it was arrived at must – after the necessary deconstruction ... - be accepted as the signal of something real in the collective national will”. Gerwel’s sense of deconstruction is of something, temporally or otherwise, finite, in the sense of it being a singular event or series of events that completes itself to reveal some incontestable verity in the text. Gerwel might, for instance, have written “subject to the necessary deconstruction” to convey the idea that constitutionalism is conditional upon continuous deconstruction taking place. He did not do so, however, and one is left with a sense of his article as being more of an apologia for legal liberalism than a critical engagement with it.

²⁸⁴ Derrida has repeatedly affirmed that deconstruction is anti-totalitarian, a fact which should be of considerable appeal in the light of South Africa’s oppressive history. Derrida has insisted that deconstruction “has always seemed to me favourable, indeed destined (it is no doubt my principle motivation) to the analysis of totalitarianism in all its forms, which cannot always be reduced to names of regimes” (Derrida 1988b: 648).

²⁸⁵ This is a quote from Sade’s political treatise in “Philosophy in the Bedroom” and is quoted by Derrida (1992c).

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