

## Being Reasonable, Becoming Plural: The Rule of Law and the Sovereign Return

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Spectres haunt the rule of law in South Africa. Law is deeply implicated in constituting and sustaining the structures and practices of the colonial and apartheid regimes. Despite this legacy, law is at the heart of transformation and renewal. The constitutional dispensations of 1994 and 1996 expressed a great faith in law – especially in ‘the law of the law’.<sup>1</sup> The early transformative metaphors of the ‘book’ and the ‘bridge’ in the Epilogue to the interim constitution evidence the aspiration that the introduction of a fundamental law and constitutional supremacy would help a fractured and wounded polity to turn the page, ‘open a new chapter’, and journey to a new social and political order.<sup>2</sup> The abandonment of parliamentary sovereignty in favour of constitutional supremacy placed the rule of law and its custodians – judges – at the apex of the juridico-political order. It can of course be argued that this dispensation was arrived at through a representative and deliberative process where an assembly of the peoples’ delegates constituted a new order, which, through democratic means, posited the constitution as supreme. This reflects a feature of many modern liberal constitutional orders that claim to logically sustain the tension between constitutional supremacy and the sovereignty of the ‘people’, or indeed to sustain a productive tension about where sovereignty is located.<sup>3</sup> This very liberal story is replete with tensions and contradictions – ones that are amplified and potentially unsustainable and undesirable in the South African setting. In this essay I consider aspects of the rule of law and constitutional supremacy as a feature of neoliberal governance. I contrast this with approaches to plurality that

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<sup>1</sup> See J Derrida, ‘The Laws of Reflection: Nelson Mandela, in Admiration’ in J Derrida and M Tlili (eds.) *For Nelson Mandela* (1987)

<sup>2</sup> AJ van der Walt, ‘Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State’ (2001) 118 *South African Law Journal* 258 at 259; M Antaki, ‘The Bridge and The Book’ in K van Marle and S Motha (eds.) (forthcoming), *Genres of Critique: Aesthetics and Liminality in Post-Apartheid Jurisprudence*.

<sup>3</sup> P Kahn, *Political Theology: Four New Chapters in the Concept of Sovereignty*. (2011) 8-17.

can inform the rule of law in ways that are more consistent with the aspiration of renewing the social and juridical order.

Neoliberal governance exhibits a strong preference for the rule of experts, the accountability and predictability of rules, and the subjection of state power to judicial control. Private power and the exigencies of capital face relatively few constraints.<sup>4</sup> Democratic and parliamentary forms of accountability and state institutions are viewed as overly bureaucratic centres of potential corruption. The ‘rule of law’ is thus posited as an unrivalled good when compared to the ‘will’ of sovereign authorities whether that is located in an office, assembly, or population. I am not suggesting that the rule of law should not be a cornerstone of a constitutionally delimited state. The problem is rather one of considering the significance of the sovereign ‘will’ and its relationship to the conditions of plural existence. My approach regards plural existence as ontologically prior to the possibility of rule-governed existence. Plurality precedes the rule of law rather than following in its wake. This is an approach, I submit, that is far more apt for the post-colonial and post-apartheid polity which struggles to be born in South Africa. It is an argument I advance by considering the South African Constitutional Court’s decision in *Albutt v Centre for the Study of Violence and Reconciliation and others*.<sup>5</sup>

## **1 Being Reasonable**

### **1.1 Rationalising the Pardon Power**

In *Albutt* the applicants challenged the power of the President to grant a pardon pursuant to s. 84 (2)(j) of the Constitution to people who claim to be convicted of offences with a political motive. The powers and functions of the President are set out in s. 84 – and includes the responsibility for ‘pardoning or relieving offenders and remitting any fines, penalties or forfeitures’ (s. 84 (2)(j)).

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<sup>4</sup> See David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005) discussed below.

<sup>5</sup> [2010] CCT 54/09

The question regarding the exercise of the pardon power framed by the parties to this dispute and the Constitutional Court was whether the President, before granting a pardon to a group of convicted prisoners, is required to afford the victims of the offences a hearing. The dispute was essentially between ‘the state’ in the form of the President and the Minister for Justice and Constitutional Development, and a coalition of non-governmental organizations (NGOs) whom, amongst other things, represented victims of offences committed by those potentially benefitting from a pardon.

The background to the case is as follows. In a speech to a joint-sitting of Parliament on 21<sup>st</sup> November, 2007 President Mbeki announced the special dispensation for people convicted of politically motivated offences. The dispensation was aimed at dealing with the ‘unfinished business’ of the Truth and Reconciliation Commission (the TRC), including the question of amnesty for those who had not participated in the TRC process. The process adopted by the President included setting up a multi-party ‘Pardon Reference Group’ (the PRG). The PRG had a limited lifespan, and was required to consider applications by persons ‘convicted and sentenced solely on account of allegedly having committed politically motivated offences before June 16, 1999’ (Albutt, para. 5). The Terms of Reference of the Special Dispensation also set out further details of how an applicant would qualify, including that they needed to have been sentenced to a period in prison or a fine for an offence, act or omission associated with a political objective committed in the course of offences of the past. While the PRG was charged with advising the President – he made it clear that he would form an independent opinion based on the material placed before him. Mbeki had also stated that in making the decision with respect to the pardon he would be guided by the principles and values that underpin the Constitution. These included ‘the principles and objectives of nation-building and national reconciliation’.<sup>6</sup> The Presidential pardon was to be used to deal with the ‘unfinished business’ of the TRC.<sup>7</sup> NGOs representing victims made attempts to

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<sup>6</sup> Address by the President of South Africa, Thabo Mbeki to the joint sitting of Parliament, Cape Town, 21<sup>st</sup> November, 2007 - <http://www.anc.org.za/show.php?id=4240> (last accessed 17<sup>th</sup> November, 2011).

<sup>7</sup> Id.

facilitate and ensure their participation in the special dispensation process. The President and the PRG refused to provide victims or their representatives the opportunity to participate and thus litigation followed.

Although multiple grounds were asserted for contending that victims had a right to participate in the process, the Constitutional Court crystallized the question as being whether the ‘decision to exclude the victims from participating in the special dispensation process is *irrational*’ (Albutt, para. 47, emphasis added). The Court applied the principle that the exercise of the pardon power, in addition to being subject to the Constitution as the supreme law, and to the doctrine of legality, also ‘must be rationally related to the purpose sought to be achieved by the exercise of it’ (para. 49). Thus, Chief Justice Ngcobo who wrote the main judgment surmised that the President’s approach to exclude victims from the process of the special dispensation must be rationally related to the achievement of the objective of granting the pardons. The means used had to be rationally related to the ends sought. This introduces an instrumental logic between mean-ends in cognizing the nature of the pardon power. Ngcobo CJ thus proceeded to assess the rationality of the dispensation process as a question of the suitability of the means used to achieve the stated ends.

The special dispensation had sought to attain national unity and reconciliation through the application of ‘principles and values that underpin the constitution’. These objectives (ends) and their formulation were principally drawn from President Mbeki’s speech of 21<sup>st</sup> November, 2007 to the Joint-Sitting of Parliament. Ngcobo CJ reasoned that as the special dispensation was compared by the President to the Amnesty process of the TRC, and the involvement of victims had been central to the work of the TRC, such participation should be regarded as central to ‘rebuilding a nation torn apart by an evil system and promoting reconciliation’ (para. 56). If the latter were the *ends* sought, to deny victim participation would constitute irrational *means*. The Chief Justice summed up the court’s approach thus:

Once it is accepted, as it must be, that the twin objectives of the special dispensation process are nation-building and national reconciliation and

that the participation of victims is crucial to the achievement of these objectives, it can hardly be suggested that the exclusion of the victims from the special dispensation process is rationally related to the achievement of the objectives of the special dispensation process. (para. 68)

He went on to say that victim participation in the process for granting pardons was ‘the only rational means to contribute towards national reconciliation and national unity’ (69). It was also held that the context of the special dispensation process, involving the establishment of whether the relevant offence was committed with a political motive, required the victim to be granted a hearing (70). ‘Accountability, responsiveness, and openness’ enshrined in s 1(d) of the Constitution required that political parties alone could not be the ones permitted to make submissions to the PRG or the President. In a separate judgment that concurred with that of the Chief Justice, Froneman J extended the basis of this conclusion to ‘African’ notions of ‘participatory democracy’. But this latter tradition was only permitted the status of a ‘further legitimisation’ of the main judgment, and was not treated as a ‘direct authority’ (para. 91). If African tradition was being invoked, it needed, it seems, to be given a subordinate status.

The ends of nation-building and reconciliation were not in question, but a process that excluded the participation of victims (the means used) was deemed irrational. The pardon process was thus subjected to the court’s standard of rationality, which, as with many courts around the world, is driven by the judicial approval of the means used to achieve legitimate or just ends.

The judicial assessment of the means-ends nexus is often presented as an objective test. The reasoning in such cases is often circular. Recall the preeminent English authority on rationality – the *Wednesbury* case.<sup>8</sup> In that case an unreasonable or irrational decision or judgment was characterized by Lord Greene MR as a decision ‘so unreasonable that no reasonable body could make such a decision’. A putative rational being is invoked who can stand in as the

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<sup>8</sup> Lord Greene in *Associated Provincial Picture Houses v Wednesbury Corporation* [1947] 1 KB 223; see also Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

objective standard to be compared with the impugned decision-maker. A simpler way of putting it would be to say ‘it is such a bad decision that no good decision-maker could have made it’, and the court will quash bad decisions. This circular reasoning is a powerful rhetorical gesture. It enacts an ‘as if’ – ‘as if’ courts can provide a measure for the full range of rational decisions. The nexus between ‘means’ and ‘end’ is that putative measure. Rationality in these cases is a notion formed through performative rhetorical gestures that place the substantive facts and circumstances of a case alongside the processes, strategies, and techniques of governance (means). The means used to reach particular objectives are then judged to be legitimate or not. It is worth exploring the relationship of means to ends further before moving to alternative characterizations of how the rule of law might interact with an exceptional juridical device such as the pardon power.

## **1.2 The Means/Ends Logic and Rationality**

On what basis is a process (means used) regarded as legitimate? What is the relative relationship of means to ends? Can the ends be justified by the means, or vice-versa? As Walter Benjamin put it in his seminal essay ‘A Critique of Violence’ in 1921: ‘the most elementary relationship in any legal system is that of ends to means, and further, that violence can first be sought only in the realm of means, not of ends’.<sup>9</sup> It might at first glance seem rather straightforward to assess whether violence (in the widest sense of the German term *Gewalt*) is being used for just or unjust ends. For instance, it might be assumed that a person convicted of a crime can legitimately be incarcerated for protecting the community or a range of other ends such as rehabilitation. The violence of confinement and deprivation of liberty would be justified on the basis that a judicial process established guilt and the proportionality of the sentence. Benjamin suggests that such a conclusion is not so self-evident. We would still be troubled by whether violence could even be used for just ends. Nor is it possible to resolve the problem in the realm of means.

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<sup>9</sup> W. Benjamin, ‘Critique of Violence’ in Benjamin, *One-Way Street and Other Writings* (1978) 132-154.

There are two standard resolutions offered for this means-ends conundrum – from natural and positive law. Benjamin goes onto dismiss both schools:

[They] meet in their common basic dogma: just ends can be attained by justified means, justified means used for just ends. Natural law attempts, by the justness of the ends, to ‘justify’ the means, positive law to ‘guarantee’ the justness of the ends through the justification of the means. This antinomy would prove insoluble if the common dogmatic assumption were false, if justified means on the one hand and just ends on the other were in irreconcilable conflict. No insight into this problem could be gained, however, until the circular argument had been broken, and mutually independent criteria both of just ends and of justified means were established.<sup>10</sup>

Benjamin interrupts and rejects the assumption that the relationship of means to end can be taken for granted. There may well be just means and just ends. The problem lies in leaping from the justification of means to the justifications of ends and vice versa. We are thus called on to emphatically reject the natural law notion that means used can be legitimated by just ends.<sup>11</sup>

Positive law admits of sanctioned and unsanctioned violence. The pardon power, existing as it does pursuant to the Constitution, may be seen as a form of sanctioned violence deployed by the state. It is a form of violence in the sense of an authorized force capable of bringing an end to the deprivation of liberty or other form of state-sanctioned violence. The Constitutional Court in *Albutt* applies the positivist dogma that the legitimacy of ends can be ‘guaranteed’ by just means. Such just means are equated with a process of consulting victims before the pardon power is exercised. The legitimacy of the exercise of the

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<sup>10</sup> Ibid, 133.

<sup>11</sup> Walter Benjamin went onto to discuss violence as a means in terms of ‘law making’ and ‘law preserving violence’, comparing revolutionary general strikes and the police power to determine when to intervene for ‘security reasons’ (141-42). It is beyond the scope of our inquiry to pursue Benjamin’s messianic account of the emergence of a non-state form of ‘divine violence’ which would break the reign of violence as means (153-54). However, he does point to the significance of the relationship between means and ends in a legal system, and interrupts the all too regular deployment of rational means as a basis for judging the legitimacy of ends.

pardon power would then be guaranteed by the process of consultation. The Court, however, fails to countenance the fact that means and ends might exist in different orders of legitimacy and judgment. Moreover, they do not entertain the fact that means and ends might actually exist in *irreconcilable conflict*. This takes us to the heart of the problem. The means-end logic risks evading the question of responsibility and judgment.

The pardon power vested by the Constitution in the President, and the circumscribed process he adopted for exercising it in this particular instance (through a process of consulting the PRG), was a means of attending to the ‘unfinished business’ of transition from Apartheid and pursuing the ends of nation-building and reconciliation. Neither the Court nor the President entertain the possibility that these means and ends may be irreconcilable, and justly so. The pardon power is invoked to contend with a crisis, to suture a tear in the polity. The victims can justly claim that they should be involved in the process that addresses the individual wounds, and especially the persons who have inflicted the scars. However, ‘finishing the business of reconciliation’ through the exercise of the pardon power hardly seems to grapple with the infinite demands of responsibility that need to be attended to in South Africa.<sup>12</sup>

We thus need to examine whether a law-sanctioned power such as the pardon can be subjected to forms of judgment or responsibility. What is the nature of responsibility and judgment in the context of a power to pardon? The Court’s conclusion in *Albutt* was that nation-building and reconciliation, reference to the TRC’s Amnesty process in the President’s 2007 speech, the deliberative nature of the South African democratic settlement, and the need to ascertain whether convictions were in fact for political crimes all point to consultation of victims as the only legitimate means. The validity of the judgment on whether to pardon depends on the process adopted when making the decision. It is a procedural approach to the question of judgment and

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<sup>12</sup> I return to this problem of a crisis of judgment and responsibility and an alternative critical approach below.



responsibility. But is a procedural approach sufficient in the face of a power as irregular as the pardon? What does it mean to regularize the pardon power? More widely, what are the implications for transformative constitutionalism if the question of judgment and responsibility is reduced to procedure? Before addressing these questions I need to place the pardon power in a wider juridical and political frame than the one entertained by the Constitutional Court's means-end approach to a rational decision.

### 1.3 Undoing the Pardon Power

The state through the office of the President has the power to pardon. More widely the *Albutt* case poses the question of what the relationship is between the state and the law. The Constitution grants the power to the President. The source of the law is the Constitution. Nonetheless, there is a question of what governs the incidence of the exercise of the pardon power. Is the Presidential pardon power subject to other norms – such as the version of reasonableness and rationality administered by the Constitutional Court? Or does the Presidential pardon power express the presence of a 'sacral' or 'infinite' element in the juridical order? The former more delimited approach to the pardon power was expressed in the 1997 ruling of the Constitutional Court in *The President of the Republic of South Africa v Hugo*. The Court said:

"(Pardoning a sentenced person) is not a private act of grace in the sense that the pardoning power in a monarchy may be. It is recognition in the Interim Constitution that a power should be granted to the President to determine when, in his view, the public welfare will be better served by granting a remission of sentence or some other form of pardon."

This is an instrumental rationalization for the existence of the pardon power, and a utilitarian account of when it should be exercised. Beyond this narrow ambit the extent to which the pardon power should be regulated by the ordinary law of the land is the subject of extended scholarly discussion.

According to Paul Kahn who renews the significance of Carl Schmitt's thinking for constitutional and legal disputes in contemporary settings – we need

to take seriously the fact that the existence of the state admits of an existential and sacral element of sovereignty in any juridical order.<sup>13</sup> Famously for Schmitt, ‘Sovereign is he who decides the exception’.<sup>14</sup> Moreover, the exception is not lawless chaos but a borderline situation that is part of the juridical order. The medieval monarch manifested the miraculous and sacral aspect of sovereignty through the notion of the ‘King’s two bodies’.<sup>15</sup> The King was at once a natural and finite person, and infinite in the reach of his office – ‘the King is dead, long live the King’. The monarch could also defy the laws of nature by curing individuals through the laying of hands, and step outside the law of the land to address the social body through equity.<sup>16</sup> The pardon power is one sense in which the sacral power of the mediaeval monarch persists. As Kahn puts it:

This is a remnant of the sovereign power to decide on the exception to the law. It always verges on lawlessness as we try to find a ground for mercy that does not appear to be mere partiality. The ground can only be care, which is always personal and unbound by rules. We may feel that we need a pardon power; yet if we cannot speak of care, love, or the sacred, we are at a loss to offer a justification that is consistent with our other beliefs about the rule of law. Our ordinary inclination, then, is to displace pardon by a system of ‘earned probation’, administered by a bureaucratic board. We seek to normalize the exception.<sup>17</sup>

Kahn identifies the tension between the rule of law, and the need for an exceptional power that is not regulated by the normal law. As Grant Gilmore put it: ‘In Hell, there will be nothing but law’.<sup>18</sup> The pardon is an event, a decision, which quintessentially should be outside law: ‘it is a gift that comes as if from nowhere. Indeed if we can give an account of its exercise in a particular case – that is, if we can offer a causal explanation of how the pardon came to be granted – we are more likely to judge it corrupt’.<sup>19</sup>

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<sup>13</sup> Kahn, (2011), p. 37ff.

<sup>14</sup> C Schmitt, *Political Theology: Four Chapters on Sovereignty* ([1922] 1986).

<sup>15</sup> See E Kantorowicz, *The Kings Two Bodies: A Study in Mediaeval Political Theology* (1957); and E Santner, *The Royal Remains: The People’s Two Bodies and the Endgames of Sovereignty* (2011).

<sup>16</sup> Kahn, (2011), p. 37.

<sup>17</sup> *Ibid*, 38.

<sup>18</sup> *Ibid*.

<sup>19</sup> *Ibid*.

Importantly, Kahn also points to the reluctance in a liberal legal order to invoke notions of 'care, love, or the sacred' when justifying or legitimating the exercise of exceptional powers. The tendency is to seek a bureaucratic resolution – or as we see in *Albutt*, a means-end rationalization, as well as instrumental reasons such as public welfare as in *The President v Hugo*. Reliance is placed on a form of technical expertise (probation), or mode of reasoning (means-end) where judgment and responsibility are replaced with a logic of substitution. In the face of what remains of a fearsome power (the sovereign exception) utilitarian reasons (of social cohesion or welfare) and procedural forms are asserted. As I have kept emphasizing, this evades the problem of judgment and responsibility.

In this context it is worth recalling the hopes and aspirations that were laid out in relation to the rule of law and adjudication in the 'new South Africa'. With constitutional supremacy came a call for judges to take an active part in the transformative aspirations of the Constitution. The rule of law needed to be given teeth and content – but with a clear sense of what the South African post-apartheid setting demanded. It is worth quoting at length, then, Karl Klare's articulation of the 'postliberal' approach to constitutional adjudication and the rule of law:

"Do traditional accounts of legal constraint and the rule-of-law ideal make sense in the new South Africa? Does the rule-of-law ideal imply a depoliticized conception of law inconsistent with the aspiration to develop adjudicative methods that will contribute to egalitarian social change? Or, must we develop a revised, perhaps somewhat more politicized, understanding of the rule of law and adjudication that can be consistent with and support transformative hopes? Can we conceive practices of constitutional interpretation that acknowledge and fulfil the duty of interpretive fidelity and yet that are engaged with and committed to 'establish[ing] a society based on democratic values, social justice and fundamental human rights,' a society that will '[i]mprove the quality of life of all citizens and free the potential of each person[,]' in the words of

the Preamble? Can we describe a method of adjudication that is politically and morally engaged but that is *not* illicit 'judicial legislation'? Is there a **postliberal account of the rule of law** suitable to the political challenges South Africa has set for itself?<sup>20</sup>

Klare was articulating the need to break from traditional models of adjudication, and the sense that the rule of law during apartheid was a system-preserving institution with habits of adjudication and legal practice from which a deliberate and conscious break was required. It was not sufficient for South Africa to develop a sophisticated constitutional framework with transformative aspirations. None of this would be of much consequence if judges saw their role in conventional liberal terms as those who merely applied and interpreted the law 'on the books' (as if that were ever possible!). What, then, does it mean for judges to be politically and morally engaged in a transformative constitutional enterprise?

I cannot say whether Klare would approve of the Court's approach to the Presidential pardon in *Albutt*. That is partly due to the limits of the notion of 'postliberal' which connotes both the preservation of liberal rights and values, as well as expecting a departure from them. It may be that the Court's stance of requiring that victims be accorded a hearing conforms to the constitutional aspiration – visible also in the constraints on emergency powers (s. 37) – of holding the executive to account in a setting where executive power has been the instrument of multiple excesses. What emerges, then, is the sense that according victims a hearing cannot be the end of the matter when it comes to determining the role and content of the rule of law in a post-colonial or transformative setting. We are simply left with the conclusion that the Court has been effective in reviewing the exercise of the pardon power because the President has been held to the Court's standard of rationality. I would like to pose the problem rather differently.

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<sup>20</sup> K Klare, "Legal Culture and Transformative Constitutionalism" [1998] *South African Journal of Human Rights*, p150.

A general tension thus emerges between what can be described as neoliberal forms of governance, and the necessary recourse to the exceptional and the *infinite* in any juridical order. In *A Brief History of Neoliberalism* David Harvey points to the juridicalisation of politics as a key feature of neoliberalism.<sup>21</sup> He suggests that neoliberal governance takes place through experts and elites who are often suspicious of and discourage more democratic and parliamentary modes of decision-making. With the horizons of social agonism and the possibility of consensus limited or discredited, political conflict is shifted to the courts. The rule of law's protection of individual rights becomes the key mediator and remedy to wider political and social disagreements. This rights-centred governance is also accompanied by a potentially contradictory appeal to populism in times of crisis. Immigration, crime, migrant labour, refugees, and the post 9/11 security agenda are all dealt with as if there is a 'society' and cohesive nation-state being harmed by an external threat. Neoliberal institutions take the individual as primary and elevate the rule of law as the key protector and guardian of individual interests. Experts such as judges are increasingly deployed to check political decisions and to assess whether they conform to increasingly globalised standards of governance.

## **2 Plural Becoming**

### **2.1 The Sovereign Return**

What was hidden in this constitutional conflict over the pardon was a fear of the power of the President. It is a fear of an archaic sovereign remainder to be found in all modern democratic states, even though the framers of the South African Constitution have done much to delimit it. Plurality may hold the key to addressing this fear, as well as to developing a different conception of judgment and responsibility through the rule of law. We can only begin to explore that here. Addressing the archaic sovereign remainder which presented itself in *Albutt* is one place to start.

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<sup>21</sup> D Harvey, *A Brief History of Neoliberalism* (2005) 66-7.

In the opening pages of *Rogues: Two Essays on Reason*, Jacques Derrida refers to 'The Wolf and the Lamb', a poem by La Fontaine.<sup>22</sup> This poem expresses the question 'who has the ability, right or power to decide on the law', and with what force. Derrida restates it as follows: "But just who has the right to give or take some right, to give him- or herself some right or the law, to attribute or to make the law in a sovereign fashion? Or to suspend the law in a sovereign way?"<sup>23</sup> In the South African setting this is presented as a tension between the assertion of the President to govern with a popular mandate, and the role of the courts in constitutional adjudication. Carl Schmitt has one of the most influential responses to this question in the modern tradition. He gives an account of the laicised theology of sovereign power, drawn from the 'outer most sphere' of limit-situations as he called it. The pardon is one such limit situation – one that the Court in South Africa attempted to discipline through the means-end account of rationality. It also drew on the fact that one of the fundamental principles in the Constitution is participatory democracy – and that principle avows consultation and the opportunity to present a view. The real fear, however, is the President's ability to say 'I can', and 'I will'. This is the *ipseity* of sovereignty that grounds and threatens the constitutional order. It is what is at stake when President Jacob Zuma asserts that: "[t]he powers conferred on the Courts cannot be regarded as superior to the powers resulting from a mandate given by the people in a popular vote".<sup>24</sup>

*Ipseity* is akin to *auto* in Greek. It is from this *ipse* that one extracts the possibility of giving oneself law, or asserting self-determination. Democracy can only be imagined with the assertion of this *ipse/auto* – the autonomous, self-same subject. This *ipseity* is taken up in liberal ontology, and this is what is called into question by Derrida. This possibility of an 'I can' by myself, that is, this *ipseity*, is named in order to call it into question. This involves calling into question the 'assembling' of the 'resembling ensemble', the simulacra of

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<sup>22</sup> J Derrida, *Rogues: Two Essays on Reason*. (2005)

<sup>23</sup> As above, (xi).

<sup>24</sup> Address to the National Assembly bidding farewell to Chief Justice Ngcobo and welcoming Chief Justice Mogoeng, 1<sup>st</sup> November, 2011, cited in Geoff Budlender, 'People's Power and the Courts', the Bram Fischer Lecture, 2011, unpublished.

resemblance, the simulation that is the act of making similar.<sup>25</sup> This is at the heart of what is potent about the presidential assertion – ‘I can, ‘I will’, ‘in the name of the people, their democratic mandate’ and so on. To say ‘I can’ also has a social manifestation and is a key condition of many liberal and modern concepts (albeit with a pedigree that can be traced back to antiquity): possession, property, power, husband, father, son, proprietor, seignior, sovereign, host, or master. Think, also, of the possessive individual from Hobbes and Locke. There can be no liberalism, and no liberal democracy, not to mention all those social contract theories, without this notion of *ipseity*.<sup>26</sup>

The exercise of presidential power and the assertion of its independence from other constitutional branches is the eruption of what threatens democracy from within. In modern democracy the individual autonomous being becomes one with a people or nation, authorises subjection to a sovereign, or holds sovereignty as one-of-the-many citizens. Democracy is a force, a force in the form of a sovereign authority (as reason and decisiveness), and re-presentation of the power and *ipseity* of a people. The authorisation of the exercise of power in modern democracy must constantly return to its source, its authorisation. While the axiomatic of democracy as circle, sphere, *ipseity*, autos of autonomy, symmetry, homogeneity, semblance and similarity, and God which is the analogy in the American Declaration, are all ways of expressing the autonomy of the political, Derrida identifies the double bind within this tradition of democracy. Each of these elements are incompatible with, and clash with, the ‘truth of the democratic’, namely the other, heterogeneity, dissymmetry, multiplicity, the anonymous ‘anyone’, the ‘each one’.<sup>27</sup>

Although participatory democracy is an important principle in the South African Constitution it hardly begins to tackle what might be rotten in the core of democracy. Democracy is an ipso-centric order where the autonomy of the political undoes itself when it is given expression through a sovereign form. The

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<sup>25</sup> Derrida (in \* above), 11.

<sup>26</sup> As above, 11-12.

<sup>27</sup> As above 14.

double bind of *ipseity* is the clash of the 'I can' with the autonomy of 'everyone'. This is what Derrida termed the auto-immunity of democracy - the possibility that like a body's immune system which can turn on itself, the principle of autonomy and a representative mandate can destroy the very conditions of its own existence.

How should a post-liberal legal system respond to this sovereign return? In constituting a legal order, sovereignty is in movement towards a frame of reference, a normalised political condition. The illimitable thus moves towards and by way of a limit. It could also be said that the illimitable exists in and through a limit. As Derrida puts it, once the indivisible is divided, and the illimitable has been limited, sovereignty as the 'undivided' and 'unshared' becomes an impossible possibility. This is in contrast to the singular plenitude of sovereignty which is often asserted:

is it not the very essence of the principle of sovereignty everywhere and in every case, precisely its exceptional indivisibility, its illimitation, its integral integrity? Sovereignty is undivided, unshared, or it is not. The division of the indivisible, the sharing of what cannot be shared: that is the possibility of the impossible.<sup>28</sup>

What is crucial here is the insight that whatever divides - and the sovereign limit divides - also "shares itself" in this partition.<sup>29</sup> That is to say, the assertion of something like the plenitude of the pardon power exposes the frontier and fault line of sovereignty. That is precisely why cases such as *Albutt* are limit cases in more than one sense. They expose the return of the archaic sovereign form as well as test the efficacy of limiting the illimitable, dividing the indivisible. The question, now, is whether that 'impossible possibility' as Derrida called the task of undoing sovereign plenitude can be driven deeper into the re-imagination of the democratic polity than the instrumental logic of means-end rationality which the court deployed and we examined above.

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<sup>28</sup> J Derrida, *Without Alibi* (2003) xx.

<sup>29</sup> As above.



## 2.2 Rule of Law: Rationality or Plurality?

Tackling the persistent sovereign return can be undertaken through the court examining the rationality of the decision. We have observed the limits to this approach, and will further explore the limits of it below. If plurality is to be at the heart of a democratic and participatory polity as an alternative approach, what will anchor it in the juridical order? In this section I explore the deeper limits to the rationalist approach as well as point towards how plurality might be installed at the heart of the rule of law guaranteed by the constitutional order. Through the notion of plurality I wish to deepen the constitutional grounds for delimiting sovereign power. The epistemic resources for this move might be drawn from tradition, custom, ubuntu, as well as a critical approach to judgment and responsibility.

*Albutt* fails to reflect the ontological plurality (of law and political existence) when giving content to the rule of law in the South African setting. The exercise of the pardon power was certainly linked to the need to build a new polity and achieve reconciliation. This approach, reflected in the amnesty process of the TRC, was the relatively unique compromise that was struck in the negotiations that lay the ground for a post-apartheid order. But the TRC process need not have been the only way to attend to the ‘unfinished business’ of reconciliation. Indeed, a new and different process may have been more apt for dealing with a large number of incarcerated persons languishing in prisons while the state and NGOs debated the ‘rationality’ of the process. The ‘law of the law’ may well have suggested, and indeed required, that a swift and effective process was the most apt way to deal with the people who had applied for a pardon for political crimes. *Albutt* reflects a Court exercising a notion of the rule of law too caught up with a Kantian notion of rationality, rather than one reflecting the ontological plurality reflected in ubuntu or other ways of expressing the same values. However, ubuntu or an ontology of plurality as an approach to what I have termed the ‘sovereign return’ does not necessarily lead to a different outcome in the case. The approach of plurality may well deem consultation and

the opportunity to be heard as central to what the rule of law might require. Though the outcome might be similar or the same, how one gets there is significant. In what follows I delve deeper into this argument.

Linda Meyer's *Justice as Mercy* contrasts the Kantian approach with more pluralist approaches to pardon, mercy, and forgiveness.<sup>30</sup> She begins by contrasting the retributive objection to reconciliatory theories of justice which involve mercy, pardon, and grace. The standard view from those who promote retribution as a basis for punishment is that anything else is demeaning of the accused, and is inegalitarian. Justice Clarence Thomas of the US Supreme Court epitomizes this latter view, and he has put it like this: 'A system that does not hold individuals accountable for their harmful acts treats them as less than full citizens. In such a world, people are reduced to the status of children or, even worse, treated as though they are animals without a soul' (2). A utilitarian response to this retributivist stance is to claim that just desert can be manipulated to produce the best outcome for the greatest number by treating crime harshly or leniently – whichever produces the best outcome for the greatest number. However, there is then Justice Thomas's Kantian objection that people are being treated as objects and not as full moral agents capable of making choices with consequences. Responding to these arguments requires a move away from the Kantian grounds of responsibility, ethics, and community (3).

Meyer argues that reason cannot be such a ground as 'reason itself requires a prior stance of being with others'. This political condition of being-in-common (Jean-Luc Nancy) is akin to the 'law of the law' to which I have alluded to above. With this move towards the notion of 'being with' as ontologically prior to rationalist orders of law and justice (or means-end logics), Meyer argues that mercy is not the exception to law (as Paul Kahn has put it) or a practical compromise (as utilitarians would have it), but in fact the ground of justice: 'the basis on which justice itself is possible'. A simplified Kantian position, she argues,

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<sup>30</sup> Linda Meyer, *Justice as Mercy* (2010).

has become a legal 'catechism' or 'Kantism'. If we understand 'reason' as a system of logically consistent rules, then a community or law that operates according to reason, or in a reasonable manner, might be thought of as a community that is held together by reason (9). This Kantian position is a conception of 'justice as reason', and of community as held together by reason:

'The ideal of justice as a system of rules is deeply embedded in our legal system. Reason is the touchstone for law. Irrational laws are unconstitutional; irrational people are not criminally responsible. Differences in treatment must be either explained as reasonable or eliminated. 'Interest', 'feeling', or 'opinion' is not universal and therefore not a reason; selfish prudence is not a reason' (9)

Meyer draws on the later Kant of the *Critique of Judgment*, as well as Heidegger and Levinas, to give an account of the relationship between justice and grace (surprisingly failing to mention Jean-Luc Nancy's intensification of this line of argument). The problem with Kantism is that it makes us believe that reason arises before our connection to each other. But reason is not the 'glue' that links one person to another. Meyer argues that mercy does not follow rules of reason and cannot be universalized. Once the switch to Heidegger and Levinas is made – it is ethical community that is the given, and reason that is a derivative. Our being-with is not derived from reason, it is ontologically prior. Community is not derived from being reasonable, it is already given (4).

'Justice as reason', and reason as the 'glue' that holds community together is the view that Meyer challenges. As she explains, the Kantism of law is based on Kant's *Groundwork on the Metaphysics of Morals* which set out propositions that have become deeply embedded in legal systems. Kant's motivation for making reason the foundation of ethics and community was driven by an urge to free human will from causal necessity (11). Principles of logic and consistency were thought to free reason from the 'arbitrary power of nature's relations of cause and effect' (11). So for Kant: 'Everything in nature works according to laws. Reasonable [*vernunftiges*] beings alone have the faculty of acting according to the conception of laws, that is according to principles, i.e. have a *will*' (Kant, *Groundwork*, 40; Meyer, 11). Once the will is freed of the impulses of nature, its

actions can be made to conform to a universal law. From this is derived the first categorical imperative of always acting in accordance with reason. Once reason is universal and an end in itself, and like cases are treated alike – we can move to the second categorical imperative that reason in oneself or others is an end in itself and not a means to an end (12). Reason then becomes the basis of freedom, responsibility, and community (12). An ethical state and harmonious community are formed on the basis of reason and its ‘kingdom of ends’ (13).

Kant’s account of judgment was driven by the conviction that reason is an assumption – and that the gap between reason and nature needed to be bridged. The application of rational principles to the world is what Kant called ‘judgment’ (17). This judgment cannot be brought under a rule – for if it were a rule it would in turn demand guidance from judgment (17). Judgment is thus a practiced talent and cannot be taught (18). Imagination is an ‘arresting faculty’ that makes us ‘passive’ so we can have the space to take in the world when making a judgment:

‘Our desire for order, pattern, form, and simplicity, for a world that makes sense as though it were designed by an intellect like our own, is the aesthetic core of judgment. Kant notes that when we discover such unities, we experience spontaneous pleasure and satisfaction, common to all human beings’ (19).

The sublime, the sense of awe, ‘the feeling of disjunction between ourselves and the world, the feeling of not being at home in the world, the feeling that the world is beyond our power to comprehend’ (22) gives us an intimation of infinity. We can intuit this idea even though we cannot experience or understand it. Justice is an encounter with this sublime but it ‘evades our grasp’ (23).

Meyer claims that we need an account of the ‘we’ in order to care for the merely finite ‘human’ (24). This account of the ‘we’ in South Africa is a problem of origin and inauguration as I pointed out above. The Constitutional order, as well as the approach to reconciliation, mercy, and forgiveness adopted at the time of transition were grounded with a view to a community that was yet to come. But it was not without a specifically African or Bantu inflection in that ubuntu was placed at the heart of the ethos of reconciliation, as well as being

central to key decisions of the Constitutional Court.<sup>31</sup> Being-with each other, and continuing to live as if South Africa belonged to 'all who live in it' was central to being and becoming in post-apartheid South Africa. To the extent that the Court in *Albutt* reduces the processes of amnesty and the work of the TRC to a participatory model and a rational means of accomplishing the ends of reconciliation, they distort the philosophy that informed the transition. They forget the grounds of community. The new constitutional dispensation was informed by a conception of community not as communitarian essence, but a dynamic form of being-with which should continue to inform the decisions of the Court.

The whole-ness that the philosophy of ubuntu is supposed to inspire is not the absolute of community-as-law or communitarianism. Rather whole-ness through ubuntu is the recognition that be-ing is not fragmented as the subject/noun 'be!' as it is in (some) western ontologies.<sup>32</sup> Ubuntu philosophy undoes the abstract human subject of western legal thought.<sup>33</sup> It eschews the representation of the subject as the abstract representation of the 'subject-verb-object' structure of language/law. It does so by de-centring the nounal subject from the fragmentation subject/object. African law:

is law without a centre since the legal subject here is an active but transient participant in the be-ing, that is, the musical flow of law ... . *Ubuntu* law is not only the ontology of the do-ing subject. It is contemporaneously the epistemology of the discern-ing subject continuously harmonising the music of the universe. In this sense, *ubuntu* philosophy of law is a dynamology. Law here is thus dynamic because it is in the first place rheomodic.<sup>34</sup>

The subject is then not obliged to live 'within the law' as with the western legal subject, but to 'live the law'.<sup>35</sup> The object of law inspired by ubuntu is to maintain equilibrium.<sup>36</sup>

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<sup>31</sup> See Motha, 'Archiving Colonial Sovereignty: From Ubuntu to a Jurisprudence of Sacrifice' (2009) 24 *SA Public Law* 297-327.

<sup>32</sup> Mogobe Ramose, *African Philosophy Through Ubuntu*, pp. 46-7.

<sup>33</sup> *Id.* p. 92.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Id.* p. 93

Drucilla Cornell and Karin van Marle have commented on how ubuntu might be regarded as an interactive ethic that stands behind the law in the ‘new’ South Africa.<sup>37</sup> On their account, ubuntu is not only an account of being or existence. It is also an ‘ontic orientation in which who and how we can be as human beings is always being shaped in our interaction with each other’.<sup>38</sup> They distinguish ubuntu from communalism or communitarianism – terms that suggest the privileging of community over the individual - arguing that what is at stake in ubuntu’s ontic orientation is the ‘process of becoming a person’, and how one is given a chance to become a person.<sup>39</sup> This accords with Ramose’s account of ubuntu as ‘be-ing becoming’. Community is then not some static entity ‘outside’ the individual: ‘The community is only as it is continuously brought into being by those who “make it up”’.<sup>40</sup> Cornell and van Marle explain how this ontic orientation of ubuntu can be deployed so that freedom can be understood as indivisible. With the Constitutional Court’s decision in *Makwanyane* in mind, they explain how a society that allows the death penalty institutionalises a form of a vengeance as the field in which we must all operate. A conception of freedom drawn from ubuntu ‘is not freedom from; it is freedom to be together in a way that enhances everyone’s capability to transform themselves in their society’.<sup>41</sup> Given ubuntu is an ‘ontic orientation within an interactive ethic, it is indeed a sliding signifier whose meaning in terms of a definition of good and bad is always being re-evaluated in the context of actual interactions, as these enhance the individual’s and community’s powers’.<sup>42</sup> While some might call this imprecise, unpredictable, or a dangerous basis on which to curtail state violence (such as the death penalty), Cornell and van Marle argue that the ‘bloatedness of ubuntu’ is actually its strength.<sup>43</sup> One person’s freedom may still be destroyed by the community. This will endure as long as long as there are competing freedoms,

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<sup>36</sup> Id. p. 93-94.

<sup>37</sup> Cornell and van Marle, ‘Exploring ubuntu: Tentative Reflections’ (2005) 5 *African Human Rights Law Journal* 195-220 at 205.

<sup>38</sup> Ibid.

<sup>39</sup> Id. p. 206.

<sup>40</sup> Ibid.

<sup>41</sup> Id. p. 207.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid.

and especially in the realm of punishment. But ubuntu is an African principle of transcendence which provides a mode of attending to the moral fabric of an aspirational community.<sup>44</sup>

Being-becoming grounded on ubuntu may be a far more durable source of ensuring the participatory nature of a democracy. If embedded in the rule of law, it might demand that a person in the community affected by a decision be treated inclusively before a decision is reached. Moreover, the persistence of the sovereign return as a feature of modern liberal democracy would be marginalised through ubuntu's renunciation of the *ipseity* discussed above. This is the potential of plurality over rationality as a core value animating the rule of law.

### 2.3 The Rule of Law as Critique

I would finally like to turn to the problem of responsibility and judgment that is also provoked by the means-end rationality posited in the *Albutt* case. If the rule of law is to have any teeth in the face of the sovereign return, then it must do so with a firm sense of the primacy of judgment as the response to a crisis. To be responsible, as I suggest here, is to exercise judgment as critique.

I will not be the first to suggest that there is something inherently restorative or re-constitutive in the work of critique as a response to a political crisis or demand. Wendy Brown builds an argument for critical theory as a hope rather than a luxury in dark times.<sup>45</sup> Through a helpful etymological memoriam of the term 'critique' which derives from the Greek term *krisis*, Brown disassociates critique from negativity, and scholasticism (5). She suggests that there could be no such thing as 'mere', 'indulgent', or 'untimely' critique. In ancient Athens *krisis* was 'a jurisprudential term identified with the art of

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<sup>44</sup> Cornell, 'uBuntu, Pluralism, and the Responsibility of Legal Academics to the New South Africa' (2009) 20: 1 *Law and Critique* 43-58 at 48.

<sup>45</sup> W Brown, *Edgework: Critical Essays on Knowledge and Politics* (2005).

making distinctions' (5). These distinctions were essential for arriving at a judgment and rectifying disorder in democracy. *Krisis* was a scene where the object, agent, and process for judging were intermingled as the defendant might at once be a citizen and member of the Senate: 'Procedurally, juridical *krisis* thus consisted of recognising an objective crisis and convening subjective critics who then passed a critical judgment and provided a formula for restorative action' (5). This is a far cry from the idea of a critic as disinterested, or radically opposed to the system or social organisation. There are of course many political and philosophical reasons to be suspicious of critique as the restoration of a fractured or adulterated whole. But we still cannot get away, as Brown insists, from the task of distinguishing 'true from false, genuine from spurious, beautiful from ugly, right from wrong'. We weigh pros and cons, we judge evidence – that is to say, we deliberate. So judgment, distinction, and deliberation are essential aspects of critique.

Can critique ever be untimely? Does it renew the time that calls it forth? Does it go past the event, the crisis that was the instance of critique? Brown eschews the notion of 'untimely critique', and affirms a critical enterprise directed at 'setting the times right again', for instance by repairing a 'tear in justice' (6). In this mode there is a clear restorative element to critique – a repairing that would sit comfortably with the exigencies of ubuntu discussed above. The very possibility of going forward demands that the contours of the crisis be articulated, that it be inscribed as a problem of justice. Critique is then the response, the gesture, however imperfect and unjust, that decides and distinguishes between a variety of infinite responses. With the force of a (critical) distinction, the finding and inscribing of a difference, time is adjusted and a new condition of plurality is made possible. We know from Derrida that these adjustments, these legal or other decisions are always already unjust, deconstructable.<sup>46</sup> But the finitude of the event of critique exposes the crisis, the tear in justice. The time of judgment as critique is, then, at once finite and infinite. The impossibility of a just response (a tear in justice that cannot be

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<sup>46</sup> Jacques Derrida, "The Force of Law: The Mystical Foundations of Authority" in Gil Nidjar (ed.) *Acts of Religion* (2001).



repaired), renews critique through the permanence of the crisis, the ‘again and again’, which marks the enormity of the demand for justice.

Also at stake in critique is the status of the critic, and her relationship to the order that has fallen into crisis. This also entails a move away from the narrowly adjudicatory sense of critique. Critique entails a spatial dimension here – it is a matter of ‘critical distance’ from the object of critique. Socrates is the early model that Brown invokes – a critic who distanced himself and the task of discerning individual virtue and political justice from the domain of political and judicial institutions. In contemporary traces of the old usage of critique there is still:

sustained linking of the objective and subjective dimensions of critique, the ways in which a worldly event or phenomenon, whether a collapsed empire or a diseased body, connects a specific condition with an immediate need to comprehend by sifting, sorting, or separating its elements, to judge, and to respond to it. (7)

While this quality of repair and restoration, sorting and separating, may seem to pull the radical edge out of critique, what Brown takes away from it is the sense of urgency, and the fact that a response to the crisis is not optional. What she seeks to establish is that critique is not merely negative or academic, nor is it dependent on some regime of transcendent Truth.

But is critique as Brown renders it too readily posed in a juridical grammar, and too redolent of seeking a (desperate) political restoration? Can a body of law, the body before the law, or the body politic be so readily restored through the devices and practices of critique as judgment? And if we are to eschew the juridico-political grammar of critique, why do we do this? And who is this ‘we’? Who is the agent of critique beyond critique as adjudication, and what does she seek? I want to suggest that in taking up these questions we must direct attention to the instance of critique, to the event that calls forth the critical response. It is the singularity of this event that drives the critical encounter, informs its ethics, and demands a politics which cannot be legislated in advance.

### 3 Conclusion

The instance of the pardon, the problem of mercy, the infinite calculation that might have been open to the President in exercising his power draws attention to a polity in crisis. The sovereign return was no arbitrary exercise of a gratuitous will, but the response to a tear in justice. In this essay I have argued that the means-end approach to rationality as the rule of law's response to the people excluded from the President's deliberations hardly addresses the crisis of democracy at the heart of this problem. A participatory democracy will always have the problem of who counts, how many will be counted, who will be heard. I have characterized this as the problem of *ipseity* or the eternal return of the sovereign. In responding to this crisis I have suggested that an alternative approach to plurality can ground a critical judgment on what it means to respond to this crisis.