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Editorial

The Diversity of Law as an Intellectual Activity

NoFo is proud of the diversity of this issue; a diversity that is thematic, methodological, and geographical (with articles from the five continents!).

The topics covered are wide-ranging: Ingo Venzke offers a theoretical approach to the concepts of authority and legal change in the international and post-national constellation; Vivian Ferreira uses the lens of normative pluralism to analyze the case of Community Development Banks in Brazil; Karin Van Marle reflects on the parallel paths of jurisprudence and historical (and life) narratives in post-Apartheid South Africa; Richard Dawson explores the intercultural encounter between white settlers and indigenous communities—an encounter between literacy and orality—in 19th century New Zealand; Oishik Sircar critically examines the memorialization of the 2002 ethnic violence in the Indian state of Gujarat through a jurisprudential engagement with its cinematic register.

In addition, NoFo12 features three book reviews: Marianne Constable's *Our Word is Our Bond: How Legal Speech Acts* (reviewed by Julen Etxabe); Roberta Kwall's *The Myth of the Cultural Jew: Culture and Law in Jewish Tradition* (reviewed by Susan Liemer) and Jeremy Webber's *The Constitution of Canada: A Contextual Analysis* (reviewed by John Erik Fossum).

NoFo remains committed to bridging the gap between law and other social and human activities and experiences, for law cannot be understood as an isolated field, or as a practice exclusive to lawyers, government officials, and those who hold judicial office. The variety and interdisciplinarity of approaches—legal theory, qualitative case-study, critical jurisprudence, law and culture, law and film—demonstrate that, if law is a professional activity, it is also an intellectually rich and stimulating endeavor.

In the opening article, 'Semantic Authority, Legal Change and the Dynamics of International Law', Ingo Venzke offers a theoretical exploration of international law as the product of a communicative process in which different actors struggle for the law. In particular, Venzke puts forward the concept of 'semantic authority' in

response to the recognition that a variety of actors, who typically find no place in the received doctrine of legal sources, impact the dynamic development of international law through their practice. This conception of lawmaking and legal change seeks to transcend the divide between both actor-centered and structural approaches that either zoom in on policy-oriented actors and then lose a grip on the contextual constraints that come with speaking the language of international law, or else stay attuned to those constraints but fade out the actors in the process. It is precisely the relationship between the actors and their strategic environment that contains within itself the dynamic for change.

Venzke's understanding of semantic authority—to be distinguished equally from coercion and from persuasion—entails the actors' capacity to have their legal claims recognized and to establish reference points for legal discourse that others can hardly escape. This notion of semantic authority is dynamic, because it is attuned to thinking of international law as a communicative and creative practice in which actors struggle for, and thus shape, the law. While many different factors sustain an actor's capacity to find recognition for their claims (from the appearance of rationality, to having been right in the past, to having a sufficiently prestigious university affiliation), Venzke underlines the role of social expectations: that one should at least refer to, and deal with, an actor's claim in international legal discourse. Interestingly, the effects of semantic authority thus understood are not merely backward looking (linked to past precedents), but forward looking, for they redistribute argumentative burdens in the future.

Moving from the theoretical underpinnings of the International arena, in 'Microfinances and Legal Pluralism: A Case Study of the Community Development Banks in Brazil', Vivian Ferreira traces the genesis and evolution of Community Development Banks (CDB) in Brazil. In a case study that combines literature on legal pluralism and interviews with key players, Ferreira describes the emergence and expansion of CDBs, with special focus on their own singular normative universe: non-profit organizations that operate according to the principles of a solidarity economy. Characteristically, CDBs are created, owned and managed by community members; they make use of microcredit and a social currency as instruments to develop a local network of consumers and producers; and operate in territories with high levels of social exclusion to mitigate its effects and advance local development.

The article traces the development of Community Banks in four stages: a first initial stage of institutional imagination; a second stage of clashes with state authorities; a third stage of collaborative relationships and consolidation of a network of CDBs; and a fourth and final stage of demands to transform state law to incorporate the new normative reality.

Jumping from community banks in Brazil to post-apartheid South Africa, Karin Van Marle explores two possible ways to read a post 1994 South Africa, by reflecting on the life stories of Nelson Mandela and his first wife Winnie Madikizela-Mandela. In 'Post-1994 Jurisprudence and South African Coming of Age Stories', Van Marle reflects on the becoming of jurisprudence through the lives of these two figures,

connecting with attempts by South African scholars to rely on aesthetic metaphors to reflect on the past, present and future of South African law.

On the one hand, Nelson Mandela's life has often been understood in the form of a *bildungsroman*, a 'Long Walk to Freedom' where Mandela, like the South African nation itself, has managed to leave behind an unjust past for the sake of reconciliation and democracy. Van Marle suggests that this narrative is underpinned by a form of imagination that hails progress and the promises of constitutionalism and human rights. She warns, however, that such a simplistic reading may draw an over-optimistic picture.

In contrast to that of Nelson, the tumultuous life of Winnie—full of disruption, equivocation and resistance—cannot equally be read as a coming of age story. Winnie has ever occupied a marginal position; she represents the excess, that which cannot be stilled or contained by a modern legal order. In offering such a reading, Van Marle does not wish to suggest Winnie as a model, but rather to recognize the possibility of contingency, inter-connectedness, and the limitations on fully comprehending others. Ultimately Van Marle is wary of grand narratives that would allegedly mirror post-Apartheid South African law and jurisprudence. Instead, she leans towards a 'minor jurisprudence' (an aim also shared by Oishik Sirkar in the last essay of this volume), where the design and meaning of the narrative cannot be foreseen, projected or controlled.

In his article 'On Close Reading the Treaty of Waitangi: An Encounter with Joseph Vining', Richard Dawson is also interested in reading a historical and intercultural encounter. Dawson approaches the encounter between the indigenous Mâori and British settlers, a remarkable moment of contact between literate and oral cultures, formalized in the Treaty of Waitangi in 1840, whereby the Chiefs ceded 'sovereignty' to the Queen of England, while maintaining 'exclusive possession' of their lands. What makes the task of reading this Treaty more complicated is that central terms such as 'sovereignty' and 'possession' were alien to the aboriginal cultures they were meant to govern, and it is doubtful what exactly both parties agreed to. As a case in point, Dawson recalls Chief Nopera Panakareao's metaphor to describe the terms of the treaty, according to which 'The Shadow of the Land is to the Queen, but the substance remains with us'.

Dawson asks how one is to approach such a metaphor if one aims to understand, and be faithful to, the treaty—an issue with profound legal and political implications in present-day New Zealand. He finds his way through the writings of Joseph Vining, who has been described as 'among the more elusive legal thinkers in recent decades' on account of his poetic sensibility. Dawson focuses on close reading; not on what Vining says *about* this activity, but as *participation in* what he does. Dawson aims to develop a self-reflective sensibility and apply it to our own processes of reading, on the assumption that the meaning of the treaty is not 'in' the text, but in the experiential process of re-creating it. In the process, Dawson forces us to re-evaluate terms such as 'sovereignty', 'treaty', 'literal', 'metaphoric', 'text', 'substance', and 'principles'.

In the closing article, Oishik Sircar scrutinizes the memorialization of the ethnic

violence in Gujarat in 2002, as one of the most litigated, mediatized and politically polarizing events of mass atrocity ('pogrom') against its Muslim minority population in contemporary India. Rather than the events themselves, or their litigation in court cases, what interests Sircar is the way the pogrom has been memorialized and passed on to Indian collective memory through the archive of Bollywood cinema. In doing so, Sircar does not limit the role of film to a mimetic reconstruction of events, but expands it to embrace its affective and aesthetic dimensions. Moreover, in questioning cinema's role in doing the work of reconstructive imagination, Sircar not only interrogates cinema's ability to keep alive an archive of collective memory, but takes it as a credible jurisprudential source to engender imaginations of justice: a 'minor jurisprudence' that challenges the hegemony of state legalism.

Sircar focuses on *Dev*, the first Bollywood film memorializing the pogrom, which appeared in 2004. In his reading, *Dev* offers a memorial reconstruction of Gujarat 2002 that reduces religious strife in India to an amorphous politics, and portrays it as the consequence of the sectarian agendas of individual fundamentalist politicians. For Sircar, this memorialization conceals the ideological and structural foundations that lend legitimacy to such hatred, and hence keeps the deep-seated structural and ideological violence of the State intact, even as it visibly condemns the violence of religious sectarianism. Sircar suggests further that such remembrance works through a 'developmental juridical rationality'—a triad of secularism, legalism and developmentalism—which reposes enormous faith in the Constitution and rule of law as unquestionable paths to justice. These aesthetic reconstructions call on law to recognize the violence of the pogrom, but at the same time to valorize the state-making practices of the new India that laid the foundations of the pogrom.

Julen Etxabe & Mónica López Lerma
Helsinki, June 2015

Semantic Authority, Legal Change and the Dynamics of International Law

Ingo Venzke*

1. Introduction

The Achilles' heel of international legal doctrine is its static view of international law. That static view is the product of a two-fold mythical imagery. First, lawmaking is pictured to be a matter of sources. The law springs from dark and hidden places into daylight in a single act of natural production. At the same time, second, depictions of interpretations of the law downstream suggest that they dig out law's meaning as it lies within that stream of legal norms, or just hidden below its surface. The finesse of doctrine further distinguishes between, on the one hand, applying the law where it is clear for everyone to see and, on the other hand, acts of interpretation where the waters are muddy. The act of interpretation looks like an act of archaeology, of recovery rather than creation.

Of course there are many exceptions to such a static view of international law, which confines the creation of law to that one time act when, at its source, the law sees the light of day. In present international legal theory the understanding is indeed rare that interpretations recover the law that is already out there, ready to be used in everyday practice. The jurisgenerative, lawmaking side of such practice is readily recognized. But that recognition is only the beginning. It continues to stir controversies that branch out into sets of normative, sociological, and doctrinal questions.

In the present contribution, I wish to further develop the concept of semantic authority in response to the recognition that a variety of actors, who typically find no place in the received doctrine of legal sources, do impact the dynamic development of international law through their practice. I build on an understanding of semantic authority as actors' capacity to find recognition for their claims about international

* Associate Professor, University of Amsterdam.

** Many thanks to the participants of the workshop on 'International Jurisprudence: Rethinking the Concept of Law' at iCourts, Copenhagen, for their valuable comments.

law and to establish reference points for legal discourse that others can hardly escape. The concept, I submit, first has the potential of capturing sociological insights on the influence of specific actors within international legal discourse. Second, it does not immediately elevate those actors' output to the status of sources of law. It does thus not immediately convey a normative judgment or confer a blessing. Rather, it (re-)directs attention and guides normative inquiry. The understanding of authority here is one that stands in the tradition of public authority, *öffentliche Gewalt* or *puissance publique*—authority as capacity and constraint, not as a normative reason for action.[1] At the same time, the choice is for the concept of authority, rather than power or violence—authority as a capacity or constraint that enjoys and requires legitimacy. The present contribution's primary ambition, in other words, is thus to offer sociological reflection, not the least so as to support normative inquiry into the legitimacy of international lawmaking.

The notion of semantic authority highlights the dynamics of international law against the backdrop of an otherwise largely static picture. It adds dynamism because it is attuned to thinking of international law as a communicative and creative practice in which actors struggle for the law and thus shape the law (see already Cover 1983). Moreover, semantic authority not only sets international law into motion but is itself a product of shifting dynamics. At its core, it is sustained by a social expectation that anyone making a legal claim within a certain domain needs to refer to the statements of the actor with semantic authority. Such authority is the product of dynamics in which one actor might evoke it and another cannot get away from it. Thanks to the move from sources to communicative practice, and from rules that allocate legal competences towards shifting semantic authority, international law appears in a much more dynamic and more realistic light. All of this becomes clearer in view of a brief set of examples that explains the scenery of semantic authority and dynamic international law (2.).

In what follows, the present contribution develops and supports the thesis that international law is best understood as the product of a communicative process in which different actors with varying degrees of semantic authority struggle for the law. For that purpose, it reviews in a summary fashion the shift from sources towards communicative practices and highlights how existing approaches in this vein have understood legal change. It argues for a conception of lawmaking in communicative practice that transcends divides between actor-centred and structural approaches. It is precisely the relationship between actors and their strategic environment that contains within itself the dynamics for change (3.). Moving on from the shift towards lawmaking in communicative practice, the present contribution zooms in on the dynamic construction of authority, focusing on how it is produced in legal discourse. The argument continues to be embedded in an understanding of lawmaking in communicative practice and thus focuses from among the many factors that shape

1 See the research project on international public authority, anchored at the Max Planck Institute for Comparative Public Law and International Law: <http://www.mpil.de/red/ipa> (last accessed: 20 April 2015).

authority on those that connect to the language of international law itself. How does that language sustain the authority that contributes to its change? (4.) The conclusions move from these points of sociological reflection to the normative implications. They clarify how exactly the next steps are steps with a normative purport and which directions they might take (5.).

2. An exemplary, scenic overview

A number of contemporary theories approach international law with a shift in emphasis from the sources of law towards the communicative practices in which a plethora of actors use, claim and speak international law. The scenery is not that of legal sources and the state actors, which the received wisdom of sources doctrine places into the limelight. The scenery is characterized by a notable increase in forms of law, in the nature legal instrument, and in the scope of relevant actors. A brief set of examples may clarify. To first illustrate why thinking about international law has moved from sources to communicative practices, one may consider the distinction between 'combatants' and 'civilians', which lies at the core of international humanitarian law and which appears, among other places, in many different provisions of the 1949 Geneva Conventions. The plain proposition is that, in order to 'know the law' it is necessary to ask what it means to be a 'combatant' or a 'civilian'. That answer cannot be gleaned from the text itself and cannot be found anywhere but in legal practice. Their meaning does not lie underneath the textual surface of the Geneva Conventions, but is instead the product of communicative practices that use these terms.[2] And these practices are not limited to state representatives who sign international treaties, but they include the opinions of military advisers, case law from domestic courts, the jurisprudence of international (criminal) courts and tribunals, statements of the International Committee of the Red Cross (ICRC), interventions by Non-Governmental Organizations (NGOs) such as Human Rights Watch, as well as the arguments of prominent legal scholars (Venzke 2009).

The extent to which any of those actors contribute to the making of international (humanitarian) law by shaping what either 'combatant' or 'civilian' means depends on their semantic authority—their capacity to establish reference points for legal discourse that other actors can hardly escape. Whether they enjoy such authority, and to which degree they enjoy it, in turn depends on factors that may still be conveniently grouped in the classic tripartite division of any authority's legitimacy bases. Legitimacy bases connect to (legal) rationality, tradition, or personal and institutional esteem (Weber 1978, 36-8). Semantic authority, like the law that it shapes, is a product of struggle. It is clear to see how actors try their best to nourish their own authority, sustain the authority of likeminded actors and aim at destabilizing the authority of others. Not only the law shifts with communicative practice. Semantic

2 The deeper theoretical underpinnings are those of the linguistic turn, developments in hermeneutics and semantic pragmatism, most of which follows on the heels of Ludwig Wittgenstein's resonating observation that 'the meaning of a word is its use in language' (Wittgenstein 1958, para 43).

authority is negotiated simultaneously. Jean Combacau and Serge Sur write lucidly in their general treatise on international law:

> Les controverses relatives à l'interprétation ne seraient pas si vives si elles ne traduisaient pas une lutte pour la maîtrise du système juridique, qui fait du processus interprétatif une variante de la lutte pour le droit. (Combacau and Serge Sur 2010, 172.)[3]

Semantic authority rests on a belief that needs to be fought for and gained. Military advisors might thus embolden or seek to undermine the ICRC. The ICRC relies on, and lends authority to, domestic court decisions. Scholars rely on all of that and are, in turn, relied upon. Those interactions shape the law and negotiate semantic authority.

As further examples from the scenery of dynamic international law, a couple of specific cases from international trade law are illustrative. When China joined the World Trade Organization (WTO) in 2001, it made, among other things, a commitment to liberalizing trade in 'sound recording distribution services'. Does this commitment also extend to distribution by electronic means? A panel found that it did. On appeal, China argued that the scope of its commitments could not simply increase due to 'temporal variations in language'.[4] The Appellate Body disagreed and held that the terms—'sound recording distribution services'—were 'sufficiently generic that what they apply to may change over time'.[5] The Appellate Body decided a concrete case *inter partes*, but its interpretation will carry onwards and instruct future practices.[6]

It is next to impossible to understand international trade law were it not through the thicket of case law. Struggles over how earlier decisions are to be interpreted oftentimes gloss over the treaty language that is formalistically supposed to carry the weight of the judgement. It is in this vein, for instance, that the treaty language on justifying trade restrictions because they 'relate to' the conservation of exhaustible natural resources has largely been forgotten in the sense that the legal discourse has come to turn on whether such measures 'are primarily aimed at' that objective.[7] The term 'exhaustible natural resources', in turn, is shaped by the Appellate Body with reference to many international legal instruments so as to support an evolutionary interpretation.[8] The Appellate Body thus shaped the meaning of this treaty term and it established new reference points for legal discourse.

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3 'The controversies of interpretation would not be so lively if they did not translate into a battle for the mastery over the legal system, which turns the interpretative process into a variation of the battle for the law' (my translation).

4 Appellate Body Report, *China—Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, para 47.

5 Ibid., para 396.

6 According to the Appellate Body, its reports create 'legitimate expectations' among WTO members so that panels are expected to follow its precedents. Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*,WT/DS8, 10 & 11/AB/R, 4 October 1996, p. 14.

7 Appellate Body Report, *US—Shrimp*, WT/DS48/ABR, 12 Oct. 1998, para 136.

8 Ibid., para 130.

3. Lawmaking in communicative practice

In what follows, I will proceed by briefly discussing two prominent angles from which the communicative practice of international lawmaking has been approached.[9] The first is actor-centred and includes the legacies of legal realism, the New Haven School and its progeny (A.). The second one is centred on structures and comes in the form of systems theory (B.). In their outlooks, the static image of international law has certainly been set into motion. But they have one-sidedly emphasized either the choice and impact of the actor to the detriment of legal structures or, conversely, lost all sight of any specific actor in communicative lawmaking. Their summary discussion paves the way towards developing an understanding of semantic authority that purports to transcend that divide (C.).

3.1. The impetus of actors

Early American realists already articulated a view of law not as rules but as process, not as 'law in the books' but as 'law in action' (Pound 1910). Holmes' emphasis on prophecies about what courts do already goes a long way towards understanding lawmaking in a communicative perspective where some actors—courts, in the context of Holmes' argument—are more powerful than others (Holmes 1897). The agenda was precisely to shift attention from sources and rules to practice and process.

Taking their cues from early realists, the founding fathers of the New Haven School of international law were, first of all, most outspoken about its disdain for thinking of international law in terms of formal sources. They foreshadowed theoretical developments that are attuned to how law changes through practice. International law, Myres McDougal already found, should be 'regarded not as mere rules but as a whole *process* of authoritative decisions in the world arena'(McDougal 1960, 169). He and his colleagues spelled out a view on international law with a substantive overarching morality towards which all efforts should be directed, the protection of human dignity (McDougal 1954). The view was decidedly functionalist. International law should be practiced so as to serve that end.

Michael Reisman takes the view further in his seminal article 'International Lawmaking: A Process of Communication'. He argues that scholarly teachings and judgments had setup a myth—the myth that international law could be found by looking at what Art. 38 ICJ Statute claims to be the sources of all law (Reisman 1981). The model of positivism, he contends, is distorting precisely because it holds that law is made by the legislator. He maintains instead that international law emerges from the myriad of legal communications that a plethora of actors utter every day. Given that the international legal process is no longer dominated by governments alone, Reisman further finds that newly generated legal norms can conflict with norms that others might find with a formalist look at traditional sources of the law. His process-oriented view of international law transcends formalism and claims to be

9 Here I draw on I.Venzke, *How Interpretation Makes International Law* (OUP 2012) 29-37.

in a position of granting humanitarian concerns, voiced by a wide range of actors in international political discourse, a legal status even if they conflict with norms that have a formal pedigree in the sources of law (see Bernstorff and Venzke 2010). Humanitarianism is construed as a social fact. It amounts to a point of reference for normative judgment and for legal argument with a certain distance to positive legal provisions that might be spelled out in the UN Charter, for instance (Reisman 2000). It is clear to see in this approach the recognition of communicative lawmaking that unfolds under the spell of a plethora of different actors.

The theory of transnational legal process (TLP), a spin-off from New Haven, borrows the concept of jurisgenesis from the work of Robert Cover to look at the law-generating interactions among a multitude of actors (Koh 1996). Yet it does not share the earlier New Haven School's conviction in an overarching end of human dignity that can offer guidance. Paul Schiff Berman's approach sands in this tradition, focusing on the contestation among interpretative communities that 'do create law and do give meaning to law through their narratives and precepts' (Berman 2007; quoting Cover 1983, 40). This opens the door towards sketching law in numerous co-existing, competing, and overlapping normative universes. Cover did not himself engage in debates of legal pluralism but his work certainly lends itself in support of pluralist conceptions of law when he writes that 'all collective behavior entailing systematic understandings of our commitments to future worlds [can lay] equal claim to the word "law"' (Cover 1985, 181). Law is not tied to recognized sources but emerges from social interaction among a variety of actors, including multinational corporations, non-governmental organizations, international organizations, terrorist networks, media and, in special circumstances, individuals. There is no centralized process of lawmaking or a single unified body of international law. Instead there are multiple normative communities, which generate their own legal norms. The grand picture is one of global legal pluralism (Berman 2014).

3.2. Logics of legal argument

The theoretical framework of systems theory paints a quite similar picture of law-making in communicative processes. It takes many of its cues from Eugen Ehrlich, one of the founding figures in sociological jurisprudence who inspired the free law movement on which also American legal realism relied. Ehrlich already opined in 1903 that '[t]he modern dogmatic legal science, which is inclined to first investigate the intention of the legislature with regard to any legal norm, has never considered sufficiently that the meaning that the law actually gains in life depends much more on its interpretation and on the persons who are called upon to deal with it' (Ehrlich 1903, my translation). Systems theory then sets itself apart from policy-oriented jurisprudence à la New Haven by remaining bound to understanding legal practice as a distinct enterprise that cannot be reduced to the exercise of power, to the pursuit of values, to the expression of culture. It recognizes that speaking the language of the law compels actors to use a certain code of legality. It critiques external perspectives on legal practice for reducing that practice to the logics of other systems such as the

political, economic, or cultural systems. Legal practice, in its view, then becomes indistinguishable—for instance, politics by other means (Fischer-Lescano and Liste 2005).

According to systems theory, law is an autopoietic subsystem of society that encompasses all communications containing claims about (il)legality (Luhmann 2004). Autopoiesis roughly means self-reproduction and Niklas Luhmann introduced the concept in order to grasp the features of social systems as well as to suggest that communications within any single system can only operate by reference to communications of that same system—legal claims have to refer to legal claims in order to be valid legal claims. The test for knowing what amounts to a valid claim in (international) law cannot be based on an idea of sources or on pedigree. It must refer to legal practice itself (Luhmann 2004, 128).

3.3. Dynamic developments

3.3.1. Actors in the law

Critiques of policy-oriented jurisprudence à la New Haven have centred, among other things, on its difficulty, or unwillingness, to account for law as a genuine field of practice—as a field of practice that is structured by demands of action unlike that of politics, economics, or morality, for instance. The critique is that making a legal claim, even vesting policy preferences in the mantle of the law, faces constraints that come with the choice for the language of law. That language has argumentative traditions, standards of validity, demands of practice that render some claims more likely of being accepted than others. Some claims might be impossible to be made at all or, if made, sound ridiculous or plainly wrong. Systems theory takes that critique on board and abstracts from any specific actor and interest that might be expressed in legal interpretations. Instead it looks at communicative operations whose writers or speakers remain in the dark.

When it comes to the dynamics of international law, views in the tradition of legal realism and the New Haven school bring in the dynamism through an emphasis on the actors in processes of continuous decision-making. Systems theory, on the other hand, sees dynamism through the lens of evolution. The law adapts in an evolutionary fashion to changes in its environment. Actors and policies cannot bear on the law in any direct fashion. But the process is one of natural selection according to the logic of the law. Luhmann thus goes to great lengths to formulate a theory of legal evolution. He thus replaces the mystique of sources with yet another metaphor that is no less opaque and that no less distances the law from human action.[10]

10 Luhmann duly notes that thinking of legal change in terms of evolution only makes good sense if the legal system is operationally closed; that is, political operations do not have an immediate impact on legal communications (Luhmann 2004, 230).

3.3.2. Evolutionary change

Other approaches to international law and practice support an understanding of legal dynamics in evolutionary terms. Even Hans Kelsen opted for this imagery and developed an evolutionary theory of international law, which was based on his idea of a 'biogenetic law' (Kelsen 1942, 148-9). Scholarly literature generally offers many spirited uses of the concept of evolution just as well.[11] In judicial practice, it is above all the European Court of Human Rights that has embraced the notion of 'evolutive interpretation' as a common *topos* in its judgments (Bjorge 2014). The ICJ has likewise, though with less frequency or enthusiasm, spoken about the evolution of international law.[12] And the WTO Appellate Body has found, it may be reminded, that the expression 'exhaustibly natural resources' is 'by definition, evolutionary'.[13] In short, it is rather common to understand developments in law and language as evolution.

Linguistic theory also seems to support such an understanding of legal change. Language change, according to linguist Rudi Keller, is the unintended by-product of a myriad of intentional actions (Keller 2003, 93). But for an evolutionary explanation to be adequate, he notes, three conditions have to be met: the process must not be analysed in light of a given goal (this precludes any talk of evolution towards something), it must be a cumulative process involving numerous individuals and knowing no single author, and the dynamics of the process must be based on a combination of variation and selection. This fits well with central tenets of systems theory. However, Keller is enormously cautious and notes with reference to his colleague Eugeniu Coşeriu that human sciences will eventually have to find their own concept to replace the concept of evolution in order to explain legal dynamics (Coşeriu 1974, 154). Coşeriu notably warned that nothing could impact language that does not pass through the speakers' freedom and intelligence (Ibid., 169). He thus brings intention and will back into the equation.

3.3.3. Change through practice

Competition between agency-centred and structural explanations flares up again in the discussion of the concept of evolution. Sure enough, no single interpretation can by and for itself be transformative—claims to the law need to find acceptance within a community of interpreters. The concept of evolution highlights environmental (structural) conditions that drive selection processes and impact particular

11 From among the many examples see: Bates 2010, Schrijver 2008, Kolb 2007; Anghie 2006; Benvenisti 2005.

12 *Aegean Sea Continental Shelf (Greece v. Turkey),* 19 December 1978, (1978) ICJ Reports 3, para 77); *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, 13 July 2009, para 65. Also compare the *dictum* in *Legal Consequences for States of the Continuing Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, (1971) ICJ Reports 16, para 53.

13 Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Like Products*,WT/DS58/AB/R, 6 November 1998, paras 127-131.

interpretations' chances of success. Yet, with this focus, it blends out any bearing of particular actors on those same conditions. In legal interpretation, actors engage in struggle for the law with the decided interest of finding acceptance for their claims. They seek to influence what is considered (il)legal. Some actors possess immense resources that they are willing to put to use in those semantic struggles. Like any language, the language of international law is a social, not a natural product (Bourdieu 1999). While the concept of evolution recalls that no single act of interpretation generates meaning, it unduly abstracts from the capacities of specific actors and from the politics that are at work within processes of change (see already Jhering 1915, 65-70).

With regard to understanding legal dynamics in terms of evolution, Max Weber's astute insight continues to be pertinent. Writing about legal change by way of changes in consensual meaning, he observed that 'the mere *change of external conditions* is neither sufficient nor necessary to explain the changes in "consensual understandings". The really decisive element has always been *a new line of conduct* which then results either in a change of the meaning of existing rules of law or in the creation of new rules of law' (Weber 1978, 755). It continues to be a lasting task for international legal theory to develop an account of legal change and lawmaking that captures legal interpretation as a distinct enterprise that is not reduced to politics, morality, or culture, on the one hand, and that maintains a grasp on those actual lines of conduct, on the other. I suggest that a renewed conception of practice helps to meet that challenge.

Whereas the concept of practice used to be closely linked to strong structuralist positions, Maurice Merleau-Ponty brought life and agency into it (Merleau-Ponty 1973). He conceived practice as historically situated speaking, thinking, and acting. Practice was not the embodiment of (material) structures but the acting of *living* persons. Pierre Bourdieu was then still more blunt in his critique of structuralist abstractions from agency: they blunder into the trap of equating what they see as objective observation (unburdened with dealings of living persons) with the view that actors themselves have of their practice. Social actors tend to be ignored where they should rather be included as a constitutive element of the social world (Bourdieu 1987a; in further detail Dezalay and Madsen 2012). On the contrary, however, only taking account of actors' practice without any critical detachment and understanding for structural predispositions would fall for an unbroken subjectivism. Sociological insight would be impossible. In other words, factors that explain a person's behaviour (her claims about international law) should not be equated with the reasons for action that actors themselves see or make explicit (Bourdieu 1977).

Understanding international law as a practice has its eyes on the actors who struggle for the law to pull it onto their side (Koskenniemi 1999, 523). And it keeps in mind the fact that the struggle is one that takes place within a structured context—a strategic environment that is international law. It is a commonplace that such structural conditions for the semantic struggle can amount to a constraint while being a product of that same struggle. What is the product of a collective

process that stretches over time does not bow to the whim of any single actor or to the input of any single instance. And yet, gradual change still depends on 'new lines of conduct', on the actors that carry it along.

It is noteworthy that few approaches to international law take this step towards articulating how the law relates to its lawyers, how the strategic environment relates to the people who live in it. Few approaches take seriously the idea that at least in sociology is a well-received suggestion: Actors and structures are co-constitutive, one cannot do without the other. Structures live through actors and actors are shaped by structures (Giddens 1979). When it comes to international law, that co-constitution contains within itself the forces of dynamism. If that is so, then the received terminology of co-constitution might turn out to stand in the way. It suggests the ordered settlement of a constitution. It suggests closure. But the relationship between the structure of the law and the people that inhibit it, who use it and shape it, that relationship is not settled. It is unstable and dynamic. Of course a constitution can and should be thought of as a living thing. But it might be better, still, to drop that terminology and to think of the relationship between international law and its lawyers as antagonistic symbiosis.

The concept of semantic authority not only builds on the idea of communicative lawmaking to stay attuned to the dynamics of international law and to capture the authority of specific actors, it also emphasizes that this authority is one that largely depends on how an actor's claim about international law links up with that language of international law. In other words, from the myriad of factors that shape, tug, and pull on any specific actor's authority, it focuses on those elements of authority that lie on the level of communication. Many different factors certainly sustain an actor's capacity to find recognition for claims about international law and to establish reference points for legal discourse. They range from the appearance of rationality, via such things as the use of wise words, to having been right in the past.[14] They include such things as having the right pedigree of education, having practiced in the right places, or having a sufficiently prestigious university affiliation (Bourdieu 1992, 171-182). For institutional and state actors, the size of GDP or military prowess may be considered. All of that matters to varying degrees for an actor's semantic authority. In the following I wish to focus on those elements that lie on the level of communication only: How does (the language of) international law sustain the authority that changes it?

4. Semantic authority

Semantic authority is a specific form of power. It is one that is generally carried by a social expectation—an expectation, namely, that one should at least refer to and deal with an actor's claim in international legal discourse. To pick up the introductory example of the Appellate Body, it enjoys semantic authority international trade law because every actor who makes a claim is expected to do so in close engagement with

14 For a reconstruction of sources of authority in the International Court of Justice see Hernandez 2014.

its earlier decisions. That expectation is something that the Appellate Body itself can foster, for instance by giving its reports strong precedential force. Its authority also leans on common sentiments such as that like cases are decided alike. It is further an authority that is linked up with incentive structures such as wining a case and to thus choose a litigation strategy that is likely to be successful (i.e. vest claims in the Appellate Body's preferred hermeneutics, picking up its earlier decisions and hints, spinning them rather than suggesting that they were wrong, etc.).

This section focuses on how the language of international law feeds and possibly sustains actors' semantic authority—that authority which changes and makes that same international law. It might first be suggested that semantic authority is a specific form of persuasive authority, but that notion fails to convince, as it offers no account of what authority might mean if it needs to be persuasive. Similarly, it cannot be that an actor enjoys semantic authority because it is in some sense right, unless the assessment of rightness receives a thorough pragmatic twist (1.). Notably, the language of international law allows semantic authority to hide—as a matter of fact, it is at its strongest when it is not recognized (2.). Strategies of how actors can effectively hide and what ultimately sustains their authority are social expectations within specific communities (3.).

4.1. Persuasive authority?

It might be suggested that claims to the law are authoritative because they are persuasive. When discussing the role of judicial precedents, for example, quite a number of international courts and tribunals are happy to say that earlier decisions have persuasive authority: they should be taken into consideration to the extent that they are convincing.[15] In the *dictum* of the Permanent Court of International Justice, earlier decisions should be taken into account if '[t]he Court sees no reason to depart from a construction which clearly flows from the previous judgments the reasoning of which it still regards as sound'.[16] When it comes to domestic courts and their treatment of claims to international law, they likewise resort to such views. Examples include the treatment of legal instruments of the United Nations High Commissioner for Refugees (UNHCR)—its Guidelines of Refugee Protection, for instance. They are taken into account, according to the reasoning of the judges, because they are persuasive (with references to domestic court practice see Venzke 2012, 117-132).

While widespread, such reasoning is ambiguous, at best. Above all, it remains utterly unclear what authority means in instances where it relies on persuasion. The notion of persuasive authority stands at odds with the strong argument that authority needs to be distinguished not only from coercion, but also from persuasion. It is in

15 See. e.g., *ADC Affiliate Limited and ADC and ADMC Management Limited* v. *Republic of Hungary,* ICSID Case No. ARB/03/16, Award, 2 October 2006, para 293.

16 *Case of the Readaptation of the Mavrommatis Jerusalem Concessions* (Jurisdiction), Greece v. Britain, Judgment, 10 October 1927, para 43.

this regard that Hannah Arendt wrote sweepingly that '[w]here arguments are used, authority is left in abeyance' (Arendt 2006, 92). H.L.A. Hart translated this aspect of authority into legal scholarship with the notion of content-independent reasons—reasons, namely, which derive from the intention of the person or institution having authority and not from an assessment of their contents (Hart 1983, 254). If authorities had to persuade and convince in order to be taken into consideration, they would cease to be authorities. It is a constitutive feature of authority that it persists even in the absence of agreement.

Ideas on persuasive authority seem to be at their strongest in comparative law and with regard to the use of foreign judicial decisions arguably providing a repository of good reasons (Glenn 1987). But the notion fails to offer an answer as to what authority might mean if arguments were simply persuasive. The notion is theoretically weak (see Schauer 2008). More generally, it reflects the struggle of legal doctrine to come to terms with the use of ubiquitous 'authorities' that enjoy normative force even if they are non-binding and do not square with the orthodox ordering of sources doctrine. Alas, the concept of persuasive authority does not offer the easy way out of this quandary that some authors wish it did (Torrance 2011). Similarly, it is not helpful to think of an actor's semantic authority as leaning on the rightness of specific claims, unless the assessment of rightness receives a pragmatic twist as I will continue to argue below (subsection 4.3). All actors in the struggle for the law might claim that they are right. To present claims in international law as the right ones is simply the currency of the game (Peat and Windsor 2015; Bianchi 2015; Venzke 2015). The law provides the battleground for competing claims about what is a right interpretation but it does not itself give away the answer.

4.2. Subservient authority

The language of international law allows actors to hide. It allows them to present themselves not as authorities at all, but as a handmaiden of other authorities. An actor's authority in contributing to the communicative making of international law seems most solid, in fact, if it is not recognized as such.[17] It is fragile if exposed. In the struggle for international law, the prevailing sentiment that distributes authority continues to be legalism flanked by formalism—the belief that rightness is a matter of following the rules of the law (seminally Shklar 1964). To be influential, the actor needs to hide. Or in the words of Kevin Spacey in *Usual Suspects*, 'The greatest trick the Devil ever pulled was convincing the world he didn't exist'.[18] The language of the law allows actors' to do precisely that, to hide. As Bourdieu observed:

17 Shai Dothan offers the alternative, largely complementary account, of how a court can build up authority by visibly getting away with interpretations that are recognized as expansive, see Dothan 2015.

18 Paraphrasing Charles Baudelaire, in the *The Generous Gambler*: 'My dear brethren, do not ever forget, when you hear the progress of lights praised, that the loveliest trick of the Devil is to persuade you that he does not exist!'

> [t]he ritual that is designed to intensify the authority of the act of interpretation [. . .] adds to the collective work of sublimation designed to attest that the decision expresses not the will or the world-view of the judge but the will of the law or the legislature (*voluntaslegis* or *legislatoris*). (Bourdieu 1987, 828.)

In the language of international law, participants in the legal discourse would typically point to treaties or customary international law as the basis for their claims. As the scenery of dynamic international law has suggested, there might be other reference points such international judicial decisions or other instruments of international institutions. Even if judicial decisions have built up a body of case law that largely glosses over the treaty texts, they took off on precisely that basis. There are notable exceptions, however. In some instances, claims were not at all supported by the will of the law or the legislature but by references to substantive justice or to community values. A noteworthy example may be one of the first decisions of ITLOS, in which it assumed jurisdiction 'in the interest of justice'.[19]

In any event, actors in the communicative practice of international law present themselves as subservient to other masters or ends: the law, state governments, the world community, or justice, above all. The law rules, not the actors who are bound by it. If the law runs out in its rule, so to speak, then other resources step up, such as the parties' intention, or justice. The variety of the masters or ends, which actors may invoke, is reflected in the way they speak and craft their claims. A sociolinguistic approach to legal reasoning is instructive in this regard. It helps to understanding how actors seek semantic authority by speaking in a way that resonates with relevant peers, how it resonates with audiences (Baum 2006). The point is to not understand claims within the international legal discourse as structured by a given language that is international law but as communicative practices in which actors gain authority by striking the right notes within their communities and, at the same time, perpetuate the underlying value and knowledge systems of those communities (Halliday 1978; Halliday and Hasan 1989).

4.3. Dynamics of expectations

Semantic authority is above all the product of discursive construction. It is crucial to appreciate authority as a product of discursive practices in a dynamic context that exceeds dyadic relationships picturing one actor in authority over another (Flathman 1980). What sustains the authority is not individual recognition in the specific case of its exercise, but its social recognition—a social belief in its legitimacy, which, as Luhmann already noted aptly, 'does precisely not rest […] on convictions for which one is personally responsible, but to the contrary on social climate' (Luhmann 1983, 34). Shared beliefs are constitutive of authority, and those shared underpinnings are shaped and upheld in discursive practices. In this sense, authority is based on 'culturally and historically conditioned expectations' (Lincoln 1991, 116).

19 ITLOS, *St. Vincent and the Grenadines v. Guinea*, No 2, Judgment on the Merits 1999, para 73.

The dynamic expectations that underpin any semantic authority hinge on many factors. Above all, it seems that they hinge on past practices. Being tied to the past, semantic authority might suggest everything but dynamism. But rather, it emphasises incremental processes of constructing authority. The use of precedents vividly illustrates this part of the argument (Jacob 2012). The WTO Appellate Body's authority *and* the development of international trade law received a push when the Appellate Body found that its earlier decisions 'create legitimate expectations […] and, therefore, should be taken into account where they are relevant to any dispute'.[20] The fact that actors on the market place, public officials, and participants of the legal discourse generally shape their expectations and legal arguments around earlier decisions puts the Appellate Body into a position of authority.

What is more, the Appellate Body picks up on an apparent fact; namely that its reports create legitimate expectations. Actors already do converge around them and therefore it is only proper that panels take them into consideration. The consequence of this finding is, of course, that actors take them into consideration even more so. The Appellate Body finds further support for its position, adding yet more force to its precedents. It thus stressed 'the importance of consistency and stability' in interpretation, emphasized that its findings are clarifications of the law and, as such, are not limited to the specific case. When it critiqued a panel for failing to follow its earlier reports, it stated that it was 'deeply concerned about the Panel's decision to depart from well-established Appellate Body jurisprudence clarifying the interpretation of the same legal issues. The Panel's approach has serious implications for the proper functioning of the WTO dispute settlement system [. . .]'.[21] Similar patterns can be found to varying degrees within other judicial institutions just as well.[22]

A claim to the law onky possibly amounts to an exercise of authority, as in the example of Appellate Body reports, if not everything can be made of it. It is powerful precisely because it redistributes argumentative burdens in the future. It is in this way that the authority hinges on the past. Any act of making law by way of creative interpretation amounts to a constraint in the future. Only if statements about the law carry content and constraint, only then can they reach into the future and make law. That constraint, semantic pragmatism suggests, stems from legal practice itself: authority in lawmaking is constrained and can constrain—is tied to the past and can reach into the future—because it is tied down by the future that looks back to see how any use relates to the past (cf. Brandom 1999).

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20 Appellate Body Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8 10 and 11/AB/R (4 October 1996), 14; *Zeroing in Anti-Dumping Measures Involving Products from Korea*, WT/DS402/R (18 January 18 2011), para 7.6.

21 Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico,* WT/DS344/AB/R (30 April 2008), paras 161-2; Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology* WT/DS350/AB/R (4 February 2009), paras 362-365.

22 ICTY, *Prosecutor v Aleksovski*, para 113; cf *Prosecutor v Kupreckic*, IT-95-16-T, Judgment, (14 January 2000), para 540. See Olsen and Toddington 2014. Similarly, ECtHR, *Ireland v United Kingdom*, Judgment of 18 January 1978, Series, A, No 25, para 154. For an overview see Bogdandy and Venzke 2013.

It may further be noted that the practical construction of semantic authority does not take place at the international level alone. When it comes to the claims of international institutions such as courts or tribunals, the way they are received on other, supranational or domestic levels of governance matters. First of all, domestic constitutional provisions that recognize the applicability of international law and, by extension, the use of international decisions that interpret it, might be read as express delegations of authority to international actors. But a lot again turns on interpretative practices, even in the case that the domestic legal order grants international decisions direct effect. Domestic cases relating to international decisions have precedential effects in domestic systems. If domestic courts for example hold other domestic actors to international commitments as interpreted by international institutions, they would certainly contribute to such international institutions' authority. Many domestic legal systems thus require under certain circumstances that domestic actors take international judicial decisions into account.

To offer but one prominent example from the field of human rights, the semantic authority of the European Court of Human Rights (ECtHR) received a boost when the German Federal Constitutional Court held that domestic fundamental guarantees need to be interpreted in light of its jurisprudence.[23] One reading of this example might suggest that the ECtHR's authority received a blow because its decisions were not given direct effect, nor were they otherwise determinative of the outcome (*in casu* whether the claimant was entitled to see and care for his son).[24] That is a matter of enforcement and compliance, and indirect effects can, in any event, go long ways. What concerns the development of international human rights law within the 'European public order', however, the obligation to take jurisprudence into account has far-reaching effects and notably does not only extend to cases to which Germany has been a party. The ECtHR's authority in shaping human rights law in Europe has thus increased.

In sum, semantic authority is not well understood along the traditional lines of a command that demands obedience. Rather, it connects to Roman law practices where the *auctoritas* of the Senate was distinguished from the *potestas* of the magistrates. While it did not impact the validity of the magistrate's acts if they went against the advice of the Senate or lacked the Senate's consent, such acts were without authority and politically frail. As Theodor Mommsen noted, '*auctoritas* was more than a piece of advice and less than a command—a piece of advice that cannot easily be disregarded' (Mommsen 2010, 1028; see further Eschenburg 1969).

5. Conclusions: towards normative implications

The present contribution has taken its start with the recognition that lawmaking unfolds in a communicative practice, which has set international lawmaking into motion. Recognizing the lawmaking side of using, speaking, and struggling for

23 German Federal Constitutional Court, G*örgülü*, 2BvR 1481/04, 14 Oct. 2004.
24 Ibid.

international law, however, is only the beginning. Normative, sociological and doctrinal sets of questions follow. The present contribution has tried to understand communicative lawmaking as a practice and the view it has set out purports to transcend divergent approaches that either zoom in on policy-oriented actors and then lose a grip on the contextual constraints that come with speaking the language of international law, or that stay attuned to those constraints but blend out the actors in the process. Whereas the former would see actors and their preferences as origins of change and dynamism, the latter would abstract from those actors and understand change in terms of evolution. Conversely, understanding lawmaking and legal dynamics through the lens of communicative practice suggests that it is precisely the relationship between actors and their strategic environment that contains within itself the dynamics for change.

The concept of semantic authority attempts to capture those actors who are influential in processes of communicative lawmaking. The contribution's argument has continued to be embedded in an understanding of lawmaking in communicative practice as it draws out actors' semantic authority precisely in the way in which it connects to that international law which it shapes. It is by highlighting the dynamic construction of such authority that a second level of dynamism is introduced: the law is a product of practice, and so is the semantic authority of the actors that contribute to its making. Actors struggle for the law in the law and in interaction with other authorities, trying to undermine some and to support others.

The present contribution's ambition has primarily been one of sociological reflection to inform practice about itself. Ultimately, that serves a normative purpose. Normative considerations also clearly underpin sources doctrine: who should have what say in the making of international law? The concept of semantic authority purports to offer an anchor of normative inquiry in this sense. Who has what authority and is it well justified? It will not be enough to point out that semantic authority hinges on acceptance, that it is fragile, or that it needs to be gained and that it can be lost. Unlike instruments of violence, authority cannot be stored up and be kept in stock so as to be employed in cases of dwindling support (Arendt 1958, 200). It leans on a general social belief. But that is certainly insufficient for a normative justification of any authority (Bogdandy & Venzke 2014).

Bibliography

Anghie, Antony: 'The Evolution of International Law: Colonial and Postcolonial Realities'. 27(5) *Third World Quarterly* (2006) 739–53.

Arendt, Hannah: *The Human Condition*. University of Chicago Press, Chicago 1958.

Arendt, Hannah: 'What Is Authority'. In *Between Past and Future*. Penguin Books, London 2006, 91–141.

Bates, Ed: *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*. Oxford University Press, Oxford 2010.

Baum, Lawrence: *Judges and Their Audiences: A Perspective on Judicial Behavior*. Princeton University Press, Princeton 2006.

Benvenisti, Eyal: 'The Interplay between Actors as a Determination of the Evolution of Administrative Law in International Institutions'. 68 (4) *Law and Contemporary Problems* (2005) 319–40.

Berman, Paul Schiff: 'A Pluralist Approach to International Law'. 32 *Yale Journal of International Law* 32 (2007) 301–29.

Berman, Paul Schiff: *Global Legal Pluralism A Jurisprudence of Law beyond Borders*. Cambidge University Press, Cambridge 2014.

Bernstorff, Jochen von, and Ingo Venzke: 'Ethos, Ethics and Morality in International Relations'. In Rüdiger Wolfrum (ed): *Max Planck Encyclopedia of Public International Law*. Oxford University Press, Oxford 2010.

Bianchi, Andrea: 'The Game of Interpretation in International Law: The Players, the Cards and Why the Game Is Worth the Candle'. In Andrea Bianchi, Daniel Peat and Matthew Windsor (eds): *Interpretation in International Law*, Oxford University Press, Oxford 2015, 34–57.

Bjorge, Eirik: *The Evolutionary Interpretation of Treaties*. Oxford University Press, Oxford 2014.

Bogdandy, Armin von, and Ingo Venzke: 'The Spell of Precedents: Lawmaking by International Courts and Tribunals'. In Cesare P R Romano, Karen J Alter, and Yuval Shany (eds): *The Oxford Handbook of International Adjudication*. Oxford University Press, Oxford 2013, 503–22.

Bogdandy, Armin von, and Ingo Venzke: *In Whose Name? A Public Law Theory of International Adjudication*. Oxford University Press, Oxford 2014.

Bourdieu, Pierre: *Outline of a Theory of Practice*. Cambridge University Press, Cambridge 1977.

Bourdieu, Pierre: *Sozialer Sinn. Kritik Der Theoretischen Vernunft*. Suhrkamp, Frankfurt am Main 1987a.

Bourdieu, Pierre: 'The Force of Law: Toward a Sociology of the Juridical Field'. 38 *Hastings Law Journal* (1987b.) 814–53.

Bourdieu, Pierre: *The Logic of Practice*. Stanford University Press, Stanford 1992.

Bourdieu, Pierre: 'Authorized Language: The Social Conditions for the Effectiveness of Ritual Discourse'. In *Language and Symbolic Power*. Harvard University Press, Cambridge 1999, 107–16.

Brandom, Robert: 'Some Pragmatist Themes in Hegel's Idealism: Negotiation and Administration in Hegel's Account of the Structure and Content of Conceptual Norms'. 7(2) *European Journal of Philosophy* (1999) 164–89.

Combacau, Jeanand Serge Sur: *Droit International Public*. Montchrestien, Paris 2010.

Coşeriu, Eugenio: *Synchronie, Diachronie und Geschichte. Das Problem des Sprachwandels*. Fink, München 1974.

Cover, Robert M.: 'Nomos and Narrative'. 97 *Harvard Law Review* (1983) 4–68.

Cover, Robert M.: 'The Folktales of Justice: Tales of Jurisdiction'. 14 *Capital University Law Review* (1985) 179–203.

Dezalay, Yves, and Mikael Rask Madsen: 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law'. 8(1) *Annual Review of Law and Social Science* (2012) 433–52.

Dothan, Shai: *Reputation and Judicial Tactics: A Theory of National and International Courts.* Cambidge University Press, Cambridge 2015.

Ehrlich, Eugen: *Freie Rechtsfindung und Freie Rechtswissenschaft*. C. L. Hirschfeld, Leipzig 1903.

Eschenburg, Theodor: *Über Autorität*. Suhrkamp, Frankfurt am Main 1969.

Fischer-Lescano, Andreas, and Philip Liste: 'Völkerrechtspolitik. Zu Trennung Und Verknüpfung von Politik Und Recht Der Weltgesellschaft'. 12(2) *Zeitschrift Für Internationale Beziehungen* (2005) 209–49.

Flathman, Richard E.: *The Practice of Political Authority: Authority and the Authoritative*. Chicago University Press, Chicago 1980.

Giddens, Anthony: *Central Problems in Social Theory. Action, Structure and Contradiction in Social Analysis*. Macmillan, London 1979.

Glenn, H Patrick: 'Persuasive Authority'. 1 *McGill L. J.* (1987) 261–98.

Halliday, Michael Alexander Kirkwood: *Language as a Social Semiotic: The Social Interpretation of Language and Meaning*. University Park Press, Baltimore 1978.

Halliday, Michael Alexander Kirkwood and Ruqaiya Hasan: *Language, Context, and Text: Aspects of Language in a Social-Semiotic Perspective*. Oxford University Press, Oxford 1989.

Hart, Herbert Lionel Adolphus: *Essays on Bentham*. Oxford University Press, Oxford 1983.

Hernandez, Gleider: *The International Court of Justice and the Judicial Function*. Oxford University Press, Oxford 2014.

Holmes, Oliver Wendell: 'The Path of the Law'. 10(8) *Harvard Law Review* (1897) 457–78.

Jacob, Marc: 'Precedents: Lawmaking Through International Adjudication'. In Armin von Bogdandy and Ingo Venzke (eds): *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance.* Springer, Berlin 2012, 35–68.

Jhering, Rudolph von: *The Struggle for Law*. Translated by John J Lalor, 2nd ed, Callaghan, Chicago 1915 [1872].

Keller, Rudi: *Sprachwandel*. Francke, Tübingen 2003.

Kelsen, Hans: *Law and Peace in International Relations*. Harvard University Press, Cambridge 1942.

Koh, Hongju Harold: 'Transnational Legal Process'. 75 *Nebraska Law Review* (1996) 181–207.

Kolb, Robert: 'Repères historiques dans l'évolution de l'occupation de guerre'. 1 *The Global Community: Yearbook of International Law and Jurisprudence* (2007) 65–102.

Koskenniemi, Martti: 'Between Commitment and Cynicism. Outline for a Theory of International Law as Practice'. In *Collection of Essays by Legal Advisors of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law*. United Nations 2007, 495–523.

Lincoln, Bruce: *Authority: Construction and Corrosion*. University of Chicago Press, Chicago 1991.

Luhmann, Niklas: *Legitimation Durch Verfahren*. Suhrkamp, Frankfurt am Main 1983.

Luhmann, Niklas: *Law as a Social System*. Translated by Klaus A. Ziegert, Oxford University Press, Oxford 2004.

McDougal, Myres Smith: 'International Law, Power, and Policy: A Contemporary Conception'. 82 *Recueil Des Cours* (1954) 137–259.

McDougal, Myres Smith: *Studies in World Public Order*. Yale University Press, New Haven 1970.

Merleau-Ponty, Maurice: *Adventures of the Dialectic*. Northwestern University Press, Chicago 1973.

Mommsen, Theodor: *Römisches Staatsrecht*, vol. 3, Cambridge University Press, Cambridge 2010 [1888].

Olsen, Henrik Palmer, and Stuart Toddington: 'The End of an Era: Static and Dynamic Interpretation in International Courts'. 14(4) *International Criminal Law Review* (2014) 1–26.

Peat, Daniel, and Matthew Windsor: 'Playing the Game of Interpretation: On Meaning and Metaphor in International Law'. In Andrea Bianchi, Daniel Peat and Matthew Windsor(eds)*: Interpretation in International Law*, Oxford University Press, Oxford, 2015, 3–33.

Pound, Roscoe: 'Law in Books and Law in Action'. 44 *American Law Review* (1910) 12–36.

Reisman, Michael: 'International Lawmaking: A Process of Communication'. 75 *American Society of International Law Proceedings* (1981) 101–20.

Reisman, Michael: 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention'. 11(1) *European Journal of International Law* (2000) 3–18.

Schauer, Frederick: 'Authority and Authorities'. 94 *Virginia Law Review* (2008) 1931–61.

Schrijver, Nico: *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*. Nijhoff, Leiden 2008.

Shklar, Judith N.: *Legalism*. Harvard University Press, Cambridge 1964.

Torrance, Michael: 'Persuasive Authority Beyond the State: A Theoretical Analysis of Transnational Corporate Social Responsibility Norms as Legal Reasons Within Positive Legal Systems'. 12 *German Law Journal* (2011) 1573–1636.

Venzke, Ingo: 'Legal Contestation about "Enemy Combatants": On the Exercise of Power in Legal Interpretation'. 5(1) *Journal of International Law & International Relations* (2009) 155–84.

Venzke, Ingo: *How Interpretation Makes International Law: On Semantic Change and Normative Twists*. Oxford University Press, Oxford 2012.

Venzke, Ingo: 'Is Interpretation in International Law a Game?' In Andrea Bianchi, Daniel Peat and Matthew Windsor (eds): *Interpretation in International Law*, Oxford University Press, Oxford 2015, 352–372.

Weber, Max: *Economy and Society*. Edited by Guenther Roth and Claus Wittich, University of California Press, Berkeley 1978.

Wittgenstein, Ludwig: *Philosophical Investigations*. Translated by Gertrude Elizabeth Margaret Anscombe. Blackwell, Oxford 1958.

Microfinances and Legal Pluralism: A Case Study of the Community Development Banks in Brazil

Vivian M. Ferreira*

1. Introduction

Brazilian National Financial System comprises several rules and institutions, which formally organize financial activity, and establish several requirements regarding currency and banking operations so as to guarantee state control over the production and circulation of goods and services within the national territory. In this highly state-controlled economic environment, the spontaneous emergence of Community Development Banks (CDBs) in areas of extreme poverty and social exclusion throughout the country is noteworthy. They are small, non-for-profit organizations that seek to promote local social and economic development by encouraging local production and consumption of goods and services, as well as practices of solidarity economy.[1] In order to do so, they have created their own local currencies, which are only accepted within the neighborhoods where they operate, what stimulates residents to buy locally. They also give out loans to local entrepreneurs, therefore boosting local economy and giving rise to a virtuous economic circle.

Palmas Bank, the first Brazilian CDB, was founded in 1998 in a poor neighborhood in the outskirts of the city of Fortaleza as a result of the initiative of

* LL.B./LL.M. (São Paulo, Brazil). She currently practices Administrative Law in São Paulo, Brazil.

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1 The term 'solidarity economy' was formulated in Brazil during the World Social Forum of 2001 (in Portuguese, 'economia solidária'). It refers to a set of economic practices—production, distribution, trade, consumption, saving and credit—that, in response to increasing levels of unemployment and economic informality, seek alternative forms of work and income distribution capable of promoting social inclusion. A solidarity economy is based on the ideals of solidarity, cooperation, self-management and collective ownership of capital and it aims at addressing the exploitation under capitalist economy (Singer, 2002).

a local residents' association (Melo Neto & Magalhães 2008, A16-H16). The bank is an informal organization entirely managed by its members through democratic mechanisms of participation (Melo Neto & Magalhães 2006, 8) that is always testing new financial strategies to strengthen the local economic network and the development of the neighborhood. In spite of its name, Palmas Bank differs radically from traditional financial institutions in its practices, goals and impacts. It does not keep its clients' money in accounts but it provides several other financial services for low-income families and the unemployed—a portion of the population that traditionally lacks access to credit in the official financial institutions. Unlike traditional banks, which seek to make profit for their shareholders, Palmas Bank is a non-for-profit organization that seeks to advance local development by stimulating local production and consumption of goods and services and fair trade. It also establishes close, informal relationships with its clients and its operations are mostly built on trust—in contrast to the impersonal and bureaucratic treatment typical of traditional banks.

Palmas Bank reports lending approximately R$1,330 million (equivalent to approximately US$475.000) to over one thousand families between January and April of 2013.[2] Although the numbers might not seem very significant at first, it is important to consider that the bank serves the extremely poor and the financially excluded—people for whom even very small loans may have great impact on their ability to plan ahead, to buy food and clothing, to develop the appropriate skills to deal with money and, ultimately, on their self-esteem (Rego & Pinzani 2014, 45-84). The qualitative impact of CDBs is hard to measure, but studies suggest that they are considerable in mitigating the negative effects of financial exclusion (NESOL 2013, 144-162). Indeed, the high levels of financial exclusion in Brazil[3] have led people in several poor communities to become interested in Palmas Bank's activities. As from 2003, Palmas Bank began to spread its ideas and practices elsewhere, something that demanded a higher degree of organization, thus compelling the bank to create an institute: Palmas Institute. The Institute is formally recognized as a legal entity under Brazilian state law and its activities have led to the proliferation of CDBs across the country.

Today, there are more than 100 CDBs in Brazil, each with their own social currency. They are part of an informal national network[4] and share a relatively flexible working methodology, which guides their actions in territories of high

2 See Palmas Bank activity report, available at: http://www.inovacaoparainclusao.com/-boletim-de-atividades-janeiro---abril-2013.html [last accessed in 05.19.2015].

3 Approximately 50% of the populations of the North and Northeast regions do not have bank accounts. Most of the excluded from the financial system are women. The exclusion is also higher among those with lower educational levels and lower income (IPEA 2011, 6). For the concept of financial exclusion, see Gloukoviezoff 2006 and Leysohn et al. 1995.

4 The network is currently comprised of 103 CDBs, scattered throughout the country. Palmas Institute carries out the coordination of such network and provides CDBs with technical, organizational and financial support, together with other four organizations—two NGOs and two university research groups. Since 2013, eight representatives from CBDs have also been elected to the coordination of the network.

social vulnerability and social exclusion. They (i) are created, owned and managed by community members; (ii) make use of microcredit and a social currency as instruments to develop a local network of consumers and producers; and (iii) operate in territories with high levels of social exclusion (Melo Neto & Magalhães 2006, 7). These initiatives have been working thus far without any submission to, or interference of, the state banking and financial regulations, potentially raising concerns among state authorities charged with the task of controlling the country's economic system. This, however, does not mean that they operate in a normative vacuum. On the contrary, their organization is based on a large number of rules, some of which originate in Brazilian state law. For example, they are subject to the norms that regulate NGOs since they operate within civil associations. But the success of their daily activities is also heavily dependent upon their own particular norms, which were gradually designed over time as these banks were developing.

This article presents a case study aimed at describing the phenomenon of the emergence and expansion of CDBs in Brazil, with special focus on their complex normative reality. Making use of the literature on legal pluralism, it argues that Brazilian CDBs can be seen as a case of legal pluralism in a contemporary constitutional democracy and clarifies how these banks developed their own normative order to regulate their activities. Furthermore, it tries to elucidate what kind of relationship these new normative orders have established with Brazilian state law.

The study focuses on the Brazilian network of CDBs and draws attention to three main units of analysis—the network itself; the CDBs belonging to it; and their relationship with state law and state authorities. It is mainly supported by interviews[5] with key players—people working at Palmas Institute and at other supportive entities, as well as members of the eight CDBs that participate on coordination of the national network. A couple of members of the Central Bank and an official from the Ministry of Labor were also interviewed. In order to overcome potential limitations of the interview method—such as selective bias, memory gaps, and self-serving rhetoric—the data obtained was compared with other studies on Brazilian CDBs and supplemented by information available in official websites and documents.

This article is divided in three further sections. The first one explains the analytical framework of the study, presenting a brief overview of the literature on legal pluralism The second section presents the case study of the CDBs in Brazil. Finally, the last section concludes the article, pointing out that after a few years of dialectical interaction, the acceptance of the CBDs by the Brazilian state is hardly reversible, even though the degree of state tolerance regarding these initiatives may vary.

5 Interviews were conducted in in-depth and semi-directive format. All of the participants were fully informed about the research objectives, and their express consent to take part in the research was requested. Consent was obtained in writing or in recorded verbal statements, depending on the situation in which the interview took place. All interviews were carried by the author, recorded and are currently transcribed and available for eventual consultation. They are numbered and listed in the appendix and will henceforth be referred to by their number on that list.

2. Analytical framework: legal pluralism

The normative reality found in the CDBs in Brazil is a complex one. It is a tangled set of norms, procedures and sanctions, formal and informal. The idea of legal pluralism provides a prism for understanding this messy normative reality and for explaining the development of these banks, their own normative order and their relationship with Brazilian state law. Literature on legal pluralism and their existing models are thus employed as the analytical framework for this case study.

Research on legal pluralism experienced a surge between the 1960s and 1970s,[6] as a tentative explanation of legal phenomena observed in colonial and postcolonial settings 'in which an imperialist nation, equipped with a centralized and codified legal system, imposed this system on societies with far different legal systems, often unwritten and lacking formal structures for judging and punishing' (Merry 1988, 874). In the 1980s, however, the concept of legal pluralism was expanded to describe legal relations in advanced industrial countries, where the dominance of a central legal system is undisputed. This shift from classic to new legal pluralism is described by Sally Merry as a concern

> to document other forms of social regulation that draw on the symbols of the law, to a greater or lesser extent, but that operate in its shadows, its parking lots, and even down the street in mediation offices. Thus, in contexts in which the dominance of a central legal system is unambiguous, this thread of argument worries about missing what else is going on; on the extent to which other forms of regulation outside law constitute law. (Merry 1988, 874.)

Authors such as John Griffiths, Marc Galanter and Boaventura de Sousa Santos began to document other forms of social regulation and rejected what they called the 'ideology of legal centralism'—the idea that 'law is and should be the law of the state' (Griffiths 1986, 3)—arguing that the term 'law' could refer equally to several non-state normative orders. According to Santos (1995, 95-96), the state has never actually obtained the monopoly of the law, as legal norms originated in a supra-state level superimposed on the national law of states across the world system and infra-state law continued to exist, develop and emerge as local legal orders, governing specific clusters of social relations and interacting with the state law in different ways, even if denied the quality of 'law' by state law. This new version of legal pluralism implies that all modern societies present a patterned normative mosaic where plural normative orders are found operating simultaneously, and establishing complex relationships with one another (Griffiths 1986, 38; Merry 1988, 873).

If on the one hand there is certain consensus about existence of 'state law' and 'nonstate law', on the other hand, the choice of a term to refer to 'nonstate law' creates considerable terminological difficulties for researchers. Authors use several

6 An earlier phase includes the work of British pluralists such as H. Laski, G. D. H. Cole and N. Figgis, who in the beginning of the 20th century defended the idea of a pluralist state and focused on local voluntary communities such as labor unions and on the British cooperative movement.

different terms and there has been disagreement on how to establish boundaries between normative orders that can and those that cannot be called law (Merry 1988, 879). The lack of agreement on what 'law' is and the difficulties involved in drawing the line that separates law from social life are the main sources of criticism of the literature on legal pluralism. Scholars like Tamanaha (2000, 297-299), approaching the topic from a more theoretical point of view, have questioned both the analytical and the operational utility of calling several different normative orders 'law'. Surely legal pluralism has become the subject of loaded debates, frequently underpinned by different ideological stances.[7]

There is no point in trying to address these criticisms here. In the case of the CDBs, legal pluralism is seen as the most useful existing framework for making sense of their complex normative reality—where state law is only one among a number of factors that affect the decisions people make and the relationships they have. Thus, questioning the theoretical possibility of legal pluralism itself becomes less relevant than trying to understand the dynamic relationship between the official legal system and these new parallel normative orders (Merry 1988, 879). Hence, leaving this otherwise relevant theoretical debate aside, this study will adopt the terms 'state law' to refer to Brazilian norms and institutions, and 'normative order' to refer to the norms and institutions developed by the CDBs to govern their own operation.[8] For these purposes, Moore's idea of semi-autonomous social-fields is quite helpful: Moore suggests that the main characteristic of complex societies is the interdependent articulation of many different social fields (1972, 720-722). These social fields can internally create and enforce rules, customs and symbols, while, at the same time, being affected by rules, decisions and other forces originated in larger world by which they are surrounded:

> The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does, affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance. (Moore 1972, 720.)

According to Moore's model, several semi-autonomous social fields articulate with others, forming complex chains (1972, 722), much like we see happening with the CDBs in Brazil. Indeed, they establish complex interactions and articulations between themselves, as well as with local authorities in the cities and states where they operate and with the Federal Government. Moore's semi-autonomous social fields can be considered arenas where new normative orders are generated. The

7 Criticising Tamanaha, Beckman points out that 'one can even observe the emergence of a bogeyman called "the legal pluralists"[…] accused of engaging in some ill-conceived enterprise of irresponsibly broadening the concept of law and equalising normative orders that are fundamentally different' (2002, 37-38).

8 The acceptance and use of the concept of legal pluralism does not, however, entail taking a romanticized approach to it, as if non-state law was always more egalitarian and less coercive than state law. As Galanter puts it, 'the coerciveness of unorganized community action tends to be indiscriminate and difficult to calibrate. Not all communities are harmonious and egalitarian, and in many settings indigenous law flourishes in association with repulsive disparities of power' (1981, 21-22).

birth of a new normative order is well explained in the terms of Cover's concept of 'jurisgenesis' (1983, 11-19). According to him, 'jurisgenesis' is a social, collective process of creation of legal meaning by which a group of people constitute their own normative world, comprising legal institutions as well as a language and a mythos that allow them to provide meaning for their collective behavior that differs from the state. In this sense, a normative order is 'a bridge, linking a concept of reality to an imagined alternative' (Cover 1983, 9).

The rise of a new normative order depends on the emergence of a common body of rules and norms; a system of education into these norms and a sense of direction of development that is progressively created and adjusted as the individual and his community work out the implications of their norms (Cover 1983, 12-13). All of this can be found in Brazilian CDBs. As a matter of fact, based on a common ideology, each one of them has developed their own rules, customs and symbols, many of which are shared with all banks that comprise the Brazilian network of CDBs. They could, therefore, be seen as semi-autonomous social fields articulated with each other, creating a normative order parallel to that of the state.

3. Brazilian Community Development Banks

This section is divided in four parts, each one of them focusing on a different stage of the development of Brazilian CDBs and their normative orders. First, there is the initial stage of institutional imagination that gave birth to Palmas Bank, the first CDB. This initial stage is then followed by a clash between this new institution, with its own rules and practices, and Brazilian state authorities, concerned with financial regulation and with the state's control over economy. The results of such clash led to a third stage, in which CDBs have spread all over the country and established a new collaborative relationship with the state. This relationship, however, is constrained by state law, what has led CDBs to claim for reforms in the existing state legal system, in what could be considered a fourth stage.

3.1. Financial exclusion and institutional imagination: the emergence of the Community Development Banks in Brazil and a new normative order

Palmas Bank, the first CDB, was created in the outskirts of the city of Fortaleza, in a neighborhood known as *Conjunto Palmeira* (Instituto Palmas 2010, 9). The occupation of *Conjunto Palmeira* resulted from a governmental policy of relocation of impoverished populations living in areas subject to the risk of floods and landslides, as well as areas with great economic potential due to the urban expansion (Toscano 2008, 9). Between the 1960s and 1970s, approximately 1.500 families were moved to an inhabited land lot, distant from the city center and devoid of the most basic urban infrastructure and public services, giving rise to a big slum (Ibid.,10). The neighborhood grew fast and the daily difficulties met by the residents of *Conjunto Palmeira* led them to organize. They created the local residents' association (ASMOCONP), which became an important player in the popular mobilizations

that demanded running water and electricity before local authorities (Ibid.,11). A strategic plan designed by community leaders ultimately resulted in the urbanization of the neighborhood.

In 1997, *Conjunto Palmeira* had running water, sewage, electricity, and regularized property rights. The process of urbanization, however, meant that people had to pay more fees, what forced the poorest to sell their homes and move to other slums (Instituto Palmas 2010, 7). Some of the people who for years had fought to urbanize the neighborhood could no longer afford to live there. In order to try to reverse this situation, community leaders decided to work on a project that would create jobs and income in the neighborhood (Instituto Palmas 2010, 7; Toscano 2008, 14). The problem, then, was to find a way of generating income in an extremely poor community, where most people had difficulties starting a productive enterprise since they did not have access to credit in the official financial institutions (Melo Neto & Magalhães 2008, C16).

Besides the difficulties getting loans, local producers also had trouble selling their products. Indeed, a survey on the consumption pattern in the neighborhood revealed that although people spent considerably high amounts of money every month, most families did their shopping outside the neighborhood, where they were able to find better prices and terms of payment (Melo Neto & Magalhães 2008, C16). Thus, in addition to the efforts to strengthen local producers, the generation of income in *Conjunto Palmeira* also depended on the organization of its inhabitants to buy locally (Ibid., D16). During one meeting of the residents' association, the idea came up to create a new local institution that could lend money to local producers and, at the same time, create a local credit card, which would help people to buy from local businesses. The plan was to create a virtuous circle of local production and local consumption, creating work opportunities and income for those living in the neighborhood.[9]

The local credit card is called PalmaCard. It is issued by the bank with a low credit limit (less than US$50) and allows people to buy products from local shops. Commercial transactions are documented at the back of the card, therefore ensuring that the cardholder only spends the amount approved by the bank. Traders keep sales records, which allows them to retrieve the value of all sales directly from Palmas Bank on the 15th day of each month. Cardholders, in turn, pay the bank in a negotiated date with no interest. For safety purposes, the Bank withholds 30% of its credit grants in a bank account, in order to guarantee that local traders are paid even in case of default by the cardholder (Melo Neto & Magalhães 2008, 44-45). Palma Card is a credit mechanism that allows people facing high levels of economic

9 Although it may be similar to other microcredit initiatives found around the world, such as the Grameen Bank, founded in Bangladesh by Muhammad Yunus, Palmas Bank claims to have not been inspired by them. There were 96 meetings with local producers, tradesmen and residents of the neighborhood to decide how to create a project to generate work and income in *Conjunto Palmeira*.' (Instituto Palmas 2010, 7). Interviewees (1, 7, 8) also said that Palmas Banks is different from other popular microcredit initiatives, because it is inspired and governed by solidarity economy.

insecurity to buy basic goods in case of emergency without having to resort to the official banking system, where they would probably not even be granted any credit. Since only registered local traders accept it, PalmaCard also keeps money in the neighborhood, helping local businesses grow and boosting local economy.

In addition to stimulating local trade, ASMOCONP also intended to provide credit for the local tradesmen willing to invest and expand their businesses. Since most potential borrowers of Palmas Bank had their names listed in organs of credit protection as defaulters, it was necessary for the bank to create its own rules and criteria for credit analysis. They then decided to build a risk assessment mechanism based on trust: they would talk to the borrowers' neighbors about their character, professional experience, reliability and relationship with their family and friends (Melo Neto & Magalhães 2008, F16). Such process of credit approval is employed both before giving out a loan for a local entrepreneur and before issuing a PalmaCard.

In 1998, having obtained a loan from a local NGO, ASMOCONP inaugurated the Palmas Bank. At the time, the bank released 20 PalmaCards and gave out loans to five local producers and tradesmen (Instituto Palmas 2010, 9; Melo Neto & Magalhães 2008, G16). By the end of the first year of its existence, the Bank had already retrieved all of the money it had lent. Within a few months, it received financial help from other international NGOs, therefore expanding its activities (Melo Neto & Magalhães 2008, J16). Microcredit and the PalmaCard were only the first of many products that Palmas Bank developed. Indeed, the bank is constantly creating, experiencing and trying to improveits strategies.

One of the most successful and relevant of tools created by Palmas Bank was the development of a local social currency, the *Palmas* (P$), which runs parallel to the state's official currency in the neighborhood of *Conjunto Palmeira*. The origins of the social currency are found in the *Projeto Fomento* (Stimulus Project), developed with the help of an international NGO (Melo Neto & Magalhães 2008, 104-110): after receiving a donation for building a school, the bank 'cloned' the value in the official currency (R$), issuing an equal amount of the local social currency (P$), therefore doubling the amount of resources in the neighborhood (Melo Neto & Magalhães 2008, 104-110). The money in *Reais*, instead of being used to actually build the school was converted into microcredit for local entrepreneurs and tradesman, who bought machinery, products and raw materials for their businesses. The cloned money, in turn, was used to pay the salaries of the workers who built the school. With their salaries in *Palmas*, they could purchase products in the businesses that had received microcredit, since, in order to receive the loans, they had committed themselves to accepting the *Palmas* and, furthermore, to repaying their loans to the bank in *Palmas* (Melo Neto & Magalhães 2008, 104-110).[10] In the end, the amount of resources in the neighborhood doubled, increasing the offer of microcredit and stimulating local consumption of goods and services.

Palmas Bank has developed into a complex institution, with a series of rules

10 Workers agreed to receive their salaries in social currency and local tradesmen committed themselves to accept the social currency in their businesses and to use it to repay their loans to Palmas Bank.

regarding its operation. They define the bank's hours and days of operation, the circulation of the social currency, the lines of credit available, the interest rates, the procedure of credit analysis and the methods for charging a client that has defaulted. There are also internal rules that determine who is able to change the existing rules and the procedures for it. These rules create a series of different arenas for decision-making. Since it consists of an institution able to internally create and enforce rules, customs and symbols, Palmas Bank might be seen as a semi-autonomous social field in Moore's terms. It has been created in *Conjunto Palmeira*—where a situation of prevalent poverty and financial exclusion created the conditions for the development of a strong popular organization willing to invest in a long process of institutional imagination (Ostrom 2008)[11]—and it managed to mobilize an entire community to actively participate in the banks' activities, raising concern about buying locally and helping local producers.

This process of institutional imagination can be seen as a process of jurisgenesis, as set forth by Cover. In this sense, the bank's operational rules and financial strategies constitute a normative order held together by a set of fundamental values, related to fostering sustainable production, fair trade and ethical consumption (Silva Junior 2002, 93; Melo Neto & Magalhães 2008, J16-K16). In fact, the main impetus behind the creation and constitution of the bank is solidarity economy—a worldview that has helped built the identity and self-understanding of the bank. Its main goal is to seek alternative forms of work and income distribution in order to promote social inclusion. The bank, therefore, tries to oppose capitalist, neo-liberal banking system and presents itself as an alternative, based on the ideals of solidarity, cooperation, self-management and collective ownership. Equality and democracy are also part of the values of this normative order (França Filho 2013, 87; Instituto Palmas 2010, 20; Melo Neto & Magalhães 2006, 8).

The experience of Palmas Bank may be considered, therefore, a unique experience in the fields of microfinances and of solidarity economics, giving rise to a new, local normative order. The bank operated autonomously and uneventfully from 1998 to 2003, without any interference from the state's authorities. In 2003, however, the Central Bank of Brazil has pressed charges against the director of Palmas Bank, who was criminally investigated for 'counterfeiting money'.

3.2. State law and community practices: from confrontation and conflict to a carved out relative normative autonomy

According to the Brazilian Constitution, the state has exclusive power to issue money within the national territory. In 2003, a civil association (*Associação*

11 The idea of institutional imagination is here taken from Ostrom (2008, 21-45), whose theory aims at explaining how a group of people involved in collective action problem (i.e., a situation in which multiple individuals would all benefit from a certain action that is, however, associated with a cost, thus making it implausible that any individual can or will undertake and solve it alone) often design new institutions that alter the structure of incentives they face. They create rules to coordinate individual activity, commit themselves to follow such rules and monitor conformance to their own agreements and rules.

Filatélica e Numismática de Brasilia—AFNB) formally notified the Central Bank that Palmas Bank was issuing their own currency and lending money. The Central Bank forwarded the case to *Ministério Público*, the public office in charge of criminal investigation and prosecution in the country (Freire 2011, 69-70). This led to a criminal investigation and the director of the bank was accused of incurring on criminal offense under the article 292 of the Criminal Code: issuing, without legal permission, documents with promises to pay money to their bearer.[12] After investigating the case, the public prosecutor requested that the case be dismissed. He concluded that the use of the social currency did not fall within the criminal offense laid down in Article 292 of the Criminal Code, because *Palmas*' bills did not contain a general and unrestricted promise of payment of money to bearer. On the contrary, the bills carried an inscription that explicitly restricted their use to the trade of goods for services in the local businesses. Moreover, the prosecutor argued that the bills did not resemble the official bills or coins, making it impossible for anyone, however naive or inexperienced, to confuse it for the official currency.

In his reasons, the public prosecutor went further in criticizing the Central Bank's decision to press charges:

> […] the community of *Conjunto Palmeira*, extremely impoverished, socially and economically excluded, only sought an alternative to boost local economy, encouraging solidarity economy as a way to alleviate the situation of the population before the complete failure of successive governments that have only aggravated poverty and unemployment in Brazil, and particularly in Fortaleza. If the Federal government has no solution to improve the situation of disadvantaged communities, it should at least leave them alone. […] This having been said […] the *Ministério Público* claims for the dismissal of this case, due to inexistence of criminal responsibility to be pursued in court.[13]

The judge fully endorsed the reasons presented by the prosecutor and dismissed the case. As Freire (2011, 175-195) points out, there is no rule in Brazilian legal system that prohibits the use of alternative means of exchange, provided they are not counterfeit money. Social currencies can legally be devised within the sphere of freedom reserved to the private initiative, as long as they do not create excessive money supply or involve fraudulent practices that may threaten the stability and value of the official currency. Also, communities using parallel currencies are not allowed to impose their currency over the official legal currency, which must always be an option of payment to any citizen inside the national territory. The Central Bank has never claimed that the social currency had affected the circulation of the *Real*. However, the episode can be read as one in which two different normative orders, living together with one another in relative insulation, at a certain point start to mutually affect each other.

12 Criminal process n. 1.482/2003 (term of criminal occurrence n. 336/2003), processed before the 20th small claims criminal court of Fortaleza. Available on Freire 2011, 81-84.
13 Translated from the Portuguese by the author.

As a matter of fact, after prosecution, in order to avoid breaking state law, Palmas Bank has conformed the circulation of its social currency to the following rules: (i) social currency is fully backed by a money reserve in the official currency, which is kept in a bank account (thus avoiding problems related to increasing the money supply); (ii) the exchange rate between the currencies is fixed—one *Palma* is equivalent to one *Real*; (iii)*Palmas*' bills have serial numbers and receive safety marks and stamps in order to avoid falsifications; (iv) local tradesmen and producers affiliated with the bank may trade their social currency for official currency; (v) acceptance of the social currency is voluntary and no one can be forced to accept it as a means of payment; and (vi) social currency has limited circulation and is only accepted within the neighborhood where the bank operates (interview 7; Melo Neto & Magalhães 2006, 41). By adopting the above rules, Palmas Bank has managed to remain within the Brazilian legal framework, therefore considerably relieving the tension of its relationship with Brazilian financial authorities. In fact, the change in the relationship of Palmas Bank with the Central Bank during the year of 2003 is noteworthy. Coming from a stage they both ignored each other, they then went through a confrontation period—when the Central Bank decided to forward a criminal accusation to *Ministério Público* against the director of Palmas Bank. These events can be regarded as a clash between two semi-autonomous social fields—the Central Bank and Palmas Bank—supporting the idea set forth by Moore that 'one of the tendencies that may be quite general in semi-autonomous social fields is the tendency to fight any encroachment on autonomy previously enjoyed' (Moore 1972, 744).

It is likely that conflicts between normative orders are somewhat inevitable. But when it comes to the state and its claim of sovereignty, the difficulties accepting the existence of alternative, self-contained normative orders might result in either tolerance or oppression and resistance (Cover 1983, 30). In Palmas Bank's case, the state's willingness either to tolerate or destroy it would determine Palmas' fate. During the interviews, this story was told as one of oppression by the Central Bank, followed by resistance of the Bank's participants and, finally, by accommodation, when the prosecutor and the judge decided for respecting the autonomy of the normative group. As a result, Palmas Bank acquired relative normative autonomy, carved out from the general legal space of the capitalist state.

However, even before the criminal procedure had been closed, in December of 2003, the Central Bank had already formally invited the director of Palmas Bank to give a speech about his experience with the local social currency (Freire 2011, 84). This might be explained by the fact that the federal executive branch experienced a shift in political orientation when a President from the left-wing Workers' Party won the national elections of 2002. This led to the creation, in May of 2003, of the National Secretary of Solidarity Economy—*SENAES*, within the Ministry of Labor and Employment,[14] with the objective of facilitating and coordinating activities

14 *SENAES* was created by Federal Law nº 10.683/2003 and presidential decree n° 4.764/2003, as a result of the mobilization of the Brazilian social movement of solidarity economy. This is a growing social movement

supportive of projects of solidarity economy throughout the national territory. From the beginning, *SENAES* has worked together with Palmas Bank in order to develop public policies of support to solidarity economy initiatives so as to expand the social technology developed in *Conjunto Palmeira* to other impoverished communities in the country (Freire 2011, 66; Melo Neto & Magalhães 2006, 30-33).

Following the new orientation of the government, the Central Bank signed an agreement with *SENAES* to study social currencies and devise a mechanism to continuously monitor them and evaluate their evolution (Freire 2011, 78). These developments suggest that the shift in the political orientation of the Federal government, the creation of *SENAES* and the dismissal of the criminal case against the director of Palmas Bank by the *Ministério Público* and the judiciary all combined to create a different relationship between Palmas Bank and state authorities. The confrontation between the Central Bank and Palmas Bank was, thus, influenced by external events and cannot be evaluated as a win/lose situation. Both the state and Palmas Bank have changed and conformed to a new situation. In 2003, Palmas Bank created the Palmas Institute, formally organized under Brazilian law as a civil association of public interest allowed to operate microcredit, within the state regulatory framework of the NGOs (Instituto Palmas 2010, 16). The Institute's aim was to manage the Palmas Bank as well as to spread its methodology to other regions and communities interested in creating their own CDB (Instituto Palmas 2010, 16; interview 7).

3.3. The Brazilian network of CDBs and the growth of a new normative order within the state

The reality of poverty and social and economic exclusion experienced in *Conjunto Palmeira* is not that uncommon in Brazil and has led people in other poor communities to become interested in the experience of microfinances and solidarity economy created by Palmas Bank. During 2004, the members of the Palmas Institute visited several different cities and neighborhoods, explaining how the bank worked and how those communities could start similar initiatives (interview 7). Between 2004 and 2005, three new CDBs were created in the state of Ceará (Melo Neto & Magalhães 2006, 5). In other communities, the need for credit and financial solutions had actually led people to develop microcredit practices similar to those employed by Palmas Bank. This is the case of the *Associação Ateliê de Ideias*, an NGO operating in Vitória/ES (interview 9) and of the *Associação Mulheresem Movimento*, an NGO operating in Dourados/MS (interview 13). Once they learned about the financial experience that was happening in *Conjunto Palmeira*, they got in touch with Palmas Bank, what resulted in the creation of another two CDBs.

The multiplication of CDBs across the national territory has created the need for them to organize, leading to the creation of the Brazilian Network of CDBs on

in Brazil, which has started organizing during the first World Social Forum. For more information, see<http://portal.mte.gov.br/ecosolidaria/historico.htm> [visited 17 December 2013].

January 2006. With Palmas Institute naturally assuming the leadership, this network was devised as a way to promote the communication between CDBs, so that they could exchange experiences and share solutions to similar problems that they faced (interviews 3, 5, 10). The Brazilian Network of CDBs was also important for smaller banks, lacking formal legal organization, to access resources that the larger, more experienced and formally organized Palmas Institute was able to access—when necessary, smaller banks would informally 'borrow' the formal legal registers of larger ones (interviews 7, 10, 11, 15).

As they helped create new CDBs, members of the Palmas Bank and Palmas Institute engaged in the effort of trying to define their identity. This inaugurated a new stage in the life of Brazilian CDBs, as they developed into a fully-fledged normative order. An important step in this direction was taken during the Second Meeting of the Brazilian Network of CDBs, in 2007, when their foundational document, called 'term of reference', was approved in a general assembly (interview 7). The 'term of reference' is a written document divided in 8 parts, which address: (i) the concept of CDB; (ii) its main characteristics; (iii) its goals; (iv) its management structure; (v) its financial resources; (vi) the types of products it offers; (vii) its targeted public; and (viii) the coverage of its operating area. Basically, the 'term of reference' outlines a set of requirements for an organization to be considered a CDB and part of the national network. According to the term of reference, CDBs are associative, non-for-profit enterprises, based on the principles of solidarity economy. Scattered through the document one can find a series of rules that the members of the national network are expected to follow. For example, CDBs must be created in, by, and for the community, and their management must be based on democratic mechanisms of participation. They should aim at generating labor and income in territories characterized by high levels of exclusion and social inequality by providing financial services. Finally, their main economic strategies should consist of offering loans (microcredit) and circulating a local social currency in the community within which they operate (Melo Neto & Magalhães 2006, 7-8; interviews 3, 10, 12, 13, 14, 15).

The term of reference may be regarded as a sort of constitution of this new normative order. Members of CDBs frequently mention it as an internal regulatory framework that sets forth semi-flexible parameters and guides their behavior (interview 3, 5, 7, 8, 10, 12, 15). Such regulatory framework is internally referred to as 'the methodology of the CDBs' and noncompliance to its more fundamental rules may be met with severe collective disapproval, and expulsion of the network.[15] The language used in the document, however, is not a typical normative language as rules are not always clearly enunciated or attached to a sanction in case of disobedience. On the contrary, since the network is structured in a non-hierarchical way, there is no clear sanctioning authority and the rules are often not clearly stated. The lack of formal hierarchy within the network is certainly deliberate, and it results directly from some of the fundamental values of this particular normative order—the values

15 One CDB has violated the terms of reference and was disconnected from the network (Instituto Palmas 2010, 29).

of equality and democratic management. The need for a central sanctioning authority is denied in face of a management structure in which decision-making is collective and based on direct or representative mechanisms of deliberation. This points towards a different concept of law from that of the state, indicating a normative order that sees itself as an alternative to the state paradigm.

Indeed, many of CDBs' operational rules have *sui generis* quality and are quite different from the laws of the state and the rules from the traditional banking system. For example, they do not pledge assets as collateral for their loans (interviews 10, 12, 13, 14, 15). The procedure for credit approval in CDBs is based on the work of credit agents, who visit the house or workplace of the potential borrower (who must be a local resident) in order to check if the person is actually going to invest the money in the activity they claim they will invest (interviews 3, 10, 14, 15). They also ask the person's neighbors about their reputation for honoring their word, for paying their bills, and for being honest.

Since CDBs deal with limited amounts of funding, the demand for credit is frequently higher than the bank's offer (interviews 3, 15). For this reason, when deciding about loans, the applicants' needs are also taken into consideration and those who are considered to have more urgent or important needs are preferred over others whose needs are considered less pressing (interviews 3, 10). Also, the amount of money lent is subject to the availability of money in the bank and some banks refuse to lend large sums of money in the first transaction—they will first lend a small amount, gradually approving larger loans as the person pays the previous one (interviews 2, 3, 10). Even though there are no material guarantees attached to the loans, these banks do not report having high degree of default rates. The concept of default is highly contested within the CDBs. Their workers prefer to distinguish cases in which the client had justified financial difficulties from those in which they intentionally defaulted (interviews 12, 14, 15). Still, none of the interviewed banks reported currently having more than 5 clients with problems of delayed payments (interviews 3, 10, 12, 13 and 15) and such cases were considered rare.

Many factors might contribute to this relatively high degree of compliance. One of them is the fact that defaulting or delaying payment without proper justification may imply restrictions for future loans, as well as the charge of a fine plus interest rates (interviews 10, 12). Nonetheless, few CDBs report employing this kind of strategy and they do not count with a sanctioning authority or police force that could impose their decisions and guarantee obedience to their rules, which suggests that other factors may also contribute to compliance.

In order to get loans, CDBs' clients have to sign a contract before other members of their neighborhood (interviews 3, 12, 14, 15). These contracts, however theoretically enforceable in Brazilian courts, in practice were never brought before state authorities and the idea of resorting to the courts in order to charge defaulting clients was strongly rejected by the interviewees (interviews 3, 10, 15), indicating once again the disconnection between these two relatively autonomous normative orders.

The accepted method for charging a client is negotiation. The bank sends the person a letter reminding them that they should have paid a certain amount of money on a given date. If they do not get any response from the client, the credit agents will visit the person, talk to them and ask them if they are going through hard times. The credit agents try to negotiate the debt and the terms of payment. Other residents may support the agents, pressuring the borrowers to pay (interviews 3, 10, 12, 13, 14, 15). In most extreme cases, they may threaten to take the contract to the state's authorities, but they never actually do it and threats usually end in forgiving the debt and not lending money to that person again (interview 16).

CDBs keep their default rates low by using a few social mechanisms that ensure voluntary compliance. They build, for example, a personal relationship with the clients before lending them money (interview 14). Other mechanisms of social control, such as gossip and peer pressure also ensure compliance (Melo Neto & Magalhães 2006, 13; interviews 9, 10, 13, 15). Indeed, CDBs are established within close-knit communities, where people know each other well and will have to live around each other for a long time, what leads people to try to avoid the community's rejection or disapproval (see Macaulay 1963, 85). CDBs also make use of a solidarity appeal, reminding borrowers that others also need money (interviews 13, 15). Finally, it is likely that there is a moral element that contributes to the low default rates: the widespread understanding that fulfilling promises and honoring obligations is a moral duty (Tyler 2006; Macaulay 1963).

In pursuit of its objectives, CDBs also employ the financial strategy of circulating a local social currency, only accepted by local tradesmen, what stimulates residents to buy locally. Social currencies are usually named after some important person or some geographic or cultural aspect of the neighborhood, and they often become an important part of the development of these banks' identity.[16] Interviews suggest that CDBs generally follow the rules of social currency circulation that were approved after the conflict with the Central Bank, thus keeping these initiatives within the legal framework of the Brazilian state.

Besides microcredit and social currencies, many CDBs partnered with official financial institutions to provide financial services in their behalf, as bank correspondents. This kind of contract is authorized by the Central Bank and allows private entities to work on behalf of the contracting financial institution, opening bank accounts, making deposits, paying bills and transferring money between accounts. The correspondent is paid a small percentage over each operation it performs. The aim is to bring financial services to small or distant villages where

16 Even though all CDBs have theoretically devised their own social currency, in practice, its circulation is more complicated (interviews 3, 14). Banks Bem, Cocais, Pirê and Tupinambá report a broad acceptance of the social currency (interviews 10, 12, 13, 15), but the strength of the social currency in each particular neighborhood may vary considerably and CDBs develop different strategies to enhance the circulation of the social currency in their territories. Financial difficulties may also prevent this strategy from being fully implemented: Banks Juazeiro and Liberdade, for example, are not currently circulating their social currencies because they lack money to back the social currency (interviews 2, 16).

there are no bank agencies and try to advance financial inclusion. CDBs operating as bank correspondents in these localities attract a broader public, also comprised of small businessmen and public officials that use the bank's service to pay bills and other simple bank transactions (interviews 2, 3, 10, 13, 15, 16).

CDBs lack a formal legal organization and their institutional organization is not rigid—there are plenty of particularities and differences between them. Typically, however, they are managed within a civil association that is formally registered as a legal entity. The association usually carries out several other projects, mainly with educational purposes. CDBs also usually have a managing council that makes the decisions about the bank's strategies and daily operations; a committee of credit approval (CAC) which makes decisions regarding microcredit; and a local forum, broader than the bank and the civil association, where the whole community is informed of the bank's activities and where the managing council can be held accountable for its decisions.

The main characteristic of CDBs is the model of self-management. They are democratically managed and decisions are made at collective meetings (interviews 1, 2, 4, 7, 10, 12, 13).They operate in a fairly localized manner in territories whose limits are given both socially and geographically, as members of a group recognize themselves as members of a particular community (interviews 1, 2, 3, 8, 10, 12, 13, 14, 16). Invariably, however, CDBs operate in neighborhoods inhabited by low-income families lacking access to public services, often in regions where the occupation of the land is irregular and the process of urbanization is just getting started (interviews 2, 3).

As a rule, CDBs do not have a sophisticated physical infrastructure. They operate in small rooms that are rented, lent, or purchased (interviews 2, 3, 10, 15, 16). Their resources come from multiple sources, private and public—donations from people, companies and other NGOs, money collected in events held by the bank, funding from the government or other NGOs for the development of social projects and the payment they get for operating as bank correspondents (interviews 3, 4, 5, 10, 12, 13, 14, 15, 16). In general, however, obtaining resources is a struggle that depends on the effort, creativity and political connections of the members of the CDB as well as on the good will of others. For this reason, CDBs usually do not count on a continuous or regular flow of resources and generally operate with small amounts of money. One exception to this rule is the Bank of Cocais, which has the support of the local authorities and has managed to get a municipal law approved reserving part of the municipal tax income to a public fund aimed at financing economic solidarity practices, thus allowing the bank to constantly receive money from the city (interview 12).

Actually, financial difficulties are one of the main reasons why CDBs have started to get closer to the state and to seek more intense interaction with it. In 2005, Palmas Institute qualified to take part in a public policy of microcredit newly devised by the Federal Government. Thus, resources from the traditional official banking system started flowing to Palmas Institute, who then lent it to entrepreneurs

through the activities of Palmas Bank or one of the other CDBs that belonged in the Brazilian network of CDBs. As CDBs started to gain visibility, *Petrobras*, a large public oil company, decided to give them some financial support (Melo Neto & Magalhães 2006, 6). They were also supported by *BNDES*, the national bank of social and economic development. *SENAES* also played an important role funding and organizing CDBs all over the country, since it provided them with public resources and combined it with the expertise of NGOs and universities. With the end of *SENAES* project in 2013, however, many banks found themselves facing complicated financial circumstances (Melo Neto & Magalhães 2006, 5; interview 13).

It is clear, therefore, how the relationship between CDBs and the state has developed into one of a collaborative kind. This process, however, has led to internal debates about whether or not CDBs should fight for continuous public funding. This, in turn, has led to discussion about their legal status and to a diffuse comprehension that current Brazilian state law constrain their activities. As they start to voice a non-specific claim for a new state rules, they inaugurate a new stage on their development as semi-autonomous social fields.

3.4. The quest for state legal recognition

CDBs developed in Brazil creating their own normative order. Considering, however, that they operate within the Brazilian state, they have developed a complex relationship with state law. In fact, they have thus far managed to avoid financial regulation because they are non-for-profit initiatives and even though they have potential to interfere with monetary policy, they seem to have not been doing so. CDBs are created by civil associations and, in spite of being broader than them; they still have been legally treated by the Brazilian state authorities under the legal regime of the NGOs.

This legal situation limits their funding options. On the one hand, they cannot open bank accounts and keep their clients' money, because doing so would imply the need for regulation by the Central Bank, with all its bureaucracy, making it impossible for them to operate. On the other hand, they face difficulties getting private investment and continuous public investment. In fact, they have not yet been fully recognized as an autonomous figure by any federal law or by the Central Bank. As the coordinator of Palmas Bank puts it:

> today the Central Bank is our partner, but there is still a juridical void. […]There is not a specific regulatory framework. And here and there […] when the news report a new social currency being created, there is always someone to go to the *Ministério Público*, send them an e-mail saying that it is illegal, saying 'they can't do that' and such. And prosecutors file criminal lawsuits. (interview 7.)

The inconvenience and the lack of safety and predictability of operating under the threat of a criminal law suit needs not be stressed. The fear of investing in an illegal activity also makes it harder for private companies and investors to donate or lend

money to the CDBs. And even when CDBs manage to get donations or loans, they cannot rely on them for their regular operation, since there is no certainty that they will get them or when.

Public resources have been the main source of maintenance of the CDBs so far, in the form of public funded projects. They are strictly controlled, however, and as soon as a project ends, it is usually the case that CDBs find themselves in a delicate financial situation, even unable to pay their workers. Moreover, their relationship with the state varies according to local authorities and is always fragile, changing with elections and government's political orientation. CDBs now face a dilemma between trying to be financially independent from the state and trying to become permanently funded as part of a public policy that promotes practices of solidarity economy. They seem to gear towards public funding, as they voice a non-specific claim for legislative reform.

It has not been possible to identify their political and legal strategy, if there is one. However, state regulation seems to be generally regarded as a source of legitimation for CDBs and legal change is thus being sought as the appropriate way to crystalize social change. Recently, a new bill has been proposed in the federal legislature aiming at regulating these initiatives by means of creating a sort of alternative financial system. Ultimately, this would mean that this parallel normative order would be absorbed and integrated to that of the state. In brief, the interaction between the CDBs' normative order and state law has led CDBs to adapt their practices, in order to remain within the boundaries of legality set by Brazilian law, but they now start to demand to be regulated by state law so as to guarantee their continuous development.

4. Conclusion

CDBs have developed in Brazil as semi-autonomous social fields, with their own normative order regulating their activities. This normative order is animated by the goals, values and practices of solidarity economy. Thus, they aim at promoting social justice and income distribution through economic practices that include fair trade, ethical consumption and sustainable production, based on the values of solidarity, equality, cooperation, democratic self-management and collective ownership of capital. This normative common-ground is set by their constitutional text, the 'term of reference' and, in practice, is reflected in their operational rules, which differ substantially from those of the state and of the traditional capitalist banking system. In fact, CDBs intentionally withdraw from the state's police forces and judicial system.

They operate, however, within the Brazilian state, which claims sovereignty and, thus normative dominance over the whole national territory. For this reason, these two different normative orders, which coexisted in relative insulation for a period, eventually started to mutually affect each other. The episode of the conflict with the Central Bank reveals that Brazilian state chose to tolerate this new normative order, thus granting CDBs a relative normative autonomy, as long as they did not exceed

certain important limits outlined by financial regulation.

CDBs have, therefore, developed a complex relationship with the Brazilian state and its laws.This relationship has been described in four different stages. First, an initial stage of isolation and autonomy, during which CDBs exercised their institutional imagination, in response to prevalent poverty and financial exclusion in certain neighborhoods. This first stage was followed by a confrontation with state's authorities, given the risks CDBs could pose for the state's economy. A shift in the political orientation of the Federal government, the creation of *SENAES* and the dismissal of the criminal case against the director of Palmas Bank by the *Ministério Público* and the judiciary all combined to support the emergence of a new collaborative relationship between Palmas Bank and the state, who has provided important financial and technical support to these initiatives. As a result, CDBs have spread all over the country and their normative order gained momentum. However, CDBs still face difficulties obtaining a regular influx of money and long-term financial autonomy and stability—in great part due to the constraints imposed by state law. For this reason, CDBs now claim for reforms in the existing state legal system in an attempt at gaining recognition and changing state law, in what could be considered a fourth stage that, arguably, would eventually lead to the absorption and integration of this parallel normative order to that of the state.

These developments might be interpreted as a process of interaction between multiple semi-autonomous social fields and their normative orders. This process does not seem to be linear, but rather dialectical in the sense that they mutually influence each other, giving and taking something and never returning to their starting point.

With respect to Brazilian CDBs, in practical terms, their official acceptance by the state is hardly reversible. Even though they are still highly dependent on the state, and a long-term opposition from the government could considerably hinder their continuation and success, the state will hardly be able to simply eliminate them. Indeed, if the state withdraws its financial support, many CDBs are already consolidated and have gathered conditions to keep on operating. Moreover, it is quite unlikely that the state could go back on some of the legal changes that have enabled the operation of CDBs—such as the laws that regulate the operation of NGOs and other public interest organizations in the country. The question is how far Brazilian CDBs will be able to press for the legislative change and whether or not the philosophy and values espoused by them will be fully recognized and incorporated to Brazilian state law.

Appendix – Interviews

1. Antônio Haroldo Pinheiro Mendonça, general coordinator of fair trade and credit at SENAES/MTE. Fortaleza.March, 2013. 1 mp3 file (78 min.).

2. Aldenor Soares Maciel, coordinator of Liberdade Bank. Telephone interview. July, 2013. 1 mp3 file (54 min.).

3. Deuzani Cândido Noleto, member of the Movimento de Educação e Cultura do Estrutural (MECE) and member of the Steering Committee of the Estrutural Bank. Telephone interview. July, 2013. 1 mp3 file (74 min.).

4. Genauto Carvalh França Filho, Professor at the Federal University of Bahia. Fortaleza. March, 2013. 1 mp3 file (38 min.).

5. Gilvan Cleber Sales do Nascimento, member of the NGO Capital Social da Amazônia. Fortaleza. March, 2013. 1 mp3 file (42 min.).

6. Idalvo Toscano, socio-economist. Sao Paulo, ago. 2013. 1 mp3 file (111 min.).

7. João Joaquim de Melo Neto Segundo, coordinator of the Palmas Institute. Fortaleza. October, 2012. 1 mp3 file (88 min.).

8. Juliana Braz, researcher at the University of Sao Paulo. Sao Paulo. July, 2013. 1 mp3 file (93 min.).

9. Leonora Michelin Laboissière Mol, president of the Association Ateliê de Ideias. Fortaleza. March, 2013. 1 mp3 file (25 min.).

10. Marivaldo do Vale Silva, coordinatorof Tupinambá Bank. Telephone interview. July, 2013. 1 mp3 file (92 min.).

11. Marusa Vasconcelos Freire, assistant attorney general of the Central Bank. Fortaleza. March, 2013. 1 mp3 file (30 min.).

12. Mauro Rodrigues da Silva, coordinator of Cocais Bank. Telephone interview. July, 2013. 1 mp3 file (103 min.).

13. Neusa Gripa, treasurer of Associação Mulheresem Movimento, in charge of Pirê Bank. Telephone Interview. July, 2013. 1 mp3 file (62 min.).

14. Rafael Mesquita, member of the Association 'União Popular de Mulheres', in charge of União Sampaio Bank. Sao Paulo. July, 2013. 1 mp3 file (72 min.).

15. Raquel de Andrade, administrative assistant of Bem Bank. Telephone interview. July, 2013. 1 mp3 file (62 min.).

16. Raquel Doroteu Rodrigues, worker at Juazeiro Bank. Telephone interview. July, 2013. 1 mp3 file (63 min.).

Bibliography

Anderloni, Luisa, Bernard Bayot, Piotr Bledowski, Malgorzata Iwanicz-Drozdowska & Elaine Kempson: 'Financial Services Provision and Prevention of Financial Exclusion'. European Comission, Directorate-General for Employment, Social Affairs and Equal Opportunities Inclusion, Social Policy Aspects of Migration, Streamlining of Social Policies 2008. Available on <http://bit.ly/YFwsYM> (visited 26 April 2013).

Beckman, Franz von Benda: 'Who's afraid of legal pluralism?' 47 *Journal of Legal Pluralism* (2002) 37–82.

Celard, Andre: 'A análise documental'. In Alvaro Pires et al. (ed): *A pesquisa qualitativa—enfoques epistemológicos e metodológicos.* Vozes, Petrópolis 2008.

Cover, Robert M.: 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative'. 97 (4) *Harvard Law Review* (1983) 4–68.

França Filho, Genauto Carvalho de: *Bancos Comunitários de Desenvolvimento (BCD's) como expressão de finanças solidárias: por uma outra abordagem da inclusão financeira* 2013.

Freire, Marusa Vasconcelos: 'Moedas sociais—contributo em prol de um marco legal e regulatório para as moedas sociais circulantes locais no Brasil'. PhD diss., Department of Law, University of Brasilia, Brasilia 2011.

Freitas, Maria Cristina Penido de: 'Racionalidade da regulamentação e supervisão bancária: uma interpretação heterodoxa'. In R. Sobreira (ed): *Regulação financeira e bancária*. Atlas, Sao Paulo 2005.

Galanter, Marc: 'Justice in Many Rooms: Courts, Private Ordering and Indigenous Law'. 19 (1) *Journal of Legal Pluralism* (1981) 1–47.

Gloukoviezoff, Georges: 'From Financial Exclusion to Overindebtedness: The Paradox of Difficulties for People on Low Income?'. In L. Anderloni et al.: *New Frontiers in Banking Services—Emerging Needs and Tailored Products for Untapped Markets*. Springer Verlag, Berlin 2006.

Griffiths, John: 'What is legal pluralism?' 24 *Journal of Legal Pluralism* (1986).

Instituto Palmas: *Banco Palmas—1º Banco Comunitário do Brasil—100 perguntas mais frequentes*. Instituto Palmas, Fortaleza 2010.

IPEA: 'Bancos: exclusão e serviços'. Sistema de Indicadores de Percepção Social 2011. Available on <http://ipea.gov.br/portal/images/stories/PDFs/SIPS/110112_sips_bancos.pdf> (visited 12 January 2013).

Leyshon, Andrew & Nigel Thrift: 'Geographies of Financial Exclusion: Financial Abandonment in Britain and the United States'. 20(3) *Transactions of the Institute of British Geographers* (1995) 312–341.

Macaulay, Stewart: 'Law and the Behavioral Sciences: Is There any There There?' 6 (2) *Law & Policy* (1984) 149–187.

Macaulay, Stewart, Lawrence M. Friedman & Elizabeth Mertz: *Law in Action—a Socio-Legal Reader*. Foundation Press, New York 2007.

Melo Neto, João Joaquim de & Sandra Magalhães: *Bancos Comunitários de Desenvolvimento—uma rede sob controle da comunidade.* Instituto Palmas, Fortaleza 2006.

Melo Neto, João Joaquim de & Sandra Magalhães: *Bairros pobres, ricas soluções: Banco Palmas, ponto a ponto.* Expressão Gráfica, Fortaleza 2008.

Merry, Sally Engle: 'Legal Pluralism'. 22 (5) *Law & Society Review* (1988) 869–896.

Minsky, Hyman:'The Financial Instability Hypothesis'. Working Paper nº 74. 1992. Available on <http://bit.ly/Z0cx3F> (visited26 April 2013).

Moore, Sally Falk: 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study'. 7 (1) *Law & Society Review* (1972) 719–746.

NESOL-Núcleo de Economia Solidária da USP: *Banco Palmas 15 anos—resistindo e inovando*. A9 Editora, São Paulo 2013.

North, Douglass: *Institutions, Institutional Change and Economic Performance*. Cambridge University Press, Cambridge 1990.

Ostrom, Elinor: *Governing the Commons—the Evolution of Institutions for Collective Action*. 22 ed. Cambridge University Press, New York 2008.

Rego, Walquíria Leão & Alessandro Pinzani: Vozes do Bolsa Família—Autonomia, dinheiro e cidadania. Editora Unesp, São Paulo 2014.

Santos, Boaventura de Sousa: *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition.* Routledge, New York 1995.

Silva Junior, Jeová Torres & Rebeca da Rocha Grangeiro: 'Finanças solidárias e desenvolvimento territorial: os impactos dos 10 anos de atuação do Banco Palmas'. In A. C. Cançado, F. G. Tenório & J. T. Silva Junior (ed): *Gestão social—aspectos teóricos e aplicações*. Unijuí, Ijuí 2002.

Singer, Paul: *Dominação e Desigualdade.* Paz e Terra, Sao Paulo 1981.

Singer, Paul: *Introdução à Economia Solidária*. Perseu Abramo, Sao Paulo 2002.

Spong, Kenneth:*Banking Regulation—Its Purposes, Implementation and Effects*. 5 ed. Federal Reserve Bank of Kansas City, Kansas City 2000.

Stiglitz, Joseph E.: 'The Role of the State in Financial Markets'. Proceedings of the World Bank Annual Conference on Development Economics 1994. Available on <http://bit.ly/11KsahJ> (visited 26 April 2013).

Tamanaha, Brian: 'A Non-Essencialist Version of Legal Pluralism'. 27 (2) *Journal of Law and Society* (2000) 296–321.

Toscano, Idalvo: 'Histórias e lutas: da remoção ao Bairro Conjunto Palmeira'. In J. J. Melo Neto & S. Magalhães (ed): *Bairros pobres, ricas soluções: Banco Palmas, ponto a ponto.* Expressão Gráfica, Fortaleza 2008.

Woodman, Gordon. 'Ideological Combat and Social Observation—Recent Debate About Legal Pluralism'. 42 *Journal of Legal Pluralism* (1998) 21–59.

Yunus, Muhammad: *Criando um negócio social—como iniciativas economicamente viáveis podem solucionar os grandes problemas da sociedade*. Elsevier, Rio de Janeiro 2010.

Post-1994 Jurisprudence and South African Coming of Age Stories

Karin Van Marle*

1. Introduction

The aim of the article is to explore tentatively the idea that there are many directions or paths for jurisprudential discourse in South Africa in the aftermath of apartheid. I focus for purposes of this piece on two possible ways to read the narratives of a post 1994 South Africa by reflecting on the life stories of two prominent South Africans, namely former president Nelson Rohihlala Mandela and his first wife Winnie Madikizela-Mandela. These two figures represent possible different and contesting versions of a 'new' South Africa.

As I subscribe to what Douzinas and Gearey have called a 'general jurisprudence' (2005, 10), the investigation of jurisprudence encompasses questions on identity, the social bond and nation, among others. Douzinas has described a general jurisprudence as follows:

> A general jurisprudence brings back to the centre the aesthetic, ethical and material aspects of legality. It reminds us that poets and artists have legislated, while philosophers and lawyers operate an aesthetics of life in order to bring together the main ingredients of life, the biological, the social, the unconscious. General jurisprudence includes the political economy of law; the legal constructions of subjectivity; and the ways in which gender, race or sexuality create forms of identity, both disciplining bodies and offering sites of resistance. (Douzinas 2014,189.)

By reflecting on the life stories of Nelson and Winnie Mandela I want to highlight the notion of 'an aesthetics of life' as invoked above. How is a jurisprudence that is concerned with politics, economics, subjectivity and identity formed in a context of change, of aftermath? Have these struggle icons—and for my purposes by implication jurisprudential discourse—been 'disciplined' and co-opted by discourses of 'formation' and settlement or have they been able to offer resistance?

* Professor of Jurisprudence, Faculty of Law University of Pretoria.

The changes that were initiated since the early 1990's in South Africa have taken many forms. One that has taken centre stage is the adoption of a supreme constitution with an entrenched bill of rights. Commentators have relied on the notion of a 'legal revolution' in order to refer to not only the shift from a system of parliamentary sovereignty to constitutional supremacy but also changes related to politics, society, culture and identity. One way and probably until recently the most pervasive response to the adoption of constitutional supremacy and human rights in post-1994 South Africa has been to read this as a culmination of many years of struggle into something to be celebrated. This way tends to follow a linear chronological and fairly simple idea of progress. Commentators describing the shift in natural law theories have warned about the limits and possible dangers of tracing shifts from natural law to natural right to human rights in this way (Douzinas 2000).

Many metaphors have been invoked as ways to reflect on the past, present and future of South African law. Wessel le Roux (2006) has noted the extent to which South African scholars have relied on aesthetic examples to reflect on approaches to constitutionalism that could counter past formalist approaches. The South African constitution has been described for example as a 'monument' and a 'memorial' (Snyman 1998, 312; Du Plessis 2000, 385). The Constitution as monument represents the grand narrative, the big promise of how the Constitution will bring about the change from an authoritarian, unequal, racist, sexist and undemocratic past to a better future, where the Constitution as memorial is the restrained constitution, aware of limits and inevitable failure. The memorial approach to the constitution recognises that the constitution is only one of many processes and institutions needed to address the multiple problems that the country is faced with. The notions of monument and memorial have been used also in the vein of authorship and narration; that the monumental constitution stands in the vein of authorship and the memorial one in that of narration.[1] To my mind to think about the constitution as either writing the story of a new nation as author, or telling the story as narration captures something about the nature of political power as represented by the Constitution.

I have also looked at post 1994 jurisprudence as a 'becoming', following Deleuze's notion of 'becoming minor' (Deleuze 1995) and Peter Goodrich's work on a 'minor jurisprudence' (Goodrich 1996). My argument is that transformation should be central to jurisprudence in the aftermath of apartheid, but more than that, it should entail what South African author Njabulo Ndebele has named 'a giving up of certitude' (Ndebele 2007).

I have attempted above to provide a glimpse on some of the ideas that have surfaced since the promulgation of the 1996 Constitution that might be significant

1 I have tentatively thought about this distinction in light of the debate between Hans Kelsen and Carl Schmitt on constituted and constitutive power (Van Marle forthcoming). My sense is that this debate that is so widely discussed elsewhere has not attracted as much attention in the South African context. Aspects of the debate have been raised in a seminar and later in a special edition on the theme of constitution-making in the *South African Journal on Human Rights.*

to the tentative reflection in this piece. I want to explore the notion of the 'book' that Mark Antaki has referred to as the South African constitution's 'most neglected metaphor' (Antaki 2013, 49). Antaki, relying on the work of André van der Walt (2001) and Antjie Krog (2009) reconfigures a notion of transformation, and transformative constitutionalism, that relies on a questioning of the concept of 'formation' (Bildung). The concept transformation is somewhat paradoxical as it captures both the idea of change and that of stability. Antaki's argument is that much of the transformation discourse in South Africa rests on the confirmation of the status quo rather than changing it. He sees in the work of Krog and Van der Walt the opening of the possibility for a change, a continuous transformation that could challenge the status quo. I want to connect Antaki's argument with the notion of the constitution as narration and constitutive power. As I expand on below Antaki questions the use of a bildungsroman or traditional coming of age story as motive for transformation in post 1994 South Africa. In the same vein I rely also on George Pavlich's reflection on what he calls a 'dissociative grammar' for constitutionalism (Pavlich 2013, 31).

I focus on the life stories of two prominent activists as possible examples of the different readings of the South African change. Former president Nelson Rohihlahla Mandela's life, his 'long walk to freedom' has been read as being true to the features of the traditional bildungsroman (Roux 2014, 205). Nelson Mandela has also been described as someone who has exposed a certain kind of modernity (Hyslop 2008, 119; Barnard 2014, 7). And, of course, he has been placed within and reflected on as a man of the law (Derrida 1986, 26; Le Roux 2006; Sitze 2014, 134). Winnie Madikizela-Mandela fits less comfortably with these notions (see Madikizela-Mandela 2013; Du Preez Bezdrob 2003). Unlike the life story of Nelson the life of Winnie thwarts the traditional features of the bildungsroman. Her life story is one of contingency, rupture and what Gillian Rose called 'double equivocation' (Rose 1992). My interest here is to consider the potential that Winnie's story holds for a jurisprudence post 1994, post official apartheid.

I start the article by putting forward readings that have associated Nelson Mandela's life with the bildungsroman and that have placed him within modernity. My sense is that this reading of his life represents something about the linear reading of South Africa's acceptance of constitutional supremacy as the culmination of struggle that will bring salvation. Thereafter I turn to the views of Antaki and Pavlich, referred to above, that trouble the former reading. I aim to connect these takes with Winnie Mandela's life story—one that represents contestation and equivocation but also a certain kind of relationality. I recall writings that have constructed Winnie in a specific relationality and interconnectedness with other women (Ndebele 2003; Krog 2009). I take these notions further with reference to Krog's latest volume of poetry, titled *Synapse* (2014), in which she, following Paul Celan, attempts to create a language that could engage with the challenge and inevitable failure of interconnectedness. I ask if this volume by Krog might be an example of what Pavlich has called a 'dissociative grammar' (Pavlich 2013). However, I return to the

notion of narration invoked earlier with reference to the constitution as narrating the story of the nation and recall Adriana Cavarero's engagement with a story told by Karen Blixen, which, although not confirming any notion of formation, holds onto a certain kind of 'unity' that was not foreseen but simply happened without any preconceived plan, design or project (Cavarero 2000, 1).

2. Life story as bildung: Nelson Mandela's long walk

John Hyslop, in his reflection on Mandela and Ghandi, starts with recalling a bookshop known as Vanguard Booksellers, owned by Russian immigrant, Fanny Klennerman (Hyslop 2008, 119). Klennerman, according to Hyslop perceived herself as part of a cultural avant-garde and part of a certain modernist movement. Klennerman, Hyslop tells us, was the first person to import Joyce's *Ulysses* to South Africa, a book exemplary of a certain modernism that at the time was banned in the English world. Hyslop is interested in how Johannesburg is part of the story of modernity and modernist culture. He discusses the politics of Johannesburg and its influence on Ghandi and Mandela against the background of Joyce's *Ulysses*.

Hyslop describes Johannesburg as instantiation of a form of modernity, as a place of simultaneously 'uncertainty and disintegration' and a place that allowed the 'search for the possibilities of freedom', 'a city of ideas' (Hyslop 2008, 12). An important element of the city that he highlights is the capability to go 'beyond its immediate confines' (Ibid., 12). He observes certain features of the Johannesburg of the early 1930's: With a population of half a million and immigrants coming from everywhere it hosted a plurality of people and perspectives. The buildings in the city for example exhibited a range of different styles, from Victorian to Edwardian to Chicago steel frame construction. There were also extreme social inequalities amongst the inhabitants that often gave rise to conflict and uncertainty. However for Hyslop 'this very extremity […] made its experience of modernity productive of modernist cultural and political creativity' (Ibid., 122). The absence of stability, living in the maelstrom made it possible for people to make themselves at home, to find new paths. The fact that individuals were uprooted produced new forms of intellectuality and generated new ideas (Ibid., 122-23).

It is in this vein that Hyslop places Fanny Kellerman within the frame of modernity, pursuing a modernist project. And it is exactly within the context of such a modernist project that he situates the development of the political thought of Ghandi and Mandela. He notes that to situate Ghandi and Mandela within the Afromodern that Johannesburg offered highlights the problem of the tension between the metropolis and nationalism. Hyslop contends that both Ghandi and Mandela, although they started out from narrow nationalism famously managed to transcend this to approaches that were inclusive, that embraced humanistic values and that had international relevance (Hyslop 2008, 123). His argument is that their approaches of inclusive nationalism founded on universalist values can be traced to their experience with the metropolitanism and cosmopolitanism of Johannesburg. Hyslop recalls how Mandela, although starting out as a dedicated follower of Anton

Lembede's firm African nationalism ended up putting forward a vision for a unified and reconciled country that includes a plurality of perspectives (Ibid., 131). For him it was Mandela's 'metropolitan experience' that nurtured his striving for personal freedom of the metropolis.

Rita Barnard similarly describes Mandela as modern: 'Mandela […] is a man of the twentieth century, viewed in its global complexity as an era of a radically incomplete and uneven modernity' (Barnard 2014, 5). She recalls the view of Anthony Sampson, author of Mandela's official biography who described him as both premodern and postmodern (Ibid., 4-5). Mandela as premodern confirms his loyalty to his Xhosa roots and culture where Mandela as postmodern responds to him becoming a celebrity, 'mixing politics with showbiz' with a certain comfort (Ibid., 5). With reference to Frederic Jameson she describes the 'modern experience' as 'one of disjuncture, of living in many worlds and marching to many different beats' (Id.). Barnard continues to say that those who excelled in being modern were those who understood this ambivalence, indeterminacy and contradict between 'tradition and innovation, stagnation and progress' best: 'It is therefore not fanciful to propose that the quintessential modern subject might well be someone like Mandela; a black South African, born in a rural and tribal world, coming into manhood and political consciousness in a vibrant, materialistic colonial city, and ending up as a citizen of the world, a deft participant in the contemporary culture of the medial spectacle' (Id.).

Below I turn to a reflection by Magobe More on how activists have been portrayed by scholars, analysts and journalists (More 2004). More's reading of Mandela could be regarded as a challenge to the readings by Hyslop and Barnard, and, as I elaborate on below, also that of Daniel Roux (2014), that situate him comfortably within a certain notion of modernity. Magobe More comments on Albert Luthuli, Steve Biko and Nelson Mandela as examples of political figures who were all produced by 'colonialist violence of an unprecendented nature in the history of colonialism' (More 2004, 207). Both Luthuli and Mandela were honoured with the Nobel Peace Prize. However, More is interested in unearthing the revolutionary impulse of South African liberation leaders in order to challenge what he sees as a 'mispresentation' of them as pacifist (Ibid., 208). He explains that the question of revolutionary violence in Africa is often placed in one of two traditions, either in Ghandi's philososphy of non-violence or Fanon's support of violence when necessary. Luthuli was a dedicated follower of Ghandi's non-violence as well as a 'Christian liberal "realist"' (Ibid.). Biko, on the other hand, is often placed in a Fanonian tradition (Ibid., 213).

More refers to the description of Mandela as 'humanist pacifist' and being placed amongst leaders such as Ghandi and Martin Luther King (More 2004, 210). 'Mandela personifies suffering under the most severe conditions and moral courage against an evil of a unique kind—apartheid' (Ibid.). However, according to More one should distinguish between a pre-Robben island and a post-Robben island Mandela. He questions the fact that Mandela is often regarded only in terms of the post-Robben island era, as being 'a man of peace and reconciliation who preferred

non-violence and negotiation as instruments of political liberation to revolutionary violence' (Id.) For More the pre-Robben island Mandela 'was a radical' (Id.) He argues that Mandela's commitment to justice and respect for the notion of the rule of law guided him in realising that even though peace might be desirable, humanistic principles such as justice, equality and dignity guided his actions that ultimately lead to accepting violence if there is no possible alternative (Id.). He remarks that for Mandela non-violence was more than a moral principle but sometimes 'a tactic to be used […] a practical necessity' (Id.). In 1961 Mandela argued in support of violence saying that 'violence is the only language that the government understands' (Ibid., 211). He argues that the post-Robben island Mandela was a radically different person from the pre-Robben island Mandela and urges that the latter should not be forgotten. More's reading of at least the pre-Robben island Mandela troubles the notion of his life story as one of traditional bildung, or a linear progress and unearths a radicalness ignored by the mainstream acceptance and embrace of Mandela.

Daniel Roux, in a chapter titled 'Mandela writing/ writing Mandela' recalls Elleke Boehmer's description of Mandela's story as 'the collective many-voiced story of a nation coming into being' (quoted in Roux 2014, 205). Roux's interest lies in the phenomenon that the question of *who* Mandela is always becomes a question of what Mandela *represents*. For him Mandela's representations always 'become identical to his life', which he interprets to mean that Mandela's life is 'always already an instrument in the service of some larger narrative' (Roux 2014, 207). Roux argues that Mandela's autobiography and in a sense, then, Mandela's life story, could be read as a coming of age novel, a bildungsroman. As mentioned above Roux seems to be going along with the views of Hyslop and Barnard. However it should be noted that Roux insists on Mandela's own role in constructing and inventing this story as bildungsroman. To relate this to More's reflection, one could argue that maybe Mandela himself gave up on the pre-Robben island Mandela. Roux considers Mandela's description of himself as a gardener and the role of the garden throughout his life, from the garden of Reverend Harris at Clarkebury, the college that he attended as a young man to his imprisonment at Robben Island. Roux comments on a photo taken of Mandela on the island, titled 'Prisoner in the garden'. He refers to Boehmer who linked gardening here with Mandela's writing of the nation: 'Here we see the political prisoner laying claim to his patch of ground, his island rock, a piece of his nation, making it fruitful' (Roux 2014, 216). Roux then states his main understanding of Mandela, namely the fact that he could attract praise from people coming from different places and perspectives across South Africa was because of the 'polyvalent, ambiguous nature of his signs and performances' (Ibid., 216).

For Roux *Long Walk to Freedom* is about growth and education. Two features of a bildungsroman as identified by Joseph Slaughter (2007) and highlighted by Roux are firstly that this genre traces the narrative of someone who at the end turns out to be the person he or she has 'always already been' (Roux 2014, 217). Secondly, there is a strong social aspect, a realization of social responsibility in the bildungsroman. Roux highlights the following from the final pages of *Long Walk to Freedom*: It starts

with what Roux calls 'Mandela's bildungs-motiv': 'I was not born with a hunger to be free, I was born free'. Initially 'I wanted freedom only for myself', but that developed into a social awareness: 'I saw that it was not just my freedom that was curtailed, but the freedom of everyone who looked like I did' (quoted in Roux 2014, 218). Roux connects Mandela's telling of his life story as a bildungsroman with the notion of human rights. He realizes that he is a rights-bearing individual and regards this as a 'natural outcome of, and expression of, his personality' (Roux 2014, 221). His life story reflects the tension between individualism and social responsibility within the South African political context but is also 'eminently global', speaking to contexts beyond South Africa (Ibid., 221). Tracing Mandela from Qunu to Johannesburg to Pretoria could be seen as representing different moments in his life story. However, although Mandela's struggle is linked to a particular community it is also linked to something beyond that—'to a particularly deterritorialized modernist ideal' (Ibid., 221). Roux argues that Mandela constructed his life story in such a way that it allows a rainbow nation that aimed at including different kinds of people.

Brenna Munro refers to Mandela's 'authoritative, yet emotive masculinity' and 'his adoptive embrace' (Munro 2014, 92). She also follows the sentiments raised above of him displaying 'a series of distinctively modern ways' throughout his life. Although he can hardly be called an 'egalitarian husband', 'his embrace of a secular humanism' was evident in his view that marriage should be based on 'freely chosen partnership' and that his three different wives all had strong personalities (Ibid., 93). Munro's reflection on Mandela, in particular his forging of a new, modern black masculinity also follows the guise of transformation and bildung. She notes the transplantation from the rural to the city, with the latter representing a 'space of self-invention' (Id.). Munro recalls the 'Sophiatown Renaissance' that was marked by a 'defiant cosmopolitan modernity that refused identification with "tribal culture"' forced upon black South Africans by the apartheid government (Id.). Munro, like many others before, pays attention to his sense of style and describes him as 'dashing, well-dressed', projecting 'a masculinity that underscored the ability of black men to be "civilized"' (Ibid., 94). One image that challenges this modern cosmopolitan look of Mandela is when he gave his first television interview in 1961 wearing a workman's jacket, has a beard and looks 'slightly unkempt' (Id.). Munro notes that this version of Mandela was used on many posters, pamphlets, badges and T-shirts and paradoxically used by activists and the apartheid government. Of interest also is the poem authored by Nigerian author and poet Wole Soyinka, 'No, he said' presenting Mandela as the example of a 'heroic masculinity, resistance itself personified' (Ibid., 97). However the Mandela who walked out of prison in 1990 portrayed a different story. Whilst in prison he came out in support of peace, negotiation, forgiveness and reconciliation (Ibid., 98). It is significant to note the difference between Mandela as father and grandfather in his personal life and the Mandela as father/grandfather of the nation. It is however the latter one, the constructed and imagined one that prevails in the public image and memory.

As explained in the introduction my aim in this piece is to reflect on the

becoming(s) of a post-1994 jurisprudence against the life stories, albeit constructed, of Nelson Mandela and Winnie Madikizela Mandela. In this section I briefly recalled some of the writings on Mandela that situated him within a certain modernity and cosmopolitanism, that traces his life story as a bildungsroman, as one of transformation and growth. I argue that this is a prevalent way to portray the development of the South African transformation, the 'birth' of a new nation and closer to my specific purpose, the development of a post-1994 approach to law, constitutionalism and jurisprudence. In this version the South African nation has managed to leave an unjust past behind and to transform to a democratic society. This story is underpinned by a modern idea of progress and an optimist embrace of the possibilities seemingly held by constitutionalism and human rights. In the section below I consider two engagements that put forward alternative visions of constitutional transformation; visions that disrupt the clean linear notions of coming of age, bildung and formation. Instead of one story, these versions put forward multiple and ever incomplete notions of law, constitution and change.

3. Bildung thwarted: Winnie Mandela's cry

Munro, in her reflection on Nelson and Winnie Madikizela notes that Winnie is a 'contradictory … figure', 'the "mother" of the struggle who fell from grace' (Munro 2014, 92). Like Nelson, Winnie also came to the city of Johannesburg in search of the new. Many visuals of the time show her just as elegantly dressed as Nelson and Munro tells us that she was asked by photographers for *Drum* to pose for them (Ibid., 93). As a couple they represented 'black African glamour and desirability' (Ibid., 94). They had only two years of married life together—in 1960 Nelson Mandela went underground. Winnie from early on played an active part in the struggle. She publicly supported Nelson Mandela and the ANC without reservation, a position that paradoxically was authorized in a conventional manner by her position as the loyal wife (Ibid., 95). Munro remarks that Winnie in her defiance of white power resembled Steve Biko far more than Nelson Mandela. Winnie transformed her symbolic role as 'mother of the nation' into the role of an activist and a revolutionary (Ibid, 96). She was detained and placed in solitary confinement for thirteen months, an experience that seems to have damaged her beyond comprehension. The apartheid state and how it treated her had profound effects on the rest of her life (Ibid., 102).

A troubled and dark side of Winnie's story is when she formed the Mandela United Football Club after she returned to Soweto in the mid-1980's after being sent to exile in Brandfort. Munro described how the Club was organised as a family with Winnie as the revolutionary, authoritarian and disciplinary mother. During her trial for kidnapping and accessory to assault a deeply problematic anti-gay stance came to the fore.[2] A famous photograph of the time was held by one of her supporters that

2 Winnie Mandela was formally charged with four counts of kidnapping, assault and with seven others for the murder of 14 year old Stompie Moeketsi. During the trial allegations related to homosexual conduct between the youths were made. Winnie Mandela and her supporters condemned homosexuality as anti-African.

read 'homosex is not in black culture', a sentiment unfortunately still prevalent in aspects of African nationalism today (Munro 2014, 104). Winnie was found guilty and sentenced to five years in prison, but after an appeal the sentence was reduced to a fine.

Winnie's appearance at the Truth and Reconciliation Commission where she was asked to respond to charges of her role in a number of murders and other serious crimes is another reflection of what can be seen as her refusal of and dissociation from the political reconciliation that resulted from the negotiated compromise of the early 1990's between mainly the outgoing apartheid government and the African National Congress. She denied everything that she was accused of. Munro compares what she calls the 'spectacle of Winnie's female misrule' with Mandela's 'saintliness' (Ibid.,107).

A few themes emerge from the epilogue of Winnie Madikizela-Mandela's prison diary: The first one is the extent to which race and gender played a role in how she was treated by the authorities. Women activists who participated in the TRC hearings had similar experiences. Winnie recalls: 'They honestly believed that it was impossible for a black woman to have this kind of stamina, to be this stubborn. Because they were meant to break us and they could not believe that anyone would resist them like that?' (Madikizela-Mandela 2013, 234). She adds 'When I was told that most of my torturers were dead, I was so heartbroken. I wanted them to see the dawn of freedom. I wanted them to see how they lost their battle with all they did to us, that we survived. We are the survivors who made history' (Ibid., 234). This could be read as a kind of overcoming of obstacles in the vein of the bildungsroman. However, I read this differently. Winnie did not overcome obstacles in any traditional way. She overcame by resistance. Unlike Nelson who after years imprisoned on Robben island walked out of prison and stepped into the role of the Father of the Nation who embraced constitutionalism, human rights, and reconciliation, Winnie refused reconciliation. Later in the epilogue she notes how their struggle was not aimed at becoming president, but fighting for freedom. And she shows her concerns on how present day leaders are mirroring the oppressors of the past.

A second theme is her care for her children and how that was her main concern while she was detained—her remembering of her detention stands in contrast to that of Nelson Mandela and the other male prisoners on Robben island.

> When I was in detention for all those months, my two children nearly died. When I came out they were so lean; they had such a hard time. They were covered in sores, malnutrition sores. And they wonder why I am like I am. And they have a nerve to say, 'Oh Madiba is such a peaceful person, you know. We wonder why he had such a wife who is so violent?' The leadership on Robben Island was never touched; [they] had no idea what it was like to engage the enemy physically […] We were the foot soldiers. (Madikizela-Mandela 2013, 234-235.)

Remembering how they operated during the night she remarks: 'We reversed the

hours in the same way we had to reverse the values of society' (Ibid., 235).

A third theme is how, after Nelson's first arrest in 1962, she became known merely as 'Mandela's wife' (Madikizela-Mandela 2013, 236). She remembers 'I could never say anything that was from myself, my own mind […] I discovered Oh, I have no name now—everything I did as Mandela's wife. I lost my individuality […] I realised that, my goodness, if you are married you lose your identity completely' (Ibid., 237). However, this is not how she was brought up—in her father's house she was taught to 'walk tall' (Id.). Her coming to Johannesburg, unlike that of Nelson, was not one where she could explore new identities and alternative forms of life, but rather one that fixed her in the position of wife. Her banishment to Brandfort turned out to be fertile ground for the forming of a new identity: '[W]hen the authorities banished me to Brandfort as far as they were concerned that was just the last act to bury me forever, but I was never as active as I was in Brandfort' (Ibid., 238). She reflects on her decision to remain in Soweto after 1994, that she 'fought' for her children to live a 'normal life' 'anywhere', but that she 'will die in Soweto' (Id.). Critically commenting on the ANC government she notes the problems of repeating past oppression in the present. 'To me, this is exactly what is happening and that is what scares me' (Ibid., 239).

I turn now to a novel that engages with the complexity of Winnie Mandela. The author, Njabulo Ndebele, through the voice of his four female protagonists, simultaneously gives a critical and sympathetic reflection on her life as activist and as wife and former wife of Nelson Mandela. *The Cry of Winnie Mandela* (Ndebele 2003) tells the story of four ordinary black women who waited in various ways and contexts on their men to return to them in the time of apartheid. The author frames them as the descendants of Penelope, who, as the wife of Odysseus, is the classical symbol of a woman who waited. The four women play a game in which they have imaginary conversations with Winnie Mandela who, like them, waited on Nelson to return to her. The novel has received attention in jurisprudential discourse mainly for the prominence given to the 'ordinary': how 'everyday' stories are singled out in contrast to the grand narratives of transition. This has been connected to Mahmood Mamdani's (1998) critique on the extent to which the South African Truth and Reconciliation Commission has overemphasised the role of what he calls perpetrators and victims in the minority to the exclusion of beneficiaries and victims in the majority. A second theme from the novel taken up by legal scholars is that of 'refusal'. Henk Botha (2009), relying on the text has for example focused on the theme of refusal and post-apartheid constitutionalism. He has highlighted that the notion of refusal could offer alternative perspectives on resistance and change, the possibility of a richer conception of politics and a perspective that does not privilege the grand narratives of past injustices and struggles over local histories (Ibid., 33-34).

In the novel Winnie Mandela is singled out as the most famous South African woman who waited on her husband to return. In using the figure of Penelope who, in this novel, has left Odysseus and her home in Greece in exchange for the road, Ndebele challenges traditional notions of home and women's relation to it. The four

women who are the main protagonists in Ndelebele's story reflect on how they waited upon their husbands, their men to return, in vain. Mannete Mofolo, one of the main characters in the novel, articulates what she sees as a resistance, a detachment that women should adopt if they want to protect their freedom. Her resistance to what is expected from her and her detachment stand in the guise of refusal.

Antjie Krog, reflecting on the novel notes the centrality of community in the novel and argues that Ndebele 'establish[es] a community of ordinary women' (Krog 2009, 58). She shows how Ndebele breaks with the 'classic narrative' of placing the hero/ heroine in a central space in his telling of an 'ethical story' of community (Ibid., 58). For Krog Ndebele underscores a sense of interconnectedness between Penelope, Sarah Baartman, Winnie and ourselves (Ibid., 59). 'And to be our fullest selves, and have our "giftedness" released, we have to accept one another as part of ourselves. Instead of judging and rejecting one another, women should actively, kindly, remove one another from banishment as aberration—a term and a place that we construct when we refuse to care' (Id.).

Krog (2009, 55-56) notes her 'complete surprise' when, instead of finding Winnie in the first pages of the book, she was introduced to Penelope. A second surprise was when it became clear to her that neither Winnie nor Penelope would be the main protagonist in the story, but rather four women telling their 'own stories' in a non-linear way, without proper beginning or ending (Ibid., 56). Krog notes also an interesting relation between 'real' and 'imaginary'—the four women who are initially presented as '"real" and "realistic" moved into the "unreal" company of Winnie and Penelope' (Id.). She describes this shift also as a 'transformation from the physical to the metaphysical sphere' (Ibid., 56-57). Another significant aspect of the story is what Krog calls the 'communal location' that she interprets to mean that Winnie's story on her own makes no sense (Ibid., 57). For Krog, Ndebele is saying that to focus on Winnie as an individual is not the point at all, but rather that 'the story about Winnie is the story about every one of us and is at heart an ethical story' (Id.). Krog quotes the words of an imaginary Winnie saying to the four other women: '*You*, all of you, have to reconcile not with me, but with the meaning of me. For my meaning is the endless search for the right thing to do' (Id.). Krog argues that Ndebele, by choosing not to make Winnie a main character in the conventional way, but rather a community of women makes two points: Firstly, that Winnie is who she is because of all of us: 'she is us, she is like us, she is who she is through us, we made her and she us' (Ibid., 58). Secondly, that the way of telling a story by focussing on a conventional hero, like Odysseus, is not the form that he feels is appropriate to tell the ethical story of his community (Id.). Finally, Krog comments on how Ndebele uses Penelope in his story: She, as a Western character, is not dictating an African story but rather, through Winnie, an alternative route and African framework is created for Penelope (Ibid., 59). For Krog, Ndebele created a shift from Penelope's 'faithfulness' to 'reconciliation': 'My journey follows the path of the unfolding spirit of the world as its consciousness increases; as the world learns to become more and more aware of me not as Odysseus's moral ornament on the mantelpiece, but as

an essential ingredient in the definition of human freedom' (Ibid., 57). This story provides an interesting angle on Winnie Madikizela Mandela: it places her within the realm of the ordinary, it highlights the relation with other women but it also gives us a view on Winnie as her own person, fighting for freedom on her terms.

Munro notes how many South Africans continue to support Winnie, maybe exactly because of her 'defiant outsiderdom' (Munro 2014, 108). The fact that she has made mistakes, suffered and endured pain draws people to her. Munro notes that Winnie's refusal to remain silent may be seen as offering 'psychic relief' in a context where so many women remain silent to their oppression and misconduct towards them. She has been an outsider, on the margin of the ANC for long times and this gives her the position of voicing her dissent.

My interest is to reflect on how the life stories of Nelson Mandela and Winnie Madikizela Mandela symbolise/represent different narratives also of the becoming of a SA nation/law/jurisprudence. Of course both of them and their stories are much more complex and could unfold more perspectives on what I have tentatively noted here. The main point for me is that Nelson Mandela can be explored from a position of being within modernity/various modernities and various readings of law—natural law, the Law of the Law, human rights—, whereas Winnnie Madikizela Mandela always already occupies a marginal position—she represents the excess, that which cannot be stilled or contained by a modern legal order.[3]

4. Every day I write a book

In this section I focus on two critical engagements with constitutionalism and the ideal of transformation within the context of post 1994 South Africa. Mark Antaki focuses on two images relied on in the Epilogue of the 1993 Constitution, namely that of the bridge and the book (Antaki 2013). He notes that although the bridge has been central in a number of reflections,[4] the book has been neglected. George Pavlich (2013) contemplates an approach to constitutional transformation that defies formalism and scientific logic. He proposes a 'dissociative grammar' of critique that supports the uncertainties and dynamism of law.

The epilogue or postamble of the 1994 Constitution invokes the image of the bridge as follows:

> This Constitution provides a historical bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and coexistence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.

3 Following the work of Luce Irigaray one could argue that it is exactly because of sexual difference and law's insistence on sexual indifference that Winnie as a woman has been systematically excluded. I am pursuing this line of inquiry in a different project in which I want to think about the exclusion of African law and jurisprudence along the line of Irigaray's insight on the insistence on one to the exclusion of the plural.
4 For one of the first writings see Mureinik 1994. For a more critical assessment, see Van der Walt 2001.

The late Etienne Mureinik, in one of the first articles that commented on the 1994 Constitution, relied on this image in explaining that this Constitution provided for a shift from an authoritarian past to a transparent future where the state would be asked to justify its actions (Mureinik 1994). Antaki recalls André van der Walt's critique of the dominant interpretation of the bridge as a linear structure, namely that the constitution could serve as a bridge that could lead South Africa from an authoritarian, racist, sexist, unequal and undemocratic past to a present and future where all these ills and injustices will have been addressed. Van der Walt (2001) problematises this view by noting soberly that a bridge of course can go in two possible directions, forward and back, and that the constitution could have exactly also any of those two consequences. Antaki connects the critical engagement of Van der Walt with Antje Krog's ethical problem with writing a novel (Antaki 2013, 51). He invokes David Scott's support of tragedy rather than romance as the genre through which to narrate the change from colonial to postcolonial. Antaki explores Van der Walt's response to the dominant writings on the bridge and his invocation of 'codes', particularly two forms of dancing to problematize the notion of a linear movement from past to future, or bad to good. Central to Van der Walt's take is the continuities at play. As is clear also from Krog's refusal to write a novel at stake here is the refusal to claim 'a wilful imagination […] a form of imagination as invention' (Ibid., 60). The over-simplistic reading of the bridge relies on a form of imagination that may draw an over optimistic picture of the possibilities of constitutional transformation—one that would fit the story of a nation's coming of age through constitutionalism and human rights. Van der Walt's hope lies at the end with the possibility for things to be 'different' but not necessarily better.

In her 2009 book *Begging to Be Black* Antjie Krog observes that she is not writing a novel as a way to explore the question of what it may mean to be black. She declares that for her 'imagination is overrated', that 'to imagine black at this stage is to insult black' (Krog 2009, 268). She explains that she wants to listen, observe and translate until she might have a better sense (Motha 2010, 300). Antaki interprets her refusal to write a novel as a refusal of 'the fantasy that one can, somehow, know others', a refusal 'of imagination as a form of mastery in the service of both reason […] and will' (Antaki 2013, 64). For Antaki 'Krog's refusal is at once the refusal of a novel that allows one to play out the fantasy of "getting" into someones else's (or even one's own) head or heart, but closer to my argument it is also the refusal of a novel that involves the movement of a protagonist towards a place where he or she arrives at a prefigured unity and maturity' (Ibid., 52). In other words it is the refusal of the traditional bildungsroman, a coming of age story. For Antaki the Epilogue of the 1993 Constitution invokes exactly the idea of South Africa's coming of age. He interprets the Epilogue as reflecting 'a moment of self-recognition, of attainment of maturity … of a form that allows the protagonist to retrospectively interpret his life story as a formation' (Ibid., 69). However, Antaki notes that there are literary genres, other kind of novels, that differ from employing the imagination as willing, as mastery, as establishing a kind of sovereign authority—such is the notion of a minor literature

for example as written by Kafka, and supported by Deleuze and Guattari (1983). Antaki refers to novels by JM Coetzee[5] and also Marlene Van Niekerk's *Agaat* (2004) as examples. At stake here is if the Constitution is seen as a 'book', what kind of book it is, and even more pertinent that it is a book that is being written continuously, started, re-started everyday again.

Pavlich is interested in thinking about 'an alternative critical grammar' on constitutional transformation that 'operate[s] by relentlessly reaching beyond current orderings' (Pavlich 2013, 33). In the previous section I considered the life story of Winnie Madikizela Mandela and I am interested to relate tentatively aspects of her life with Pavlich's notion of depth grammar:

> Existing within an everyday social ethos, participants seldom reflexively examine or challenge the limits that constitute them as particular kinds of contextual beings. The depth grammars through which they come to engage meaningfully, make sense of, and act in a social context remain hidden. Yet, precisely at those moments where limits to particular forms of life are experienced as deeply problematic, subjects inaugurate unusual processes to name aspects of their subjection. (Pavlich 2013, 40.)

For Pavlich critical forms of life start at that moment, as formulated by Foucault, when subjects actively contemplate 'how not to be governed thus' (Ibid., 40). Pavlich unpacks this by saying that Foucault could be interpreted here to refer to a grammar that offers the possibility of imagining the 'dissolution of themselves and their current ways of being, and to consider ways to live outside of what they have come to be' (Id.). He turns to the novel by Ndebele referred to above and invokes a specific theme from the novel, namely that of order. The fictional Winnie in the novel reflects on what she sees as the link between 'housekeeping and order', between the everyday practices and the ordering of the mind (Ibid., 41). Winnie in the novel observes: 'I think this kind of order is one of the central features of whiteness. We were all "civilised" into it' (quoted in Pavlich 2013, 41). Pavlich reads Winnie in the novel to be wanting a 'kind of death that simultaneously opens up to an "instinctual knowledge", […] an "emptying out of my life. My law of resistance emerged from the gradual emptying out of my life. Here was my law: embrace disruption, and then rage against order instead of longing for it"' (Pavlich 2013). Drawing on Derrida, Pavlich notes that reflective subjects problematizing their own lives 'welcome alternative futures and open up to what may yet come' (Ibid., 42). He notes aptly that such a dissociative critique is not preoccupied with 'specific reflections on limits, immediate calculations of injustice, or even the disordering of an order' (Id.). Order and dissociation remain as 'permanent possibilities', neither of them is 'fixed as a state or a law that cannot be undone' (Id.).

The aim of this section was to draw on the writing of Antaki and Pavlich as examples of views that provide alternatives to the pervasiveness of formation,

5 See *Waiting for the Barbarians* (1980) and *Disgrace* (1999).

settlement and transformation as bildung. As recalled above the main reading of the life of Nelson Mandela 'fits' this story, although we should heed that this is a constructed (also self-constructed) story, and that there are of course versions that could trouble this one. The life of Winnie could be seen as one that challenges the notion of a bridge crossed in a linear fashion or a book in the guise of a simple coming of age story. Disassociation seems to be an apt metaphor for her life. Thinking about where South Africa and, in particular, South African law and jurisprudence find themselves 21 years after the first democratic elections is a complex matter and one should be careful not to come to any quick conclusions or to make grand statements.

5. Concluding remarks on interconnectedness and the story of a stork

The lives of Nelson Mandela and Winnie Madikizela-Mandela have been described as reflecting 'both trauma and transformation' (Munro 2014, 109). This description is apt also for the becoming of a post-1994 nation and, for my purposes, jurisprudence. By reflecting on the becoming of a post-1994 jurisprudence through the lives of these two figures I want to underscore something about the ambiguity, the contingency and ever-changing nature of law and jurisprudence in these times. I want to conclude with reference to three suggestions: Firstly interconnectedness/relationality as raised by Ndebele and Krog in their reflection on Winnie. I draw briefly on the notion of a relational approach to law (Nedelsky 2011). Secondly, I turn to a new work by Antjie Krog in which she strives to accomplish a kind of interconnectedness by way of language. I read this work in light of what Pavlich calls a dissociative grammar. I end with Adriana Cavarero's engagement with a story told by Karen Blixen as a story of groundless formation, as it were.

Jennifer Nedelsky has developed a relational approach to law and rights based on a relational theory of self and autonomy. She starts off her book that brings together her work on relationality and law by stating the centrality of relationships to people's lives (Nedelsky 2011, 3). Relationships, for her, are at the heart of who we are, what we can do or not do, what we value, suffer, and what we are able to enjoy (Id.). Her project is to show how relationships are central to law. Nedelsky's context is the Anglo-American one where human beings are seen as 'essentially separate' from one another. She argues that her project aims at two levels, firstly to bring about a shift that could make relationship more central to law and political practice; but secondly a shift that is more radical and fundamental in the way people see the world. Her argument is that the Anglo-American conception of law is founded on liberal conceptions of an autonomous self that she regards as 'faulty' (Ibid., 5). Her aim is to suggest a restructuring of the way law, rights and jurisprudence understand autonomy, interdependence and relationship. She insists for example that autonomy is possible because of our connections to others; it is our relations with others that make autonomy possible (Ibid., 118). I find Nedelsky's work suggestive for thinking about a post-1994 jurisprudence in South Africa partly also because it

underscores for me the extent to which South African law and jurisprudence rely on the understanding that Nedelsky articulates as Anglo-American. One would have hoped that South Africa law and jurisprudence would have developed, at least in the past 21 years, in a direction that is much more reflective of local and indigenous ontology, epistemology and practice.[6]

By recalling the stories of Nelson and Winnie it is the story of Winnie, as reflected on by Ndebele and Krog that underscores interconnectedness and relationality. The version of Nelson Mandela's life story, as bildung, as coming of age reflects in a way a story of an autonomous self who managed to transcend challenges and obstacles. Nedelsky refers to Nelson Mandela as an example of someone who internalised autonomy to such an extent that he was able to sustain his capacity for autonomy whilst being in prison. For Krog we can make sense of Winnie only to the extent that we interpret her actions and life as one that is interconnected to others. As we've seen, Winnie's life—and to follow the line of argument, her life as one of interconnection and relation—is not an idealised version at all. Nedelsky also makes it clear that relations are not necessarily 'benign' and that they can be bad and destructive (Nedelsky 2011, 32). However, this does not eschew the ontology of interconnection.

In the volume titled *Synapse* (2014), Krog pursues the theme of co-responsibility, the relation between self and other, co-existence, and also conscience. The Afrikaans title *Medewete*, meaning 'to know with others', draws attention also to what it means to know, to know with others, to have a shared knowledge (Taljaard 2014). In an interview Krog explains that the volume was profoundly influenced by German poet Paul Celan (Esterhuizen 2014). She focused on techniques employed by him to 'break language in the hope of finding something humane in which he could live'. He innovated many neologisms. Krog refers to these as a type of word-knot, to read it as causing a kind of suffocation that urges one's attention, that forces one to try to comprehend, to start something new before you merely continue (Id.). Krog observes that one translates Celan in German whilst reading him in German. 'Translation emerges as an extension and radicalization of conditions inherent in his act of writing, as also in the act of reading him […] nativity is itself alien to Celan. His work never resides fully or comfortably in any native tongue' (Id.). For

6 Douzinas and Gearey's invocation of the social bond, their notion of 'a communism of the heart' that underscores their understanding of a general jurisprudence, a jurisprudence that is concerned not only with law's consciousness but also law's conscience (see Douzinas and Gearey 2005), has not been prevalent in post-1994 South African law and jurisprudence. There have been voices calling for the recognition and development of the indigenous value of Ubuntu, that a person is a person through other persons, in South African law. A number of court cases have focused on the value of Ubuntu in the context of socio-economic rights, defamation and most famously finding capital punishment unconstitutional. Drucilla Cornell has convened a project on Ubuntu since 2003 and has done a lot to insist on the importance of developing a notion of constitutionalism that is grounded in Ubuntu (Cornell 2012). Ubuntu, however, is also contested in the South African context and it has been criticised from multiple perspectives. One voice to be noted here is the view of Magobe Ramose (1999 & 2001) who has consistently argued that the African value of Ubuntu is not to be reconciled with the terms in which the South African settlement and adoption of constitutionalism have taken place.

Krog Celan sounds non-conventional, exactly because he uses techniques to cut through language as way to becoming human. She connects his work with that of Levinas in his reliance on the eye that calls the self to become human. Krog exposes the difference between African and European philosophy in the sense that, in the former, the 'you' and the 'I' are multiple and always already interconnected. This volume, on the one hand, strives towards interconnectedness, but, at the same time, is also brutally honest about the impossibility of such interconnection, particularly in a country such as South Africa.

In a segment of the volume titled 'Servants talk', the poet succumbs to the inability of the imagination to overcome the deep differences in South African society (Viljoen 2014). On one page we find firstly a conversation between a husband and wife about their 'servant', secondly conversations between the 'servant' and her family in Xhosa which is translated in a third section in English. We see here that, despite her attempts to overcome the deep cleavages in South African society, the poet is thwarted. This relates for me to Pavlich's notion of disassociation and his search for a dissociative grammar of critique discussed above. Pavlich argues that the recognition of contingency and disruption, the impossibility of inter-connection could invite stronger connections, 'a dissociative critique may disrupt, but that disruption also reorders by installing new grammars and meanings' (Pavlich 2013, 42). Pavlich keeps the ideal of justice alive in the sense that I want to think about the possibility of justice through an unconventional figure like Winnie Madikizela. Winnie's story is one of contingency, equivocation and rupture that open possibilities for a critical jurisprudence. This does not entail a nihilist view. Pavlich, following Adorno states that 'critique is not simply a matter of resisting for the sake of resisting; it is intimately tied to democracy and the never-ending process of thwarting totalitarian socio-political and legal formations' (Ibid., 45).

Should the life story of Winnie Mandela be read only as rupture? I want to conclude with Adriana Cavarero's reflection on the following story told by Karen Blixen:

> A man, who lived by a pond, was awakened one night by a great noise. He went out into the night and headed for the pond, but in the darkness, running up and down, back and forth, guided only by the noise, he stumbled and fell repeatedly. At last, he found a leak in the dike, from which water and fish were escaping. He set to work plugging the leak and only when he had finished went back to bed. The next morning, looking out of the window, he saw with surprise that his footprints had traced the figure of a stork on the ground. (Cavarero 2000, 1.)

Cavarero responds to the story by asking if one will be able to see a stork at the end of one's life—is there a design that has a meaning to be recognised? Following Hannah Arendt, Cavarero insists on the importance of *who* someone is rather than *what* someone is (Ibid., 2). *Who* someone is can only be revealed by stories. The tendency in philosophy and, of course, law is to give prominence to the *what* rather than the *who*. A jurisprudence that strives to be attentive to the who, might be open to

the possibility of interconnectedness and relations. As Cavarero states, the extent to which a design, meaning could be recognised is not something than can be foreseen, projected or controlled. The man in the story did not intend anything more than to find the reason for the noise and fix it—the design, meaning at the end, the trace of a stork, happened without any preconceived plan, design or project. What possibilities may this hold for the contemplation of a post-1994 jurisprudence? What is envisioned is a jurisprudence that does not follow a preconceived plan or design, one of bildung, or progress but rather one that is open to contingency, disruption and equivocation. By being attentive to the story (authored or narrated) to *who* someone is, there is a possibility of meaning to come to the fore, for interconnection and relationality to be recognised. The inevitable failure of the latter in itself could be a way of connecting and disclosing meanings. As Pavlich notes 'dissociative critique's promise is to pursue a different life in the name of such noble—if never fully calculable—ideals as justice, equality and democratic patterns of association' (Pavlich 2013, 45).

Bibliography

Ackermann, Laurie: 'The Legal Nature of the South African Constitutional Revolution'. 4 *New Zealand Review* (2004) 633-679.

Antaki, Mark: 'From the Bridge to the Book: An Examination of South Africa's Transformative Constitutionalism's Neglected Metaphor'. In Karin van Marle and Stewart Motha (eds): *Genres of Critique. Law, Aesthetics and Liminality*. Stellenbosch, Sun Press 2013, 49-74.

Arendt, Hannah: *Between Past and Future. Eight Exercises in Political Thought*. Penguin Books, New York 1961.

Barnard, Rita: 'Introduction'. In Rita Barnard (ed): *The Cambridge Companion to Nelson Mandela*. Cambridge University Press, New York 2014, 1-28.

Blixen, Karin: *Out of Africa*. Random House, New York, 1938.

Cavarero, Adriana: *Relating Narratives, Storytelling and Selfhood*. Routledge, London 2000.

Cornell, Drucilla: 'Bridging the Span Toward Justice: Laurie Ackermann and the Ongoing Architectonic of Dignity Jurisprudence'. In Jaco Barnard-Naude, Drucilla Cornell and Francois du Bois (eds): *Dignity, Freedom and the Post-Apartheid Legal Order*. Juta, Cape Town 2008, 18-46.

Cornell, Drucilla & Muvangua, Nyoko: *Ubuntu and the Law. African Ideals and Post-Apartheid Jurisprudence*. Fordham Press, New York 2012.

Deleuze G, Guattari F, Brinkley R 'What is a minor literature?' 11 *Mississippi Review* (1983) 13-33 <http://www.jstor.org/stable/20133921> (accessed 21/08/2009).

Deleuze, Giles: *Negotiations. 1972-1990.* Columbia University Press, New York 1995.

Derrida, Jacques: 'The Laws of Reflection: Nelson Mandela, in Admiration'. In Jacques Derrida and Mustapha Tlili: *For Nelson Mandela*. Seaver Books, New York 1986.

Douzinas, Costas: *The End of Human Rights*. Hart Publishing, Oxford 2000.

Douzinas, Costas and Adam Gearey: *Critical Jurisprudence. The Political Philosophy of Justice*. Hart Publishing, Oxford 2005.

Douzinas, Costas: 'A Short History of the British Critical Legal Conference or, The Responsibility of the Critic'. 25 *Law and Critique* (2014) 187-198.

Du Plessis, Lourens: 'The South African Constitution as Memory and Promise'. 11 *Stellenbosch Law Review* (2000) 385-394.

Du Plessis, Lourens: 'The South African Constitution as Monument and Memorial, and the Commemoration of the Dead'. In R Christensen & B Pieroth (eds): *Rechtstheorie in rechtspraktischer Absicht. Freundesgabe zum 70. Geburtstag von Friedrich Müller*. Duncker & Humblot, Berlin 2008, 189-205.

Du Preez-Bezdrob, Anné Maria: *Winnie Mandela. A Life*. Zebra Press, Cape Town 2003.

Esterhuizen, Louis: 'Die verweerde liggaam vertaal haar ontologie. Antjie Krog gesels met Louis Esterhuizen oor haar nuutste bundel, *Mede-wete*' available at <versindaba.co.za/tag/onderhoud-met-antjie-krog/> (accessed 10 June 2015)

Goodrich, Peter: *Law in the Courts of Love. Literature and Other Minor Jurisprudences*. Routledge, New York 1996.

Hyslop, John: 'Ghandi, Mandela and the African Modern'. In Sarah Nuttal & Achille Mbembe (eds): *Johannesburg. The Elusive Metropolis*. Wits University Press, Johannesburg 2008.

Klare, Karl: 'Legal Culture and Transformative Constitutionalism'. 14 *South African Journal on Human Rights* (1998) 146-188.

Krog, Antjie: *Begging to Be Black*. Random House, Cape Town 2009.

Krog, Antjie: 'What the Hell is Penelope Doing in Winnie's Story?' 36 *English in Africa* (2009) 55-60.

Krog, Antjie: *Synapse*. Human & Rousseau, Cape Town 2014.

Le Roux, Wessel: 'The Aesthetic Turn in the Post-Apartheid Constitutional Rights Discourse'. 1 *Journal for South African Law* (2006) 101-120.

Madikizela-Mandela, Winnie: *491 days. Prisoner number 1323/ 69*. Picador Africa, Johannesburg 2013.

Mamdani, Mahmood: *When Does Reconciliation Turn into a Denial of Justice?* Human Sciences Research Council, Pretoria 1998.

Mandela, Nelson: *Long Walk to Freedom. The Autobiography of Nelson Mandela*. Macdonald Purnell, Randburg 1994.

Markel, Patchen: *Bound by Recognition*. Princeton University Press, Princeton 2003.

More, Magobo: 'Albert Luthuli, Steve Biko, and Nelson Mandela: The Philosophical Basis of Their Thought and Practice.' In Wiredu, K. (ed): *A companion to African Philosophy*. Blackwell Publishing, London 2004, 207-215.

Motha, Stewart: '"Begging to Be Black": Liminality and Critique in Post-Apartheid South Africa'. 27 *Theory, Culture & Society* (2010) 285-305.

Munro, Brenna: 'Nelson, Winnie and the Politics of Gender'. In Rita Barnard (ed): *The Cambridge Companion to Nelson Mandela*. Cambridge University Press, New York 2014, 92-114.

Mureinik, Etienne: 'A Bridge to Where? Introducing the Interim Bill of Rights'. 10 *South African Journal on Human Rights* (1994) 31-48.

Ndebele, Njabulo: *The Cry of Winnie Mandela.* Ayebia, Oxford 2003.

Ndebele, Njabulo: *Fine Lines From the Box*. Umuzi, Roggebaai 2007.

Nedelsky, Jennifer: *Law's Relations. A Relational Theory of Self, Autonomy and Law*. Oxford University Press, Oxford 2011.

Nuttal, Sarah & Mbembe, Achille (eds): *Johannesburg. The Elusive Metropolis*. Wits University Press, Johannesburg 2008.

Pavlich, George: 'Dissociative Grammar of Constitutional Discourse?' In Karin van Marle & Stewart Motha (eds): *Genres of Critique. Law, Aesthetics and Liminality*. Sun Press, Stellenbosch 2013, 31-48.

Ramose, Magobe: *African Philosophy Through Ubuntu*. Mond Books Publishers, Harare 1999.

Ramose, Magobe: 'An African perspective on Justice and Race' 2001, polyog <http://them.polyog.org/3/frm-en.htm> (visited on 20 April 2015).

Rose, Gillian: *The Broken Middle.* Blackwell, Oxford 1992.

Roux, Daniel: 'Mandela Writing/Writing Mandela.' In Rita Barnard (ed): *The Cambridge Companion to Nelson Mandela*. Cambridge University Press, New York 2014, 205-223.

Scott, David: *Conscripts of Modernity. The Tragedy of Colonial Enlightenment*. Duke University Press, Durham 2005.

Sitze, Adam: 'Mandela and the Law.' In Rita Barnard (ed): *The Cambridge Companion to Nelson Mandela*. Cambridge University Press, New York 2014, 134-161.

Slaughter, Joseph: *Human Rights Inc: The World Novel, Narrative Form, and International Law*. Fordham University Press, New York 2007.

Snyman, Johan: 'Interpretation and the Politics of Memory'. *Acta Juridica* (1998) 312-337.

Taljaard, Marlies: 'Mede-wete deur Antjie Krog'. Available on http://versindaba.co.za/2014/12/08/resensie-mede-wete-antjie-krog/ (visited on 31 March 2015).

Van der Walt, André: 'Dancing with Codes: Protecting, Developing and Deconstructing Property Rights in a Constitutional State'. 118 *South African Law Journal* (2001) 258-311.

Van Marle, Karin & Stewart Motha (eds): *Genres of Critique. Law, Aesthetics and Liminality* Stellenbosch, Sun Press 2013.

Viljoen, Louise: 'Baanbrekend, nuut vir Krog en taal'. Available on http://www.netwerk24.com/vermaak/2014-12-12-baanbrekend-nuut-vir-krog-en-taal (visited on 20 April 2015).

On Close Reading the Treaty of Waitangi: An Encounter with Joseph Vining

Richard Dawson*

> *People who vocalize their reading, who let it register on the ear and not simply on the eye, are apt to be more than ordinarily sensitive to the fantastic and baffling variability of sounds in any sentence or phrase, and of how this precludes their arriving at any sure sense of meaning.*
>
> Richard Poirier[1]

In 1839, Lord Normanby composed treaty instructions for Captain William Hobson, expressing a desire to 'govern [. . .] New Zealand [. . .] as a part of the dominion of Great Britain', conditional on 'the free and intelligent consent of the natives' (Normanby 1839, 38). An attitude of cultural superiority suggested that the 'intelligent consent' would lack depth. Normanby remarked, for example, that 'their ignorance [. . .] of the technical terms [. . .] may enhance their aversion to an arrangement of which they may be unable to comprehend the exact meaning' (Ibid.). Also, he used literacy and literature as a standard of civilized as contrasted with primitive living:

> The establishment of schools for the education of the aborigines in the elements of literature, will be another object of your solicitude; and until they can be brought within the pale of civilized life, and trained to the adoption of its habits, they must be carefully defended in the observance of their own customs, so far as these are compatible with the universal maxims of humanity and morals. (Ibid., 40.)

Normanby delineated the British as the carriers of 'civilized life' who will show 'the aborigines' how to properly order the world. In his us/them world, 'they' who lacked an 'education [. . .] in the elements of literature' were inferiors with much to learn.

* Visiting Scholar, Mercer Law School, Mercer University.

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1 Poirier 1992, 176.

While Normanby expected the indigenes to be positively changed as a result of their encounter with the British, there was no indication that he expected any kind of reciprocal change. Given his attitude of cultural superiority, it may have been beyond his imagination to consider asking what the literates could learn from an oral-aural culture—a learning that could modify, for example, his sense of 'the elements of literature'. He may well have had prejudices relating to literacy and literature that warranted a challenge. It would turn out that when engaging with practices of literacy and literature, the indigenes retained certain habits. A century after Hobson arrived at Waitangi and pursued 'the free and intelligent consent of the natives', the Maori scholar and lawyer Sir Apirana Ngata remarked:

> Reading and writing! A miracle in combination, the greatest inventions of civilization! [. . .] But here the reader of these few comments should be introduced to a feature of early Maori society, one which persists to this day. The people preferred to hear the matter, whether written or printed, read to them. [. . .] [I]t was closer than *mute transference* through the *eye* to what they had been accustomed to; it was nearer to the old-time narrative of adept raconteurs, or of poetical and priestly reciters. More than that, the genius of the race *preferred education through the ear*, conveyed by artists in *intonation* and *gesticulation*. (Ngata 1940, 48-49, emphasis added.)

We might wonder what might have happened had Normanby's instructions recommended exploring the possibilities of 'education through the ear' for the colonists. What might be the significance of the 'eye'/'ear' distinction when reading the Waitangi treaty? If an eye-reader and an ear-reader meet to read the treaty, they might consider asking: '*What* is it precisely that we are reading?' An eye-reader may point to a *document*, from which to get the meaning by a brief *look*. An ear-reader, however, may imagine that the document is *mute* fragment of an *aural/oral event*, in which people are speaking to each other and trying to establish shared meanings. (Here we could connect to the metaphor of writing as shadow in Plato's *Phaedrus*.[2]) An attempt to vocalize their readings may lead them to question the faithfulness of a brief look.

To whom might we turn for help with ear-reading in a legal context? Joseph Vining has offered a conception of law as an aural/oral activity. I began reading him when thinking about 'standing'—about getting into court to be given a hearing. My inquiry began with this specific question: Should Maori have treaty-based 'standing' to challenge unjust legislation passed by a Pakeha (European) majority? From that question came this general one: What is at stake in the question of standing? Vining's first book, *Legal Identity*, has much to say about that question. In one section, he connects legal life to seemingly remote life—'an octopus, which builds a cave for itself on the ocean floor':

2 After Socrates complained that 'written words [. . .] maintain a solemn silence [. . .] if you ask them a question', Phaedrus wondered whether 'written speech might fairly be called a kind of shadow' of 'living and animate speech' (Plato 1973, 275-276).

> [O]nce a case is formed only certain facts, certain laws, certain consequences, certain persons are treated as relevant, *except* insofar as the court chooses to break out and consider the relevance of other laws, effects, or persons. Inside the self-constructed home everything does not depend on everything else and entities do not dissolve conceptually into some other entity or some large unity. The court can swim out into the great sea around and dart back when frightened by its dark vastness. But when considering standing and jurisdiction the case is not yet formed and the legal mind has no home. Fear may make it too difficult to admit, except by allusion, that one is swimming in the sea and that one's behavior is a reaction to it. Denial is a normal defense of the human mind against great fear; the legal mind is not peculiar in this regard. (Vining 1978, 94.)

Vining's will to connect law to potentially 'everything else' may be read as an attempt to 'break out' of narrow boundaries in conventional talk about 'the legal mind'—an attempt that may evoke the 'fear' he mentions. Those who insist that we should keep law separate from the rest of life might question the value of analogical reasoning about law. On hearing the octopus analogy, a colleague of Vining's imagined a 'disaster': 'One will end by reading poetry under a palm tree' (Ibid.). Resisting the imagined slippery slope (and any suggestion that poetry is beyond the pale of legal discourse) may awaken us to defective analogies by which we live. An awakening could be liberating, especially for those who desire to reconstitute the 'home' of 'the legal mind', a home that takes justice seriously.

Vining has been described as 'among the more [. . .] elusive [. . .] legal thinkers in recent decades' (Smith 2006, 1306). The elusiveness comes 'not [. . .] from ponderous prose or jargonistic terminology' but from our habitual modes of thought and expression: 'It may be that readers are simply not accustomed to a legal author whose sensibility and message seem more characteristic of a poet than of either a traditional doctrinal technician or of a law-and-whatever type' (Ibid., 1306-1307). In his third book, *From Newton's Sleep* (1995), Vining offers to render the ordinary activity of reading productively strange. He does so partly by giving attention to different ways of reading, one of which he calls 'close reading'. He begins to give life to the term in this passage:

> The ordinary legal text stands somewhere between piece of journalism and sacred text or studied work of art. Legal method holds it there.
>
> Journalism does not last. It is not read closely, reread—there is hardly time to do so. It is replaced. It cannot be reread, read closely, if it does not last, and if it is not reread, it does not last. It disappears.
>
> The legal text, like a piece of journalism, also is replaced. But it is read closely in course of writing the new statement of law that replaces it. Legal method, close reading, makes a legal text last at least long enough to be read closely, and pulling back from the rush of journalism, and looking to the studied work of art, demands devotion of the time and care to writing that will support close reading. (Vining 1995, 6.)

From Newton's Sleep creates for its reader an in-'between' place that reveals contrasts between different ways of reading. In doing so, the book offers a resource that can help us to reimagine what it means to 'read', especially for contributing—with 'care'—to a 'new statement of law'. Different ways of reading are different ways of life, and an awareness of this could equip us to, say, notice and resist destructively bureaucratic legal writing.[3]

We might hope that by attuning to Vining on 'close reading' we can contribute to a valuable conversation about the Waitangi treaty. A Vining reader may appreciate that we could do this by becoming equipped to, say: identify the existence of over-looked and under-heard ambiguity; make an unduly neglected voice more audible; and resist over-confident dispositions in talk about either the treaty's meaning or 'the law'. At the very least, we may detect and help reduce misunderstandings. More positively, we may enable deeper mutual understanding and a meaningful quest for justice.

Section I of this essay engages with parts of Vining's book *From Newton's Sleep* that are concerned with 'close reading'. While the engagement will include attending to what he says *about* the activity of close reading, it is vital to notice that the engagement takes the form of *participation in* the activity—rather than passively viewing descriptive statements. This is reading by immersion in a language, a reading experience that may noticeably transform the reader. The experience could include culture shock, a disorienting process in which the familiar becomes strange, leading to some basic questions, such as: 'Why have I assumed that the world is like this rather than that? Why have I not asked that "why" question before?' Section II extends Vining's line of inquiry to the treaty of Waitangi. Section III concludes the essay. As a whole, a central aim is to identify and transcend (from 'trans' and 'scendo', 'to climb across') some dehumanizing habits of thought and expression about both 'the treaty' and 'the legal'—with the aim of adopting richer habits.

1. 'Close Reading': Joseph Vining

Vining's *From Newton's Sleep* has eight sections and a vast collection of subsections. One reviewer remarked: 'I despair of giving an accurate account of the complex whole, but I shall try my hand at putting some of the parts together as the author invites readers to do' (Ball 1996, 2017). The reviewer appreciated that meaning is not 'in' the text but in the experiential process of 'putting some of the parts together' and creating out of them a new whole. This brings to mind the quandary of the 'hermeneutic spiral' (named after the movements of the messenger-god Hermes): in order to understand the whole of a text one must have a prior understanding of its parts, but in order to understand each part one must have a prior understanding of the whole. Making sense of a text involves a spiraling process of moving between understanding the parts and the whole. An awareness of an inevitably incomplete

3 Vining's *The Authoritative and the Authoritarian* (1986) is written out of a concern with bureaucratic writing.

understanding can make a space for endless learning.

A basic question for a legal philosopher is this: What is the nature of law? Many responses to that question are 'abstract', in the sense that they draw away from particulars in pursuit of impersonal knowledge. At the outset of *From Newton's Sleep*, Vining indicates a dissent:

> Beginning with clear and distinct ideas, and building on them: how wrong that is, though 'objectivity' is conceived now to be based upon it. [. . .] Ideas, clear and distinct, are to be captured, tied down [. . .]—they do not themselves lead on to other ideas or beyond themselves, and they do not themselves lead one on. But the what of an idea [. . .] always escapes. It leads on, unfolds, is not captured, and cannot be made into a unit. [. . .] The whatness of an idea [. . .] is not separate from the person thinking. [. . .] The *love*, *fear*, and *envy* treated in psychology are a person's love, fear, and envy, and always escape [. . .] the definitions proposed to capture them so that those using and building on the definitions can [. . .] be seen not to be speaking or thinking about *love*, *fear*, or *envy*. (Vining 1995, 10.)

If we are reading Vining for the first time, we might be disposed to ask: What is the 'whatness of an idea'? A more 'person'-oriented re-reader might suggest this question instead: What does 'idea' mean to Vining and what is wrong about 'beginning with clear and distinct ideas'? Also: How might I talk about the meaning to Vining in a way that does not reproduce the language of 'ideas'? By way of a signpost: his resistance to a quest for 'clear and distinct ideas' is of significance for our sensorial economies. The word 'idea' is a visual metaphor, coming from the Latin *videre*, to see. The word 'define' is also a visual metaphor, coming from *definire*, a finish line. Sight can be a distancing sense, and the use of these visual metaphors can readily commit a user to imagining a mechanistic world of static and mute objects 'out there'. Such imagining may lead us to unduly neglect a 'person', a sonic metaphor, coming from *personare*, to sound through. A person's voice is a fleeting event that cannot be captured, and this can help us to remember that we inhabit an organic world of movement and shifting relationships. If we become more attuned to our sensorial economies, we might rehear the legal hearing and notice its possibilities for justly re-orienting human relationships. Lawyers and non-lawyers alike might wonder what could become of, say, the *sovereignty*, *property*, and *treaty* treated in the legal hearing. What could become of us when *re-sounding* these terms?

The tradition that seeks impersonal objectivity idealizes language as an instrument that can connect to reality in a way that is 'literal'—with meaning being independent of context. This tradition has sought to control metaphor, lest it poetically distort reality. The word 'metaphor' has Greek roots, coming from *meta* (across) and *phor* (carry). 'Metaphor' is a metaphor that suggests we are re-locating meaning, imagery that may mislead us to imagine 'meaning' to be an object that can be re-located. Vining offers a different imagery:

> Metaphor is not the use of the name of one thing for the name of something else. That would be a literalism once removed. In metaphor the word or pattern of words disattached from a previous object of understanding is not reattached to another previous object of understanding, but is used to express something new—or alive, which is the same—and that something new is meaning itself, the meaning of what is being said. Metaphor is the result actually of a *search for precision*, an attempt to speak the new which is in mind beyond language and of which language is only evidence. (Vining 1995, 89, emphasis added.)

After reading Vining, we may find that we pursue a more precise understanding of 'understanding', for want of a better metaphor. For Vining, metaphor need not be a mere figure of speech (in the commonly suggested ornamental sense); rather, he suggests is an essential part of an event that we call meaning, 'of which language is only evidence'. He can be read as giving the meaning of 'meaning itself' some poetic 'precision', which may sound oxymoronic to those who imagine the poetic to be 'beyond' the pale of reason. He may be read as trying to 'speak the new' about what can be involved when a person tries to 'speak the new'.

In the act of unsettling seemingly clear distinctions (such as literal/figurative), a speaker contributes to the making of a language. That which we call language is not an object that can be captured, tied down. With a desire to de-reify language, we might consider using the verb 'to language'. The noun 'language' can be deceptive, possibly leading us to reify 'meaning'. Concerning acts of language and meaning:

> There is always an enormous *difficulty*, an enormous *struggle* in law particularly, to recall and keep in mind that language is *evidence of meaning*, not *meaning itself*. The struggle comes from the *thirst to know*, for *closure*, that can always be slaked for the moment by *illusion*, but at a *cost* and often a terrible cost. The difficulty, the struggle, is the *difficulty of listening*, and it is a *person* one listens to—only a person, whom one approaches in *good faith*, which includes faith that there is a person to be heard. Axiomatic elimination of the person, at least from *conscious presence* in the reasoning mind, is a way of cutting short the struggle, stopping the work of listening. (Ibid., 239, emphasis added.)

> There is always the temptation in law to approach a statute as if its words had *meanings in themselves and by themselves*—the *authoritarianism* sometimes shown by those devoted the maintaining the supremacy of democratic politics and legislative authority. (Ibid., 240, emphasis added.)

What does Vining mean by 'evidence of meaning', not 'meaning itself'? Our answers will be influenced by our 'struggle' to make sense of what he means by 'authoritarianism', 'difficulty', 'thirst to know', 'closure', 'illusion', 'cost', 'listening', 'person', 'good faith', and so on. For Vining, a word is never alone but inhabits a complex network of associated meanings. (Simply declaring what he means with person-less dictionary-style definitions would be a performance of the 'authoritarianism' that he seeks to resist.) When encountering these familiar words, his reader may find

that the familiar becomes unfamiliar—that the words have lost their ordinary or conventional 'meaning'. It may be that an experience of disorientation is an essential part of a 'struggle' to listen to a person in 'good faith'. The experience may help us inhabit a place where we speak and listen with another person with fuller 'conscious' (from 'con' and 'scire', 'to know together') awareness.

* * *

'Lawyers listen for the live meaning of the whole of what they read' (Vining 1995, 156). The whole, for Vining, is more that the sum of its parts. The activity that Vining calls 'close reading' does not lend itself to a dictionary-style definition, for it calls for creative involvement in a process that directs a reader's attention both outward and inward:

> In close reading, one has to *imagine* another using a word and imagine *why* another used that word. Reading is a constant calling upon the *imagination*. There is a running *question* 'why' in the reading mind, asked over and over.
>
> But the question 'why' is not asked out of ignorance, doubt, or challenge. And it is answered by oneself. It is actually hardly a question at all, more the inchoate and preliminary form of identification, of *placing oneself with the writer*, heads together as it were, and looking at the choosing and choice of the word through his or her eyes. (Ibid., 70, emphasis added.)

Let us check any inclination to look at the plain meaning of those words from Vining. Instead, let us read as the author and *imagine* using the words and imagining why they were used. We may be confident that Vining would have his reader take 'imagination' seriously, which would include transcending the influential tradition that sets imagination and reason as opposites. If we can imaginatively imagine him using the word 'imagination', we may hope that we will be fittingly 'placing' ourselves 'with' him. Also, we may do well to *question* our questions (or lack of them) and to repeatedly ask the 'running question "why"'. If we can place ourselves *with* him, we may notice sights and sounds and questions that we would have otherwise missed.

As Vining's readers read *From Newton's Sleep* the first time through, they may notice that their answers to the 'running question "why"' change. A gap between expectations and experience—the material of surprise and disorientation—may stimulate new questions, which can form a new standpoint for rereading. Vining offers this imagery of the activity of rereading:

> [W]hat one determines to be the meaning of the author, and therefore takes away from the text, is very much a product of one's own work. [. . .] If what we take away changes as we go back to the text again and again, the reason may be that there has been a change in us, our resources, our understanding of life. That we have not discovered its final meaning (because we discover that *it means something new to us each time*, and have no reason to think that readings have come to an end) is as much a tribute to us as it is an indication of the difficulty of the author. It is *a sign of adequacy in us*, not inadequacy. The meaning we

> take away from the text becomes more easily seen to be attributable to us as well as to the author. (Vining 1995, 81, emphasis added.)

How might we treat that passage with the hope of achieving 'a sign of adequacy in us'? We may do well to read it 'again and again' and hope for 'a change in us'. On each rereading we might ask ourselves what we can contribute (with Vining) to the joint 'product' ('the meaning') of the text. Habitually asking that question as a reader of texts will help us to resist any temptation to imagine that we have captured a text's 'final meaning'.

When we read heads together with the author, we may become more sensitive to our inescapable presence as readers. Drawing attention to the collaborative nature of reading, Vining invites his readers to attend to the images by which they might live (perhaps without noticing them) when reading:

> Give up the notion that an author's meaning is apart from our creation of it. Shy away from phrases such as 'recovering' an author's meaning from a text. 'Recreate' would be a better word than 'recover' in describing what we do. (Ibid., 87.)

How might we judge Vining's suggested approach to talking about 'meaning'? Close reading, it seems tempting to say, is a self-'creation' process. Not every 'creation' will be equally faithful to an author or text. How can we distinguish better from worse and how can this help with reading the Waitangi treaty?

From Newton's Sleep lends itself as a resource for thought and expression about our economies of attention. Vining invites his reader to notice acts of noticing. In order to notice noticing we need to pay attention to acts with language. Turning to the life of the lawyer:

> There are all manner of words or phrases in law that point to attention, to embracing, and to the within as part of the *phenomenon of authority*—or respect—or true deference. Many such characterizing words or phrases invoke 'faith', which is a notion in some academic trouble. 'In good faith' is one of them, peppering statute, rule, opinion, doctrine, and discourse in corporate and securities, constitutional, civil rights, and criminal law. 'Bad faith' [. . .] and 'fidelity' and 'faithfulness' cluster about *the standard phrase*. And the words 'real', 'actual', 'genuine', 'substance', 'spirit' as legal terms have a similar function, referring as they do to the object of faith. Lawyers, legislators, and judges do not bracket them when using them. They are used rather *unselfconsciously*, and they are used pivotally, which should make law an object of *amazement* to the modern and postmodern mentality. (Ibid., 110, emphasis added.)

Here and elsewhere Vining seeks to render the familiar ('the standard phrase') unfamiliar by directing attention to it. When experiencing the familiar-to-unfamiliar transition, we may wonder about our lack of 'amazement' with legal language; with the fact that lawyers and judges use these words 'unselfconsciously' without 'bracketing' them. (Does the 'authority' of law get enacted in part by a lack of amazement?) The

experience of wonder commonly sparks a questioning spirit. What forces may have been behind our old patterns of noticing? What questions does Vining ask himself when he reads materials from the law? Why does he render the familiar unfamiliar? Does he seek to take the 'un' out of 'unselfconsciously'?

Making sense of an experience of the familiar-to-unfamiliar transition calls for rereading that which was familiar. To read one's rereading is an act of placing oneself with oneself and with the writer, heads together as it were. How might one describe one's motives for doing so? What terms might be fitting for talking about our motives for engaging in close reading?

> The very act of close reading presumes or indicates that the *meaning* of *another* person makes a difference. [. . .] Of course one who is truly interested in another's thought may be truly *interested* because he wants to know what he him*self* believes. It is his *own mind* in which he is ultimately interested. But if he reads hastily and sloppily and does not read closely and carefully when he has time to do so, he does not *care* what the *other* actually thinks. What the other actually thinks does not make a difference to him. Perhaps then he does not care what he him*self* actually believes. (Vining 1995, 138, emphasis added.)

'Meaning' for Vining is an experiential process that can change who we are, including our motives. In a process-oriented spirit: Who are we becoming in the process of reading? Or: Why read at all? Some economists might be disposed to respond to that last question by assuming persons are 'self-interested', in the sense of seeking to 'maximize their utility'. Vining offers the possibility of a different sense, namely that of being 'interested' in the kind of 'self' that the other is and that one is becoming—with reference to character virtues such as 'caring' for oneself and others. And this requires careful reading of texts in contrast to hasty or sloppy reading (without care for the other). With a will to resist economic or legalistic varieties of imperialism, we surely should care about what we ourselves actually believe about the value of maintaining the distinction between care and self-interest.

Vining seeks 'to find a place in thought for the real existence of caring mind' (Ibid., 180). Caring involves paying real attention to oneself and others. In the context of reading, such attention involves rereading. Turning again to law:

> Rereading, or reading anew, which is done in *each* legal argument and *each* case and *each* time a lawyer turns to the texts, involves seeing words or phrases that *were not seen before* [. . .], emphasizing words or phrases or sentences or structures that were not *emphasized* before [. . .], moving aspects of the object in or out of *attention*. The question in law is always what one emphasizes, *concentrates* upon. Any written text is open to this, and all music. A reading one year is rarely the same as reading another year. (Ibid., 219, emphasis added.)

A question in reading Vining is what one concentrates upon. He invites his readers to attend to 'the question' of 'attention' and its place in that which we call 'legal' argument. It would seem that to pay attention to one's own shifts of attention—to

read one's rereading—would be an important way of treating oneself as a person. And all this is at stake in each legal argument, each case, and each time a lawyer turns to texts. The shifts offer a resource for a story about who one is becoming in and out of law's stories.

In an inquiry about the identity of lawyers, Vining has taken a theological turn. At one point, he imaginatively connects the legal imagination and the theological imagination:

> There is a terrible tension in what both lawyers and theologians *do*, given what tools and methods are put at their disposal for doing it. Always flickering in them is *the terror of responsibility in the face of the unknown*. Lawyers and theologians reach for the sovereign, look to the sovereign, speak for the sovereign, something or someone to pay serious attention to, or, to use the liturgical term, to praise. They turn to texts. But the texts to which they turn are selected and are old, necessarily from the past, requiring translation over time and between languages and places, year to year, decade to decade. Why do the words 'authentic' and 'legitimate' punctuate the history of law and the history of theology? They state the object of the work, of course, but their *repetition marks repeated doubt* and repeated challenge as the work goes on. (Vining 1995, 263-4, emphasis added.)

For Vining, both lawyers and theologians are concerned with the big questions of life, which involves confronting 'the unknown', including their own identity—what they 'do', who they are, and who they are becoming. In matters of ultimate authority, some un-'authentic' lawyers and theologians may be inclined to flee 'responsibility' by asserting, with an authoritarian tone, something like this: 'The sovereign is the sovereign and that is the end of it'. In reply, Vining might be inclined to attempt to take the essence (the invisible cultural force) out of the word 'sovereign' by, say, playfully remarking: 'You, who must be the real Sovereign, say "the sovereign is the sovereign is the sovereign is the sovereign is the sovereign is the sovereign..."'. With such 'repetition', the apparently known may become 'unknown', while the 'unknown' becomes known—or a known unknown. Alternatively, he might reply with a tricky question, such as: Should the sovereign have standing to define what the sovereign is? To whom could such a question be properly directed? The supra-sovereign sovereign? Concerning Waitaingi, what would it mean to use the word 'sovereignty' more self-consciously?

Vining's reader may readily feel that a key line of inquiry pursued in *From Newton's Sleep* is oriented toward addressing the limits of our languages, especially in matters relating to inexpressible yet real experience. At the end of his book, he offers a poem, 'Present Meaning', which is concerned with such limits. It ends:

> What we say—
> Always behind us,
> You, me,
> In the silence,

The present silence,
Existing beyond words,
Always beyond words,
In the clear silence,
The moving stillness—

What, we might ask after hearing 'moving stillness' as an oxymoron, is Vining saying about 'What we say'? Is he saying something about the unsayable? What is 'silence'? How might an ear-reader let 'it' register on the ear? We might wonder if Vining's turn to silence here is an attempt to make a space for his reader to begin a response to *From Newton's Sleep* as a whole. Does a sound close reading begin and end in a certain kind of 'silence'? If so, given the elusiveness of silence, it would seem that we are a very long way from the culture that values clear and distinct ideas, and building on them. This distance may help us to hear the sound of silence in the Waitangi treaty.

2. The treaty of Waitangi

2.1 Negotiations

At the conclusion of his treaty instructions to Captain Hobson, Lord Normanby remarked on their incompleteness. It was not possible to deal with every contingency in detail:

> Many questions have been unavoidably passed over in silence, and others have been adverted to in a brief and cursory manner, because I am fully impressed with the conviction, that in such an undertaking as that in which you are about to engage, much must be left to your own discretion, and many questions must occur which no foresight could anticipate or properly resolve before-hand. (Normanby 1839, 42.)

With his 'silence' and grant of 'discretion', Normanby was beginning a constitutional conversation that would be directed in part by new 'questions'. The Waitangi treaty would be another stage in the conversation. Whether he knew it or not, Hobson would pass over many questions in silence and leave much to the discretion of others. A close reading can help us tune in to the possibilities for others to ask questions and to join the conversation.

'On the 4th of February, about four o'clock p.m.', Rev'd Henry Williams wrote in a paper titled 'Early Recollections', 'Captain Hobson came to me with the Treaty of Waitangi in English, for me to translate into Maori, saying he would meet me in the morning at the House of the British Resident, Mr. Busby, when it must be read to the chiefs assembled at ten o'clock' (in Carleton 1948, 312). That time limit would seem to be a remarkably short for such an important and complex task! We might wonder about the image of meaning by which Hobson was living when he spoke with Williams. Perhaps governed by habits of thought associated with literacy,

was Hobson's sensorial economy visual-oriented? Did he imagine 'the Treaty' as a written document containing 'clear and distinct ideas'? Did he imagine a word as a visible object, a thing, rather than as an event? Was he, to echo Vining, disposed to approach the text *as if its words had meanings in themselves and by themselves*—and without relation with the *person* who does the reading/translating? He may have imagined translation as a mechanical conveying of meaning from one language to another. A markedly different image may have been apparent if, for instance, he had given Williams a week to work on the translation and encouragement to repeatedly address the question of meaning, so that he could *place himself*, *heads together*, *with* Hobson. Such encouragement would have made a place for close reading—for both Williams and Hobson. Hobson could have been given the opportunity to reread his own text and to place himself with himself, asking why he used this and that word.

What did the Waitangi transaction mean to Williams? How did he imagine meaning? Here are some fragments from his 'recollections':

> In this translation it was necessary to avoid all expressions of the English for which there was no expressive term in the Maori, preserving entire the spirit and tenor of the treaty . [. . .] In the midst of profound silence, I read the treaty to all assembled. I told all to listen with care, explaining clause by clause to the chiefs, giving them caution not to be in a hurry, but telling them that we, the missionaries, fully approved of the treaty; that it was an act of love towards them on the part of the Queen, who desired to secure them their property, rights and privileges; that this treaty was a fortress for them against any foreign power which might desire to take possession of their country.
>
> There was considerable excitement amongst the people, greatly increased by the irritating language of ill-disposed Europeans, stating to the chiefs in most insulting language that their country was gone. [. . .] Many came to us to speak upon this new state of affairs. We gave them but one version, explaining clause by clause, showing the advantage to them of being taken under the fostering care of the British Government, by which act they would become one people with the English in the suppression of wars and every lawless act; under one Sovereign, and one Law, human and divine.
>
> No chief raised any objection that he did not understand the treaty, though some held back under the influence of the Romish Bishop and his priests. (Normanby 1839, 312-315.)

How might we 'listen with care' to Williams? Why did he use the word 'love' when referring to the motives of 'the Queen'? Does he imagine that 'human' law is founded on 'divine' law and that a purpose of law to create the conditions in which 'love'—of God and of neighbor— flourishes? If so, is this purpose connected with 'the spirit and tenor of the treaty'? What did he mean by that phrase? Did he use it *unselfconsciously*? What relation did it have to the letter of the treaty (to use an ancient distinction)? Let me suggest that he was referring to that which he thought his 'explaining' left out (for

want of adequate language) and which nevertheless was significant. Perhaps sensitive to certain forms of 'silence' and how they impact on the meaning of what is said, he may have appreciated that something was lost in translation and that it was *beyond* expression to completely identify the 'something'. If so, it may have been valuable for him to say that there was a sense in which he himself did not *fully* 'understand' the treaty. Saying as much may have started an inclusive dialogue, perhaps with the 'ill-disposed Europeans' and 'the Romish Bishop', in which participants found themselves asking questions about their 'understanding' of what 'understandings' they shared. (The 'ill-disposed Europeans' may have imagined that the Article 1 sovereignty clause[4] clearly and distinctly functioned to authorize the appropriation of 'their country'.) Dialogue—from the Greek *dia logos*, 'across word'—can only happen when, among other conditions, the participants treat each other as persons (like 'us') and what we might call 'good faith' can overcome any fear of an unfamiliar world. Acts of dialogue could be a fitting occasion for Williams to re-use the word 'love'—a new context for us to make sense of what he may have meant by the word at Waitangi.

After the conclusion of the Waitangi meeting, British officials headed elsewhere to get 'intelligent consent' to the treaty. On 27 April 1840, officials and Te Rarawa leader Nopera Panakareao met at Kaitaia. In one account, John Johnson (the Colonial-Surgeon) noted that the officials 'endeavoured' to make the word 'sovereignty' 'intelligible' to Panakareao (in Belgrave 2005, 108). The following day, after the conclusion of the meeting, Johnson wrote:

> Nopera's speech was evidently that of a man of reflection and the elegant figure by which he expressed the word Sovereignty showed that he had ponder'd deeply on his conversation of the previous evening, nothing could be more beautiful or expressive than 'The Shadow of the Land is to the Queen, but the substance remains with us'. (Ibid., 109.)

How are we to read Panakareao's 'elegant figure' of speech about the shadow and the substance of the land? It seems that he has put the *whatness* of 'sovereignty' in question. Sir Apirana Ngata (from whom we heard in the introduction to this essay) read Panakareao as having 'combined the words of the first article with those of the second article' (Ngata 1922, 10)—the sovereignty and property provisions.[5] Was Panakareao reading the treaty by ear and *listening for the live meaning of the whole* (including the interaction of the clauses)? (If so, might his way of reading challenge an eye-reader who has a concern with clear and distinct ideas?) Is his figure a *creative* act of *poetic precision* in an attempt to *speak the new* and to understand the Waitangi event? I am unaware of any evidence to suggest that the British officials inquired

4 'The Chiefs [. . .] cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty . [. . .]'

5 The Article 2 property clause is: 'Her Majesty the Queen of England confirms and guarantees to the Chiefs [. . .] the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties. [. . .]'

into the meaning of the 'elegant figure'. Asking explorative questions—such as 'Why the metaphor of the shadow?'—about its meaning might have led to a creative *dialogue* about the meaning of the treaty, and perhaps about Panakareao's creativity. We might wonder if the British officials thought to put the question of meaning to him. If they did not think to ask, this may have been because they assumed that what Panakareao said was the same as what he (and they) meant. Such an assumption can conceal an opportunity for real *listening*.

2.2 Part-whole relationships

When a copy of Nopera Panakareao's speech reached England, Parliamentary-Under-Secretary Vernon Smith 'feared that the Maoris would discover that the [European] subjects of Queen Victoria had something more than the shadow' (in Wards 1968, 49). He failed to say more about the 'something more than the shadow'. His remark connects to claims that the 'illiterate' indigenes did not 'fully understand' the treaty, contrary to its epilogue. (The epilogue in the document refers to 'We the Chiefs' as 'having been made fully to understand the Provisions of the foregoing Treaty'.) In 1848, the Assistant-Secretary of the Aborigines Protection Society, Louis Chamerovzow, responded to the claims. The treaty document, he stressed, had more than one possible meaning. 'The ambiguity [. . .] was on the part of the British in not defining more clearly and unmistakably what they meant by Sovereignty'. Rejecting the claim 'that the New Zealanders were incapable of comprehending the nature and the importance of the Treaty', he quoted Panakareao:

> As to their appreciation of the term 'sovereignty' limited as it was by the second article of the Treaty, the explanation given by Nopera [. . .] is perhaps at once the most graphic, the most poetic, and the most logical. [. . .] [C]oming to the question of the sovereignty as asserted in antagonism with the second article, he said: 'The shadow of the land goes to Queen Victoria, but the substance remains with us'. [. . .] This speech is [. . .] an explanation of 'sovereignty' as the New Zealanders understood it [. . .] [and] an assertion of their title to the soil. (Chamerovzow 1848, 14.)

For Chamerovzow, the first article directly connects to the second article: the meaning of sovereignty is 'limited [. . .] by' the meaning of the property clause. How 'limited'? He passed over that question, and thus failed to open up basic questions about part-whole relationships when reading the treaty. In situations of discord over the meaning of 'title to the soil', the 'explanation given by Nopera' offers not a determinate answer but a resource for a dialogue undertaken in the hope of creating a workable harmony, of doing justice.

Panakareao's act of metaphor (the shadow-substance imagery) may be imagined as a movement in the 'hermeneutic spiral'. Making sense of a text, to repeat, involves a spiraling process of moving between understanding the parts and the whole. The emergence of new questions can stimulate new movements. Questions about roads would directly touch on the sovereignty-property relationship. In 1862, Attorney-

General Henry Sewell questioned the right of 'the Crown as Sovereign, by virtue of what is termed its Eminent Domain',[6] to make roads through 'Native Lands' (Sewell 1864, 39). The Colonial Secretary urged that 'policy, not less than justice, requires that the course of the Government should be regulated with a view to the expectations which the Maories have been allowed to base on the Treaty of Waitangi' (Ibid). Here the Secretary, perhaps unknowingly, was suggesting a *persons*-oriented rule of interpretation to which Chief Justice Marshall gave life in a case involving a United States-Cherokee treaty.[7] Sewell was familiar with that case and an earlier one involving the Cherokees. In 1863, he wrote to the Secretary identifying 'a pretty exact parallel' with 'the American Indians and their relations with the United States'. He quoted Marshall's opinion declaring the Cherokee to be a 'domestic dependent nation'. Then, perhaps feeling the *terror of responsibility in the face of the unknown*, he asked: 'Did the New-Zealanders any more than the American Indians, imagine that by placing themselves under the guardianship of the British Empire they forfeited their inherent rights to govern themselves according to their own usages, and to retain the ownership of their land?' Here Sewell *imaginatively places* himself with a possible 'placing', the material of close reading. He went on to connect to say:

> [T]he treaty of Waitangi expressly reserves to them their territorial rights. [. . .] [I]t is true they surrendered to the Queen the 'Kawanatanga'—the governorship—or sovereignty; but they did not understand that they thereby surrendered the right of self-government over their internal affairs. [. . .] The acknowledgment of sovereignty by the New-Zealander was the same in effect as in the case of the American Indians. It carried with it the exclusive right of pre-emption[8] over their lands, and the exclusion of interference of foreign nations. [. . .] [B]ut it could not authorise us to inflict on them, as ordinary citizens the penalties of laws which they never heard of, expressed in language of which they are ignorant. (Sewell 1864, 9.)

In a *search for precision*, Sewell gives meaning to the sovereignty clause by contemplating a similarity with a different situation. Re-reading the treaty of Waitangi in the echo of a reading of another treaty is an act of metaphor, which can *create new* meaning. 'Without a "right"' to modify the indigene 'right of self-government over their internal affairs', 'the Queen' may have had a less substantial (or more shadowy) existence in New Zealand than any Crown officials had imagined. (This talk of 'self-government' readily fits with the translation of the Article 2 property clause, by which the Queen agrees to the Chiefs to 'te tino rangatiratanga o o ratou wenua o

6 Eminent domain is commonly defined as the power to take (with compensation) property for public use.
7 *Worcester v. Georgia* 30 US (5 Pet.) 1 1831, 582. Marshall stated: 'The language used in treaties with the Indians should never be construed to their prejudice. [. . .] How the words of the treaty were understood by this unlettered people [. . .] should form the rule of construction'. For a discussion of the case, see Dawson 2001, chapter 2.
8 The 'exclusive right of pre-emption' here means the sole power to purchase indigene lands. On conflict over the meaning of pre-emption, see Dawson 2014, 233-234.

ratou kainga me o ratou taonga katoa.'[9]) Here new life can be given to Panakareao's shadow-substance imagery by connecting it to the 'domestic dependent nation' category of Chief Justice Marshall in *Worcester*.

2.3 The subjection of the tribes

Soon after the Waitangi negotiations, Captain Hobson contributed to hostilities between and within tribes over relative capacities to sell land. Disputants included Pororua of Ngapuhi and Panakareao of Te Rarawa. In 1988, the Waitangi Tribunal reported:

> Hobson [. . .] learnt [. . .] of the rivalry over the Oruru and Mangonui lands. The hostility was such that the settlers feared for their own safety and promptly told Hobson so. [. . .] [He] appears to have struck upon a solution of his own though he knew very little of the Maori mind. [. . .] It appears that on the spur of the moment he agreed to pay a nominal sum in exchange for Te Rarawa's claims to the whole of the disputed land. Far from easing the situation, the 'purchase' inflamed it. To Pororua the transaction was a treaty between Te Rarawa and the Crown in which the latter recognised a Te Rarawa right over Ngapuhi land. (Waitangi Tribunal 1988, 17-18.)

Perhaps having an attitude of cultural superiority that would serve as an obstacle to a conversational equality, Hobson set up a basic relational problem: with decision-making being unilateral ('a solution of his own') and arbitrary ('on the spur of the moment'), he became authoritarian. Those exposed to this arrangement might sometimes applaud a 'right' (or a 'treaty' 'transaction') that is 'recognised', but the exposure was a form of subjection to the extent that 'the Crown' could unilaterally and arbitrarily take away their right at a later moment.

Following Hobson's miss-steps, Panakareao reversed his elegant figure: 'The substance of the land goes to the Europeans, the shadow only will be our portion' (in Wards 1968, epigraph). The reversal could be read in various ways. He may have, for example, dramatically modified his image of the treaty, or he may have been inferring that Hobson was being unfaithful to the treaty. In 1856, just before he died, he called into question his acts of metaphor: 'What truly is a shadow? It is like death that the hand cannot hold' (in Mutu 1992, 17). Here he may have become aware that his original image of the treaty was open to some fruitful questioning. In questioning his metaphor, we might imagine that he is rereading both himself and the treaty. Perhaps he came to imagine an inadequacy in his earlier reading of the treaty. If so, such an imagining could be a sign of adequacy in him and inadequacy of the treaty.

* * *

9 In translation: 'the unqualified exercise of their chieftainship over their lands over their villages and over their treasures all' (Kawharu 1989, 319-320).

In the 1860s, a settler-controlled legislature put in place the legal foundations for the subjection of the tribes with the enactment of the Native Lands Act 1865, which sought 'to encourage the extinction of [. . .] Maori proprietary customs' (in Williams 1999, 142), by establishing a Native Land Court that would determine which 'Maori' could sell what land. Questions would arise as to how this and other statues connected to the treaty. An address by Governor Bowen to chiefs in 1868 is indicative:

> It has been asked by one of the speakers at the present meeting, if the Treaty of Waitangi is still in force. [. . .] The sovereignty of the Queen in New Zealand was founded on the willing love and loyalty of the Maoris. And now, my friends, hearken well to my words. The faith of the Queen will be preserved inviolate. [. . .] The Treaty of Waitangi is still in force; the only difference of late years is, that the disposal of their lands is now placed more entirely at the discretion of the Maori owners. By the treaty, the right of purchase was reserved to the Queen alone; but now the Maoris can sell and lease their lands to whomsoever they please. The right of property will be safe under the shadow of the Queen and of the law. Hearken to this word: the Treaty of Waitangi has not been broken; it has, on the contrary, been strengthened and extended. (In New Zealand 1990 Commission 1990, 13-14.)

It may have been beyond Bowen's imagination to appreciate that 'the Treaty' could mean something new to him each time he read it—and that its meaning to him might unavoidably differ from each of those at the meeting. Indigenes may have welcomed an invitation to dialogue on the meaning of 'the shadow of the Queen'—dialogue that compared and contrasted Panakareao's image of 'the shadow of the land'. (The invitation could have been a fitting response to the 'willing love and loyalty of the Maoris' upon which Bowen imagines Victoria's 'sovereignty' to be 'founded'. Recall that Williams identified an opposite flow of love: 'the treaty', he said at Waitangi, 'was an act of love towards them on the part of the Queen'.) Had the chiefs questioned Bowen about the meaning of 'sovereignty' (a meaning that could readily connect to the meaning of 'property'), they may well have turned 'friends' into enemies. To 'hearken well' perhaps really meant 'passively listen and obey my commands'. A substantial impropriety was the unilateral creation and appropriation, in the name of the Queen, of the unlimited discretion to read the treaty for the purpose of making and interpreting 'the law'. The authoritarian exercise of this discretion undermined the 'discretion' of the chiefs to determine who were 'Maori owners' and to determine the justness of the owners' capacities and constraints in relation to non-owners. We might say that Bowen lacked a *caring* disposition, given his elimination of the indigenes from a meaningful participation in working out the 'force' of the Waitangi compact.

* * *

In 1877, Ngati Toa leader Wi Parata entered the Supreme Court to challenge acts by colonial officials that breached the Waitangi transaction. An *authoritarian* judgment

deemed the 'pact' to be 'a simple nullity'. The indigenes were 'primitive barbarians' and '[n]o body politic existed capable of making cession of sovereignty, nor could the thing itself exist'.[10] Wi Parata had no standing. (Recall Vining's image of the octopus. Did the Court swim out into the great sea around and dart back when frightened by its dark vastness?) In both depreciating the indigenes and reducing 'sovereignty' to the condition of a distinct and controllable 'thing', the Court unimaginatively composed a self-contained legal domain that had no place for the question of justice. (Augustine (1958, 88) claimed that sovereignty without justice is organized brigandage.) At a *terrible cost*, the Court *eliminated the work of listening* to the treaty and to indigenes disposed to make claims in relation to it. Had Rev'd Henry Williams lived to listen to the Court, he may have judged that the Court was erasing an 'act of love' by law—and erasing law worthy of the name.

After *Wi Parata*, an institutionalized judicial devotion to maintaining the supremacy of legislative authority would make it difficult for lawyers to take claims of injustice seriously.[11] A settler-dominated legislature had no formal limits to disempower and dispossess the indigenes. The conditions for legislative authoritarianism were created by an act judicial authoritarianism.

2.4 'The principles'

The early 1970s saw the emergence of the American Indian Movement, helping to create a force that led to a March on Washington during election week in 1972. Echoes could be heard in 1975 in the Land March from Te Hapua to Wellington. In 1975, Parliament passed the Treaty of Waitangi Act, establishing the Waitangi Tribunal. Its preamble states:

> Whereas [. . .] the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles [. . .].

Let us resist any temptation to approach the statute *as if its words had meanings in themselves and by themselves*. In what sense might the texts 'differ' from one another? Contrary to a literalistic imagination, difference is not simply there to *see*, like a rock in front of us. Rather, difference is a relationship established by the metaphorical imagination, which creates similarity and difference simultaneously. An awareness of this can help make us *conscious* of our acts of metaphor and of our *responsibility* for making meaning.

10 *Wi Parata v. Bishop of Wellington* (1877) 3 NZ Jur. (NS) SC 72, 78. For a fuller discussion of this case, see Dawson 2014, 136-138.

11 Such judicial devotion can be heard in *Hoani Te Heuheu Tukino v Aotea Distruct Maori Land Board* [1941] NZLR 590. For criticism of this case, see Dawson 2015, 417-418.

* * *

In 1983, the Waitangi Tribunal released its first major report, on the Motunui-Waitara claim, initiated by a member of Te Atiawa following the discharge of sewage and industrial waste into the sea. In a section on interpretation, the Tribunal said:

> A Maori approach to the Treaty would imply that its wairua or spirit is something more than a literal construction of the actual words used can provide. The spirit of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretations out of place. (Waitangi Tribunal 1983, 47.)

How are we—'Maori' and others—to 'approach' the Tribunal's words? The orientation metaphor 'approach' may mislead us into imagining 'the Treaty' as a passive object outside of us rather than as a conversational event that we recreate when we talk about it. Given that there is no such thing as an impersonal 'literal construction of the actual words', we might wonder what the 'something more' is. Such wondering may help us to avoid using the word 'spirit' *unselfconsciously*. We—'Maori' and others—might do well to consciously transcend the setting of the 'spirit' in opposition to the 'literal'. The real question concerns the kind of spirit with which we might engage with the letter.

* * *

In 1986, Parliament passed the State-Owned Enterprises Act, which enabled the transfer of assets, including land, controlled by government departments to 'State-Owned Enterprises'. The New Zealand Maori Council believed that transfer could reduce the likelihood that Maori would be able to get land returned to them—an injustice that would add to past injustices. The Council began a Court action, putting to work Section 9, which specified: 'Nothing in this Act shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi'. The Court of Appeal reached a unanimous decision, agreeing with the Council that a transfer would be 'inconsistent'. The Court's President, Sir Robin Cooke, wrote:

> The principles of the Treaty are to be applied, not the literal words. As is well known, the English and Maori texts [. . .] do not necessarily convey precisely the same meaning. The story of the drafting of the Treaty and the procurement of the signatures [. . .]—events in which no lawyer seems to have played a part—is an absorbing one, but not within the ambit of this judgment.
>
> The differences between the texts and the shades of meaning do not matter for the purposes of this case. What matters is the spirit. This approach accords with the oral character of Maori tradition and culture. [. . .] In brief the basic terms of the bargain were that the Queen was to govern and the Maoris were to be her subjects; in return their chieftainships and possessions were to be protected, but sales of land to the Crown could be negotiated. These aims partly conflicted. The Treaty has to be seen as an *embryo* rather than a fully developed and integrated set of ideas.

> The Treaty signified a partnership between races, and it is in this concept that the answer to the present case has to be found. For more than a century and a quarter after the Treaty, [. . .] the assimilation of the Maori to the Pakeha [European] was the goal which in the main successive Governments tended to pursue. [. . .] Now the emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.
>
> [T]he principles of the Treaty [. . .] require the Pakeha and Maori Treaty partners to act towards each other reasonably and with the utmost good faith. That duty is no light one. It is infinitely more than a formality. If a breach of the duty is demonstrated at any time, the duty of the Court will be to insist that it be honoured. All too clearly there have been breaches in the past.
>
> [T]he present decision [. . .] means that there will now be an effective legal remedy by which grievous wrongs suffered by one of the Treaty partners in breach of the principles of the Treaty can be righted. I have called this a success for the Maoris, but let what opened the way enabling the Court to reach this decision not be overlooked. [. . .] If the judiciary has been able to play a role to some extent creative, that is because the legislature has given the opportunity.[12]

Sir Robin Cooke's image of the treaty as 'an embryo rather than a fully developed and integrated set of ideas' seems sound and helpful, given that neither the texts nor the larger events in which they emerged set up working relationships (with procedures and roles) that offer a resource on which to found a communal life. The absence of such relationships makes it difficult to precisely identify specific 'breaches', not least because the basic question of who decides is an open one. A judge less devoted to maintaining the supremacy of legislative authority may have been disposed to take this basic question seriously.

Like the Waitangi Tribunal, Sir Robin sets 'the spirit' in opposition to 'the literal'. If we imagine 'meaning' not as a 'convey'-able object (like goods transported by a vehicle) but as an experiential process to which author and reader contribute, we will be inclined to question the suggestion that 'differences between texts' exist independently of our imaginings. Our imaginings will include context against which the texts were composed, context that will influence textual meaning. As such, the Court should properly include 'events' such as 'the drafting of the Treaty and the procurement of the signatures' as 'within the ambit of this judgment'. This could make a place for taking seriously Panakareao's image of sovereignty as shadow, an image that could dramatically change what the texts mean to a reader. Listening to Panakareao would fit with taking seriously 'the oral character of Maori tradition'.

* * *

The *Maori Council* case has received criticism from various standpoints. Some critics expressed concern about the Court's task. Auckland University legal academic

12 *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 662-668 (Cooke P).

Jane Kelsey, for example, considered the terms of the governing legislation to be defective:

> [T]he State Owned Enterprises Act [. . .] said that the Government had to comply with the 'principles of the Treaty', not the Treaty itself. So the five Pakeha male judges on the Court of Appeal set about defining these principles. [. . .] The Treaty was redefined to remove the guarantee of rangatiratanga and to reinforce British sovereignty. This is how the Government has been able to argue that it was honouring the 'principles' of the Treaty while its actions clearly breached the guarantees of both the Maori and the English text. (Kelsey 1989, 129.)

Perhaps not one to vocalize her reading and to listen to the whole of what she reads, Kelsey seems insensitive to the possibility that 'the Treaty itself' is open to various readings, the existence of which may lead us to doubt our capacity to arrive at any sure sense of what 'the guarantees' mean. (Such doubt opens up the procedural question of who decides, a question that is perhaps inchoately behind her reference to 'Pakeha male judges'.) Her word 'redefined' may lead us into delusively imagining that an impersonal pre-existing literal meaning can exist—that 'the Treaty' is a passive object to be seen rather than a conversational event that can transform us in the process of tuning in to it. In what direction might she have gone if she had chosen the word 'recreated' instead or 'redefined'? One possibility is that she may have connected to Panakareao's elegant figure.

* * *

Canterbury University academic David Round has also faulted 'principles' talk. He targeted 'judicial activism':

> How can one *extract* the 'principles' of the Treaty from its terms? It is entirely a speculative and *imaginative* exercise. The terms of the Treaty are simple. Maori recognise the sovereignty of the Crown, and in return have their possessions guaranteed and enjoy the rights of British subjects. These terms—and such a treaty—are surely little more than meaningless in a settled legal order where the Crown *undoubtedly* has sovereignty, and where all subjects and citizens are guaranteed the enjoyment of their possessions. To move from this very simple prescription for a legal order to ideas of partnership and special relationships is not done by ineluctable logic but by *invention*.
>
> The *discovery* and application of 'Treaty principles' is a political, imaginative and unpredictable activity, and rule by 'Treaty principles' must inevitably have something about it of rule by secret law never known until it is revealed in particular decisions. (Round 2000, 653, emphasis added.)

Round's guiding question (an 'invention' of sorts?) begins with a problematic metaphor ('extract') that can tempt us into imagining 'meaning' as an impersonal object, a metaphor that sets up a false opposition: 'terms' versus 'principles'. (The

metaphor 'discovery' may conceal ineluctable 'imaginative' creativity in working out 'principles'.) The real question for an interpreter concerns the interpretive principles with which they treat both the terms and the persons with whom the terms are concerned. With the voice of certainty, telling his readers how things 'undoubtedly' are, he speaks of 'sovereignty' as if it is a distinct object than can be possessed (like one's tangible 'possessions'), in this case by 'the Crown'. (To echo Panakareao, sovereignty is like death that the hand cannot hold.) A volume could be written on the elusiveness of 'the Crown' (and of 'sovereignty' and 'possessions'). To raise the issue of the identity of the Crown could readily unsettle what Round imagines as 'settled'.

* * *

In 2007, Ngapuhi elder Titewhai Harawira initiated a wide-ranging claim to the Waitangi Tribunal, concerning various 'impacts' ('political, social, economic' and 'cultural and spiritual') on the tribe's 'wellbeing' (Healy et alia 2012, Appendix 1). Her opening remarks (made on behalf of herself and Sir Graham Latimer) referred to the Waitangi compact:

> Everyone knows that the promises [. . .] have been broken. Yet instead of figuring out how to honour [them] in a principled way, new principles have been invented to change what the agreement was in the first place [. . .]. (in Healy et al. 2012, ix.)

Does Harawira's 'everyone knows' speak for us? She seems to call for nothing more than a brief glance at 'the promises' to see if they have been fulfilled or not. Until we engage in a lawyerly close reading of 'what the agreement was in the first place', we cannot meaningfully *begin* to talk about a 'change' of meaning and to judge what is and isn't 'broken'. She has implicitly accepted the defective image that *an author's meaning is apart from our creation of it*. Concerning the activity of law, a vital question concerns the identity of those who should read, and in reading *recreate*, the treaty in the pursuit of justice. This is a question that seems to be beyond her horizons.

* * *

Various contributors to talk about 'the principles'—the Waitangi Tribunal, Sir Robin Cooke, Jane Kelsey, David Round, and Titewhai Harawira—sound off-key to my ears. They accepted without question Parliament's statutory language. Let us return to the Treaty of Waitangi Act: 'Whereas [. . .] the text of the Treaty in the English language differs from the text of the Treaty in the Maori language'. It seems reasonable to imagine that the authors of the statute imagine (i) that a 'language' is a transparent container of meaning, or a tool for pointing to an object for all to see; and (ii) that the meaning contained in the texts 'differ' from one another. Concerning the different meanings, the authors might readily accept without question these remarks by the legal historian David Williams:

> While oral transactions may have been more important at hui [meetings] in 1840, it is the written word which has come down to us today. In the workings of our legal system careful scrutiny of written formulations are paramount. [. . .] [E]ach Treaty document has a distinctively different general thrust. The Māori text predicates a sharing of power and authority in the governance of the country between Crown and Māori. The English text is about a transfer of power, leaving the Crown as sovereign and Māori as subjects. Much of the Treaty's history has been bedevilled by the fact that Māori and Pākehā have been 'talking past each other'. (Williams 1989, 79-80.)

In a spirit of 'careful scrutiny': how does Williams imagine 'the written word'? From where or whom did it (whatever 'it' might be) 'come down to us'? Was the movement a *mute transference* from eye-reader to eye-reader? Our ear-training with Vining might prompt us to transcend the opposition between the 'oral' and the 'written' word. If Williams was disposed to *vocalize* his reading of the Waitangi texts with Panakareao's shifting shadow-substance imagery in his mind's ear, he may have been less sure on what each of them is 'about'. An artist in *intonation* and *gesticulation* perhaps could render 'sovereign' and 'subjects' as equals, if only in their capability for 'talking past each other'. If we accept the possibility of equal capability, we might be disposed to ask what principles we should adopt in attempting to talk together. I would begin by proposing a lawyerly fair *hearing* exploring the meaning of sovereignty the unique Waitangi context. This could enable Panakareao's 'elegant figure' to be heard.

3. Conclusion : Provocation to *rereading*

What are we doing when we are reading? Lord Normanby passed over in silence that question when he composed treaty instructions for Captain Hobson. Hobson perpetuated the silence. Many others have followed them. We commonly read *unselfconsciously* and do not even think to question ourselves about what is involved in acts of reading and whether we can do better. Inspired by Joseph Vining and his imaginative efforts to reconstitute the home of the legal mind, this article offers an attempt at a conscious act of reading.

Vining has invited his reader to set about learning anew to read. There is a sense in which he contributes to thought and expression about legal literacy. The direction he takes resembles efforts by the literary critic George Steiner to promote 'humane literacy'. Steiner has sought to transcend the simple opposition between literate and illiterate. Let him speak:

> In that great discourse with the living dead which we call reading, our role is not a passive one. [. . .] We engage the presence, the voice of the book. [. . .] A great poem, a classic novel, press in upon us; they assail and occupy the strong places of our consciousness. [. . .] A man who has read Montaigne's chapter XX (*Que philosopher c'est apprehendre à mourir*) and Hamlet's use of it—and who is not altered, [. . .] who does not, in some subtle yet radical manner, look on the room in which he moves, on those that knock on the door, differently—has

> read only with the blindness of physical sight. [. . .] To read well is to take great risks. It is to make vulnerable our identity, our self-possession. In the early stages of epilepsy there occurs a characteristic dream (Dostoevsky tells of it). One is somehow lifted free of one's own body; looking back, one sees oneself and feels a sudden, maddening fear; another presence is entering into one's own person, and there is no avenue of return. Feeling this fear, the mind gropes to a sharp awakening. So it should be when we take in hand a major work of literature. [. . .] He who has read Kafka's *Metamorphosis* and can look into his mirror unflinching may technically be able to read print, but is illiterate in the only sense that matters. [. . .] It is the task of literary criticism to help us to read as total human beings, by example of precision, fear, and delight. (Steiner 1967, 28-29.)

Steiner's own 'example of precision, fear, and delight' and the experience of transcendence with which he is concerned ('somehow lifted free of one's own body') will be familiar to a Vining reader—or at least a *close* reader who has felt *From Newton's Sleep* 'press in'. The passage could serve here as a frame for imagining Vining. After *placing oneself with* him, *heads together as it were*, one will be disposed to claim that a key task of legal philosophy is to help us to read law and legal criticism 'as total human beings'. She (or he) who has read *From Newton's Sleep* and who does not notice the law in which she moves differently has failed to pay due attention to the voice of the book. As for a Waitangi lawyer, if Vining's 'presence' has entered into her own person, she may well begin to notice those who have read the treaty only with the blindness of physical sight' and to do better than them. She may wonder what it might mean if those speaking in the name of the Queen made vulnerable their identity, their self-possession, in Waitangi talk. Such a disposition would be readily connectable to the 'act of love' (Henry Williams) at Waitangi.

Practices that are worthy of being called 'humane literacy' will reflect an awareness of language as a cultural force that is at once outside us and inside us—in contrast to the image of language as an external transparent container of meaning. Vining touches on the mixture of inside and outside as follows:

> Writing wholly unconverted about religious conversion is not quite writing about *it*, religious conversion. Yet if converted one must have at least one foot on the outside in order to write about it. Language itself puts us in that stance. We do not have to struggle to assume the position of being both inside and outside. The instant one says something one is detached from it and critical of it, able to ask whether it is what one really thinks, and yet one is sufficiently behind it to say it and knows it is not someone else who is saying it. (Vining 1995, 72.)

'Language itself' is mysterious, yet often taken for granted, like reading. When Vining draws attention to 'it', his reader may readily become lost for words as their image of 'it' turns inside out, a movement that could serve as a resource for attuning to the precarious 'stance' about which he writes. This is a stance that could prod a

Waitangi reader to wonder if she is *both inside and outside* the treaty—a wondering that productively puts in question *what* 'the treaty' is. She may initially feel like at least two persons at once, with one immersed in the world Vining creates and the other able to ask the 'what' question ('what one really thinks') in the Waitangi context. A third person within her could act as a translator for the two of them, *heads together as it were*. A fourth person, a poet, may feel inclined and equipped to judge the translation. If the fidelity of the translator is questioned, a fifth person within her might wonder how to pursue a workable harmony in situations of talking past each other. A sixth may suggest to all of them that they enter into a 'treaty' in order to guide their Waitangi talk in the direction of justice. If a workable harmony does emerge between her selves, she could consider offering the personal 'treaty' as an example for Waitangi talk at a national level.

This personal treaty could be called the Treaty of Transcendence. Vining, or at least one of his many selves, might quibble over the name:

> The transcendent produces such agony now, that we want to deny it. Why? Is the reason frustration, that we cannot understand despite our yearning to understand and so we try to avoid the trial altogether? Not this only. 'Frustration' is too mild. There is fear too, fear of pain, being torn apart. (Ibid., 329.)

That passage could help us to reflect on the experience of responding to our 'yearning to understand' a multitude of understandings of the treaty—as expressed by various people, including Henry Williams, Nopera Panakareao, Henry Sewell, Sir Robin Cooke, Jane Kelsey, David Round, Titewhai Harawira, and David Williams. (Recall the epilogue in the Waitangi document, referring to 'We the Chiefs' as 'having been made fully to understand the Provisions of the foregoing Treaty'.) If we can come to 'understand' the need for a deeper understanding of what it is to 'understand', we could say that we have had a valuable experience of transcendence. Why? In the process of coming to understand the *limits* of our understanding of understanding, we will have moved *beyond* our former horizons (when we thought we fully understood what understanding is). If it was common for us to attend to and talk about the various limits against which we 'understand' the treaty, we might hope to transcend talking past each other and begin to talk together, aided by the imaginative enterprise of close reading.

Bibliography

Augustine, *City of God*. Edited by V. Bourke and translated by G. Walsh. Image Books, New York 1948.

Ball, Milner S.: 'All the Company of Heaven'. 94 *Michigan Law Review* (1996) 2016-2223.

Belgrave, Michael: *Historical Frictions. Maori Claims and Reinvented Histories*. Auckland University Press, Auckland 2005.

Carleton, Hugh: *The Life of Henry Williams. Archdeacon of Waimate*. Reed, Wellington 1948 [1874-1877].

Chamerovzow, Louis Alexis: *The New Zealand Question and the Rights of the Aborigines*. Newby, London 1848.

Cleave, Peter: *The Sovereignty Game. Power, Knowledge and Reading the Treaty*. Institute of Policy Studies, Wellington 1989.

Dawson, Richard: *The Treaty of Waitangi and the Control of Language*. Institute of Policy Studies, Wellington 2001.

Dawson, Richard: *Justice as Attunement. Transforming Constitutions in Law, Literature, Economics, and the Rest of Life*. Routledge, Abingdon 2014.

Dawson, Richard: 'Transcendental Sense and a Playful Approach: The Treaty of Waitangi'. 66 *Mercer Law Review* (2015) 395-424.

Healy, S., I. Huygens & T. Murphy: *Ngapuhi Speaks. He Wakaputanga o te Rangatiratanga o Nu Tireni and Te Tiriti o Waitangi—Independent Report on Ngapuhi Nui Tonu Claim*. Network Waitangi, Whangarei 2012.

Kawharu, Ian Hughes: 'Translation of Maori text'. In I. H. Kawharu (ed): *Waitangi. Maori & Pakeha Perspectives of the Treaty of Waitangi*. Oxford University Press, Oxford 1989, 319-321.

Kelsey, Jane: 'Rogernomics and the Treaty'. In H. Yensen et alia (eds): *Honouring the Treaty. An Introduction to Pakeha to the Treaty of Waitangi*. Penguin, Auckland 1989, 126-129.

Mutu, Margaret: 'Tuku Whenua or Land Sale', 1992; Submission to the Waitangi Tribunal's Muriwhenua Land Claim, Doc. F 12.

New Zealand 1990 Commission, *The 150 Year Debate*. Government Printer, Wellington 1990.

Ngata, Sir Apirana: 'The Maori and Printed Matter'. In R. A. McKay (ed.): *A History of Printing in New Zealand, 1830-1940*. Wellington, 1940.

Normanby, The Marquis of, 'Letter to Captain Hobson (Aug. 14, 1839)', in 3 *British Parliamentary Papers. Colonies: New Zealand*. Irish University Press 1989, 37-42.

Plato: *Phaedrus and The Seventh and Eighth Letters*. Translated by W. Hamilton. Penguin, Harmondsworth 1973.

Poirier, Richard: *Poetry and Pragmatism*. Harvard University Press, Cambridge, Massachusetts 1992.

Round, David: 'Judicial Activism and the Treaty: The Pendulum Returns'. 9 *Otago Law Review* (2000) 653-671.

Rutherford, James: *Sir George Grey K.C.B., 1812-1898. A Study in Colonial Government*. Cassell, London 1961.

Sewell, Henry: *The New Zealand Native Rebellion. Letter to Lord Lyttleton*. Hocken Library Facsimile Series, Dunedin 1974 [1864].

Smith, Steven: 'Science, Humanity, and Atrocity: A Lawyerly Examination'. 104 *Michigan Law Review* (2006) 1305-1320.

Steiner, George: *Language and Silence. Essays 1958-1966*. Faber and Faber, London 1967.

Vining, Joseph: *Legal Identity. The Coming of Age of Public Law*. Yale University Press, New Haven 1978.

Vining, Joseph: *The Authoritative and the Authoritarian*. University of Chicago Press, Chicago 1986.

Vining, Joseph: *From Newton's Sleep*. Princeton University Press, New Jersey 1995.

Waitangi Tribunal: *Report of the Waitangi Tribunal on the Motonui-Waitara Claim*. Government Printer, Wellington 1989 [1983].

Waitangi Tribunal, *Mangonui Sewerage Report*. Government Printer, Wellington 1988.

Wards, Ian: *The Shadow of the Land. A Study of British Policy and Racial Conflict in New Zealand, 1832-1852*. Government Printer, Wellington 1968.

Williams, David V.: 'Te Tiriti o Waitangi—Unique Relationship Between Crown and Tangata Whenua?' In I. H. Kawharu (ed): *Waitangi. Maori & Pakeha Perspectives of the Treaty of Waitangi*. Oxford University Press, Oxford 1989, 64-91.

Williams, David V.: *'Te Kooti Tango Whenua'. The Native Land Court 1864-1909*. Huia Publishers, Wellington 1999.

Bollywood's Law: Collective Memory and Cinematic Justice in the New India

Oishik Sircar*

Law tells stories, just as stories are told about law.
Peter Goodrich

1. The work of reconstructive imagination

In 2013, a Bollywood film[1] called *Kai Po Che* (Kapoor 2013)[2] received both popular and critical attention from audiences and commentators alike. The re-telling of the 2002 anti-Muslim pogrom in Gujarat—a sophisticatedly planned ethnocide targeting Muslims, unlike its popular characterization as a riot, which is spontaneously provoked mob violence[3]—is part of the film's fictive plot and cathartic closure,

* Teaching Fellow and Doctoral Scholar, Institute for International Law and the Humanities, Melbourne Law School.

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1 Though it is commonsensically understood to be so, especially outside of India, Bollywood is not synonymous with the Indian cinema. It is one kind of Indian cinema. Bollywood can be loosely understood as Hindi mainstream cinema produced in Bombay/ Mumbai. In this essay I use it in this way, remaining attentive both to the uniqueness of the genre and to its universalising weight that flattens the idea of the Indian cinema.

2 The English title of the film is *Brothers for Life.*

3 Later in the essay I provide a brief re-telling of what this event was, and also an explanation for why I use 'pogrom' to characterize the violence.

and was one of the major reasons for this attention. While on the one hand it was praised for taking a sensitive look at the pogrom and spoke of friendship, hope and forgiveness in the midst of mindless religious hatred (Patel 2013), on the other hand there was a lot of criticism about the cunning ways in which the film avoided questions of accountability, downplayed the enormity of the event, even as it acknowledged trauma (Janmohamed 2013). When I first watched it on a pirated DVD in Melbourne, I felt that the film, in its narrative and aesthetic re-constructions of the pogrom, revealed—more than conceal—the workings of a nationalist, secularist and developmentalist rationality in postcolonial India that has come to texture the mnemohistories of collective memory of the pogrom. As I read it, not only did the film not depict the violence in all its nuance (which was the standard critique), it also glorified love for the new India: a neoliberal and Hindu nation (a key element of Hindu right wing discourse which provided the ideological justification for the violence) as the panacea for everyone who was affected by it. To put it simply, I too felt that the film lacked in its re-telling of the events of 2002.

A few months after the film's release a Public Interest Litigation (PIL) was filed in the Gujarat High Court in Ahmedabad, demanding that its clearance by the Central Board of Film Certification in India be cancelled.[4] A news headline reporting the incident read: 'PIL against *Kai Po Che* for "biased" portrayal of Gujarat riots' (*The Times of India*, May 3, 2013). The petitioners, a lawyer named Bhautik Bhatt and another applicant, took issue with the representation of the 2002 violence in the film for its anti-Hindu bias. As the judgment noted, the two reasons for which the petitioners approached the court were: first, 'the film defames group of a certain community, in the guise that the members of the minority community were victimized'; and second, 'the film does not approach the topic evenhandedly and projects one community being more responsible than the other' (*Bhautik Vijaykumar Bhatt v. Central Board of Film Certification*, September 23, 2014, 1).

I was a little taken aback.[5] It was primarily secular-leftists like me who slammed the film for its bias in favour of Hindus, for not depicting the atrocity in all its nuances, and for explaining the causes of the violence through *realpolitik* framings that displaced its deep ideological foundations (Sircar 2013a; Mukherjee 2013; Ghufran 2013). And here, the petitioners felt that even in the film's soft pedaling of the violence carried out by Hindus, it depicted the majority community in a bad light. I did not think the petition stood any chance in court. The film could not

4 The Central Board of Film Certification (CBFC) in India, also known as the Censor Board, a statutory body established by the Indian Cinematograph Act of 1952 makes it mandatory for films to apply for a censor certificate before they can be publicly exhibited. The CBFC also classifies films based on their content for universal or restricted viewing. The CBFC's decisions to censor films considered sexually explicit or communally sensitive tend to reflect the moral and political views of the government in power. CBFC's decisions have met with resistance from both free-speech advocates and right-wing conservatives. On the history and politics of film censorship in India, see Bhowmik 2009; Mazzarella 2013.

5 *The 3 Mistakes of My Life*, the novel on which the film was based (Bhagat 2008), the film's publicity and trailers, and even the theatrical release did not attract any attention from Hindu right wing parties—including the ruling Hindu nationalist Bharatiya Janata Party (BJP) in Gujarat at that time—as has been the case in the past with most other feature and documentary films on the pogrom (Menon 2004; Bandukwala 2007).

have been challenged on its reconstruction of facts, because it did not make any claims regarding historical accuracy. It was, after all, a work of fiction, adapted from a novel. The court in its 2014 judgment rejected the petition by stating why the freedom of speech and expression of the filmmakers cannot be curtailed, especially because it was 'made on an imaginatory [sic] topic'. It might have been possible to restrain exhibition if the film had provoked sectarian violence because of the reasons that the petitioners had stated. However, as the judges noted: 'Nothing untoward has happened or reported. The viewers across the country, with due maturity, have absorbed the theme' (*Bhautik Vijaykumar Bhatt v. Central Board of Film Certification*, September 23, 2014, 3).

Yet, the same sequence of fictive events—or 'imaginatory', as the court called them—in the film are considered a watered-down version of the *real* violence by some like me, and by those like Bhatt as being biased against Hindus. This encounter between law and film opens up a contestation about the truth claims that constitute collective memory in the realm of filmic re-constructions of mass atrocity. *Kai Po Che* (KPC) participates in the 'ideoscapes'[6] and 'lawscapes'[7] of collective memories which I consider to be mnemonic in nature, doing, what Jan Assman would describe as 'the ongoing work of reconstructive imagination': 'the past cannot be stored but always has to be "processed" and mediated' (Assman 1997, 14).

This reconstructive imagination also points at the complicated intimacies between law and the aesthetic, and the ways in which their encounter processes and mediates collective memory. The aesthetic provides the fictive grounding for the film, while the legal provides the traction for making, or appealing to, truth claims. The critics of *KPC*—both groups that point at the film's pro and anti-Hindu bias—are engaged in contestations about the ways in which the stories of the pogrom are actively reconstructed and remembered. In recognition of this law/aesthetic conversation, this essay attempts to chart a response to the question: Do our legal investments in establishing the truth about the violence of Gujarat 2002 keep alive a faith in the aesthetic (in this case the cinematic) as an active archive of collective memory, and consequently as a credible jurisprudential source that engenders imaginations of justice?

Law and image/imagination have played an important role in the making of collective memories of Gujarat 2002. This is the case especially for those like me who experienced it from a safe distance, consuming the unfolding of the horror on television screens or in newspapers, and continue to do so, given that the Gujarat violence has come to be one of the most mediatized events of postcolonial India (Ohm 2010, 123-144). The event's contested narratives are shaped through a set of

6 Arjun Appadurai understands 'ideoscapes' as 'composed of elements of the Enlightenment world-view, which consists of a concatenation of ideas, terms and images, including "freedom", "welfare", "rights", "sovereignty", "representation", and the master term "democracy"' (Appadurai 1996, 299).

7 Drawing on the work of Andreas Philippopoulos-Mihalopoulos, I understand the 'lawscape' as imaginations of justice that are 'so thick with law that, just like air, the law is not perceived. It becomes "invisible", white noise, thin air. It becomes an *atmosphere*—there but not there, imperceptible yet all-determining' (Philippopoulos-Mihalopoulos 2012, 2, emphasis in original).

iconic photographs—like Qutubuddin Ansari begging for mercy with folded hands or Ashok Mochi's war cry against Muslims with outstretched arms (Sahni 2012; Hazra 2012)—and landmark legal signposts—like the Best Bakery and Gulberg Society cases (Dhavan 2003; Katakam 2012)—that have not only produced a surfeit of reportage but have also offered templates for popular culture and aesthetic reconstructions in film, literature, art. Despite their perceived incommensurability, law and image/imagination are porous archives seeping into each other constantly, and they share a tendentious intimacy in making, managing and ordering collective memory.

Law and image, notes Cornelia Vissman, share 'a troubled relationship' (Vissman 2008, 1). She identifies jurists as those who are most uncomfortable with images: 'Jurists fear images foremost and by vocation. After all, they are expected to establish order, a mission they see frequently challenged by the ambiguity of images' (ibid.). As Peter Goodrich critically observes: 'law […] is a text that negates its images and denies the figurations of fluidity in its texts' (Goodrich 1995, x). Commenting on the 'aesthetic question' in law, Costas Douzinas and Lynda Nead write: 'Modern law is born in its separation from aesthetic considerations and the aspirations of literature and art, and a wall is built between the two sides […] Art is assigned to imagination, creativity and playfulness, law to control discipline and sobriety' (Douzinas and Nead 1999, 3).

However, despite this historical opposition between law and aesthetics, one is deeply implicated in the other; they share a relationship that is troubled because of their collaborative contestations, and not because of their antithetical orientations. There is an 'enriching asymmetry of their encounter', that connects 'justice [or injustice] and beauty [or the ugly]' (Ben-Dor 2011, 1). Clifford Geertz's observation that law, 'here, there, everywhere, is a distinct manner of imagining the real' (Geertz 1983, 184) is a reminder of 'the imaginative life of the law and the way law lives in our imagination' (Sarat 2011, 2). In conceptually understanding law's imaginative habitations, particularly as they appeal to the visual, Richard Sherwin writes:

> If law is to be treated as part of contemporary visual culture, and of that need there be no doubt, it is not enough to consider the way in which law partakes in various aesthetic, cognitive and cultural codes that different visual media deploy. Law also shares in the various normative aspirations and afflictions that are bound up in the culture at large. For this reason, we must also be attentive to cultural conditions. (Sherwin 2011, 3.)

Collective memory is one such cultural condition which is paradigmatic of the contested collaborations between law and aesthetics. Collective memory—a term originally coined by sociologist Émile Durkheim, and subsequently developed by his student Maurice Halbwachs—is a mode of active remembering, unlike the hegemony of history—that is only possible to produce in groups, and not individually. As Halbwachs notes in his classic work *On Collective Memory*: 'It is in society that people normally acquire their memories. It is also in society that they recall, recognize, and

localize their memories' (Halbwachs 1992, 38). Within group formations, collective memory is not generated only through commemorative interactions between group members, but also draw on 'publicly available commemorative symbols, rituals, and technologies' (Olick, Vinitzky-Seroussi and Levy 2011, 21): 'collective memory is the *active past* that forms our identities' (Olick 2007, 20, my emphasis).

In the context of the Gujarat pogrom, both law and cinema are 'publicly available commemorative symbols, rituals, and representations' that are in continuous engagement with an 'active past': one whose, meanings and truths are being revealed and regenerated through continuous collaborative contestations—the ongoing investigations, trials, political rhetoric, and aesthetic memorializations. Legal and filmic reconstructions of the pogrom are archives that both lend to and derive meaning from their collective public reception and response.

2. A small re-telling

Gujarat 2002 has been one of the most litigated, mediatized and politically polarizing events of mass atrocity in contemporary India. The version of the events of the pogrom and the narrative that I hold on to through this essay, is aimed at foregrounding the 'small voices,' to borrow historian Ranajit Guha's expression (Guha 1996, 1-12), that struggle to keep alive a certain memory of the pogrom in an India where they are constantly being 'drowned in the noise of statist [and increasingly corporatist] commands' (ibid., 3), that propagate a dominant memory.

It has been over a decade since the western Indian state of Gujarat experienced one of independent India's most violent mass atrocities against its Muslim minority population.[8] Postcolonial India has experienced many incidents of anti-minority mass religious violence since the Partition in 1947 (Pandey 2002), notably the anti-Sikh violence of 1984 in Delhi (Mitta and Phoolka 2008), and the anti-Muslim violence of 1992 in Bombay (Menon 2011), and all of these events have been part of a larger script that animates the violence of postcolonial state making. However, during Gujarat 2002, the sophisticated organization of the violence, the macabre forms of brutality and extent of state involvement, particularly police inaction and complicity, was unprecedented (Chopra and Jha 2014). Although official estimates state that the violence lasted for three days, many Gujaratis say that it lasted for as long as three months (Ghassem-Fachandi 2012, 1). The mayhem continued unabated, and despite a complete breakdown of law and order and grave instances of police

8 The account that follows is based on a select set of fact-finding reports, investigative and academic works that can be broadly and loosely classified as left-secular, human rights affirming. I am sympathetic to these tellings, and draw on them, because of my own ideological and political alliance to the left-secular and human rights groups and individuals that have authored these, and also because these have been considered credible accounts by victim-survivors of the pogrom. I spent time in Ahmedabad, the capital city of Gujarat in 2002, right after the pogrom, as part of a fact-finding team constituted by the South Asia Human Rights Documentation Centre, New Delhi. I revisited Ahmedabad and Baroda in 2014 for my doctoral research. On both these occasions, in my conversations with victim-survivors, some of the reports that they have expressed faith in are the ones that I draw on in my brief retelling of the pogrom in this essay. All these sources have also been consistently referenced in the literature on the pogrom that I have read.

inaction (both of which are state subjects in the Constitution of India), a central state of emergency was not declared, thus revealing how the central government—which at that time was the Hindu nationalist Bharatiya Janata Party (BJP) led National Democratic Alliance—condoned the event,[9] rendering it non-exceptional in political and public consciousness, even though it could be considered to be a rule of a state of exception.[10]

Starting on February 28, 2002, Hindu militant mobs ran rampage across both urban and rural Gujarat singularly targeting Muslims: killing close to 2000 people (which included some Hindu, Christian and Parsi casualties as well) and driving tens of thousands homeless (Human Rights Watch 2002). Sexual violence was rampantly used to murder Muslim women, including pregnant women, which in turn was meant as humiliation of the entire Muslim community (International Initiative for Justice in Gujarat 2003). Homes and property owned by Muslims were pillaged and burnt. Several mosques were desecrated and razed to the ground, and roads paved over them. The violence targeted Muslims across the board, irrespective of their class status and residential locations (Engineer 2003).

Even over a decade later, there were several Muslims languishing in refugee camps, many victim-survivors were still awaiting compensation for damages, and the criminal justice processes that they had initiated had seen no to very little progress (Amnesty International 2012; Choksi 2014). For the few criminal trials that did result in convictions of the perpetrators, or are underway, they have been at the receiving end of powerful State manipulations to subvert the justice and evidence gathering processes (Jaffrelot 2012, 77-89).

Over these many years, Gujarat, under the chief ministership of Narendra Modi (now India's Prime Minister) of the BJP, has been celebrated as one of India's most developed states with great urban and industrial infrastructure, and is a preferred destination for corporate investments by huge multinationals. Such has been the spectacular projections of growth rates by the State taking on a post-ideological persona that it has come to be showcased by both political parties as well as industrialists, as the 'Gujarat Model', meant for emulation by the rest of India. Many on the secular-left in India, including me, have questioned this rhetoric of growth that clearly excludes marginalized populations like Muslims, Dalits and *Adivasis* in Gujarat, and also consider this to be a form of neoliberal whitewashing of the

9 This was evident in the way the then BJP prime minister, Atal Bihari Vajpayee, at a speech delivered in Goa in April 2002, justified the pogrom, by citing Muslim separatism as its foundational cause, and rationalizing such alleged Muslim behaviour as an affront to Indian secularism. He is recorded to have said: 'Wherever Muslims live, they don't like to live in co-existence with others, they don't like to mingle with others; and instead of propagating their ideas in a peaceful manner, they want to spread their faith by resorting to terror and threats' (Quoted in Varadarajan 2002, 450-451).

10 The imposition of Emergency, or President's Rule, has been a practice of considerable debate in Indian Constitutional jurisprudence, especially given the history of the widespread abuse of power and the violent throttling of dissent under Emergency rule experienced from 1975-77 during Prime Minister Indira Gandhi's leadership. I draw attention to the non-imposition of an Emergency during Gujarat 2002 as an attempt by the State to treat the event as an ordinary occurrence, not recognizing the complete breakdown of law and order and the Gujarat government's failure to control the violence.

memories of 2002 (Sood 2012; Sud 2012; Chandoke 2012, 10-11; Sircar 2013b).

Modi is also considered by the left-seculars as the one who—along with other politicians in the Gujarat BJP—meticulously planned and sanctioned the 2002 violence, as a step towards establishing India as a Hindu *Rashtra* (nation), in furtherance of their neo-fascist ideology of *Hindutva* (Gregor 2006, 197-227), that considers India to be the holy land of Hindus, and thus Muslims and Christians as outsiders, who must assimilate, or be annihilated.[11] Gujarat has been considered by many as the 'Hindutva Laboratory' that experimented with the pogrom in furtherance of its neo-fascist mission by teaching Muslims in India a lesson (Spodek 2010, 349-399). Modi and many of his ministers in Gujarat have been named in independent fact-finding reports (Concerned Citizens Tribunal 2002), survivor testimonies (Citizen's Initiative 2002), revelations by public servants (*The Hindu*, August 20, 2009; *The Times of India*, October 1, 2012), media investigations (*Tehelka*, November 2, 2007), and statements by the Supreme Court (*Zahira Habibulla H. Sheikh vs State Of Gujarat*, 12 April, 2004) for having ordered the police to step back and let the mobs rein free, for having instigated the mobs with their inflammatory anti-Muslim speeches,[12] and for justifying the pogrom by citing the Godhra train-burning incident of February 27, 2002, that killed 58 *Kar Sevaks* (Hindu pilgrims) as the legitimate cause for this *pratikriya* (retributive action) by angry Hindus.

The incident of the burning of compartment S-6 of the Sabarmati Express, carrying *Kar Sevaks* returning from Ayodhya,[13] allegedly by Muslim mobs at Godhra station in Gujarat, has come to stand as the temporal and ideological justification for the pogrom, or as the 'precipitating event' (Nussbaum 2004). In line with the Newtonian explanation that Narendra Modi provided to rationalize the violence—'every "action" has an equal and opposite "reaction"'[14]—almost all references to the Gujarat pogrom till today continue to replay this cause and effect logic of equivalence: the Muslims burnt the Hindus in the train, so now the Hindus are taking their

11 'Hindutva ("Hindu-ness", shorthand for Hindu nationalism) in India is a chauvinist and majoritarian nationalism that conjures up the image of a Hindu Self vis-à-vis the threatening minority Other' (Anand 2011, 1). Leftist scholarly works in India have traced the origins of *Hindutva* ideology to that of European Fascism (see Ahmad 2002, 129; Sarkar 1993, 163-167; Basu et al. 1993). Italian Historian Marzia Casolari has done extensive archival work on how *Hindutva* ideology draws on both Nazi and Italian Fascism (Casolari 2000, 218-228; Casolari 2011). The Hindu Right in India is a consolidation of political parties and other outfits collectively called the Sangh Parivaar (United Family), which includes not only the BJP, but also the Rashtriya Swayamsevak Sangh, the Vishwa Hindu Parishad, the Bajrang Dal, and the Shiv Sena, among others.

12 Rakesh Sharma's 2002 documentary film *Final Solution* carries footage of several such hate speeches by Narendra Modi and many others. To watch the film, go to: < https://vimeo.com/ondemand/32491/110332012> (last visited May 20, 2015).

13 In Ayodhya, on December 6, 1992, militant Hindu mobs, led by key leaders of the BJP, demolished the Babri Masjid (built in 1527 by Babur, the first Mughal Emperor of India) because they claimed that the mythological Hindu god Ram was born exactly where the mosque stood. The demolition led to widespread anti-Muslim violence, and erupted in the Bombay riots of 1992. Both the demolition and the Bombay riots catapulted the BJP as a party of national significance, leading to them winning the general elections in 1998 and installing Atal Behari Vajpayee as India's first BJP Prime Minister.

14 Quoted in Mitta 2014, 237.

revenge on Muslims.[15] Collective memory of the pogrom has thus been mobilized through the marking of Godhra as a singular history-vanishing 'flashpoint'[16] that turns Hindus into victims, and blinds us to the deep and dispersed structures of prejudice which informed how the pogrom was meticulously planned much before the train caught fire. It also blinds us to the historical antecedents of *Hindutva* in Gujarat that did not erupt only as a spontaneous and reactionary response to Godhra (Yagnik and Sheth 2005).

The foregrounding of this small re-telling gains special significance at this particular point in contemporary Indian history, because Narendra Modi, the current Prime Minister of India, representing the Hindu nationalist BJP, was the Chief Minister and Home Minister of Gujarat in 2002. The pogrom was orchestrated under his watch, and it has been argued on the grounds of empirical evidence that it is the pogrom that consolidated the Hindu vote in Modi's favour, that led to him winning four consecutive State elections in Gujarat as Chief Minister since 2002 (Kumar 2002, 270-275); and in 2014 a sophisticated, media managed mixture of soft Hindu nationalism and robust neoliberal developmentalism was the resounding campaign call that got Modi elected as Prime Minister in an election that saw a clear majority emerge for a single party for the first time since 1984 (Bobbio 2013, 123-134; Chacko and Mayer 2014, 518-528; Simpson 2006, 331-348).

During the run-up to his prime ministerial campaign Modi was exonerated in 2012—given a 'clean chit'—by a Supreme Court of India appointed Special Investigation Team (SIT), whose independent functioning has rigorously been questioned for procedural, investigative and ethical lapses, especially in the way it has been complicit in protecting Modi from being criminally prosecuted (Mitta 2014; Setalvad 2013, 10-13). A protest petition by Zakia Jafri, a victim-survivor, against the SIT's exoneration of Modi was also dismissed by a court in Ahmedabad in 2013, upholding the 'clean chit' (*Hindustan Times*, December 26, 2013). In response to this judicial exoneration of his accountability as head of state, Modi had tweeted 'truth alone triumphs' (Ibid.). In fact, if postcolonial India's ostensibly secular legal system, with particular regard to the Apex court, had to write its autobiography, it would repeat and echo Modi's tweet with equal exuberance when it comes to the judiciary's performance in delivering justice in cases of mass anti-minority violence, including Gujarat 2002 (Grover 2002, 355-388). Despite the failures in investigation and prosecution, judicial rationality—even in its condemnation of Modi as a 'modern day Nero' (*Zahira Habibulla H. Sheikh vs State Of Gujarat*, 12 April, 2004)—has projected

15 Atal Bihari Vajpayee, the BJP prime minister in 2002, buttressed this logic to justify the pogrom when he said at the Goa speech: 'What happened in Gujarat? If a conspiracy had not been hatched to burn alive the innocent passengers of the Sabarmati Express, then the subsequent tragedy in Gujarat could have been averted. But this did not happen. People were torched alive. Who were those culprits? […] The subsequent developments were no doubt condemnable, but who lit the fire? How did the fire spread?' (quoted in Varadarajan 2002, 450-451).

16 Jasbir K. Puar, citing David Kazanjian, understands a 'flashpoint' as 'a centripetal turbulence of illumination so powerful that it may blind the past even as it spotlights the present and lights up the future' (Puar 2007, xviii).

itself as an almost transcendental arbiter, uncontaminated by any complicities with the deep structures of anti-Muslim prejudice of *Hindutva* that formed the foundations of the pogrom. In fact, in 1994, it was the Supreme Court of India that granted judicial imprimatur to the idea of *Hindutva*, recognizing it as a way of life, rather than neo-Fascist ideology, providing much fillip to the institutionalization of *Hindutva* which has only been strengthened over time (Cossman and Kapur 2001; Ronojoy Sen 2010).

Modi's version of the truth about Gujarat 2002 can be deciphered from his response in an interview to *Reuters*, where he likened his feelings for the victims as the sadness that a person in a car would feel if the driver runs over a puppy (Colvin and Gottipati 2013). Regarding continuing to fund relief camps for the Muslims displaced by the pogrom, Modi has expressed eugenicist panic about how they can turn into 'child producing centres' that will breed more Muslims (*Outlook*, September 30, 2002). The possibility of him expressing even an iota of remorse for the pogrom had turned so absurd, that a news outlet had to speak of it in the form of an April Fool's day joke (*Firstpost*, April 1, 2013). His standard refrain whenever asked about the 2002 violence has been to say 'Why even talk about 2002? […] It's the past. What does it matter?' (Quoted in Dalrymple 2014).

3. Beyond an amorphous politics

It is this rhetoric of Modi's "let's move on" that has animated a lot of the dominant legal and aesthetic discourses about how to remember the Gujarat pogrom. This history-vanishing point of view, however is not reflective of a practice of denial, but one which even while acknowledging the horror of the pogrom, either traces everything about it back to what it believes to be its originary cause, that is Godhra, or it relegates 'all violence to an amorphous "politics"' (Ghassem-Fachandi 2012, 2). Such relegation works to guard against 'summoning a past that still vividly lurks in the present', (Ibid., 2-3) and as Ghassem-Fachandi notes:

> Such interpretations elide the more disturbing realization that not only do political parties manipulate constituencies for electoral gain, but people themselves become complicit in this by inhabiting representations, participating in acts and thoughts that have effects beyond the mere political calculations of those who organize violence. The political machinations of the pogrom reveal only half the story. (Ibid., 3.)

It is an attention to the mnemohistories of collective memory that can open up space for ways of remembering the pogrom that do not necessarily use the scaffolding of an amorphous politics to make the pogrom intelligible for public consumption and memorialization. The work of reconstructive imagination in the way I use it in this essay is thus, not about testing the mimetic accuracy of *a posteriori* narratives of the pogrom—in this case law and cinema—but to lend solidarity to the 'right to story-telling that the vulnerable in Gujarat are asked to, [and sometimes have been forced

to] abandon' (Visvanathan and Setalvad 2014, 122).

This essay is interested in understanding the discursive intimacies and encounters of law and cinema in doing the work of reconstructive imagination that engender collective memories of the Gujarat pogrom. In these times of information overload—particularly in the way Gujarat 2002 has been spectacularized in media publics (Jain 2010, 163-179)—I argue that what should concern the critical jurisprudent is not a contest between memory and forgetting, as most on the secular-left in India continue to claim and fear with regard to the neoliberal whitewashing of the memories of the Gujarat pogrom, but rather the *ways* of remembering that are brought into being by the collective workings of law and cinema.[17]

In the last thirteen years since the 2002 pogrom, a significant archive of memorialization in Bollywood films has come to exist. The most notable of these films are *Dev* (Nihalani 2004), *Parzania* (2006), *Firaaq* (2007) and the previously mentioned *Kai Po Che*—all which use the Gujarat pogrom as part of their narrative plots to reconstruct the events of the pogrom, and also to offer political and cultural commentary on the event.[18] Rather than *Kai Po Che*, which I referred to in the beginning, in this essay I will focus on *Dev*—the first Bollywood film memorializing the pogrom to be released in 2004.

Dev is a part of popular Hindi cinema of Bombay, which in recent times, as Ashish Rajadhakshya notes, has 'Bollywoodized' Indian cinema,[19] having turned it into a 'culture industry', that is constantly 'being created and marketed' as an aesthetic genre, industrial product and economic practice (Rajadhyaksha 2008, 20). In its culture industry avatar, the cinema occupies an extremely significant place in India's cultural, political and public life and in the wake of Bollywoodization in its

17 I have repeatedly used the expression secular-left in this essay to identify a certain political position that I ally with. In making the instant claim, my aim is to in fact argue against that very position. This particular political juncture in the new India is indeed a moment of reckoning for the secular-left for having failed to offer any meaningful resistance to the collective rise of the combined forces of *Hindutva* and neoliberalism, a brand of politics of which Modi is the torchbearer. Despite its best intentions, the secular-left's failure in its attempts to keep alive the small memories of Gujarat 2002 can be blamed on its logic of positing secularism and *Hindutva* in untouchable opposition. Such a clear opposition overlooks how *Hindutva* politics speaks and gains recognition through the very language of secularism and liberal rights. The secular-left's Manichean logic of thinking of *Hindutva* as evil and secularism as sacred forecloses readings of the practices of postcolonial secularism that are foundational to the advancement of *Hindutva* politics and neoliberalism, and even works as a cover for the secular-left's own complicities with developmentalism, legalism and indeed *Hindutva*.

18 As far as I am aware, there are four other Bollywood films in which the pogrom features either centrally or marginally as part of the fictive plots. These are: *Chand Bujh Gaya* (2005), *Road to Sangam* (2009), *Mausam* (2011), and *Rajdhani Express* (2013). Of these, *Chand Bujh Gaya* was involved in litigation to fight cuts demanded by the Central Board of Film Certification because the character of a minister in the film allegedly resembled Narendra Modi, and *Rajdhani Express* was taken to court by Qutubuddin Ansari, a pogrom victim-survivor, who alleged that the film used his photograph, which had turned him into the iconic face of the pogrom, without consent.

19 Bollywood does not carry a stable meaning. As M. Madhava Prasad writes: 'It is precisely the act of naming that is the most interesting aspect of Bollywood. It is a strange name, a hybrid, that seems to at once mock the thing it names and celebrate its difference […] Today, the term "Bollywood" has become naturalized not only in the English-language media, which is probably the term's original habitat, but also the Indian-language press, not only among journalists but also film scholars' (Prasad 2008, 41).

transnational economic lives (Mishra 2002; Ganti 2013). M. Madhava Prasad has called the Indian cinema 'a site of ideological production […] as the (re)production of the state form' (Prasad 1998, 9). Bollywodization has entrenched this further, with the emergence of 'techno-nationalism' as '*the* Bollywood thematic' (Rajadhyaksha 2008, 29, emphasis in original). This thematic proffers 'a discourse of love and a discourse of law—the two fundamental registers of universality' (Prasad 2008, 46) that has made Bollywood cinema 'indispensable to the State' (Rajadhyaksha 2008, 34). It has made the film industry win 'for itself, a distinct, even unique, space for spectatorial address and spectatorial attention that even today is not shared by any of its other ancillary industries [like] […] television…' (Ibid., 35). Bollywodization's spectatorial affects, both inside and outside the theatrical space, and across geographical locations, are sutured through the cinema's address that produces a distinct public of cinematic citizens (Liang 2005, 366-385) where the 'ticket-buying [or DVD buying] spectator assumes certain rights like that of 'the right to enter a movie theater, to act as its privileged addressee' (Rajadhyaksha 2008, 33). As Rajadhyaksha notes: 'It is important […] to recognize that spectators were, and continue to be, symbolically and narratively, aware of these rights, aware of their political underpinnings, and do various things – things that constitute the famous "active" and vocal Indian film spectator…' (Ibid.) as a cinematic citizen.

These are very significant observations because it is in the realm of the state/nation/affect analytic that cinema's relationship to law and memory is both forged and fraught. Bollywood cinema, thus, provides a valuable archive for an analysis of how collective memories of the Gujarat pogrom and its relation with law, are actively engendered and ordered. While photographic or documentary images of 2002 have focused on phantasmagoric violence, films have woven fictive representations of the violence with narratives of the everyday and ordinary that Bollywood cinema's many publics can connect with at the level of the quotidian and not the exceptional. The use of music and songs, typical of the Bollywood genre, add texture to the fictive narrative that enhance their affective appeal, especially how it has been used in the conjuring of a national imaginary in the new India (Dutta 2013, 231-245).

Bollywood cinema's reconstructive imagination of the pogrom not only commemorates the event, but also develops a vision of cinematic justice that calls on imaginations of law to play a specific role in the memorialization of the pogrom. I will demonstrate how *Dev*, even while recognizing the horror of the pogrom, offers a vision of justice that valorizes the violent techniques of postcolonial state-making, which actually formed the foundations for the pogrom. In its memorialization of the Gujarat pogrom, *Dev*'s filmic archive of collective memory works as a 'narrative compact' (Basu 2012, 12) between law and cinema to engender a particular way of remembering: one that aligns itself with the state-making practices of the new postcolonial India, even as it acknowledges the horror of the event. This way of remembering works through what I provisionally call a 'developmental

juridical rationality', practiced through the triad of secularism,[20] legalism[21] and developmentalism.[22] This rationality, even as it condemns the visible violence of religious sectarianism, keeps the deep-seated structural and ideological violence of the putative secular postcolonial Indian nation against its Muslim minorities intact.

4. Cinema as minor jurisprudence

In its examination of the Gujarat pogrom, legal analysis has remained mostly concerned with the institutional discourse of trials, investigations, judgments and legislations, focusing on criminal law issues related to impunity, constitutional issues related to the rule of law and secularism, and human rights and international law issues related to freedom of religion, citizenship and transitional justice. These are extremely important analyses; however, the aesthetic dimensions of law have not been attended to in this body of legal work on Gujarat 2002, despite the fact that law occupies a significant place in all aesthetic reconstructions, particularly films.[23] As I understand, this is because, on the one hand, law in jurisprudential analysis of the pogrom has seldom been imagined as an aesthetic category and on the other, law is constantly burdened by the demands of being a problem-solving practice, meant only to deliver justice as quantifiable result: convictions, compensation, reparations and legislations.

I understand cinema as a credible source of jurisprudence that we encounter as the subterranean other of the hegemonic jurisprudence of state legalism. The state in practicing its sovereign craft to mete out justice for the victim-survivors of the pogrom, has turned *parens patriae.* This doctrine which has been used as a 'spectacle of emancipation' and parental care by the state to absolve itself of accountability in cases of mass harm in India (Sircar 2012, 527-573), is aptly captured by the Ciceronian maxim *salus publica suprema lex* (the safety of the state is the supreme law). The working of state law towards justice for victim-survivors is a means for the very state that enabled the pogrom, to secure its symbolic and sovereign power, to keep intact the 'weighty mythology', of what Sudipta Kaviraj has called 'the imaginary institution of India', born out of a 'narrative contract' between history-making and the nation, which makes the idea of the Indian nation an 'ideological construct' (Kaviraj 2010, 167).

20 'The modern concept of secularism in India […] is borrowed from western history and has been, during the last one hundred years or so, a symbol of the efforts to interject history and redesign contemporary Indian life according to the demands of that history. This concept has a clear normative component: religion and ethnicity should be banished from the public sphere and an area should be marked out in politics where rationality, contractual social relationships, and *realpolitik* would reign' (Nandy 1995, 41, emphasis in original).

21 'Legalism' is understood as a governmental obsession with 'rule following', and an over-reliance on law reform as forms of governance practice (see Shklar 1964; Brown and Halley 2002).

22 'By developmentalism—to be distinguished from development—I mean an ideological orientation characterized by the fetishization of development, or the attribution to development of the power of a natural (or even, divine) force which humans can resist or question only at the risk of being condemned to stagnation and poverty' (Dirlik 2014, 30-31).

23 Two notable exceptions are: Nussbaum 2007 and Kapur 2006, 885-927.

Aesthetics, and in this case cinema thus, enters this story not as an end to state law, but as an encounter with what Peter Goodrich calls a 'minor jurisprudence', that repeatedly challenges 'the dominance of any singular system of legal norms', and 'neither aspires nor pretends to be the only law or universal jurisprudence' (Goodrich 1996, 2). It is necessary to clarify that I do not think of minor jurisprudence as equivalent to legal pluralism. I use the concept to not talk about a diversity of legal imaginations, but how law needs to be understood as an assemblage, or what Deleuze and Guattari have termed 'the machine of justice' (Deleuze and Guattari 1986, 81). A recognition of law as an assemblage of minor jurisprudences is an assertion that there is nothing like a major jurisprudence—because the machine of justice is a constantly mutating assemblage based on the jurisdictions of minor jurisprudence that it is located in.

I also don't valorize minor jurisprudence in the aesthetic archive merely as a romantic category of resistance to hegemonic state law. Creating a hierarchy between law and aesthetics defeats the very aim of thinking about their conjoined habitus—'narrative compact'—in the making of collective memory, and their consequent ordering through juridical developmental rationality. Rather, my account of minor jurisprudence, in reading *Dev* is a story of complicities—between law and aesthetics, their inflections and contaminations. Understanding minor jurisprudence as such becomes necessary given why I have chosen to characterize Gujarat 2002 as a *pogrom*, and not as riot or genocide, as it has generally been understood in most of the existing literature on Gujarat 2002.[24]

I draw on the work of Parvis Ghassem-Fachandi, who understands a pogrom as: 'an event driven by [the narrative compact of] words and images, as much by the associations and invocations that precede it as by those that accompany it. The enactment of the Gujarat pogrom followed a script collectively shared on the streets and in the media representations' (Ghassem-Fachandi 2012, 1): 'the pogrom was an acting out of [this] imaginary script' (Ibid., 64-65). The narrative compact of law and cinema—in the ways in which it has contributed to the making of a disgusting Muslim subject—has been 'the symbolic repository to imagine violence' (Ibid., 65) that was already being performed in Gujarat much before the actual violence began on February 28, 2002. And by extension, has also contributed to imaginations of post-violence justice. Ghassem-Fachandi writes:

> As informed by this script, the pogrom violence was motivated not merely by an "initial" violent attack—the burning of Hindu pilgrims in Godhra—but by a

24 For a discussion on conceptual distinctions and similarities between these terms see Brass 1996 and Brass 2006. The terms pogrom and genocide carry derivative valence, and enable making Gujarat 2002 intelligible to a primarily international audience for whom the Holocaust is the most identifiable point of historical reference. Riot has remained the preferred term in India, given that it is the only way collective violence is defined in the law. During my field travels in Gujarat these English terms were seldom used to identify 2002. Some of the vernacular terms used were *dhamaal*, *hullad*, *aandhi*, *toofan* and *qayamat*. I point at this politics of naming to provide a sense of the difficulty in drawing equivalences between the English and vernacular expressions through translation.

> mimetic desire that preceded the Godhra incident and provided a rationale for the enactment of violence. (Ibid., 65.)

This script of violence emerges out of the entanglements and intimacies between law and aesthetics, both as method and meaning, that frames and orders collective memories of the pogrom. Taking minor jurisprudence of the cinematic archive seriously, can reveal what Soshana Felman calls the 'juridical unconscious' (Felman 2002) in this script, which is the affective life of the law, as lived in the cinematic publics of Bollywood.

5. A jurisprudential-aesthetic reading of Bollywood's Law

Given law's symbolic and spectral presence in the way the filmic reconstructions of Gujarat 2002 frame collective memory, it is imperative that law is understood as a discursive category that is not restricted only to the texts of legislations and judgments in its making of collective memory, but also informs aesthetic imaginations of justice. I use a jurisprudential-aesthetic lens as a method of reading *Dev* to understand the work of law *as* and *in* aesthetics, in fashioning particular ways of remembering the pogrom. By *law as aesthetics*, I mean law's aesthetic incantations beyond its scriptural organization and articulation, and by *law in aesthetics*, I mean the form and place of law in aesthetic imaginations of justice. Such a reading renders visible the workings of the law/cinema narrative compact in the making of collective memories of the pogrom, and managing the aftermath of atrocity.

Building on such an understanding, the jurisprudential-aesthetic lens as a methodology of reading cinema seeks to avoid the two standard approaches in law and film scholarship. The first, is to not 'reduce film to a resource for specific legal issues, points or questions', and second, to not let 'each medium [law and film that is] retreat […] to its own corner relatively unscathed and looking pretty much as it had before the encounter' (Seymour 2007, 107). In other words, this method will read law's representations, not in the corrective or mimetic, but the 'affective register', i.e., to read film as a jurisprudential event (Buchanan and Johnson 2009, 33-60). *Dev* will not be read only for the story of the pogrom that it tells, but also the intensity it generates through its visual and auditory dimensions in engendering particular ways of remembering the pogrom (Ibid., 39).

The minor jurisprudence of cinema, will thus be considered as a system of memory (Goodrich 1996). The significance of unravelling minor jurisprudences in the aesthetic archive of cinema lies in the fact that the 'moving image provides a domain in which legal power operates independently of law's formal institutions' (Sarat, Douglas and Umphrey 2005, 1). In lending meaning to social relations, law and film share a relationship, in which they use their distinctive and discursive narrative styles to make powerful symbolic gestures toward witnessing and truth telling. As Jessica Silbey writes:

> The affinity of law and film lies in their mutual manufacture of truth through strategies of representation and storytelling and also in the power of these truth

> claims to structure and regulate social relations. Film, no less than law, changes our perceptions of reality; it shapes our understanding of the world. The power of both film and law derives at first from the intensity of the personal faith in believing what we see [and hear] (*bearing witness and judging based on the act of witnessing*). (Silbey 2014, 26, my emphasis.)

Imaginations of cinematic justice, thus, emerge from this relationship that law and film share in their ability to open up the space of affective reception such that the act of embodied witnessing and the responsibility of judging coalesce in the spectator. By cinematic justice I do not only mean the representation of law and justice in film, but more importantly, as Alison Young puts it, 'how cinema is jurisprudence', in how it generates judgment outside of the scriptural confines of law books, and architectural confines of the court room (Young 1997, 31). A double-play between law and the aesthetic language of cinema, one which undermines and reinforces imaginaries of justice simultaneously, is what the interpretive work of the jurisprudential-aesthetic lens aims to reveal in *Dev* as an instance of Bollywood cinema's mnemonic reconstructions of collective memories of the Gujarat pogrom. Such a reading shows us the way Bollywood's visions of cinematic justice do not make its spectators forget the pogrom, but at the same time orders the *ways* in which it is remembered.

Since 1991, when the Indian economy was liberalized—that temporal marker of the birth of the new India—mainstream Hindi cinema's form, content, reach and consumption started appealing to an audience that cuts across class, caste, religion, gender and national barriers. What was once, in the words of Ashis Nandy 'a slum's eye view of politics', has today also become a '*haute bourgeoisie*', view of politics as well (Nandy 1999, emphasis in original). There does not, any longer, remain an older binary opposition between a '"low", popular, resistant Hindi cinema and a hegemonic "high" literary culture in India' (Virdi 2002, xi). What makes Bollywood cinema attract such wide-ranging appeal is what Ranjani Mazumdar refers to as its 'techno-folk form'—like Rajadhyaksha's 'techno-nationalism' discussed before—which is achieved '[by] combin[ing] folk traditions with new cinematic technology [that offers an] unabashedly hybrid cultural form that narrates the complicated intersection between tradition and modernity in contemporary India' (Mazumdar 2007, xvii). This hybridity is sustained by invoking symbols of developmentalist desire on one hand—democracy, rule of law, wealth, the market, glitz, fashion, technology, urbanity, exotic foreign locales, the good life—and on the other, by appealing to tropes of relationality in the family, community and most importantly, the nation.

The complicated intersection between developmentalist desires and tropes of relationality does not always happen through neat categorizations of the former as markers of modernity and the latter as tradition, particularly at a time in the new postcolonial India, where the lines between the state and the market are increasingly getting blurred. Bollywood primarily produces privately funded cinema, so while the films can be said to have deep investments in a proto-neoliberal ethos, they cannot be said to have a direct connection with promoting state propaganda. Yet, as filmmaker Saeed Mirza has sharply noted, '[a] certain kind of cinema exists only

because a certain kind of state exists' (quoted in Prasad 1998, 1). M. Madhava Prasad in his book *The Ideology of the Hindi Film* studies 'cinema as an institution that is part of the continuing struggles within India over the form of the state' (Prasad 1998, 9). Although written in 1998, within a few years of India liberalizing its economy, Prasad's observations still carry trenchant currency:

> Cultural production too registers this reality through the recurring allegorical dimension of the dominant textual form in the popular cinema. […] What the allegorical dimension of texts represents is the continuing necessity to conceive the state form which will serve as the ground for cultural signification. Through the allegorical scaffolding, texts register the instability of their ground of practice and signification, as well as the continuing possibility of struggles *over* the state, of struggles to reconstitute the state. (Ibid., emphasis in original.)

The most potent site for contests over the allegories of the state form is cinema in general and Bollywood cinema in particular. In the mythology of the new India—marked by the narrative contract between *Hindutva* and neoliberalism—the state and the nation seamlessly merge as a dominant allegorical trope in this kind of cinema, which, historically, as many have claimed has been 'an exemplar of secularism,' with 'Islamicate roots' (Chadha and Kavoori 2008, 131). As Jyotika Virdi writes in her analysis of representations of the "nation" in mainstream cinema:

> Popular films touch a major nerve in the nation's body politic, address common anxieties, and social tensions, and articulate vexed problems that are ultimately resolved by presenting mythical solutions to restore an utopian world. The situation, complication, action and resolution in all popular film narratives both creates and is created by a collective social imagination […] The concept of nation subtends that imagination in Hindi films, and centres its moral universe. All ethical dilemmas revolve around the nation; good and bad, heroes and villains are divided by their patriotism and anti-patriotism. (Virdi 2002, 9.)

Law, in all its discursive forms is the scaffolding that plays the role of framing the allegories of the nation-state form. The Indian cinema does not have a distinct "law film" genre, although, as Prasad has pointed out, in the wake of Bollywoodization, a 'post-national aesthetic' has developed 'where the old dramatic courtroom confrontations seem to have lost their place', replacing law as one of the fundamental registers of cinematic universality with a rise in an Anglicized register of love (Prasad 2008, 47). This replacement, however, as I understand is that of law's statist symbols, like that of the courtroom. But even in this new discourse of love, the meta-trope of the nation, and the sub-tropes of community and family, draw on *Dharmic* thinking (traditions of Hindu Law founded on the *Dharmaśâstra*)[25] in moments of 'acute

25 As Donald R. Davis, Jr. writes: *Dharmaśâstra* are 'a specific genre of text in the Sanskrit language', that 'contain Hindu jurisprudence, a way of thinking about law from a distinctively Hindu perspective' (Davis 2010, 12-13). *Hindutva* ideology has historically drawn its inspiration from the *Dharmaśâstra*, among other classical Hindu legal texts (Sharma 2002, 1-36).

crisis', (Virdi's ethical dilemmas) 'to close the gap between the fallible world of human law and a divine ontology of justice' (Basu 2010, 3). As Anustup Basu, drawing on Derrida, explains, 'Law, it must be remembered, is for judgment, not justice. The former is an earthly discursive phenomenon, prone to error and adjustment; the latter is a divine ideal toward which historical procedures of judgment aspire but never quite reach' (Ibid.).

This ancient-mythical rendering of justice in Bollywoodized cinema, seems to coincide with what has been referred to as the 'dream life of law', or the 'mythic discourse', in the 'law film' genre in the West, where '[i]nasmuch as legal legitimacy is derived from society's perceptions of historical and cultural truths, generating myth is crucial to building legitimacy' (Sarat, Douglas and Umphrey 2005, 11). To quote Sherwin: 'The battle to control the constitutive norms of myth by taking over the means of cultural production is crucial to many aspects of law and politics' (Sherwin 2005, 106). The trope of the myth, as Silbey notes, plays a role in connecting law, film and memory: 'film, like memory can be mythic […] This mythic memory is law's popular consciousness' (Silbey 2014, 31). The mythic in the cinematic allegories of law and justice draws on *Dharmic* thinking, which affectively marks the Hinduness of the nation-state's imagination in Bollywood cinema. Keeping this myth alive, even when fractures and fragments on the nation's filmic canvas contest it, is the ideological script for Bollywood cinema. This mode of *Dharmic* address is directed at the spectatorial publics of a community of cinematic citizens for whom the secular nationalism of Hindu thought is held up, as Tejaswini Niranjana notes as 'a marker of the readiness to enter the "modern" age, and the modern person produced as "Indian" was the free, agentive, romantic subject of liberal humanism' (Quoted in Liang 2005, 372). This modern cinematic citizen is also a mythic construction: 'while allegedly a neutral category, is invariably marked invisibly as middle class, upper caste, Hindu and male' (Ibid., 373).

6. *Dev*: A Hindu Constitution?

Made by critically acclaimed filmmaker Govind Nihalani, with super-star Amitabh Bachhan in the lead, the violence of Gujarat 2002 is central to *Dev*'s (2004) narrative, though it is not represented as a pogrom, but as a riot. *Dev* was the first Bollywood film made on the Gujarat pogrom. Its theatrical release took place few months ahead of India's general elections in 2004 (in which the Hindu right wing BJP was voted out at the Centre, though continued to win elections in Gujarat), and soon after the controversial Best Bakery case (which was one of the major trials arising from the killing of 14 people at a bakery in the city of Vadodara during the pogrom), was shifted out of Gujarat to Mumbai (to guard against subversion of justice by the State government).[26]

Dev opens with a standard disclaimer: 'All characters and incidents in this film are fictitious and bear no resemblance to any person living or dead or to any incident

26 See Dhavan 2003.

whatsoever. Any similarity so perceived is purely coincidental'. Despite the fact that *Dev*'s story is located in Mumbai, and makes no mention of the Gujarat pogrom, the *pure coincidence* is that the key moments in its plot and narrative borrow from events that happened in 2002 in Gujarat. The violence against Muslims in the film is preceded by a precipitating event like that of the Godhra train burning incident. *Dev*, interestingly, even in its non-naming and non-identification with the Gujarat pogrom, frames its narrative in the same chronology as the 2002 pogrom, the death of Hindus in the train compartment is replaced by a bomb blast at a Hindu temple that becomes the trigger for the killing of Muslims. In fact, it was because of these striking similarities with actual events from 2002 that legal action was initiated against *Dev* by private petitioners, much like *KPC*, who demanded a ban, claiming that the film could instigate sectarian tensions (Pandya 2004).

As journalist Ayesha Khan reports, when *Dev* released in Vadodara, cinema theater owners put out advertisements in local dailies calling on both Hindus and Muslims to come and watch the film, to get as much business as possible, fearing that it might be banned by a court order. The fact that *Dev*'s story was similar to events related to the pogrom, especially the Best Bakery massacre that took place in Vadodara, was apparent from the text of an advertisement, which read: 'Watch Vadodara's Zaheera Sheikh-inspired Kareena Kapoor's role. Naked portrayal of riots, inactive police force and non-performance at the behest of the chief minister'. In fact, as Khan noted, the audiences would shout out 'Zaheera Sheikh' when the actress Kareena Kapoor appeared on the screen (Khan 2004). *Dev*, it is possible to argue, brought into being, through its surrogate address about sectarian violence, a cinematic public that identified the film with the Gujarat pogrom, despite its disclaimer of being fictitious.[27] This identification also wasn't mere familiarity with the event. As Martha Nussbaum wrote commenting on her experience of watching the film in an Ahmedabad theater: 'the mood of the audience was staunchly anti-Muslim' (Nussbaum 2007, 10).

Like any other Indian film approved for public exhibition, *Dev* inaugurates the legal-aesthetic narrative contract/compact of cinematic citizenship by displaying a certificate from the CBFC (Fig. 1), that declares its images and sounds as legitimate speech, an archive of state sanctioned memory, and its audience are made the contractually rightful recipients of its memorial narrative. The film was classified for viewing by 'Adults Only', constituting an imagined mature cinematic public, as was referred to in the *KPC* judgment discussed at the beginning of the essay, who might be able to absorb the film without being provoked to resort to violence, unlike the murderous mobs during the pogrom. One might think of the censor certificate as what Peter Goodrich has called 'obiter depicta' (Goodrich 2014): an iconic legal

27 This particular spectatorial identification also carried strong juridical-aesthetic traction, given that Zaheera Sheikh in the Best Bakery judgments was repeatedly referred to as the 'star witness'—like that of a movie star—and was accorded fallen celebrity status by the media, not so much for the violence she witnessed and experienced, but for being the unreliable Muslim who flip-flopped on her testimony, ultimately being convicted for perjury by the Supreme Court of India.

emblem that any film-watching Indian will be extremely familiar with, which is the working of a governmental rationality, lending life and form to the relations between law, cinema, nation-state and the citizen. I would like to understand this rationality as part of Bollywood's 'cinematic apparatus and its pedagogic role as the disseminator of modernity' (Prasad 2008, 46).

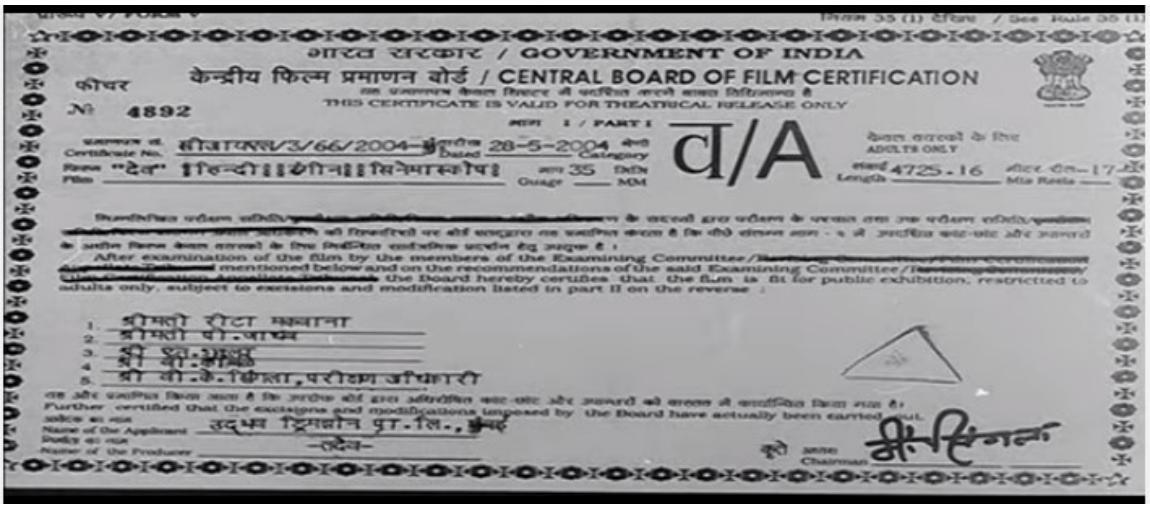

Figure 1: 'Obiter Depicta': Adults Only

The English and Hindi titles of *Dev* digitally stylized to emerge out of flames, suggesting a trial by fire (Fig. 2), is accompanied by an intense background score in which a chorus of deep male voices recites a Sanskrit *shloka* (chant) from Chapter 2, Verse 27 of the *Bhagavad Gita*: *'Karmanye Vadhikaraste Ma Phaleshu Kadachana, Ma Karmaphalaheturbhurma Te Sangostvakarmani'*. Its English translation would mean: 'You have a right to perform your prescribed duty, but you are not entitled to the fruits of action. Never consider yourself the cause of the results of your activities, and never be attached to not doing your duty' (Prabhupada 1983, 69). It is this message from the *Gita*—'of action without consequence' (Kapila and Devji 2010, 271)—that frames the ethico-juridical universe that the film conjures.

The invocation of the Hindu holy book and the use of language in the title sequence offer a telling instance of how *Hindutva* ideology subliminally informs *Dev*'s affects of initiation and spectatorial address. The use of English and Hindi in the titling suggests the practice of what Prasad has called the 'structural bilingualism of the Indian nation-state': 'a state of affairs where the multitude of Indian languages (here counted as one) function under the direction of a meta-language in which alone the national ideology can be properly articulated' (Prasad 2008, 45). It is through Bollywood cinema that the meta-languages of English and Hindi have thus emerged as 'defining the linguistic order of new India' (Ibid.), in which English works as the language of secular neoliberal aspiration, and Hindi as that of secular nationalist unity: a classic instance of techno-nationalism, or folk-nationalism at work. What this has done is to wipe out the Islamicate presence of Urdu—much in line with what the proponents of *Hindutva* would ideally want—as a language that would always

appear on film posters (Mazumdar 2003), and opening title sequences of Bollywood cinema 'as a matter of routine' (Prasad 2008, 46).

The seamless blending of the Sanskrit *shlokas* from the *Bhagavad Gita*, and the English-Hindi titling of *Dev*, initiates the pedagogical project of Bollywood cinema in naturalizing *Hindutva*'s secular narrative that reduces anti-Muslim violence to tragedy and politics, and celebrates the mythical Hindu foundations of modernity in India that the Constitution is popularly believed to enshrine.[28]

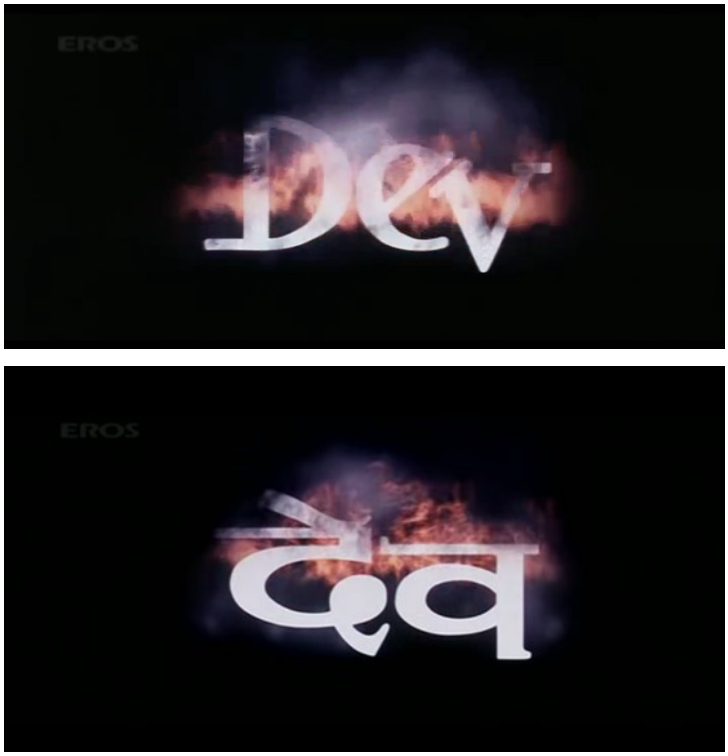

Figure 2: 'Structural Bilingualism'

Dev's story is set at a time in India—taking its cue from the Gujarat pogrom—that is rife with sectarian tensions. The main character in the film is Dev Pratap Singh (played by Amitabh Bachchan), a joint commissioner of police in Mumbai. The film's subtitle—'He chose to walk the razor's edge…'—is a comment on Dev's personality: a police officer who does not fear to stand by his convictions, and takes his responsibility as a policeman of upholding the rule-of-law and protecting the nation-state from 'terrorists' so seriously, that he is known for carrying out and defending extra-judicial killings. The film portrays Dev's belief in the supremacy of law as a virtue, especially in the way he repeatedly declares in the film that he

28 While the use of English has powerfully aided the processes and practices of Bollywood in its transnational developmentalist avatar, the way in which Hindi has come to displace Urdu can be read as the fulfilling of a juridical mandate enshrined in Articles 343 and 351 of the Indian Constitution that make Hindi the official language of India, and directs the state to be duty bound to promote and spread it 'relying *primarily* on Sanskrit', considered by Brahmins to be the language of the Gods (Singh 2005, 921, emphasis in original).

does not discriminate between terrorists based on their religion. Such a portrayal is, by extension, a comment on the rule-of-law as a value neutral idea that is purely committed to maintaining national security by killing anyone, irrespective of identity, who poses a threat to the nation-state.

The other important character in the film is Dev's very good friend and colleague, Tejinder Khosla (played by Om Puri), whose ideology turns him into Dev's antagonist. Tejinder identifies Muslims as the Outsiders who are the reason for India's ills. His mission, in the fight against terrorism, is to root out all Muslims, to annihilate them. The Outsider metaphor has been repeatedly used in Bollywood cinema in its representations of Muslim characters; and despite continuing to narrativize the Muslim as exoticized, marginalized or, and more increasingly, demonized (Chadha and Kavoori 2008, 131), *Dev* in Bollywood's 'techno-nationalist' tradition rehabilitates the fractured nation through the tropes of familiality, diversity, nationalism and a belief in the rule-of-law.

A parallel narrative in the film portrays the lives of a young Muslim man called Farhaan Ali (played by Fardeen Khan), who has just returned to Mumbai after completing his law degree from Vadodara, and his girlfriend Aaliya (played by Kareena Kapoor), a college student in Mumbai. They live in a densely populated Muslim community housing complex called Noor Manzil, located in a working class area. Farhaan's father, Ali Khan, is a respected local Muslim leader, who has a lot of faith in Indian democracy and pluralism and believes in the ideologies of non-violence and pacifism of anti-colonial leaders like Mohandas Karamchand Gandhi, and Khan Abdul Gaffar Khan. The trope that Ali Khan's character follows is that of a *good* Muslim, who believes in the constitutional vision of 'unity in diversity' (Singh and Deva 2005, 649-686) and is an exception to the rule of the *bad* Muslim as terrorist (Mamdani 2004). Farhaan, however, feels that the lofty ideals of constitutional equality have turned into a sham, and that innocent Muslims are being persecuted by the Indian state and its police in the name of fighting terrorism. It is here that an invocation of law sets up the crisis in the film, which unfolds as an ideological conflict, on the one hand, between Farhaan, as a Muslim and a law graduate, whose lived experience considers the Constitution to be a document worthy of suspicion, and on the other, Dev, as a police officer, whose lived experience suggests that even extra-constitutional violence by the police is justified to uphold the Constitution.

At a peaceful protest demonstration against anti-Muslim police brutality, Farhaan's father is killed by the police, when Dev orders his cadres to open fire after the crowd turns violent. Farhaan decides to take revenge on Dev. Taking advantage of Farhaan's rage, a fundamentalist Muslim politician offers to train Farhaan as a *jihadi*. The politician's character, of course, is created using the tropes of the *bad* Muslim, in contrast to that of Ali Khan.

Farhaan fails an assassination attempt against Dev, but is then surreptitiously, without his knowledge, made to plant a bomb outside a Hindu temple. The bomb blast—akin to the Godhra incident, but in this case made clear as to have been carried out at the behest of the Muslim politician—kills several Hindus, provoking

retaliation against Muslims. This *pratikriya*, of the kind that followed the Godhra train burning—is openly led by a right wing Hindu politician, pointing at the connivance of political leaders in fomenting the Gujarat pogrom. The violence is represented as a reactionary and spontaneous outrage, like a riot, and not a sophisticatedly pre-planned pogrom. Farhaan survives the blast, and realizes that he was being used as a foot soldier by the Muslim politician to serve his sectarian agenda. Aaliya also survives the retaliatory violence, though she witnesses the killing of all her family members. In the middle of the violence, Dev helps Farhaan take Aaliya to the hospital, and this effects a change of heart in Farhaan and his hatred for Dev ends.

When the Hindu mobs were on the rampage killing Muslims, Dev as part of the anti-terrorism team led by his friend and colleague Tejinder, was ordered not to take action to stop the mobs. This order came from the Hindu Chief Minister, who much like Narendra Modi, asked Tejinder to ensure that Hindus get to freely vent their anger against Muslims for this blast. Dev arrives at the scene to find that Tejinder is waiting with the police squad as onlookers, allowing the Hindu mobs a free rein in killing Muslims. Dev ignores Tejinder's orders and goes ahead with his team of policemen to stop the killings, but his efforts are in vain and several people die.

Dev is deeply distraught about not being able to uphold the rule-of-law to save the victims, in spite of having the opportunity and authority to do so. He realizes the ideological differences between him and Tejinder. Despite political pressure, Dev organizes a public meeting at the site of Noor Manzil, where he urges people to come forward to lodge their First Information Reports (FIR), and also identify any police or politicians who were involved in carrying out the violence. Despite threats to her life Aliya comes forward to testify, and inspires other women to do the same.

The mise-en-scène (Fig. 3) comprises a large makeshift tent, which has been erected right outside Noor Manzil. Inside the tent there is a table with the necessary legal documents in which FIRs will be filed. There are local leaders sitting on chairs behind the table. Dev speaks through a microphone that carries his voice to residents of Noor Manzil who have gathered on their verandahs to hear him speak and be spectators of what is on offer, lending a theatrical feel to the space. This space of the public meeting can be read as an allegory for what Dorsett and McVeigh have called a 'jurisdiction of conscience', (Dorsett and McVeigh 2012, 112) in which it is not the victims who have to go to the law—that is to go to police stations to file their FIRs to put the law in motion—but it is the law that has ceremonially travelled to them. The jurisdictional boundaries between the private space of Noor Manzil, and the public space of the police station merge, and Dev embodies state law and carries it to Aaliya and other victim-survivors. The theatrical arrangement of the space also lends to it the form of a public court handing out popular justice outside of the architectural confines of a courtroom. However, here Dev presides as the judge and jury—he is the sole embodiment of the majesty of law. This is especially the case when on Aaliya's identification of the erring policemen, Dev suspends them without a hearing, and orders that a charge sheet be filed against them.

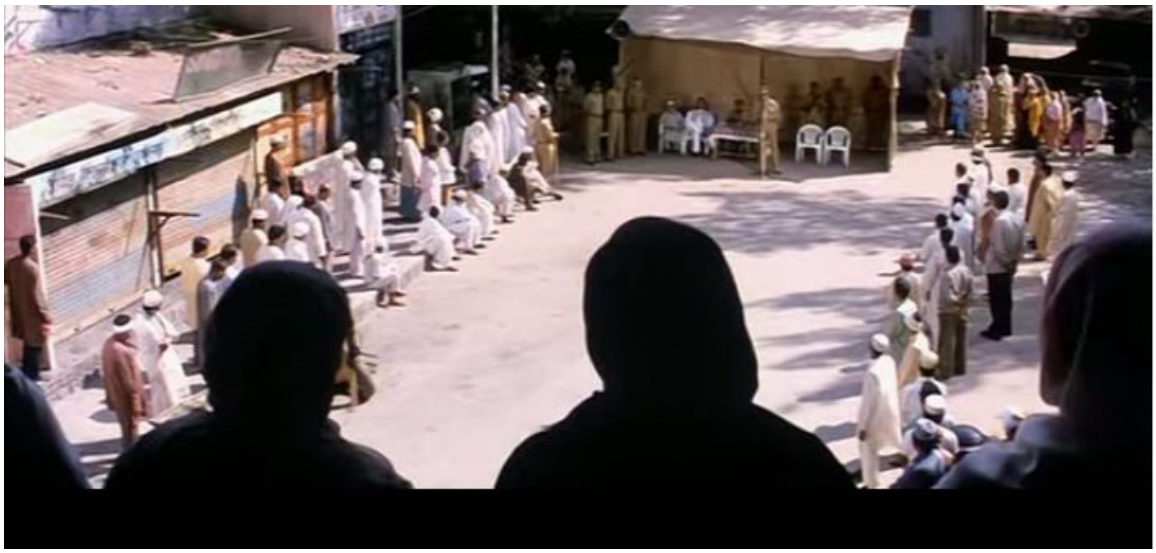

Figure 3: Noor Manzil's 'Jurisdiction of Conscience'

Meanwhile, Farhaan and Aaliya take refuge at Dev's home, where it is decided that Dev will present his eyewitness account of police and political inaction and collusion in carrying out the violence. He submits his report to the Chief Minister (CM), but also decides to depose in the court, since he is aware of the CM's anti-Muslim ideology. Farhaan expresses his fear that Dev's life will be under threat if he goes ahead with his decision to expose police and political complicity. Dev invokes the morality of the Sanskrit *shloka* from the *Bhagavad Gita* with which the film opened to emphasize that life or death does not matter as long as he continues to fight for the truth to uphold the rule-of-law until his last breath. Tejinder tries to dissuade Dev, but Dev stands by his convictions. In the climactic scene, set right outside a symbolically imposing court building, Dev is shot dead by Tejinder. In a show of secular solidarity Farhaan, a Muslim, lights fire to the Hindu Dev's funeral pyre, a duty that in Hinduism is supposed to be the privilege of the son. Later, unable to deal with the trauma of having murdered his friend, Tejinder kills himself.

The film ends with Dev's wife handing over a file with all the necessary evidence that Dev had collected, to Farhaan, who finally dons the lawyer's attire and walks up the stairs of the court house, following Dev's instructions that he must keep faith in the law and start litigating. Dev, in an all-black attire, seated against a black background, in his transcendental post-death avatar fades in, repeating with singular intensity, in Amitabh Bachhan's famed baritone, the *Gita*'s morality of relentlessly fighting for truth irrespective of consequence. The symbolic message, with which the film ends, is that the Muslim Farhaan, having given up on the path of violence to seek justice, will now follow the path of the secular law to seek justice for the violence against his community, and as a tribute to the Hindu Dev's courage and sacrifice.

Dev offers a memorial reconstruction of Gujarat 2002 that reduces religious strife in India to an amorphous politics, and portrays it as the consequence of the sectarian agendas of individual fundamentalist politicians—much like the post-Gujarat 2002 focus on Chief Minister Narendra Modi—who spread hate to gain political mileage.

This memorialization conceals the ideological and structural foundations that lend legitimacy to such hatred. The film's assessment of religious violence is that ordinary Hindus and Muslims are the victims, first as pawns in the hands of politicians who brainwash them to propagate their violent agendas, and second as the innocents who get killed because of this violence. That both Hindus and Muslims bear the brunt of this equally, lends a democratic logic to religious violence, and equalizes its consequences on both majority and minority communities. The film's emphasis is on the fact that both sides suffer, that sectarian violence does not choose its victims based on religion, much like how Dev's secularism tells him not to kill terrorists based on their faith, but kill them nevertheless. Interestingly though, the retaliatory cycle of violence is initiated by Muslims, which is the reason why Hindus are forced to respond. As Sunera Thobani writes:

> In the cinematic Gujarat—and India—[…] [t]he deeply institutionalized inequities and imbalance of power between Hindus and Muslims is rarely allowed to enter the frame, and if it is, the good intentions of the secular Hindu hero/heroine becomes a mitigating factor—his/her ideals and values, his/her personal acceptance of Muslims will set everything right. The Muslims who do not abide by these ideals and values are hopelessly naïve, and the proof of Muslim loyalty is, without exception, subservient to the values and embrace of enlightened Hindu characters, most of whom are secularists. (Thobani 2014, 493.)

This memorial ordering of reconstructive imagination has been a standard refrain of the Hindu right to justify violence against Muslims, citing *inter alia* the "invasion" of India by the Mughals and the Partition in 1947 as precipitating events.

Law occupies an extremely significant role in the film, both in metaphoric and material forms. Its aesthetic incantations are metaphorically embodied in the character of the film's protagonist Dev. Dev embodies the characteristics of the ideal nationalist: a benevolent patriarch, Hindu, secular, liberal and an unshakeable believer in the rule-of-law—he is the good secular Hindu hero. Dev's beliefs are so powerful, that they can on the one hand justify extra-judicial killings, and on the other inspire a young Muslim gone astray to repose faith in the law in his quest for justice. In the traditions of the classic psychoanalytic reading of the law of the father, the good secular Hindu in Dev, and his unwavering belief in the rule-of-law, turns him into a father figure for the father-less Farhaan, and in the film's affective address to the cinematic public. In the 'world of danger' that the film conjures, Dev and his *Gita* inspired juridico-moral universe offers succor for 'certainty and security' and embodies the role of the 'father substitute' (Sarat 2000, 13). '[T]he father is the infallible Judge', writes Jerome Frank, 'the Maker of definite rules of conduct. He knows precisely what is wrong and… sits in judgment and punishes misdeeds. The Law… inevitably becomes a partial substitute for the Father-as-Infallible-Judge…' (quoted in Sarat 2000, 14).

Law's aesthetic incantations are further exemplified in the way it resolves the

ethical dilemmas that *Dev*'s protagonists confront. For Dev, the primary dilemma was on the one hand to uphold the rule-of-law to end terrorism and sectarian violence, and on the other to stay loyal in his friendship with Tejinder. Dev's decision to stand firm on his rule-of-law conviction comes from a certain belief in constitutionalism that becomes apparent in a very didactic scene in the film in which Dev and Tejinder are discussing over a drink what the foundations of their conscience are (Fig. 4).

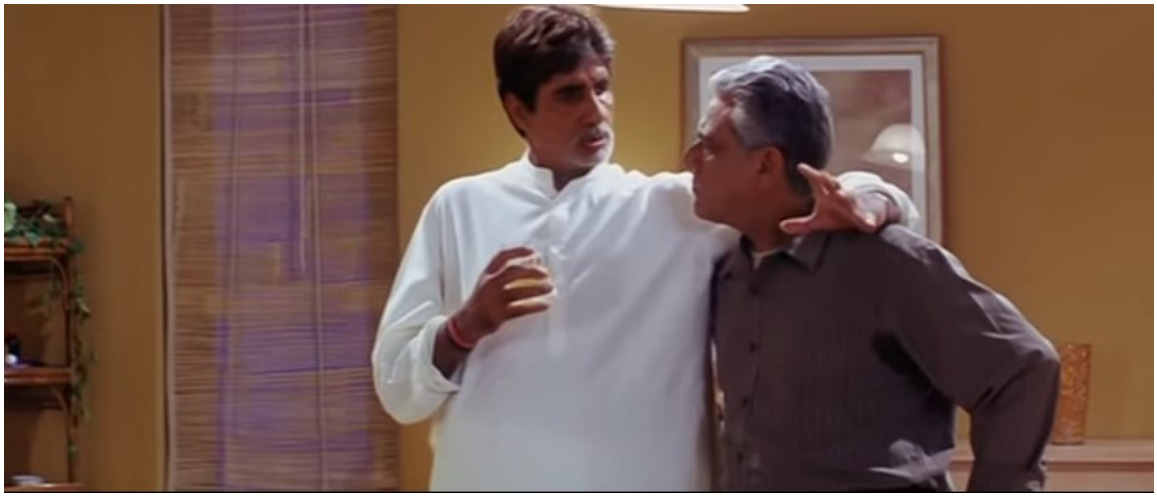

Figure 4: Drawing room Constitutionalism: *Gita* as Conscience

The location of this discussion, in Dev's elite living room, is a telling scenario of the role class plays in determining who gets to pontificate on issues of constitutionalism. Dev uses the metaphor of the *Bhagawad Gita* to refer to this foundation. He says that for him the Constitution of India and the idea of rule-of-law are his *Gita*, and that's where he derives his foundational beliefs from. Tejinder disagrees, and says that only if there is a nation, will there be a constitution, will there be laws. His *Gita* is power; the powers to annihilate all the enemies of the nation, who, for him, are Muslims. A constitution, he says, will make sense only after that. Dev calmly argues that power does not come from the police, the army or weapons; the power of the nation-state comes from its political framework, economy, justice delivery system, social equality and secularism, and that all of these virtues—democracy, development, and the justice system as I understand them—are founded in the Constitution for Dev. In an innocuous way Dev's assertions about the Constitution point at his passionate investments in the triad of developmental juridical rationality as well as its sacrality. It is this belief in the rationality of the Constitution that convinces Dev to depose in the court against the misdeeds of the police and politicians in supporting the pogrom, the court for him being the ultimate objective institution that upholds the Constitution.

In the *law as aesthetics* register, the Constitution of India is equated to the *Gita*. Dev's conscience—captured in the affective force of the Sanskrit *shlokas* that opened the film—considers the idea and imagination of the Constitution to be sacred. By doing this, Dev Hinduises not only his, but also the conscience and legal foundations

of the nation, in keeping with both the Indian Supreme Courts' jurisprudence that did not find any reason for *Hindutva* ideology to be antithetical to secularism (Sen 2010; Cossman and Kapur 2001), and how the *Gita* has served as the inspiration for the founders of *Hindutva* ideology (Chaturvedi 2010, 417-435).[29] Dev is the hero of the film—he is characterized as progressive, secular and liberal (the unmarked Hindu in secular police uniform), he does not hate Muslims, but at the same time likens the Constitution to the *Gita*, which in a recursive way was the foundation of the imaginary script on which the pogrom was planned and executed. The film, interestingly, draws a distinction between Dev's good Hinduism, and Tejinder's bad version. The good version rationalizes, modernizes and secularises the imagined Hindu foundations of postcolonial India by using the Constitution as an alibi, whereas the bad version offers extra-constitutional justifications for the annihilation of Muslims. Both these versions ultimately celebrate soft and hard versions of *Hindutva* ideology. Dev's version speaks more to *Hindutva*'s neoliberal avatar that understands developmentalism and legalism as a means of assimilating the Muslim as 'reluctant citizen' (Visvanathan and Setalvad 2014, 125) into the Hindu nation's fold. If Muslims resist this governmental tactic, it will be 'read in jurisprudential terms as a self-imposed injury of an ethnic group caught in a time-warp and reluctant to embrace citizenship and development' (Ibid.). Farhaan's lawyerly transformation into the good Muslim citizen, as a seeker of justice using constitutional means, rehabilitates him and champions the promise of Dev's *Gita* as Constitution.

This script has also been the secular rhetoric on the basis of which Narendra Modi had appealed for votes during his prime ministerial campaigns. Time and again Modi has referred to the Constitution as the 'holy book' that should drive his 'India First' mission (*Business Standard*, January 12, 2014). Similarly, since after Modi's win in 2014, there have been attempts to include the *Gita* as a secular pedagogical text in school curriculums in BJP ruled states in India (Mohan 2015). This secular rhetoric of constitutionalism has been a part of Indian juridical governance techniques since 1976 when the word 'secular' was inserted into to text of the Constitution for the first time through The Constitution (42nd Amendment) Act.[30] Dev's valorization of the Constitution as his holy book is a narrative that even the secular-left in India would subscribe to. The secular rhetoric, thus, works as a mask to cover the Hindu foundations of the Constitution. Pointing out the 'Hindu bias', in the Indian Constitution, Pritam Singh writes: 'The progressive and genuinely secular forces in India need to recognize a bitter truth, namely that uncritically claiming a secular heritage from […] the Constitution of India is to play a potentially losing game from the very beginning against their *Hindutva* opponents' (Singh 2005, 911, emphasis in original). The appeal to the Constitution, like in *Dev*, as the panacea for all injustices

29 The *Bhagavad Gita* is a complex political text, and might be read in myriad ways that do not necessarily lend it entirely to *Hindutva* appropriation (See Kapila and Devji 2013). However, under the present political dispensation it has served to strengthen *Hindutva* ideology in India than provide any meaningful resistance to it.

30 Available at <http://indiacode.nic.in/coiweb/amend/amend42.htm> (last accessed 20 June 2015)

against Muslims, and the contradictory projection of it as a sacred text that is secular, is in fact, institutionalized within India's juridical imagination.

In the Best Bakery case (*Zahira Habibulla H. Sheikh vs State Of Gujarat*, 12 April, 2004), where the Supreme Court, after ordering that the case be shifted out of Gujarat for fear for political manipulation by the State and to uphold Constitutional standards of fair trial, tried Zahira Sheikh—the key witness who turned hostile due to political threats against her and her family—held her guilty for contempt of court. In sentencing Zahira, the same court that expressed anguish over how the justice process in Gujarat was weighed against its Muslim minority population, and how that was an affront to our Constitutional principles of secularism, began the judgment by quoting from the *Manusmriti*—a classical Hindu religious scripture that also forms the basis of Hindu law—on the duties of a witness.[31] In upholding the secular Constitution, the court, much like Dev, Hinduised it. As Kalpana Kannabiran notes:

> […] by drawing justification from the Manusmriti to negate the liberty of a Muslim survivor of Hindu fundamentalist assault—the Supreme Court demonstrated by its own example the way in which discrimination interlocks with the loss of liberty in the case of persons belonging to religious minority communities, especially the women of these communities. […] [T]he normativization by constitutional courts of conservative Hindu legal traditions embodied in the Manusmriti, and the situated reading of the constitution within the ideological frameworks of orthodox Hinduism, sharpens the crisis of constitutional disarticulation on the critical issue of non-discrimination. (Kannabiran 2012, 298.)

Moving on: for Farhaan, the dilemma was between subscribing to his father's belief in the non-violence and pacifism of freedom fighters like Gandhi and Khan, as the way to respond to the discrimination faced by Muslims in India, or to take the path of violence. After his brush with violence, and seeing Dev firmly standing his ground to side with his constitutional beliefs, Farhaan also reposes faith in the justice system, the courts—by taking up litigation to fight for Dev's cause and for the Muslims of India, and in turn, to resolve his own dilemma. Aaliya too—in resolving her dilemma of whether to speak up as an eyewitness in front of the same police force that aided and abetted the violence—believed in Dev's promise at the public hearing, ensuring that if people lodge FIRs, the police will ensure justice by arresting and charging the individual wrongdoers—a gesture towards individual criminalization as a way of ending impunity.

In the *law in aesthetics* register, the legal process, particularly the criminal law,

31 The *Manusmriti* form a part of the *Dharmaśâstra* texts and serves as an important source of what constitutes Hindu law. Several parts of the *Manusmriti* are out rightly discriminatory towards women, and Dalits (see Doniger & Smith 1991). As has been argued, it is in fact the anti-Dalit foundations of Hindu scriptures that form the basis of the birth of *Hindutva* ideology in India (See, Menon 2006). For the historical connections between caste, *Hindutva* and violence in Gujarat see, Shani 2007.

is represented as the ultimate location for justice seeking. Like the protagonists of the film, the audience is called on to repose faith in the law. This is the performance of a particular kind of rationality that displaces structural concerns about state accountability. Legal culpability is individualized, and is singularly focused on specific politicians or a prejudiced police officer like Tejinder. Responding to the Gujarat pogrom where all investments are directed at individual criminalization of perpetrators, does very little to challenge the historical, structural and ideological foundations that resulted in the pogrom occurring in the first place. Convictions can, in fact, create an illusion of the restoration of rule-of-law, the state's commitment to liberal rights, which demands that we repose faith in new India's state-making practices. As Ratna Kapur has argued in her assessment of the justice seeking mechanisms post the Gujarat violence:

> The story of the Gujarat riots and subsequent efforts to address the harms and injuries through prosecution and apology does not pay attention to the institutional discursive mechanisms within a democratic polity that can produce moments of extreme violence, moments that cannot be written off as aberrational and deviant […] 2002 cannot be addressed exclusively within a prosecutorial, or reparations framework that seeks to prosecute individual wrongdoers who carried out such atrocities and provide compensation to those who suffered […] [T]he riots were a logical product or outcome of a discursive strategy partly in and through liberal rights discourse and not in opposition to such rights. (Kapur 2006, 889.)

By extension, the film addresses its cinematic publics, especially Muslims, to repose faith and trust in the Constitution and the courts. The idea of the Constitution and the institution of the court are represented as incorruptible foundations of the nation-state which can weather all crises, and can in consequence unshakably guard the nation. The court house outside which Dev is murdered, and the steps of which Farhaan climbs in his advocate's attire, the sun shining on him, is an imposing building, painted white, and its environs look sanitized (Fig. 5). These material locations of law, and the location of the elite drawing room where Dev and Tejinder pontificated on constitutionalism, are set-up, in my reading, in contradistinction to the squalid and lawless Muslim ghetto of Noor Manzil—which when introduced early on in the film, was shown to be a hideout for a Muslim militant. For those like Farahaan and Aaliya, who are the victim-survivors of the pogrom, they had to exit that lawless location, find refuge in the Dev's secular home, and then enter the ostensibly secular space of the court in search of justice. The jurisdictional organization of the city and that of law and legalism are, thus, clearly identified in its aesthetic representations.

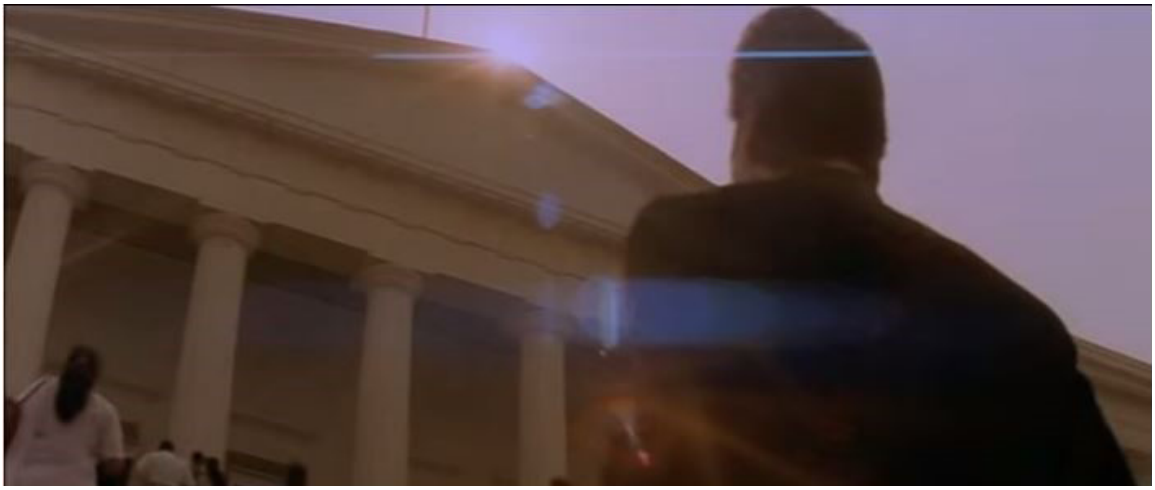

Figure 5: Farhaan meets the Court/ No more 'Reluctant Citizen'

The *way* of remembering that *Dev*'s reconstruction of the pogrom engenders, is that religious strife is a doing of individual evil politicians, that violence begets violence (and Muslims generally tend to start it), so trust the Constitution and courts, they are secular, they will ultimately deliver justice. More importantly, it is the trust in the Constitution and the conviction to stand by the rule-of-law that also resolves the enmity between the Muslim Farhaan and Hindu Dev. The intensity of the Constitutional resolution is so powerful that Farhaan is able to overlook the fact that it was because of Dev's extra-judicial orders that his father and many other Muslims were killed in police firing. Despite developing an endearing feeling towards Farhaan, Dev, in fact, never expresses any remorse about his orders that killed Farhaan's father—he is placed above the audience's moral judgment because that was in the realm of his *Gita* inspired *Dharma* (juridico-ethical duty) to protect the nation. Farhaan, similarly, never demands justice for Dev's act of ordering the killing of his father, and many other Muslims at the protest rally.

Dev, thus, reconstructively imagines a *way* of remembering where, while the phantasmagoric violence is not forgotten, the structural Othering of Muslims in India is rationalized. Through such a rationalization, secular Hindus like Dev, despite their belief in the Hindu foundations of the nation and its Constitution are rehabilitated in the eyes of the Muslim cinematic citizen, as being fair to Muslims as long as they stand by the Constitution and the rule-of-law. The Muslim victim-survivors of the violence in the film ultimately repose faith in Dev's Hindu Constitution, and the secular courts as the ultimate arbitrators of justice. It is this form of rationality, one that elides the Hindu foundations of the Indian nation-state, its Constitution and courts, which orders and lends meaning to law's institutions and imaginaries of justice. The memorialization of the pogrom in *Dev*, thus, happens through the projection of the performance of state legalism, which is designed to restore faith in the mythical capacity of law to deliver justice. Interestingly though, in its cinematic representation, *Dev* ends outside the courtroom and the audience does not yet know whether the law is able to perform the promise of its powers that the film has celebrated.

7. A provisional closure

My reading of *Dev* through the jurisprudential-aesthetic lens has demonstrated the aesthetic forms that law takes in the making of imaginaries of cinematic justice, and in rationally ordering a way in which collective memory of the pogrom is actively reconstructed in Bollywood cinema. Despite not being a law film, this way of remembering that *Dev* engenders is framed by a Bollywoodized imagination/imagery of law and legalism. *Dev* recognizes the scale of the violence (chronology and facts aside), and also reposes enormous faith in the Constitution and rule-of-law as unquestionable paths to justice. While *Dev* condemns the violence, and mourns the dead, at the same time it also reifies Constitutional secularism and legalism as part of new India's state-making arsenal, the embrace of which will provide the most effective closure to the trauma of the pogrom. The foundational Hinduness of the nation-state, and its buttressing by secularism and legalism is never questioned by the memorial reconstructions of the pogrom in the film. The landscape of cinematic justice that is painted rationalizes the pogrom as aberrant—one that does not fit the way the Indian nation-state conducts its governance—and offers visions of reconciliation and resolution that are deeply invested in the very structures that enabled the pogrom in the first place.

It is this particular form of ordering of collective memory that I have called 'developmental juridical rationality': the ordering of collective memory through the combined working of the triad of secularism, legalism and developmentalism. My reading of *Dev* was aimed at demonstrating the working of the first two techniques in the triad, and offer some brief sense of how the third works. Drawing on Michel Foucault's analytic of 'governmental rationality', and later critiques and interventions by postcolonial and other critical scholars, I provisionally develop this conceptual category that explains how new India conducts its state-building practices. Foucault notes that the purpose of government is to secure the 'welfare of the population, the improvement of its condition, the increase of its wealth, longevity, health et cetera' (Foucault 1991, 100). To do this, writes David Scott, government 'arrange[es] things so that people, following only their self-interest, *will do as they ought*' (Scott 1995, 202-203, emphasis in original). Secularism, legalism and developmentalism are projected by the new Indian nation-state as governmental practices for the welfare of its population, which is legitimated by the filmic reconstructions. The cinematic public is addressed to identify with these practices as virtues of governance, and hence, conduct themselves *as they ought*. According to *Hindutva* ideology—its two different hues embodied by Dev and Tejinder—such conduct involves the pursuance of self-interest for welfare, health, wealth, and longevity, which is attainable only through the revival of Hindu India. The existence of Muslims who behave as reluctant citizens, thus, is a hindrance to the achievement of welfare of (Hindu) populations.

In Foucault's formulation, the conduct of government in modernity arrived through a periodization from control over the individual body (punishment), to panoptic control (discipline), to inducing violence free self-discipline *en masse* (biopolitcs). Achille Mbembe argues that in postcolonial locations the operation

of governmental rationality works in ways where control over minds is coexistent with brutal violence over bodies (Mbembe 2003). Thus, by developmental juridical rationality, I mean a particular way in which a state's governance tactics order the conduct of politics in a neoliberal 'postcolony'.[32] Such a tactic valorizes accelerated legalism and developmentalism as primary markers of secular constitutionalism and modernity, and is simultaneously accompanied by a conjuncture of violence and violation—thanatopolitics: 'killing rather than simply as allowing to die or exposing to death' (Gupta 2012, 17)—against minority groups, that remain implicitly tied to the Indian state's rational performances and enactments of legalism, not exceptionalism.[33]

In this essay, my attempt was to bring into conversation law and aesthetics and Indian film studies to take the minor jurisprudence of Bollywood cinema seriously as a memorial archive through which we can read the Gujarat pogrom both as a concentrated instance of the making of collective memory and the managing of its aftermath through cinematic imaginations of justice. In reading *Dev* through the jurisprudential-aesthetic lens, I demonstrated how aesthetic reconstructions of the Gujarat pogrom call on law to generate a way of remembering that is ordered by the workings of a juridical developmental rationality that recognizes the violence of the pogrom, but at the same time valorizes the state-making practices of the new India that laid the foundations of the pogrom.

The many cinematic publics of Bollywood reconstructions of the pogrom—including the other films that have memorialized the pogrom—can be said to have elicited three kinds of responses from urban, Hindu middle-classes who voted Modi to power: they were either happy about what happened to Muslims (because they deserved it), or they were repulsed by them (too much gore is not good for our happy lives), or it generated, as Anuja Jain says, 'a "politics of pity", which had the polarizing

32 I deploy postcolony as a cartographic and ideological category, and not simply a geographical one. To quote Mbembe at length:

> The notion 'postcolony' identifies specifically a given historical trajectory -that of societies recently emerging from the experience of colonisation and the violence which the colonial relationship, par excellence, involves. To be sure, the postcolony is chaotically pluralistic, yet it has nonetheless an internal coherence. It is a specific system of signs, a particular way of fabricating simulacra or re-forming stereotypes. It is not, however, just an economy of signs in which power is mirrored and imagined self-reflectively. The postcolony is characterised by a distinctive style of political improvisation, by a tendency to excess and a lack of proportion as well as by distinctive ways in which identities are multiplied, transformed and put into circulation. But the postcolony is also made up of a series of corporate institutions and a political machinery which, once they are in place, constitute a distinctive regime of violence. In this sense, the postcolony is a particularly revealing (and rather dramatic) stage on which are played out the wider problems of subjection and its corollary, discipline. (Mbembe 1992, 3.)

33 There is enough evidence to support the fact that brutal violence and institutionalized forms of prejudice against Muslims continues in India since Gujarat 2002, with legal impunity and social sanction. For instance, these have ranged from mass killings and displacement of Muslims in Muzaffarnagar in 2014 (Rao et al 2014); wrongful framing of Muslim youth in terror cases (Sethi 2014); and social and economic boycott in cities (Gayer and Jaffrelot 2011). Such treatment of Muslims in the new India does not always require the cover of *Hindutva* any longer, given how normalized anti-Muslim prejudice has become.

implications of creating a binary of the "fortunate us" and "unfortunate them"' (Jain 2010, 163). Given how Modi has been deified in India, and the landslide victory of the BJP in 2014, pity, in my reading, is the closest sentiment of attachment that the elite and middle-classes, as well as the secular-left, have come to express for the victim-survivors of the Gujarat pogrom. This sentiment even while expressing feelings of injustice done to Muslims, have exacerbated anti-Muslim prejudice manifold and entrenched a deeper belief in the need for Muslim assimilation into Hindu ways of living and behaving; else their annihilation can be successfully rationalized and memorialized for national posterity—in law, in cinema, in our storytelling of small lives in the new India.

Bibliography

Ahmad, Aijaz: *Lineages of the Present. Ideology and Politics in Contemporary South Asia*. Verso, London 2002.

Amnesty International: *A Decade on From the Gujarat Riots, an Overwhelming Majority of Victims Await Justice in India*. April 2012. Available on: <http://www.amnesty.org/en/library/asset/ASA20/006/2012/en/e77dabb7-151f-410e-93c9-68513bd3eebc/asa200062012en.html> (visited 20 May 2015).

Anand, Dibyesh: *Hindu Nationalism in India and the Politics of Fear*. Palgrave Macmillan, New York 2011.

Appadurai, Arjun: *Modernity at Large*: *Cultural Dimensions of Globalization*. University of Minnesota Press, Minneapolis 1996.

Assman, Jan: *Moses the Egyptian. The Memory of Egypt in Western Monotheism*. Harvard University Press, Cambridge 1997.

Bandukwala, J.S.: *Why Gujarat 'Banned' Parzania*. Outlook 2007. Available on: <http://www.outlookindia.com/article/why-gujarat-banned-parzania/233909> (visited 20 May 2015).

Basu, Anustup: *Bollywood in the Age of New Media. The Geo-televisual Aesthetic*. Edinburgh University Press, Edinburgh 2012.

Basu, Tapan, Pradip Datta, Sumit Sarkar, Tanika Sarkar & Sambuddha Sen: *Khaki Shorts Saffron Flags*. Orient Longman, Hyderabad 1993.

Ben-Dor, Oren: 'Introduction. Standing Before the Gates of the Law?'. In Oren Ben-Dor (ed): *Law and Art. Justice, Ethics and Aesthetics*. Routledge, Oxford 2011, 1-30.

Bhagat, Chetan: *3 Mistakes of My Life*. Rupa, New Delhi 2008.

Bhautik Vijaykumar Bhatt v. Central Board of Film Certification, September 23, 2014. Available on: < http://indiankanoon.org/doc/36425680/> (visited 20 May 2015).

Bhowmik, Someswar: *Cinema and Censorship. The Politics of Control in India*. Orient Blackswan, Hyderabad 2009.

Bobbio, Tommaso: 'Never-ending Modi *Hindutva* and Gujarati Neoliberalism as Prelude to all-India Premiership?' 67 *Focaal—Journal of Global and Historical Anthropology* (2013) 123-134.

Brass, Paul R (ed.): *Riots and Pogroms*. Macmillan, London 1996.

Brass, Paul R.: *Forms of Collective Violence. Riots, Pogroms, and Genocide in Modern India*. Three Essays Collective, Gurgaon 2006.

Brown, Wendy and Janet Halley (eds): *Left Legalism/ Left Critique*. Duke University Press, Durham 2002.

Buchanan, Ruth & Rebecca Johnson: 'Strange Encounters: Exploring Law and Film in the Affective Register'. 46 *Studies in Law, Politics and Society* (2009) 33-60.

Business Standard: *'India first' should be govt's religion and 'constitution' its holy book*: Narendra Modi. *Business Standard* 2014. Available on: <http://www.business-standard.com/video-gallery/general/india-first-should-be-govt-s-religion-and-constitution-its-holy-book-narendra-modi-3442/india-first-should-be-govt-s-religion-and-constitution-its-holy-book-narendra-modi-6767.htm> (visited 20 May 2015).

Casolari, Marzia: 'Hindutva's Foreign Tie-up in 1930s. Archival Evidence'. XXXV (4) *Economic and Political Weekly* (2000) 218-228.

Casolari, Marzia: *In the Shade of the Swastika. The Ambiguous Relationship Between Indian Nationalism and Nazi-fascism*. I Libri di Emil, Bologna 2011.

Chacko, Priya & Peter Mayer: 'The Modi Lahar (Wave) in the 2014 Indian National Election. A Critical Realignment?' 49 (3) *Australian Journal of Political Science* (2014) 518-528.

Chadha, Kalyanee and Anandam P. Kavoori: 'Exoticized, Marginalized, Demonized. The Muslim "Other" In Indian Cinema'. In Anandam P. Kavoori & Aswin Punathambekar (eds): *Global Bollywood*. New York University Press, New York 2008, 131-145.

Chandoke, Neera: 'Modi's Gujarat and Its Little Illusions'. XLVII (49) *Economic and Political Weekly* (2012) 10-11.

Chaturvedi, Vinayak: 'Rethinking Knowledge with Action: V.D. Savarkar, the Bhagawad Gita, and Histories of Warfare'. 7(2) *Modern Intellectual History* (2010) 417-435.

Choksi, Mansi: *Narendra Modi's Shame: Muslim Survivors of the Gujarat Riots are Still Suffering*. Vice News 2014. Available on: <https://news.vice.com/article/narendra-modis-shame-muslim-survivors-of-the-gujarat-riots-are-still-suffering> (visited 20 May 2015).

Chopra, Surabhi and Prita Jha (eds): *On their Watch. Mass Violence and State Apathy in India. Examining the Record*. Three Essays Collective, Gurgaon 2014.

Citizen's Initiative: *The Survivors Speak: How has the Gujarat Massacre Affected Minority Women*. Outlook 2002. Available on: <http://www.outlookindia.com/article.aspx?215433> (visited 20 May 2015).

Concerned Citizens Tribunal: *Crime Against Humanity*. Sabrang 2002. Available on: <http://www.sabrang.com/tribunal/index.html> (visited 20 May 2015).

Cossman, Brenda and Ratna Kapur: *Secularism's Last Sigh? Hindutva and the (Mis)rule of Law*. Oxford University Press, New Delhi 2001.

Dalrymple, William: *Narendra Modi. Man of the Masses*. New Statesman 2014. Available on: <http://www.newstatesman.com/politics/2014/05/narendra-modi-man-masses> (visited 20 May 2015).

Davis, Donald R. Jr.: *The Spirit of Hindu Law*. Oxford University Press, Oxford 2010.

Deleuze, Gilles & Felix Guattari: *Kafka. Toward a Minor Literature*. The University of Minnesota Press, Minneapolis 1986.

Dhavan, Rajeev: 'Justice, Justice and the Best Bakery Case'. 30 (2) *India International Centre Quarterly* (2003) 1-11.

Dirlik, Arif: 'Developmentalism. A Critique'. 16 (1) *Interventions: International Journal of Postcolonial Studies* (2014) 30-48.

Doniger, Wendy & Brian K Smith: *The Laws of Manu.* Penguin, London 1991.

Dorsett, Shaunnagh and Shaun McVeigh: *Jurisdiction*. Routledge, Oxford 2012.

Douzinas, Costas and Lynda Nead: 'Introduction'. In Costas Douzinas & Lynda Nead (eds): *Law and the Image. The Authority of Art and the Aesthetics of Law*. The University of Chicago Press, Chicago 1999, 1-18.

Dutta, Aniruddha: 'Digitizing the National Imaginary: Technology and Hybridization in Hindi Film Songs of the Post-liberalization Period'. In K. Moti Gokulsingh and Wimal Dissanayake (eds): *Routledge Handbook of Indian Cinemas*. Routledge, Oxford 2013, 231-245.

Engineer, Asghar Ali (ed): *The Gujarat Carnage*. Orient Longman, Hyderabad 2003.

Felman, Soshana: *The Juridical Unconscious. Trials and Traumas in the Twentieth Century*. Harvard University Press, Cambridge 2002.

Firstpost: *Here it Comes: An Apology from Modi for Gujarat Riots*. Firstpost 2013. Available on: <http://www.firstpost.com/politics/here-it-comes-an-apology-from-modi-for-gujarat-riots-680400.html> (visited 20 May 2015).

Foucault, Michel: 'Governmentality'. In Graham Burchell, Colin Gordon & Peter Miller (eds): *The Foucault Effect. Studies in Governmentality*'. The University of Chicago Press, Chicago 1991, 87-104.

Ganti, Tejaswini: *Bollywood. A Guide to Popular Hindi Cinema*. Routledge, New York 2013.

Gayer, Laurent and Christophe Jaffrelot (eds): *Muslims in Indian Cities.Trajectories of Marginalization*. Columbia University Press, New York 2011.

Geertz, Clifford: *Local Knowledge. Further Essays in Interpretive Anthropology*. Basic Books, New York 1983.

Ghassem-Fachandi, Parvis: *Pogrom in Gujarat. Hindu Nationalism and Anti-Muslim Violence in India*. Princeton University Press, Princeton 2012.

Ghufran, Iram: *No Redemption Without Justice*. Outlook 2013. Available on: <http://www.outlookindia.com/article/no-redemption-without-justice/284592> (visited 20 May 2015).

Goodrich, Peter: *Law in the Courts of Love. Literature and Other Minor Jurisprudences*. Routledge, Oxford 1996.

Goodrich, Peter: *Legal Emblems and the Art of Law. Obiter Depicta as the Vision of Governance*. Cambridge University Press, Cambridge 2014.

Goodrich, Peter: *Oedipus Lex. Psychoanalysis, History, Law*. University of California Press, Berkeley 1995.

Gregor, A. James: *The Search of Neofascism. The Use and Abuse of Social Science*. Cambridge University Press, Cambridge 2006.

Grover, Vrinda: 'The Elusive Quest for Justice: Delhi 1984 to Gujarat 2002'. In Siddharth Varadarajan (ed): *Gujarat. The Making of a Tragedy*. Penguin, New Delhi 2002, 355-388.

Guha, Ranajit: 'The Small Voice of History'. In Shahid Amin and Dipesh Chakrabarty (eds): *Subaltern Studies IX. Writings on South Asian History and Society*. Oxford University Press, New Delhi 1996, 1-12.

Gupta, Akhil: *Red Tape: Bureaucracy, Structural Violence, and Poverty in India*. Duke University Press, Durham 2012.

Halbwachs, Maurice: *On Collective Memory*. Edited, translated and with an introduction by Lewis A. Coser. The University of Chicago Press, Chicago 1992.

Hazra, Indrajit. *The Forgotten Man*. Hindustan Times 2012. Available on: <http://www.hindustantimes.com/indrajithazra/the-forgotten-man/article1-820381.aspx> (visited 20 May 2015).

Hindustan Times: *Modi Gets Relief in 2002 Riots, Tweets 'Truth Alone Triumphs'; Zakia Jafri Says Won't Give Up*. Hindustan Times 2013. Available on: <http://www.hindustantimes.com/india-news/modi-gets-relief-in-2002-riots-tweets-truth-alone-triumphs-zakia-jafri-says-won-t-give-up/article1-1166526.aspx> (visited 20 May 2015).

Human Rights Watch: *We Have No Orders to Save You*. Human Rights Watch 2002. Available on: <http://www.hrw.org/reports/2002/india/> (visited 20 May 2015).

International Initiative for Justice in Gujarat: *Threatened Existence: A Feminist Analysis of the Genocide in Gujarat*. International Initiative for Justice in Gujarat, Bombay 2003.

Jaffrelot, Christophe: 'Gujarat 2002: What Justice for the Victims?'. XLVII (8) *Economic and Political Weekly* (2012) 77-89.

Jain, Anuja: '"Beaming it Live": 24 Hour Television News, the Spectator and the Spectacle of the 2002 Gujarat Carnage'. 8 (2) *South Asian Popular Culture* (2010) 163-179.

Janmohamed, Zahir: *Kai Po Che and the Reduction of 2002*. Kafila 2013. Available on: <http://kafila.org/2013/03/02/kai-po-che-and-the-reduction-of-2002-zahir-janmohamed/> (visited 20 May 2015).

Kannabiran, Kalpana: *Tools of Justice. Non-Discrimination and the Indian Constitution.* Routledge, New Delhi 2012.

Kapila, Shruti and Faisal Devji: 'The Bhagavad Gita and Modern Thought. Introduction'. 7(2) *Modern Intellectual History* (2010) 269-273.

Kapila, Shruti and Faisal Devji (eds): *Political Thought in Action. The Bhagavad Gita and Modern India.* Cambridge University Press, Cambridge 2013.

Kapoor, Abhishek: *Kai Po Che*. UTV Motion Pictures 2013.

Kapur, Ratna: 'Normalizing Violence: Transitional Justice and the Gujarat Riots'. 15 (3) *Columbia Journal of Gender and Law* (2006) 885-927.

Katakam, Anupama: *A Decade of Shame*. Frontline 2012. Available on: <http://www.frontline.in/static/html/fl2904/stories/20120309290400400.htm> (visited 20 May 2015).

Kaviraj, Sudipta: *The Imaginary Institution of India. Politics and Ideas*. Columbia University Press, New York 2010.

Khan, Ayesha: 'In Best Bakery City, They are Lining up to Watch Dev's Aaliya'. Indian Express 2004. Available on: <http://expressindia.indianexpress.com/news/fullstory.php?newsid=32798> (visited 20 May 2015).

Kumar, Sanjay: 'Gujarat Assembly Elections 2002. Analysing the Verdict'. 38 (4) *Economic and Political Weekly* (2002) 270-275.

Liang, Lawrence: 'Cinematic Citizenship and the Illegal City'. 6 (3) *Inter Asia Cultural Studies* (2005) 366-385.

Mamdani, Mahmood: *Good Muslim, Bad Muslim. America, The Cold War, and the Roots of Terror*. Doubleday, New York 2004.

Mazumdar, Ranjani : *Bombay Cinema. An Archive of the City*. University of Minnesota Press, Minneapolis 2007.

Mazumdar, Ranjani: *The Bombay Film Poster*. Seminar 2003. Available on: <http://www.india-seminar.com/2003/525/525%20ranjani%20mazumdar.htm> (visited 20 May 2015).

Mazzarella, William: *Censorium. Cinema and the Open Edge of Mass Publicity*. Duke University Pres, Durham 2013.

Mbembe, Achille: 'Necropolitics'. 15 (1) *Public Culture* (2003) 11-40.

Mbembe, Achille: 'Provisional Notes on the Postcolony'. 62 (1) *Africa: Journal of the International African Institute* (1992) 3-37.

Menon, Dilip: *The Blindness of Insight. Essays on Caste in Modern India*. Navayana, New Delhi 2006.

Menon, Meena: *Riots and After in Mumbai. Chronicles of Truth and Reconciliation*. Sage, New Delhi 2011.

Menon, Parvathi: *Censoring Freedom*. Frontline 2004. Available on: <http://www.frontline.in/static/html/fl2117/stories/20040827003210300.htm> (visited 20 May 2015).

Mishra, Vijay Mishra: *Bollywood Cinema. Temples of Desire*. Routledge, New York 2002.

Mitta, Manoj & H.M. Phoolka: *When a Tree Shook. The 1984 Carnage and its Aftermath*. Roli Books, New Delhi 2008.

Mitta, Manoj: *The Fiction of Fact Finding. Modi & Godhra*. HarperCollins, New Delhi 2014.

Mohan, Lalit: *Gita in School: Religious Text or Philosophical Treatise?* The Times of India 2015. Available on: <http://timesofindia.indiatimes.com/india/Gita-in-school-Religious-text-or-philosophical-treatise/articleshow/46180717.cms> (visited 20 May 2015).

Mukherjee, Debashree: *No Time For Grieving*. Outlook 2013. Available on: <http://www.outlookindia.com/article/no-time-for-grieving/284593> (visited 20 May 2015).

Nandy, Ashis: 'An Anti-Secularist Manifesto'. 22 (1) *India International Centre Quarterly* (1995) 35-64.

Nandy, Ashis: 'Introduction. Indian Popular Cinema as a Slum's Eye View of Politics'. In Ashis Nandy (ed): *The Secret Politics of our Desires. Innocence, Culpability and Indian Popular Cinema*. Zed Books, London 1999.

Nihalani, Govind: *Dev*. Eros Entertainment 2004.

Nussbaum, Martha: *Body of the Nation. Why Women were Mutilated in Gujarat*. Boston Review 2004. Available on: <http://bostonreview.net/martha-nussbaum-women-mutilated-gujarat> (visited 20 May 2015).

Nussbaum, Martha: *The Clash Within. Democracy, Religious Violence and India's Future*. Harvard University Press, Cambridge 2007.

Ohm, Britta: 'Forgetting to Remember. The Privatisation of the Public, the Economisation of Hindutva, and the Medialisation of Genocide'. In Shakuntala Banaji (ed): *South Asian Media Cultures. Audiences, Representations, Contexts*. Anthem Press, London 2010, 123-144.

Olick, Jeffrey K., Vered Vinitzky-Seroussi & Daniel Levy: 'Introduction'. In Jeffrey K. Olick, Vered Vinitzky-Seroussi &Daniel Levy (eds): *The Collective Memory Reader*. Oxford University Press, Oxford 2011, 3-62.

Olick, Jeffrey K.: *The Politics of Regret. On Collective Memory and Historical Responsibility*. Routledge, New York 2007.

Outlook: *Should We Run Relief Camps? Open Child Producing Centres?* Outlook 2002. Available on: <http://www.outlookindia.com/article/should-we-run-relief-camps-open-child-producing-centres/217398> (visited 20 May 2015).

Pandey, Gyanendra: *Remembering Partititon. Violence, Nationalism and History in India*. Cambridge University Press, New Delhi 2002.

Pandya, Haresh: *Govind Nihalani's Dev in Trouble*. Rediff India Abroad 2004. Available on: <http://www.rediff.com/movies/2004/jun/16dev.htm> (visited 20 May 2015).

Patel, Aakar: *Riot Act*. Caravan 2013. Available on <http://www.caravanmagazine.in/perspectives/riot-act> (visited 20 May 2015).

Philippopoulos-Mihalopoulos, Andreas: 'Atmospheres of Law. Senses, Affects, Lawscapes'. 7 *Emotion, Space and Society* (2013) 35-44.

Prabhupada, A.C. Bhaktivedanta Swami: *Bhagavad-Gita As It Is*. The Bhaktivedanta Book Trust, Bombay 1983.

Prasad, Madhava M.: 'Surviving Bollywood'. In Anandam P. Kavoori & Aswin Punathambekar (eds): *Global Bollywood***.** New York University Press, New York 2008, 41-51.

Prasad, Madhava M.: *Ideology of the Hindi Film. A Historical Construction*. Oxford University Press, New Delhi 1998.

Puar, Jasbir: *Terrorist Assemblages. Homonationalism in Queer Times*. Duke University Press, Durham 2007.

Rajadhyaksha, Ashish: 'The "Bollywodization" of the Indian Cinema. Cultural Nationalism in a Global Arena'. In Anandam P. Kavoori & Aswin Punathambekar (eds): *Global Bollywood***.** New York University Press, New York 2008, 17-40.

Rao, Mohan, Ish Mishra, Pragya Singh and Vikas Bajpai: *'Fact FindingReport: Independent Inquiry into Muzaffarnagar "Riots"'*. XLIX (2) Economic and Political Weekly (2014). Available on: <http://www.epw.in/reports-states/fact-finding-report-independent-inquiry-muzaffarnagar-"riots".html> (visited 20 May 2015)

Ross, Colvin & Sruthi Gottipati: *Interview with BJP Leader Narendra Modi*. Reuters 2013. Available on: <http://blogs.reuters.com/india/2013/07/12/interview-with-bjp-leader-narendra-modi/> (visited 20 May 2015).

Sahni, Diksha: *Ansari and the Anatomy of Fear*. The Wall Street Journal 2012. Available on: <http://blogs.wsj.com/indiarealtime/2012/02/28/picture-focus-ansari-and-the-anatomy-of-fear/> (visited 20 May 2015).

Sarat, Austin, Lawrence Douglas & Martha Merrill Umphrey: 'On Film and Law: Broadening the Focus'. In Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey (eds): *Law on the Screen*. Stanford University Press, Stanford 2005, 1-26.

Sarat, Austin: 'Imagining the Law of the Father: Loss, Dread, and Mourning in "The Sweet Hereafter"'. 34 (1) *Law & Society Review* (2000) 3-46.

Sarat, Austin: 'What Popular Culture Does For, and To, Law. An Introduction'. In Austin Sarat (ed): *Imagining Legality. Where Law Meets Popular Culture*. The University of Alabama Press, Alabama 2011, 1-21.

Sarkar, Sumit: 'The Fascism of the Sangh Parivar'. XXVII (5) *Economic and Political Weekly* (1993) 163-167.

Scott, David: 'Colonial Governmentality'. 43 *Social Text* (1995) 191-220.

Sen, Ronojoy: *Articles of Faith. Religion, Secularism, and the Indian Supreme Court*. Oxford University Press, New Delhi 2010.

Setalvad, Teesta: 'The Importance of Zakia Jafri's Petition'. XLVIII (21) *Economic and Political Weekly* (2013), 10-13.

Sethi, Manisha: *Kafkaland. Prejudice, Law and Counterterrorism in India.* Three Essays Collective, Gurgaon 2014.

Seymour, David M.: 'Film and Law. In Search of a Critical Method'. In Leslie J. Moran, Emma Sandon, Elena Loizidou & Ian Christie (eds): *Law's Moving Image*. The Glass House Press, London 2004, 107-120.

Shani, Ornit: *Communalism, Caste and Hindu Nationalism. The Violence in Gujarat*. Cambridge University Press, Cambridge 2007.

Sharma, Arvind: 'On Hindu, Hindustân, Hinduism and Hindutva'. 49(1) *Numen* (2002) 1-36.

Sherwin, Richard K.: 'Anti-Oedipus, Lynch: Initiatory Rites and the Ordeal of Justice'. In Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey (eds): *Law on the Screen*. Stanford University Press, Stanford 2005, 106-152.

Sherwin, Richard K: *Visualizing Law in the Age of Digital Baroque: Arabesques and Entanglements*. Routledge, Oxford 2011.

Shklar, Judith N.: *Legalism. Law, Morals and Political Trials*. Harvard University Press, Cambridge 1964.

Silbey, Jessica: 'Persuasive Visions: Film and Memory'. 10 (1) *Law, Culture and the Humanities* (2014) 24-42.

Simpson, Edward: 'The State of Gujarat and the Men without Souls'. 26 *Critique of Anthropology* (2006) 331-348.

Singh, M.P. and Surya Deva: 'The Constitution of India: Symbol of Unity in Diversity'. 53 *Jahrbuch des Of entlichen Rechts der Gegenwart* [Yearbook of Public Law, Germany] (2005) 649-686.

Singh, Pritam: 'Hindu Bias in India's Secular Constitution. Probing Flaws in the Instruments of Government'. 26 (6) *Third World Quarterly* (2005) 909-926.

Sircar, Oishik: 'Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse'. 49 (3) *Osgoode Hall Law Journal* (2013) 527-573.

Sircar, Oishik: *Coffee Shops, Cricket and a Pogrom*. InfoChange 2013. Available on: <http://infochangeindia.org/human-rights/rights-and-resistance/coffee-shops-cricket-and-a-pogrom.html> (visited 20 May 2015).

Sircar, Oishik: *How Do We Remember Gujarat 2002?*. InfoChange 2013. Available on: <http://infochangeindia.org/human-rights/rights-and-resistance/how-do-we-remember-gujarat-2002.html> (visited 20 May 2015).

Sood, Nikita: *Liberalization, Hindu Nationalism and The State. A Biography of Gujarat*. Oxford University Press, New Delhi 2012.

Spodek, Howard: 'In the Hindutva Laboratory. Pogroms and Politics in Gujarat, 2002. 44 (2) *Modern Asian Studies* (2010) 349-399.

Sud, Atul (ed): *Poverty Amidst Prosperity. Essays on the Trajectory of Development in Gujarat*. Aakar Books, New Delhi 2012.

Tehelka: *The Truth: Gujarat 2002*. Tehelka 2007. Available on: <http://archive.tehelka.com/story_main35.asp?filename=Ne031107gujrat_sec.asp> (visited 20 May 2015).

The Hindu: *I Was Warned Against Deposing: Sreekumar*. The Hindu 2009. Available on: <http://www.thehindu.com/news/national/article5896.ece> (visited 20 May 2015).

The Times of India: *Gujarat IPS Officer Sanjeev Bhatt Who Took on Narendra Modi Arrested*. The Times of India 2012. Available on: <http://timesofindia.indiatimes.com/india/Gujarat-IPS-officer-Sanjeev-Bhatt-who-took-on-Narendra-Modi-arrested/articleshow/10191519.cms> (visited 20 May 2015).

The Times of India: *PIL Against Kai Po Che for 'Biased' Portrayal of Gujarat Riots*. The Times of India 2013. Available on: <http://articles.timesofindia.indiatimes.com/2013-05-03/news-interviews/39007874_1_po-che-the-3-mistakes-hindi-film> (visited 20 May 2015).

Thobani, Sunera: 'Performing Terror, Mediating Religion: Indian Cinema and the Politics of National Belonging'. 8 *International Journal of Communication* (2014) 483-505.

Varadarajan, Siddharth (ed): *Gujarat. The Making of a Tragedy*. Penguin, New Delhi 2002.

Virdi, Jyotika: *The Cinematic ImagiNation. Indian Popular Films as Social History*. Rutgers University Press, New Jersey 2003.

Vissman, Cornelia: 'Image and Law—A Troubled Relationship'. 14 (4) *Parallax* (2008) 1-9.

Viswanathan, Shiv and Teesta Setalvad: 'Narratives of Vulnerability and Violence: Retelling the Gujarat Riots'. In Anique Hommels, Jessica Mesman & Wiebe E. Bijker (eds): *Vulnerability in Technological Cultures: New Directions in Research and Governance*. MIT Press, Cambridge 2014, 109-130.

Yagnik, Achyut & Suchitra Sheth: *The Shaping of Modern Gujarat. Plurality, Hindutva, and Beyond*. Penguin, New Delhi 2005.

Young, Alison: 'Murder in the Eyes of the Law'. 17 *Studies in Law, Politics and Society* (1997) 31-58.

Zahira Habibulla H. Sheikh v. State Of Gujarat, 12 April, 2004. Available on:
< http://indiankanoon.org/doc/1067991/> (visited 20 May 2015).

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Marianne Constable: *Our Word is Our Bond. How Legal Speech Acts*. Stanford University Press, Stanford 2014.

Julen Etxabe*

Marianne Constable's *Our Word is Our Bond* is a rhetorical and jurisprudential investigation into modern law's embeddedness in language and its relation to justice, an alternative to those who would define law as a system of rules, as a regulatory science, a problem-solving technique, or as an instrument of power. At the most basic level, *Our Word is Our Bond* argues that modern law (mostly of the Anglo-American variety, but not only[1]) exists rhetorically, in the sense that legal institutions and claims such as promises, oaths, pleas, contracts, marriages, torts, criminal indictments, and judgments come to fruition through acts of language—which include symbols, gestures, and silences. To say that language is central to law, to be sure, is not to say that language is all there is to law, or that all law is reducible to language; in fact, 'law cannot be *reduced* to anything' (Constable 2014, 132), which could be taken as the central programmatic statement of the book.

In contrast to the eternal and immutable truths of Philosophy, rhetoric seeks the contextual and contingent 'appropriate saying', relative to particular speakers, situations, and contexts. Consistently, the book offers neither a *theory* of justice nor a *concept* of law as such. It shows, rather, how modern law is a matter of language and that justice, however impossible to define and difficult to determine, depends on the relationships we have with one another (Constable 2014, 4). Thus, to those who ask 'What is law?', the book suggests that the answer lies in further investigating law's relations to the rhetorical activities of *claiming* and *hearing* (Ibid., 1). In so

* University Researcher, Helsinki Collegium for Advanced Studies.

1 Constable's examples are drawn from the Anglo-American legal tradition, but claiming and hearing are common to a plurality of legal contexts and geographies.

saying, the book targets contemporary legal education that teaches law as a system of rules; sociolegal scholarship which, by sharply dividing speech and action, dismisses and fails to understand how speech acts[2]; and the dominant legal positivism, which rejects the necessary connection between law and justice.

For a long time, rhetoric has suffered from a bad reputation of using language to persuade by whatever means necessary, a sort of verbal manipulation unconcerned with sincerity or honesty and used merely to equivocate or conceal. It is also viewed as purely ornamental, and thus believed to be superfluous and dispensable: an outward layer to peel off in order to reach the 'real substance' of things. As a form of discourse, rhetoric is often equated with the kind of epistemic relativism where 'anything goes' as long as presented in a nice 'package'. Finally, 'rhetorical' questions are the kind that are not meant to be answered, for the answers are already implied in the question. Thus rhetorical questions elide the figure and autonomy of the listener, who is there only to assent to the conclusion already reached by the questioner.

Adopting none of these views, the book's claim that law is rhetorical alludes firstly to the *languagedness* of law—its necessary dependence and reliance upon language. Dishonest, cynical and manipulative speech is certainly a reality of legal discourse, but attention to it allows one also to contest such (ab)uses. To those who would dismiss rhetoric as a cover up, Constable responds that language reveals more than what it says explicitly, and that close attention to it allows one to uncover what the law discloses, as well as what it hides, omits, represses, or suppresses (Constable 2014, 137).

More generally, the book's rhetorical approach opposes the dominant scientific paradigm applied to law (and concomitant ideals of objectivity, detachment, and fact/value distinction), replacing it with a richer and more personal understanding and participation in the object of study. Therefore, a rhetorical investigation into the claims of law and justice is *not a nihilistic disavowal of them* (Constable 2014, 9). As Constable argues, while rhetoric points out that language is not truth, it also recognizes that words, in particular contexts, may be true or false; similarly, it is argued that even though law is not justice, legal claims in particular contexts may be just or unjust (Ibid., 9). The book then seeks to explore what these claims are, how they assert truth and demand recognition, and in what way they bind us.

Lastly, Constable places emphasis on the figure and responsibility of the listener, arguing convincingly that law requires to be *heard* before it can be properly followed, and that the hearer is as responsible for the continued existence of law as the official is said to be. *Our Word is Our Bond* serves as a corrective to the Hartian emphasis on officials, and the hierarchical relationship between 'authorities' and citizens.

Before laying out the rest of the argument, it may be helpful to clarify three key terms: With respect to *language*, the book adopts a non-representational and non-propositional view, for 'language is not like a window through which we

2 Likewise, Constable challenges the pernicious grip of policy talk in contemporary societies, as well as discourses that make law into a set of optimal solutions where the imperfect aspects of law are its ineffectiveness and inefficiency (Constable 2014, 136-137).

look to an outside of which we are not part. Our speech is rather akin rather to the paths we walk as we make our world through the wider world' (Constable 2014, 15).[3] Thus, *truth* refers not to the mere accuracy of propositions, or to the correspondence of propositional statements to external realities. Nor does it refer to the coherence of language-use among subjects speaking the same tongue. 'At issue in the truth of language', writes Constable, 'is the showing or revealing of a world that is not completely of human making, through a human capacity to speak that is not completely within human control' (Constable 2014, 109). In turn, *justice* does not mark a return to the metaphysical certainties of natural law—a world before Nietzsche—but comes closer to the Heideggerian act of clearing, whereby the world discloses itself through language (which is never purely subjective or human-centric). In a world where traditional natural law commitments appear increasingly unavailable, the empiricism of social sciences demands a measurable justice, and as for the opposite movement of deconstruction, where justice is an inaccessible horizon of possibility, Constable maintains that justice is partial and incomplete, but it may be done (Ibid., 132)—sometimes, even, without being said (Ibid., 138).[4]

The overall arch of the book argues that we are bound to law, and law binds us, through shared language. These bonds manifest themselves through dialogic acts or interactions in which we make claims, however imperfectly, of one another. At the same time, the dialogic social acts of law bind us not only into imperfect communities, but also to a larger world that exceeds conventional morality and the articulations of positive law. The argument is grounded on several building blocks: First, the book relies on J.L. Austin's performative speech-acts (promising, warning, declaring, appointing, dissenting…), which succeed or fail in part on the basis of something other than the truth or falsity of what they state, namely a set of conventional elements that Austin calls the 'felicity conditions'[5] of the utterance. The utterance's *locutionary* content (saying something), *illocutionary* force (doing something *in* being said) and *perlocutionary* effect (doing something *by* being said) together draw attention to the act-like character of legal speech, which is ignored by too sharp a separation between 'law-on-the-books' and 'law-in-action'.[6]

It is worth pointing out that the *languagedness* of speech acts does not diminish their potentially violent content, where Constable recalls the famous final scene of Virgil's *Aeneid*: '"So saying" [*dicens*], Virgil's *Aeneid* concludes, "Aeneas buried

3 Relying on Nietzsche's critique of grammar as metaphysics, the book suggests that both 'law and language are sites of judgment and of ascriptions of responsibility' (Constable 2014, 11). At the same time Constable argues in Heideggerian vein that, though humanly related, language need not be human-centric or conform to human will (Constable 2014, 128).

4 For the argument that justice today lies in the silences of positive law, see Constable 2005.

5 These include, first, an accepted procedure for the act (a.1) and their application to particular persons and situations (a.2). Secondly, the utterance must be carried out correctly (b.1) and completely (b.2). And when the procedure designs for persons to have certain intentions, they must have those intentions (c1); if subsequent conduct is part of the procedure, those persons must conduct themselves accordingly (c.2).

6 'Despite some strands of legal realism that would dismiss legal language in the name of a radical distinction between "law-in-action" and "law-on-the-books"', writes Constable, 'sociolegal studies cannot completely disregard language nor unmoor it from their own claims about the law' (Constable 2014, 43).

his sword into his (opponent's) chest"—thereby founding Rome' (Constable 2014, 105). In this example, the saying of Aeneas coincides with the action of burying his sword into Turnus' chest, which in turn is a direct and violent rejoinder to Turnus' previous act of supplication. All these speech acts merge further into a moral register coincident with the founding of Rome, which is ultimately for the reader to judge.

Despite Austin's contributions, Constable points out that an Austinian account that suggests that legal speech acts are more or less successful performances to be assessed by conventions for speaking does not go far enough in recognizing the role of the hearer (Constable 2014, 33). As a second step, the book incorporates Stanley Cavell's 'passionate utterances', which are neither constative nor performative but focus on the 'you'. A passionate utterance such as 'I insult you' or 'I seduce you'—or even 'I persuade you'—does not do what it says in the same way as the performative 'I promise…' does, and requires a hearer who is attuned to it in a particular way. Moreover, passionate utterances require imagination (and often considerable talent) to move 'you', in contrast to performative utterances that only require knowledge of convention. While accepting Cavell's main point, Constable rejects the strict dichotomy between convention and passion. Insofar as legal claims are persuasive acts designed to make demands on you, they are indeed 'passionate utterances', but the fact that legal claims often require thought, tact, and imagination implies that any strong distinction between a conventional 'order of law' and a passionate 'disorder of desire' does not do justice to the appeal of legal speech (Ibid., 103).

The third pillar of the argument relies on Adolf Reinach's 'social acts', which require being heard or apprehended by a second person for them to happen, for example, in an *invitation*. Social acts may instigate responses, but they necessitate no particular response in order to be completed. For example, an invitee may forget to respond, but the invitation may have been appropriately uttered and heard, so that it will have changed a state of affairs. Social acts involve a particularly human capacity for initiating new states of affairs (which Hannah Arendt called 'natality'), but the speaker can never completely determine how a social act, or the state of affairs it initiates, will be taken up—or for how long it will endure (Constable 2014, 91). Not only are there different kinds of hearing, but the dependence of an act on its being heard opens it up to unconventional interpretations and possibilities (Ibid., 33), in various changing contexts.

Offering diverse and thorough examples, Constable makes significant contributions to our understanding of legal claims, their distinct temporalities, the dialogical construction of law, and the imperfect (and sometimes tragic) world we share and within which we and the law exist. As to the nature of legal claims, Constable argues that 'many claims made in the name of the law do not necessarily *exist* as positive law at the moment they are made; neither are they necessarily effective nor produce results' (Constable 2014, 76). At the moment of their being spoken they appeal to a 'law' that they affirm as a speaker's and hearer's own, even though not all legal claims will be ultimately (re)cognizable (Ibid., 76-77). At an *ontological* level, then, we might say claims exist as potentiality, in what Robert Cover called the realm

of the 'might be' (see Etxabe, 2011, 122).

Moreover, speech acts made in the name of law may be spoken strategically, hypocritically, even unfairly. But insofar as claims are spoken in the name of some law, they assert the truth of which they speak and demand recognition as belonging to the shared law in the name of which the claim is made. Thus, legal claims have a necessary relation with justice—an evaluative or *axiological* dimension—whether or not they affirm or contest positive law and whether or not they are just (Constable 2014, 77-78). Concerning their *epistemic* ground, legal claims are made from within a given 'tradition',[7] although at times they may interrupt it. Knowing how to craft legal claims is a form of practical knowledge not of a Kantian moral law, but of an ongoing and never completely articulable language which, contrary to what social contract theorists from Hobbes to Locke to Rawls to Habermas suppose, we are already—*or will already have been*—imperfectly sharing.[8]

The latter sentence paves the way for a most innovative aspect of Constable's argument, namely, the twofold temporal dimension of legal claims. According to Constable, legal claims (and legal acts and events more broadly) are to be understood in two different temporal registers: On the one hand, the future perfect offers a way of thinking about the way claims are made in the present but await a future, when they *will have been* retroactively settled—an argument that echoes Derrida's 'fabulous retroactivity' of the Declaration of Independence. Constable offers the example of the *Palsgraf* decision authored by Benjamin Cardozo in 1928, which redefined the rules of negligence to limit liability to 'foreseeable risks', while rejecting contemporary standards extending it to all harms 'proximately caused' by the wrongful act. In 1928 Cardozo's holding may *become* precedent, but at the moment of the decision it is *not yet*, and indeed *may never turn out to be*, precedent. In other words, the issue can only be answered in the future, only after an appropriately related case arises, at which point *it will have become* precedent.

On the other hand, Constable develops the idea of the 'imperfect', which is the aspect of the verb that alludes to ongoing and habitual ways of doing things. This ongoing or continuous background of practical knowledge allows particular legal acts to be done and to be known as the acts and events that they turn out to be, even as this background knowledge, like knowledge of a given language, is imperfect, incompletely articulable, and interruptible (Constable 2014, 131). For instance, unfamiliar ways of doing things may interrupt or challenge habitual or routine ways of hearing and judging (Ibid., 135), thereby reconfiguring states of affairs in previously unthought ways (Ibid., 89). Since the ongoing practical knowledge need not coincide with the community's articulated rules or conventions, the 'imperfect' may also point to a non-harmonious or consensual ethical world (that the final chapter alludes to tragedy gives credence to this interpretation).

7 By 'tradition' Constable means that speaker and hearers participate in legal and social acts and share practical knowledge of language, not that all agree (Constable 2014, 42).

8 As Constable puts it, '[t]he ragged commonality of knowledge does not follow from acts of agreement, but rather makes agreement possible' (Constable 2014, 105).

For Constable both the future perfect and the imperfect are needed to understand the temporal dimension of legal claims, and challenge the idea-static universe of legal provisions and fixed meanings (Constable 2014, 134). The dual temporal aspect entails further that 'law cannot be fully grasped as a set of events in a linear chronology of cause and effect' (Ibid., 101). Cardozo's ruling may have had the effect of changing the course of tort law,[9] but 'if one is to understand how utterances can come to have impact or how rules emerge, then one must attend to how texts circulate, to how language is used in interactions and institutions' (Ibid., 41).

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To recapitulate, Austin has helped to explain the sphere of the 'I' who acts through speech; Cavell the sphere of the 'you' who is interpellated by it; and Reinach the sphere of the 'he/she' who is to hear it. It is now necessary to introduce the world of law in the name of which 'we' make legal claims, the 'it' to which 'you' and 'I' appeal in order to establish common bonds. Indeed, law is the third party in whose name both official and nonofficial claimants speak; but law is a peculiar third party, in that it also functions as the first-person plural or 'we' to which claimants, in their desire to persuade, would recall their hearers. Making legal claims is thus an imperfect rhetorical art, designed to evoke in their respective hearers a shared sense of obligation, in the name of an ostensible third party: 'our' law.

And how is the 'we' of law disclosed? Constable develops a dialogical construction that challenges hierarchical, command theories of law.[10] As Constable explains it, for the *we* of 'our word' and 'our bond' to emerge *I* must become *you*, and *you*, *I* to one another (Constable 2014, 93). In other words, 'I' appeal to 'you' to judge not simply as 'I' do, but as 'we' do, in the name of a particular and peculiar third party: our shared law. Thus, fluid and practical (imperfect) knowledge manifests itself in the turn-taking dialogues of speakers and hearers who talk with one another and recognize the same world, despite their differences. Dialogues may also include, and often gesture toward, more than two interlocutors: The third-person grammar of *he*, *she*, *it* supplements *I*, *you*, and *we*, showing further the complexity of dialogue (Ibid., 94).

In presenting such dialogical construction, Constable 'does not set out to identify an "ideal speech situation" or a "discourse ethics" à la Habermas' (Constable 2014, 133). Arguably a closer affinity can be drawn to Bakhtinian *dialogism* (Bakhtin 1981 and 1984) which does not bracket, but rather incorporates, affective, ideological,

9 Changing the history of accident law, Constable argues, 'is a more or less contingent effect of what was said' (68). This raises the difficult question of the relationship of Cardozo's language to the change that effectively happened. Still, Constable reminds us in Austinian vein that '[t]he assessment of the success of an act […] cannot be simply in terms of future impact, for the accomplishment of the act or performance can be distinguished from its fulfilment' (Constable 2014, 75).

10 'Nineteenth-century legal positivism viewed subjects of law as objects of commands issued by the sovereign-subject, but the addressees of legal claims today seldom appear in this way' (Constable 2014, 92). 'In responding "I will do it", the actor constitutes him– or herself not only as hearer and addressee of an imperative but also as actor and speaker' (Ibid., 93).

and rhetorical power relations. (In addition, Bakhtin goes further than Austin in recognizing the role of the 'other' in the utterance.) I want briefly to flesh out this possible connection by imaginatively expanding on a short example of dialogue offered in the book:

A: I'd like pizza tonight. How would you like to go to that Italian place by the bay?
B: I guess I could have salad if you really want to go.

How to interpret this dialogue between A and B? Is B saying that she[11] does not mind going to the pizza place? Or is B trying to say, though politely, that she does not really want to go? But if the plan A offers does not genuinely appeal to B, why doesn't she simply say it? Does she expect A to notice for himself? Or has B given up the hope that her wishes will be attended to by A? In turn, is A's desire for pizza strong enough to dismiss B's (hardly veiled) concerns about having to order a salad?

Interpreting this short dialogue entails fleshing out as many issues as the sort of people A and B are, their previous history together, the kind of plans they like to make, the kind of food they like, and, in short, the entire forms of life that are disclosed in living dialogues. This is where Mikhail Bakhtin's theory of the utterance (Bakhtin 1986) can be enriching, as I can simply sketch here. The main thrust is to incorporate the *interactions* between speakers—and particularly the answering world—into the utterance; for an utterance does not just call into being what it performs, but it also anticipates and imagines an answering world, so that what I say is both *inviting* a future response and simultaneously *presupposing* it in the saying.

The other is introduced not as someone who exists outside, lying in wait to interpret (hear or listen) the utterance, but as part of its structure of signification. As Maurizio Lazzarato explains further, the difference with Austin,'the response that the [Bakhtinian] utterance awaits is an … "active responsive attitude", an "active responsive comprehension" of the other, unlike the [Austinian] performative where the other is neither autonomous nor free' (Lazzarato 2009). More importantly, for Bakhtin, 'comprehension is always taking up a position, a judgment, a response—an action inside dialogical relations' (Ibid), while it may be argued that in eliding the listener, the Austinian performance functions like the rhetorical questions explained at the beginning. Bakhtin underlines the affective, as well as evaluative and political dimensions, of language pertaining to living dialogues. I will mention four:

1) Voice, intonation, inflexion, accent, and emphasis: For example, in the utterance 'I'd like pizza tonight', the word 'like' may be more or less stressed, while the rejoinder 'if you really want to go' may either stress the word 'really' or de-emphasize it using a softer flat tone. Thus, the tone of the question 'How do you like…?' may indicate whether it is a genuine invitation, or a foreclosed option, closer to a command; in turn, the answer may indicate enthusiasm, tediousness, or passivity. Intonation thus expresses the affective register and the 'volitional orientation' of an utterance.

11 For the sake of convenience, I have used the gendered nouns 'he' and 'she' to refer to A and B.

2) A second significant aspect is the speaker's relationship with his or her own language. For example, the rejoinder 'I guess…' may be employed with more or less detachment, sincerity, resignation, insolence, or defiance.

3) The relationship of the utterances with prior utterances, which are expressive of complex genealogies and histories. For instance, has this scene or conversation taken place before between A and B? Is the conversation running through a known script? Are variants being introduced in this particular instance? To which genre does the conversation belong or contribute?

4) Relationship between the utterances of speakers (e.g. agreement/disagreement, conformity/disconformity; responsiveness/evasiveness). For instance, the statement 'I'd like pizza tonight' can genuinely usher the door to an endearing invitation, or else function like the conclusory premise of a plan already decided. In turn, B's rejoinder 'if you really want to go' might welcome A's initiative and wishes, or else passive-aggressively point to the need for A seriously to reconsider them. And thus, finally we might ask: Is this conversation the beginning of a beautiful night out or the prelude to a coming storm?

Dialogues such as this require subtle readings beyond the 'denotative' (i.e. descriptive) register. Legal scholarship that ignores, dismisses, or carelessly glosses over it, does so at its own peril. For example, without careful and attentive reading of the concrete rhetorical context of an utterance such as 'it is not the issue to substitute the democratically elected representatives for the judge's personal ideology', one could hardly guess whether this sentence, employed on countless occasions and in countless jurisprudential debates, is the expression of an exemplary judicial deference, the opposite attempt to delineate the limits of majoritarianism,[12] or an empty cliché in defense of the status quo.

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The concluding chapter of the book considers how the social act of claiming binds us to a world that exceeds the assertions and demands of conventional moralities and law. In closing, *Our Word is Our Bond* offers an insightful reading of Euripides' tragedy *Hippolytus* and, in particular, of the famous line 612: 'My tongue swore, my mind did not' uttered by Hippolytus, which Austin understood to imply an attempt to repudiate his promise not to reveal Phaedra's secret. Against Austin, Constable shows compellingly that Hippolytus is not trying to release himself from the obligation to keep the secret, but rather expressing his profound dismay at being bound to something that is not virtuous at all merely because he promised—a promise uttered by his tongue, but not his mind. In other words, Hippolytus means not to break his

12 See the majority opinion of Justice McLachlin in *Sauvé v. Canada* (Chief Electoral Officer) [2002] 3 S.C.R. 535 (arguing that striking down legislation banning prisoners from voting 'is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense').

promise as Austin thought, but to accept the consequences of having given his word, although at the same time passionately objecting to the injustice of a world that requires oaths such as his to be kept.

I find this reading of *Hippolytus* compelling, and the example of tragedy itself fitting for thinking about the world where we make legal claims. This world is at times inhospitable, cruel, and irrational beyond human control, but we hope our words will help us navigate the storm without drowning. While words alone cannot guarantee justice (140), claims of justice accord well with an imperfectly spoken claim that the ever-imperfect promise of language be kept (129). Here may be a lesson for all in this thoughtful and inspiring book.

Bibliography

Bakhtin, Mikhail: 'Discourse in the Novel'. In *The Dialogic Imagination. Four Essays.* University of Texas Press, Austin 1981, 259-422.

Bakhtin, Mikhail: *Problems of Dostoevsky's Poetics.* Edited and translated by Caryl Emerson. University of Minnesota Press, Minneapolis 1984.

Bakhtin, Mikhail: 'The Problem of Speech Genres'. In *Speech Genres and Other Late Essays*. University of Texas Press, Austin 1986, 60-102.

Constable, Marianne: *Just Silences. The Limits and Possibilities of Modern Law.* Princeton University Press, Princeton, NJ 2005.

Constable, Marianne: *Our Word is Our Bond. How Legal Speech Acts.* Stanford University Press, Stanford 2014.

Etxabe, Julen: 'The Legal Universe After Robert Cover'. 4(1) *Law and Humanities* (2010) 115-147.

Lazzarato, Maurizio: 'Mikhail Bakhtin's Theory of the Utterance'. Translated by Arianna Bove, Maastricht 2009. Available on <http://www.generation-online.org/p/fp_lazzarato6.htm> (last accessed June 3, 2015).

Book Review

Roberta Rosenthal Kwall: *The Myth of the Cultural Jew. Culture and Law in Jewish Tradition.* Oxford University Press, Oxford 2015.

Susan P. Liemer*

How does a law professor in the United States today approach a problem in a religious community that spans the globe and stands on more than three thousand years of recorded history? Professor Roberta Rosenthal Kwall at Depaul University School of Law says she is engaging in 'cultural analysis' in her new book, *The Myth of the Cultural Jew*. I suspect she is doing that and more.

Professor Kwall's book explores what it means when a Jew today says that he or she is a 'cultural Jew'. This term is meant to be a shorthand way to indicate that, while the person self-identifies as Jewish, that person is not necessarily a believer in the theology nor a participant in the religious practices of Judaism. In Israel, the country with the largest number of Jews in the world today, the number of secular Jews is increasing rapidly. In the United States, the country with the second largest number of Jews, the rates of assimilation into the broader culture and inter-marriage with non-Jews are both accelerating. Thus, the underlying concern of this book is how Judaism will flourish going forward.

The book starts with the premise that even a cultural Jew 'is inevitably molded and shaped by the Jewish tradition, which includes Jewish law' (Kwall 2015, xiii). Kwall defines the Jewish tradition, known as the *mesorah*, very broadly, 'as the entire chain of the Jewish tradition handed down over the generations' (Ibid.). The *mesorah* incorporates both the Jewish religious law, *halakah*, and Jewish customs, the *minhag*. The Jewish religious law is important to Kwall's inquiry because, as she explains, Judaism is a religion of laws. This religion welcomes people to ask questions and seek answers; it even allows doubts as to faith. It is the practices involved in observing the

* Professor of Law, Southern Illinois University School of Law.

religious law, however, that are an integral part of what makes a person Jewish.

The primary methodology that Kwall uses to examine her premise is cultural analysis. This approach assumes that law and culture are inevitably intertwined; law helps to shape culture, and culture helps to shape law. Together, culture and law define a community and its tradition. A cultural analysis of a particular legal system acknowledges that the law changes over time, due to influences both within and outside the legal system and within and outside the culture. In this way, cultural analysis accounts for multiple values and voices within a legal system and encourages lively discourse and debate as a systemic norm.[1] Cultural analysis is an approach that can help identify how a community maintains enough of its core, cohesive identity to still exist while undergoing the very developments that may be needed to allow it to continue. Just how far can a culture become untethered from its law before it stops being that particular culture? Just how much can Jewish religious law and the practices it requires be diluted before a cultural Jew stops having a culture recognizable as Jewish? And is there some way to infuse new enthusiasm for Jewish religious law back into the lives of cultural Jews, to help maintain the community and its tradition? These are the questions that Kwall tackles in *The Myth of the Cultural Jew*.

After introducing readers to her inquiry and its methodology, Kwall describes the various sources of Jewish law, looking through the cultural analysis lens. She first explains the 'top-down' sources of law, the formal law that comes from recognized authority. The first such source of Jewish religious law is the written law of the Torah, which some Jews understand as revealed directly from a divine source and other Jews understand as being written by divinely inspired people. Within Judaism, there are different schools of thought as to the appropriate role of human interpretation of this original source of law. This multiplicity of perspectives is not a modern phenomenon; it is indeed one that has 'continued down through the ages' (Kwall 2015, 30). As Kwall emphasizes, throughout Jewish history even those who believed in the direct revelation of the law in the Torah understood that human beings must endeavor to figure out how to apply it. There has always been a self-conscious role for human beings in determining Jewish law. Thus, as Kwall asserts, 'Judaism as a religion is set up so that the law essentially is the product of human judgment about God's will' (Ibid., 44).

Inquiries about Jewish law may start with the Torah, but they certainly do not end there. Although many Christians may think that their Old Testament is the scripture of the Jews, the scripture of the Jews actually only starts with the Torah. Kwall explains the origins of another important 'top-down' source of Jewish law, the Talmud. This source of law became solidified when the rabbis helped people apply the Torah to their lives after the destruction of the temple in Jerusalem and the Jews' subsequent exile. To give one quick example, the Torah tells the people to celebrate the Passover festival with a pilgrimage to Jerusalem and a festival meal. But when

1 See Kahn 2001, cited in Kwall 2015, 3-8; Mezey 2001, cited in Kwall 2015, 1-11; Sarat & Simon 2001, cited in Kwall 2015, 1-3.

the pilgrimage became impossible, the rabbis emphasized the festival meal instead, and it developed into the Passover seder (Ibid., 43).[2] The comprehensiveness of the Talmud, developed over centuries and covering all aspects of human life, means that practicing Jews today are Talmudic Jews, not Biblical Jews. As a source of law, the Talmud presents certain challenges. Kwall aptly states, 'it is extremely difficult to determine not only the circumstances in which the Talmud actually reaches a consensus, but also the substantive content of any given consensus in certain situations' (Ibid., 20). As the old joke goes, if there are two Jews in the room, there are three opinions.

As the Jews negotiated life in the Diaspora, influences from other legal systems and cultures seeped in. Indeed, the ability to both assimilate some outside influences while still maintaining a distinct identity likely has been the key to the robustness of Jewish law through the millennia. Cultural analysis indeed predicts that this ability to allow change and developments within the tradition will produce a resilient culture. And, as in most legal systems, in Jewish religious law, too, novel legal problems have always been solved 'through creative legal interpretations' (Kwall 2015, 53).

Kwall's cultural analysis lens also makes it easier to recognize the importance of the *aggadah*, the narratives found in each source of Jewish religious law. The Torah and the Talmud teem with narratives, both famous and obscure. It is hard to imagine a Jewish sermon or religious lesson without a narrative, used to convey, quite literally, the moral of the story. Today, secular legal scholars and neuro-scientists alike recognize what the sages of old understood all along: human beings make sense of their world through story telling.[3] And it is this story telling that serves as a bridge between what Kwall calls the 'top-down' and 'bottom-up' sources of Jewish religious law.

As Kwall explains, the 'bottom-up' source of law is the *minhag*, the customs of the people. Over the millennia, the people validated the religious law through their practices. The religious authorities paid attention to popular custom when determining what the law was and encouraged certain folklore and folk practices, while discouraging others. In time, certain popular practices became endorsed religious practices, even though they were not found in the early scriptures. Also, nothing prevented observant Jews from having more stringent practices than *halakah* required. Many of those practices simply became the unquestioned way things were done. Customs tended to develop in reaction to local circumstances, especially in commercial life, and customs were often influenced by other cultures.

Here Kwall's examples provide fascinating histories of long-established Jewish religious practices. To share just one such example, Jews observe the *yarzheit*, the anniversary of a close family member's death. The family lights a twenty-four-hour candle in the home, has the name of the deceased read in the synagogue, and

2 Even though the pilgrimage is possible today, Jews around the world still end the Passover seder saying 'next year in Jerusalem' (Maxwell House 2014).

3 See Rideout 2015. I teach my first-year students to picture the factual story of each new legal case in their minds as if it were a movie, so they can understand and remember it better.

says the mourner's prayer. Lighting candles, reading aloud names of the deceased, and saying special prayers on the death anniversary are practices borrowed from Medieval German monasteries remembering their martyrs. This borrowing took place in response to a local tragedy, when a Medieval German Jewish community was attacked; even the term *yarzheit* is borrowed (Kwall 2015, 77).

A key point Kwall makes is that 'despite considerable uniformity of the tradition overall, there never has been a unified series of practices among the Jewish people, who have lived throughout the majority of their history in the Diaspora' (Ibid., 59). In each place they settled, however, Jews had their own, recognizable sub-culture.[4] 'With time, a remarkable consistency in legal practice developed across the Diaspora despite the differences in local customs and surrounding cultures. This outcome is a testament not only to the power of the tradition and its rabbinic authorities, but also to the people's inclination to accept and validate the tradition' (Ibid., 62).

After describing the many historic sources and developmental processes of Jewish religious law, Kwall provides further context for her inquiry by summarizing the various denominations within Judaism today. As she explains, when modernity spread throughout Europe and separated religious life from secular life, the Reform and Conservative movements arose. An even more recent addition is the Reconstruction movement. A major characteristic of Jews who are members of these newer denominations is that they tend to pick and choose those religious practices that they find personally meaningful. The Modern Orthodox movement also has become distinguished from more right-wing Orthodox Judaism. There are also various currents within the denominations. Each denomination has its own approach to Jewish religious law, and Kwall summarizes each approach well. She shows how each version of Judaism includes some degree and type of human decision making in determining Jewish religious law.

Once she has provided this broad and deep context, Kwall turns to showing how a cultural analysis approach may be helpful in working through some of the biggest challenges in and to Judaism today. '[T]his methodology seeks to preserve a tradition's integrity and authenticity while simultaneously justifying the development of the tradition in response to cultural changes' (Kwall 2015, 130). The first half of the book establishes that this very dynamic has been integral to Judaism at least since the beginning of the Diaspora, i.e., for some two thousand years. So Kwall's use of cultural analysis to examine fundamental questions in Jewish religious law today is at once innovative and traditional. Her recognition of the parallels in the two processes of legal analysis and her ability to translate those parallels to people familiar with one or the other is a major contribution. For secular legal scholars, she provides a detailed case study and important proof of the value of cultural analysis. For the Jewish community, she provides a forthright, intellectually honest way to approach current issues, a way that all participants can be comfortable with.

Kwall devotes one chapter to what she calls the 'foundational conflicts'. First

4 The separation between Jews and indigenous populations often lead to such high intermarriage rates among Jews that genealogists now can use DNA to identify Jewish ancestry.

she explores the thorny issue of just who is a Jew. This issue often becomes relevant in modern life in the context of marriage, divorce, burial, adoption, and Israel's law of return. At times this issue can impact profoundly both individuals who self-identify as Jewish and those who do not. And it has ramifications for the continuity of Judaism, the underlying concern of the book. Kwall uses cultural analysis to show how each of the major movements within Judaism approaches this issue. She then takes a similar approach to explore issues concerning how to observe *Shabbat*, the Sabbath. These issues, too, impact the lives of many Jews and have ramifications for the continuity of the tradition. Throughout these explorations, Kwall's cultural analysis approach allows inclusion of considerations that have not always been given full recognition, including countervailing approaches found within the tradition historically and perspectives on the fringes that help to clarify the boundaries of core consensus.

Indeed, where Kwall's approach seems particularly promising is in providing a way to analyze issues that on the surface might seem impossible topics for consensus among Jews today. She devotes one entire chapter to the Jewish religious law on homosexuality and another entire chapter to the Jewish religious law on the role of women in synagogue practices. In the chapter on homosexuality, Kwall shares a metaphor that seems to open up infinite possibilities for problem solving. Here Kwall is describing the back-and-forth between two Orthodox rabbis. One rabbi criticizes the other for 'failing to play sufficiently with the *halakah* in a creative way in order to arrive at solutions to the problems being discussed, […] for not plunging "into the great pool of our tradition, certain that he will be received by water rather than a dry cement bottom"' (Lopatin 2004, 9, quoted in Kwall 2015, 168). Of course water is both fluid and buoying, and this metaphor provides Kwall's central suggestion: look to the fluidity and the support inherent in the Jewish tradition to figure out approaches to today's issues. Jews who know the tradition's religious law already have a vibrant problem solving process and a common language for respectful debate and productive discourse.

Kwall does not hesitate to take on the issues of the day. In her review of the various Jewish movements' views on homosexuality, she highlights the Talmud's insistence that all people be treated with dignity, which in turn suggests paths for reconsidering some of the movements' views. Likewise, she shows how the prohibition on women's public Torah reading may be an instance of historic 'bottom-up' cultural practices becoming legally endorsed. This acknowledgment, too, opens up paths for reconsideration. Using the cultural analysis approach, Kwall's study of each issue includes a wide variety of Jewish legal and cultural sources, enriching the analysis. Her approach offers the possibility that eventually Judaism may find authentically Jewish answers to any issue that confronts it. She does not assume every answer will be liberal, leftist, or new; indeed she makes clear that sometimes cultural analysis may lead to more conservative results or even maintenance of the status quo. Nonetheless, a sense of possibility infuses this book. Perhaps the one openly gay Orthodox rabbi or the three Orthodox female spiritual leaders described

in the book are just historic anomalies. But they also are now known possibilities, which people now *have* heard of. When a cultural analysis includes their voices, too, the debate includes even more perspectives to aid in legal problem solving.

As if tackling all of these issues were not enough, Kwall also includes a chapter on how Jewish religious law is currently developing in Israel and another chapter on how it is currently developing in the United States. She presents a clear-eyed view of the obstacles to that development in each community. Underlying all of her expositions are the lessons of cultural analysis: that law and culture are constantly influencing each other and that they allow for multiple perspectives, robust dialogue, and developments that maintain the authenticity of the tradition. This approach allows her to discern instances of renewed enthusiasm for Jewish religious law. For example, she describes how the Reform movement in the United States is incorporating some religious practices it previously eschewed and how some secular and observant Israelis join together in a popular pre-*Shabbat* prayer gathering. Professor Kwall also sees promise in a very traditional source, the *aggadah*, the narratives that have always made the law accessible to the people. Ultimately, her book is reasonably optimistic about the prospects for its central concern for Jewish continuity.

The sheer breadth and depth of Jewish law and culture that Kwall comfortably explores as she supports her points are reason enough to read this book. Indeed, few books about a religious tradition extant today need to consider the influences of the Roman, Greek, Ottoman, Iberian, French, Hapsburg, and British empires. If you knew nothing about Jewish law and culture before reading this book, it would certainly give you a solid survey course. Kwall has done excellent work defining terms and explaining examples for the uninitiated. I tried to read this book thinking about the information needs of a cultural Jew who might be drawn to it by the title, and I could only find a few references–among hundreds of clearly explained references–that a person without a Jewish education might not understand.[5] Even readers who have had a strong Jewish education may not be well-versed in every topic explored, because Kwall examines the practices and social movements of Jews across the spectrum, from far right to far left, and delves into pockets of history that are not part of the standard curriculum.

The respect with which Kwall treats each group within Judaism is another hallmark of this book. In addition to the major religious movements within Judaism, she also accounts for the wide variation in practices between *Ashkenazim*, with their cultural origins in Northern Europe, and *Sefardim*, with their cultural origins in the region encircling the Mediterranean Sea. Kwall pretty studiously avoids any vocabulary that would place a value judgment on a particular movement's practices or beliefs. A member of one movement within Judaism will learn about the practices and beliefs of another movement through this book, without being made to feel that any one is more or less valued. (As I read, I tried to figure out which movement Kwall

5 In a testament to the breadth of Jewish religious law, these include one reference to a tuna fish sandwich (Kwall 2015, 105) and another to the prohibition against descendants of the ancient priests entering a cemetery (Ibid., 37).

belongs to, and I could not.) This comfort with the multiplicity within a tradition is one of the benefits of viewing a legal system through the lens of cultural analysis. As Kwall argues convincingly, it also is a helpful approach for an examination of the interplay between Jewish law and culture in particular, exactly because they have been shaped in so many places over so much time, through a parallel process.

Indeed, in the end, it is that very process of Kwall's analysis that is the *tour de force* here. As good law professors do in their classes, she models what she teaches even as she is teaching it. As a law professor in the United States, she has had long practice teaching her students to develop a tolerance for the uncertainty inherent in the United States' legal system. That system synthesizes the traditions of the common law, developed over time by the judiciary, with ever growing bodies of statutory and regulatory law, all taking place within the context of a multi-cultural society. Throughout *The Myth of the Cultural Jew*, a similar tolerance for uncertainty–created by the multiple sources of law within the Jewish legal system and the multi-cultural influences upon it–becomes abundantly clear. Kwall does not just explain how to do cultural analysis here; she does cultural analysis. That process has remarkable similarities to many aspects of traditional Jewish legal analysis. So in the end, what Kwall is really doing is 'plunging into the pool' herself, participating in the dynamic process of Jewish religious law. She invites readers to join her.

Bibliography

Kahn, Paul W.: 'Freedom, Autonomy, and the Cultural Study of Law', 13 *Yale Journal of Law & Humanities* (2001) 141-171.

Kwall, Roberta Rosenthal: *The Myth of the Cultural Jew: Culture and Law in Jewish Tradition.* Oxford University Press, Oxford 2015.

Lopatin, Asher: 'What Makes a Book Orthodox? *Wrestling with God and Men*, by Steven Greenberg'. 4 (2) *Edah Journal* (2004) 1-11.

Maxwell House: *Passover Haggadah*. Kraft Foods 2014.

Mezey, Naomi: 'Law as Culture'. 13 *Yale Journal of Law & Humanities* (2001) 35-67.

Rideout, J. Christopher: 'Applied Legal Storytelling: A Bibliography'. 12 *Legal Communication & Rhetoric: Journal of the Association of Legal Writing Directors* (forthcoming 2015).

Sarat, Austin & Jonathan Simon: 'Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship'. 13 *Yale Journal of Law & Humanities* (2001) 3-32.

Book Review

Jeremy Webber: *The Constitution of Canada. A Contextual Analysis*. Hart Publishing, Oxford 2015.

John Erik Fossum*

The author of this book, Jeremy Webber, is a major expert on Canadian constitutional law.[1] His many outstanding contributions reflect well the breadth and depth of themes that are discussed under the heading of Canadian constitutionalism. Webber's deep insights also permeate this book even if the book's format limits the space available for in-depth reflection, given the sheer breadth of themes it covers. Each of the six themes that the book focuses on: the territorial organization of the Canadian state; the structure and operation of democratic government; federalism; human rights; the role and status of Aboriginals; and Canada's external relations could by now almost fill a small library.

Apart from size, another obvious constraint stems from the fact that the book is part of a series on Constitutional Systems of the World published by Hart, an imprint of Bloomsbury. The justification for the series is that there is a dearth of texts 'which enable one to understand the true context, purposes, interpretation and incidents of a constitutional system […]. This series seeks to provide scholars and students with accessible introductions to the constitutional systems of the world, supplying both a road map for the novice and, at the same time, a deeper understanding of the key historical, political and legal events which have shaped the constitutional landscape of each country'.

My comment is neither a criticism of the series nor of Webber's book, both of which are very valuable. The point is simply to say that the format is very demanding

* ARENA Centre for European Studies, University of Oslo.
1 See in particular Webber 1994, 2010.

on the author who must write accessibly almost along the lines of producing an introductory text whilst at the same time carving out sufficient space for deeper reflection. I think Webber has excelled on both counts.

Webber's position on constitutionalism is quite appropriate to a book that is concerned with situating the Canadian Constitution in a broader context. Three aspects of Webber's approach stand out. One is the strong onus on democratic constitutionalism which immediately brings in the issue of balancing legal regulation and democratic decision-making. The context requires focus on the relationship between law and politics, and what we may term the dynamic interaction of patterns of juridification and of de-juridification. A second is that '(c)ontemporary constitutional lawyers have come to think of constitutions as being primarily concerned with limiting state power. But a primary role of any constitution—perhaps *the* primary role—is not to limit collective action but to enable it' (Webber 2015, 59). A third aspect that Webber highlights is deliberation: the constitution is the product of deliberation; it is also the frame within which deliberation unfolds. In a contested polity marked by competing conceptions of community and allegiance Webber underlines, deliberation is indispensable to civilized co-existence. That clearly also marks the conception of the Constitution; it is as much a continuing conversation as a system of rules.

An important premise for Webber is that Canada has been and remains a contested country. It is also a country that 'was not constituted by a single act of will or by a set of founding fathers acting in a privileged "constitutional moment". The Canadian constitution has been a work in progress. It has never taken a thoroughly rationalized form' (Webber 2015, 1). This recognition of the Constitution as a work in progress is reflected in the living tree doctrine which entails that constitutional originalism plays a very modest role in interpretation (Webber 2015, 146).

Canada has even been on the brink of Quebec secession and possible unravelling.[2] The persistent presence of Quebec nationalism and the rise of Aboriginal or First Nations nationalism, Webber underlines, make Canada a political system with highly asymmetrical affiliations. Most English-speaking Canadians understand Canada as a nation (even if English-speaking Canada is not institutionally united, consisting as it does of nine provinces that the citizens have also developed allegiance to); most Quebecers understand Canada as a compact of nations. The upshot is that Canada's experience clearly runs up against nation-state constitutional orthodoxy. Stephane Dion (political scientist and former Minister of Intergovernmental Relations and former leader of the federal Liberal party) noted some years ago that 'Canada is a country that works better in practice than in theory'.[3]

At the same time, today the following statement by Northrop Frye finds obvious resonance. He argued that Canada: 'has passed from a pre-national to a post-national

2 The late Rene Levesque, former leader of the Parti Quebecois (PQ) has referred to the relation between the two 'founding peoples' of Canada, French and British, as 'two scorpions in the same bottle'. That metaphor was earlier coined by Robert Oppenheimer (1953) who used it to depict Cold War super-power relations.
3 http://www.economist.com/node/8173164

phase without ever having become a nation' (Frye cited in Lipset 1990, 6). Thus, what at one point was considered a serious deficiency could in today's transnational world, be a major asset.

These aspects of the book perhaps somewhat surprisingly make it quite relevant for those interested in Europe and European developments, as I will indicate here (even if that is of course not much covered in the book). It is obvious that Europeans encounter an important aspect of their past when they look at North-America because Europe has been such a vital formative influence: it filled North America with its peoples, its ideas, its cultures and its institutional arrangements. Canada's European legacy, a legacy with a strong British accent, has created opportunities as well as engendered problems and challenges that continue to mark Canada, a fact that is well-reflected in Webber's book.

In Europe, Canada is very often overshadowed by the U.S.; thus a book that more accessibly explains Canada to Europeans is valuable unto itself. But that is not the only reason why Europeans should find this book interesting. In today's globalized world, Canada's cosmopolitan leanings, its distinctive form of 'rooted cosmopolitanism' (Kymlicka and Walker 2012), might hold valuable lessons in living with diversity that Europeans are well advised to look more closely at. Canada's long tradition of accommodating diversity is a core component of Canada's distinctive constitutional tradition. Webber refers to that as 'agonistic constitutionalism'[4]:

> (i)t acknowledges that parties often do disagree over fundamentals—indeed, may push very hard to have their view of the world accepted—and yet find a way to collaborate nevertheless. The principles remain important. The parties are deeply committed to them […] But the parties place the maintenance of the relationship ahead of agreement on the fundamental structure of sovereignty. (Webber 2015, 263.)

One way of reading the book, then, is as a kind of microcosm of constitutional issues and challenges, with particular emphasis on how they have been discussed and addressed within the distinctive setting of Canada. The book's thematic structure helps to sort out the most important themes, how they manifest themselves, and what they signify within the broader ambit of Canadian constitutionalism. The first chapter introduces these dimensions. The second chapter provides a historical overview of the development of the Canadian constitution, from the British-French battles over ascendancy in the latter part of the 1700s, with the Royal Proclamation of 1763 as a major milestone. That proclamation set the tone of many of the developments to come. It marked the ceding of New France to Britain; it also set down procedures that shaped Aboriginal treaty processes in Canada. A general push for responsible government in the colonies combined with French-speakers' insistence on retaining

4 I have argued elsewhere that 'Europeans might usefully set up Canada as a mirror of themselves, as Canada is the state that comes closest to the EU in several critical respects. Canada might be a useful mirror also because it speaks to how far we can "stretch" the state form in diversity accommodation terms' (Fossum 2009, 498).

political institutions that would operate in French made the 1840 merger of Upper and Lower Canada unworkable. The obvious solution would be federalization, because that would also be an important means of ensuring Westward expansion and territorial consolidation. No doubt the American Civil War affected the timing of federalization, which was codified in the 1867 British North America Act (BNA-Act). The British North America Act laid the constitutional foundations of Canada, but it remained an act of the UK Parliament. The period between then and its eventual patriation in 1982 may be termed a gradual transition from colony to independent country. That process was not however marked by a homogenizing nation-building impetus. Instead, there were several important centrifugal developments that preserved the need for accommodation and even reconciliation. The period saw the consolidation of Quebec as a French-speaking province. From the 1960s Quebec underwent a major political and social transformation generally referred to as the Quiet Revolution. Key was secularization and an étatiste policy program centered on province-building. The political mobilization crystallized around the definition of Canada as made up of two Founding Peoples, the English and the French, a symbolic framing that made the country's large portions of non-British and non-French immigrants feel left out. The response was to label Canada multicultural. That in turn did little to placate Aboriginals, who had long been marginalized and discriminated against. Aboriginals suffered denial of recognition; lost out in re-distribution terms; and lacked adequate political representation. In other words, they were marginalized on all the three dimensions of justice: recognition, re-distribution and representation (Fraser 2005).

This complex scene set the stage for the 1982 patriation of the Constitution. The Constitution Act, 1982 included a Canadian Charter of Rights and Freedoms. The Charter was designed with a dual objective. As a rights-based legal-constitutional vehicle it was intended to reinforce the constitutional symbolic status of individuals (and groups). As a political-identitarian instrument it was intended to foster nation-building through attaching citizens to Ottawa and bypassing provinces. It was thus intended simultaneously to foster an inclusive bilingual Canadian nationalism, and at the same time, to undercut a French-focused Quebec nationalism.

In this connection it is interesting to note that the main architects drew on nationalism as the symbolic frame even if one could argue that the complex conception of Canada that the Constitution Act actually sought to manifest had a strong cosmopolitan flavor. An interesting issue is whether a more pronounced or explicit cosmopolitan normative framing instead of the national one would have helped carry it through or not.

In any event, the province of Quebec ended up not signing the Constitution Act (even if most of Quebec's federal parliamentarians did), which prompted several major constitutional rounds to obtain the province of Quebec's consent. The first round was framed as a 'Quebec Round', aimed at gaining acceptance of Quebec as a 'distinct society'. It resulted in the Meech Lake Accord 1987, which failed as much on account of its closed and secretive process as on account of its substance. The

next round which ended in the Charlottetown Accord (1992) was far more open and inclusive and would have led to the entrenchment of 'an inherent right to Aboriginal self-government' (Webber 2015, 51) had it passed. It was rejected in two popular referenda (one in Quebec and the other in the rest-of-Canada), however. The Meech Lake and Charlottetown Accord failures gave impetus to Quebec separatism. In 1995 Quebec held a referendum on secession from Canada. The result was a very narrow 'no'. In response, the federal government referred several important questions to the Supreme Court whose landmark decision Webber terms 'a masterstroke. By sidestepping the amending formula, by denying the constitutionality of a unilateral declaration of independence, and yet by holding that there was an obligation on Canadian governments to respect the democratic will of Quebecers, it left room for the concerns of all, exhorting all parties to collaborate in the search for an agreed outcome' (Webber 2015, 53). The 1999 federal Clarity Act provided further procedural guidelines in the event of a new secession referendum.

Chapters Three through Five focus on the three main institutions of parliamentary democratic governance, where the relations between the former two—legislature and executive—are fused and regulated by the notion of responsible government, and the latter—the judiciary—is regulated by the norm of independence. Chapter Six focuses on federalism, Chapter Seven is devoted to rights and freedoms, and Chapter Eight is devoted to aboriginal peoples.

Canada is a parliamentary federation. The British influence highlights the key principle of parliamentary sovereignty, and an active state presence in society. But given that Canada is made up of parliamentary systems of government at both of the two main levels of government in a complex federal structure, which privileges executives and which has since 1982 also been subject to the provisions in the Charter, many analysts claim that parliamentary sovereignty is deeply constrained. Webber is not quite that pessimistic. He on the one hand points to the merits of parliamentary institutions in working out disagreements and responding to public pressures and concerns. On the other hand he also points to a number of mechanisms that ensure an inter-institutional dialogue, among which are Section 33 (the so-called notwithstanding clause) and Section 1 (reasonable limits clause). Further, Webber also points to the fact that legislatures have played an important role in supporting rights development, especially in the pre-Charter period but also in those areas not covered by the Charter, in the areas of social and economic rights. He notes that '(i)n rights terms, the Charter is a conservative instrument; it focuses overwhelmingly on civil and political rights' (Webber 2015, 179). Webber also points to the area of social rights to underline the limits of law:

> When judges adjudicate the merits of social programmes, they have, in effect an implicit preference for non-intervention. This is not the result of malevolence, deliberate decision or a conservative understanding of rights (at least not necessarily); it is a function of courts' institutional strengths and weaknesses: what courts are and how they operate. It is significant that in the early years of the Charter, when the Supreme Court was most attentive to this bias, its

> correction took the form of deference to legislative action, not the pursuit of positive rights. (Webber 2015, 221.)

We see from this how sensitive Webber is to the vital need for political systems to find a viable balance between patterns and processes of juridification and de-juridification.[5] That balancing takes on a special significance in the state's relations to Aboriginal peoples, which pertains to the need to rectify past injustice, and establish viable arrangements for Aboriginal/non-Aboriginal co-existence. Critical issues pertain to Aboriginal title and self-government. Webber rightly sums up the incisive chapter in the following manner: 'Here too, the adaptation of principles of equality and individual rights to a culturally diverse polity remains one of the great challenges of Canadian constitutional law' (Webber 2015, 258).

We see from this very sketchy overview that Webber has taken the task of providing adequate context very seriously. There is a chapter specifically devoted to historical context and each of the subsequent chapters provides historical background and major developments up to the present. There are good grounds for dividing the book into thematic sections. And yet, the book's division comes with the cost of downplaying one of political science's obsessions, namely the role and importance of constitutional process. In that sense the patriation and the insertion of the Charter had important implications for the manner in which constitutional settlements were negotiated in Canada. Prior to the patriation it is reasonable to talk of a built-in executive dominance in the sense that heads of governments negotiated constitutional accords in relative secrecy and with very little direct parliamentary and societal input. The reaction to the Meech Lake Accord showed that this view was no longer accepted in the post-patriation period.

The structure of the book makes it difficult to convey the magnitude of transformation that this entailed for Canadian constitutional culture which abandoned its previous deference. In that sense I would argue that one of the many merits of the book, which I would call its 'institutional sensitivity', in the sense that organizations are living institutions imbued with cultures and values does not fully incorporate the 'shock' or critical juncture that the patriation process represented. My point is that this has bearings on how we talk about agonistic constitutionalism. I would argue that the patriation and the so-called Canadian Charter revolution (Morton and Knopff 2000) represented a case of 'cathartic constitution making' (Fossum 2007; Fossum and Menéndez 2011). It reconfigured the prevailing conception of constitutional justice through giving constitutional recognition to a range of weak and/or constitutionally disenfranchised groups. In the pre-Charter period federal accommodation was particularly focused on the need to accommodate Quebec nationalism. The Charter Revolution meant that this had to compete with the need to rectify historical injustice wrought on Aboriginals, as well as the accommodation of demands from other groups in Canadian society (*i.e.,* women's groups, gays and lesbians, and disabled people). As such, the Charter served to

5 For an excellent overview of the different forms of juridification, see Blichner and Molander 2008.

open up the process of constitution making and helped to rank-order conflicts and concerns more in line with people's intuitive conceptions of justice (rectification of historical and contemporary injustice especially inflicted on Aboriginals, Inuits and Métis). The Charter Revolution also heightened constitutional reflexivity in that the Canadian political system appears to have developed a more principled approach to the settlement of issues that have not gone away. In some cases, such as Quebec separation, we see clearer procedures.

This is not to deny the relevance of the notion of agonistic constitutionalism; it should rather be seen as a way of inserting a form of periodization because patriation and the Charter have set the various institutional realms of Canada onto different path dependencies after the initial shake-up. One issue is therefore whether we face greater agonism now than before.

Another issue is that the relations among the three core components of justice that Nancy Fraser (2005) underlines, namely recognition, redistribution and representation have changed. Canada is interesting because all three dimensions are in play, not the least with regard to the Aboriginal peoples.

Bibliography

Blichner, Lars Christian and Anders Molander: 'Mapping Juridification'. 14 (1) *European Law Journal* (2008) 36-54.

Fossum, John Erik: 'On democratizing European Constitution Making: Possible lessons from Canada's experience'. 37 *Supreme Court Law Review* (2007) 343-381.

Fossum, John Erik: 'Europe's American Dream'. 12 (4) *European Journal of Social Theory* (2009) 483-504.

Fossum, John Erik and Agustín José Menéndez: *The Constitution's Gift. A Constitutional Theory for a Democratic European Union*. Rowman and Littlefield, Boulder (Co.) 2011.

Fraser, Nancy: 'Reframing Justice in a Globalising World'. 36 *New Left Review* (2005) 69-88.

Levesque, René: 'For an Independent Quebec'. 34 *Foreign Affairs* (1976) 733-744.

Lipset, Seymour Martin: *Continental Divide*. Routledge, London 1990.

Macleod, Colin and Jeremy Webber: *Between Consenting Peoples. Political Community and the Meaning of Consent*. UBC Press, Vancouver 2010.

Morton, Frederick Lee and Rainer Knopff: *The Charter Revolution and the Court Party*. Broadview Press, Peterborough 2000.

Oppenheimer, J. Robert: 'Atomic Weapons and American Policy'. July *Foreign Affairs* (1953) 525-35.

Webber, Jeremy: *Reimagining Canada*. McGill-Queen's University Press, Montreal and Kingston 1994.

Webber, Jeremy: *The Constitution of Canada. A Contextual Analysis*. Hart Publishing, Hart 2015.