The Law's authority to implicitly inscribe the Rhetoric of Forgiveness through creatures of Statute tasked with Truth Recovery, Justice, Peace and Reconciliation in post-conflict contexts of South Africa and Rwanda

By

Thapelo Teele

TLXTHA002

Submitted to the University of Cape Town

Thesis presented in fulfilment of the requirements for the degree of

Doctor of Philosophy

Faculty of Law

Department of Private Law (Rhetoric Studies)

10 February 2023

Supervisor:

Distinguished Professor Philippe-Joseph Salazar

Declaration

I…….Thapelo Teele……, hereby declare that the work on which this thesis is based on my original work (except where the acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce for the purpose of research either whole or any portion of the contents in any manner whatsoever.

Signature: ….....Thapelo Teele……. Date: 10 February 2023

ABSTRACT

This thesis presents a socio-legal approach to the rhetoric of law and the rhetoric of forgiveness in bodies legally mandated with reconciliation in post-conflict democratic contexts of South Africa and Rwanda. Through a qualitative engagement with literature, the aim is to ascertain whether the law has the authority to grant forgiveness to a perpetrator on behalf of a victim? This question is premised on an understanding of reconciliation as occurring between two individuals in the presence of a third party in view of a specific political outcome, whereas forgiveness is personal, occurring without a specific political outcome and only between two individuals. It is argued that there exists a rhetorical gap between those who speak the language of the law on reconciliation, and those who speak the everyday language of forgiveness informed by a Judaeo-Christian rhetorical frame. It is argued that the gap is addressed by public deliberation or "live rhetoric", allowing for a divided citizenry in post-conflict contexts to create a transformation (*metanoia*) and sameness of intent (*homonoia*) in their community that prevents *stasis* – a reciprocal threat of civil war due to a difference of opinion. "Live rhetoric" functions to keep everyone bound in the process towards reconciliation, and this thesis seeks to highlight that "live rhetoric" is significant not only for the maintenance of peace and democracy in post-conflict contexts at the level of the state, but also allows processes of reconciliation and possibly forgiveness to continue among individuals beyond the confines of bodies legally mandated with reconciliation.

ACKNOWLEDGEMENTS

I would like to begin by thanking the A.W. Mellon Foundation for awarding me my scholarship, thus enabling me to pursue my studies in both my Masters and PhD. I would like to thank Professor Jaco-Barnard Naude for believing in my potential and being the catalyst for pursuing my postgraduate studies. It is through Professor Barnard-Naude that I met my supervisor, Distinguished Professor Philippe-Joseph Salazar, whose incisive mind, breadth of knowledge, wisdom and humour have provided much insight, guidance and respite in moments where I felt like I did not know what I was doing.

Professor, it has been an absolute honour to be one of your students, and it is an experience I will cherish and hold on to for the rest of my days. We have worked well together notwithstanding that there was a pandemic that prevented us from having in-person meetings for almost two years. Rhetoric Studies has changed the way I think, perceive and engage with the world. It is a school of thought that I wish more people had the privilege to engage with, especially as it is so fundamental to meaningfully engaging in the deliberative tenets of democracy.

To my parents, thank you for going above and beyond to allow me the best opportunities with my education, and for always giving me the space and grace to explore my intellectual endeavours over the many years of study. May God bless you both with long and healthy lives to see your children yield good fruit in the harvest of your lives. To my sister, thank you for always being there for me, for encouraging and anchoring me in every and all moments of this journey. To my friends who did not know what this process entailed but approached supporting me with sensitivity, patience and utmost care, thank you: you are valued and appreciated.

Finally, I would like to give thanks and praise to the God of Abraham for His endless mercies in my life. Nothing would have been possible if not for His Grace, for it is by Grace that I live and breathe. I would like to dedicate this degree to my late maternal and paternal grandparents who would be beaming with pride because they loved education so much: I hope they are joyous on this occasion as they sit at the feet of our Creator where I shall meet them one day.

LIST OF FREQUENTLY USED ACRONYMS AND ABBREVIATIONS

Azanian People's Organization v. President of The Republic of South Africa 1996 (8) BCLR 1015 (CC)	*AZAPO*
The Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza, Hassan Ngeze, (Judgment and Sentence), Case No. ICTR-99-52-T, International Criminal Tribunal for Rwanda (ICTR), 3 December 2003d	Nahimana Trial Judgment
The Prosecutor v Siméon Nchamihigo (Judgment and Sentence) Case No. ICTR-01-63-T, International Criminal Tribunal for Rwanda (ICTR), 12 November 2008	Nchamihigo Trial Judgment
Promotion of National Unity and Reconciliation Act No. 34 of 1995	Reconciliation Act
Restitution of Land Rights Act No. 22 of 1994	Act No. 22 of 1994
Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1994	Genocide Law
United Nations Statute for the International Criminal Tribunal for Rwanda	ICTR Statute
International Criminal Tribunal for Rwanda	ICTR
Land Claims Court	LLC
National Unity and Reconciliation Commission	NURC
Truth and Reconciliation Commission	TRC

GLOSSARY OF RECURRING TERMS

Epideixis / epideictic rhetoric	(Greek) Contrasting it with its antonym, *apodeixis*, the suffix *deixis* is the act of pointing without speech with the index finger extended toward a disappearing phenomenon. *Epideixis*, therefore, is the art of showing "before" and of showing "more" based on the main sense of the prefix. in a restricted sense, *epideixis* or epideictic rhetoric is a public praise or blame that speaks of the good or the shameful. In a broad sense, it is a performance that is improvised or planned, spoken or written, but is always related to the public.
Homonoia	(Greek) A word denoting consensus or concord through sameness (*homo*) of the mind and sensitivities (-*noia*). Simply put, it is a sameness of intent.
Metanoia	(Greek) A word denoting a transformative change of heart or mind. In a Judaeo-Christian sense, it denotes a change of one's way of life resulting from spiritual conversion or penitence.
Stasis	Greek) A transgression of the zone of indifference in which the unpolitical space of the family and the political space of the state meet. This transgression usually arises from the lack of interest or concern between blood kinship and citizenship. This transgression often presents as a difference of opinion that can manifest itself as civil war.

TABLE OF CONTENTS

TABLE OF CONTENTS

1.1 BACKGROUND TO THE STUDY

The law occupies an interesting position within the realm of deliberative democracy, especially as it often sways between the past and the future. What makes the law unique is that it functions in a paradoxical manner: it provides stability, structure and order in socio-political contexts in which there is political turmoil, accounting for the events that led to the turmoil while also prospectively looking towards a future of order, stability, peace and the rule of law.

While there are schools of thought that would deem the law as a self-propelling phenomenon, at its core, the law derives its power from the actors who engage with it – those who beckon the law to assist them with whatever issues they are facing. This means that as an element of the state, the law can effectively enforce its power through its recognition by ordinary citizens on whom part of the sovereignty of the state in democracy rests.

The primary concern of this thesis is a critical engagement with the extent to which the law can intervene in the personal affairs of individuals within the state, especially in relation to communities whose differences of opinion on a range of matters become sources of socio-political conflict. Once the conflict has begun, the role of the law is ordinarily to mediate between the events of the past that led to the conflict, while also looking forward to a future of peace, stability, and social cohesiveness after conflict. As such, it explains why it can be said that the law is inherently paradoxical as it is often concerned with retrospective and prospective matters simultaneously.

This research is interested in fleshing out the basis of the authority of the law to intervene in matters between perpetrators and victims arising from conflict in the socio-political arena. In particular, the thesis seeks to explore whether the law, mediating between perpetrators and victims in bodies legally mandated with reconciliation, has the authority to implicitly inscribe the rhetoric of forgiveness above and beyond the explicit task of reconciling individuals as a political objective. This task is critical because there is a generally held assumption that reconciliation ordinarily occurs between two or more individuals involved in a conflict in the presence of a mediating third party (in this instance, in view of the political objective of societal cohesion against the backdrop of socio-political conflict), while

forgiveness appears to be personal in nature, occurring exclusively between the perpetrator of a harm and the victim who suffered as a result of that harm.

Considering that the contexts within which the described scenarios occur are spaces of deliberative politics that espouse democratic values, the question becomes whether the matter of forgiveness falls within either the public or the private realm of deliberation. Whether forgiveness falls in one or another realm has the potential to palpably implicate people who are the subject of reconciliation in a post-conflict context. Choosing which realm forgiveness falls under also practically impacts associations and dissolutions within social units, revealing that the power of the law is that it ascribes different amounts of capital to different people in any given context.

Considering these points, embarking on a conversation about the effects of law in contexts of conflict may allow a better understanding of whether, how and why the law mediates inter-personal relationships between citizens in post-conflict democratic contexts.

This research project incorporates bodies of existing literature on a range of topics discussed – literature from which the thesis draws information in order to present a broad and multi-disciplinary discussion on the authority of the law to implicitly inscribe the rhetoric of forgiveness in post-conflict contexts through bodies that are legally mandated with truth recovery, justice, peace and, importantly, reconciliation. The hope is for this thesis to enrich the already-existing literature on peacekeeping and the maintenance of sustainable and citizen-centred democracy in which there is on-going public deliberation occurring not only horizontally between the state and the citizens, but also vertically between citizens.

1.2 PRINCIPAL RESEARCH QUESTIONS AND RESEARCH OBJECTIVES

The central research question of this dissertation asks: does the law have the authority to grant forgiveness to perpetrators on behalf of victims in bodies legally mandated with reconciliation in post-conflict democracies of South Africa and Rwanda respectively? Applying a socio-legal approach premised on Rhetoric Studies for analysis, I ask several questions that highlight the various layers to an engagement with the rhetoric of forgiveness from the level of the state to political, legal, religious, and individual spheres. The sub-questions are as follows:

1. What constitutes a democratic state, what is its role in relation to the person, and on what basis is that relationship mediated in communities in which free people govern themselves?
2. What is the basis of the law's authority to mediate on the rhetoric of forgiveness between people represented as victims and perpetrators in post-conflict democratic contexts?
3. Has the mode of mediating the relationship between the state and the person changed from the conception of democratic thought in ancient Greece to contemporary democratic contexts?
4. What is the role of memory in post-conflict democratic contexts seeking reconciliation, how is memory stored, how is its scope determined, and how is this memory engaged with as a means of ensuring that there is truth, justice and possibly even forgiveness in the pursuit of reconciliation?
5. How does reconciliation, existing beyond the confines of bodies legally mandated with it, manifest itself at the level of the layperson, and does this have any bearing on the possibility of forgiveness?

These research objectives will be met using qualitative research methods that will engage a plethora of sources. This will be in view of understanding the legal, philosophical and historical development of notions of the state, the nation, the citizen, and the law as justice, reconciliation and even forgiveness. This approach will allow the research to be guided by case studies, legislative analysis and academic literature, all of which will be used to investigate the

meanings, symbols, interpretations and the development of ethico-political ideas of man as a political animal possessing speech as both communication and reason.

1.3 SIGNIFICANCE OF THE STUDY

This thesis seeks to contribute to the existing body of literature in rhetoric and socio-legal studies by highlighting that while the law – as an element of the state – may seem like it *creates* the world, it is the world that first *creates* the law.[1] This thesis is a socio-legal project underpinned by an engagement with Rhetoric Studies. The primary task of socio-legal scholarship, broadly constructed, is to better understand the social, cultural, political and economic contexts within which law operates in practice, be it in the past or the present.[2] The purpose of a socio-legal approach is that broad approaches to knowledge will make law more widely accessible, equitable and just – especially considering that the socio-legal framework is critical of the gap perceived as existing between the law in books (known as doctrinal law, positivist law or black letter law) and law in action as it plays out among and between peoples, places, histories, and institutions.[3]

From this perspective, law must be analysed in the wider spheres where it is interpreted by people and shapes their social relations and ways of operation in the world.[4] The arenas of legal interaction, or what is often referred to as law in action, occurs in obvious settings such as parliaments, courts of law, commissions of inquiry, as well as less obvious places like the marketplace, neighbourhoods, workplaces, schools, entertainment venues and sports arenas.[5] This thesis illustrates the law in action in bodies legally mandated with reconciliation in South Africa and Rwanda, along with the various socio-political spaces within each respective context.

A socio-legal perspective is important because it argues that people do not passively receive the law, but that in their daily practices, they palpably have an impact on the law and

1 Pierre Bourdieu, *The Force of Law: Towards a Sociology of the Juridical Field*, The Hastings Law Journal, 1987, Vol. 38, Issue 5, 839
2 Eve Darian-Smith, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013), 2
3 Ibid.
4 Ibid.
5 Stewart Macaulay, "Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports" in *Law and Society Review* 21 (1987)

its legal processes.[6] This is, in part, because people can imagine new forms of legal engagement and may resist or reframe prevailing legal norms, regulations and categorizations.[7] Indeed, Clifford Geertz mentions that the law is, as he puts it, a way of "imagining the real".[8]

While there are some socio-legal scholars who are critical of "gap studies" in the field,[9] it nonetheless remains a defining characteristic of socio-legal scholarship.[10] Rhetoric Studies is quintessentially socio-legal because rhetoric constitutes the art of constructing perceptions of the natural universe elaborated and enacted through methods of reasoning and persuasion contained in language.[11] Thus, rhetoric is critical in providing an analytical means by which to engage the law as a demonstration of reasoning and persuasion contained in language,[12] a language which both imagines *and* creates the real.[13]

6 Eve Darian-Smith op cit note 2 at 3
7 Ibid.
8 Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983), 184
9 Richard L. Abel, "Law books and Books about Law" in *Stanford Law Review*, Vol. 26, no. 1 (1973), 175-228; David Nelken, The "Gap" Problem in the Sociology of Law: A Theoretical Review" in *Windsor Yearbook of Access to Justice* (1981), 35-61
10 Carroll Seron and Susan S. Silbey, "Profession, Science, and Culture: An Emergent Canon of Law and Society Research" in *Dictionary of Law and Society*, ed. Austin Sarah (Blackwell Publishing, 2004), 30-60; Kitty Calavita, *Invitation to Law and Society: An Introduction to the Study of Real Law* (Chicago University Press, 2010)
11 James Boyd-White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" in *University of Chicago Legal Review*, 52 (1985), 692
12 *Plato with an English translation*: *The Laws* by R. G. Bury. In Two Volumes (Harvard University Press, 1981) at 315
13 Clifford Geertz op cit note 8 at 184

1.4 RESEARCH METHODOLOGY

Legal material in the form of case law, legislation and the Constitutions of states are the primary basis for a discussion for the rhetoric of forgiveness between perpetrators in post-conflict democratic contexts of South Africa and Rwanda. Through a critical lens, there shall be discussions looking into the ways in which the law and its institutions have shaped and affected South African and Rwandan societies after the advent of democracy in 1994 and the genocide of 1994 respectively.

The purpose of employing this approach is to trace the results of legal procedures and decisions of the Truth and Reconciliation Commission in South Africa and the Gacaca Courts in Rwanda in order to pinpoint the impact that these bodies – both legally mandated with reconciliation – had on how citizens in both contexts engaged in conversations relating to the state, the nation, citizenship, the law, justice, reconciliation and even forgiveness. Schools of legal thought premised on formalist ideology engage with legal material in a manner that often lacks a critical socio-political approach. This limitation shall be addressed by reference to Rhetoric Studies sources, which will function to not only explain the effect, function and role of law, but will also highlight the tangible effects the law has on the lives of those subject to it.

By virtue of a socio-legal frame, this project is interdisciplinary and will engage with a wide array of literary material spanning from the ethico-political writing of thinkers from Ancient Greece, the tenets of Judaeo-Christian theology, and texts in analytical philosophy outlining the power and effect of the law in the post-conflict democratic contexts of South Africa and Rwanda. The goal is to create an in-depth understanding of the legal, philosophical, social and political features underpinning reconciliation as a legal process in these post-conflict contexts. Considering that engagement is exclusively with literature, this research project is qualitative in nature.

1.5 THE THEORETICAL FRAMEWORK OF THE RHETORIC OF FORGIVENESS IN BODIES LEGALLY MANDATED WITH RECONCILIATION IN POST-CONFLICT DEMOCRATIC CONTEXTS

1.5.1 Conceptions of citizenship in ancient Athens through the Funeral Oration

In her piece titled *The Invention of Athens: The funeral Oration in the Classical City*,[14] and expanding her argument further in *The divided City: On memory and forgetting in Athens*,[15] French Historian Nicole Loraux explores the function of the funeral oration in ancient Athens in times of peace and of civil war, highlighting its role in promoting democracy through notions of citizenship.[16] According to Barbara Cassin and Andrew Goffey, funeral orations are political and ethical in nature, and are part of what is known as epideictic rhetoric or *epideixis*, that is, in a broad sense, a performance that is improvised or planned, spoken or written, but is always related to the public.[17] In the restricted sense, however, as codified in Aristotle's *Rhetoric*,[18] *epideixis* or epideictic rhetoric is praise or blame which speaks of the good or the shameful.[19]

The funeral oration also functioned to justify and celebrate the military exploits of Athens against the neighbouring city-state of Sparta.[20] It pitted Sparta against Athens, with Sparta's role always being the same – that of an inferior or a subordinate to Athens.[21] As such, through the oration, the city invented not only perfect allies and enemies who are always content, but a perfect image of itself.[22] As Loraux highlights, while the funeral oration was performed before the Athenian people, it was also addressed to other Greek cities, and thus served as a form of Athenian foreign policy in relation to "the others".[23] The funeral oration's function as military speech made listeners aware that in exchanging their own future for that

14 Nicole Loraux, *The Invention of Athens: The funeral Oration in the Classical City* trans. from French by Alan Sheridan, (Harvard University Press, 1986)
15 Nicole Loraux, *The Divided City: On memory and forgetting in Athens*, trans. by Corrine Pache and Jeff Fort (Zone books, 2006)
16 It is worth noting that her discussions of civil war fall short of an adequate presentation of what causes civil war, and Giorgio Agamben in his text *Stasis: Civil War as a Political Paradigm (Homo Sacer II, 2)* gives a more thorough explanation of the causes of civil war as not stemming from within the household as Loraux articulates, but instead has its starting point at the lack of interest or concern between blood kinship and citizenship (15).
17 Barbara Cassin & Andrew Goffey, "Sophists, Rhetorics, and Performance; or How to Really Do Things with Words", in *Philosophy & Rhetoric,* 2009, Vol. 42, No. 4 (2009), 353
18 *Aristotle's Rhetoric. An Art of Character* (University of Chicago Press, 1994)
19 Barbara Cassin & Andrew Goffey op cit note 17 at 353
20 Nicole Loraux *The Divided City* op cit note 15 at 79
21 Ibid at 81
22 Ibid at 83
23 Ibid at 77

of the city through conscription to the army, they honoured not only their city but also future generations of Athenians. [24]

A funeral oration as *epideixis* or epideictic rhetoric is a public show or demonstration through speech "before" everyone's eyes.[25] It occurs "before" everyone's eyes not because the audience can see the speech in a literal sense, but because in listening to the speech, the audience envisions for themselves what the speech demonstrates. Indeed, as Philippe Joseph-Salazar points out, the funeral oration was a medium of a "speech-act" where the words of praise by a speaker created reality for the public listening.[26] This "speech-act" created reality through words because the orator, through the device of "speech without reply" common to funeral orations, roused feelings of both submission and respect to the state in the audience.[27]

It is within this context that it becomes clear why the funeral oration is regarded by Loraux as a fundamental organising principle of a democratic Athenian society in which free men constituting a body of citizens govern themselves.[28] The means through which the funeral oration reflected this fundamental organising principle was often by speaking of past citizens manifest as dead Athenians, speaking to the listeners who constituted the present generation of Athenian citizens, and also speaking of the future Athenian citizens who were yet to be born.[29]

1.5.2 Conceptions of citizenship in the Roman Empire

Ancient Rome adopted a model of citizenship akin to that of ancient Athens before it, with Roman citizenship also comprising of the duty to perform military service, for example.[30] In doing so, Rome created for its Empire the kind of citizen willing to die for the glory of Rome – though it must be noted that Rome's leadership was always careful to exclude the values of democracy espoused in ancient Athenian political thought.[31] Public service of any kind, but

24 Ibid at 27
25 Ibid.
26 Philippe-Joseph Salazar, "An African Athens: Rhetoric and the Shaping of Democracy in South Africa", in Rhetoric, Knowledge, and Society ed. Charles Bazerman (Lawrence Erlbaum Associates, 2002), 11
27 Nicole Loraux op cit note 15 at 90
28 Ibid at 51
29 Ibid.
30 Derek Heater, *A Brief History of Citizenship* (Edinburgh University Press, 2004), 31
31 F.W. Walbank, "Nationality as a factor in Roman History" in *Harvard Studies in Classical Philosophy, Vol. 76 (Harvard University Press, 1972),* 150

especially that which involved military enlistment, was perceived as a great civic virtue for all social classes. [32]

So important was this civic virtue that Roman thinker and politician Markus Tullius Cicero declared in his writing that citizens who led private lives – those who refuse to take up public service – are "traitors to social life", for he thought that partaking in social life through public service was critical for the advancement of the state.[33] An important caveat to this civic virtue was that only someone possessing full Roman citizenship (*Cives Romani*), could espouse this civic duty as full Roman citizenship was shaped by a pattern of rights and duties.[34]

Under private rights, matters such as property, commercial trading and marriage between other citizen families were regulated, while *perigrini* (foreigners) generally remained subject to the laws of the province annexed by Rome and did not enjoy these rights and the privileges accrued to them.[35] Public or political rights were divided into three kinds, and included the right to vote for members of the Assembly and candidates of political office, the right to sit in in assemblies and, finally, to become a magistrate.[36] Rights balanced duties, and a clear distinction was drawn between private and public spheres of life.[37]

Beyond the specific obligations of full Roman citizenship, the ideal of civic virtue – like the ancient Athenian virtue before it – encapsulated an expectation that every citizen must possess a stern dedication to the state, and must therefore be willing to undertake the civic virtue of public service as the greatest of civic virtues.[38] So fundamental was the advancement of the state for Roman political thinkers and politicians alike that in view of securing the stability of Rome's territories of Empire beyond the Italian peninsula, the previously exclusive Roman citizenship was gradually extended to *perigrini* or foreigners who retired after enlisting in the legions of the Empire's army across its various foreign territories. [39]

---

32 *Cicero: On Duties,* eds. M.T. Griffin and E.M. Atkins (Cambridge University press, 1991)
33 Oxford World Classics: Cicero, "The Republic and The Laws", introduction XVII
34 Derek Heater op cit note 30 at 31
35 Ralph W. Mathisen "*Peregrini*, *Barbari*, and *Cives Romani*: Concepts of Citizenship and the Legal identity of Barbarians in the later Roman Empire" in *The American Historical Review*, Vol. 111:4 (Oxford University Press, 2006), 1013
36 Derek Heater op cit note 30 at 32
37 Ibid at 31
38 Ibid at 37
39 Ralph W. Mathisen op cit note 35 at 1036

As the Empire expanded, the necessity of the status of Roman citizenship as reward for service to the Empire was recognised as important to the maintenance of the Empire, such that numerous Roman leaders including Augustus (14 AD - 27 BC), Claudius (54-41 BC), Hadrian (138-117 BC) and Caracalla (217-211 BC), bestowed on many foreign males, at their discharge from the legions, varying degrees of citizenship mirroring full Roman citizenship.[40]

Full Roman citizenship bore numerous legal protections for privileges, with one such legal protection being the right to be tried for a crime or bring a legal action to a Roman Court, and to appeal any decision to Courts in Rome itself,[41] invoked by merely uttering the Latin phrase "*Civic Romanus sum*" ("I am a Roman Citizen"). In the Roman Empire the mere declaration of the Latin phrase *"Civic Romanus sum"* ("I am a Roman Citizen") served to protect *anyone* claiming such status from all impending harm in any of the territories annexed by the Empire.

Furthermore, As Markus Tullius Cicero pointed out, in the Roman Republic the mode of governance was determined by the *Populus Romanus* (the Roman people) – those enjoying full Roman citizenship – who held the ultimate power by exercising any of the three kinds of public or political rights: voting for members of the Assembly and candidates of political office; sitting in in assemblies, and opting to becoming a magistrate.[42] Owing to the power inherent in full Roman citizenship stemming from the legal protections of Roman civil law, it is understandable that full Roman citizenship was highly sought after by people in the Empire's foreign territories. [43]

While Greece before it comprised of several city-states each with their own citizenship, Rome advanced from the citizenship of a singular city-state to a world empire.[44] Rome's once exclusive full Roman citizenship became a matter of degree, with some foreign inhabitants of the provinces having access to the full benefits of Roman civil law while others had less access.[45] The success of the Roman Empire until its fall lay not only in its ability to break down

40 Derek Heater op cit note 30 at 35-6
41 Frederick Cooper, "Imperial Citizenship from the Roman Republic to the Edict of Caracalla" in *Citizenship, Inequality and Difference*, (Princeton University Press, 2018), 29
42 Cicero op cit note 33 at Introduction XVII
43 Ralph W. Mathisen op cit note 35 at 1036
44 F.W. Walbank op cit note 31 at 168
45 Ibid at 147

different groups and substitute them with a vast supranational state,[46] but also in the strategy of rewarding conformism with political recognition through granting of Roman citizenship.[47] As Ralph Mathisen points out, full citizenship was indeed an elite status desired by many.[48]

Georg Jellinek notes that it is from the binding forces and emotion inherent to Roman citizenship from which ideas of contemporary citizenship would spring.[49] The contemporary understanding of citizenship can be contextualized through the re-emergence of the writing of ancient Greek philosophers on the person, citizenship, the state and democracy among Christian populations of the European mediaeval period through the theory of Natural Law.[50] The re-emergence of the ancient Greek and Roman ideas of the person and citizenship in Europe reconfigured citizenship as the intersection between the formidable force in politics symbolized by the combination of nationalism and democracy. [51] The result of citizenship being at the intersection of nationalism and democracy set the scene for the events informing the legal texts of the American and French Revolutions of 1776 and 1789 respectively.

1.5.3 The consent of the governed in Democracy

German legal philosopher Georg Jellinek notes that a passage from Roman legal thinker Ulpian in the *Digests* declares that all men are equal according to the law of nature.[52] The period that marked accelerated growth in philosophy in Europe was around 1718 in Scotland with the development of Roman ideas of natural law creating a tradition of scientific investigation of human nature in order to construct and account for principles that are morally binding on people.[53] It is from this context that the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen are contextualised.

For example, Americans believed they were not legally subject to the jurisdiction of the British Parliament, except through their free consent, which they believed could occur solely

46 Ibid at 154
47 Ibid at 147
48 Ralph W. Mathisen op cit note 35 at 1036
49 George Jellinek, *The Declaration of the Rights of Man and of Citizens: A contribution to Modern Constitutional History*, 168
50 Ibid at 36
51 Arnold J. Toynbee, *Hannibal's Legacy: The Hannibalic War's effects on Roman Life,* Volumes I and II, (Oxford University Press, 1965)
52 George Jellinek op cit note 49 at 25
53 Broadie Alexander, "Scottish Philosophy in the 18th century", *Stanford Encyclopedia of Philosophy* (Stanford University Press, 2017), Edward N. Zalta (ed.), 88

in respect of regulating the channels of imperial commerce.[54] This idea speaks, in part, to Locke's influence on Thomas Jefferson in the notion that the legitimacy of the authority and power of the government are derived wholly from the consent of the governed.[55] This Lockean notion is most explicitly referred to in the American Declaration in the phrase "Governments are instituted among Men, deriving their just powers from the consent of the governed"

The reference to "mankind" often referred to in the text of the American Declaration speaks of the rest of humanity who are being informed of the birth of a new political nation.[56] Donald S. Lutz stresses that the impact of the American Declaration of Independence from international relations and a legal perspective is that it set the scene for 'a "national compact", the birth certificate of a nation, or the secular scripture of a self-chosen people.'[57] The American Declaration was an assertion of autonomy,[58] one which would inspire and motivate the liberation struggles of different ethnic and national groups worldwide.[59]

Rett R. Ludwikowski notes that while the idea of a Bill of Rights as a preamble to a constitution was American, as was the idea of a constitution being a single document providing law superior and distinct to any legislation that required passing and amendment by special conventions higher than those of ordinary statutes, the French Declaration stressed the importance of the union of Equality to Liberty more than the American Declaration of Independence before it.[60] Prior to 1789, France only acknowledged the rights of succession of the individual ruler manifest in the king and,[61] it had no written constitution – though it possessed numerous permanent institutions such as a peculiar system of higher courts of law.[62] The establishment of the Constitution can be better contextualised as stemming from the course

54 Jack N. Rakoye ed. "The Declaration of Independence" in *The Annotated U.S Constitution and Declaration of Independence*, (Harvard University Press, 2009), 80
55 John Somerville, "The Contemporary Significance of the American Declaration of Independence", in *Philosophy and Phenomenological Research*, Vol. 38, No. 4 (International Phenomenological Society, 1978), 490
56 Jack N. Rakoye op cit note 54 at 76
57 Donald S. Lutz, "The Declaration of Independence as Part of an American National Compact", Publius: The Journal of Federation, 19 (1989), 41-58
58 David Armitage "The Declaration of Independence and International Law" in *The William and Mary Quarterly* (Omohundro Institute of Early American History and Culture), Jan 2002, Vol. 59, No. 1 (Jan. 2002), 43
59 John Somerville op cit note 55 at 495
60 Rett R. Ludwikowski "The French Declaration of Rights of Man and Citizen and the American Constitutional Development" in *The American Journal of Comparative Law*, 1990, Vol. 38, Supplement. U.S. Law in an Era of Democratization (Oxford University Press, 1990), 484
61 David Armitage op cit note 58 at 59
62 James Harvey Robinson, "The French Declaration of the Rights of Man, of 1789", in *Political Science Quarterly*, Vol. 14, No. 4, trans. From German by Max Farrand (The Academy of Social Sciences, 1899), 654

of events in France at the time it was being debated by France's revolutionary National Assembly.[63]

The aim of the French Declaration was the restoration of man's dignity, rediscovered in Jean Jacques Rousseau, and the wish of the drafter was to emphasise that such dignity had a prior existence.[64] Georges Lefebvre affirmed this point when he noted that the decree of equality of rights and liberty opened up gates of individual effort, intelligence, and the spirit of enterprise of the most capable of the people in France to come forward and seize society's economic and political leadership if they can.[65] This appeal and the promises of the rights of equality and liberty contain what Lefebvre says remains an incomparable source of life and power even in modern society.[66]

Importantly, the French Declaration pointed out that the sovereignty of the state now resided in both the nation and the general will of the people, with the people being the source of legitimacy in a sovereign statehood.[67] This explains why Lynn Hunt stated that arguably, the greatest change the French Revolution brought about was the way in which the realm of politics was both understood and participated in after the French Revolution.[68] This statement not only means that the government must act in the interest of the people, but also that the concept of the nation is identifiable as its citizens.[69]

Mlada Bukovansky points out that the French Revolution marked an accelerated shift in the European state system from one of a dynastic territorial state to the nation-state as a dominant model for political legitimacy.[70] What the French Revolution did through the notion of popular sovereignty underpinned by natural equality and the rights of man, was that it introduced a new dimension into power politics of all states looking to transform from one

63 Ibid at 655
64 Roger Errera, "The French Declaration of the Rights of man and the citizens of 1789", in *Proceedings of the Annual Meeting (American Society of International Law), Vol. 70* (1976), *92*
65 Georges Lefebvre, *The French Revolution from its origins to 1793*, trans. By Elizabeth Moss Evanson (Columbia University Press, 1962), 143
66 Ibid at 144
67 Suresh Moradi, A Critical legal Study of the Declaration of the Rights of Man and the Citizen, *Beijing Law Review*, 10 (Scientific Research Publishing, 2019), 1146
68 Lynn Hunt, *Politics, Culture, and Class in the French Revolution*, (University of California Press, 1984), 221
69 Suresh Moradi op cit note 67 at 1146
70 Mlada Bukovansky "The French Revolution" in *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton University Press), 165.

system to another system in the same state.[71] On one hand, Donald S. Lutz argued that the American Declaration of Independence set the scene for 'a "national compact", the birth certificate of a nation',[72] on the other hand, Alphonse Aulard – cited by Georges Lefebvre – argued that the French Declaration of 1789 constituted the "death certificate" of the old regime.[73]

In view of this, Jacques Godechot – commenting on the tendency to liken the two revolutionary texts of the American and French Revolutions – argued that the character of the French and American Declarations varied as he considered the French Declaration an appeal to mankind as a whole, and was consequently much more universal in character than the American text, which he argued was: 'very specific, very American'.[74] Notwithstanding the differences between the texts of each context, the contemporary notion of citizenship as it is understood is derived from the combination of the American legal documents such as the articles of the Declaration of Independence and the Constitution of the United States of America, and what is known as the "block of Constitutionality" in French law,[75] which comprises of the French Constitution of 1958, the French Declaration of the Rights of Man (1789), the Republican principles of the third Republic,[76] along with the social and humanitarian values of the post-World War II period.

The legal texts from these two contexts is of fundamental importance because they not only represented a culmination of the development of the contemporary understanding of citizenship as it was reinterpreted in eighteenth-century Scotland from its Greek and Roman beginnings, [77] but also because the settings of the United States of America and France formed the socio-political basis for a shift away from the concept of the subject within a system of a dynastic territorial state in which sovereignty was centred around the King, to the nation-state

71 Ibid at 208-9
72 Donald S. Lutz op cit note 57 at 41-58
73 Georges Lefebvre op cit note 65 at 142
74 Jacques Godechot, *France and the Atlantic Revolution of the Eighteenth Century 1770-1799*, trans. Rowen H. Herbert (Free Press, 1965), 45
75 Martin A. Rogoff, "Fifty years of Constitutional Evolution in France: the 2008 Amendments and Beyond" in *Jus Politicum*, No. 6 (2011), 151
76 These provide the basis for the laws predating the French Constitution of 1946 that are described as having Constitutional status by the Constitutional Council of France.
77 Broadie Alexander op cit note 53 at 88

in which sovereignty was based on the collective citizenship of the people as a dominant model for political legitimacy.[78]

1.5.4 Judaeo-Christian religious rhetoric in relation to atonement and Kairos theology

In *Joining Religion and Politics: The South African Rhetorical Presidency,*[79] Philippe-Joseph Salazar argues that any engagement with the relationship between religion and rhetoric must not be approached from the viewpoint of religion, but instead from an understanding of religion as an expression of rhetoric – with rhetoric being the practice of public augmentation and democratic deliberation.[80] For example, the repetitive ritual practise of the proceedings of the South African Truth and Reconciliation Commission (TRC) was a manifestation of Judaeo-Christian religious rhetoric that functioned to socially educate the listener by inciting imitation and emulation that consciously creates belonging to a community in the mind of the person to whom it is directed.[81]

Through the TRC and the Land Claims Court in South Africa along with the hearings of the Gacaca Courts and the legal decisions of the International Criminal Tribunal on Rwanda in Rwanda, public deliberation constituting "live rhetoric" allowed for the divided citizenry in each context to head towards a state of sameness of intent (*homonia)*.[82] In post-conflict South Africa and in Rwanda, this occurred primarily though the transformation (*metanoia*) of people from victim and perpetrator into the "we" constituting South Africans and Rwandans respectively.

In the South African context where the TRC was the primary medium of public deliberation through which reconciliation would occur, Kairos theology is usually associated with the apartheid era and functions as a prophetic theology for a time of struggle.[83] The term *Kairos* is Greek in origin, and is one of two words expressing time with the first being *Chronos*,

78 Mlada Bukovansky op cit note 70 at 165
79 Philippe-Joseph Salazar, "Joining Religion and Politics: The South African Rhetorical Presidency", in *Journal for the Study of Religion*, (2001), Vol. 14, No. 1, Religion, Rhetoric and Politics (Association for The Study of Religion in Southern Africa, 2001)
80 Ibid at 43
81 Ibid at 42
82 Philippe-Joseph Salazar, "Compromise and Deliberation: a rhetorical view of South Africa's democratic transformation" in *Social Science Information*, 2004, SAGE Publications (London, Thousand Oaks, CA and New Delhi), Vol. 43(2), 151
83 Clint Le Bruyns, 1995, *The rebirth of Kairos theology and Citizenship in South Africa*, Missionalia Volume, 43. Issue. 3, 461

which refers to chronological or sequential time, while the term *Kairos* signifies an intervening period of time during which something special occurs.[84] Consequently, the term *Kairos* in theology implies an "opportune" or "right" moment during which God creates an opportunity for the church to fulfil a particular assignment for its community.[85]

Kairos theology uses a category of liberation to define the task, purpose and methodology of the church community.[86] Kairos theology is so important in the aim of liberation that it is applicable to various settings and situations of public life – from politics, civil society, and public opinion formation to economics.[87] In the South African context, Kairos theology manifests as the Kairos documents, a text written by the church community admonishing the system of oppression that was apartheid and calling for reconciliation and democracy. For the authors of the South African Kairos documents, reconciliation did not entail fabricating a peaceful coexistence, but required a reconciliation that reflects justice and repentance in line with Judaeo-Christian theological teaching.[88]

According to Judaeo-Christian theological teaching, in order to atone of one's sins, one must begin with repentance. From a Judaeo-Christian understanding, to repent of sin – through total exposure and condemnation instead of underplaying or undermining the sin – is to enter a new life or relationship with Jesus Christ as the saviour.[89] As such, to call for repentance in any situation or context is ultimately a call to a radical break with sin.[90]

In the Kairos documents, the authors also highlighted the importance of reconciliation as the means by which the conflict between the oppressed and the oppressor was to be resolved in the South African context.[91] What they made explicitly clear was that reconciliation did not mean to reconcile good and evil, that is, to come to terms with evil, instead, it was to do away with evil, with injustice, and with oppression.[92] For South Africa, this meant that reconciliation was not possible without justice – tangible by the opposition, rejection and confrontation of

84 E.C White, *Kaironomia: On the will to invert*, (London: Cornell University Press, 1987), 13
85 Justus Musya, 2012, *'Kairos' theology in Apartheid South Africa*, Churchman, Vol.126, Issue. 2, 163
86 Clint Le Bruyns op cit note 83 at 460
87 Ibid at 461
88 Justus Musya op cit note 85 at 165
89*The moment of Truth: The Kairos Documents*, compiled and edited by Gary S. D. Leonard, (Ujamma Centre for Biblical and Theological Community Development Research), 117-18
90 Ibid at 117
91 Ibid at 15
92 Ibid at 16

present injustices, failing which there could be no negotiations, no reconciliation and no forgiveness.[93] To put it simply, the authors of the Kairos documents found that nothing could happen without repentance.[94]

The authors of the Kairos documents highlighted that even people on earth are not expected to forgive the unrepented sinner.[95] Indeed, Kairos theology highlights the inherent public nature of the Christian faith and necessitates an engagement with and the transposition of Judaeo-Christian rhetoric into the secular space of politics, civil society and public opinion formation.[96] Kairos theology as public theology is underpinned by the theology of atonement, which is outlined in Karl Barth's work titled *Church Dogmatics*, in which he deals with atonement as the threefold reality of Jesus Christ as: (a) God; (b) as man, and (c) as a personal unity of the two.[97] He finds that the statement "God is with us" lies at the heart of the Christian message.[98] Barth best encapsulates the doctrine of atonement when he writes that, in short, atonement is: 'primarily … a statement about God: that it is He who is with [us] as God.'[99] Barth goes further to add that:

> While much depends upon [our] coming to see that [Christ's work] applies to [us] … everything depends upon [our] coming to see that it all has to do with God; that it is God who is with [us] as God.[100]

Through the death and resurrection of Jesus Christ, Barth finds that it is God himself who intervened to act and work and reveal.[101] So fundamental is the resurrection of Jesus Christ that Barth points out: 'it is thus with good reason that from the first, the main Christian festival has not been Christmas, nor Good Friday, but Easter.'[102] Barth goes further to say that Easter being the main Christian festival does not negate the birth, suffering and death of Jesus Christ, but that His resurrection is given what he terms "its supreme value".[103]

---

93 Ibid.
94 Ibid.
95 Ibid.
96 Clint Le Bruyns op cit note 83 at 460
97 Karl Barth, *Church Dogmatics.* (Trans.) G. T Thomson, (Eds.) Geoffrey Bromiley and Thomas F. Torrance. 5 Volumes in 14 parts (Edinburgh: T & T Clark), IV,1, 70
98 Ibid at 6
99 Ibid at 4
100 Ibid.
101 Ibid at 74
102 Ibid at 284
103 Ibid.

According to Barth, Jesus Christ is the ultimate mediator between man and God, and he expresses this sentiment by saying that Jesus would not have been the mediator in His (God's) glory if what He did, He did somehow for Himself alone and not from the very first of His own, to men, and in and to the world.[104] For Barth, the atonement brought by the resurrection of Christ is a free act of faithfulness by God to people. In view of this sentiment, it makes sense why Barth states that it was God himself who was reconciling, for indeed, the reconciliation of man with God is the fulfilment of the covenant as expressed in the biblical text in Corinthians 5.19.[105]

1.5.5 The Force of Law

In a 1987 article titled *The Force of Law: Toward a Sociology of the Juridical Field*,[106] French sociologist Pierre Bourdieu made a bold move to assert that the force of law – that is, its authority – was grounded in the social field or what he prefers to call the juridical field.[107] By this, he was speaking of the historical contexts emerging from struggles in the political field that are necessary for the autonomous social universe to emerge.[108] Through the argument presented in this text, Bourdieu challenged an insistence held in academic circles that the law as thought and action had absolute autonomy free from any social determination.[109]

Bourdieu notes that there is a competitive bid to control access to legal resources, such as the body of coherent rules inherited from the past – a bid which is so contentious that there is an establishment of a social division between professionals in the legal field and lay people through the continual rationalization of separation between those with judgments based on the law, and those with allegedly naïve intuitions of fairness.[110]

Bourdieu makes a compelling point in respect of the institution of "judicial space", from which he says exists a division between those qualified to participate in the game and those who are unqualified to participate, but may nonetheless find themselves in the middle of the game – that is, between legal professionals and lay persons.[111] The latter group are excluded

104 Ibid at 323
105 Ibid at IV,/1, 70
106 Pierre Bourdieu op cit note 1
107 Ibid.
108 Ibid at 815
109 Ibid at 814
110 Ibid at 817
111 Ibid at 828

by virtue of: 'their inability to accomplish the conversion of mental space, and particularly of linguistic stance – which is presumed by entry into this social space.'[112]

As an ideal manifestation of legitimized discourse, Bourdieu finds that the law's recognition is dependent on an exercise of the specific power attained by the law that, through a foundational principle that elevates the professional ideology of jurists, binds laypersons to a belief in the autonomy and neutrality of both the law and the jurists – what Bourdieu terms "the tacit grant of faith in the juridical order".[113] In judicial proceedings like those of a court of law, Bourdieu says that there is a presumption that professional competence and the presumed proficiency concerning advanced bodies of knowledge renders non-law actors as possessing simple common sense, non-special sense of fairness, and a supposedly naïve factual comprehension – what Bourdieu terms "their view of the case".[114]

Bourdieu conceptualises a trial in a court of law as a space in which individual points of view clash.[115] Indeed, while a private person who furnishes an insult in a private speech engages only the speaker, with such speech hardly possessing symbolic value, a court judgment in adjudicating disputes or negotiations regarding people or things by making a public proclamation about them is quintessential of: 'authorised, public, official speech which is spoken in the name of, and to everyone.'[116]

Bourdieu says the basis of authorization of the legal agent acting on behalf of the collective is by virtue of degrees and certificates, ratifying all processes relating to the acquisition, transfer, augmentation or withdrawal of those powers – all of which are rights whose power is bestowed by the state.[117] As such, the state: 'grants its actors a secure identity, a status and, above all, a body of powers or competences that are socially recognized and therefore productive.'[118] In this respect, Bourdieu notes that writing is critical, for it creates: 'the possibility of universalizing commentary, which discovers "universal" rules and principles …. Adds the possibility of transmission.'[119]

112 Ibid.
113 Ibid.
114 Ibid.
115 Ibid at 837
116 Ibid at 838
117 Ibid.
118 Ibid.
119 Ibid.

Through writing, the position of the legal actor is favoured, especially considering that they are deemed to possess the power of naming (manifested tangibly through writing) – for to write is to distribute symbolic power throughout society.[120] The power lies in the linguistic ability to create things to be named, and to create social groups in particular.[121] To this effect, Bourdieu says when a court of law makes a judgment on a matter, the court is effectively distributing varying degrees of capital to a range of actors or institutions by limits, exchange, negotiation or struggle:

> 'Concerning the qualities of individuals or groups; concerning the membership of individuals within groups; concerning the correct attribution of names (whether proper or common) and titles. Concerning union or separation – in short, concerning the entire practical activity of "worldmaking" (marriages, divorces, substitutions, associations [or] dissolutions which constitute social units…"world making"'.[122]

Bourdieu finds: 'the law is the quintessential form of "active" discourse, able by its own operation to produce its effects.'[123] Bourdieu does not conceive of this argument to be excessive, saying that while it seems that the law *creates* the world, it is actually the world that first *creates* law.[124] Furthermore, Bourdieu argues that juridical practice defines itself in part, much like the practice of religion, by virtue of the intersection between the juridical field and the layperson's needs.[125]Bourdieu notes that according to the institution of monopoly found in the legal system, there exists a:

> 'vulgar vision of the person who is about to come under the jurisdiction of the court, that is to say, the client, and the professional vision of the expert witness, the judge, the lawyer and other juridical actors.'[126]

Bourdieu says this is not accidental, for it is: 'essential to a power relation upon which two systems of presuppositions, two systems of expressive intention – two world-views – are grounded.'[127] The exclusion of non-specialists in favour of specialists is written into its fundamental law, what Bourdieu terms the law's *constitution*.[128]

120 Ibid.
121 Ibid.
122 Ibid.
123 Ibid.
124 Ibid at 839
125 Ibid at 841
126 Ibid at 828
127 Ibid at 828-9
128 Ibid at 829

1.5.6 The Politics of Memory on treatments of hate

Through her work on the management of memory on treatments of hate, Barbara Cassin argues that historically, the management of memory in democracies has followed three varied models. These three models impact the extent and means by which citizens deliberatively engage in the memory archive of certain political events,[129] thus also necessarily having an impact on how the political present is to be determined.[130] For Cassin, the three models help provide insight into the relationship between the notions of truth in a specific political context and its particular discursive practices and modes of deliberation.[131] She begins her work by discussing the Athenian model subsequent to the decree of 403 BC, after which she proceeds to the model derived from the democratic transition of South Africa from apartheid and, finally, on the model applicable to France from before the Revolution of 1789 to the contemporary context.

Cassin cites the first recorded model of the management of memory as a decree in ancient Athens that was summed up in what she describes as amnesia-amnesty.[132] It imposed upon Athenian citizens a duty to not recall and remember the events leading up to the Athenian civil war.[133] The decree did not necessarily forbid reprisal, but acted to censure the recall and memory of past events that could compromise the aims of reconciliation.[134]

In a recorded case in which a previously exiled citizen returned to Athens and recalled the past, an exemplary citizen seeking to uphold the decree dragged the returning citizen to the Council to be put to death without a hearing.[135] A citizen being put to death without a hearing was unheard of in Athens, however, it occurred in this instance because the decree had required that exiled citizens from the civil war take an oath in the first person after reconciliation – one which the exiled citizen in question had broken by recalling the past.[136]

---

129 Barbara Cassin, (2001) "Politics of Memory: On Treatments of Hate", *Javnost -The Public, "Democratic Deliberation and the Duty of Deliberation", 8(3),* 9
130 Ibid at 10
131 Ibid at 9
132 Ibid.
133 Ibid.
134 Ibid.
135 Ibid at 12
136 Ibid.

The function of this decree, therefore, is that amnesty is an entry-way for public deliberation in order to construct a community and its institutions through a shared amnesia – one that requires the erasure of memory of the civil war in view of reconciliation and harmony.[137] The decree can be understood as having been enacted for the benefit of the common good,[138] one that was achieved through initiating *homonoia* – a Greek word denoting consensus or concord through sameness (*homo*) of the minds and sensitivities (*-noia*).[139] While today a decree of amnesty would require a duty of memory, a decree of amnesty-amnesia in ancient Athens stood in direct contrast to a duty of memory.[140]

While in Athens it was legally prescribed that one should neither remember nor recall events from the civil war,[141] in South Africa, there was an imperative set by legal prescription in the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (hereafter simply the Reconciliation Act) of what Cassin describes as "full disclosure" in order to receive "amnesty".[142] The TRC process took on a performative discourse (ranging from the pragmatic to the theatrical) for one and for all; from city to city, with a televised re-broadcast happening every Sunday for the duration of the TRC's proceedings.[143]

Cassin highlights that like the Athenian decree of 403BC, the South African TRC was a political act with a cut-off date on which the past – by transforming the mistakes, sufferings and misfortunes to make good – was used to create the "we" constituting the "rainbow nation".[144] The "we" constituting the "rainbow nation" was made possible through the full disclosure requirement as a pre-requisite for amnesty, from which a *declaration* of one's injustice was arguably made instead of a declaration of one's *injustice*.[145] This is a distinction Cassin makes because the *declaration*, she argues, belongs to the realm of the ethical and religious.[146]

137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid at 10
141 Ibid at 12
142 Ibid at 15
143 Ibid.
144 Ibid.
145 Ibid at 20
146 Ibid at 19

Considering that the TRC required perpetrators to engage in a non-criminal judicial process of "full disclosure" by way of public rituals of narration, it also required that perpetrators and victims alike participate in the membership of a deliberative community whose stories of a shared past was a minimum requirement for the "we" to emerge.[147] Unlike the South African context in which perpetrators and victims alike actively engaged in the memory archive through narration, in France it is worth pointing out that the citizens are forbidden from forgetting but are required to recollect only for commemoration because of a legally inscribed latency period within which memory of politically related acts are stored in archives and may not be consulted.[148]

In France, Loraux notes that the arrangement is entirely reliant on a written treatment of documents in an aim to de-politicize memory regarding collaboration – a manifestation of civil war.[149] The written treatment in the law regulates an archival procedure from which there is a latency period within which the archives may not be consulted.[150] The time period in question is dependent on the nature of the archives and their classification.[151] Cassin highlights that the regulation of the memory archive in France is not just administrative, but constitutes a political act that is by its nature subject to change.[152]

Cassin finds that the French public and its democratically elected representatives are effectively denied the possibility of knowing what they – as the "we" comprising of the body of citizens – should consider in order to make informed political decisions.[153] She points out that the French memory archive through its written treatment (manifest an the numerous legislative documents governing the French National Archives) is neither memory as "I would not remember" in ancient Athens, nor is it the South African requirement for *full disclosure* – both of which she says are expressions of memory that is politically alive.[154]

147 Ibid at 20
148 Ibid at 18
149 Ibid at 9
150 Ibid at 17
151 Cassin highlights that the arrangement varied from archives containing medical files, personal records concerning private life information of living and deceased people, notary records, records of intelligence and census, registry files, and matters concerning the security of the state and national defense.
152 Barbara Cassin op cit note 129 at 17
153 Ibid at 18
154 Ibid.

Public access to the public archives was regulated, for example, by the law of 3 January 1979 which stated a general rule of access of 30 years. For documents containing personal information of a medical nature, for example, the delay enumerated in the law of 3 January 1979 was up to 150 years.[155] To this, Cassin says:

> This delay of access functions like a suppression, which keeps the "hot" information in limbo. The past never arrives directly in the present: it is a differed, disinfected dead past. Deliberation is stifled. To put it crudely: a past so regulated is a past for historians and statisticians, never a past for the citizen.[156]

1.5.7 Truth, Justice, Memory and Reconciliation

Kirk Simpson, writing on the socio-political context of Northern Ireland, provides a clear theoretical framework for how the process of truth recovery in post-conflict contexts can be approached in view of attaining reconciliation.[157] Simpson highlights that truth recovery is a critical factor to any transitional justice model as it aids in ameliorating the widespread damaging legacy often found in post-conflict contexts.[158]

For Simpson, the core political, social and legal objective of a truth recovery process is to overcome obstacles of a weak grasp of history relying on fabrication and myth, and to foster a consensual history that resists the dominant group's historiography.[159] Simpson argues that this approach would allow for an open society in which the government, policy-makers and citizens alike show a commitment to a sufficiently strong cross-community consensual moral backdrop.[160] Simpson believes that a critical interpretation of the past as existing for people in "history" takes into account the fact that individual recollections are often inescapably subjective.[161] Similarly, Philosopher Alasdair MacIntyre highlights: 'that humans seek to arrange various experiences and beliefs that constitute their life into an "ordered unity" that gives meaning to their life as a whole.'[162] To this effect, it is why Jean-Paul Sartre's character Roquentin in his novel titled *La Nausée* says:

---

155 Michel Duchien, "Archives in France: The New Legislation of 1979" *Archivaria* 11 (January), 127 accessed on 10 September 2021 at: *https://archivaria.ca/index.php/archivaria/article/view/10843.*
156 Barbara Cassin op cit note 129 at 18
157 Kirk Simpson, *Truth Recovery in Northern Ireland: Critically Interpreting the Past*, (Manchester, Manchester University Press, 2009)
158 Ibid at 2
159 Ibid at 132
160 Ibid.
161 Ibid at 131
162 Alasdair MacIntyre, *Three Revival Versions of Moral Enquiry: Encyclopedia, Genealogy and Tradition,* (London, Duckworth, 1990), 197

> A man is always a teller of tales, he lives surrounded by his stories and the stories of others, he sees everything that happens to him through them; and he tries to live his own life as if he were telling a story.[163]

Considering the quote above, Paul Antze and Michael Lambek – writing on the importance of memory within the archive – find that: 'memories are not simply records of the past, but interpretive reconstructions.'[164] Jacques Derrida goes even further, arguing: 'there is no political power without control of the archive, if not of memory.'[165] Furthermore, Derrida finds that archives not only serve to preserve an archivable content of the past (or memory), but that life itself and its relation to the future are determined by the technique of archiving.[166] In line with Derrida's thinking, James Scott argues that records usually reflect the reality perceived by their creators, saying:

> Builders of the modern nation-state do not merely describe, observe, and map; they strive to shape a people and landscape that will fit their techniques of observation… there are virtually no other facts for the state than those that are contained in documents.[167]

Considering the sentiment expressed by James Scott in the quote above, Simpson is opposed to an idea of "history" used with the term "objectivity", finding that this allows for an uncritical historical interpretation that is shielded from critical scrutiny.[168] Simpson says that what is deemed "acceptable" in terms of the past and how it is told in the future is a standard that should be totally reliant on some form of consensually negotiated version of history instead of an imposed singular narrative as a limited expression of truth-telling that is often ideologically motivated.[169] Simpson warns not to underestimate 'the interpretive dimension in language reclamation and victim storytelling because stories are told not only according to subjective perceptions, but also local legal, cultural and political contexts and the conventions and customs of situated narrative structures.'[170]

---

163 Jean-Paul Sartre, Nausea (trans.) L. Alexander (New York, New Directions Publishing, 1964), 56
164 Paul Antze and Michael Lambek (eds.), *Tense Past: Cultural Essays in Trauma and Memory*, (London, Routledge, 1996), *viii*
165 Jacques Derrida, *Archive Fever* (University of Chicago Press, Chicago – London 1996), 4.
166 Ibid.
167 James Scott, *Seeing Like a State: How certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven – London 1998), 82-3
168 Kirk Simpson op cit note 157 at 131-2
169 Ibid at 69
170 Ibid at 68

As a result, Simpson endorses any past from which there is a consensually negotiated version of history containing the inescapably subjective recollections of individuals.[171] Speaking on transitional regimes in contexts of conflict, Simpson warns that such regimes must not try to impose master narratives that allow little or no room for dissent, but should instead recognise the value of inclusivity in discourse.[172] This is because he finds that allowing differing views signals a commitment to truth recovery from the government – a commitment which Simpson argues is important because one on hand it considers the fact that individual recollections are often inescapably subjective,[173] and on the other hand, it indicates the presence of characteristics that will serve to strengthen democratic participation and prevent potential apathy on the part of citizens.[174]

The approaches endorsed by Simpson speak not only to truth, but also have a palpable effect on justice and reconciliation because as John Paul Ledarch observes about reconciliation, it is relationship-centric and requires: 'that responses to conflict must penetrate to the level of individual relationships.'[175] Ledarch finds that: 'to enter reconciliation processes is to enter the domain of the internal world, the inner understandings, fears and hopes, perceptions and interpretations of the relationship itself.'[176]

1.5.8 The importance of Language in mitigating reciprocal threats of violence

Writing specifically on language in ethnic conflicts in Europe and Eurasia, Diarmait Mac Giolla Chríost notes that language resides in a complexity of relationships between self-identification, group cohesion and worldview.[177] Chríost notes that as a policy tool, language can significantly contribute to the building of political institutions, civil society development, power sharing arrangements, and that it can promote and monitor human rights.[178] In the same breath, Chríost warns of the importance that timing and the nature of the intervention have in determining the failure or success of language as a policy tool for conflict resolution because

171 Ibid.
172 Ibid at 60
173 Ibid at 131
174 Ibid at 132
175 John Paul Lederach, 'Five Qualities of Practice in Support of Reconciliation Processes', in R. Helmick and R. Petersen (eds.), *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation*, (Philadelphia; Templeton Foundation Press, 2001),
176 Ibid.
177 Diarmait Mac Giolla Chríost, *Language, Identity and Conflict: A comparative study of language in ethnic conflict in Europe and Eurasia* (Routledge, London, 2003), 9
178 Ibid at 221

managing and finding ways to resolve conflict does not come in a one-size-fits-all approach.[179] Seeming to corroborate these sentiments, Jacques Rancière proposes that politics, as occurring primarily through linguistic deliberation:

> Consists in reconfiguring the distribution of the sensible which defines the common of a community, to introduce into it new subjects and objects, to render visible what had not been, and to make heard as speakers those who had been perceived as mere noisy animals.[180]

So critical is the use of language in creating a cohesive and peaceful community that Judaeo-Christian biblical texts, for example, preach for caution in the use of language. For instance, when the apostle Paul states in the biblical text of Colossians 3:11 that in Christ there is no longer Jew, Greek, Barbarian or Scythian, what he does is not to deny cultural diversity, but to reject the privileging of one culture above another that can be a source of conflict. The sentiments of the apostle Paul speak to the biblical text of 1 Corinthians 12:12-27, for example, in which it is clearly stated that if one part suffers, every part suffers with it, and if one part is honoured, every part rejoices with it, and that every person who accepts Christ as their saviour is part of the body of Christ as a metaphor for the ecclesiastical community.

Thus, these texts contain a message preaching harmony and peaceful coexistence notwithstanding the diversity of the community comprising of the body of Christ. The sentiments expressed in the biblical texts above preaching for peace instead of conflict are found in several biblical texts, all of which themselves allude to the oneness of the body of Christ in one way or another.[181] When language is carefully used, in a practical sense, it helps foster relationships in any given community. Indeed, Chríost suggests that sometimes a language policy, where it is grounded in political realities, may be effectively used to manage and resolve conflict.[182] He also thinks that for language planners and policy makers to effectively intervene in a context of conflict, they must understand not only the causes of conflict but also its lifecycle.[183]

1.5.9 The theory of Metacognition

179 Ibid.
180 Jacques Rancière, *Aesthetics and its Discontentments*, (Cambridge: Polity, 2004), 25
181 These include biblical texts like Colossians 1:24; Romans 12:4-5; Ephesians 1:23; Ephesians 4:16; Ephesians 5:30, and Hebrews 1:5) and many more.
182 Diarmait Mac Giolla Chríost op cit note 177 at 220
183 Ibid at 221

The theory of metacognition was coined in 1979 by John H. Flavell who proposed that the aim of metacognition is evaluating a person's present cognitive disposition, endorse them, and form epistemic and conative commitments.[184] Building on the theories of Favell, Joëlle Proust finds that a mental agent needs to adjust their cognitive efforts and goals with their cognitive resources.[185]

Proust finds that there are three major claims in respect of the theory of metacognition: first, that mental and ordinary actions do not have the same normative structure.[186] Second, if metacognition is understood as a self-evaluation of one's acquired or predicted mental properties, it is constitutive of every mental action though it is absent from ordinary basic actions.[187] Third, metacognitive ability is not exclusive to humans though, admittedly, linguistic capacity in humans expands the ability to exercise metacognition through social learning.[188] In respect of the theory of metacognition, only the parts relating to metacognition in human beings shall be focused on. The theory of conversational metacognition in humans is especially useful in relation to (1) features of multilevel forms of evaluation between two or more communicating agents, and (2) norms of acceptance and their role in shaping notions of "truth".

Metacognition within speech is used to decide, for example, 'whether one is emotionally able to speak in public.'[189] Proust argues that this is because specific embodied experiences determine metacognitive evaluative outcomes. These embodied experiences include, but are not limited to feelings of knowing, those of attending, tip-of-the-tongue experiences, and insight experiences.[190] Proust finds that this metacognitive evaluation occurs to the speaker through questions like: 'was my speech clear; was my gesture appropriate [and] did my pointing identify its intended referent?'[191] This cognitive evaluation encompasses what is referred to as "conversational metacognition", or a set of abilities that allows speakers to

184 John H. Flavell, "Metacognition and cognitive monitoring: A new area of cognitive developmental inquiry', *American Psychologist* 34; 906-11
185 Joëlle Proust, *The Philosophy of Metacognition: Mental Agency and Self-Awareness,* (Oxford University Press 2013) at 4-5
186 Ibid.
187 Ibid.
188 Ibid.
189 Ibid at 265
190 Ibid.
191 Ibid.

receive from others and to make available to them certain markers with regards to what Proust terms their "conversing adequacy".[192]

This process can be identified by way of two procedures: first, self-prediction or self-assertion is reliant on internal feedback to compare output with a stored norm – for example, speakers are able to estimate the extent of their knowledge concerning a given subject based on their feelings of knowing.[193] Second, self-retrodiction or an interpretation by an individual of past actions or events compares outputs that have been observed with a stored norm on the basis of external feedback – for example, a speaker may immediately realise that their response to a specific problem feels wrong.[194] These individual metacognitive feelings are those that one can, but does not need to communicate.[195]

Through the two procedures outlined above and their respective procedures, metacognition involves emotions and embodied feelings rather than abstract conceptual reasoning.[196] Conversational metacognition involves specific communication control processes because there are often anywhere between two and several actors involved in conversation.[197] By virtue of this, Proust says that identifying whether an embodied utterance as something specific needs repair or is satisfactory: 'can be gained both through an internal comparison process …. and through the on-line linguistic and embodied response(s) from the recipients(s).'[198]

As Proust finds: 'a…distinctive property of conversational metacognition is that it provides multilevel type of evaluation.'[199] Further, she notes that 'communicating agents need to keep track of the various task dimensions that are structuring talk-in-interaction.'[200] Because of this, agents are required to observe moment-by-moment turn-taking and sequence

192 Ibid at 266
193 Ibid at 267
194 Ibid.
195 Ibid.
196 Ibid.
197 Ibid.
198 Ibid.
199 Ibid.
200 Ibid.

organization.[201] Agents involved in conversation must also keep watch of their ability to refer to and to achieve their illocutionary goals.[202] As Proust notes:

> An intriguing consequence of this multidimensional aspect of conversational metacognition is that a communicator needs to operate simultaneously on different temporal frames of gestural discourse – from the short-lived evaluation of her capacity to retrieve a proper name (while keeping the floor) to the full-length appreciation of the success of a whole conversation.[203]

Therefore, in its function an utterance or gesture pertains to a speaker or recipient evaluating how – during a conversation of any given context – they have been doing or how well they can hope to do.

In respect of norms of acceptance and their bearing on notions of "truth", Proust notes that accepting is the most common mental action of all our daily life,[204] with acceptances being made voluntarily.[205] This cannot be said of beliefs because accepting is an epistemic action that involves deliberation, [206] so for example, when an agent accepts something they regard the thing as true although it may not really be the case. [207] Proust says what justifies accepting in such an instance: 'is that sometimes it is reasonable to accept something that one knows or believes to be false.'[208] Instances where this is reasonable include cases where something may assist in simplifying an inquiry, where that thing is close to the truth, or is as close as one needs to get for task at hand.[209]

Proust notes that a feature of acceptance are feelings, and feelings are epistemic because they express 'the degree of [subjective] uncertainty or sensed feasibility for a given task or [the] outcome.'[210] Proust notes that considering truth or adequacy: 'the value of all these feelings is "epistemic" because [their] function is to help a thinker recognize and evaluate the dynamics of their own beliefs, memories and plans.'[211] Proust points out that this feature of

201 Ibid.
202 Ibid.
203 Ibid at 267-8
204 Ibid at 172
205 Ibid.
206 Ibid.
207 Ibid.
208 Ibid.
209 Ibid.
210 Ibid at 223
211 Ibid.

acceptance can prove to be troublesome in its consequences because: 'accepted propositions are subject to contextual variation in their sensitivity to evidence and truth [because] they cannot be freely agglomerated in a coherence-preserving way in contrast to beliefs.'[212]Another feature of accepting is that whereas judgements and beliefs are solely geared towards tracking truth, acceptances conjoin both epistemic and practical goals.[213]

1.6 OVERVIEW OF CHAPTERS

Chapter 1 outlines the theoretical foundations for the methodology employed in the research. It also outlines the description of key features and theories in my research. The five sub-questions presented in the section relating to the principal research question and research objectives are addressed throughout the body of thesis from Chapter 2 through to 13.

Sub-question 1, *What constitutes a democratic state, what is its role in relation to the person, and on what basis is that relationship mediated in communities in which free people govern themselves?* is addressed by Chapters 2, 3, 4 and 5. Sub-question 2, *What is the basis of the law's authority to mediate on the rhetoric of forgiveness between people represented as victims and perpetrators in post-conflict democratic contexts?* is addressed by Chapters 6, 8 and 9. Sub-question 3, *has the mode of mediating the relationship between the state and the person changed from the conception of democratic thought in ancient Greece to contemporary democratic contexts?* Is addressed by Chapter 5, 6, 10, 11 and 12. Sub-question 4, *What is the role of memory in post-conflict democratic contexts seeking reconciliation, how is it stored, how is its scope determined, and how is this memory engaged with as a means of ensuring that there is truth, justice and possibly even forgiveness in pursuit of reconciliation?* Is addressed by Chapters 10, 11 and 13. Sub-question 5, *How does reconciliation, existing beyond the confines of bodies legally mandated with it, manifest itself at the level of the layperson and does this have any bearing on the possibility of forgiveness?* is addressed by Chapters 12 and 13.

In Chapter 2, I unpack ethico-political theories of ancient Greek writers to highlight the importance of speech (as both communication and reason) as an entryway into the political

212 Ibid.
213 Ibid at 173

community of citizens comprising of free people within a Greek city state. In doing so, I aim to highlight the basis of the composition of the state in Greek democracy as the socio-political space on which the foundations of modern democracy are premised. I uncover that the chief good of the state is for the preservation and advancement of the state as the composite whole down to its uncompounded elements or smallest parts (the partnerships of people), especially considering that the single person is not self-sufficing.

In Chapter 3 I explore the role of speech as both communication and reason, specifically as it manifests as the Funeral Oration. Through discussing the Funeral Oration as epideictic rhetoric (public speech as an art of persuasion) in a democratic society where peers governed themselves in a free society, I uncover that the greatest virtues of citizens – those of public service, justice, courage, temperance, prudence and wisdom – are mediated by the Funeral Oration as a "speech act" that elicits a crowd's participation in response, thus "creating" the state "before" the eyes of its listeners as the body of citizens.

In Chapters 4 and 5, I explore the changing conception of citizenship from the ancient Greek city-state as it is adopted by ancient Rome in pursuit of Empire through to Europe in the eighteenth-century during the American and French Revolutions of 1776 and 1789 respectively. I unpack the way Rome, like the ancient Greek city-states before it, used citizenship to distinguish between Roman Citizens and populations of annexed territories in the Empire – though full Roman Citizenship was reserved only for those born in Rome. I uncover that (1) Rome, like Ancient Athens before it, conceived of the state as being of greatest importance and citizens functioning to preserve the state, and (2) submission to the state was ensured through legal protections and privileges accruing to full Roman Citizenship in Roman Civil Law, and for those not possessing full Roman citizenship, the possibility of acquiring it in service of the empire was enough to enable populations to submit themselves to Rome (even though they often acquired Roman citizenship to a lesser degree without the right to participate in elections for Senate, for example). I also uncover that the binding forces inherent in full Roman Citizenship would go on to influence the American and French Revolutions, helping the citizens in the aforementioned contexts to frame for themselves their own ideas of citizenship that would impact contemporary ideas of citizenship, the nation and democracy considering that both contexts are arguably the oldest surviving contemporary democracies.

In Chapters 6, 7 and 8, I unpack the role of Judaeo-Christian rhetoric on the theology of atonement, highlighting that this theology not only assisted the church community in fulfilling their biblical mission of fighting against all forms of socio-political injustice, but also in introducing to the public realm the rhetoric of forgiveness explicit in the theology of atonement to the layperson in post-conflict contexts embarking on the process of reconciliation. I uncover that Judaeo-Christian theology is inherently public in nature, and that its tenets are espoused by state entities – explicitly or implicitly – to inform the secular and political mandates of ensuring peace, justice, reconciliation and nation-building amidst a background of conflict.

In Chapter 9 I discuss the force of law, especially considering that the law is an essential element of the state. I unpack the source of law's authority, and discover that it is grounded in the social field. Through a critical analysis of a legal case decided in South Africa's Constitutional Court after the advent of democracy, I highlight that while it may seem that the law *creates* the world, it is the world that first *creates* law. I uncover that juridical practice as an expression of law defines itself , much like the practice of religion, in part through the layperson's needs.

In Chapter 10, I discuss the management on memory in relation to contexts of conflict, highlighting that the way the state approaches the memory archive determines the extent and quality of engagement by citizens with democratic values of public engagement and deliberation. Through engaging with the management of memory in democratic contexts of ancient Greece, post-apartheid South Africa and France before and after the Revolution of 1789, I uncover that the ability for citizens to engage in the memory archive not only has a bearing on the degree and quality of their participation in democracy, but also has a bearing on matters of justice and reconciliation in relation to socio-political contexts of conflict.

In Chapters 11, 12 and 13, I discuss the role and importance of speech as both communication and reason as it is manifest in engagements with notions of truth, justice, and memory in the post-conflict context of Rwanda considering the genocide of 1994. I discover that speech as both communication and reason in this socio-political context is critical to the process of reconciliation because it also represents public deliberation or "live rhetoric", which is a core value of negotiation between free people governing themselves in a democratic state.

In chapter 14, I highlight some key points in denouement of the dissertation, pointing to the salient features outlined in the body of the thesis. Through teasing out some of these salient features, I highlight the most important observations from several chapters and from the thesis as a whole.

To begin, the chapter below unpacks ethico-political theories of ancient Greek writers to highlight the importance of speech (as both communication and reason) as an entryway into the political community of citizens comprising of free people within a Greek city state. This will done in view of outlining and explaining how societies comprising of free and equal people organise and perceive themselves and their state.

2. CHAPTER 2: MAN AS A POLITICAL ANIMAL: THE CITY-STATE, THE CITIZEN AND VIRTUES

2.1 Introduction

Ideas of the citizen and their virtues in the ancient Greek city-state are best encapsulated by the theory put forward by Aristotle that man is a political animal.[214] The basis of this theory is derived from a method of investigation of the state that analyses the composite whole down to its uncompounded elements, or the smallest parts to the whole.[215] Thus, for Aristotle, the starting point of the analysis is the state, which he considered as being prior in nature to the person because without the several partnerships of persons from which the city is comprised, the singular person is not self-sufficing.[216]

Aristotle's theory isolates the possession of speech as the differentiator between humans and other animals, highlighting that through speech, humans are able to distinguish between right and wrong, good and bad, and other moral qualities.[217] Furthermore, he argues that through speech and its associated moral qualities, humans are able to organise themselves starting at the household as the smallest part to the whole that is the city-state.[218] The analysis provided by Aristotle's theory takes the view that all things are defined by their function (the

214 Aristotle, *Politics*, trans. H. Rackham, Vol. XXI (Harvard University Press, 1944)
215 Ibid at 5
216 Ibid at 13
217 Ibid at 11
218 Ibid.

role of the city) and their capacity (possession of free speech as the basis of organisation for people).[219]

This theory was influenced, in part, by the writing of Plato before him, who was Aristotle's teacher and later colleague – though it is worth noting that Aristotle's discussions were much more practically grounded than those of Plato. After all, one of Plato's most important works *The Republic*, was premised on an ideal state as a vehicle through which he expressed thoughts otherwise inexpressible on a range of matters from the importance of higher education for the young to the grace and beauty of life.[220] As illustration of Plato's ideal approach, he paradoxically states in the text of *The Republic*: 'until kings are philosophers or philosophers are kings, cities will never cease from ill.'[221]

From a reading of *The Republic*, it becomes apparent that many features mentioned in Plato's ideal state do not exist in the real world.[222] This is a point he himself continually emphasises and repeats in the *Laws* when casting the reader's mind back to the ideal state of *The Republic*,[223] which is the backdrop upon which the ideas expressed in the *Laws* is based. Notwithstanding these practical issues, his writing is nonetheless useful in that several ideas he discusses reflect, to some degree, elements found in the real lives of ancient Greeks and would go on to influence the writing of numerous ancient Greek thinkers after him – including his student Aristotle, whose work shall be referred to in affirmation of and in contrast to Plato's writing.

2.2 Discussions by Plato and Aristotle on the state, citizens and their virtues

In the *Laws*, Plato asserts quite strongly in the belief that a person is required to be entirely subordinated to their state.[224] For Plato, such a person epitomizes the virtue of civic excellence he advocates for in *The Republic*.[225] He communicates these ideas using the artistic strategy of dialogue between three different speakers presented as old men having conversation. In doing so, he invokes a style akin to the Socratic method of his former tutor

219 Ibid.
220 *Plato's The Republic*, trans. Benjamin Jowett (New York: The Modern Library, 1941)
221 Plato explains that by philosophers he means those capable of comprehending ideas, especially the idea of good.
222 He too understands that his ideal State is not possible, and admits to this fact in the subsequent work of the *Laws*
223 Plato op cit note 273 at 162
224 *Plato with an English translation: The Laws* op cit note 12 at 497-501
225 Ibid at 395

who would ask questions to explore concepts and knowledge. In the dialogue of the *Laws*, there is an Athenian without a name, a Crete named Clinias and a Spartan named Megillus.

The identities of the three speakers are arguably as important as the conversation being had because what becomes clear is that the wisest of all – and the one who leads the conversation – is the Athenian. This is very intentional because in their dialogue, Plato through the Athenian, speaks of the ideal state of *The Republic* in which the lives of all, from their birth to their death, are strictly regulated by legal prescriptions.[226] This view aligns with that of Plato's student Aristotle in his theory of man as a political animal, from which he writes that justice – meted out through the law and as an element of the state – is necessary for judicial procedure that ensures the regulation of the political partnership of groups of people comprising the city-state by determining what is just.[227]

In Book I of the *Laws*, Plato contends that a city's laws should not be aimed solely at advocating for the virtue of courage like they do in Crete and Sparta,[228] but should also promote the greater virtue manifested in temperance or self-control and moderation.[229] He argues that both of these features must be instilled initially through education for the young in order to foster willing obedience in citizens to the state.[230] Aristotle's own writing fortifies this argument in light of the criticism of Sparta in Book VII of *Politics*, in which he argues that Sparta holds the mistaken belief that the greatest goods – virtues of temperance and moderation – are achieved by means of only one virtue; courage.[231]

In Book IV, Plato, through the Athenian, argues that man is bound to render service and duty to their city in humility as they would to the gods and all superior powers.[232] In respect of the authority of the law, Plato suggests that the most effective means by which to foster attitudes of service and humility is that laws themselves must be accompanied by preludes or preambles containing persuasive sentences and justifications.[233] In Book IV the Athenian, speaking on the role and function of preludes, says:

---

226 Ibid at 501
227 Aristotle, *Politics*, op cit note 214 at 13
228 *Plato with an English translation: The Laws* op cit note 12 at 233
229 Ibid.
230 Ibid at 321
231 Aristotle, *Politics*, op cit note 214 at 615
232 *Plato with an English translation: The Laws* op cit note 12 at 317
233 Ibid at 315

> [Preludes] provide a kind of artistic preparation which assists towards the further development of the subject. Indeed, we have examples before us of preludes, admirably elaborated, in those prefixed to that class of lyric ode called the "Nome" and to musical compositions of every description … the laws … consist of these two things combined – law, and prelude to law.[234]

Speaking of the function of law itself, Plato through the Athenian takes a dual approach by arguing that law should not only to coerce but also persuade its subject.[235] The importance of this exercise is:

> To ensure that the person to whom the lawgiver addresses the law should accept the prescription quietly – and, because quietly, in a docile spirit – that, as I supposed, was the evident object with which the speaker uttered all his persuasive discourse.[236]

The purpose of structuring the laws in the manner prescribed in the quote above serves to allow people who are subject to the law to understand that ultimately, the aim of law is reason – which is always the good – and that this too is the objective of the state.[237] Corroborating this view, Aristotle in Book I of *Politics* points out that the city-state, being a political association formed by partnerships composed of several villages,[238] is created with a view of ensuring the good.[239] Through *Laws*, Plato advocates for citizens with a self-controlled and law-abiding nature,[240] citizens for whom freedom is ultimately the freedom of obedience to higher powers.[241] As the Athenian expresses in dialogue: 'I should desire the people to be as docile as possible in the matter of virtue; and this evidently is what the legislator will endeavour to effect in his legislation.'[242]

Obedience is a common thread of discussion in the *Laws*, and Plato believes that a citizen who has fostered an obedient nature is most honourable, such that he finds them to be the most suitable candidates to be appointed to administer the laws. He even goes as far as arguing that lack of obedience to the laws by administrators of the laws is the beginning of ruin

234 Ibid at 315-17
235 Ibid at 317
236 Ibid.
237 Ibid at 205
238 Aristotle, *Politics*, op cit note 214 at 9
239 Ibid at 3
240 *Plato with an English translation: The Laws* op cit note 12 at 395
241 Ibid.
242 Ibid at 303

for the state.[243] For Plato, like Aristotle after him, the greatest concern of all is the state, its preservation and its advancement – all of which occur primarily through fostering virtues in its citizens.[244] As such, perhaps Plato's choice to name the series of books the *Laws* is not quite accurate, for it covers much more than laws as it is also concerned with politics and ethics.[245] What is clear from an overview of the range of topics covered in the *Laws*, is that for Plato a person is an ethico-political entity that exists within the principle of the *part* of the greater *whole* – for citizens this means that they are a *part* of the *whole* that is the city-state to which they belong.[246]

While Plato's principle of the *part* and the *whole* is discursively interesting, it unsurprisingly lacks both practical grounding and sufficient detail to serve as a guide to understand the point at which the *part* and *whole* intersect. It is in this weakness where Aristotle's analysis of the state as the composite whole down to its uncompounded elements or smallest parts proves useful.[247] This is because Aristotle's theory and analysis has a function and capacity perspective to understanding the role that agreement and partnership play between the city-state, the household and a person.[248] Indeed, Aristotle proclaims that the object for which a thing exists – its end – is its chief good.[249] Following this logic, he argues that the city (maintained by political partnership) is an end, and its chief good is the common interest of citizens of the city being able to achieve a share of the good life – meaning that the good life is therefore the chief aim of the society (both collectively for all members and individually for each citizen).[250]

It is worth noting that Aristotle's idea of the good life encompasses virtues held in high regard by people of the city-state such as justice, courage, temperance, prudence and wisdom.[251] Aristotle notes that the virtue of courage, for example, was venerated through the

243 Ibid at 291-3
244 Aristotle, *Politics,* op cit note 214 at 201
245 *Plato with an English translation: The Laws* op cit note 12 at 295
246 Ibid at 291-3
247 Aristotle, *Politics,* op cite note 214 at 5
248 Ibid at 11
249 Ibid at 9
250 Ibid at 201
251 Aristotle, *On Rhetoric*: A Theory of Civil Discourse, 2nd ed. trans. George A. Kennedy (Oxford University Press, 2007), 1366b 1-22

genre of public speeches called epideictic rhetoric popular in ancient Greek city-states.[252] In *Rhetoric*, where he wrote about the art of persuasion as part and parcel of a free and democratic society, Aristotle described epideictic rhetoric (one of three types of rhetoric along with judicial and political) as speech in which the audience is not required to act but to make up its mind, saying that the speaker of epideictic rhetoric: 'either praises or censured somebody.'[253]

Aristotle cites an example of epideictic rhetoric that praises Achilles, who embarked on aiding his companion Patroclus knowing that he would himself die, though he might have otherwise lived.[254] Aristotle highlights that the point of praise stemming from epidictic rhetoric for Achilles was to emphasise to the listeners (the body of citizens constituting the public) that death was more honourable, though life advantageous.[255] The aforementioned point speaks of a civic virtue that is, for Aristotle, one of the most highly esteemed and desirable in Athenian citizens. Aristotle believed that as opposed to rule of authority by those deemed superior in moral or intellectual virtue and the rule of force by a tyrant, epideictic rhetoric made the most sense in a world where peers governed themselves in a free society.[256] From this point, it is evident that epideictic discourse played an essential role in the public realm of politics in the democratic ancient Greek city-state.

So important was epideictic discourse in the public realm of the ancient Greek city-state that Nicole Loraux, writing on the genre of the funeral oration as a manifestation of epideictic discourse, claims that it was fundamental to the way the city both managed and created an image of itself in the minds of its citizens.[257]

2.3 Conclusion

Considering the claim that epideictic discourse was fundamental to the way the city both managed and created an image of itself in the minds of its citizens by Loraux, it will be useful to embark on an exploration of Loraux's text titled *The invention of Athens: the Funeral*

252 Aristotle notes that the importance of epideictic discourse was beyond commemoration, for its role in the public realm served as a tool for negotiation of governance in a free society in which peers governed themselves (Aristotle, On Rhetoric. Trans, George A. Kennedy (Oxford University Publishers, 1991)
253 Aristotle, *On Rhetoric*, op cit note 251 at 1358b 7-14
254 Ibid at 51
255 Ibid.
256 Ibid.
257 Nicole Loraux op cit note 14

Oration in the classical City,[258] as it will provide a better understanding the role of the genre of the funeral oration as epideictic rhetoric in not only creating an image of the city-state in the minds of its citizens, but also in shaping politics in the ancient Greek city-state.

A discussion of the genre of the funeral oration as part and parcel of politics in ancient Athenian democracy in the following chapter of this thesis will illustrate how democracy functions in a world where peers governed themselves in a free society,[259] and will inform the task of ascertaining how, in post-conflict democracies, perpetrators and victims may negotiate reconciliation, justice, truth and peace between themselves.

3. CHAPTER 3: THE "CREATION" OF ATHENS "BEFORE" THE EYES OF ITS CITIZENS: THE ROLE AND IMPORTANCE OF THE FUNERAL ORATION ON CITIZENSHIP AND DEMOCRACY IN ANCIENT ATHENS

3.1 Introduction

In order to meaningfully engage with the role, importance and effect of the genre of the funeral oration in ancient Greece, it is necessary to understand in greater detail what the funeral oration is, and of what it is comprised. According to Barbara Cassin and Andrew Goffey, funeral orations are political and ethical in nature, and are part of what is known as epideictic rhetoric or *epideixis* – that is, in a broad sense, a performance that is improvised or planned, spoken or written, but is always related to the public.[260] In the restricted sense, however, as codified in Aristotle's *Rhetoric*,[261] *epideixis* or epideictic rhetoric is praise or blame which speaks the good or the shameful.[262]

In order to understand the meaning of the word *epideixis*, it is essential to contrast it with its antonym *apodeixis,* with the suffix *deixis* therein being the act and art of pointing without speech with the index finger extended to the disappearing phenomenon.[263] *Epideixis*, therefore, is the art of showing "before" and of showing "more" based on the main sense of the prefix.[264] In the two senses of *epi*, Cassin and Goffey point out that here lies a link between

258 Ibid.
259 Aristotle, *On Rhetoric* op cit bote 251 at 51
260 Barbara Cassin & Andrew Goffey op cit note 17 at 353
261 *Aristotle's Rhetoric* op cit note 18
262 Barbara Cassin & Andrew Goffey op cit note 17 at 353
263 Ibid.
264 Ibid.

performance and the eulogy that praises someone or something.[265] In view of the aforementioned points, a funeral oration as *epideixis* or epideictic rhetoric is a public show or demonstration through speech "before" everyone's eyes.[266] It occurs "before" everyone's eyes not because the audience can "see" the speech in a literal sense, but because in listening to the speech, the audience envisions for themselves what the speech is demonstrating.

Speaking to the aforementioned point, Philippe-Joseph Salazar notes that the power of the funeral oration as a form of epideictic rhetoric lies in its ability to elicit a crowd's participation in responses.[267] Salazar, referring to J.L. Austin's terminology,[268] points out that: 'epideictic rhetoric is akin to a "performative" speech a "speech-act" whereby words create a reality.'[269] Nicole Loraux's work on the funeral oration can be contextualized against an understanding of the funeral oration as a manifestation of epideictic rhetoric that is a "speech-act" with the ability to elicit a crowd's participation in responses. Nicole Loraux's text, *The Invention of Athens,*[270] is helpful in illuminating the link between Aristotle's virtues and their relation to the city-state. This is because not only does Loraux discuss the historical development of the funeral oration as epideictic rhetoric, but she also highlights the critical function it came to serve for ancient Athenian democracy as a medium of a "speech-act" where the words of praise by a speaker created a particular reality.[271] In order to better understand why and how this medium of a "speech act" functioned to serve ancient Athenian democracy, it is worth delving into Loraux's writing, which it outlined below.

3.2 The epideictic rhetoric of the funeral oration as an expression of citizenship and democracy in ancient Athens: discussion of the work of Nicole Loraux

In her work on the funeral oration, Nicole Loraux notes that all funeral orations have in common what she terms as a "triple destination" comprising of: (1) the dead (representing the past); (2) the living (representing the present) and, (3) posterity (the future).[272] In respect of the first destination being the dead, Loraux quotes Pindar, saying:

265 Ibid.
266 Ibid.
267 Philippe-Joseph Salazar 'An African Athens', op cite note 26 at 11
268 J.L. Austin, *Sense and Sensibilia: How to Do Things With Word*s (Oxford University Press, 1962)
269 Philippe-Joseph Salazar 'An African Athens', op cit note 26 at 11
270 Nicole Loraux op cit note 14
271 Philippe-Joseph Salazar 'An African Athens', op cit note 26 at 11
272 Nicole Loraux op cit note 14 at 14

> Glory is the reward of the valiant… he who in that hurricane that is war, fighting for his country, shields her from bloody hail and goes out, carrying death into the enemy camp, that man so increases the glory of his fellow citizens that it reaches heaven itself, by his life or by his death.[273]

Loraux says the benefit of glory is that it wipes away evil, both of acts of the person concerned and of poverty.[274] She points out that to this extent, even a mediocre man, though brave in war in the service of his country, deserves to hide the rest.[275]

In respect of the second destination manifested in the living, the oration emphasised that the greatness of Athens' superiority lay in the belief that it had pre-eminence over other Greeks.[276] Loraux notes that the funeral oration was also addressed to other Greek cities and no-doubt served as a form of Athenian foreign policy of its relation to "the others".[277] In respect of the third destination, the future (or posterity as Loraux terms it), the funeral oration makes it clear that there is a transformation of promise to reality with ancestors (the dead) having handed down the land to fathers (the living), and fathers themselves not acquiring this land for themselves, but their sons (the future).[278] As Loraux notes, each period is linked directly by the culmination of the process.[279]

Loraux also identifies two primary aims of the funeral oration in ancient Athens: first, to silence the internal conflicts (*stasis*) common within the Hellenic city and, second, to create a counterbalance to the dominance of Sparta in the rest of Greece (*Hellas*). [280] This duality of aim contains what Loraux describes as the coexistence of threat and justification respectively, and is especially powerful because the orator – through the device of *"*speech without reply*"* common to funeral orations – rouses feelings of both submission and respect to the state in the audience. [281] This is characteristic of the funeral oration as it is a manifestation of epideictic rhetoric, possessing the ability to elicit a crowd's participation in responses.[282]

---

273 Ibid at 51
274 Ibid at 52
275 Ibid.
276 Ibid at 89
277 Ibid at 77
278 Ibid at 112
279 Ibid.
280 Ibid at 107
281 Nicole Loraux op cit note 14 at 90
282 Philippe-Joseph Salazar 'An African Athens', op cit note 26 at 11

The first aim of the funeral oration outlined by Loraux arguably aligns with the ideas that Plato puts forward about citizens needing to possess a self-controlled and law-abiding disposition.[283] In Book IV, through the Athenian's dialogue, Plato warns of the dire consequences of persons lacking self-control and a law-abiding disposition, saying:

> He who is lifted up with pride, or elated by wealth or rank, or beauty, who is young and foolish, and has a soul hot with insolence, and thinks that he has no need for any guide or ruler, but is able himself to be the guide of others, he, I saw, is left deserted of God; and being thus deserted, he takes to him others who are like himself, and dances about, throwing all things into confusion, and many think that he is a great man, but in a short time he pays a penalty which justice cannot but approve, and is utterly destroyed, and his family and city with him.[284]

The points the Athenian highlights in the quote above appear to encompass an example of the *stasis* Loraux speaks of. This is because according to Loraux's logic, one would imagine that no citizen who is prone to have self-control and a law-abiding disposition would seek to cause or exacerbate *stasis* within his or her city because they would understand that this *stasis* could lead to their ruin, that of their family and the city-state to which they belong.[285] It is necessary at this point to present an opposing and more preferable view to Loraux's understanding of *stasis* as presented by Giorgio Agamben.[286] Responding to Loraux's argument that *stasis* is a war within the family because the family irreducibly entails conflict at its centre,[287] Agamben argues that *stasis* does not, in fact, have its place in the household but that it has its starting point at the lack of interest or concern between blood kinship and citizenship.[288]

Agamben adds that the factions of this lack of interest or concern move into the household at the same extent that the family bond is estranged in the faction.[289] He proceeds to conclude that *stasis* is the transgression of what he calls "the zone of indifference" in which the unpolitical space of the family and the political space of the city meet.[290] Agamben points out that in her writing on *stasis*, Loraux overlooked Solon's Law, which meted out punishment

283 *Plato with an English translation* op cit note 12 at 295
284 Plato, *The Laws of Plato*, trans. by Thomas L. Pangle, (University of Chicago Press, 1988), 60
285 *Plato with an English translation*: *The Laws* op cit note 12 at 295
286 Giorgio Agamben, *Stasis: Civil War as a Political Paradigm (Homo Sacer II, 2)* trans. Nicholas Heron (Stanford University Press)
287 Ibid at 13
288 Ibid at 15
289 Ibid.
290 Ibid at 16

to those who did not fight on either side in a civil war by stripping them of civil rights.[291] This law confirms Agamben's disagreement with Loraux's formulation of *stasis* because according to Solon, for people to not choose a side to fight for in a civil war is a refusal to acknowledge that "the zone of indifference" in which the family and the city meet has been transgressed.[292] In view of these arguments, Agamben's view on *stasis* is preferable to that of Loraux.

In respect of the second aim of the funeral oration outlined by Loraux in her writing, she highlights that the funeral oration itself also functioned as a military speech that both justified and celebrated military exploits of the Athenian city-state against the city-state of Sparta.[293] If one takes the view that funeral orations are *epideixis* in the restricted sense as praise or blame and speaking of the good and the shameful,[294] then funeral orations justifying and celebrating military exploits successfully performed the function of epideictic rhetoric because they elicited the justification for military exploits by Athens against Sparta in Athenian citizens. Loraux asserts, however, that certainly, the funeral oration was an *epainos,* or "praise" to the Athenian.[295] Thus, the funeral oration's function as military speech made listeners aware that in exchanging their own future for that of the city, they honoured not only their city, but also future generations of Athenians.[296] It is therefore unsurprising that the funeral oration functioned as a military speech presenting military activity as a fundamental civic practice.[297]

Loraux points out that the funeral oration is a form of speech specific to Athens, for it distinctively expresses an awareness of the originality of Athens and the choice of a political system that separates Athenian interests from those of Sparta[298] The opposition created in the funeral oration of "the other" takes various forms, but the role is always the same: that of an inferior or a subordinate to Athens,[299] so much so that the theme is often that Athens's enemies are enthralled by her greatness.[300] So great was the portrayal of the superiority of Athens that it was believed that it had pre-eminence over other Greeks.[301] Through the oration, Loraux

291 Ibid at 17
292 Ibid at 16-17
293 Nicole Loraux op cit note 14 at 79
294 *Aristotle's Rhetoric* op cit note 18
295 Nicole Loraux op cit note 14 at 49
296 Ibid at 27
297 Ibid at 98
298 Ibid at 56
299 Ibid at 81
300 Ibid at 82
301 Ibid at 89

observed that the city invents perfect allies and enemies who are always content,[302] though perhaps more accurately, she notes that this is how Athenians themselves dream that their relations with the others are.[303]

Loraux highlights that a tangible notion in the funeral oration is of the posthumous glory and memory of the names of the dead,[304] but because there was a rule of anonymity, citizens were merely named "Athenians" – thus, the glory they were given was collective.[305] J.K. Anderson illuminates this point in his review of Nicole Loraux's *the Invention of Athens*, noting that the funeral oration:

> Honours the city rather than particular men; the Athenians, not Miltiades, saved Greece at Marathon; the Athenians, not Theseus, defeated the Amazons, who represent the inversion of the manly virtues celebrated by the oration.[306]

Considering the quote above, it is understandable why for Athenians, an honourable death denoted the sacrifice accepted by a citizen.[307] So powerful was the effect of the funeral oration that they espoused in the living audience a desire to die in battle, if need be, for they understood that to do so will merge their own names in the collective proper name of Athenians – a title owing to a city for which they belonged and would readily die. Indeed, Loraux points out that the funeral oration promises the warriors remembrance as "Athenians" by generations to come.[308] She also points out that the dichotomy of Athenian and non-Athenian created by the funeral oration occurs between the city and death, from which: 'the eulogy must emerge the victor, for the greater glory of the dead and of the city.'[309] She cites Pindar's oration as being unique in that, unlike most funeral orations, it emphasises the person as a means of the city's *Glory* instead of the *City's* glory being emphasised by the effort of the person. An excerpt of Pindar's oration reads:

> Glory is the reward of the valiant… He who in that hurricane that is war, fighting for his country, shields her from bloody hail and goes out, carrying death into the enemy camp,

302 Ibid at 83
303 Ibid.
304 Ibid at 41
305 Ibid at 42
306 J.K. Anderson "Book Review of Nicole Loraux" in *The Historian*, Vol. 50, No. 2 (Taylor & Francis, 1998) 260-1
307 Nicole Loraux op cit note 14 at 100
308 Ibid at 51
309 Ibid at 50

> that man so increases the glory of his fellow citizens that it even reaches heaven itself, by his life or by his death.[310]

Pindar's oration quoted above reveals that in order to earn the eulogy, one must die in service of the city. By contrast, in most Athenian funeral orations, so important is the city that even for the dead, there is no other life than that of Athens.[311] This speaks not only of the power of the funeral oration as an organising principle of a democratic Athenian society of free men constituting a body of citizens as Aristotle noted,[312] but indeed of the fact that *through* the lives of citizens, the city of Athens was re-presented by the funeral orations of those who died in a manner defined as an honourable death. In view of the discussions above, it is manifest that the genre of the funeral oration as epideictic rhetoric was a fundamental ideological and practical means of organising and fortifying the city-state of ancient Athens, its citizens and its democracy.

In view of the successes of the epideictic strategies of the genre of the funeral oration as an organising principle for the citizens of Ancient Athens, it is understandable why the leaders of Rome sought to espouse for themselves a conception of citizenship that not only mirrored that of the ancient Greek state to which Rome looked up, but also served to fortify Rome's own ambitions for the establishment and expansion of Empire. As such, it is important to proceed to a discussion pertaining to the transposition of the notion of the state and citizenship from ancient Greece to Rome to better understand how it assisted the Romans in formulating their own notion of citizenship in the quest for the expansion and strengthening of Empire.

3.3 Conclusion

Tracking the changing notions of the state; citizenship, and democracy from ancient Greece to Rome, is important not only because ancient Greece is the birthplace of democracy as we know it today,[313] but also because these ideas were implemented by Rome in its

310 Ibid at 51
311 Ibid at 105
312 Aristotle, *On Rhetoric*, op cit note 251 at 51
313 Cynthia Farrar, *The origins of democratic thinking: The invention of politics in classical Athens* (Cambridge University Press, 1998)

expansion of Empire and would greatly influence Christian European society centuries later with the re-emergence of both ancient Greek and Roman political thought.[314]
The next chapter of this thesis, found below, shall discuss and outline in great detail shifting notions of citizenship from ancient Athens to the Roman Empire in order to set the scene for the re-emergence of ideas of citizenship and the state in eighteenth-century Europe.

4. CHAPTER 4: CITIZENSHIP AND EMPIRE: SHIFTING CONCEPTIONS OF CITIZENSHIP FROM ANCIENT ATHENS TO THE LATE ROMAN EMPIRE

4.1 Introduction

The ancient Greeks self-conceptualized as being united by common ancestry and kinship, and had an understanding of the non-Greek world as barbarians or non-Greek speakers (of which the Romans formed a part).[315] Though the Greek people had a number of dialects, they shared a common language, a common way of life and a common religion.[316] Notwithstanding these commonalities, they never conceptualised themselves as a "nation" as we understand it today, and this is in part due to the geographical nature of their landscape, which deemed them scattered across parts of the Mediterranean.[317]

As such, many Greeks were arranged according to city-states, but more accurately, they were arranged as "peoples, cities and princes" – a phrase used by Greek historian and scholar Polybius as a synonym for classical Greece's varying political originations.[318] The description indicates that ancient Greece was organised under people first – perhaps living in small clusters of villages that eventually formed cities – and then cities under monarchies. Indeed, the rise of city-states in Greece signified the breaking up of the Hellenic people's lifestyle, linguistic and religious unity to an arrangement akin to a federal state.[319]

The arrangement of people according to city-states highlighted above also formed the basis of citizenship for any Greek person belonging to a particular city, thus a person born in Athens was an Athenian citizen and one born in Sparta a Spartan citizen and so on. Within this system, some city-states were more ambitious than others, considering themselves markedly

314 George Jellinek op cit note 49 at 36.
315 F.W. Walbank op cit note 31 at 146
316 Ibid at 147
317 Ibid at 149-50
318 Ibid at 147
319 Ibid at 147-8

different owing to possessing the citizenship of a particular city-state. As such, this city-state-centred organisation posed a threat to any prospects of lasting unions between the various city-states.[320]

Romans also implemented the Athenian city-state-based citizenship model, but unlike the Greeks, whose landscape deemed them scattered across a corner the Mediterranean sea, the Italian peninsula allowed for a political arrangement that propelled the people of the city of Rome to exert their influence on the neighbouring city-states they conquered and incorporated into Rome's realms.[321] Through this process, all conquered neighbouring groups of people were incorporated into the growing Roman state and considered themselves Romans.[322] While the conquered peoples considered themselves Roman, in reality there was initially no extension of *civitas Romana* (full Roman Citizenship) to them as only those from the city of Rome itself had the right to lay claim to its citizenship.[323] According to Ralph W. Mathisen, full Roman citizenship was an elite status that, through the law, accrued rights, privileges and obligations to the concerned party: they could marry, make wills and carry on business under the protection of Roman Law while *perigrini* (foreigners) generally remained subject to the laws of the province annexed by Rome.[324] In this respect, it may prove useful to unpack and understand the elite status that Mathisen speaks of in order to understand why full Roman Citizenship was so desirable.

4.2 The status of full Roman Citizenship

Full Roman citizenship (*Cives Romani*) was shaped by a pattern of rights and duties.[325] Duties comprised of military service and the payment of certain taxes, for example, while rights were divided according to being either public and private.[326] Under private rights, matters such as property, commercial trading and marriage between other citizen families were regulated while *perigrini* (foreigners) generally remained subject to the laws of the province annexed by Rome, and therefore did not enjoy the rights and the privileges of full Roman citizenship.[327]

320 Ibid.
321 Ibid at 150
322 Ibid.
323 Ibid at 153-4
324 Ralph W. Mathisen op cit note 35 at 1013
325 Derek Heater op cit note 30 at 31
326 Ibid at 31
327 Ralph W. Mathisen op cit note 35 at 1013

Public or political rights, on the other hand, were divided into three kinds and included the right to vote for members of the Assembly and candidates of political office; the right to sit in in assemblies and, finally, the right to become a magistrate.[328] In Roman Law, rights balanced duties and a clear distinction was drawn between private and public spheres of life.[329] Beyond the specific obligations of Roman citizenship existed an ideal of civic virtue which, like the ancient Athenian virtue before it, encapsulated an expectation that every citizen must possess a stern dedication to the state, and must therefore be willing to undertake the civic virtue of public service as the greatest of civic virtues.[330]

The most famous example illustrating the great civic virtue of public service comes from the tale of a man named Cincinnatus. As Derek Heater outlines, after having led a distinguishable public life, Cincinnatus proceeded to retire and tend to his small farm when a crisis arose between the city of Rome and people living in a neighbouring city to the east.[331] Consequently, Cincinnatus was requested by the government of Rome to return to office and save the city and, in return, he was given supreme powers for a period of six months. He subsequently defeated the neighbouring people's city in fifteen days, after which he not only returned to tend to his small farm, but also refused any reward – after all, he had discharged his citizenly duty sufficiently, and in doing so had displayed the greatest civic virtue.[332]

Drawing on tales like that of Cincinnatus above and reflecting on the state of affairs in the Rome he found himself in – one in which the upper classes of Roman society waned in upholding civic virtues – thinker and politician Markus Tullius Cicero wrote an essay entitled *On Duties* urging upper classes to mend their ways.[333] In this essay, he declared that men who lead private lives are "traitors to social life" – that is, traitors to the state because they neglected to undertake the ideal civic virtue of public service.[334] Cicero held the belief that all social classes must work together, summed in the Latin phrase "*concordia ordinum*", holding further that the consensus of all citizens ("*concensio omnium bonorum*") was necessary for the peace

328 Derek Heater op cit note 30 at 32
329 Ibid at 31
330 Ibid at 37
331 Ibid at 31
332 Ibid.
333 *Cicero: On Duties* op cit note 32
334 Derek Heater op cit note 30 at 31

and honour ("*otium cum dignitate*") of Rome.[335] As with Aristotle's theory on man as a political animal, for Cicero, the city-state was of the greatest importance.

Cicero was immersed in the high-minded values of Hellenic philosophers like Plato and Aristotle, from whom he sought to draw ideas to foster a sense of patriotic duty in Roman citizens to the state and its ever-expanding Empire.[336] Drawing on Platonic ideas about the virtues of the model citizen in Plato's ideal state,[337] Cicero believed that the antithesis of the ideal citizen was a person who lacked self-control and a law-abiding disposition.[338] To this effect, he wrote:

> A worthy and truly brave citizen, and one who deserves to hold the reins of government … will give himself so to the service of the public, as to aim at no riches or power for himself; and will so take care of the whole community, as not to pass over any part of it [and] will rather part with life itself, than do anything that is contrary to the virtues I have maintained.[339]

The quote above references the story of civic virtue displayed by Cincinnatus, and as with Plato's guardians in *The Republic* and Aristotle's civic virtues as critical for the advancement of the state, Cicero in *Politics* considered taking up public office a matter of either necessity or a sense of duty.[340] Unlike Plato, however, Cicero took the view that monarchy was not the preferred model of governance, advocating instead for the Roman Republican Constitution as the most superior mode of governance with the *Populas Romanus* (the Roman people) – those who enjoy full Roman citizenship and hold the ultimate power by the exercise any of the three kinds of public or political rights, namely voting for members of the Assembly and candidates of political office; sitting in in assemblies, and opting to becoming a magistrate.[341]

Having regard of the rights, duties, and legal protection of privileges owing to full Roman citizenship, it is understandable why the attainment of full citizenship beyond Rome

335 Oxford World Classics: Cicero op cit note 33 at XII (introduction)
336 Ibid at XII
337 Ibid at XVI
338 Plato had warned against those who are vain [and] find their souls inflamed with insolence and dream they do not need a ruler or guide, believing themselves competent, but they shall eventually bring ruin to their person, their family and ultimately their state (*Plato with an English translation*: *The Laws* by R. G. Bury, 295)
339 *The Offices (On Duties) by Cicero* op cit note 61 at I, XXV
340 Oxford World Classics: Cicero op cit note 33 at introduction XVII (introduction)
341 Ibid at XVII

stood to benefit the person in its possession.[342] Full Roman citizenship contained numerous legal protections and privileges, with one legal protection being the right to be tried for a crime or bring a legal action to a Roman Court and the right to appeal any decision to Courts in Rome itself,[343] invoked by merely uttering the Latin phrase "*Civic Romanus sum*" ("I am a Roman Citizen"). This phrase served to protect *anyone* claiming full Roman citizenship from all impending harm in any of the territories annexed by the Roman Empire. In view of such benefits, Mathisen points out that full citizenship was, in fact, an elite status desired by many in the Empire.[344]

As the Roman Empire expanded well beyond the Italian peninsula, however, the necessity of the status of Roman citizenship as reward for service to the Empire was recognised as important to the maintenance of the Empire, such that numerous leaders including Augustus (14 AD – 27 BC), Claudius (54-41 BC), Hadrian (138-117 BC) and Caracalla (217-211 BC), bestowed on many foreign males, at their discharge from the legions, varying degrees of citizenship mirroring full Roman citizenship.[345]

Towards the late Roman Empire as the Empire's borders reached the ends of known world, full Roman citizenship had been extended to certain elite classes of *peregrini* or foreigners, and as Ralph W. Mathisen notes, the differences between citizen and non-citizen became more a matter of degree of legal freedom than of kind.[346] This degree was determined by the ability or inability of a person to lay legitimate claim to the power of full Roman citizenship, and to benefit from the protection therein. In order to illustrate both the power of full Roman citizenship and the ways in which the degrees of Roman citizenship in Rome played out practically, it may prove useful to outline and discuss an example recorded in the text of the bible.

4.3 The power of full Roman Citizenship illustrated: "Civic Romanus Sum"

Considering that in the Roman Empire the mere declaration of the Latin phrase "*Civic Romanus sum*" ("I am a Roman Citizen") served to protect *anyone* claiming such status from

342 F.W. Walbank op cit note 31 at 160
343 Frederick Cooper op cit not 41 at 29
344 Ralph W. Mathisen op cit note 35 at 1036
345 Derek Heater op cit note 30 at 35-6.
346 Ralph W. Mathisen op cit note 35 at 1036

all impending harm in any of the territories annexed by the Empire, it is understandable why full Roman citizenship was such a coveted status across the provinces of the Empire.[347] Additionally, taking into account the fact that the ever-expanding realms of the Empire accompanied the extension of the status of Roman citizenship, it is also understandable why, eventually, the nature of citizenship morphed from an emphasis on the dichotomy of citizen and non-citizen to one of Roman and non-Roman.[348] Notwithstanding this, it is worth nothing that even as the emphasis shifted from citizen and non-citizen to Roman and non-Roman, to lay a claim to full Roman citizenship in any context was powerful.

The statement's power was derived from the power of Rome itself, and while the power of the Roman Empire cannot singularly be attributed to what Walbank says was Rome's inversion of the modern idea of the nation as it broke down national groups and substituted them with a vast supranational state,[349] it is precisely because of these aforementioned characteristics of the Roman Empire why to merely utter the phrase "*Civic Romanus sum*" ("I am a Roman citizen") was to lay claim to arguably the most coveted status of citizenship of antiquity.

It is against this context that the biblical story of Paul the Apostle, born as a Roman citizen named Saul of Tarsus, is put into context and the power of the declaration and degree of full Roman citizenship is tangibly captured by the phrase "I am a Roman Citizen" in Acts 22:22 – 23:11. The biblical texts note that several years after converting to Christianity, Paul was arrested in Jerusalem for allegedly insulting the Jewish High priests, and was chained to receive flogging when he came across the commander representing Rome in Judaea to whom he declared his full Roman citizenship in order to gain freedom.

In the exchange, Paul – unlike the commander who admitted to paying a lot of money for his citizenship – declares that he was born a citizen. Thus, not only does Paul lay claim to full Roman citizenship knowing it would free him from chains and entitle him to a trial in a Roman Court, he reveals that his citizenship is of a higher degree than that of the commander as he did not purchase his, but was born into it. The narrative of the commander in the biblical tale of Paul can be historically contextualized as falling into the period of the late Roman

347 Frederick Cooper op cit note 41 at 29
348 F.W. Walbank op cit note 31 at 166
349 Ibid at 147

Empire in which varying degrees of citizenship were extended even to *peregrini* (foreigners), and the differences between citizen and non-citizen became more a matter of degree of legal freedom than of kind as noted by Mathisen.[350]

In this regard, free status indicated full access to *ius civile* or civil law, whereas those who did not have free status indicated non-citizen status as it concerns an incomplete access to Roman civil law.[351] As a result of invoking the status of full Roman citizenship and by virtue of entitlement to full access to Roman civil law, Paul was released from chains and stood trial in a Roman court. Unfortunately for him, however, his full Roman citizenship could not protect him from execution for what was then considered in Rome a dangerous and unpopular belief system.[352] Notwithstanding the eventual outcome of Paul's case, the incident highlights that Paul himself understood the power of such a claim, and that he had perhaps successfully invoked it numerous times before when facing trouble.

In view of the illustration above highlighting full Roman citizenship in action, it can be argued that the Romans took the Hellenic division of the world of ancient Greeks and barbarians (of which the Romans formed a part), and created a new world order arranged initially according to citizen and non-citizen, and later in the expansion of Empire according to Roman and non-Roman. [353] In either instance, a claim of full Roman citizenship was a distinguishing feature that could spare any claimant's life if found to be true. Walbank argues that perhaps a sign of the success of the Roman state was that the Greek rhetorician Aelius Aristides – who lived under the rule of the Roman Empire – referred to *all* inhabitants of the Empire as *Romani* (Roman) despite some being full Roman citizens and others *peregrini* (foreigners) not possessing full Roman citizenship at all, or possessing varying degrees of citizenship.[354]

Considering the points made above, Walbank warns that it is crucial that one does not confuse equating citizenship with nationality as we do today, for indeed the latter – being a relatively recent historical notion – would lead to confusion in the Roman context.[355] This is

350 Ralph W. Mathisen op cit note 35 at 1036
351 Ibid.
352 Derek Heater op cit note 30 at 35
353 F.W. Walbank op cit note 31 at 166
354 Ibid at 147
355 Ibid at 154

because as Walbank points out, the history of Rome is the inversion of modern ideas of nations, for Rome broke down national groups and substituted them with a vast supranational state.[356] In furtherance of this argument, Walbank highlights two reasons why national patriotism never flourished in Rome notwithstanding that the citizens of the Roman Provinces comprised of various races, spoke different languages, and had different religions and practices.[357]

First, Rome's strategy of rewarding conformism with political recognition and equality to only the highest classes and the more ambitious sections of the populations in annexed territories with only hope to the rest, ensured that Rome had to deal with only few members of the foreign population and, second, there was always the greatest of care in Rome to never allow anything like ancient Greek or even modern forms of democracy to flourish – such that the poorest of the populations of the provinces saw nothing of their differences worthy of fighting about.[358] Thus, Rome's offer of the upper classes of the provinces something and the lower classes too little meant that nationalist sentiments remained largely undeveloped as a political force.[359]

Walbank says that Greece, while having influenced the Roman empire in philosophy, art and architecture, is even less useful for such comparisons because in ancient Greece any notion of "nationality" was intertwined with problems of the varying political and geographic challenges of the different Hellenic city-states.[360] Rome saw issue with the political challenges of Greek democracy, resulting in an intentional selection by Rome of elements of Greek influence to impart and those to dispose of. Notwithstanding this, it is undeniable that ethico-political ideas and the vocabulary of citizenship stemming initially from ancient Greek thinkers like Plato and Aristotle, and then fashioned to suit Rome's Empire have influenced contemporary ideas of citizenship. At this juncture, it must be noted that citizenship as expressed by Roman thinker and politician Cicero was not merely restricted to sharing the same kingship, state, and language in line to the modern understanding of the term, it was instead more limited in scope than that: it was the community of the city-state of Rome itself.[361]

356 Ibid.
357 Ibid at 167
358 Ibid.
359 Ibid
360 Ibid at 154
361 *Cicero: On Duties* op cit note 32

While Greece before it comprised of several city-states each with their respective citizenship, Rome advanced from the citizenship of a singular city-state to an Empire.[362] It is from the binding forces and emotion inherent to Roman citizenship in the expansion of Empire from which ideas of contemporary citizenship would spring.[363]

4.4 Conclusion

The ideas of contemporary citizenship were spearheaded by the emergence of nationalism and the re-emergence and popularity of the writing of ancient Greek philosophers on the person, citizenship, the state and democracy among Christian populations of the European medieval period through the theory of Natural Law.[364] As Arnold J. Toynbee points out, the combination of nationalism and democracy makes it a formidable force in contemporary political thought.[365]

Considering this view, the point at which nationalism and democracy intersect today is arguably on the notion citizenship. It is within this intersection that the contexts of the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen are arguably located.

Considering that both contexts are arguably the oldest contemporary democracies to date, their discussion in relation to notions of the state, citizenship and democracy will hopefully bring this thesis closer to an answer on whether the law has the authority to grant forgiveness to a perpetrator on behalf of a victim in bodies legally mandated with reconciliation in post-conflict democratic contexts. This is because Aristotle, in the theory of man as a political animal, finds that justice – which is critical to the task of bodies legally mandated with reconciliation in post-conflict contexts – is meted out through the law, and that as an element of the state, the law is necessary for judicial procedure that ensures the regulation of the political partnership of groups of people who constitute the democratic state by determining what is just.[366]

362 F.W. Walbank op cit note 31 at 168
363 Ibid.
364 George Jellinek op cit note 49 at 36.
365 Arnold J. Toynbee op cit note 51
366 Aristotle, *Politics*, op cit note 214 at 13

Furthermore, the political contexts of both the American Revolution of 1776 and the French Revolution of 1789 are important in answering the principal thesis question because the post-conflict democratic contexts of South Africa and Rwanda, whether implicitly or explicitly, draw from the political ideas espoused in both the American Revolution of 1776 and the French Revolution of 1789 – both of which are also arguably contexts of democracy arising from conflict, though the nature of conflict manifested differently in each socio-political context.

To begin these discussions, the next chapter fleshes out notions of citizenship, the state, the nation and democracy through the discussion of the eighteenth-century contexts of the United State of America and France in 1776 and 1789 respectively. It begins by outlining the theories underpinning ideas of rights, and proceeds to discuss each context before proceeding to a comparative analysis to ascertain whether the texts of both socio-political context can be said to have distinct and identifiable similarities.

5. CHAPTER 5: CITIZENSHIP, THE STATE, THE NATION AND DEMOCRACY IN THE LATE EIGHTEENTH-CENTURY: CASE STUDIES FROM THE 1776 AMERICAN REVOLUTION OF AND THE 1789 FRENCH REVOLUTION

5.1 Introduction

The theory of natural rights played a critical role in the re-emergence of ancient Greek and Roman political ideas of citizenship, the state and democracy in the nationalist contexts of the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen.[367] As German legal philosopher George Jellinek notes, a passage from Roman legal thinker Ulpian in the *Digests* declares that all men are equal according to the law of nature,[368] indicating one of the earliest textual references to the notion of natural rights. The sentiment expressed by Jellinek is present in both the American and French revolutionary literature, though admittedly manifested in different ways. Jellinek points out that in the eighteenth-century, many thinkers and writers such as John Locke in England and Jean Jacques Rousseau in Geneva seized political ideas that were already known to the ancient theories of

367 George Jellinek op cit note 49 at 25
368 Ibid.

the city-state and state of Greece and Rome respectively, and transformed them to suit their contemporary socio-political realities.[369]

In order to meaningfully trace the incorporation and the development of the ancient theories of the citizen, the state and natural rights stemming from ancient Greece developed through the Roman Empire into eighteenth-century Europe, it will prove useful to engage in an in-depth analysis of each of the contexts of the American and French Declarations separately, after which a comparative analysis of the differences and similarities of the two socio-political contexts shall be embarked on.

To create a logical flow of ideas, the discussion will be chronological, beginning with the American Declaration of Independence of 1776, and moving onto the French Declaration of the Rights of Man and the Citizen of 1789. In either case study, the excerpts of the Declaration relevant to each context will be provided, and discussion will emanate from a close reading of the ideas espoused in the different documentary literature in order to assess the political theories contained therein. Both case studies will highlight the importance of the notion citizenship as it had changed from ancient Greece and Rome, and will highlight that citizenship was critical as the intersection between nationalism and democracy.

The discussions of the American and French revolutionary contexts shall both commence with an excerpt of the texts to be analysed critically, and from which much will be extrapolated. To begin, we commence with the text of the American Revolution manifest as the Declaration of Independence of 1776.

5.2 The American Revolution: The Declaration of Independence of 1776

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That wherever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundations of such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly, all experience hath shown, that mankind are more disposed to suffer, while evils are

369 Ibid.

> sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.— Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To Prove this, let Facts be submitted to a candid world….[370]

The structure of the American Declaration of Independence is comprised of five parts, namely: (1) a declaratory statement outlining the purpose and necessity for a group of people to opt to terminate their political affiliation with Great Britain; (2) principles underlying a legitimate government and the violations that deem it justifiable to bring down such a government and install new leadership for future security; (3) a list of grievances allegedly committed by the king of Great Britain, George III, that justify separation from his government; (4) a narration of grievances not redressed, the deafness of the British to the voice of justice, all of which necessitate separation of the 13 colonies to Great Britain and, on this basis, (5) a declaration of the rights of the 13 colonies to freedom and independence as resolved by a united congress from all colonies on July 2 1776.[371]

For purposes of the analysis at hand, the greatest emphasis will be made on the first, second and fifth sections, with thin engagement with both the list of grievances under the third section and the fifth section emphasising a united congress representing all the colonies. The first paragraph of the American Declaration speaks about the formation of a new people who are opting to terminate political affiliations that connect them with the people of Great Britain.[372] The first paragraph is also important because it explains the need for the document: the colonies are seeking to break with Great Britain, and accompanying this statement is an explanation to mankind for the drastic action taken.[373] Jack N. Rakoye notes that the contemporary use of the term "self-evident" when the declaration was drafted did not simply mean obvious as it does today, rather, it meant accepted.[374] The first self-evident truth asserted by the 1776 American Declaration of Independence is equality, encapsulated in the phrase "all men are created equal". This speaks to people being created by God with equal rights, with the

370 The American Declaration of Independence, United States of America, 4 July 1776
371 Howard Mumford Jones, "The Declaration of Independence: A Critique," in Proceedings of the American Antiquarian Society (1975), 55
372 Donald S. Lutz op cit note 57 at 50
373 Ibid.
374 Jack N. Rakoye op cit note 54 at 78

most important being spelled out – life, liberty, the pursuit of happiness, and the right of revolution.[375] As men possess these rights, it necessarily means that these rights are likened to property according to the framing of the American Declaration – which would arguably align to the theories of Locke because he stated that men enter society for the preservation of their property.[376]

When Jefferson included the word "inalienable" to describe the rights enumerated in the American Declaration, following Locke's thinking, he was also insisting that human rights precede civil government and that they existed before the political state and can, therefore, not be abolished by a government or a state.[377] This point arguably echoes the writing of Aristotle in *Politics* when he proclaimed that the city-state is an end for which the chief good – the interests of the citizens for a share in the good life – exists.[378]

As Somerville points out, mention of the word "create" by Thomas Jefferson, as one of the authors of the American Declaration, connoted a conceptual framework in which civil government was set up, and the authority to the state over the person was not by virtue of divine right bestowed by God as with monarchical systems, but under the notion that the legitimacy of authority and power of the government came wholly from the consent of the governed.[379] This arguably echoes the writing of Aristotle who opposed a rule of authority by a tyrant, preferring a world in which peers governed themselves in a free society.[380] It is from the consent of the governed in the American Declaration that the notion of the right and duty of the people to throw off government of absolute despotism is also derived.[381] It is worth noting that unlike the other rights enumerated in the quote above, the right of revolution is also the only one regarded as a duty.[382]

Where God is invoked in the American Declaration, it is because it was believed that it was how God wanted civil governance to be arranged.[383] It is important to highlight that the writing of English philosopher John Locke heavily influenced these ideas, for he formulated

375 John Somerville op cit note 55 at 492
376 Ibid at 198
377 Ibid at 493
378 Aristotle, *Politics,* op cite note 214 at 201
379 John Somerville op cit note 55 at 490
380 Aristotle, *On Rhetoric*, op cit note 251 at 51
381 John Somerville op cit note 55 at 491
382 Ibid at 492
383 Ibid at 491

the doctrine of consent of the governed being the basis of the legitimacy of government.[384] The mention of "a long train of abuses" echoes the analysis of "the Dissolution of Government" in Locke's *Second Treatise of Government*,[385] and is captured in the American Declaration, which states:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these states. To prove this, let the Fact be submitted to a candid world....[386]

The absolute tyranny being referred to was one that King George III was accused of, and related to the fact that Great Britain's Parliament could theoretically legislate for Americans on all matters of life – direct reference was made to George III because after 1774, allegiance to the crown was deemed the sole and last link connecting the colonies to the realm of Great Britain.[387] As such, the mention of "despotism" in the American Declaration does not actually refer to an exercise of absolute power in a cruel or oppressive way by king George himself.[388]

As noted by Rakoye, referring to the resolutions of the First Continental Congress, it was clear that Americans believed they were not legally subject to the jurisdiction of British Parliament except through their free consent and this, they believed, could occur solely in respect of regulating the channels of imperial commerce.[389] This idea speaks to the aforementioned point regarding Locke's influence on Jefferson in the notion that the legitimacy of authority and power of the government came wholly from the consent of the governed.[390] This Lockean notion is most explicitly referred to in the American Declaration in the sentence stating: 'Governments are instituted among Men, deriving their just powers from the consent of the governed….'[391]

384 Ibid at 490
385 John Locke, "of The Dissolution of Government" in *Second Treatise of Government*, Chapter 19, sections 223 to 225 and 230.
386 The American Declaration of Independence, United States of America, 4 July 1776
387 Jack N. Rakoye op cit note 54 at 78
388 Ibid.
389 Ibid at 80
390 John Somerville op cit note 55 at 490
391 The American Declaration of Independence, United States of America, 4 July 1776

In accordance with Locke's theory that the legitimacy of authority and power of government comes wholly from the consent of the governed,[392] it was the American people who declared their independence and not just Congress and, thus, the reference to "mankind" in the American Declaration speaks of the rest of humanity who are being informed of the birth of a new political nation.[393] In fact, the last paragraph of the American Declaration contains signatures of representatives of the "United States of America" who are said to act: '… in the Name, and by the authority of the good People of these Colonies….'[394]

For David Armitage, mention of the phrase "self-evident truths" considering the "inalienable individual rights to life, liberty and the pursuit of happiness" has played a significant role in contemporary international law, and is seen as a core contribution to political philosophy – especially for those who interpreted the meaning of those phrases during the period subsequent to the Second World War and the 1948 Universal Declaration of Human Rights as part of rights-centred conversations.[395] It is worth nothing, however, that the wording preferred in the contemporary documents of other nations is not expressed in the formulation of the American Declaration above, but instead in the language resembling Article I of the Virginia Declaration of Rights, which preceded the 1776 American Declaration of Independence.[396]

Donald S. Lutz stresses that the impact of the American Declaration of Independence from an international relations and law perspective, is that it set the scene for 'a '"national compact" – the birth certificate of a nation or the secular scripture of a self-chosen people.'[397] He explains that the importance of this compact was organisational, for it allowed Americans prior to their independence to organise themselves as a people; to establish a government; to flesh out basic commitments and values they share, and to articulate the values and principles of collective decision-making institutions.[398]

392 John Somerville op cit note 55 at 490
393 Jack N. Rakoye op cit note 54 at 76
394 The American Declaration of Independence, United States of America, 4 July 1776
395 David Armitage op cit note 58 at 40
396 The formulation of Article I of the Virginia Declaration of Rights is: "the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safely"
397 Donald S. Lutz op cit note 57 at 41-58
398 Ibid at 41

J.G.A Pocock stresses that the interpretation of the American Declaration must highlight it as a document performing *Jus gentium* (Law of Nations) instead of *Jus civile* (Civil Law) because it is: 'a statement of the powers and capacities of states as much as of the rights and duties of individuals.'[399] As David Armitage notes, to interpret the Declaration in the manner suggested by Pocock is to historically contextualise it as an assertion of autonomy.[400] In doing so, there is an emphasis on assertions of autonomy in the international order instead of claims made on behalf on individuals in relation to their governments.[401] So influential are the assertions of autonomy put forward by the 1776 American Declaration of Independence that John Somerville notes that it has lived on to inspire and motivate the liberation struggles of different ethnic and national groups world-wide.[402]

Of particular interest in respect of the influence of the American Declaration of Independence, is the case study presented by France. This is because not only was the support America received from France essential to the success of the revolt against the English, it also saw many French nobles offering up their military services to the American effort – including Marquis de Lafayette, whose writing on the Virginia Declaration of Rights and the American Declaration of Independence allegedly informs the basis of his drafts – drafts which would become the French Revolution of 1789's French Declaration of the Rights of Man and the Citizen.[403] As such, it will be worthwhile to embark on a discussion of the context within which the French Declaration arose and the features of the text of the document in order to critically engage with the ideas espoused therein.

5.3 The French Revolution: The Declaration of the Rights of Man and the Citizen of 1789

> The representatives of the French People, formed into a National Assembly, considering ignorance, forgetfulness or contempt of the rights of man to be the only causes of public misfortunes and the corruption of Governments, have resolved to set forth, in solemn Declaration, the natural, inalienable and sacred rights of man, to the end that this Declaration, constantly present to all the members of the body politic, may remind them unceasingly of their rights and their duties; to the end that the acts of the legislative power and those of the executive power, since they may be continually compared with the aim of every political institution, may thereby be the more respected; to the end that the demands

399 J.G.A. Pocock, "Political Thought in the English-speaking Atlantic: I, The Imperial Crisis" in Pocock, ed., *The Varieties of the British Political Thought, 1500-1800* (Cambridge, 1995), 281
400 David Armitage op cit note 58 at 43
401 Ibid.
402 John Somerville op cit note 55 at 495
403 Rett R. Ludwikowski op cit note 60 at 450

of the citizens, founded henceforth on the simple and incontestable principles, may always be directed toward the maintenance of the Constitution and the happiness of all.

In consequence whereof, the National Assembly recognises and declares, in the presence and under the auspices of the Supreme Being, the following Rights of Man and of the Citizen.

First Article: Men are born and remain free and equal in right. Social distinctions may be based only on considerations of the common good

Article 2: The Aim of every political association is the preservation of the natural and imprescriptible rights of Man. These rights are Liberty, Property, Safety and Resistance to Oppression.

Article 3: The principle of any Sovereignty lies primarily in the Nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.

Article 4: Liberty consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man has no bounds other than those that ensure to the other members of society the enjoyment of these same rights. These bounds may be determined by only the Law.

Article 5: The Law has the right to forbid only those actions that are injurious to society. Nothing that is not forbidden by Law may be hindered, and no one may be compelled to do what the Law does not ordain.

Article 6: The Law is the expression of the general will. All citizens have the right to take part, personally or through their representatives, in its making. It must be the same for all, whether it protects or punishes. All citizens, being equal in its eyes, shall be equally eligible to all high offices, public positions and employments, according to their ability, and without other distinction than that of their virtues or talents.

Article 7: No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed. Those who solicit, expedite, carry out, or cause to be carried out arbitrary orders must be punished; but any citizen summoned or apprehended by virtue of the Law, must give instant obedience; resistance makes him guilty.

Article 8: The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied.

Article 9: As every man is presumed innocent until he has been declared guilty, if it should be considered necessary to arrest him, any undue harshness that is not required to secure his person must be severely curbed by Law.

Article 10: No one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinion does not interfere with the established Law and Order

Article 11: The free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law.

> Article 12: To guarantee the Rights of man and of the Citizen a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted.
>
> Article 13: For the maintenance of the public force, and for the administrative expenses, a general tax is indispensable; it must be equally distributed among all the citizens, in proportion to their ability to pay.
>
> Article 14: All citizens have the right to ascertain, by themselves, or through their representatives, the need for a public tax, to consent to it freely, to watch over its use, and to determine its proportion, basis, collection and duration.
>
> Article 15: Society has the right to ask a public official for an accounting of his administration.
>
> Article 16: Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution.
>
> Article 17: Since the right to Property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.[404]

The Structure of the 1789 French Declaration of the Rights of Man and the Citizen is an introductory paragraph emphasising the role of a National Assembly representative of the French people, along with a referral to the Declaration as a preamble of enumerated rights in view of drafting a constitution. The rights in question are enumerated in a series of 17 Articles, each adding onto and complementing the other. At this juncture, it is worth remembering that Plato, speaking on the authority of the law in his ideal republic in the *Laws*, noted that preludes containing persuasive sentences and justifications function to foster attitudes of service and humility to the law in citizens.[405]

James Harvey Robinson highlights that every time the French Declaration of the Rights of Man and the Citizen is discussed, two things happen: either there is a recall of the American precedent as the documentary basis of the French Declaration, or there is tendency to lay its formulation at the door of Jean Jacques Rousseau's theories on the social contract.[406] Robinson takes the view, in corroboration of Georg Jellinek,[407] that the best way to proceed on an inquiry into the French Declaration is by looking into the discussions conducted by members of the revolutionary National Assembly.[408]

---

404 The Declaration of the Rights of Man and the Citizen, France, 26 August 1789
405 *Plato with an English translation: The Laws* op cit note 12 at 315
406 James Harvey Robinson op cit note 62 at 653
407 George Jellinek op cit note 49
408 James Harvey Robinson op cit note 62 at 654

Prior to 1789, France had no written constitution, though it possessed numerous permanent institutions such as a hereditary monarchy and a peculiar system of higher courts of law.[409] The establishment of the Constitution can thus better be contextualised as stemming from the course of events in France at the time it was being debated.[410] The French nation at large did not envisage how difficult it would be to embark on the tremendous task of completely reorganising government on a new plan after the French Revolution.[411] Indeed, most people were not too concerned with the intricacies of governmental systems: they merely longed for the kind of fundamental changes that would ensure that their civil liberties were protected, and that the revival of the abuses reminiscent of the old system would not occur again.[412]

Consequently, it was decided by revolutionary leaders occupying the National Assembly that a Declaration of Rights was to be drawn up as an answer to a very general demand and, on 26 August 1789, the final form was almost unanimously promulgated.[413] The French people received it with enthusiasm when it was first promulgated, with its copies appearing over and over again in modified versions in the French Constitution up until 1848.[414] Notwithstanding this enthusiastic reception by the French people, it is worth noting that the Declaration was, in large part, a product of compromise and a reflection of confusion amongst the members of the National Assembly who held differing opinions on matters ranging from practical reform of existing institutions,[415] all the way through to the best way to deal with the abolition of the most serious vices of the regime prior to 1789.[416]

According to Roger Errera, the French Declaration is a series of tensions and juxtapositions held together by key concepts.[417] Notwithstanding this, what makes the French Declaration a coherent document is: (1) the balance between nature and law and, (2) the free associated concepts of idealism, optimism and individualism.[418] In respect of idealism, Errera

409 Ibid.
410 Ibid at 655
411 Ibid at 658
412 Ibid.
413 Ibid at 660
414 So too did the populations of other continental European states who used it as a model for their own declaration of rights.
415 James Harvey Robinson op cit note 62 at 661
416 Ibid.
417 Roger Errera op cit note 64
418 Ibid at 93

refers to the preamble of the Declaration, noting that the drafters thought that the "corruption of governments" and "public misfortunes" were a result of the neglect of the rights of man.[419]

By the definition of general will as unity,[420] it meant that in a society where the basic concept was equality, each citizen has the same rights and, therefore, no one can consent to their oppression.[421]Errera argues that this means it is from nature as an intellectual category instead of a historical event that men derive their fundamental rights.[422] Drawing from a natural law perspective which views the natural man as rational, reasonable and individual, a concept of society was formulated in two parts, namely: (1) men are free due to their faculty of self-determination and, (2) men are equal because reason gives every man the same dignity.[423] From these ideas, it can be argued that the person forms political associations with the aim being the conservation of these natural rights – an idea that echoes the writing of Aristotle that the relationships of persons within the state exist because the state guarantees the common interest of citizens being the attainment of a share of the good life.[424] Errera notes that in the arrangement of the French Declaration, the person is primary and the political society is secondary.[425] This stands in contrast to the writing of Aristotle who argued that starting point is the state, which he considered to be prior by nature to the person because without the several partnerships of persons from which the city (state) is comprised, the singular person is not self-sufficing.[426]

The first Article of the French Declaration articulates the universal right to freedom and equality, stating that men are born and remain free and equal in rights.[427] While Article 1 does not enumerate the rights, Article 2 elaborates this further by bringing to the fore the idea of natural rights, saying that liberty is: 'the natural and imprescriptible rights of man'.[428] Article 4 describes liberty in greater detail, saying it is: 'the freedom to do everything which injures

419 Ibid at 92
420 Jean Jacques Rousseau "On the Social Contract" (1754), in Rousseau, *The Basic Political Writings*, trans. Donald Cress (Hackett, 1987)
421 Roger Errera op cit note 64 at 92
422 Ibid.
423 Ibid at 92
424 Aristotle, *Politics*, op cit note 214 at 201
425 Roger Errera op cit note 64 at 92
426 Aristotle, *Politics*, op cit note 214 at 13
427 This notion speaks directly to the first phrases of the opening words of Rousseau's *Social Contract*, in which he wrote that man is born free, and everywhere he is in chains.
428 The Declaration of the Rights of Man and the Citizen, France, 26 August 1789

no one else….'[429] As Suresh Moradi notes, this necessarily implies a positive right to limit the freedom of a person who injures another rather than it being regarded as an absolute liberty.[430] Furthermore, the notion of equality mentioned in Article 1 is elaborated in Article 6, in which it is written:

> All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues or talents.[431]

Based on the quote above, it is evident that what limits man, if at all, should not be his birth (economic, social and educational status as was the case in France prior to the Revolution), but whether a person possesses the virtues and talents that will prove useful in holding public office.[432] These sentiments arguably echo those of Aristotle, who was opposed to rule of authority by those deemed superior in moral or intellectual value, preferring instead that peers govern themselves in a free society.[433]

The aim of the French Declaration was the restoration of man's dignity, rediscovered in Rousseau, and the wish of the drafter was to emphasise that such dignity had a prior existence.[434] Georges Lefebvre emphasised this point when he noted that the decree of equality of rights and liberty opened up gates of individual effort, intelligence, and the spirit of enterprise of the most capable of the people in France to come forward and seize society's economic and political leadership if they can.[435] This aligns with Aristotle's theory that the state is comprised of partnerships for the good life and, in principle, those who contribute the most to the state have the right to power.[436]

Lefebvre notes that the French Declaration was a personal appeal for each person to try their luck, which explains why the French Revolution proved successful not only in France, but in neighbouring European monarchical contexts where this kind of individual growth was fettered.[437] This appeal and the promises of the rights of equality and liberty contain what

429 Ibid.
430 Suresh Moradi op cit note 67 at 1147
431 The Declaration of the Rights of Man and the Citizen, France, 26 August 1789
432 George Jellinek op cit note 49 at 34
433 Aristotle, *On Rhetoric*, op cit note 251 at 51
434 Roger Errera op cit note 64 at 92
435 Georges Lefebvre op cit note 65 at 143
436 Aristotle, *Politics*, op cit note 214 at XVIII (Introduction).
437 Georges Lefebvre op cit note 65 at 143-4

Lefebvre says remains an incomparable source of life and power even in modern society.[438] In the immediate socio-political setting of the French Declaration's promulgation, each person felt that they must find a means to enjoy the rights enumerated therein, such that Lefebvre notes that even those without an inheritance did not despair for the future.[439]

Moradi points out that the National Assembly sought to explain and clarify rights through the Declaration of the Rights of Man and the Citizen as a means of setting in motion a path towards the development of a future in which a new Constitution would be adopted.[440] It is worth noting, however, that this was not without contention as certain factions of the revolutionary National Assembly after 1789 argued that the Declaration should not be published before the Constitution was drawn up so that the two could be reconciled.[441]

The socio-political backdrop of the promulgation of the Declaration is one in which numerous serious revolts were spreading throughout France after 1789 when the supporters of the monarchy attempted to abolish the higher courts of law and, therefore, the restoration of order was the primary concern of the revolutionary National Assembly.[442] During this period, as with the old regime, people were being arrested without access to courts of law, laying down the path for what would be the right of every citizen to never be arrested except by being sent immediately before competent judges.[443] The essence of this right – being so fundamental to the injustice of arrest without access to courts of law – was encapsulated in a number of Articles of the Declaration of the Rights of Man and the Citizen.[444]

The reality of this political climate puts into perspective why the proposals by members of the Assembly such as Sieyes on restricting notions of social equality to exclude resources, and Abbé Grégoire's desire for duties of citizens to be listed along their rights, were not subject to debate.[445] As Jean Jacques Rousseau highlighted, the French revolutionary leaders came to

438 Ibid at 144
439 Ibid.
440 Suresh Moradi op cit note 67 at 1144
441 Georges Lefebvre op cit note 65 at 143
442 James Harvey Robinson op cit note 62 at 656
443 Ibid.
444 These include Articles 4 and 5 regarding the determination of all things by law; Article 7 in respect of arrest, accusation or detention and the prevention of arbitrary order and punishment of those who issue them; Article 8's requirement that an offense is only such when promulgated in law; Article 9's mention of the presumption of innocence; Article 10's right to opinions that do not interfere with Law and Order and, finally, Article 11's promotion of ideas except those tantamount to abuse of liberty as determined by Law.
445 Georges Lefebvre op cit note 65 at 144

believe that the general will had to be one will instead of the balance of many individual wills or interests.[446]

Moradi notes that accordingly, Article 3 points out that the sovereignty of the state resides in both the nation *and* the general will of the people, with the people being the source of legitimacy in a sovereign statehood.[447] This not only echoes Rousseau's idea of the general will discussed above, it also explains why Lynn Hunt stated that, arguably, the greatest change the French Revolution brought about was the way in which the realm of politics was both understood and participated in after the French Revolution.[448] For example, Article 3 of the French Declaration explicitly states that: 'no body nor individual may exercise any authority which does not proceed directly from the nation….'[449] Moradi argues that this means the government must act in the interest of the people, but also that the concept of the nation is identifiable as its citizens.[450] In view of this important point regarding the relationship between the nation and its citizens, it is understandable that Lynn Hunt proclaimed that an upsurge of nationalism in France after 1789 was fuelled by the entry of new political actors onto the scene, saying:

> The revolutionary state did not expand because its leaders manipulated the ideology of democracy and the practices of the bureaucracy to their benefit; power expanded at every level as people of various stations invented and learned the new political "*microtechniques*". Taking minutes, sitting in a club meeting, reading a republican poem, wearing a cockade, sewing a banner, singing a song, filling out a form, making a patriotic donation, electing an official – all these actions converged to produce a republican citizenry and legitimate government… Power, consequently, was not a finite quantity possessed by one faction or another; it was rather a complex set of activities and relationships that created previously unsuspected resources. The surprising victories were only the most dazzling consequence of this discovery of new social and political energy.[451]

Considering the features of the French revolutionary text in respect of the rights of the citizen, the role of the state, and the elements of democracy discussed above, a comparative analysis of the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen will be embarked on to identify the similarities and

446 Jean Jacques Rousseau op cit note 420
447 Suresh Moradi op cit note 67 at 1146
448 Lynn Hunt op cit note 117 at 221
449 The Declaration of the Rights of Man and the Citizen, France, 26 August 1789
450 Suresh Moradi op cit note 67 at 1146
451 Lynn Hunt op cit note 117 at 72

differences of the two revolutionary texts. This comparative analysis will provide insight into the relationship between the revolutionary texts of America in 1776 and France in 1789.

5.4 Comparative analysis of the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen.

Links between the contexts of the American and French Declarations of Independence of 1776 and The Rights of Man and the Citizen of 1789 have always been drawn, with American scholars like A.P. Blaustein saying:

> While the famous French Declaration of the Rights of Man and the Citizen of August 1789 was officially the work of Lafayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage.[452]

Indeed, others, in their overestimation of the similarities of the French text to the American text have gone as far as declaring:

> The Virginia statesmen George Mason might well have instituted an action of plagiarism against the authors of the Declaration of the Rights of Man and the Citizen which the French Assembly adopted on August 26th, 1789. The resemblance … is too coincidental.[453]

Rett R. Ludwikowski notes that while the idea of a Bill of Rights as a preamble to a Constitution was American, as was the idea of a Constitution being a single document providing law superior and distinct to any legislation that required passing and amendment by special conventions higher than those of ordinary statutes, the French Declaration stressed the importance of the union of Equality and Liberty more than either the American Declaration of Independence or the Virginia Bill of Rights before it.[454]

It is true that the United States of America became the primary example in discussions pertaining to recognition of states amongst the European intellectual class, with David Armitage pointing out that German jurist J.C.W von Steck referred to the United States of America in order to step outside confined arguments that only acknowledged the rights of succession of individual rulers in Europe.[455] As Elise Marienstras and Naomi Wulf

452 A.P. Blaustein op cit note 98 at 16
453 R.B. Morris op cit 99 at 56
454 Rett R. Ludwikowski op cit note 60 at 484
455 David Armitage op cit note 58 at 59

acknowledge in their work on the translation and reception of the American Declaration of Independence in Europe and France, French revolutionary leaders who occupied the National Assembly from 1789 to 1791 referred to American documentary precedent often in their debates.[456] Marienstras and Wulf also highlight, interestingly, the problems posed by the reference to American documentary precedent due to an absence of a universal language for words, ideas and concepts.[457]

Phrases in the American revolutionary document such as: "all men"; "mankind"; "one people"; "nature's God"; "human events"; the invoking of the "Brittish brethren", and the mention of "common kindred", were not easily translatable either purely linguistically or due to the particularity of the socio-political context of their meaning in America versus in France.[458] For example, the mention of "mankind" in the American Declaration was linguistically challenging for French authors who used "*les hommes*" (men) instead, thus changing sentiments like "the rest of mankind" to literally mean "the rest of men" by translation to "*le reste des hommes"*.[459] Marienstras and Wulf note that for the French writers referring to the idea of "mankind", there was reluctance to use abstract words because they were of the view that America only thought in limited terms of natural men while they, on the other hand, believed themselves to be addressing a general human species.[460]

Even more contentious for the French context was mention, on numerous occasions, of the word "people" in the American Declaration.[461] French translators had trouble with the word because in the political language of France in the late eighteenth-century, the French equivalent of "*peuple"* was loaded with political references that bore a narrower meaning than the American understanding of the word.[462] The French preferred, instead, apolitical descriptions such as "*les habitants*" to describe large districts of people, or even *"les habitents de ce pays"* denoting the inhabitants of the country.[463] The French, having lived under a monarchical regime until 1792 with the sovereign essence formerly held exclusively by the king before

456 Elise Marienstras and Naomi Wulf, "French Translations and Reception of the Declaration of Independence" in *Journal of American History* Vol. 85, No. 4, (1999), 1307
457 Ibid.
458 Ibid at 1299-324.
459 Ibid at 1308
460 Ibid at 1308-9
461 Ibid at 1310
462 Ibid.
463 Ibid.

1789, could not as yet conceive of a Republic born out of a complete break as Americans had experienced it.[464]

From an ideological perspective, the way the list of grievances in the American Declaration was translated to French did not account for John Locke's civil compact embedded within,[465] which implied that because there had been a breach of the civil contract by the English against the American people, it justified the breakaway by the American people.[466] This is because the French reader of the eighteenth-century translations did not necessarily comprehend that the mention of the King's mischiefs in the American Declaration stemmed from abusing his prerogatives in the English tradition of Constitutional monarchy – a system of governance unlike the system of absolute monarchy in France preceding the 1789 Revolution.[467]

In addition, while Thomas Jefferson included God as the creator of rights through the phrase "Nature's God" in the American Declaration, French translations of the text omitted the reference entirely because from the French perspective, there was a greater relation to positive rights rather than natural rights.[468] According to authorities of natural law like Grotius, Pufendorf and Vattel, the sentiments of the American Declaration were binding on all nations because the American declaration carried an intrinsic validity stemming from nature and God.[469] The idea of a genesis of rights stemming from nature *prior* to society was so confusing to the French National Assembly in 1789 that nothing came of debates around the matter.[470] This is because in the context of France's Revolution, the phrase "laws of nature" had ceased to be attributed to the will of God, but pertained to material phenomena instead.[471]

Considering the contentions highlighted above by the French of America's socio-political conceptions of the source of rights, a contradiction was that on one hand, the universal idea of natural rights was understood and accepted as a general principle while, on the other hand, French Revolutionaries saw the American people as '"new men" enjoying: 'primitive

464 Ibid at 1311
465 Ibid at 1319
466 Ibid at 1312
467 Ibid.
468 Ibid at 1313
469 Gregg L. Lint, "The American Revolution and the Law of Nations, 1776-1789", in *Diplomatic History,* Vol. 1, No. 1 (Oxford University Press, 1977), 21
470 Elise Marienstras and Naomi Wulf op cit note 456 at 1313
471 Ibid.

sovereignty … in the bosom of nature' as articulated by French Assembly delegate Pierre-Victor Malouet.[472] The point about the primitive sovereignty of the United States of America was so highly contentious that in one of the revolutionary-era translations of the American Declaration to French, the "United States" was intentionally translated to "*Colonies-Unies"* (United Colonies).[473] In view of these points, it is understandable that a French Assembly member named Trophime-Gérard, Compte de Lally-Tollendal, in response to a version of a Declaration of Rights in Marquis de Lafayette's draft highly inspired by the American model, exclaimed:

> Please ponder the enormous difference existing between new ["*naissant"*] people recently born into the universe, a colonial people breaking away from a distant government, and an ancient people.[474]

The Compte de Lally-Tollendal's criticism above arguably aligns to the idea put forward by Aristotle that each state possesses a different constitution comprising of kingship, aristocracy and constitutional government,[475] and that, therefore, different states require discernment of what laws best suit them.[476] Since France's National Assembly considered the United States of America primitive, they eventually opted to not copy its Declaration as it was deemed unfit.[477] The French regarded themselves as a "regenerated people" who, due to their ancient origins, believed themselves to have surpassed the American example through the formulation of what they regarded as truly universal principles.[478] Considering the claim of truly universal principles by the French, Mlada Bukovansky points out that the French Revolution marked an accelerated shift in the European state system from one of a dynastic territorial state to the nation-state as a dominant model for political legitimacy.[479]

Through notions of Liberty and Equality, the French were reinventing power politics by instituting popular sovereignty and espousing a universalistic cause that appealed to the remaking of society in many European countries.[480] Indeed, Roger Errera notes that the French

---

472 Ibid at 1309
473 Ibid.
474 Trophime-Gérard, Compte de Lally-Tollendal, "Premier discours sur la declaration de droits de l'homme" (First speech on the Declaration of the Rights of Man), in *Archives palementaires*, ed. Madival and Laurent, *1e Série,* VIII, 221.
475 Aristotle, *Politics*, op cit note 214 at IV. II 1-3, 283
476 Ibid at 281
477 Elise Marienstras and Naomi Wulf op cit note 456 at 1309
478 Ibid at 1307
479 Mlada Bukovansky op cit note 70 at 165.
480 Ibid at 202

Declaration had an influence on the Spanish Constitution of Cadiz (1812), which later influenced Latin American countries seeking independence, and also had an influence on the Belgian Constitution, which was imitated by Spain again in 1837, then Portugal, Romania, Greece and Bulgaria.[481] As corroboration of the aforementioned points by Bukovansky and Errera, according to Jacques Mirabeau, the French Declaration's application: 'cuts across all ages, all peoples, all moral and geographic latitudes.'[482]

Marienstras and Wulf take a similar stance to Bukovansky above, highlighting that while the French nation existed before 1789, through the changing of hands, the modern nation-state was born.[483] George Jellinek also argues that while revolutionary ideas in France led to the eventual killing of the King, the French Revolution did not mark an attempt to reconstruct the whole state system.[484] In contrast to this, Donald S. Lutz stressed that the impact of the American Declaration of Independence from the perspective of international relations and law, was that it set the scene for 'a "national compact", the birth certificate of a nation or the secular scripture of a self-chosen people.'[485] David Armitage notes that statehood in the international order was truly formally attained after England recognised the American Independence movement in 1783, notwithstanding that the United States of America had claimed legitimate rights to do all that free and independent states had the right to do since at least 1774 – two years before the American Declaration of Independence was finalised.[486]

Thus, while the French Revolution caused shifts from one system of governance to another in existing European nation-states, the American Revolution birthed a nation anew. What the French Revolution did through the notion of popular sovereignty underpinned by natural equality and the rights of man, was that it introduced a new dimension into power politics of all states looking to transform from one system to another system in the same state.[487] It is in view of this point that Godechot argued that the character of the French and American Declarations varied as he considered the French Declaration an appeal to mankind as a whole, and thus much more universal in character than the American text, which he argued was: 'very

481 Roger Errera op cit note 64 at 93
482 Jacques Godechot op cit note 74 at 96
483 Elise Marienstras and Naomi Wulf op cit note 456 at 1324
484 George Jellinek op cit note 49 at 91
485 Donald S. Lutz op cit note 57 at 41-58
486 David Armitage op cit note 58 at 60-1
487 Mlada Bukovansky op cit note 70 at 208-9

specific, very American'.[488] To substantiate Godechot's emphasis on the distinction between the French and American Declarations, it may prove useful to critically analyse a section of the American Declaration usually cited as having influenced the French Declaration:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. -- That to secure these rights Governments are instituted among Men, deriving their just powers from the consent of the governed. --That whenever any Form of Government becomes destructive to these ends, it is the Right of the People to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness ….[489]

A sentence in the quote above from the American Declaration of Independence reads: 'all men are created equal, that they are endowed with certain inalienable rights … Life, Liberty and the pursuit of Happiness',[490] which is like that of the second French Declaration of 1793, reading:

> The aim of society is collective happiness. Government is established to guarantee mankind the enjoyment of his natural and imprescriptible rights.[491]

It is worth mentioning that the phrase the "pursuit of happiness" from the American Declaration text was initially refused by the French National Assembly in 1788 in anticipation of the 1789 French Declaration, with The Marquis de Condorcet finding that neither the general nor the abstract meaning of the American reference explained what its conception of "happiness" was.[492]

As George Jellinek notes, the American reference is itself is so general that a whole system of rights cannot be deduced from it enough to make a claim that it was a model for the French Declaration – The French Declaration goes to great lengths through the various Articles

488 Jacques Godechot op cit note 74 at 45
489 The American Declaration of Independence, United States of America, 4 July 1776
490 George Jellinek op cit note 49 at 16
491 Elise Marienstras and Naomi Wulf op cit note 456 at 1315
492 For Marquis de Condorcet the nation was abstract: it could not be either happy or unhappy, but the happiness of the nation however could be spoken of collectively as deriving from its individuals or in general terms, from the well-being and tranquility offered to citizens as a whole by the laws, the soil, industry and relations with foreign nations (Antoine Nicolas Caritat, marquis de Condorcet, "The Influence of the American Revolution on the opinion and legislation in Europe", ed. Filippo Mezzi, *Historical and political research on the United States of North America… by a citizen of Virginia. With four letters from a townsman of New Haven*, (Paris, 1788), IV, 238)

to describe the nature of the rights it emphasises.[493] As such, Jellinek argues that claims that the American Declaration contained the first exposition of a series of the rights of man are inaccurate.[494] To this effect, Jellinek cites Marquis de Lafayette's own statement in his *Memoires*,[495] in which Lafayette mentions that the Congress of the newly formed Confederation of North American free states was not in a position to set up rules of right which would have binding force because each separate colony lay claim to its own sovereignty, which allowed the people to change the form of government and could justify separation from England.[496]

A more accurate assertion is that the constitutions of the separate colonies – themselves possessing Declarations of Rights – were sources for Marquis de Lafayette's introduction of a declaration of rights to revolutionary France.[497] For Jellinek, the Constitutions of American states like Virginia were widely known in France – with translations to French appearing in 1778 in Switzerland – and while they were initially difficult to access in France itself, their influence on the French Constitutional legislation is not sufficiently recognized.[498]

Mlada Bukovansky's writing, however, contends with the claim that the role of the Virginia Constitution is not sufficiently recognised, noting that it was primarily the Virginia Constitution's Declaration of Rights that influenced Marquis de Lafayette's drafts on which the French Declaration of the Rights of Man and the Citizen was based.[499] Rhett. R. Ludwikowski makes the same finding, acknowledging that while the Virginia Constitution was a source of Marquis de Lafayette's work, the American Declaration of Independence also was, though to a lesser extent.[500]

Perhaps assumptions of similarity between the Declarations of the United States of America and France is due, in large part, to not only the fact that the American colonial rebellion against England was an opportunity for France to take revenge on England for the

493 George Jellinek op cit note 49 at 17
494 Ibid at 15
495 *Memoires, correspondance et manuscrits du général Lafayette, Publiés par sa famille,* II, 46.
496 George Jellinek op cit note 49 at 17
497 Ibid at 18
498 Ibid at 18-19
499 Mlada Bukovansky op cit note 70 at 187
500 Rett R. Ludwikowski op cit note 60 at 450

humiliation suffered by France in the Seven Years' War,[501] but also because the French Declaration of the Rights of Man and the Citizen was based on the drafts of Marquis de Lafayette who had volunteered his military services to assist the American revolutionary cause.[502] Additionally, it is also perhaps because Thomas Jefferson had visited France in anticipation of the American Revolution to seek French assistance, and then proceeding to personally annotate the second draft of Marquis de Lafayette's Declaration when the French Revolution occurred years later.[503]

Notwithstanding the factual basis of the aforementioned events, in view of the extensive number of practical, linguistic and socio-political differences discussed above between the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen, it is understandable why, in response to assertions by Bernard Fay that a detailed comparison between the two declarations brings out striking resemblance,[504] Godechot proclaimed : 'The French Declaration of the Rights of Man and Citizen offers some significant differences from the American Declaration.'[505]

In affirmation of Godechot's contention above, Donald S. Lutz argued that the American Declaration of Independence set the scene for a '"national compact" or a birth-certificate of a nation,'[506] conversely, Alphonse Aulard – cited by Georges Lefebvre – argued that the French Declaration of 1789 constituted the "death certificate" of the old regime.[507] What the French Revolution did through the notion of popular sovereignty underpinned by natural equality and the rights of man was that it introduced a new dimension into power politics of all states looking to transform from one system to another system in the same state.[508] It is for this reason why Godechot argued that the character of the French and American declarations varied, for he considered the French Declaration an appeal to mankind as a whole

501 See Rett R. Ludwikowski "The French Declaration of Rights of Man and Citizen and the American Constitutional Development" in *The American Journal of Comparative Law*, 1990, Vol. 38, Supplement. U.S. Law in an Era of Democratization (Oxford University Press,1990), 449; Mlada Bukovansky "The French Revolution" in *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton University Press), 172
502 Mlada Bukovansky op cit note 70 at 187
503 Ibid.
504 Bernard Fay op cit note 145 at 266-7
505 Jacques Godechot op cit note 74 at 96
506 Donald S. Lutz op cit note 57 at 41-58
507 Georges Lefebvre op cit note 65 at 142.
508 Mlada Bukovansky op cit note 70 at 208-9

and thus, much more universal in character than the American text which he found to be: 'very specific, very American.'[509]

Notwithstanding these differences, the contemporary concept of citizenship as it is understood is derived from the combination of the American legal documents such as the articles of the Declaration of Independence and the Constitution of the United States of America, and what is known as the "block of Constitutionality" in French law,[510] comprising of the French Constitution of 1958, the French Declaration of the Rights of Man (1789), the republican principles of the third Republic,[511] and the social and humanitarian values of the period after the Second World War.

The revolutionary texts of these two contexts are important because they not only represented a culmination of the development of the contemporary understanding of citizenship as it was reinterpreted in eighteenth-century Scotland from its Greek and Roman beginnings, [512] but also because the American and French Revolutions formed the socio-political basis for a shift away from the concept of the subject within a system of a dynastic territorial state in which sovereignty was centred around the King, to the nation-state in which sovereignty was based on the collective citizenship of the people as a dominant model for political legitimacy.[513]

As Rett R. Ludwikowski notes, while the idea of a Bill of Rights as a preamble to a constitution was American (as was the idea of a constitution being a single document providing law superior and distinct to any legislation that required passing and amendment by special conventions higher than those of ordinary statutes), the French Declaration stressed the importance of the union of Equality to Liberty.[514]

5.5 Conclusion

Read together, the revolutionary texts of these two socio-political contexts are critical in finding an answer to the primary research question of this thesis in ascertaining whether the

509 Jacques Godechot op cit note 74 at 45
510 Martin A. Rogoff op cit note 75
511 These provide the basis for the laws predating the French Constitution of 1946 that are described as having Constitutional status by the Constitutional Council of France.
512 Broadie Alexander op cit note 53
513 Mlada Bukovansky op cit note 70 at 165.
514 Rett R. Ludwikowski op cit note 60 at 484

law has the authority to grant forgiveness to perpetrators on behalf of victims in bodies legally mandated with reconciliation in post-conflict contexts. This was done by isolating the sovereignty of the state, of which the law is an element,[515] as residing in both the nation *and* the general will of the people.[516]

Rhetoric as the art of persuasion – through preambles contained in the revolutionary texts of both the United States of America and France, for example – played a critical role in influencing the will of the people in understanding notions of the citizen, the state, the nation, justice and democracy in contexts that came after. One such context is that of South Africa towards the transition from apartheid to democracy just over two hundred years after the American and French Revolutions, in which this rhetoric – manifest as Judaeo-Christian rhetoric – arguably influenced the will of the people in the deliberation of notions of pardon, amnesty, indemnity and amnesia in the South African TRC.

Considering the aforementioned points, the next chapter of this thesis shall flesh out a conversation relating to Judaeo-Christian rhetoric in South Africa's transition to democracy as it pertains to notions of pardon, amnesty, indemnity and amnesia.

6. CHAPTER 6: JUDAEO-CHRISTIAN RELIGIOUS RHETORIC IN SHAPING NOTIONS OF PARDON, AMNESTY, INDEMNITY AND AMNESIA IN DEMOCRATIC SOUTH AFRICA'S TRANSITION FROM APARTHEID TO DEMOCRACY.

6.1 Introduction

In his text titled *Joining Religion and Politics: The South African Rhetorical Presidency,*[517] Philippe-Joseph Salazar argues that any engagement with the relationship between religion and rhetoric must not be approached from the viewpoint of religion, but instead from an understanding of religion as an expression of rhetoric with rhetoric being the practice of public augmentation and democratic deliberation.[518] Salazar highlights the ritualism of Judaeo-Christian religious rhetoric invoked by Archbishop Desmond Tutu at the funeral

515 Aristotle, *Politics*, op cit note 214 at 13
516 Mlada Bukovansky op cit note 70 at 165.
517 Philippe-Joseph Salazar, "Joining Religion and Politics" op cit note 79
518 Ibid at 43

oration of Chris Hani, where he referred to Romans 8:31, rhetorically asking the crowd: 'If God be for us, who can be against us?'[519] This was, in Salazar's view, oratorically unique because it functioned to shape democracy through public deliberation infused with Judaeo-Christian religious arguments about the nation.[520]

The question posed by Archbishop Desmond Tutu is important in the circumstances because while not everyone in the stadium at Chris Hani's funeral subscribed to the Judaeo-Christian teachings, they recognised the passage and knew the nature of the question posed was rhetorical and demanded a "response" from them.[521] In their spoken or unspoken responses, they were essentially participating in the creation of the nation constituting the "us" being addressed in the biblical text of Romans 8:31. This point puts into context why, approximately a year after Chris Hani's funeral at the Union Buildings in Pretoria on 10 May 1994 at the swearing-in-Ceremony, Archbishop Desmond Tutu invoked Judaeo-Christian religious rhetoric, exclaiming: 'Thank you [O God] for the miraculous way in which you transformed the election into a corporate act of nation building.'[522]

The political leadership too, especially the presidency, attempted to express itself in a manner akin to Judaeo-Christian religious sermons familiar to Archbishop Desmond Tutu – indicating, in part, the permanence of Judaeo-Christian religious values as effective and established channels of persuasion.[523] Much like the epideictic rhetoric of the genre of the funeral oration of ancient Athens that Loraux writes about,[524] the repetitive ritual practise of the TRC's proceedings as a manifestation of Judaeo-Christian religious rhetoric functioned to socially educate the listener by inciting imitation and emulation that consciously creates belonging to a community in the mind of the person to whom it is directed.[525] In this instance, the community could collectively be described under the adjective "South African".

As such, the influence of Judaeo-Christian religious rhetoric in the way notions of pardon, amnesty, amnesia, exoneration and indemnity are understood, is evident as an ideological and practical means through which the religious and political classes "created" a

519 Ibid at 42
520 Ibid.
521 Ibid.
522 Ibid.
523 Ibid at 43
524 Nicole Loraux op cit note 14
527 Philippe-Joseph Salazar, "Joining religion and politics", op cit note 79 at 42

peaceful, democratic and unified South Africa "before" the eyes of the audience constituting the public.[526] In order to understand how the aforementioned process occurred, both practically and ideologically, it is worth delving into discussion about the intersection of the dialectic of the rhetoric of forgiveness and that of reconciliation as it played out in the South African TRC. After all, the TRC proceedings brought to the fore an engagement with forgiveness not just at the level of the layperson, but also through Archbishop Desmond Tutu as the Chair of the TRC. While this may be the case, it appears that there is a dialectic of conversation about the nature of the rhetoric at play in spaces for deliberation like the TRC, especially as it pertains to questions of whether the rhetoric in question is either that of forgiveness or reconciliation. To elaborate on this dichotomy, a detailed discussion of rhetoric in the South African TRC will be had below.

6.2. The Dialectic of the Rhetoric of Forgiveness and the Rhetoric of Reconciliation present in the proceedings of the South African Truth and Reconciliation Commission

6.2.1 The Truth and Reconciliation Commission: Full Disclosure and Amnesty as entry-points for political deliberation

After the first democratic elections of South Africa in 1994, one of the first acts of law implemented by the new Minister of Justice, Dullah Omar, was to establish a TRC as he understood the binding nature of the preamble of the 1996 Constitution required a mechanism and criterion for the granting of amnesty.[527] This point is interesting in light of the ideas of Plato speaking on the ideal state through the dialogue of the Athenian in the *Laws*, from which he says that the function of law is not only to coerce, but also to persuade its subject.[528]

Minister Omar was especially concerned that an amnesty process would be disproportionately geared towards the perpetrators at the expense of the victims and so, he believed that any attempt to build national reconciliation and establish a society founded on respect for human rights must take into account the needs of victims through the obligation for perpetrators to disclose the systematic nature of the crimes committed – functioning to allow

526 Philippe-Joseph Salazar 'An African Athens', op cit note 26 at 11
527 Graeme Simpson, *A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for societies in transition*, (Centre for the Study of Violence and Reconciliation, 1998), 4
528 *Plato with an English translation: The Laws* op cit note 12 at 317

the victims to access essential information for rehabilitation.[529] The aim of any reconciliation process needed to de-escalate rather than escalate the on-going socio-political instability by minimizing resentment at both an individual and a collective level.[530]

In view of these concerns, the TRC was a creative response borne out of political compromise that attempted to strike a fine balance between the interests of the perpetrator and those of the victim, [531] and can be viewed as a moral response to an amnesty process.[532] The South African TRC fused an amnesty process for perpetrators on the basis of full disclosure with the provision of reparations for victims in a manner without precedent among similar initiatives internationally.[533] Its composition and mandate could not, in light of the mistrust amongst the people of previously existing state institutions, be carried out by any other body but a newly formed one. The TRC had to balance the interests of pre-existing institutions and be mindful of the impact of its decisions on these institutions.[534] This view is reflected in the comments of the Parliamentary Committee of the General Council of the Bar of South Africa, which argued that the general concern with the political reconciliation:

> Must be balanced … by a concern for the administration of justice … it is apparent that a blurred pursuit of "reconciliation and peaceful solutions" without adequate regard for its impact on policing, the courts, and the control of crime, will do more to threaten social stability.[535]

In view of the aforementioned quote, a prevailing concern then, as it is today, is whether the TRC can be said to have lived up to expectations of a remedial as well as a pro-active role in consolidating democracy through the notion of reconciliation.[536] At face value, the average person who attended the TRC's hearings may have confused the concepts of amnesty and reconciliation with the concept of pardon or forgiveness found in Judaeo-Christian religious

529 Graeme Simpson op cit note 527 at 5
530 Numerous sects of society voiced these concerns out, with the press media specifically having written extensively on this matter. In this respect, the December 22 *Business Day* Article by Graeme Simpson titled "Blanket Amnesty Poses a Threat to Reconciliation" stands out.
531 In Chapter 1, on page 22 of the Report of the South African Truth and Reconciliation Commission (1998), Archbishop Desmond Tutu encapsulates the nature of this compromise, saying: "We would have been overwhelmed by the bloodbath that virtually everyone predicted as the inevitable ending for South Africa".
532 Richard Wilson, "The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State" (Cambridge University Press, 2001)
533 Graeme Simpson op cit note 527 at 5
534 Ibid at 6
535 Memorandum by the Parliamentary Committee of the General Council of the Bar of South Africa (October 1992, 1-2
536 Graeme Simpson op cit note 527 at 6

rhetoric, and in some instances, may have confused the concepts with an understanding of retributive justice that was an important and sometimes essential element of a victim's recovery and psychological healing.[537] This confusion, alongside a fundamentally Judaeo-Christian religious approach to amnesty as akin to confession to clear the conscience of the perpetrator or sinner,[538] may explain why it is that amnesty and reconciliation came to be understood as synonymous with pardon or forgiveness to the people. To illustrate this misunderstanding, Peter Storey noted a case relating to a police officer who masterminded the butchering of a number of families in a rural village, who upon facing his victims spoke of forgiveness, saying:

> I can never undo what I have done … I have no right to ask for your forgiveness, but I ask that you will allow me to spend the rest of my life helping you to rebuild your village and put your lives back together.[539]

It could be argued the confusion of amnesty as denoting forgiveness functioned to ideologically challenge the legal framework that granted amnesty to perpetrators in the text of the Promotion of National Unity and Reconciliation Act (hereafter simply the Reconciliation Act).[540] As a tangible manifestation of this confusion, the TRC's hearings were met with numerous lawsuits seeking to challenge the constitutionality and the legal framework underpinning the Commission's contentious amnesty provisions. One such challenge claimed that through section 20(7) of the Reconciliation Act,[541] there was a removal of civil remedies for perpetrators, which contradicts the right of access to court outlined in section 22 of the Constitution to settle disputes in a court of law or an impartial forum. [542]

What is interesting about the nature of the legal challenges is that they came not only from non-profit organisations,[543] but also from victims and their family members who had

537 Debra Kaminer et al., "The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuse", in *British Journal of Psychiatry*, 373 (2001)*;* Daniel W. Shuman & Alexander McCall Smith, "Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological and Moral Concerns" (American Psychological Association, 2000)
538 Terry Bell & Dumisa B. Ntsebeza, "Unfinished Business: South Africa, Apartheid and Truth" (Verso Books, 2003), 205
539 Peter Storey, "A different Kind of Justice: truth and Reconciliation in South Africa" (1997)
540 Act No. 34 of 1995
541 The section provided: "No person who has been granted amnesty in respect of an act, omission or offence shall be criminally liable or civilly liable in respect of such act, omission or offence and no body or organization or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence"
542 This argument was presented in the case of *Azanian People's Organization (AZAPO), Biko, Mxenge, Ribero v The President of the Republic of South Africa, the Government of South Africa, The Minister of Justice, The Minister of Safety and Security, the Chairperson of the Truth and Reconciliation Commission, Constitutional Court of South Africa,* 1996.
543 Namely the Black Lawyer's Association (BLA) and the National Association of Democratic Lawyers (NADEL)

negative perceptions of the amnesty provision of the Reconciliation Act as they misunderstood the amnesty provision as denoting impunity, which implies escape from accountability.[544] An example illustrating this is that of Sylvia Dlomo-Jele whose son, Sicelo Dlomo, was murdered for his anti-apartheid activism. She, like many families appearing at the TRC on behalf of their deceased family members, believed that the perpetrators of her son's murder had not fully disclosed the truth of the circumstances of his death, but had instead recalled details sufficient to meet the amnesty requirements set out in the Reconciliation Act.[545]

Considering the context of compromise and the ambitious mandate of consolidating democracy through reconciliation in the Reconciliation Act,[546] it is perhaps unsurprising that responding to arguments by plaintiffs challenging the amnesty provisions of the Reconciliation Act, the Constitutional Court held that the provisions were both constitutional and in accordance with international law.[547] Notwithstanding the Constitutional Court ruling, these legal challenges are important because they arguably signal a rhetorical gap existing between those who spoke on behalf of the law on amnesty, and those who spoke an everyday language informed not by knowledge of the law, but in part by a Judaeo-Christian religious rhetorical frame that determined the average person's understanding of the role of the TRC as a place for retributive justice and forgiveness.[548]

While the amnesty provisions linguistically operated at the level of those who understood the legal framework, the average person's views could not be said to be unjustified, for indeed, even the Chair of the TRC, Archbishop Desmond Tutu, teetered on the line between the language of law and the everyday language informed by Judaeo-Christian religious rhetoric. A poignant example to this end is that Archbishop Desmond Tutu not only opened and closed every session of the TRC proceedings with prayer and song in a manner akin to church proceedings, but also often made explicit reference to Judaeo-Christian religious rhetoric in the duration of the TRC's proceedings.[549]

---

544 Peter Storey op cit note 539
545 Piers Pigou, "False Promises and Wasted Opportunities? Inside the South African Truth and Reconciliation Commission" in Deborah Posel & Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission (*Witwatersrand University Press, 2002), 37
546 Graeme Simpson op cit note 527 at 7
547 Erik Doxtader and Philippe-Joseph Salazar, *Truth and Reconciliation in South Africa: the fundamental documents* (New Africa Books, 2007)
548 Philippe-Joseph Salazar in "Joining Religion and Politics" op cit note 79
549 Ibid at 42

The abovementioned intersection between the everyday language of forgiveness among the laypeople and that of the law in the TRC also occurred in its corollary, the Land Claims Court (hereafter simply the LCC). In the LCC, much like the TRC, the interplay between the everyday language and the language of the law played itself out in public deliberation about land restitution. Commenting on the rhetorical uniqueness of South Africa's transition to democracy, Philippe-Joseph Salazar explored the relationship between the judicial vision of public deliberation and public deliberation itself,[550] which is to be discussed below by looking at the matters dealt with by the LCC. Considering that the LCC dealt with apartheid as spatiality, it will be interesting to see how that impacts the extent and quality of political deliberation among South Africans in the transition after the dawn of democracy in 1994.

6.2.2 The Land Claims Court: apartheid spatiality as the subject of political deliberation

Focusing specifically on the LCC, Philippe-Joseph Salazar points out that the South African example provides a unique situation from which to examine both the theory and practice of compromise in establishing a democracy that allowed – to paraphrase Barbara Cassin's terminology – for the "we" of the "rainbow nation" to emerge.[551] The LCC was established in 1996 to give effect to the Restitution of Land Rights Act No. 22 of 1994 (hereafter simply Act No. 22 of 1994).[552] It had the power to conduct hearings in which it mediated claims for land referred to it by the Commission of Restitution of Land Rights – this occurred in the instance where the commission itself was unable to address certain claims.[553]

The existence of a body dealing with land restitution was critical to an engagement with redress, rehabilitation and the transformation of apartheid as a policy on space. Indeed, while the TRC engaged with truth and amnesty,[554] the LCC engaged with apartheid in its most tangible form: the use, allocation and function of space and its access, enjoyment and benefit.[555] What the TRC and LCC have in common is that they are both spaces for the kind of public deliberation that constitutes what Salazar describes as "live rhetoric".[556]

---

550 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 145
551 Barbara Cassin op cit note 188 at 15
552 Act no. 22 of 1994
553 Kyle Fambry and Raina Harper, "Institutional Legitimacy Building in a context of Transition: The South African Land Claims Court", in *Public Administration Review*, 65:6, (Wiley Publishing, 2005), 681
554 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 150
555 Ibid at 146
556 Ibid at 152

"Live rhetoric" in this instance functioned to reconcile the divided citizenry of South Africa towards a state of sameness of intent (*homonoia)*.[557] Salazar points out that in the TRC, for example, there was a realization that the work of transformation (*metanoia*) is not only for "perpetrators",[558] but is the work for *all* South Africans.[559] This *metanoia* is critical to a divided citizenry because without it, different parties with their differences of opinion constitute what is known in Rhetoric Studies as *stasis*.[560] This was of great concern in the South African socio-political context because the *stasis* was reciprocal, threatening to place South Africa in a civil war as the most violent expression of *stasis*.[561]

Speaking on the LCC's mandate on land claims, Salazar observes that apartheid's spatiality took on an Aristotelian view of deliberative rhetoric aimed at persuading the white oligarchy that any policy regulating land was for their benefit.[562] Through a gradual development of the rhetoric of utility containing principles of a system of land ownership and allocation, the 1950 Group Areas Act No. 41 of 1950 was promulgated.[563] It was built upon the foundations of preceding acts,[564] attaining its persuasive public force through the racial classification brought about by the Population Registration Act No. 30 of 1950.[565]

In light of the extent and effect of the abovementioned legislative acts in regulating South African spatiality, it is perhaps unsurprising that after Act No. 22 of 1994 was assented to on November of 1994, by March of 1997 claims totalling 11,000 had been received by the Commission on the Restitution of Land Rights.[566] Many ordinary South Africans arguably saw this as an opportunity in which the judiciary and the people came face-to-face to try and establish the truth of claims and counterclaims according to the new Constitution's aim of restorative justice.[567]

---

557 Ibid at 151
558 Ibid at 149-50
559 Ibid at 142
560 Ibid.
561 Ibid at 149
562 Ibid at 146-57
563 Ibid at 147
564 Namely the Native (Urban Areas) Act No. 21 and No. 25 of 1923 of 1945 respectively, and the Native Trust and Land Act No. 18 of 1936.
565 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 147
566 Ibid at 165
567 Ibid at 155

In order to illustrate public deliberation or "live rhetoric" in action, it is worth looking at and discussing case studies decided by the LCC in the new democratic dispensation. In this respect, Salazar highlights two cases the LCC dealt with, the first of which is the Cato Manor case,[568] which is discussed in greater detail below.

6.2.2.1 The Cato Manor Case

The Cato Manor case concerned a pre-emptory application by the municipality of Durban in terms of Act No. 22 of 1994.[569] The pre-emptory application sought to prevent restoration of the Cato Manor suburb of Durban to claimants who were not only forcibly removed in the 1960s when it was proclaimed a white-only area, but were also excluded from access when it was "deproclaimed" a white area and proclaimed an Indian area in 1980.[570] The parties of equal claims and strength had reached an agreement between themselves prior to approaching the court, and had placed the agreement before the judge for judicial evaluation to be validated. [571] The ideological and practical differences between the parties was summarised by the judge in two contrasting deliberative positions – two "virtualities" of a lost past for those forcibly removed who have a dream to return to their roots and, on the other hand, of a future filled with promise of the development of the area.[572]

The issue in the case was how the judge would validate the agreement as a manifestation of public deliberation when they, as a judicial officer representing the court, were not present during discussions between the parties.[573] To do this, the judge stepped outside of the debate between the parties in order to measure the outcome in contrast to the people's interest, thus imagining a hidden debate between the parties so as to test whether the agreement was false by entrenching the status quo instead of addressing the issues relating to the aftermath of forced removals.[574] In such an instance, the judge – seeking to redeem judicial rhetoric – sought guidance on the notion of "public interest" from records of public deliberation, which did not contain anything of assistance. Salazar observes that had the parties addressed subsection 6 of

568 *Ex parte: The Two councils, being the North Central and the South-Central Metropolitan Substructure Councils of the Durban Metropolitan area and Inner West Local Council of the Durban Metropolitan Council*, Land Claims Court of South Africa, case number 15/96 (Cato Manor)
569 Philippe-Joseph Salazar, 'Compromise and deliberation' op cit note 82 at 158
570 Ibid.
571 Ibid at 158-9
572 Ibid.
573 Ibid at 159
574 Ibid.

section 34 of Act No. 22 of 1994, the judge would not have had to imagine and summon what he described as: 'piecemeal interlocutors so odd that they could be described as "gleaned"'.[575]

While the judgment was in the words of the presiding judge, it was essentially the settlement agreement reached by the parties to the case.[576] In this respect Salazar observes that in the end: 'judicial review is a fiction (in rhetoric terminology, a *pseudos* or *fictio*) that leaves, *in fact*, the last word to the public deliberators.'[577] Thus, the judge arguably rubberstamped the deliberated agreement, effectively validating the truth held by the parties to the agreement.[578]

The court order, therefore, arguably "gave effect to the intentions of the parties" through a process of public deliberation, while also seeking to restore the dignity of legal rhetoric to the deliberative truth that the parties had reached between themselves.[579] Salazar says this case is an example of the intersection between public deliberation and judicial rhetoric,[580] for the settlement reached by the parties outside the courtroom took on deliberations conducted as if in a courtroom.[581] For Salazar, what makes this case critical is the manner in which public deliberation embodies the spirit of democracy and respects legal decorum – that public deliberation can "truly" argue for space in this instance.[582] The second LCC case highlighted by Salazar is that of the Makulele Community,[583] which shall be discussed in detail below.

6.2.2.2 The Makulele Community Case

The Makulele Community case concerned the Makulele community, who were forcibly removed by virtue of Act No. 22 of 1994 from an area now part of the Kruger National Park in 1969 to a farm – this happened notwithstanding that they had settled in the area 200 years before the eviction occurred.[584] The land in question bordered Zimbabwe and Mozambique and

575 Ibid at 160
576 Ibid at 162
577 Ibid at 160
578 Ibid.
579 Ibid at 162
580 Ibid at 158
581 Ibid at 162
582 Ibid at 160
583 *Makulele Community Re: Pafuri area of Kruger National Park and Environs, Soutpansberg District Northern Province* (LCC90/98) [1998]
584 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 153

was identified as strategically placed as it played a critical role to biodiversity through conservation while also possessing numerous mineral deposits.[585]

Briefly summing up this history, the judge remarked that it is common cause that the Makulele community were forcibly removed because of racially discriminatory legislation and practice.[586] The judge also highlighted the complexity of the matter at hand considering that, in ascending order, it involved six government ministries, a provincial government, and the Makulele community members.[587] After reaching an agreement with the assistance of two mediators, Salazar points out that the judge endorsed the "truth" of the process engaged by means of public deliberation, presuming it took the direction it did because they were following the route stipulated by Act No. 22 of 1994 for attempts at mediation and negotiation.[588]

Salazar points out that unlike in the Cato Manor case in which the judge did not question the validity of the referral to the LCC, the judge in the Makulele case asked in review whether a court order was necessary at all?[589] By analysing critically the mediation process regarding the Makulele community's claims, and thus the process of public deliberation therein, the judge partook in the process towards "true" deliberation.[590] This is most tangible in that the court endorsed a fictitious reintroduction of the parties to the courtroom in order to argue their case – signalling the judge's assertion of the importance of legal oratory of arguments, exchanges and evidential processes as part and parcel of the public deliberation processes that the court had been deprived of.[591]

From the perspective of a layperson, especially one who had been previously dispossessed and denied land rights like ownership through apartheid's racial legislation, they held the mistaken view that the LCC was a site for claims for the return of land to its rightful owners owing to the word "restitution" contained in the name of Act No. 22 of 1994.[592] Instead, through the system of the referral of claims to the LCC along with the public deliberations that placed the redefinition of property ownership at stake through tensions involving both

585 Ibid at 161
586 Ibid.
587 Ibid.
588 Ibid.
589 Ibid.
590 Ibid at 162
591 Ibid.
592 Ibid at 153

individuals and communities,[593] according to Salazar the LCC was – in establishing the truth of land restitution claims – a site for conflict, tension, and resolution between two forms of persuasion: public deliberation and judicial review.[594] When the judiciary in both the Cato Manor and Makulele cases probed into the people as a deliberative entity, itself entering deliberation, it arguably embodied the tenets of participatory democracy, or as Salazar put it, "rhetorical democracy" embodied in the new constitutional dispensation.[595]

These differing legal tensions and their interests were a fine balance to strike and, the lawmaker was acutely aware that the effects of the LLC could not embody a practical exercise of carving up the land and causing the upset of economic interests that could result in the disruption of communities much like in apartheid.[596] Nonetheless, in its mandate of tackling spatial "restitution", the LCC was a platform in which apartheid's spatiality was deliberated in the reconciliatory politics of a newly democratic South Africa,[597] thus arguably being just as constitutive of South African democracy as the TRC's process of reconciliation.[598] For this reason, Salazar argues that the South African transition to democracy was "uniquely rhetorical" considering the existence of a tension between the judicial vision of public deliberation and public deliberation itself.[599]

This is because while they possessed different functions of capacity, the TRC and LCC could be argued as having given effect to the principles of the Constitution through deliberative processes that created space for the "we" constituting "the rainbow nation" to emerge.[600] Indeed, both the TRC and the LCC: (1) allowed the presentation of arguments based on the expediency of the political stalemate South Africa had reached by the 1990s; (2) by arrangement, they were a "demonstration" of shared values by the people partaking in their respective processes and, (3) neither of their proceedings were prescribed according to criminal law.[601] On one hand, the TRC and LCC used legal instruments largely borrowed from dispute resolution and,[602] on the other hand, the processes of transformation (*metanoia*) that they both

593 Ibid at 155
594 Ibid at 160-1
595 Ibid at 160 - 3
596 Ibid.
597 Barbara Cassin op cit note 129 at 19
598 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 153
599 Ibid at 145
600 Barbara Cassin op cit note 129 at 20
601 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 152
602 Ibid at 155

necessitated was imbibed with a Judaeo-Christian religious frame that implied both repentance *and* mental changes.[603]

6.3 Conclusion

Considering the mention of Judaeo-Christian religious frame for the transformation (*metanoia*) of not just of perpetrators of apartheid, but also of *all* South Africans, it would be worthwhile to investigate the doctrines that informed the South African transition to democracy as it relates to Judaeo-Christian religious rhetoric specifically. To embark on this task, the theological work of Karl Barth will prove useful as he explores the theology of atonement on which any attempt at invoking transformation (*metanoia*) through public deliberation rests.

This task will tangibly outline the tenets of Judaeo-Christian religious rhetoric as an established channel of persuasion, and will hopefully highlight that these tenets – often explicitly invoked in the South African transition to democracy – may help explain not only how the notion of forgiveness came to form part of the everyday language of reconciliation, but may also assist in speaking to how the rhetoric of forgiveness may emerge in bodies legally mandated with reconciliation in post-conflict contexts.

7. CHAPTER 7: KARL BARTH'S THEOLOGY OF ATONEMENT

7.1 Introduction

In the South African context where the TRC was one of the primary mediums of public deliberation through which reconciliation would occur, Kairos theology is usually associated with the apartheid era and functions as a prophetic theology for a time of struggle.[604] The term *Kairos* is Greek in origin, and is one of two words expressing time with the first being *Chronos*, which refers to chronological or sequential time, while the term *Kairos* signifies any intervening period of time during which something special occurs.[605] Consequently, the term *Kairos* in theology implies an "opportune" or "right" moment during which God creates an opportunity for the church to fulfil a particular assignment for its community.[606]

603 Ibid at 149
604 Clint Le Bruyns op cit note 83 at 461
605 Justus Musya op cit note 85 at 163
606 Ibid.

While Kairos theology is not unique to South Africa because it is global in its application, the common feature of the various contexts spanning from Latin American Liberation Theology to Black Theology in the United States of America is that all contexts use a category of liberation to define their task, purpose and methodology.[607] So important is Kairos theology in the aim of liberation that it is applicable to various settings and situations of public life; from economics to politics through to the formation of opinions in the public realm.[608] In view of this, it is worthwhile to explore the writing of Karl Barth, whose work is useful in setting the backdrop for the theological foundations that underpin Kairos theology as an expression of public theology.

In his work titled *Church Dogmatics*, Karl Barth deals with atonement as the threefold reality of Jesus Christ as: (a) God; (b) as man and, (c) as a personal unity of the two.[609] He finds that the statement "God is with us" lies at the heart of the Christian message.[610] Barth best encapsulates the doctrine of atonement when he writes that, in short, atonement is: 'primarily … a statement about God: that it is He who is with [us] as God'.[611] Barth goes further to add that:

> While much depends upon [our] coming to see that [Christ's work] applies to [us] … everything depends upon [our] coming to see that it all has to do with God; that it is God who is with [us] as God.[612]

Through the death and resurrection of Jesus Christ, Barth finds that it is God Himself who intervened to act and work and reveal.[613] So fundamental is the resurrection of Jesus Christ that Barth points out: 'it is thus with good reason that from the first, the main Christian festival has not been Christmas, nor Good Friday, but Easter.'[614] Barth goes further to say that Easter being the main Christian festival does not negate the birth, suffering and death of Jesus Christ, but that His resurrection is given what he terms "its supreme value".[615]

---

607 Clint Le Bruyns op cit note 83 at 460
608 Justus Musya op cit note 85 at 459
609 Karl Barth *Church Dogmatics* op cit note 97
610 Ibid at IV/1, 6
611 Ibid at 4
612 Ibid.
613 Ibid at 74
614 Karl Barth, *Church Dogmatics* op cit note 97 at IV/III, 284
615 Ibid.

According to Barth, Jesus Christ is the ultimate mediator between man and God, and he expresses this sentiment by saying that Jesus would not have been the mediator in His glory if what He did, He did somehow for Himself alone and not from the very first of His own, to men, and in and to the world.[616] Barth appears to conceive of atonement as resulting from the resurrection of Christ as God's faithfulness to people, so it makes sense why he states that it was God himself who was reconciling, for indeed, the reconciliation of man with God is the fulfilment of the covenant as expressed in the biblical text in Corinthians 5.19.[617] Expanding on these ideas, Barth finds it important to historically contextualize them within the framework of history and man, which shall be outlined below.

7.2 Karl Barth on History and Man

In Volume One of his writings on the theology of atonement, Barth introduces a distinction that is important to bear in mind as one engages deeper with the notion of atonement. This distinction is based on *Prolegomena,* from which Barth rejects all anthropology and philosophy as valid sources of true knowledge of the Word of God – this is because he makes an argument to the effect that man cannot be placed before God, or history before revelation.[618] In light of this, Barth speaks on his ideas of history, saying:

> It cannot be ignored that many men have suffered grievously, most grievously, in the course of world history… many who suffered at the hands of men have been treated no less and perhaps more unjustly than this man [Jesus Christ]. Many have been as willing as He was to suffer this way. Many in so doing have done something which, according to their intention and it may be in fact, was significant for others, perhaps many others, making a redemptive change in their life.[619]

Notwithstanding the quote above, what distinguishes Jesus, for Barth, is that Jesus is: 'the fellow man who goes before us as an example and shows us the way because and in the power that He is "for us"'.[620] Barth goes on to ask a question, saying: 'what does it mean that "God was in Christ" as expressed in 2 Corinthians 5.19?' to which he immediately responds, saying:

616 Ibid at 323
617 Ibid at IV,/1, 70
618 Ibid at I/1, 273
619 Ibid at IV/1, 245-6
620 Ibid at 229

> It obviously means that all that God, without either needing or being subject to any change or diminution or increase, is characterized by the fact that He is everything divine, not for Himself only, but also, in His Son, for the sake of man and for Him.[621]

Barth extends the point expressed in the quote above when he states: 'only when we know Jesus Christ do we really know that man is the man of sin, and what sin is, and what it means for man.'[622] To know Jesus Christ is, for Barth, to understand that His death and resurrection is itself a unique time event in human history that possesses what Barth terms "a concrete actuality of its own".[623] Furthermore, the resurrection is an event in history that is, as Barth argues, exclusively the work of God.[624]

In his writing on history and man, Barth emphasizes that the unity of Christ's death and resurrection is the basis of the realization of the atonement in history, explaining that the history to which he refers is not the history of man but that of salvation.[625] In view of the history of salvation, Barth places great importance on the written word manifest in biblical text, saying: 'without the knowledge of God there is no salvation. God's design in His whole action with us … is in fact that we may know God.'[626]

Barth consequently considers the apprehension of atonement in the biblical texts coming to the individual in faith, love and hope – not individually, but as an ecclesial activity.[627] What this means is that the work of atonement is collective and, therefore, the onus rests on *all* parties forming part of a community (or the "we" constitutive of "South African" or "Rwandan") to involve themselves in the process towards atonement – perpetrators and victims alike.

In the ecclesiastical activity Barth writes on, the ultimate goal is to understand the importance of the resurrection, which for Barth is a historical event marking the positive intention by God in place of the negative act of the death of Christ.[628] In light of these ideas, it

621 Ibid at IV/2, 86
622 Ibid at IV/1, 389
623 Ibid at 333
624 Ibid at 300
625 Ibid at IV/III, 211
626 Ibid at II/1, 180
627 John Reilly, 1978, *Atonement in the church Dogmatics of Karl Barth*, (Sage publishing), Irish Theological Quarterly, Vol. 4, No. 1
628 Karl Barth, *Church Dogmatics* op cit note 97 at IV/I,310

may be useful to understand the doctrine of the trinity manifest in the Father, Son and Holy Spirit to better contextualise some of the ideas Barth puts forward. This context is provided by Barth's discussion of the doctrine of Trinity, which shall be delved into in greater detail below.

7.3 Karl Barth on the doctrine of Trinity

Reflecting on the work of Karl Barth on atonement in *Church Dogmatics*, John Reilly notes that he invokes the doctrine of the Trinity to frame Christ's work, concluding that for Barth all the Trinitarian theology is distinction in unity and unity in distinction.[629] Thus, for Barth, the role of the doctrine of the Trinity is to highlight the critical role it plays in conceptualizing God as triune, simply put, God's divine One being existing as perfection in the Father, Son and the Holy Spirit.[630] For Barth, each of the three perfections presents what he terms the "one complete essence of God".[631] Barth argues that Jesus is God and became man as God in Him, He reconciled the world to Himself, and fulfilled and sealed His covenant with all men.[632] Barth acknowledges that in order to speak meaningfully on the Trinity, one must discuss the perfection of the divine essence, saying: 'to speak of God's attributes as we must and may do, since we are speaking of Him on the ground of His revelation, means therefore to speak … of His being.'[633] Barth goes further to say: 'many individual and distinct perfections … [are] nothing else but God Himself, His one, simple, distinctive being.'[634] Continuing on the point relating to the oneness of God in the Trinity, Barth notes:

> It does not follow from His trinity that His being is three-fold in the sense that His perfection consists of three parts… [Instead] His being is whole and undivided, and therefore all His perfections are equally the being of all three modes of the divine being.[635]

In fact, Barth argues that God's purpose through His Son's death and resurrection was to reveal Himself to us, for indeed, the work of the whole Holy Trinity is not the act of the Son from which the Father and Holy Spirit are involved, but the incarnation of God as living and

629 John Reilly op cit note 629
630 Karl Barth, *Church Dogmatics* op cit note 97 at II, 1, 660
631 Ibid at 491
632 Ibid at IV/III, 278
633 Ibid at II/1, 323
634 Ibid at 322
635 Ibid at 660

active in Jesus Christ and His life, death and resurrection for us.[636] To this effect, Barth observes:

> The fact that it was God himself who took our place on Golgotha and thereby freed us from the divine anger and judgment reveals first the full implication of the wrath of God, of His condemning and punishing justice.[637]

In the *Dogmatics in Outline*, published six years after publishing *Church Dogmatics*, Barth wrote: 'in the death of Jesus Christ God accomplished His law … He has acted as Judge towards man'.[638] Barth expands this point when he says:

> We are now at the end of the important section dealing with… what Jesus Christ was and did *pro nobis*… to this question we have given four related answers. He took our place as Judge. He took our place as the judged. He was judged in our place. And He acted justly in our place.[639]

Barth goes on to say: 'what God does in all this, He is, and He is no other He who does all this.'[640] Through this quote, Barth essentially means that there is no distinction to be made between reconciliation and God's self-revelation accomplished through the death and resurrection of Jesus Christ. Indeed, the doctrine of the trinity as Father, Son and Holy Spirit is critical in understanding the notion of the theology of atonement that Barth speaks of. He beckons his reader to recognize the danger in attempting to break apart the unity of the event of Jesus' suffering and death as distinct from the unity of God's being. After all, when considering that judgement of the Father on man is fulfilled on the Son through His suffering and subsequent death, it becomes clear why there can be no distinction from the unity of God's being, to which Barth says:

> It is not at all the case that God has no part in the suffering of Jesus Christ even in His mode of being as the Father … primarily it is God the Father who suffers in the offering and sending of His Son with a depth with which it never was or will be suffered by any man – apart from the One who is His Son ....[641]

Expanding on the quote above, Barth points out that:

636 Ibid at IV/2, 43-4
637 Ibid at II/1, 398
638 Ibid at 116
639 Ibid at IV/1, 273
640 Ibid at 274
641 Ibid at IV/2, 357

> … In Jesus Christ, God Himself, the God who is the one true God, the Father with the Son in the Unity of the Spirit, has suffered what it befell this man to suffer to the bitter end … it is of this fellow-suffering of God Himself borne on earth and also in heaven to the greater glory of God and the supreme salvation of man; it is of the God who has not evaded, and on the very grounds of His deity could not evade, this suffering with and for the world that the crucified man Jesus Christ Speaks … He speaks …[of] the peace of the price which He Himself willed to pay and did pay in the person of this man, and therefore the person of His own Son, and therefore of His fatherly heart.[642]

Thus, the role of Jesus is that His resurrection *is* the event of salvation.[643] While Jesus comes to the world and is present to man, what He does for man, He does to and in Him – this is because Jesus provides for man the freedom, permission and command to be the man he is in Jesus, the new creature, and as Barth puts it: 'the justified and sanctified sinner … the child of God, the responsible witness of the atonement which had taken place in [Jesus Christ].'[644] Jesus reconciles man with God through Him and His resurrection,[645] and so for Barth, atonement is embodied in the person and activity of Christ.[646] The fulfilment of atonement is, for Barth, the final salvation of mankind in the future.[647]

In light of the ideas put forward above, it is worthwhile to point out that Barth believes that those who identify as Christian owe their great or less, and their clear or less clear knowledge of Jesus Christ and all that entails of the Easter event solely from His self-declaration as resurrected from the dead.[648] Thus Jesus is, for Barth, the light, word and the prophecy with the declaration of atonement being made in Him for the world, for and in and through the world.[649] To this effect, Barth says:

> It is God's will that in the death of [Jesus Christ], judgment should be fulfilled on all others, but that they who accept Jesus as their saviour should all be set up and set right, the old man shall be expelled and the new man shall be introduced once and for all in the place of all, to His glory and to the salvation of all.[650]

Considering the sentiments expressed in the quote above, especially in relation to the setting up of rights and the expulsion of the old and the introduction of the new, it may prove

642 Ibid at IV/3.1, 414
643 Ibid at 220
644 Ibid.
645 Ibid at 221
646 Ibid at 211
647 Donald K. McKim, *How I changed my mind, Karl Barth*. (Richemont, Virginia: John Knox Press, 1968), 86
648 Karl Barth, *Church Dogmatics* op cit note 97 at IV/III, 342
649 Ibid at 284
650 Ibid at 413

useful for a comprehensive discussion of the notion of atonement to engage with how it practically manifests as Kairos theology. This is because Kairos theology speaks both to the ecclesiastic and the political contexts that Barth speaks on,[651] touching on the importance of a community and their engagement with one another in the public realm. Considering this, Kairos theology is an important basis for a discussion on the manner in which theology and politics intersect.

7.4 Conclusion

The doctrines expressed in Karl Barth's theology of atonement are most tangible in the proceedings of the TRC of South Africa. This is, in large part, due to real and symbolic role of Archbishop Desmond Tutu as the Chair of the TRC. With him he brought expansive theological knowledge on a range of matters spanning from atonement itself to amnesty, forgiveness and reconciliation,[652] and was arguably the best-suited person to chair the Commission as he was a leader and representative of the very ecclesiastical community that Barth writes of.[653] Outlining the characteristics of the theology informing Archbishop Tutu's chairing of the TRC will provide insight into what his aims were in accordance with his theological knowledge and belief system, and how he practically implemented this knowledge and belief system into orchestrating a community-centred peaceful transition to democracy.

8. CHAPTER 8: KAIROS THEOLOGY: AN EXPRESSION OF KARL BARTH'S THEOLOGY OF ATONEMENT IN SOUTH AFRICA'S ANTI-APARTHEID STRUGGLE

8.1 Introduction

The term *Kairos* in Greek signifies an intervening period of time during which something special occurs.[654] It is an "opportune" or "right" moment in which God creates an opportunity for the church to fulfil a particular assignment for its community.[655] According to Clint de Bruyns, public theology, of which Kairos theology is a part, draws attention to the

651 Letter, 31 October 1963, in *Karl Barth: His Life from Letters and Autobiographical Texts.* By Eberhard Busch. Trans. From the German 2nd Revised Edition, 1976, by John Bowden. London: SCM Press, 1976, 490.
652 *The moment of Truth: The Kairos Documents* op cit note 89 at 108
653 John Reilly op cit note 627 at 41
654 E.C White, *Kaironomia* op cit note 84 at 13
655 Justus Musya op cit note 85 at 163

Christian faith's inherent public nature and, therefore, understandably requires participation with the question of public responsibility in the midst of a history of inconsistency, difficulty, and ambivalence.[656]

Consequently, de Bruyns argues that the term "public" in public theology should neither be diminished to merely mean the opposite of "private" nor should it be deemed synonymous with "social".[657] This is because for de Bruyns, the foundational sense of public theology is lost in these reductionisms to be nothing more than either social theology or relational theology.[658] de Bruyns finds that: 'public theology is a way of understanding and practising theology which must contribute in constructive, dialogical, enriching, and transform[ative] ways to "the public good".'[659] De Bruyns argues that the emphasis on "the public good" helps in maintaining 'the connection between theology and the public sphere with its political, economic, civil society and public opinion domains.'[660]

Considering this brief outline of Kairos theology as public theology underpinning a particular assignment for the church to fulfil for their community, it is understandable, then, that the "opportune" or "right" moment in South Africa for the church to fulfil what it considered to be a God-given assignment for the South African community was the period in which the public suffered at the hands of state-sanctioned violence in the years leading to the end of apartheid. Kairos theology in the South African context was manifest as written documents by the church community condemning apartheid. To meaningfully engage with Kairos theology expressed in the South African Kairos documents, it is important to not only discuss the substance of the documents themselves, but to also highlight their substantial contribution to bringing about the end of apartheid – discussions which shall be outlined below, starting with providing context on Kairos theology in the South African socio-political space.

8.2 Context on Kairos theology in South Africa

The Kairos documents in South Africa were a product of a biblical and theological response to the socio-political crisis that faced South Africa during the mid-1980s in which the

656 Clint Le Bruyns op cit note 83 at 462
657 Ibid.
658 Ibid.
659 Ibid at 463
660 Ibid at 464

oppressed majority became impatient with the circumstances of their conditions, causing them to engage in acts of civil disobedience and outright violence.[661] The authors of the Kairos documents comprised of theologians, pastors and academics that met in Johannesburg to formulate a report responding to a crisis that threatened to rip South Africa apart.[662] In drafting the Kairos documents, the authors agreed to both forge a common position against apartheid and to collaborate to overthrow it.[663] The basis of this decision was on the premise that tyrannical governments – being those that brutalize the people – lack the necessary moral authority to govern and should therefore be overthrown.[664]

Robert McAfee Brown, writing on the Kairos documents of South Africa, highlights that generally, Kairos documents contain a number of important characteristics: they start with an analysis of: 'the present situation of oppression and pain; they accept the claim of theology as a "second act" preceding an active engagement with and commitment to the poor and oppressed; they are self-critical; they are informed theologically by social analysis; they take the role of the church very seriously; they name the enemy as a means of locating major sources of sin and destruction in the public domain; they affirm hope as a major contribution to the Gospel despite the heaviness that the social context may have and, finally, they conclude with great specificity a variety of calls to action, pointing towards practical and immediate steps to be taken.[665]

In view of the aforementioned characteristics, it is understandable why the authors of the Kairos documents in South Africa called on churches to intervene in cases of systematic injustice whenever human dignity was roundly undermined.[666] Through this call for intervention, they were essentially calling the church to repentance.[667] This is because the authors acknowledged that they as evangelists needed to repent because of their selective radicalism and biased morality, also acknowledging that they had forgotten that the God they

661 Justus Musya op cit note 85 at 163
662 Ibid.
663 Richard Rwiza, "An African Liberation Theology" in Benezet Bujo and Juvenal Ilunga Muya (eds), *African theology in the 21st century*, II, 2 (Nairobi: Paulines Publications Africa, 2005), 234-5
664 Justus Musya op cit note 85 at 165
665 Robert McAfee Brown, *Kairos: Three Prophetic Challenges to the Church,* (Grand Rapids: Eerdmans, 1990), 9-12.
666 Justus Musya op cit note 85 at 166
667 Ibid at 165

preached about and claimed to represent was partial to injustice as it is written in the biblical text of Acts 10:34, for example.[668]

The authors acknowledged that they had been biased in their sermons and their messages of salvation, which were aimed primarily at black people rather than white people.[669] In doing so, they acknowledged that they allowed white people in South Africa during apartheid to remain racists who undermined and dehumanized black people and could still regard themselves as "fantastic" Christians – such that some could speak and sing in tongues to the Glory of God while they were responsible for the misery of millions of people in South Africa.[670]

The authors emphasized that like Jeremiah who was sent out by God to nations and kingdoms to break down, destroy, pluck up, overthrow and to build and plant anew in the biblical text of Jeremiah 1:10, they too, as members of the church needed to take a radical stance to their ministry even at the risk of breaking the law, being harassed and being imprisoned by apartheid security forces.[671] Through their commitment to bringing down apartheid – tangibly manifested in the Kairos documents – the authors had essentially repented, confessed and taken on a renewed vow to carry out their duty of taking a firm stance against the oppressors in accordance with Judaeo-Christian theological teachings. To this effect, the authors of the Kairos documents wrote:

> We have not done this [radical ministration]. We have rather regrettably betrayed the faith. We have cowardly "sold out" the mission of our Lord; we have sold out our birth right. We have mismanaged our responsibility. We must repent and minister according to our calling. We call upon all committed evangelicals in South Africa to come out boldly to be witness of the gospel of salvation, justice and peace in this country without fear. You have not received the spirit of slavery to fall back into fear (Romans 8:15) as many of us have done. We have to take a stand now even if it may mean persecution by earthly systems. For if we fail now we shall have no legitimacy in the post-liberation period unless we want to join the hypocrites of this world.[672]

Beyond the Church's own repentance, they acknowledged that there needed to be a systemic overhaul, saying:

668 *The moment of Truth: The Kairos Documents* op cit note 89 at 118
669 Ibid.
670 Ibid.
671 Ibid at 119
672 Ibid at 119-20

> The problem that we are dealing with here in South Africa is not merely a problem of personal guilt; it is a problem of structural injustice. People are suffering, people are being maimed and killed and tortured every day. We cannot just sit back and wait for the oppressor to see the light so that the oppressed can put their hands and beg for the crumbs of some small reforms. That in itself would be degrading and oppressive.[673]

The authors of the Kairos documents also took a firm stance against the Dutch Reformed Church who endorsed apartheid ideology, arguing that as a segment of the church, the ideology it endorsed was steeped on a blatant misreading of biblical texts and concepts which allowed the system of apartheid to be maintained, saying:

> Both the oppressor and the oppressed lay claim to the same church… there we sit in the same church while outside Christian policemen and soldiers are beating up and killing Christian children or torturing Christian prisoners to death while yet other Christians stand by and weakly plead for peace. The policemen and soldiers are following orders, which ultimately come from the Nationalist Party from leaders who, with few exceptions are members of the Dutch Reformed Churches. The theology of these churches has allowed the Nationalists to rule South Africa with a clear conscience, convinced that their powers to rule come from God.[674]

In explicitly denouncing the role of the Dutch Reformed Church, the authors essentially struck apartheid at its root: its ideological foundations.[675] As they did so, they challenged its moral legitimacy, declaring it repugnant and biblically indefensible.[676] Additionally, they chastised the English-medium churches for having been remiss in their obligation to scrutinize the philosophical basis of apartheid, noting that while these segments of the church generally rejected apartheid, the manner in which they did so was both unremarkable and superficial.[677]

The authors endorsed for reconciliation in society, contending that it would only be sensible and justifiable if it entailed a just political settlement to end apartheid.[678] They did not conceive of reconciliation occurring without acknowledging first that the ideology behind apartheid was morally controversial and, second, that there needed to be an admission that apartheid was fundamentally evil.[679] As such, for the authors, reconciliation did not entail

673 Ibid. 17
674 Pierre Bigras, "Aspects of the struggle: analysis of different segments of South Africa's anti-apartheid movement", *Monthly Review*, April 1986, 10
675 Justus Musya op cit note 85 at 164
676 Ibid.
677 Nicholas Lash, *A matter of hope* (Notre Dame: University of Notre Dame Press, 1982), 132
678 Justus Musya op cit note 85 at 165
679 Ibid.

fabricating a peaceful coexistence but required a reconciliation that reflects justice and repentance in line with Judaeo-Christian teachings.[680]

To atone for one's sins, one must begin with repentance and, according to Gary S.D Leonard, the notion of repentance is derived from the Greek word *metanoia*, meaning a change of mind, attitude or course.[681] From a Judaeo-Christian understanding, to repent of sin through total exposure and condemnation instead of underplaying or undermining the sin, is to enter into a new life or relationship with Jesus Christ as the saviour.[682] As such, to call for repentance in any situation or context is ultimately a call to a radical break with sin.[683] In the context of South Africa during apartheid, the authors of the Kairos documents acknowledge their own flawed approach to repentance as evangelicals, notably that they were uncompromising on a number of sins while ignoring others.[684]

For example, the authors of the Kairos documents highlighted that they ordinarily preached enthusiastically against sins of adultery, drunkenness, fornication, theft, hatred and robbery but were completely silent about the sin of discrimination and apartheid which had created walls of hostility between black and white people in South Africa as it had been between the Jews and gentiles in the biblical text of Ephesians 2:11-22.[685] The authors also acknowledged that they closed their eyes to certain biblical texts preaching that there are no distinctions in difference between individuals because all are baptized in One Spirit into One body of Christ, and must drink of One Spirit according to biblical texts of 1 Corinthians 12:13, Galatians 3:28 and Colossians 3:11 to mention but a few.[686] In fact, the authors readily acknowledged that they had dishonoured the poor and honoured the rich contrary to the word of God in the biblical text of James 2,[687] and in doing so, they effectively repented and confessed in accordance with Judaeo-Christian teachings.

In the Kairos documents, the authors also highlighted the importance of reconciliation as the means by which the conflict between the oppressed and the oppressor was to be resolved

680 Ibid.
681 *The moment of Truth: The Kairos Documents* op cit note 89 at 117
682 Ibid at 117-18
683 Ibid.
684 Ibid at 118
685 Ibid.
686 Ibid.
687 Ibid.

in the South African context.[688] What they made explicitly clear was that reconciliation did not mean to reconcile good and evil, that is, to come to terms with evil, but instead denoted doing away with evil, with injustice and with oppression.[689] For the South African context, this meant that reconciliation was not possible without justice, tangible by the opposition, rejection and confrontation of present injustices – failing which there could be no negotiations, no reconciliation, and no forgiveness.[690] To put it simply, they found that nothing could happen without repentance.[691]

The authors highlighted that biblical teachings are clear that nobody can be forgiven and reconciled with God unless they repent of their sins.[692] Thus, repentance is the starting point for a process towards justice, such that the authors acknowledge that in accordance with their theological knowledge, a pertinent sinner – after repentance and confession – can receive forgiveness.[693] The authors pointed out that not even people on earth are themselves expected to forgive the unrepented sinner,[694] saying:

> When he or she repents we must be willing to forgive seventy times but before that, we are expected to preach repentance to those who sin against us or anyone. Reconciliation, forgiveness and negotiations will become our Christian duty in South Africa only when the apartheid regime shows signs of genuine repentance … There is nothing that we want more than true reconciliation and genuine peace – the peace that God wants and not the peace the world wants (John 14:27).[695]

In light of the quote above, it is worth remembering that Karl Barth in his writing conceptualised atonement as coming to the individual in faith, love and hope, not individually, but as an ecclesiastical activity. [696] The authors of the Kairos documents corroborate Barth's view when they speak of the process beginning with atonement as a Christian duty for, indeed the work of atonement and all that is associated with it is the work of the church community.

In light of the discussions outlined above, it is clear that both the theology of atonement as expressed by Barth and the Kairos documents were critical in informing the manner in which

688 Ibid at 15
689 Ibid at 16
690 Ibid.
691 Ibid.
692 Ibid.
693 Ibid at 118
694 Ibid at 16
695 Ibid at 56
696 John Reilly op cit note 627 at 41

Archbishop Desmond Tutu – a member of the ecclesiastical community who also co-authored the Kairos documents – would invoke the Judaeo-Christian repetitive ritual practice that consciously created belonging to a community in the mind of the listener in the South African TRC.

8.3 Conclusion

Considering the point by the authors of the Kairos documents that even people on earth are not expected to forgive the unrepented sinner,[697] Kairos theology highlights the inherent public nature of the Christian faith and necessitates an engagement with, and the transposition of Judaeo-Christian rhetoric into politics, civil society and public opinion formation.[698] By extension, an engagement with the laws of states as both a public and palpable means by which justice or injustice can be meted out will be necessary to embark on.

This engagement will be premised on an understanding that the TRC was a public space for the deliberation of the laws and the TRC's role in promoting justice in post-apartheid South Africa. This engagement will arguably assist in answering the important question this thesis seeks to tackle: does the law have the authority to grant forgiveness to a perpetrator on behalf of a victim in bodies like the TRC in South Africa, which is legally mandated with reconciliation in the post-conflict democratic context? This is because there is going to be an engagement with the force of law, that is, where the law derives its authority from.

An attempt at answering this central question will be premised on a discussion by French sociologist Pierre Bourdieu, because when he published his article in 1987 titled *The Force of Law: Towards a Sociology of the Juridical Field*,[699] he made a bold move to assert that the force of law – that is, its authority – was grounded in the social field.[700] In reaching this conclusion, Bourdieu effectively challenged the previously held insistence in academic circles that the law as thought and action had absolute autonomy free from any social determination.[701] It is worth delving into the arguments that Bourdieu makes to this effect in order to map out,

697 *The moment of Truth: The Kairos Documents* op cit note 89 at 16
698 Clint Le Bruyns op cit note 83 at 460
699 Pierre Bourdieu, *The Force of Law,* op cit note 1
700 Ibid.
701 Ibid at 814

practically, how Bourdieu justifies the premise that the law's authority is grounded in the social field.

9. CHAPTER 9: PIERRE BOURDIEU ON "THE FORCE OF LAW"

9.1 Introduction

According to Pierre Bourdieu, the law's perceived ideological autonomy is rooted in the social, that is, through struggles in the political field – struggles which are critical for the autonomous social universe to emerge.[702] Bourdieu finds:

> The tendency to conceive of the shared vision of a specific historical community as the universal experience of a transcendental subject can be observed in every field of cultural production.[703]

This view results in a perception of a universal reason that is self-actualizing, appearing to have no bearing on the social conditions that underpin it.[704] This perspective explains why the formalist ideology that underpins certain schools of legal thought assume that the law and its legal professionals are independent from the social universe.[705]

For Bourdieu, the law (both internally and externally) cannot be conceptualised without accounting for the social universe – what he prefers to call the juridical field.[706] He argues that the social practices of the law are a product of the functioning of a juridical field whose logic is determined by two factors: first, the specific power relations which give the social practices of the law its structure and orders conflicts over competence within it and, second, by the juridical functioning's internal logic which perpetually acts to constrain the range of possible actions, thus limiting the realm of solutions that are specifically juridical.[707]

In order to meaningfully engage with the ideas Bourdieu puts forward, especially considering that his article lends itself to generality, it will be worthwhile to apply them to a specific case study. The case study chosen to address the issue of generality is a legal case decided in South Africa's democratic constitutional dispensation pertaining to the validity of

---

702 Ibid at 815
703 Ibid at 819
704 Ibid.
705 Ibid at 816
706 Ibid.
707 Ibid.

TRC's legally mandated tasks of amnesty and reconciliation, and will assist in illuminating the ideas Bourdieu puts forward about the force of law being rooted in the social or juridical field. The case study in question is discussed below.

9.2 Case study: Azanian People's Organisation v The President of the Republic of South Africa

The case study chosen to tackle the generality that Bourdieu's article lends itself to, is the judgment of then-Justice Ismail Mahomed in the Constitutional Court Case of *Azanian People's Organization v. President of The Republic of South Africa* (hereafter simply *AZAPO*),[708] in which applicants sought to attack the Constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act No. 34 of 1995 (hereafter simply the Reconciliation Act).[709] Relief from the Constitutional Court was sought on the grounds that the consequences of the section in question was not authorised by the Constitution.[710] The value of this case study is that will assist in identifying whether the judgment of the Constitutional Court contained therein can be argued to constitute a case of Bourdieu's force of law.

According to Bourdieu, the right to determine the law within the juridical field gives rise to confrontations between actors possessing the technical competence that is ultimately social, as this right entails the interpretive capacity of a body of texts that sanctify a legitimate and correct perception of the social world.[711] This legitimized or correct view of the social world is tangibly conceptualised by juridical actors through juridical language, which Bourdieu explains is a combination of elements of common language and those that are alien to the system – a language that possesses all the characteristics of a rhetoric of both neutrality and impersonality.[712] An example highlighting the aforementioned point by Bourdieu is found in the part of Mahomed J's judgment in which he, as the quintessential example of a legally competent actor, interprets the purpose of the Reconciliation Act, saying:

> All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded, those aggrieved by such invasion

708 *Azanian People's Organization v. President of The Republic of South Africa* 1996 (8) BCLR 1015 (CC),
709 Promotion of National Unity and Reconciliation Act 34 of 1995
710 *AZAPO* supra note 708 at para 8
711 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 817
712 Ibid at 819

> have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally.[713]

For Bourdieu, Mahomed J's statement above creates two major effects: the first being *neutralization*, while the second is *universalization*.[714] The *neutralization effect* is created by a number of rules of language containing predominantly passive and impersonal instructions, such that these instructions: 'mark the impersonality of normative utterances and to establish the speaker as universal … impartial and objective.'[715] Mahomed J as the speaker establishes himself as a universal, impartial and objective actor in the manner in which he speaks of all persons, their entitlements in the law in respect of their rights, and the court's role. He does this as if he is not the one who pronounces on those persons, their entitlements and rights, or that he – as one of the adjudicators of the court – is not the symbolic and real representation of "the court".

The *universalization effect* is created by a systematic recourse to a mood of expressing norms in which there is use of words describing states of affairs that are either true or false.[716] Examples are words and phrases describing factual circumstances, with those often used in official statements and reports including but not being limited to: "admits"; "accepts"; "has stated", and "commits himself to".[717] These words and phrases are intended to express the rule of law's generality: the styles of speech and fixed formulas do not allow space or room for individual variation, and are a reference to values independent of an individual mind or mode of thinking that presupposes the existence of ethical consensuses such as "acting as a responsible parent", for example.[718] In the quote by Mahomed J above, this is marked by the use of passive phrases like 'all persons are entitled'; 'when those rights are invaded'; 'those aggrieved'; 'the right to obtain redress' and 'those guilty of perpetrating such violations.'[719] Thus, what Bourdieu calls the "juridical sense" or "juridical faculty" is ultimately a universalizing attitude that is:

> The entry-ticket into the juridical field – accompanied … by a minimal mastery of the legal resources amassed by successive generations, that is, the canon of texts and modes of

713 *AZAPO* supra note 710 at para 9
714 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 820
715 Ibid.
716 Ibid.
717 Ibid.
718 Ibid.
719 *AZAPO* supra note 708 at para 9

> thinking, of expression, and of action in which such a canon is reproduced and which reproduce it.[720]

This perspective professes to conjure a species of judgment that is particular, one which: 'is completely distinct from the often wavering intuitions of the ordinary sense of fairness because it is based upon a rigorous deduction from a body of internally coherent rules.'[721] This point is most tangible in the judgment of Mahomed J when he changes his mind about the effect of the amnesty provision of the Reconciliation Act, arguing instead that amnesty was the most workable solution in light of the internally coherent rules of the law about what makes for successful prosecutions:

> The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependants of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order ….[722]

Bourdieu notes that competition for control of access to legal resources – such as the body of coherent rules inherited from the past – is so contentious that there is an establishment of a social division between professionals in the legal field and laypeople through the continual rationalization of separation between those with legally-based judgments, and those with allegedly naïve senses of fairness.[723] Of particular interest is a compelling point Bourdieu makes in respect of the institution of "judicial space", from which there exists a division between those qualified to participate in the game and those who are unqualified to participate, but may nonetheless find themselves in the middle of the game – that is, between legal professionals and laypersons.[724] The latter group are excluded by their perceived inability to accomplish the conversion of mental space and specifically of linguistic stance, which is presumed by entry into this social space.[725]

720 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 820
721 Ibid.
722 *AZAPO* supra note 708 at para 18
723 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 817
724 Ibid at 828
725 Ibid.

An example of the conversion of mental space and linguistic stance that Bourdieu speaks of occurs in a part of the judgment by Mahomed J in which he explicitly invokes the language of the Interim Constitution in subsections 33(1)*(a)*(iii*)* and 35(1) while speaking on the importance of amnesty, saying:

> But for a mechanism providing for amnesty, the "historic bridge" itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimized by abuse but also those threatened by the transition to a "democratic society based on freedom and equality"….[726]

The phrase in double quotation marks in the last sentence of the quote above – used intentionally by Mahomed J to highlight his knowledge of the Constitutional text – conveys the conversion of mental space that signals entry into the social space of the legal profession. Additionally, in invoking the notion of a "historic bridge" he highlights a language, while seemingly plain, whose meaning is known fully by legal professionals only – for a layperson would not have full context and understanding of what this historic bridge is.[727]

The effect of the division between actors who are members of the legal profession and those who are not also has practical ramifications. Bourdieu highlights that the universalizing claims of the legal doctrine and legal procedure contribute to the establishment of their practical universality, explaining how a critical feature 'of symbolic power is that it can be exercised only through the complicity of those who are dominated by it.'[728] Furthermore, it is worth noting that there is unconsciousness on the part of those affected by this symbolic power, leading to a conclusion that they are subtly coerced by it.[729] Bourdieu highlights that the law's recognition is dependent on an exercise of the specific power attained by the law that, through a foundational principle that elevates the professional ideology of jurists, binds laypersons to a belief in the autonomy and neutrality of both the law and the jurists – what Bourdieu terms "the tacit grant of faith in the juridical order."[730]

726 *AZAPO* supra note 708 at para 19
727 This references Etienne Mureinik's article titled 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *SAJHR*, in which he envisions the introduction of a Bill of Rights in South Africa's transition from apartheid to democracy as "the bridge" between a past of human rights abuses to a future of the protection of human rights.
728 Pierre Bourdieu, *The Force of Law* op cit note 1 at 844
729 Ibid.
730 Ibid.

Considering "the tacit grant of faith in the juridical order", the fact that the applicants who challenged the Reconciliation Act in the *AZAPO* case voluntarily approached and submitted themselves to the Constitutional Court to resolve the matter is significant. This voluntariness signals a belief by the applicants in the autonomy and neutrality of both the law and the jurists, and is a tangible expression of "the tacit grant of faith in the juridical order."[731] For Bourdieu, there is a presumption that professional competence and its presumed proficiency concerning advanced bodies of knowledge renders non-law actors as possessing simple common sense, non-special sense of fairness, and a supposedly naïve understanding of the facts – what Bourdieu terms "their view of the case".[732] This point is best captured by the part of Mahomed J's judgment in which he says:

> I understand perfectly why the applicants would want to insist that those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families who had, in their view, been engaged in a noble struggle to confirm the inhumanity of apartheid, should vigorously be prosecuted and effectively be punished for their callous and inhuman conduct in violation of the criminal law. I can therefore also understand why they are emotionally unable to identify themselves with the consequences of the legal concession made by [their legal counsel] and if that concession was wrong in law I would have no hesitation whatsoever in rejecting it.[733]

What makes this quote interesting is, first, the arguably condescending way that Mahomed J assumes to know why the applicants are aggrieved by stating that he "understands perfectly". Second, a key phrase in the quote above that speaks explicitly to what Bourdieu argues about the presumption of a professional competence is presumed proficiency concerning advanced bodies of knowledge that distinguishes law actors from non-law actors, is when Mahomed J explicitly uses the phrase "in their view" verbatim – as if having read and intentionally referencing Bourdieu's writing. Mahomed J uses this phrase to not only distinguish the perceived simple common sense and naïve understanding of the facts by the applicants, but also to highlight the supposedly complex common sense and informed understanding possessed by legal actors like himself.

At this juncture, it is worth remembering that the space in which the case study in question occurs is a trial in a court of law. Bourdieu conceptualises a trial in a court of law as a confrontation of perspectives between individuals.[734] While a private person who furnishes

731 Ibid.
732 Ibid at 828
733 *AZAPO* supra note 708 at para 16
734 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 837

an insult in a private speech only engages the speaker, with such speech hardly possessing symbolic value, a court judgment in adjudicating disputes or negotiations regarding people or things by making a public proclamation about them is quintessential of: 'authorised, public, official speech which is spoken in the name of, and to everyone.'[735]

Considering that judgments are utterances made by authorised agents acting on behalf of the collective, Bourdieu points out that they are deemed universally recognised and therefore successful because they create a situation in which no one can ignore or refuse the point of view or the vision which they impose.[736] This is most evident in that the applicants in the *AZAPO* case, while understandably unhappy about the finding that section 20(7) of the Reconciliation Act was constitutionality sound, could neither ignore nor refuse the point of view and vision presented in the majority judgment of the Constitutional Court presented by Mahomed J.[737]

The applicants in *AZAPO* could not ignore or refuse the point of view articulated in the judgment because Bourdieu says the basis of authorization of the legal agent acting on behalf of the collective is due to the state distributing the right of use over those powers resulting from possession of degrees and certificates, ratifying all processes relating to acquiring, transferring, augmentation or withdrawal of those powers.[738] The state, therefore, grants the legal agents 'a secure identity, a status and, above all, a body of powers or competences that are socially recognised and therefore productive.'[739] The aforementioned state action occurs in the South African context primarily through the authority granted to legal actors by Section 34 of the Constitution,[740] and also by way of the Legal practice Act No. 28 of 2014, which replaced its predecessor the Attorneys Act No. 53 of 1979 – all of which outline the duties, responsibilities and powers of all actors qualified to be legal practitioners in South Africa. If one considers that Mahomed J's judgment is an authorised, public, official speech of an actor qualified to be a legal practitioner, it is evident that the judgment is made in the name of and to everyone, for he says:

735 Ibid at 838
736 Ibid.
737 *AZAPO* supra note 708 at para 50
738 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 838
739 Ibid.
740 Constitution of the Republic of South Africa, 1996.

> Every decent human being must feel grave discomfort in living with a consequence which might allow the perpetrators of evil acts to walk the streets of this land with impunity, protected in their freedom by an amnesty immune from constitutional attack, but the circumstances in support of this course require carefully to be appreciated.[741]

Continuing to speak in the name of and to everyone, Mahomed J went further and directly addressed the families of victims, the perpetrators and, indeed, the entire country in his judgment, saying:

> The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for the "reconciliation and reconstruction" which informs the very difficult and sometimes painful objectives of the amnesty articulated in the epilogue.[742]

Bourdieu highlights that the Rule of Law, for example, at the level of custom: 'is symbolized by the unplanned and collective sanctions such as moral disapproval, and of the existence of explicit rules and sanctions and normalized procedures.'[743] In this respect, Bourdieu notes that writing is critical, for it: 'adds the possibility of universalizing commentary that discovers "universal" rules and principles and transmits them.'[744]

According to Bourdieu, another factor that favours the law actor's position of power is that they possess the power of naming (manifested tangibly through writing), for to write is to distribute symbolic power throughout society.[745] The power lies in the linguistic ability to create things to be named, and to create social groups in particular.[746] As such, Bourdieu says that when a court of law makes a judgment on a matter, the court is effectively distributing varying degrees of capital to a range of actors or institutions by limits, exchange, negotiation, or struggle:

> 'Concerning the qualities of individuals or groups; concerning the membership of individuals within groups; concerning the correct attribution of names (whether proper or common) and titles. Concerning union or separation – in short, concerning the entire

741 *AZAPO* supra note 708 at para 17
742 Ibid.
743 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 844
744 Ibid.
745 Ibid at 838
746 Ibid.

> practical activity of "worldmaking" (marriages, divorces, substitutions, associations [or] dissolutions which constitute social units…"world making"'.[747]

The sentiment expressed above is explicit in the judgment of Mahomed J when he names and lists the groups of non-law actors involved in the *AZAPO* case, saying:

> … The applicants … Those wrongdoers who abused their authority and wrongfully murdered, maimed or tortured very much loved members of their families … every decent human being … the perpetrators of evil acts … survivors and the dependents of the tortured and the wounded, the maimed and the dead … The families of those unlawfully tortured, maimed or traumatized … the wicked and the innocent … survivors and the dependents of the tortured and the wounded … victims … witnesses are often unknown, dead, unavailable or unwilling.[748]

The naming and listing of the non-law actors by Mahomed J in the quote above is not random, as it arguably has both practical and legal ramifications for how each party would be dealt with in a legal trial. It also arguably determines the kind and level of capital individuals are given depending on which categories of people they fall under.

According to Bourdieu: 'the law is the quintessential form of "active" discourse, able by its own operation to produce its effects.'[749] Bourdieu does not conceive of this argument to be excessive, saying that while it seems that the law *creates* the world, it is actually the world that first *creates* law.[750] Furthermore, Bourdieu argues that juridical practice defines itself in part – much like the practice of religion – through the intersection between the juridical field and the layperson's needs.[751] Mahomed J's judgment captures the intersection between the juridical field and the layperson well when he says:

> All persons are entitled to the protection of the law against unlawful invasions of their right to life, their right to respect for and protection of dignity and their right not to be subject to torture of any kind. When those rights are invaded those aggrieved by such invasion have the right to obtain redress in the ordinary courts of law and those guilty of perpetrating such violations are answerable before such courts, both civilly and criminally.[752]

Taking into account the sentiments expressed in the quote by Mahomed J above, it is understandable that the layperson is critical, whether dealing with civil or criminal matters, to

747 Ibid.
748 *AZAPO* supra note 708 at paras 16-17
749 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 838
750 Ibid at 839
751 Ibid at 841
752 *AZAPO* supra note 708 at para 9

the nature and function of courts by willingly submitting themselves to the authority of the courts.

9.3 Conclusion

What is clear is that the legal institution manifested in the court – beyond its own internal rules, procedures and language – defines itself in part through the need of the layperson to approach it in seeking redress for civil or criminal violations. Bourdieu notes that according to the institution of monopoly found in the legal system, there exists a:

> Vulgar vision of the person who is about to come under the jurisdiction of the court … the client, and the professional vision of the expert witness, the judge, the lawyer, and other juridical actors.[753]

Bourdieu says this is not accidental, for it establishes what he describes as an essential 'power relation upon which two systems of presuppositions, two systems of expressive intention – two world-views – are grounded.'[754] The exclusion of non-specialists in favour of specialists is written into its fundamental law, what Bourdieu terms the law's "*constitution*".[755]

As such, it may prove helpful to discuss the ways in which the law – deriving its authority from the social field – manages memory, especially in contexts where there have been instances of conflict and hate. In order to do this, the work of Barbara Cassin on the management of memory in democracies may be useful, and will be discussed in the next chapter below.

Cassin's writing is useful because it has proposed that not only is the approach to memory crucial to the extent and quality of public deliberation about political events, but also because she puts forward a thorough and detailed explanation of the three models that she proposes illustrate how, *through* the law, the management of memory between the past and the future is decisive for a political present.[756]

753 Pierre Bourdieu, *The Force of Law,* op cit note 1 at 828
754 Ibid at 828-9
755 Ibid at 829
756 Barbara Cassin op cit note 129 at 10

10. CHAPTER 10: THE MANAGEMENT OF MEMORY ON TREATMENTS OF HATE: BARBARA CASSIN'S THREE MODELS

10.1 Introduction

Barbara Cassin argues that historically, the management of memory in democracies has followed three varied models that impact the extent and means by which citizens deliberatively engage in the memory archive of certain political events,[757] thus also necessarily having an impact on how the political present is to be determined.[758] For Cassin, the three models provide insight into the relationship between the notions of truth in a specific political context, and its particular discursive practices and modes of deliberation.[759] She begins her work by discussing the Athenian model subsequent to the decree of 403 BC, after which she proceeds to the model derived from the democratic transition of South Africa from apartheid and, finally, discusses the model applicable to France from before the Revolution of 1789 through to the contemporary context.

The discussion of these three models will follow the chronology on which Cassin arranges the models in her text, starting with the Athenian model, then the South African model and, finally, the French model. To begin the discussion, we shall unpack and understand the features and effect of the the ancient Athenian decree of amnesty-amnesia.

10.2 Athens: A Decree of Amnesty-Amnesia

Cassin cites the first recorded model of the management of memory as a decree in ancient Athens that was summed up in what she describes as amnesia-amnesty.[760] The decree is one of amnesty-amnesia because it imposed upon citizens a duty to not recall and remember the events leading up to the Athenian civil war.[761] Cassin highlights an important etymological connection to bear in mind between notions of "amnesty" and "amnesia", saying it is not a matter of chance, but is instead a linguistic doublet from which the treatment of memory in

757 Ibid at 9
758 Ibid at 10
759 Ibid at 9
760 Ibid.
761 Ibid.

Athens can be properly contextualised.[762] While today a decree of amnesty would require a duty of memory, a decree of amnesty-amnesia in ancient Athens stood in direct contrast to a duty of memory.[763]

The decree came about towards the end of the fifth century BC after the end of the Peloponnesian war between Athens and Sparta.[764] As a result of the defeat of Athens, the Spartans occupied the city with assistance of a group of fifteen hundred collaborating Athenian citizens known as the Thirty.[765] A year into the occupation, there was an outbreak of civil war initiated by the democrats under the leadership of Thrasybulus to restore democracy and to overthrow the Spartans and their collaborators. Upon the success of the Athenians to oust the Spartans, the collaborators who had assisted to render Athenian democracy powerless were expelled from the city by the decree promulgated in 403 BC.[766]

In the political and democratic crisis of 403 BC in Athens, decrees took precedence over laws because as Aristotle notes: 'on some matters, legislation is impossible.'[767] For Aristotle, to legislate on matters of deliberation is impossible because questions of action and expediency have no fixed answer – this is important to highlight because the law contains fixed and general prescriptions.[768] The matter of expediency mentioned above concerned the re-establishment of democracy ended by the rule of the Thirty (also known as the Oligarchs) who, after assuming power, began to attack citizens in Athens.[769] They sought to lay claim to the property of Athenians, killing many people for wealth, reputation and family in view of removing potential threats to their rule.[770] Those who were not killed or stripped of their property were sent into exile in their thousands.[771]

It was the exiled Athenians under the leadership of Thrasybulus who would cast out the Thirty and restore Athens to democracy once more. As they encountered defeat at the hands of

762 Ibid at 10
763 Ibid.
764 Ibid.
765 Ibid.
766 Barbara Cassin op cit note 129 at 10
767 Aristotle's Nicomachean Ethics, (ed.) Christopher Warne (Bloomsbury Publishing, 2006) 5.10.1137b29
768 Ibid at 2.2.1104a, 2-3
769 *Constitution of Athens*. Trans. Kurt Von Fritz and Ernest Kapp. In *Aristotle's Constitution of Athens and Related Texts.* (New York: Hafner Publishing, 1950), 35.4
770 Ibid at 35.2
771 Xenophon, *Hellenica,* Volume I: Books 1-4. Trans. Caleton L. Brownson (Cambridge, Massachusetts; Harvard University Press, 1918), 2.4.1

the Athenian Democrats under Thrasybulus, the Thirty left behind ten men to remain behind in Athens to negotiate favourable terms for reconciliation on their behalf.[772] Reconciliation was eventually brokered and was primarily concerned with future arrangements, with one provision mentioning that the past should not be recalled by one party against another.[773] This provision was manifest as a promise that citizens would not bring up charges in court against the Thirty for wrongdoing during the occupation, and seems to have been a genuine attempt to ensure the interest of restoring harmony.

Led by statesman Archinus, a vote was cast to the effect that the first person to contravene the terms of the amnesty decree was to be executed.[774] This is because both the democrats who took back Athens and the Oligarchs had sworn oaths of reconciliation.[775] These oaths required that there should not be a recall of evils,[776] and applied to *all* citizens except for the hangmen and rulers of the Oligarch, comprising of the Thirty and the Ten of the Piraeus because they were deemed outgoing office-holders.[777] All former supporters of the Thirty who had concerns about remaining behind in Athens for fear of reprisal could register to leave and relocate to the enclave of the Oligarchs at Eleusis.[778] It is worth noting that beyond the decree of 403 BC, the success of the reinstatement of democracy and the aim of reconciliation is attributed mostly to the citizens of Athens:

> The Athenians appear to have reacted to their previous misfortunates, both private (*idia*) and public (*koine*), in the most noble and statesman-like war of all. They not only refused to entertain any charges based on previous events, but they repaid out of the common funds the money which the Thirty had borrowed from the Spartans for the war, although the agreement had specified that men of the city and those of the Piraeus should pay their debts separately; they felt that this ought to be the first step in restoring like-mindedness (*homonoia*) in the city. In other cities, the democrats, far from making contributions themselves in similar circumstances, redistribute the land.[779]

Beyond the practical contributions of the citizens, Athenians helped accomplish the feat of Solon (without Solon) by healing the wounds of democracy and re-establishing democracy once more.[780] What makes this feat worth noting is that it went beyond the legal obligations required of

772 *Constitution of Athens* op cit note 769 at 41.2
773 Ibid at 39
774 Ibid at 20.2s
775 Ibid at 39.4
776 Ibid at 39.6
777 Ibid.
778 Ibid at 39.1-5
779 Ibid at 40.3-4
780 Ibid at 5-13

Athenian citizens.[781] Through the decree, amnesty was provided to all involved in the occupation of Athens except in cases of homicide or wounding that occurred beyond implementing the policies of the Thirty.

The decree did not necessarily forbid reprisal, but acted to censure the recall and memory of past events that could compromise the aims of reconciliation.[782] In a recorded case in which a previously exiled citizen returned to Athens and recalled the past, an exemplary citizen seeking to uphold the decree dragged the returning citizen to the Council to be put to death without a hearing.[783] A citizen being put to death without a hearing was unheard of in Athens, however it occurred in this instance because the decree had required that exiled citizens from the civil war take an oath in the first person after reconciliation – one which the exiled citizen in question had broken by recalling the past.[784]

The function of this decree, therefore, is that amnesty is an entry-way for public deliberation in order to construct a community and its institutions through a shared amnesia that required the erasure of memory of the civil war in view of reconciliation and harmony.[785] The decree can be understood as having been enacted for the benefit of the common good,[786] one that was achieved through initiating *homonoia* – a Greek word denoting consensus or concord through sameness (*homo*) of the minds and sensitivities (*-noia*).[787]

While in Athens it was legally prescribed that one should neither remember nor recall events from the civil war,[788] in South Africa there was an imperative set by legal prescription in the Reconciliation Act of what Cassin describes as "full disclosure" in order to receive "amnesty".[789] Looking critically at the South African TRC, Cassin argues that the finality of the TRC was far more geared towards reconciliation than seeking truth.[790] To ascertain the truth of this view, a discussion on full disclosure and amnesty will be had in relation to the South African TRC.

781 Ibid at 39-41.2
782 Barbara Cassin op cit note 129.
783 Ibid at 12
784 Ibid.
785 Ibid.
786 Ibid.
787 Ibid.
788 Barbara Cassin op cit note 129 at 12
789 Ibid at 15
790 Ibid.

10.3 Full Disclosure and Amnesty in the South African Truth and Reconciliation Commission.

In the South African TRC, Cassin says that storytelling – through recourse to everyday words – was integral to a process of national healing.[791] This process took on a performative discourse (ranging from the pragmatic to the theatrical) for one and for all; from city to city, with a televised re-broadcast happening every Sunday for the duration of the TRC's proceedings.[792]

Cassin highlights that like the Athenian decree of 403 BC, the South African TRC was a political act with a cut-off date on which the past – by transforming the mistakes, sufferings and misfortunes to make good – was used to create the "we" constituting the "rainbow nation".[793] The "we" constituting the "rainbow nation" was made possible through the full disclosure requirement as a pre-requisite for amnesty, from which a *declaration* of one's injustice was arguably made instead of a declaration of one's *injustice*.[794] This is a distinction Cassin makes because the *declaration*, she argues, belongs to the realm of the ethical and the religious.[795]

Additionally, considering that the TRC required perpetrators to engage in a non-criminal judicial process of "full disclosure" by way of public rituals of narration, it also required that perpetrators and victims alike participate in the membership of a deliberative community whose stories of a shared past was a minimum requirement for the "we" to emerge.[796] Unlike the South African context in which perpetrators and victims alike actively engaged in the memory archive through narration, in France it is worth pointing out that the citizens are forbidden from forgetting, though they are required to recollect only for commemoration because of a legally inscribed latency period within which memory of politically related acts are stored in archives and may not be consulted.[797]

791 Ibid at 11
792 Ibid at 15
793 Ibid.
794 Ibid at 20
795 Ibid at 19
796 Ibid at 20
797 Ibid at 18

To better understand the management of memory in France and its latency period regarding the memory archive, a discussion will occur to understand what the latency period is, how it operates, and what its effects are on the extent and quality of public deliberation for citizens of France on a range of political matters.

10.4 Latency in French Memory-Archive

In respect of the French memory archive, Cassin highlights that the arrangement is entirely reliant on a written treatment of documents in an aim to de-politicize memory regarding collaboration – a manifestation of civil war.[798] The written treatment in the law regulates an archival procedure from which there is a latency period within which the archives may not be consulted.[799] The time period in question is dependent on the nature of the archives and their classification.[800] Cassin highlights that the regulation of the memory archive in France is not just administrative, but constitutes a political act that is by its nature subject to change.[801]

As such, it is worthwhile to embark on an analysis of the development and treatment of archives before and after the Revolution of 1789 in France to identify whether, if at all, matters of political expediency played a role in determining the manner and extent of regulating the memory archive. To begin, a discussion of pre-Revolution archives known as the "Archives of Bastille" will be embarked on through Arlette Farge and Michel Foucault's work titled *Disorderly Families: Infamous Letters from the Bastille Archives*.[802]

10.4.1 The French Memory-Archive before the French Revolution of 1789: focus on the Bastille Archive's Lettres de Cachet.

In their discussion of the "Archives of Bastille" currently housed in the *Bibliotheque de l'Arsenal*,[803] Farge and Foucault find the *lettres de cachet* of particular interest. The *lettres de*

798 Ibid at 9
799 Ibid at 17
800 Cassin highlights that the arrangement varied from archives containing medical files, personal records concerning private life information of living and deceased people, notary records, records of intelligence and census, registry files, and matters concerning the security of the state and national defense.
801 Barbara Cassin op cit note 129 at 17
802 Arlette Farge & Michel Foucault, *Disorderly Families: Infamous letters from the Bastille Archives*, ed. Nancy Luxon (trans.) Thomas Scott-Railton (Minneapolis, Minnesota University Press, 2016)
803 Michel Foucault, *History of Madness,* ed. Jean Khalifa, trans. Jonathan Murphy and Jean Khalifa (New York, Routledge, 2006), *xxxviii.*

cachet are a collection of letters related to normal families and their private matters such as marital disagreements, the misbehaviour of a spouse and even minor conflicts between parents and children.[804] Upon close analysis of these archives, Farge and Foucault identified that most letters were not related to matters of the state,[805] but often concerned the lives of modest and sometimes quite poor households.[806] Notwithstanding their subjects, these letters would play an important symbolic role in the changing political scene of France in the run up to the Revolution of 14 July 1789.

The term *lettres de cachet* is defined very generally by Joseph-Nicolas Guyot as a: 'letter written by order of the king [that is] countersigned by a Secretary of State and stamped with the seal of the king.'[807] As such, it makes sense why people who wrote them often referred directly to the king, as evidenced by a letter outlined by Farge and Foucault that is dated 1758, which reads:

To the King

> Sire,
> Overcome by the weight of a most excessive pain, Duchesne one of the clerks of M. The Procurator General of the *Parlement de Paris*, dares with humble and respectful confidence throw himself at the feet of Your Majesty to implore his Justice against the evilest of women.[808]

In the decades leading up to the French Revolution, *lettres de cachet* were used in Paris by the city's police lieutenancy to ensure 'simple, flexible, fast, and formality-free arrest and imprisonment.'[809] Before their widespread use by police, perpetrators often escaped before trial because arrests happened primarily through a decree ordered by a judge.[810] Indeed, as they became a feature of the justice system, Farge and Foucault find that it was commonplace for the Prosecutor General to request that imprisonment be effected by way of the *lettres de cachet*.[811] Farge and Foucault also point out that the use of the *lettres de cachet* for police matters became so common in Paris that the notion of a "police matter`' was sufficiently vague

804 Arlette Farge & Michel Foucault op cit note 802 at 20
805 Ibid.
806 Ibid at 19
807 Joseph-Nicolas Guyot, *Repertoire universel et raisonne de jurisprudence civil, criminelle, canonique et beneficiale*, Vol. 10 (Paris, Visse, 1785).
808 Arlette Farge & Michel Foucault op cit note 802 at 69
809 Ibid at 20
810 Ibid.
811 Ibid.

and imprecise enough that a "police matter" could include conflict arising between a master and their apprentice.[812]

In addition, the authors highlight that the king himself often used the *lettres de cachet* to enforce compliance to the ban on assembly, which was a royal crime prohibited by several decrees, ordinances and edicts throughout the sixteenth, seventeenth and eighteenth centuries.[813] In light of the fact that most *lettres de cachet* were also addressed either to the lieutenant of police and/or to the king directly,[814] and that they were an appeal seeking to obtain a sovereign order to curtail individual freedoms through punishments ranging from house arrest, exile or imprisonment,[815] it is understandable why they became a symbol of the fall of the Bastille where many members of the ordinary population were imprisoned and their freedoms restricted.[816]

The collection of documents in the archives of the Bastille before the Revolution contained not only the letters, but also related documents such as statements of families or neighbours; police superintendent investigations; the decision of the king; pleas for release emanating from the imprisoned, as well as those who had initially requested imprisonment.[817] A letter that requests imprisonment dated July 1760 reads:

> … It is true, Sir, that I requested of M. Bertin your predecessor, an order to place in the hospital the wife of one Lafond heretofore my cook. I had strong reasons for soliciting the imprisonment of this woman then, but as her husband is no longer in my service and that it was in part on his insistence that I went to these extremities, I no longer have the same motives to interest myself in what concerns either him or her, I will always be delighted to receive news of you. I pray you to continue to honor me with our friendship and to be persuaded of the respect with which I have the honor of being, Sir, Your most humble and most obedient servant.
>
> De Zurlauben.[818]

The letter of appeal above gives no indication of the alleged crime committed by the wife of the cook in question, except to admit to imprisonment being on the insistence of the cook and a vague mention of "strong reasons" for soliciting the imprisonment without spelling

812 Ibid.
813 Ibid at 20-1
814 Ibid at 12
815 Ibid at 19
816 Ibid at 20
817 Ibid at 19
818 Ibid at 74-5

out what these strong reasons are. There are also a few cases relating to arbitrary imprisonment identified by Farge and Foucault, such as that of a three-months-pregnant embroiderer named Catherine Louis at her family's request in 1756.[819] The superintendent of Catherine Louis's case inadvertently highlights the arbitrariness of her imprisonment, writing:

> Everyone says that this girl always behaved herself well… But the neighbourhood still requires an example: it is full of a populace that can be restrained only by fear. How many useful subjects does the state not lose to the libertinage into which most of the girls in the lower orders give themselves.[820]

Forge and Foucault note that it is precisely on the basis of such arbitrariness that the nation as a whole no longer endured, and refused to be complicit in.[821] Before the Revolution, the powers of the police were far-reaching, allowing a police inspector to enter anywhere: interrupting people's rest; demanding the justification of activities, and even surprising lovers or adulterers.[822] The authors point out that almost three thousand arrests were carried out by an inspector named Poussot from records he kept from 1738 to 1754, of which just over half were taken in the king's orders and the remainder were imprisoned on the decision of the police.[823] These records were so meticulously arranged that they contained details of those arrested in alphabetical order including first and last names, age, place of domicile, occupation, the date on which arrest was effected, the relevant authority who made the decision, reasons furnished for arrest, and the name of the prison in which they were held.[824]

In light of the sensitive and often personal nature of the contents of the records, their misuse by the king and his agents for arrests without adhering to formalities, and their ability to often arbitrarily limit the freedom of ordinary people, it is understandable that the *lettres de cachet* along with copies of registers of the police, the archives of the judiciary and the police, and daily administrative records were scattered by the common people into the gutters of Paris after the storming of the Bastille on 14 July 1789.[825] Their scattering occurred because these records were practically and symbolically powerful, explaining why according to Charles Dickens's *A Tale of Two Cities,* the people storming the Bastille are alleged to have cried out:

819 Ibid at 45
820 Ibid.
821 Ibid.
822 Ibid at 22
823 Ibid at 21
824 Ibid.
825 Ibid at 286

- "The prisoners!"
- "The records!"
- "The secret cells!"
- "The instruments of torture!"
- "The prisoners!"[826]

The subsequent revival and archival preservation of the records that could be salvaged – totalling approximately six hundred thousand – occurred as a result of the Paris Commune of 1789 to 1795 who, upon realising that the historical record containing incidents of royal absolutism could be lost, resorted to issuing a civic appeal for the return of the records.[827] In light of the value of the record, Farge and Foucault disagree with the simplification of the Bastille Archive as purely representing royal absolutism that reveals how the system of absolute monarchy helped rid an important family of a member or penalized its enemies.[828] Perhaps it is that the Paris Commune already understood – at that time – David Hanlon's assertion two-hundred years later that knowledge in the service of power needs to be collected, housed, catalogued and preserved.[829]

It is widely accepted that the French Revolution is a decisive moment in history regarding archives as it marked the beginning of a new era in archive administration that was spurred on not by internal workings of the archive administrators, but by political forces manifest in the changes in government after the Revolution of 1789.[830] Indeed, after the abolition of aristocratic and ecclesiastical privileges on 4 august 1789 in France, a mass reconstruction project was spearheaded by the principle of equality in Article 1 of the Declaration of the Rights of Man and of the Citizen.[831] This occurred in what Francois Furet referred to as the most profound characteristic of the French Revolution, being: 'to reinstitute society in the manner of Rousseau, that is, to regenerate mankind through a true social

826 Charles Dickens, *A Tale of Two Cities* (Book 2, chapter 21) Penguin Classic Books, first published in 1859
827 Arlette Farge & Michel Foucault op cit note 802 at 286
828 Ibid at 19
829 David Hanlon, "The Chill of History: The Experience, Emotion and Changing Politics of Archival Research in the Pacific", *Archives and Manuscripts* Vol. 27, No. 1 (1999), 15
830 Ernst Posner, "Some Aspects of Archival development Since the French Revolution," *American Archivist* Vol. 3, No. 3 (Society of American Archivists, 1940), 161
831 This article in the 1789 Declaration of the Rights of Man and the Citizen reads: "men are born and remain free and equal in rights", an expression which marked a sharp departure to the system of the ancient regime in which society was divided into three estates (the first estate being the clergy, the second estate being the nobility, and the third estate being the commoners)

contract.'[832] As such, it may be useful to speak directly to these changes to better understand how they impacted the French memory archive.

Writing a brief account on the historical development of the Archives of France, Michel Duchien notes that one of the first steps taken by the revolutionary government between 1789 and 1793 was to suppress virtually all existing political, administrative, judicial and ecclesiastical systems of the old regime.[833] This meant that arrangements needed to be made for the archives that remained behind from all of the suppressed bodies and establishments – thus necessitating that the newly created National Assembly organise its own records under the title of *Archives Nationales*.[834] Part of this collection of *Archives Nationales* contains the *Lettres de cachet* discussed by Farge and Foucault.

To allow this new system of archives to accommodate the archives of the old regime, a law of 7 Messidor Year II (25 June 1794) was passed. It declared that the central repository for the entire Republic was the *Archives Nationales*.[835] Duchien points to the fact that contrary to the ideal of a central archive for the Republic, it was unrealistic in practice because it did not take into account the already existing archives of the *departements* (the new word for "provinces") and the *Archives communales*.[836] To deal with this contradiction, the law of 5 Brumaire Year V (26 October 1796) was passed to allow for the separate administration of the archives of the *departements*.[837] A century later in 1897, the *Archives Nationales* and those of the *departementes* were reunited under the same authority of a newly-created *Directeur des Archives de France* (now *Directeur general*) who was granted the right to issue nation-wide regulations regarding administration.[838] Notwithstanding the aforementioned developments, there was still no clear definition provided of what constituted "the archive" in France.[839]

Duchien comments that the evolution of the archive system in France was unsatisfactory and fell short of the revolutionary legislator's anticipation well into the

832 Francois Furet, *The Old Regime and the Revolution*, Volume I, trans. Alan S. Kahan University of Chicago press, 2004), 107-8
833 Michel Duchien op cit note 155
834 Ibid.
835 Ibid.
836 Ibid.
837 Ibid.
838 Ibid at 128
839 Ibid at 127

nineteenth century.[840] On 21 July 1936, a decree was passed which, for the first time, expressed two important principles, namely: (a) the obligation to transfer administrative documents that were out-of-date to the *Archives Nationales*, *depertementales* or *communales* and, (b) pronouncement that it was illegal to destroy, without the Director of the Archives of France or his representative's authorization, any administrative paper.[841]

With new technical advancement and the rapid growth of archival material, a completely new law conforming to academic and administrative conditions was created through the law of 3 January 1979 (no. 79-18), and the decrees of 3 December 1979. The most critical innovation of the law of 3 January 1979 was that it provided the first legal definition of the concept of "archives" which did not exist until then.[842] Through this law, not only was the concept of the archive legally defined, but there was also a division of archives as either being public or private, and that neither of these documents could be destroyed outside the requisite double authorization of the authority that issued or received it, and of the administration of the Archives.[843] Public access to the public archives was also regulated by the law of 3 January 1979, which stated a general rule of access of 30 years. For some documents, like those containing personal information of a medical nature, for example, the delay enumerated in the law of 3 January 1979 was up to 150 years.[844] To this Cassin says:

> This delay of access functions like a suppression, which keeps the "hot" information in limbo. The past never arrives directly in the present: it is a differed, disinfected dead past. Deliberation is stifled. To put it crudely: a past so regulated is a past for historians and statisticians, never a past for the citizen.[845]

The act of 3 January 1979 was not detailed in respect of the administrative organisation of the archives in France as this was dealt with by decree no. 79-1037 of 3 December 1979, which was designed for the enforcement of the act of 3 January 1979.[846] The body entrusted with the control of both public and private archives was the *Direction des Archives de France*,

840 Ibid at 128
841 Ibid.
842 Article 1 stated: "archives are the whole of documents, whatever their date, from and material appearance, either issued or received by any individual person or corporate body, and by any agency or organism, either public or private, in the course of their activity. The conservation of these documents is organized in the interest of the public, as well for the needs of administration and proof of rights od individual persons or corporate bodies, either public or private, as for the historical documentation of research"
843 Michel Duchien op cit note 155 at 129
844 Ibid.
845 Barbara Cassin, op cit note 129 at 18
846 Michel Duchien op cit note 155 at 129

a government agency part of the ministry of Culture and Environment.[847] There was a Director-General heading up the government agency, and they worked with a team of approximately 50 staff – though there were also three Inspector-Generals who had the responsibility of periodically visiting all repositories under the Direction and had to make accounts and observations to present to the Minister.[848] There are, however, two exceptions worth taking note of, namely: (1) the ministry of foreign affairs and, (2) the autonomous archive administration independent from the *Direction des Archives de France* possessed by the ministry of national defence.[849] As such, these ministries each bore the responsibility of carrying out the requirements of the law of 3 January 1979.[850]

The decree of 3 December 1979 functioned to deal with the preservation of documents and defined the "three stages" of documents being: (a) current records; (b) intermediate records and, (c) definitive archives. For each ministry, agency, establishment or body, there was provision of a record scheduled under the joint authority of the relevant agency and also of the *Direction des Archives de France*, in which there was a definition for each kind of documents as being (1) current, (2) intermediate or (3) definitive in age.[851] The work of selection fell on the archivists of the *Direction des Archives de France* but in certain instances, permanent authorizations of destruction were issued under the joint authority of both the relevant agency and of the *Direction des Archives de France*.[852]

To better explain the three ages of the documents and the responsibility attached to each age, it would be worthwhile to briefly outline each. The basis of the determination of the different ages of documents occurred through a record schedule provided for each ministry, agency, establishment or body under the joint authority of the agency itself and of the *Direction des Archives de France,* in which there was a definition for each kind of document as either current, intermediate or definitive.[853] The work of selection fell on the archivists of the *Direction des Archives de France*, but in certain instances, permanent authorizations of

847 Ibid.
848 Ibid at 130
849 Ibid at 129-30
850 Ibid.
851 Ibid at 132
852 Ibid.
853 Ibid.

destruction were issued under the joint authority of the concerned agency and of the *Direction des Archives de France*.[854]

First, current records were documents whose frequent use was necessary for the current activity of the agencies, establishments, and bodies which have issued or received them. Their preservation fell on those bodies, agencies and establishments which had issues or received them under the control of the *Direction des Archives des France*.[855] Second, intermediate records were documents that were no longer used as current and yet, because they possessed administrative value, they could not be selected or disposed of.[856] Their conservation was ensured in the special repositories (*depots de pré-achivage*) administered or controlled by the *Direction des Archives de France*, or on the premises of the agencies, establishment and bodies which had issued or received them, or in archive repositories under the *Direction des Archives de France*'s supervision.[857] Third, definite records were documents that had undergone selection and which were to be preserved forever.[858] Their conservation was ensured in archive repositories under the supervision of the *Direction des Archives de France*.[859]

The most important law to date in respect of the French National Archives is the Ordinance of 2004 – 178 (*Code du Patrimonie*/National Patrimony), which is the enabling legislation of the French National Archives. Ordinance of 2004 works in tandem with the act of 3 January 1979, and addresses the gaps of the tumultuous development of archival laws and the administration of archives from the Revolution until the period preceding its promulgation. There are also a few important legislative frameworks that speak to archiving, which function to complement the Ordinance of 2004.[860] The Ordinance of 2004 encompasses the contemporary legislative framework as it pertains to the French national archives, and will be discussed in greater detail below.

10.4.2 Archives in France: the contemporary legislative framework

854 Ibid.
855 Ibid.
856 Ibid,
857 Ibid.
858 Ibid.
859 Ibid.
860 These include Law 78-753 (Access to Information); Law 2000-230 (Evidence Law and Electronic Signatures); Decree 2001-272 (Electronic Signatures); Order of 25 March 2001 (National Archives' Services); Order of 25 March 2002 (Direction of National National Archives)

The Ordinance of 2004 states explicitly that from a historical, archaeological and artistic perspective, archives are a major concern of national patrimony, and are therefore considered to be national treasures.'[861] The Ordinance also expresses that anything defined as a national treasure can only be exported outside French territory with permission and reasons for export, with reasons for export including but not limited to export for exhibitions and for purposes of preservation. Furthermore, Ordinance of 2004 states that those items deemed to be a national treasure or historical archives could be expropriated, with the compensation provided by the state being based on fair market value.[862] Ordinance of 2004 also outlines that the state has the power to reproduce records it believes are of national historical significance, and that the state may also pre-empt the destruction or sale of records – thus an individual wishing to sell private records of historical significance, for example, is required by law to inform the state at least fifteen days prior to the sale.[863]

The Ordinance defines archives as a collection of documents, because of their form, their age and their material support, made or received by a physical or moral person, whether private or public, and in the course of their normal activities.[864] Public archives are defined as:

> 'Documents that result from the activities of the French Government, the Territorial Governments, and Public Institutions; documents that result from legal institutions that conduct business for the public or in the service of the public, and the minutes and documents of public and ministerial officials.'[865]

Article L.211-1 defines private archives, stating that private archives fall beyond the scope of the definition of public archives.[866] Private archives can be classified as "historical archives" if they are of historical interest to the public.[867] It is worth pointing out that decrees of the state determine the preservation of public archives, and these decrees outline the circumstances under which a public body will preserve its records and not forward them to the archives – in this instance, the decree will outline the manner of cooperation occurring between the public body and the archives in order to preserve the records.[868] In respect of life cycles of public records, Ordinance of 2004 states that when public records have outlived their current

861 L111-1 of Ordinance 2004-178 (National Patrimony)
862 L212-15 to 28
863 L212-30 to 34
864 L211-1
865 L211-4
866 L211-5
867 L212-15
868 L 212-2

usefulness for their generating agency, the records will be subject to appraisal, after which it will be determined whether the records will be preserved or destroyed – a decision dependent on whether there is any historical or administrative value to the record.[869]

Except in specific conditions, the Ordinance requires that: 'records belonging to a ministry or public body must be turned over to the archives when the ministry or body ceases to exist.'[870] Furthermore, Ordinance of 2004 states that Provincial governments are to look after their own records.[871] What this system of intricate legislative organisation spanning back from before the French Revolution outlines, is what sociologist Anthony Giddens says about the control and retention of information:

> There is a fundamental sense… in which all states have been "information societies", since the generation of state power presumes reflexively gathering, storage, and control of information, applied to administrative ends.[872]

In light of the information state Giddens describes in the quote above, which France arguably represents, Cassin finds that the French public and its democratically elected representatives are effectively denied the possibility of knowing what they – as the "we" comprising of the body of citizens – should consider in order to make informed political decisions.[873] She points out that the French memory archive through its written treatment (manifest an the numerous legislative documents governing the French National Archives) is neither memory as "I would not remember" in ancient Athens, nor is it the South African requirement for *full disclosure* – both of which she says are expressions of memory that is politically alive.[874] Cassin's criticism of the French memory archive has merit if one subscribes to archivists Joan Schwartz and Terry Cook's assertions that: 'Records are about imposing control and order on transactions, events, people, and societies through the legal, symbolic, structural, and operational power of recorded communication.'[875]

---

869 L 212-3
870 L. 212-5
871 L 212-6
872 Anthony Giddens, *The Nation-State and Violence. Volume Two of A Contemporary Critique of Historical Materialism* (Polity Press, Cambridge, 1985), 178
873 Barbara Cassin op cit note 129 at 18
874 Ibid.
875 Joan M. Schwartz - Terry Cook, "Archives, Records, and Power: The Making of Modern Memory", *Archival Science* 2 (2002), 13

The view expressed by Schwartz and Cooke above is not farfetched considering that (1) control is derived from the medieval Latin word *contrarotulare,* which indicates checking something on parchment or paper accounts,[876] and (2) As Roberto G. Echevarrîa points out, the word "archive" is derived from the Greek word *archè,* meaning power or government.[877] Speaking directly to Cassin's assertion that French citizens are effectively denied the possibility of knowing what they should consider in making informed political decisions,[878] John Van Maanen and Brian Pentland in their work on police records in the United States of America say:

> … What is recorded is never simply "what happened" because, first, no event can be fully or exhaustively described and, second, all records, as institutionalised forms, represent the collective wisdom of those who are trained to keep them … they are designed – implicitly or explicitly – to produce an effect in some kind of audience, which itself actively uses the records to interpret events.[879]

Notwithstanding the points put forward in the quote above, Van Maanen and Pentland warn that just because records are not neutral, factual or technical, it does not suggest conscious deceit or cynicism by the record-keepers – though admittedly deceit is possible.[880] They argue that the work of archivists is merely a critical lens from which one can analyse the conditions under which organisational records are used and produced.[881] While it could be argued that the intricate system of archiving in France gives the guardians of the archive (the archivists) power, it is important to highlight that archivists have to yield to the powers bestowed by the legislation over the archive responsibly, for an abuse of such power could jeopardize the right to integrity and other universal humans rights as was the case before the French Revolution of 1789 with the *lettres de cachet* as discussed in the work of Arlette Farge and Michel Foucault.[882]

In view of the importance of the memory archive in safeguarding human rights discussed through the French example on one hand, and Cassin's preference for memory that is politically alive on the other hand, it would be worthwhile to have a look at the post-conflict

876 James R. Beniger, *The Control Revolution. Technological and Economic Origins of the Information Society* (Harvard University Press, Cambridge Mass.- London 1986) 7-8.
877 Roberto G. Echevarría, *Myth and archive: A theory of Latin American narrative*. Second edition (Duke University Press, Durham - London 1998) 31-32
878 Barbara Cassin op cit note 129 at 18
879 John Van Maanen and Brian T. Pentland, "Cops and Auditors: The Rhetoric of Records", in: Sim B. Sitkin and Robert J. Bies (eds.), *The Legalistic Organization* (Sage Publications, Thousand Oaks, 1994) 53
880 Ibid.
881 Ibid.
882Arlette Farge & Michel Foucault op cit note 802.

democratic context of Rwanda in which the recovery of notions of "truth" in the Gacaca Courts and the proceedings of the International Criminal Tribunal for Rwanda (hereafter simply the ICTR), allowed for citizens to actively engage in the creation of what would become a national memory archive in respect of the 1994 genocide.

10.5 Conclusion

As Cassin argues, the regulation of memory is more than an administrative decision and constitutes a political act.[883] In furtherance of this point by Cassin, Van Maanen and Pentland find that a record is designed: '… implicitly or explicitly – to produce an effect in some kind of audience, which actively uses the records to interpret events.'[884]

To identify whether post-genocide Rwanda can be said to have allowed for its citizens to engage in memory that is both politically active and that produces an effect on them to actively use the record to interpret events relating to the genocide, Phil Clark's work on Rwanda may be prove useful.[885] The discussion on Rwanda will be prefaced by the work of Bernard Williams, which will provide a basis for discussion in Clark's work as it outlines the relationship between truth, instances of self-deception and how truth fits into the realm of politics.

11. CHAPTER 11: POST-GENOCIDE RWANDA: TRUTH, JUSTICE, MEMORY AND RECONCILIATION

11.1 Introduction

Writing on truth, politics and self-deception, Bernard Williams notes that the characterization of certain social practices requires an engagement with truth.[886] An engagement with truth is neither what we regard as true nor what other people hold as true,

883 Barbara Cassin op cit note 129 at 17
884 Van Maanen and Pentland op cit note 879
885 Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda,* in Law, order and restoration (Cambridge University Press, 2010)
886 Bernard Williams, "Truth, Politics, and Self-Deception" in Social Research Vol. 63, No. 3, Truth-Telling, Lying and Self-Deception (New School, 1996), 603

instead it is an engagement with the virtues of truth such as accuracy and sincerity.[887] Accuracy implies reliability or precision in the discovery or belief of truth, while sincerity implies what people believe to be true – that is, what they believe.[888] Williams argues that to speak of truth is to engage in the properties relating to belief formation.[889]

Williams highlights the importance of the method of inquiry in pursuit of truth, finding that the method of inquiry chosen can aid in answering a question.[890] He argues that what is needed are general ideas like *method of inquiring the truth* or a *method which favours finding the truth.*[891] According to Williams, there is no method of inquiry on truth will contain a desirable property if its efficacy in generating the belief of something would extend equally to generating the belief of that same thing.[892]

Just as there is no characterization of "the truth" which is both non-trivial and totally general, Williams argues that there is no general and non-trivial account of finding the truth or a method of acquiring the truth.[893] Speaking specifically of the transmission of truth over time and its transmission between people, Williams argues that self-deception (as the great enemy of truth) contains in it a kind of conspiracy between the deceiver and the deceived – meaning that there is no such thing as collective self-deception.[894]

This conclusion applies to the representation of politics in societies, especially considering that the status of politics as it is represented in the media is ambiguous between the transmission of discoverable truth and entertainment.[895] Consequently, Williams concludes that the transmitter of living myth is in league with their audience to tell a tale in which they will enter – thus the media, politicians and the audience all conspire to pretend that there is consideration of serious realities, and that the world is being responsibly addressed.[896]

887 Ibid.
888 Ibid.
889 Ibid.
890 Ibid at 604
891 Ibid.
892 Ibid.
893 Ibid.
894 Ibid at 615
895 Ibid at 616
896 Ibid.

Williams furnishes an example to this effect, highlighting that in ancient Greece those who heard songs about Troy conveying the living myth were not at Troy.[897] In our instance, however, he finds that we are supposed to be in some real relation to today.[898] For example, he notes that the medium of television has a disposition to make everything mediately immediate,[899] arguing that it contributes to the conspiracy of pretending there is a serious reality under consideration. Williams finds that this conspiracy is detrimental because it is closer to self-deception, which he calls the great enemy of truthfulness.[900] This is because Williams says where there is self-deception, it is often because there is a subversion of a real truth.[901] He warns that it cannot be forgotten that our need for relations to that world to be truthful or give up asking to what extent our institutions – including the institutions of freedom – help them to be so.[902] The ideas Williams presents will become manifest in this chapter when speaking on the proceedings of the Gacaca Courts in relation to truth, lies and even silence by participants and observers of the proceedings. It is worth embarking on an understanding of the function, arrangement and capacity of the Gacaca Courts in Rwanda as discussed by Phil Clark. To begin, a discussion on the Gacaca Courts' historical development will be had in order to provide some background into the nature and function the courts, and to understand the critical role the courts would play after the genocide.

11.2 The historical development of the Gacaca Courts

Prior to the genocide of 1994, Gacaca was in a state of constant change although it primarily served as a platform in which members of Rwandan communities could resolve disputes. While there is not much written history on Gacaca prior to the Belgian colonial era, Clark finds that Gacaca's authority was unwritten and operated by means of public hearings usually held outside in the village courtyard in view of sanctioning reconciliation after the community rules were violated.[903] Men as the heads of households oversaw its proceedings, and women prohibited from partaking unless they were defendants or claimants.[904]

897 Ibid.
898 Ibid.
899 Ibid at 615
900 Ibid at 616
901 Ibid.
902 Ibid.
903 Phil Clark op cit note 885 at 52
904 Ibid.

Facts relating to matters at the Gacaca Courts were heard by judges who were usually community elders, and after allowing defendants to respond to charges, judgment would be passed based on evidence with the reconciliation between the parties being manifest in the guilty party providing food and beer to be shared.[905] During the Belgian colonial period the Gacaca system was formally given judicial legitimacy, and was regarded as supplementing the existing court system, but it was interfered with by the Belgian colonial administration as judges were appointed politically rather than by the community as was customary.[906]

Clark points out that while before 1994 Gacaca was in ever-changing development, its methods towards reconciliation were not intended to deal with complex crimes such as genocide.[907] Considering that Gacaca's methods were aimed toward reconciliation, Clark writing on post-genocide Rwanda notes one detainee from the solidarity camps describing Gacaca as a platform in which people come together as a family would to resolve issues.[908]

In the period after the genocide, both government representatives and members of the public who attended the Gacaca hearings agreed that it contributed to the restoration of individual relationships.[909] Clark cites the views of the President of the Judge's panel from the Butamwa sector of the Rwandan province of Kigali Ville, who summed up the aforementioned views, saying: 'Gacaca is important for reconciliation because what happens here is real justice where we are all together, criminals and the innocent, and people can talk to one another face to face.'[910] Considering the mention of justice in the quote above, it may be useful to delve into the legal framework within which the crime of genocide and matters of justice were dealt with in Rwanda's Gacaca Courts after the genocide of 1994.

11.3 The legal framework for dealing with the crime of genocide.

The Rwandan context after the genocide of 1994 is one in which almost every citizen had individually been affected by violence, whether that be from personal injury, the injury or

905 Ibid at 53
906 Ibid at 53-4
907 Ibid at 50
908 Ibid at 195
909 Ibid at 194
910 Ibid.

death of a loved one, or direct involvement in perpetrating crimes of genocide.[911] Article 2 of the International Criminal Tribunal for Rwanda Statute (hereafter simply the ICTR Statute) states that the crime of genocide constitutes: 'a number of acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.'[912]

Under Article 2, the ICTR Statute proposes punishment for perpetrators of acts of genocide crimes in Rwanda, while Article 8 of the ICTR Statute established concurrent jurisdiction for the International Criminal Tribunal based in Arusha, Tanzania, and for Rwanda's national courts to hear matters relating to the crimes of genocide. As such, the issue of justice through legal bodies is a critical one in many post-conflict contexts because there are often questions including, but not limited to, the necessity of punishing perpetrators for their role in mass crimes. Inherent to the discussion is also a paradox of the response of a legal system to mass crimes that:

> Law is between the past and the future … between retrospective and prospective. Transitions imply paradigm shifts in the conception of justice; thus, law's function is inherently paradoxical. In its ordinary social function, law provides order and stability, but in extraordinary periods of political upheaval, law maintains order, even as it enables transformation.[913]

The emphasis on justice outlined above is because there is often a view held in contexts of injustice that: 'no reconciliation is possible … without justice.'[914] It is important to point out that reconciliation, too, as it is usually framed within the context of the law is both retrospective (because it looks at past wrong doings) and prospective (because it seeks to carve out a cohesive future). The law and the judicial system are, in such contexts, perceived as being critical to attaining both justice and reconciliation. The issue in Rwanda was not, however, as straight forward. This is highlighted in a 17 December 2002 Amnesty International Report on Gacaca, which found that the Rwandan judicial system faced several pressures even before 1994, and

911 Laurie A. Pearlman, 'Psychological Trauma', lecture for 'Healing, Forgiving and Reconciliation' project, John Templeton Foundation Press (Radnor, Pennsylvania, 2001)
912 These include (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group, and (e) forcibly transferring children of the group to another group.
913 Ruti Teitel, "Transitional Jurispdrudence: The Role of Law in Political Transformation", *Yale Law Journal*, Vol. 106, No. 7 (The Yale Law Journal Co. 1997), 2014
914 Institute for Contextual Theology, 'The Kairos Document: Challenge to the Church', 1985, accessed on 3 September 2021 at: *www.bethel.edu/~letnie/AfricanChristianity/SAKairos.html*

that after the genocide the judicial system was nearly destroyed both in terms of infrastructure and manpower with many judges and lawyers having fled the country or having been killed.[915]

In 1996 the Parliament of Rwanda passed the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1994 (hereafter simply the Genocide Law). This law created an innovation by categorising offenders according to four categories,[916] with punishments ranging from capital punishment to damages.[917] Another innovation was the introduction of the common law practice of plea-bargaining that could enable courts to reduce sentences for actors who confessed to crimes and named their accomplices.[918]

Additionally, while the aim of the Genocide law's two innovations mentioned above was to ensure speedy trials, with few people confessing there was soon a backlog of trials at the ICTR in Tanzania that the ordinary courts in Rwanda did not have the capacity to adjudicate over. Notwithstanding that some cases were handed over to the Gacaca courts, this backlog continued well into 2008 as expressed in an interview in the same year by the President of Rwanda, Paul Kagame, who said: 'Presently, the maintenance of 120,000 prisoners costs US$20 million per year, for which we receive assistance from the international community. This cannot continue in the long term: we have to find other solutions.'[919]

The agreed upon solution was that the Gacaca Courts had the requisite jurisdiction to hear most genocide crimes.[920] Initially, the exception to Gacaca's jurisdiction was crimes in category 1, which were to remain within the jurisdiction of conventional courts but with the amendments of Gacaca law in 2004, 2006, 2007 and 2008 respectively,[921] there was an

915 Amnesty International, 'Rwanda: Gacaca – A Question of Justice', AI Doc. AFR 47/007/2002, December 2002. 12-3. Available at: *https://www.amnesty.org/en/documents/afr47/007/2002/en/* accessed on 2 September 2021

916 These categories are outlined in Article 2 of the Genocide Law, with category 1 being leaders, planners, organizers and instigators of the genocide, known killers and rapists; category 2 including people who have committed homicide; category 3 including those who killed or inflicted bodily harm without the intention to kill, and category 4 including those that damaged property and stole.

917 The punishments based on the four categories outlined in Article 2 of the Genocide Law are listed in Articles 14-18 of the Genocide Law

918 This is found in articles 10-13 of the Genocide Law

919 Phil Clark op cit note 887 at 51

920 In articles 33-44 of the Genocide Law, there is an outline on the various processes of legal truth hearing.

921 These 2004 law decreased the number of levels Gacaca jurisdictions to three from four and reducing the number of judges required to hear cases to 7 down from 19. The 2007 law extended Gacaca jurisdiction to well-known category 1 criminals

incremental widening of the jurisdiction of the Gacaca courts over all genocide crimes with all appeals to be referred to the conventional courts.

In this respect, the writing of Yan Thomas as interpreted by Marta Madero, argues that "context" in relation to any event – which is indispensable in the description of an alleged crime – is the sole responsibility of the judge.[922] Madero notes that for Thomas, institutional forms of memory invoked in courts of law function as if everyone privy to the case was present when the alleged crime occurred, while also positioning the judge in the matter as a "judge-historian" who integrates the context of an act to describe and attribute it.[923] Furthermore, from a legal perspective, the prosecution of a crime occurs as if judges were present when the alleged crime occurred – especially if the accused who faces judgment is still alive.[924] Madero finds that for Thomas, the relationship between an act of crime and its description as a crime is within the control of only the judge in a court of law.[925] It follows, then, why for Thomas it is the law that illuminates evil, leading to the conclusion that: "disorder first came into the world from within the law itself".[926] This does not mean the law brought disorder, but that in the power of naming, law creates and defines what crime is – this aligns with the writing of Bourdieu who points out that the linguistic ability create things, and to name them is a power ascribed to legal actors.

Considering the writing of Thomas as interpreted and presented by Madero, a conversation relating to the goals of the Gacaca courts in respect of truth, justice and reconciliation will be embarked on to gain insight on how these goals were addressed by judges considering the post-conflict context of the genocide. This is an important trajectory of the discussion at hand because the Gacaca Courts, especially through the buy-in of citizens, represent a tangible and participatory means of brokering peace, promoting truth, justice and reconciliation in the aftermath of the genocide.

---

922 Marta Madero, "Interpreting the Western Legal Tradition: Reading the work of Yan Thomas" in *Annales. Histoire, Sciences Sociales*, Vol. 67:1, 2012 (trans.) Kathleen Guilloux, (France, Editions de L'E.H.E.S.S.), 123
923 Ibid.
924 Ibid at 122
925 Ibid at 123
926 Ibid at 106

11.4 Rwanda's post-genocide goals through the Gacaca Courts: truth, justice and reconciliation

While Gacaca was created as part of a hybrid approach through which truth, justice and reconciliation could occur in post-genocide Rwanda, it is important to note that it also had substantial limitations. This view is succinctly expressed in a 2006 interview Clark conducted with President Paul Kagame of Rwanda who pointed out that the colossal burden of an enormous caseload of both old and newly identified cases was putting strain on Gacaca,[927] saying:

> I have to stress that Gacaca is not open-ended. It has to have an end. It won't just stop if we reach 2008 but, at the same time, it can't continue forever because we have other goals to pursue. Open-endedness would be negative for the whole country… even an amnesty is possible, especially for low-level perpetrators. You'll remember that we used an amnesty for some people in 2003. Anything is possible, even with some of the very serious cases. We'll give time to our various processes to deal with these cases but we're talking about justice on a massive scale and we have to look at other approaches.[928]

Indeed, the Gacaca Manual, created to complement the Gacaca law, points out that mandate of the courts is: 'to help facilitate the emergence of the truth of what happened during the genocide and other massacres; to recognise the victims and the nature of the damages inflicted on them … these are the tasks of the Gacaca Jurisdictions.'[929] It is interesting to observe that the introduction of the Gacaca Law to which the Manual above refers reads: 'that a major purpose of Gacaca is to reconstitute the Rwandan society that had been destroyed by bad leaders who incited the population into exterminating part of the Society.'[930]

Having read both the Gacaca Manual's mandate and the introduction to Gacaca Law together, it becomes clear that violence inflicted on victims stems not only from perpetrators who partook in killing, but also from leaders who incited the population to exterminate parts of society. Furthermore, as Clark observes, according to the Executive Secretary of the National Unity and Reconciliation Commission (hereafter simply the NURC), Fatuma Ndangiza, Gacaca's aims are: 'Not to administer the classical system of justice, but to re-

927 Phil Clark op cit note 885 at 242
928 Ibid.
929 Gacaca Manual, 12
930 Gacaca Law, 2

establish harmony and to bring citizens who were manipulated to commit crimes by the state intelligentsia, back to the right path.'[931]

The notion of manipulation to commit crimes by state intelligentsia mentioned in the quote above by Ndangiza speaks to what Patrick Mazimpaka, a Presidential envoy for the Rwandan government, expressly articulated as a belief that outsiders sowed the social divisions that led to the killing in 1994.[932] Aloisea Inyumba elaborates on the identities of some of these outsiders, describing the divisions in Rwanda as stemming from white people – referring to colonial administrations that ruled Rwanda before its independence.[933]

The mistrust and perceived complicity of outsiders in exacerbating the conditions for the genocide by the post-genocide government of Rwanda was evident as high up as the President's office, for in a 2003 Interview, Rwandan President Paul Kagame was quoted speaking on the effectiveness of the ICTR that sat in Arusha, Tanzania, saying:

> [The United Nations Statute of International Criminal Tribunal for Rwanda] has performed very poorly and consumed huge amounts of resources for doing very little … the world is ready to keep wasting resources for doing nothing. The tribunal was not established to deal with the problem we are talking about, of genocide in Rwanda. It's dealing with paying huge salaries to [United Nations] workers or other individuals.[934]

The reference to poor performance relates to the fact that by the date of the interview in question, the ICTR had heard forty five cases with thirty eight convictions out of hundreds of pending cases.[935] By Contrast to the ICTR, for Executive Secretary of the NURC, Fatuma Ndangiza, Gacaca represented: 'a form of justice originating from and serving Rwandan culture.'[936] One Rwandan commentator expanded on what the characteristics of this justice were, saying:

> Justice at Gacaca is very important for reconciliation … Justice at Gacaca is a form of state-controlled revenge, and this lessens the need for revenge by the community … justice

931 Phil Clark op cit note 885 at 135
932 Patrick Mazimpaka, "Reconciliation and Democratization Processes", in *Reconciliation and Democratization: Experiences and Lessons Learned in Reconciliation and Democratization from Germany, South Africa, Namibia and Rwanda* (Kigali, National Unity and Reconciliation, 2003), 19-23
933 Aloisea Inyumba, 'Report on the Consultative Meetings held at Grassroots Level by the Unity and Reconciliation Commission Executive Secretary', in NURC *Report on the National Summit of Unity and Reconciliation,* 2000, 41
934 Phil Clark op cit note 885 at 136
935 Ibid.
936 Ibid at 89

> at Gacaca is communal. It is not handed down by a judge. The way everyone takes part in doing justice at Gacaca means that reconciliation is possible.[937]

Considering mention that everybody takes part in "doing justice" at Gacaca expressed in the quote above, it becomes clear why the former Minister of Justice and Institutional Relations in 2000 proclaimed: 'the success of Gacaca largely depends on an active and unconditional participation by the population.'[938] Taking into account the varied views of Gacaca's role, Clark points out that Gacaca is a complex and multifaceted body that contains what he terms as an "internal hybridity" encompassing the wide range of historical influences, objectives and processes that inform its proceedings.[939]

Clark observes that after the genocide, the Gacaca Courts were state-initiated through legislation on which the courts drew their authority and, the Gacaca Courts also functioned beyond the scope of official political or judicial structures.[940] Certainly, one of the features of this internal hybridity is that while the Gacaca Courts had jurisdiction over matters with legally inscribed consequences like imprisonment, for example, there was an intentional political decision by legislators that professional judges and lawyers would not be directly involved because of concerns that their expertise in official legal argument would intimidate participants and deter them from partaking.[941] Even the former Chief Legal Advisor of the Gacaca courts, August Nkusi, who is a lawyer by profession, said to Clark in a 2003 interview that: 'at Gacaca the truth ultimately comes from the population … because they saw what [the perpetrators] did … they saw everything with their own eyes.'[942]

The concept of truth mentioned by the former Chief Legal Advisor above succinctly highlights Gacaca's hybridity in discursive and formal methods, as well as legal and non-legal objectives.[943] This is because the notion of "truth" is highly contested, revealing the tensions that exist between its conception and the practical difficulties that it poses for discussions regarding Gacaca's legal and non-legal aims to punishment, and to provide for the restoration of fractured social relations.[944]

---

937 Ibid at 248
938 Jean de Dieu Mucyo, "Minutes of the Symposium on Gacaca", Hotel Umabano, Kigali, 6-7 March 2000, 11
939 Phil Clark op cit note 885 at 48
940 Ibid at 50
941 Ibid at 64
942 Ibid at 138
943 Ibid at 186
944 Ibid.

For Clark, the difficulty of truth also arises from the fact that survivors in contexts of fractured social relations may describe, in a single testimony, both "legal truth" (having bearing on the justice and guilt or innocence of a suspect) and what Clark calls "therapeutic truth", which is personal and emotional in pursuit of healing and reconciliation.[945] This tension is not unique to the Rwandan context and is observed by Anthony Holiday in the South African TRC, except he terms it as the truth relating to "forensic" facts and that relating to "psychological" facts,[946] saying:

> There were forensic facts of politico-legal history, concerning what had been done, by whom and to whom and the political purposes (if any) for which these crimes had been committed. There were, on the other hand, the psychological facts, pertaining to how people now felt about what had been done to them. The former set of facts served the interests of the TRC's truth-gathering task, while the latter set, once bared in public, would be grist to the mill of national reconciliation.[947]

Speaking on the South African TRC, legal scholar Jeremy Sarkin noted that in South Africa, reconciliation and punishment were considered to be contradictory objectives, such that political compromise in view of reconciliation allowed for amnesty to be traded for truth (described within legally inscribed parameters).[948] In contrast to the South African case, the ICTR proposed punishment for perpetrators of genocide in Rwanda as a pre-requisite for peace and, ultimately, the objective of reconciliation.[949]

Commentators on post-genocide Rwanda approached hybridity in the Gacaca Courts as it relates to legal pluralism, describing a context where 'two or more legal systems coexist in the same social field.'[950] Clark says this view results from a focus on the historical development of Gacaca alone,[951] leading some international media to refer to it as a "traditional" or a "village" practice.[952] Clark says the aforementioned descriptions imply ideas that Gacaca is

945 Ibid at 187
946 Anthony Holiday, "Forgiving and Forgetting: The Truth and Reconciliation Commission", in S. Nuttall & C. Coetzee (eds.), Negotiating the Past: The Making of Memory in South Africa, (Oxford, Oxford University Press, 2000), 54
947 Ibid.
948 Jeremy Sarkin, "The trial and Tribulations of South Africa's Truth and Reconciliation Commission", *South African Journal on Human Rights,* Vol. 12, No. 4 (1996), 629
949 Phil Clark op cit note 885 at 31
950 Sally E. Merry, "Legal Pluralism", in *Law and Society Review*, Vol. 22, No. 5 (Wiley, 1988), 870
951 Phil Clark op cit note 885 at 49
952 See for example, "Rwandans face village justice" in *Mail & Guardian* 5 July 2004, available at: *https://mg.co.za/article/2004-07-05-rwandans-face-villa-justice/* accessed on 2 September 2021; 'Rwanda ends

"indigenous" or occurs "naturally" and is therefore inevitably accepted by the community.[953] If anything, he argues that Gacaca is "endogenous" – connoting that it was initiated and synthesised within, by and for members of Rwandan society.[954] A number of observers were not sold on the idea of a purely community-based model for truth, justice and reconciliation. For example, a 17 December 2002 Amnesty International Report on Rwanda's Gacaca argued:

> Since community members both provide the information regarding the genocide offences and judge the suspected perpetrators, anything outside of their active and honest participation nullifies the fairness of the tribunals.[955]

Other observers found no issue with Gacaca being a community-based model, but were less forgiving of the process itself, with scholar Lars Waldorf criticizing the extent to which the state in respect of the Gacaca Courts was said to have compelled or coerced citizenry participation.[956] At this juncture, it must be noted that both views of the observations outlined above came from non-Rwandan commentators, and that neither view was backed by evidence from the Gacaca hearings themselves.

In respect of the critique on fairness in Gacaca in the quote reflecting the 17 December 202 Amnesty International Report above, this perspective is void of an understanding that both the Gacaca Law and the Gacaca Manual highlight the critical role of the judges in the Gacaca Courts to not only mitigate unfairness in the hearings through the powers conferred onto them, but also to provide guidelines to be followed by judges to regulate conduct in proceedings.[957]

In respect of the critique that the state is coercing people to attend Gacaca hearings, Clark acknowledges that while there were cases of state officials who encouraged and even coerced people to attend Gacaca hearings, he points out that there is evidence that this was not

---

Gacaca Genocide tribunals' Deutsche Welle (DW) 19 June 2012, available at: *https://dw.com/en/rwanda-ends-gacaca-genocide-tribunals/a-16033827* accessed on 2 September 2021

953 Phil Clark op cit note 887 at 50

954 Ibid.

955 Amnesty International, 'Rwanda: Gacaca – A Question of Justice', AI Doc. AFR 47/007/2002, December 2002. 12-3. Available at: *https://www.amnesty.org/en/documents/afr47/007/2002/en/* accessed on 2 September 2021

956 Lars Waldorf, "Mass Justice for Mass Atrocity: Rethinking Local Justice in Transitional Justice", in *Temple Law Review*, Vol. 79, 2006, 3

957 For example, Articles 30 of the Gacaca Law authorised judges to halt individual testimonies; banish participants who are antagonistic or violent to either judges or members of the community in the general assembly of the hearings or halt the entire proceedings if they are of the view that certain testimonies would damage the pursuits of Gacaca in respect of truth, justice and reconciliation. The Manual on Gacaca was created to expanded on aspects of the Gacaca Law, and it afforded judges significant powers to control the content and purpose for which evidence is given in order to maintain decorum and even security during hearings.

a widespread phenomenon.[958] Refuting claims of widespread coercion, there are instances in which some survivors exercised their agency to elect to attend the Gacaca hearings intermittently or not at all, depending on the state of their mental well-being at the time of the hearings. Clark's 2006 interview with a female survivor is a case in point, from which the survivor says:

> It is too difficult to constantly go to Gacaca. You hear many terrible things there, over and over again those things that happened in the past. I have suffered nightmares because of what I hear at Gacaca and the things it puts back in my mind.[959]

Revealed in the first sentence of quote above, is that the female survivor has arguably exercised her agency to choose not to attend *all* Gacaca hearings considering the terrible things about the past discussed there. In respect of the agency to not attend any of the Gacaca hearings at all, there is a revealing interview by Clark with Nathan from Nyamata, a Pastor of the Pentecostal denomination whose wife was killed in 1994. In it, Nathan boldly asserts:

> I am not always mentally stable when I think of what happened to my wife. I cannot identify her killers. I have heard news of who these people are but I am not sure and I think it is better not to know.[960]

It is interesting that the quote above comes from a pastor of a church because Clark emphasises that another sign of Gacaca's internal hybridity is the way in which Judeo-Christian religious rhetoric played a role in several Gacaca jurisdictions. This Judaeo-Christian religious rhetoric was directly informed by biblical texts such as John 8:32, which reads: 'the truth shall set you free'. Through the imperative message of biblical texts like John 8:32, Clark points out that notions of truth in the Gacaca hearings were often framed in parallel to confession as a critical means by which a perpetrator would voluntarily recognise the wrongfulness of their crimes – in Judaeo-Christian religious terms, they would recognise their sinfulness and the consequent separation from God's salvation.[961]

Indeed, it is explicitly clear in Judeo-Christian teachings that for a pertinent sinner (for whom many would have likened to suspects and perpetrators of the genocide in Rwanda), repentance followed by confession – manifested in the Gacaca hearings as acknowledgement

958 Phil Clark op cit note 885 at 158
959 Ibid at 149
960 Ibid at 199
961 Ibid at 197

to the crime by truth-telling – is the starting point towards a process of reconciliation with God (in post-genocide Rwanda, reconciliation would occur between the perpetrator and members of the affected the community). For example, such Judaeo-Christian religious rhetoric may have been supplemented in various contexts by other biblical texts like Acts 3:19, which reads: 'Repent, then, and turn to God, so that your sins may be wiped out', and Proverbs 28:13, which reads: 'whoever conceals their sin does not prosper, but who confesses and renounces them finds mercy'. In Clark's interview with a widow in Butare whose brother and son were imprisoned as suspects for perpetrating genocide crimes, she reveals the existence of a "Christian Gacaca" that not only coexists but, she insists, complements the purpose of the officially recognised Gacaca, saying:

> At Gacaca, the judges will bring us to the truth, just as the Gacaca with the priests shows us how we can find the truth. The priests taught us to talk together. They were very gentle with us, saying God loves peace and truth, so we must love peace and truth.[962]

The sentiments expressed by the widow in the quote above are interesting because while she is neither suspect nor perpetrator, the Judaeo-Christian religious rhetoric of truth and peace taught by the priests in the "Christian Gacaca" have clearly impacted her perspective. It appears that the teachings of the priests seem to have enabled her to accept the legitimacy and the decisions that the officially recognised Gacaca may make in respect of not only her brother and son, but perhaps of any other suspects and perpetrators as well. Furthermore, Clark highlights that the Judaeo-Christian religious rhetoric of truth as confession in some of the Gacaca hearings may have allowed survivors to experience catharsis through access to knowledge from suspects and perpetrators about what happened exactly – potentially opening a way for apology, reparation and even the granting of forgiveness.[963]

At this juncture it, is worth pointing out that unlike the testimony of the widow above who made explicit reference to a Christian Gacaca – thus revealing an understanding of the role of Judaeo-Christian religious rhetoric in impacting participation in some of the Gacaca hearings – other participants in the Gacaca hearings were not necessarily aware of the presence of Judaeo-Christian religious rhetoric implicit in their understanding of truth as confession. For example, for those who pleaded guilty for partaking in the crime of genocide, truth as confession was merely a practical means to both reconcile with and to reintegrate into society

962 Ibid.
963 Ibid.

after serving their prison sentences. To corroborate this point, Clark's interview with a detainee who committed murder, and was held at a camp in Butare is telling, with the detainee saying:

> But [the confession] will reconcile me to those around me because I have confessed, because I have told the truth… I will probably have to return to prison because of my crimes and I will probably do some community work as punishment.[964]

As is evident from the quote above, the Judaeo-Christian religious rhetoric of truth as confession is equally applicable to the suspects and perpetrators themselves, though perhaps not always explicitly. A detainee named Richard who claimed to have been unjustly accused of complicity in murder was noted by Clark as saying:

> The community will definitely accept what I say at Gacaca. I will stand up and tell them everything I saw when these killings occurred, and they will agree that I am telling the truth.[965]

To this point, Clark notes that of the guilty suspects he interviewed, many claim to have felt unburdened from feeling shame and dislocation through truth-telling as public confession and apology in the presence of victims and the general assembly at Gacaca.[966] Even where truth as public confession did not lead to their exoneration, many suspects and perpetrators believed that it would enable them to benefit from a plea-bargaining system found in the procedure of the Gacaca Courts if they were found guilty.[967]

While not every person would have subscribed to notions of truth as confession as informed by Judeo-Christian religious rhetoric, that truth was seen by most participants as critical in Gacaca is important. This is what Clark describes as the potential for the concept of truth, even in its Judaeo-Christian rhetorical framework, to unburden people from the shackles of feeling uncertaint and disconnected from their community as a consequence of having experienced personal injury relating to the genocide.[968]

What the perspectives on truth-telling as confession discussed above highlight is that there was buy-in from various members of Rwandan society that the Gacaca Courts were

964 Ibid at 243
965 Ibid at 193
966 Ibid at 194
967 Ibid at 193
968 Ibid at 196

spaces for truth recovery. Notwithstanding this, the buy-in did not always translate into truth-telling because there were instances in which lies were identified in Gacaca hearings. Considering the point on lies, it is worthwhile to discuss some of the issues lies and even silence may have posed in view of Gacaca's aims at truth recovery as a means of attaining justice, reconciliation and possibly even forgiveness in post-conflict Rwanda.

11.5 Overcoming Issues related to truth-telling, truth hearing, silence and truth-shaping: the importance of the memory-archive

Highlighting the issue of lies in Gacaca hearings and their bearing on the truth recovery process in the Gacaca Courts, Clark's 2008 interview with the Executive Secretary of the NURC, Fatuma Ndazinga, is important as they are recorded as saying:

> Truth-telling has become our biggest challenge. In our original surveys, 90 per cent of people were favourable toward Gacaca's objectives. They said they trusted the *inyangamugayo* [judges] but they had some concerns about whether they would hear the whole truth from the perpetrators… now many victims doubt the truth will come out of Gacaca. They hear many lies from the perpetrators and suddenly these new returnees [from the diaspora] are attending Gacaca and talking about genocide events that they never saw with their own eyes.[969]

Considering doubts about hearing the whole truth along with the issue of lies, in 2008 the Projects coordinator at NURC, Oswald Rutinburana, is quoted by Clark as saying:

> Many people are not willing to tell the truth and as a result there is a long process involved in sieving the information. People are not always straight. They go round and round, and the judges require smart tactics in finding out the truth. Eventually the truth is known but the process becomes very long.[970]

For Clark, the prevalence of lies in contrast to truth is interesting, and requires that there be a critical analysis on the means by which the notion of "truth" in the Gacaca Courts can be understood from three interrelated perspectives that cumulatively encompass the process of truth recovery. These three interrelated perspectives are what Clark calls (1) truth-telling as the narration of personal and collective experiences of people, (2) truth hearing as the reception of truth-telling and, (3) truth shaping as a mediated outcome – usually occurring beyond the confines of the space in which truth-telling and truth hearings occurs, resulting in the

969 Ibid at 190
970 Ibid.

reinterpretation of evidence from truth-telling and truth hearing in order to create a record.[971] These three perspectives arguably operate in a manner like an equation, from which the combination of truth-telling and truth hearing allows for truth shaping to occur. Indeed, Clark highlights that the effectiveness of truth-telling is hinged on the extent of truth hearing, meaning that truth-telling alone is not inherently restorative.[972] To better understand how these three interrelated perspectives operate, Kirk Simpson's work may prove helpful because Simpson, writing specifically on the socio-political context of Northern Ireland, provides a clear theoretical framework for how the process of truth recovery in post-conflict contexts can be approached in view of attaining reconciliation.[973]

Simpson highlights that truth recovery (what Clark calls truth shaping arising from truth-telling and truth hearing) is a critical factor to any transitional justice model as it aids in ameliorating the widespread damaging legacy often found in post-conflict contexts.[974] For Simpson the core political, social and legal objective of a truth recovery process is to overcome obstacles of a weak grasp of history relying on fabrication and myth, and also to foster a consensual history (truth shaping) that resists the dominant group's historiography.[975] Simpson argues that this approach would allow for an open society in which the government, policy-makers and citizens alike show a commitment to a sufficiently strong cross-community consensual moral backdrop.[976]

Simpson believes that a critical interpretation of the past as existing for people in "history" takes into account the fact that individual recollections (forming part of truth-telling) are often inescapably subjective.[977] Similarly, Philosopher Alasdair MacIntyre highlights that: 'humans seek to arrange the various experiences and beliefs that constitute their life into an "ordered unity" that gives meaning to their life as a whole.'[978] It is for this reason why Jean-Paul Sartre's character Roquentin in his novel titled *La Nausée* says:

971 Ibid at 188
972 Ibid at 196
973 Kirk Simpson op cit note 157
974 Ibid at 2
975 Ibid at 132
976 Ibid.
977 Ibid at 131
978 Alasdair MacIntyre op cit note 162 at 197

> A man is always a teller of tales, he lives surrounded by his stories and the stories of others, he sees everything that happens to him through them; and he tries to live his own life as if he were telling a story.[979]

Considering the sentiment expressed in the quote above, Simpson is opposed to an idea of "history" used with the term "objectivity", finding that this allows for an uncritical historical interpretation that is shielded from critical scrutiny – this often promotes a historical interpretation resulting in a set-up by dominant political actors because it encapsulates only truth-telling and not truth hearing, thus lacking a critical negotiation component that allows for truth shaping.[980] To highlight the danger in this, Simpson uses the totalitarian regime of the Nazis as an example, highlighting that one of the primary goals of their reign was to eliminate history and replace it with a warped and fabricated cult of destruction and conquest – one which would function to support their goal towards a thousand-year Reich.[981]

Simpson says what is deemed "acceptable" in terms of the past and how it is told in the future is a standard that should be totally reliant on some form of consensually negotiated version of history (truth shaping arising from both truth-telling and truth hearing), instead of an imposed singular narrative as a limited expression of truth-telling that is often ideologically motivated.[982] Simpson warns not to underestimate what he describes as: 'the interpretive dimension in language reclamation and victim storytelling for stories are often retold not only according to subjective perceptions but also local legal, cultural and political contexts and the conventions and customs of situated narrative structures.'[983]

As a result, Simpson endorses any past from which there is a consensually negotiated version of history containing the inescapably subjective recollections of individuals.[984] Thus, for Simpson, the Gacaca courts would arguably be an appropriate platform to consensually negotiate a version of history – especially considering that it encouraged both victims and perpetrators alike to retell their version of history in a public manner without the involvement of legal actors in view of attaining social and political reconciliation in post-genocide Rwanda.[985] Simpson warns, however, that transitional regimes must not try to impose master

979 Jean-Paul Sartre op cit note 163 at 56
980 Kirk Simpson op cit note 157 at 131-2
981 Ibid at 126
982 Ibid at 69
983 Ibid at 68
984 Ibid.
985 Ibid at 69

narratives that allow little or no room for dissent, but should instead recognise the value of inclusivity in discourse.[986] Highlighting Simpson's concern, Clark's interview with a sixty-two-year-old survivor of the Rwandan genocide, Patrice, records him saying:

> I hope that we [survivors] will be allowed to speak freely at Gacaca. I have much to tell about what I saw during the genocide… I saw many crimes with my own eyes and I want to tell what I know at Gacaca.[987]

It is worth pointing out that the case in the quote above is one where the speaker indicated that they are willing to engage in truth-telling. In a different case, Grégoire, a survivor in Butare, opted to engage in the Gacaca hearings through truth hearing alone, saying to Clark in an interview:

> All of these prisoners have confessed their crimes and I'm sure now that they are ready to tell us the truth, to say what they did. But I just want to look at them now. I don't want to say anything. I just want to look at them and watch what they do. I won't speak at Gacaca. I will just listen.[988]

In the quote above, Grégoire, who was unwilling to engage in the Gacaca hearings by truth-telling, captures the sentiments of those in Rwandan society who had doubts about whether the discursive space that Gacaca created would necessarily contribute to engagement between perpetrators and victims that is meaningful beyond the confines of the Gacaca hearing.[989] In Gacaca it appears that victims who felt sceptical about truth recovery were not only permitted to hold these differing views, but were also encouraged to retell *their* version of history in a public manner in the hope that this would contribute towards the achievement of social and political reconciliation for Rwandan society.[990]

Allowing differing views arguably signals a commitment to truth recovery from the Rwandan government, a commitment which Simpson argues is important because one on hand, it considers the fact that individual recollections are often inescapably subjective and,[991] on the other hand, it indicates the presence of characteristics that will serve to strengthen democratic participation and prevent potential apathy on the part of citizens.[992] Considering some of the

986 Ibid at 60
987 Phil Clark op cit note 885 at 193
988 Ibid at 193
989 Ibid at 195
990 Kirk Simpson op cit note 157 at 69
991 Ibid at 131
992 Ibid at 132

features of post-genocide Rwanda in the process towards truth recovery, Simpson would likely to find that Rwanda prima-facie possess the necessary tools to achieve the goal of reconciliation.

To better understand how the process towards reconciliation occurred in Rwanda considering the genocide, John Paul Ledarch's conception of reconciliation may prove useful. This is because for Ladarch, reconciliation is relationship-centric and requires: 'that responses to conflict must penetrate to the level of individual relationships.'[993] According to Ledarch: 'to enter reconciliation processes is to enter the domain of the internal world, the inner understandings, fears and hopes, perceptions and interpretations of the relationship itself.'[994]

Considering, however, that some people in the Gacaca hearings either told lies (foreclosing the possibility of truth-telling and thus truth hearing) or refused to speak at all (engaging solely in truth hearing, if they attended the hearings at all), the question becomes whether the truth recovery process as truth shaping is compromised and, by consequence, whether it compromises the objective of reconciliation in Rwanda? This question is necessitated by the fact that Simpson's theory arguably prioritises speech as being central to the truth recovery process. On the topic of truth as speech, the theory of communicative action by Jürgen Habermas comes to mind as he argues that in order to engage in any negotiation, which Simpson's theory on truth recovery proposes, people should be "communicatively competent".[995]

To address the concerns outlined above, the work of Alexandre Dauge-Roth may be helpful. This is because Dauge-Roth is inclined to disagree with Simpson and Habermas's insistence on speech as a necessary condition for entry into the process of reconciliation as a negotiated process. Dauge-Roth focuses on surviving the genocide and the aftermath, saying:

> To bear witness represents the possibility "of" and call "for" a dialogic space where survivors seek to redefine the present meaning derived from their experience and its haunting resonance. In their attempt to re-envision and re-assert themselves through testimony, survivors move from a position of being subjected to political violence to a

993 John Paul Lederach op cit note 175 at 185
994 Ibid.
995 Jürgen Habermas, *The Theory of Communicative Action (English) – Vol. 1: Reason and the Rationalization of Society* (London, Heinemann, 1984)

> position that entails the promise of agency and the possibility of crafting the meaning of who they are.[996]

This is because Dauge-Roth's work on witnesses in the Gacaca hearings refutes depictions of the Gacaca courts as purely discursive spaces in which the silence of survivors is deemed to be representative of the perpetuation of their trauma.[997] In fact, Dauge-Roth holds the view that when bearing witness to their suffering and its aftermath through attending hearings, survivors should not be described as "having survived a trauma", but rather as "still surviving" as an expression of active engagement.[998]

Thus for Dauge-Roth, it is not always the testimony of the survivor itself that is critical but the ways in which bearing witness (especially for those who choose not to speak) can allow them an opportunity to re-envision and re-assert themselves – perhaps in the future outside of the proceedings of Gacaca hearings.[999] This is especially poignant considering that as Clark conceptualised it, truth shaping often occurs outside the confines of the space in which truth-telling and truth hearing occurred.[1000] If it is accepted that bearing witness can allow the witnesses to re-envision and reassert themselves in the future,[1001] it would set the scene for the emergence of what Mark Drumbl calls the "discursive potential".[1002] This discursive potential is arguably manifest in the words of a survivor who, while having lost his father, two brothers and a sister in the genocide, is quoted by Clark as saying:

> Gacaca is important for us survivors because it helps us live and work in the community again … All the survivors come together and talk about what has happened. We realise that we are in the same situation, that we have all had family who were killed. We understand each other and we realise that we are not alone.[1003]

Considering that the survivor's quote above not only speaks of their positive personal experience of Gacaca, but also of other survivors with whom they are in a contact, it can be argued that the relationship-centric form of reconciliation outlined by Ledarch appears to have begun in this instance. This is because attendance of Gacaca hearings, as per the words of the

---

996 Alexandre Dauge-Roth, 'Testimonial Encounter: Esther Mujuwayo's dialogical Art of witnessing', (Sage Publications, 2009), 167-8
997 Ibid at 166-7
998 Ibid.
999 Ibid.
1000 Phil Clark op cit note 885 at 188
1001 Alexandre Dauge-Roth op cit note 996 at 166-7
1002 Mark Drumbl, *Atrocity, Punishment and International Law,* (Cambridge, Cambridge University press, 2007), 96
1003 Phil Clark op cit note 885 at 194

survivor above, appears to have assisted both the speaker and other survivors in entering what Ledarch describes as: 'the domain of the internal world, the inner understandings, fears and hopes, perceptions and interpretations of the relationship itself'[1004] – in this particular case, their relationship to the genocide and those who perpetrated it. Perhaps, then, the entry into the internal world described by Ledarch is the beginning of healing and eventually reconciliation. Indeed, Malvern Lumsden proposes that healing is not only necessary, but is also essential to the aims of reconciliation because it first involves: 'rebuilding a coherent sense of self and sense of community.'[1005]

Having answered the questions posed above on the issue of lies (as a foreclosure of truth-telling) and witnesses who choose not to engage in truth-telling (engaging in truth hearing exclusively), Clark notes that the government of Rwanda – through evidence gathered in the Gacaca hearings to teach civil lessons to the population – has proposed an initiative for truth shaping.[1006] Expanding on this truth-shaping project, Domitilla Mukantaganzwa, Executive Secretary of the National Service of Gacaca Jurisdictions, is quoted by Clark as saying:

> We have gathered so much evidence over all these years … now Gacaca is contributing to changing people's minds about the criminal justice system. They have seen that Gacaca has dealt with all levels of criminals. They have seen others accused, even by their own relatives, and they have learnt what good behaviour is how they must live together in harmony.[1007]

The material and symbolic representation of the Rwandan government's commitment to truth shaping by contributing towards reconciliation and maintaining peace in Rwanda is the Gacaca Document Centre in the capital city of Kigali. Shedding light on this Centre the Director of Training, Mobilisation and Sensitization at the National Service of Gacaca Jurisdictions, David Bikesha, said to Clark in an interview:

> We will have a meticulous record of everything the population has discussed at Gacaca … People will come from all over to consult these records. They will understand the events that overwhelmed us in 1994 and they will know how to stop such things ever happening here again.[1008]

1004 John Paul Ledarch op cit note 175 at 185
1005 Malvern Lumsden. 'Breaking the Cycle of Violence', *Journal of Peace Research*, Vol. 34, No. 4 (Peace and Research Institute Oslo, 1997), 381
1006 Phil Clark op cit note 885 at 191
1007 Ibid at 192
1008 Ibid.

Considering the mention of the meticulous record of everything discussed at Gacaca mentioned in the quote above, it is clear that the government of Rwanda seeks to engage in truth shaping through the memory archive – what Barbara Cassin would say encapsulates the management of memory.[1009] Indeed, truth shaping as a reconstruction of social memory in post-conflict contexts aligns with Paul Antze and Michael Lambek's view that: 'memories are not simply records of the past, but interpretive reconstructions'.[1010] Jacques Derrida goes even further, arguing: 'there is no political power without control of the archive, if not of memory'.[1011] Furthermore, in relation to Derrida, Ketelaar finds that: 'archives [do] not merely serve to preserve an archivable content of the past, no life itself and its relation to the future are determined by the technique of archiving.'[1012] Similarly, James Scott argues that records usually reflect the reality perceived by their creators, saying:

> Builders of the modern nation-state do not merely describe, observe, and map; they strive to shape a people and landscape that will fit their techniques of observation… there are virtually no other facts for the state than those that are contained in documents.[1013]

11.6 Conclusion

In light of the theories of Cassin, Antze and Lambek, and Derrida and Scott in relation to truth and memory, their archive and management – essentially the control of the archive and its impact on political power, as well as the record of the archive reflecting the reality perceived by its creator – it is worth asking whether what the Rwandan government proposes through the Gacaca document Centre is not the kind of truth shaping that Simpson warns against: one that imposes a singular narrative that is often ideologically motivated.[1014]

Furthermore, and considering the question posed above, it is worth asking whether the legacy of the Gacaca Courts in respect of the truth recovery and reconciliation mandates with the records of the Gacaca Document Centre can be said to implicitly inscribe the forgiveness of perpetrators on behalf of survivors? An attempt to begin answering this question may be

1009 Barbara Cassin op cit note 188
1010 Paul Antze and Michael Lambek op cit note 164 at *viii*
1011 Jacques Derrida, *Archive Fever* op cit note 165 at 4.
1012 Eric Ketelaar, *Tacit Narratives: The meanings of Archives,* (Kluwer Academic Publishers, Netherlands), 134
1013 James Scott op cit note 167 at 82-3
1014 Kirk Simpson op cit note 157 at 69

framed by the work of Hannah Arendt who, writing in the aftermath of the Second World War, discusses the appropriateness of forgiveness considering genocide committed by one group against another, stating that forgiveness in such a context is:

> The exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process.[1015]

Considering the questions posed above, and the sentiments expressed in the quote by Arendt above, language as policy is arguably the entry-point through which public deliberation as "live rhetoric" could lead to reconciliation, peace, and possibly even forgiveness. As a result, it will be worthwhile to explore the role and importance of language as policy in public deliberation or "live rhetoric" as it plays out in the post-conflict context of Rwanda after the genocide, especially amidst the pressing issue of deep-rooted animosity that could function to destabilize the reconciliatory process in the aftermath of the genocide.

12. CHAPTER 12: THE IMPORTANCE OF LANGUAGE IN POST-GENOCIDE RWANDA: PUBLIC DELIBERATION AS "LIVE RHETORIC" AND ITS ROLE IN MITIGATING THE THREAT OF RECIPRICAL VIOLENCE MANIFEST AS STASIS OR CIVIL WAR

12.1 Introduction

In the Rwandan context, an issue of great concern was that the deep-rooted animosity of the genocide resulted in fear, resentment and even anger at perpetrators – all features that could potentially hinder efforts for reconciliation. Phil Clark highlighted these sentiments when he cited the words of a pastor and survivor named Nathan who said:

> Everyone is still fearful – the prisoners and the survivors. The biggest fear though is among those coming back from the prisons … for those coming back, their fears are justified because the survivors are still angry. It depends how bad [the prisoner's] crimes were. But for the survivors, the genocide is still haunting… there is a small chance of revenge attacks against prisoners ….'[1016]

1015 Hannah Arendt, *The Human Condition,* (Chicago, University of Chicago Press, 1958), 241
1016 Phil Clark op cit note 885 at 244

Echoing the sentiment expressed by the pastor and survivor above, a prisoner detained in Kigali Ville, Révérien, on his release day said to Clark:

> I don't know who's waiting for me in the village. People talk about survivors waiting there for us, maybe wanting to hurt us. I hear stories of survivors waiting for us in the market. I don't know what to expect. It's very scary for us.[1017]

Survivors also appeared to be afraid of the prospect of having to encounter perpetrators once they were released from detention. For example, Clark notes a survivor named Christine expressing fear for having to engage with perpetrators upon hearing they would eventually be released, saying:

> I got very scared when I first heard the radio message that the prisoners were going to be released… I often see prisoners now in the streets and I get scared. I think to myself "Will they hurt me? Am I safe here?" ….[1018]

What the quote above highlights is that there needs to be a balance struck between the idea that a punitive approach is sufficient enough of a response to genocide crimes and the importance of maintaining peace (but specifically negative peace manifest as non-violence). The crux of achieving this balance appears to be the "live rhetoric" Philippe-Joseph Salazar speaks of when writing on the South African context in relation to the transition from apartheid to democracy.[1019]

Through this "live rhetoric" all the Rwandan people, not just the perpetrators, need to work towards achieving a sameness of intent (*homonoia*) through public deliberation that will allow for the transformation (*metanoia)* of Rwandan society.[1020] As Gary S.D Leonard identifies, the notion of repentance in Christianity is derived from the Greek word *metanoia*, which denotes a change of mind, attitude or course.[1021] This would mean that Rwandan perpetrators of genocide would be required to repent of their crimes (equitable to sin in Judaeo-Christian religious terms) through truth-telling and reception of punishment (total exposure and condemnation) instead of underplaying or undermining the crime. This would allow them to enter a new life or relationship with survivors and the broader Rwandan society (which in Judaeo-Christian religious terms would be to enter a new life or relationship with Christ as the

1017 Ibid. 227
1018 Ibid.
1019 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 151
1020 Ibid. 149-51
1021 *The moment of Truth: The Kairos Documents* op cit note 202 at 117

saviour in order to become part of the ecclesiastical community known as the body of Christ.)[1022] Language is critical to enter into the realm of public deliberation, and so we proceed to a discussion about the importance of intentional and goal-oriented use of language, and the ways in which language as a policy tool can not only broker but maintain peace in post-conflict contexts.

12.2 Language use as a critical feature of public deliberation or "live rhetoric" among Rwandan people in post-genocide Rwanda

In Rwanda, the manifestation of the sameness of intent or *homonoia* would ideally be in view of creating a unified Rwandan society in which all – regardless of whether classified as a suspect, perpetrator or survivor – can live together in an environment of sustainable peace and harmony. As Salazar points out, the consequence of the inability to achieve *homonoia* and *metanoia* in a post-conflict context can result in the difference of opinion constituting *stasis*, which would be expressed as reciprocal threats of violence and possibly even civil war.[1023]

The features of *metanoia* and *homonoia* outlined above would practically occur in several spaces including but not limited to the very villages, the marketplace, and the streets that both survivors and perpetrators speak of with apprehension when they consider that they may come face-to-face with one another in post-genocide Rwanda. After all, it must be remembered that Phil Clark pointed out that the Gacaca Courts were aimed not only at meting out punishment and allowing survivors to speak on their experiences, but also to contribute to restoring relationships between individuals and their community outside of the hearings themselves.[1024] Indeed, Gacaca was aimed at creating a culture of discursive potential beyond its hearings that is critical for the restoration of relationships between individuals and their community.[1025] This process is arguably facilitated through politics, for Jacques Rancière proposes:

> Politics consists in reconfiguring the distribution of the sensible which then defines the common of the community, to introduce into it new subjects and objects, to render visible

1022 Ibid. 117-18
1023 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 149-151
1024 Phil Clark op cit note 885 at 191
1025 Ibid at 194

> what had not been, and to make heard as speakers those who has been perceived as mere noisy animals.[1026]

For Rancière, politics is the human activity that turns on equality as its principle or basic presupposition.[1027] His conception of politics is 'that one counts to constitute the political community', from which he declares: 'politics arises from a count of community "parts", which is always a false count, a double count, or a miscount'.[1028] Because of this false count, a double count, or a miscount, Rancière holds the view that any government lacks the ultimate foundation to be legitimate and, thus, politics exists because there is no natural or divine principle on which society must be grounded.[1029] In furtherance of this point, Rancière says:

> The struggle between the rich and the poor is not a social reality which politics has to deal with. It is the actual institution of politics itself. There is politics when there is a part of those who have no part, a part or party of the poor. Politics does not happen because the poor oppose the rich. It is the other way around: politics (that is, the interruption of the simple effects of the domination by the rich) causes the poor to exist as an entity.[1030]

Considering the sentiments expressed in the quote above, Rancière argues: 'any ruling part which wants to dominate within any order requires, at the very least, for the dominated to understand the order in question *and* to understand that they must obey.'[1031] This is also critical to understanding that public deliberation as "live rhetoric" is people-centred though, of course, the process may be initiated and facilitated by the state through bodies legally mandated with reconciliation like the Gacaca Courts and the TRC in Rwanda and South Africa respectively. For Rancière, human beings are equal because they share speech as *logos* – that is, not merely voice, but also reason.[1032] In fact the two requirements outlined by Rancière are grounded on a basic equality among human beings, and that any ruling part needs them is Ranciére's proof that both, in the end, are equal.[1033] This point is made clear when Rancière highlights that the protagonist in *The Ignorant Schoolmaster*, a former revolutionary official-turned-teacher, had to come to terms with the reality that his Flemish students had taught themselves French without his help because their intelligence and mastery was equal to his own.[1034] To this,

---

1026 Jacques Rancière, *Aesthetics* op cit note 180 at 25
1027 Jacques Rancière, *Disagreement, Politics and Philosophy*, Trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999), ix
1028 Ibid at 2
1029 Jacques Rancière, *Dissensus: On Politics and Aesthetics*, (Bloomsbury Publishing, 2010), 50
1030 Jacques Rancière, *Disagreement* op cit note 1027 at 11
1031 Ibid at 16
1032 Ibid.
1033 Ibid.
1034 Jacques Rancière, *The Ignorant Schoolmaster: Five Lessons in Intellectual Emancipation*. Trans. Kristin Ross (Stanford; Stanford University press, 1991. [*Le Maitre Ignorant*, Paris, Fayard, 1987]

Rancière proclaims: 'politics is not made up of power relationships; it is made up of relationships between worlds.'[1035]

Practically, the relationships between the worlds are underpinned by speech as both communication and reason, which is important because the discursive potential manifest in language sets the scene for the potential emergence of public deliberation or "live rhetoric" mentioned by Salazar.[1036] Writing specifically on language in ethnic conflicts in Europe and Eurasia, Diarmait Mac Giolla Chríost notes that language resides in a complexity of relationships between self-identification, group cohesion and worldview.[1037] Speaking specifically on ethnic difference, which was a significant factor in the Rwandan genocide, Chríost asserts that:

> Ethnic difference is not absolute, fixed nor impenetrable. Identity, imagined and conceptual, is defined in [the] process rather than event. It is in the streams of tradition, the ebb and flow of culture, that identity is navigated, and it is in this navigation that the tensions and competitions which relate to language are to be found.[1038]

The sentiment expressed above by Chríost about ethnic difference not being absolute, fixed or impenetrable is poignant because Clark cites a person in Rwanda commenting on the fact that there was often intermarrying between the *Hutu* and *Tutsi* ethnic groups before the genocide, saying: 'everything has changed. It isn't like before [the genocide] … when Hutu and Tutsi intermarried, and Hutu children were considered Tutsi children.'[1039]

Chríost suggests that sometimes a language policy can be used to effectively manage and resolve conflict, especially where it is grounded in political realities.[1040] Chríost also thinks that for language planners and policy makers to effectively intervene in a context of conflict, they must understand not only the causes of conflict, but also its lifecycle.[1041] Echoing these sentiments in the Rwandan context, Clark noted one survivor as saying: 'survivors might hunt down the killers. The killers might hunt down survivors.'[1042] To illuminate the suggestion of revenge-killing in the aforementioned quote, the Coordinator of the Catholic Peace and Justice

1035 Jacques Rancière *Disagreement* op cit note 1027 at 42
1036 Philippe-Joseph Salazar op cit note 82 at 151.
1037 Diarmait Mac Giolla Chríost op cit note 177 at 9
1038 Ibid at 220
1039 Phil Clark op cit note 887 at 124
1040 Diarmait Mac Giolla Chríost op cit note 177 at 220
1041 Ibid at 221
1042 Phil Clark op cit note 885 at 226

Commission in Rwanda, Jean-Claude Ngendandumwe, was cited by Clark as saying: 'justice at Gacaca is a form of state-controlled revenge, and this lessens the need for revenge by the community.'[1043]

The sentiments expressed in the two quotes above highlight that while the causes of the genocide in Rwanda were varied, members of the general public had a deep appreciation for the life cycle of conflict that Chríost speaks of – a desire for retribution amongst both perpetrators and survivors. From the second of the two quotes, it is also clear that there is a perception of the state as the authority for the kind and extent of vengeance to be meted out in Rwanda. This speaks directly to Hannah Arendt's assertion that forgiveness in contexts of genocide is the exact opposite of revenge that re-acts against the original trespassing, functioning to stop the first misdeed's consequences.[1044] The role of the state in this regard is critical and is reflected in the words of a trained psychologist working for the NURC cited by Clark as saying: 'justice at Gacaca is a form of state-controlled revenge, and this lessens the need for revenge by the community.'[1045]

Considering these points, it makes sense why Clark notes that there are detention centres in post-genocide Rwanda referred to as "Solidarity Camps".[1046] These solidarity camps are intermediary spaces between prisons and the outside in which there are greater comforts and amenities than prisons, with some having football fields, higher quality meals, visitation rights and civic education to prepare detainees for reintegration into society.[1047] From an analytical perspective, the name of the camps contains a clever rhetorical strategy to make detainees believe that they too are playing role – albeit still restrained in their personal freedom – in the success of the reconciliatory project by remaining incarcerated in "solidarity" with those on the outside trying to fashion a peaceful life for themselves in post-genocide Rwanda.

Chríost notes that as a policy tool, language can significantly contribute to the building of political institutions, civil society development, power sharing arrangements and the promotion and monitoring of human rights.[1048] In the same breath, Chríost warns of the importance that timing and the nature of the intervention have in determining the failure or

1043 Ibid at 248
1044Hannah Arendt op cit note 1015 at 241
1045 Ibid at 104
1046 Phil Clark op cit note 885 at 102-3
1047 Ibid.
1048 Diarmait Mac Giolla Chríost op cit note 177 at 221

success of using language as a policy tool for resolving and managing conflict because conflict resolution does not come in a one-size-fits-all approach.[1049]

The warning against a one-size-fits-all approach is poignant considering that language cannot be used to aid in resolving conflict in Rwanda in the same way it is used in South Africa, for example. This is not only because the two contexts are geographically different, but also because beyond having have different languages that their respective citizens speak, the particularities of the nature of the conflict in each socio-political context demands that if language is used, it should be tailored to fit that specific context. For example, the use of the term "solidarity camp" would not fit in South Africa's anti-apartheid context, just as the rhetoric of "restitution of land" found in the South African Restitution of Land Rights Act No. 22 of 1994 would not fit in the Rwandan conflict.

Beyond an appreciation of the distinct approaches to language as policy in the two contexts, in Rwanda's Gacaca Courts as in South Africa's TRC, Judaeo-Christian religious rhetoric informed the use and power of language to aid in resolving conflict through reconciliation. When the apostle Paul states in the biblical text of Colossians 3:11 that in Christ there is no longer Jew, Greek, Barbarian or Scythian, what he does is not to deny cultural diversity, but to reject the privileging of one culture above another, which can be a source of conflict. The sentiments of the apostle Paul speak to the biblical text of 1 Corinthians 12:12-27, for example, in which it is clearly stated that if one part suffers, every part suffers with it, and if one part is honoured, every part rejoices with it, and that every person who accepts Christ as their saviour is part of the body of Christ as a metaphor for the ecclesiastical community. Thus, these texts contain a message preaching harmony and peaceful coexistence notwithstanding the diversity of the community comprising of the body of Christ. The sentiments expressed in the biblical texts above that preach for peace instead of conflict are found in several biblical texts, all of which allude to the Oneness of the body of Christ in one way or another.[1050]

From a Judeo-Christian rhetorical perspective, the practical ramifications of the messages of the biblical texts in Rwanda is that they could arguably be used to silence

1049 Ibid.
1050 These include, but are not limited to, Colossians 1:24; Romans 12:4-5; Ephesians 1:23; Ephesians 4:16; Ephesians 5:30, and Hebrews 1:5)

mutterings of the superiority of one ethnic group over another, for indeed, to have accepted Christ as your saviour meant that while linguistically there were suspects, perpetrators and survivors in Rwanda – let alone *Hutu* and *Tutsi* – in terms of this Judaeo-Christian religious rhetoric, distinctions were disregarded because *all* who had accepted Christ as their saviour and repented for their sins were part of one community. It is therefore understandable that Phil Clark noted the presence of a coexisting and complementary "Christian Gacaca" where priests spoke of the love, peace and truth of God's Word.[1051]

The existence of a "Christian Gacaca" mentioned above is arguably indicative of the presence of public deliberation manifest as the "live rhetoric" that Salazar speaks of,[1052] and also of the discursive potential represented in the process that is reconciliation occurring beyond the confines of the Gacaca hearings. This is precisely the point that Alexandre Dauge-Roth makes in his work on survivors in Rwanda, from which he argues that people after the genocide are "still surviving" instead of "having survived" – indicating an active and intentional participation in the continuous process that is reconciliation.[1053] A suspect named Laurent, interviewed by Clark, articulates the continuous feature of reconciliation succinctly, saying:

> Reconciliation doesn't come from the sky. It comes bit by bit. It means living together, saying sorry, asking for forgiveness. It is much more than words – it is actions.[1054]

It is worth pointing out that the quote above is prefaced by Laurent expressing concern to Clark about how his neighbours would react knowing he was leaving prison and returning to the world outside, especially considering he was a suspect who received a sentence.[1055] As Laurent so eloquently articulates in the quote above, reconciliation requires that suspects, perpetrators and survivors alike live together, attempt to engage in public deliberation manifest as "live rhetoric", and try to live in peace by both word *and* action. To do this is what Malvern Lumsden argues not only allows for healing, but also aids the aims of reconciliation because for survivors to occupy spaces outside Gacaca hearings with suspects or perpetrators and vice versa, is to rebuild a coherent sense of self and community.[1056] This point is poignant and aligns

1051 Phil Clark op cit note 885 at 197
1052 Philippe-Joseph Salazar, 'Compromise and Deliberation' cit note 82 at 151.
1053 Alexandre Dauge-Roth op cit note 996 at 166-7
1054 Phil Clark op cit note 885 at 112
1055 Ibid.
1056 Malvern Lumsden op cit note 1005 at 381

with the writing of Jacques Rancière discussed earlier on his understanding of politics, from which he says:

> Politics consists in reconfiguring the distribution of the sensible which defines the common of a community, to introduce into it new subjects and objects, to render visible what had not been, and to make heard as speakers those who had been perceived as mere noisy animals.[1057]

For Rancière, 'politics is the human activity that turns on equality as its principle or basic presupposition.'[1058]

12.3 Conclusion

Writing on politics, Rancière observes that: 'politics is not made up of power relationships; it is made up of relationships between worlds.'[1059] Practically, the relationships between the worlds are underpinned by speech both as communication *and* reason – characteristics all human beings arguably possess. This is important because the discursive potential manifest in speech arguably sets the scene for the emergence of the "live rhetoric" mentioned by Salazar to occur between suspects, perpetrators and victims in Rwanda. Public deliberation or "live rhetoric" manifest in speech is critical for the transformation (*metanoia*) of society that fosters the sameness of intent (*homonoia*) to contribute to, and help maintain peace by and for the people.[1060]

To understand how this "live rhetoric" manifests practically in spaces constitutive of post-genocide Rwandan society, the theory of metacognition may prove insightful as a tool for analysis in philosophy because it fleshes out the ways in which thinking, gestures and speech may create space for the emergence of *metanoia* and *homonoia* in the post-conflict context of Rwanda – features that are necessary to create a cohesive society for the maintenance of democracy and peace in Rwandan Society.

1057 Jacques Rancière *Aesthetics* op cit note 180 at 25
1058 Jacques Rancière *Disagreement* op cit note 1027 at ix
1059 Ibid at 42
1060 Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 151

13. CHAPTER 13: THE THEORY OF METACOGNITION AS A TOOL IN ANALYTICAL PHILOSOPHY: "LIVE RHETORIC" IN ACTION AS ILLUSTRATED BY LEGAL CASES DECIDED IN POST-GENOCIDE RWANDA

13.1 Introduction

The theory of metacognition was coined in 1979 by John H. Flavell who proposed that metacognition's aim is to evaluate one's present cognitive disposition, endorse them, and form epistemic and conative commitments.[1061] Building on the theories of Favell, Joëlle Proust finds: 'a mental agent needs to adjust her cognitive efforts and goals with her cognitive resources.'[1062] That is to say, when an agent is trying to solve a problem, that agent must assess the difficulty of the problem in order to ascertain whether it is beyond their competence.[1063]

Proust takes this approach to metacognition based on three main claims: first, that mental and ordinary actions do not have the same normative structure.[1064] Second, if metacognition is understood as the self-evaluation of one's acquired or predicted mental properties, it is constitutive of every mental action, though it is absent from ordinary basic actions.[1065] Third, while metacognitive ability is not exclusive to humans, linguistic capacity in humans expands the ability to exercise metacognition through social learning.[1066]

For purposes of the task at hand, I shall constrain my engagement with the theory of metacognition to the first two claims relating exclusively to metacognitive processes in humans. The specific focus in this task shall be on the theory of conversational metacognition as it pertains to: (1) the features of multilevel type of evaluation between two or more communicating agents involved in conversation and, (2) how norms of acceptance – relevant to court processes, for example – highlight the interaction between individual mental agency and world-directed agency within the broader theory of action, which ultimately has a bearing on notions of "truth". The purpose of these tasks is to illustrate public deliberation or "live rhetoric" in action by revealing that speech, in its metacognitive sense, is an entryway towards

1061 John H. Flavell op cit note 184 at 906-11
1062 Joëlle Proust op cit note 185 at 4-5
1063 Ibid.
1064 Ibid.
1065 Ibid.
1066 Ibid.

reconciliation. Further, this public deliberation or "live rhetoric" can arguably set the scene for the potential emergence of Hannah Arendt's conception forgiveness as: 'the exact opposite of vengeance …. which re-acting against the original trespassing [which] far from putting an end to the consequences of the first misdeed, everyone remains bound to the process.'[1067]

The discussion will begin by outlining the theories of conversational metacognition considering (1) features of multilevel forms of evaluation between two or more communicating agents, and (2) norms of acceptance respectively. Considering that the theory of metacognition otherwise lends itself to generality, the discussion will provide examples of how each aspect of the theory of metacognition outlined above practically manifests by way of case studies of decided legal cases in post-genocide Rwanda to illustrate metacognition in action. I will now embark on a discussion of conversational metacognition and the features of multilevel forms of evaluation between two or more communicating agents.

13.2 Conversational Metacognition and the features of multilevel forms of evaluation between two or more communicating agents

According to Joëlle Proust, embodied communication in humans often involves metacognitive speech and gestures.[1068] Proust says: 'embodied communication refers to the process of conveying information to one or several interlocutors through speech and associated bodily gestures, or through gestures only.'[1069] Metacognition within speech is used to decide, for example, whether someone emotionally possesses the capacity speak in public.[1070] Proust argues that this is because: 'one becomes conscious of the outcome of a given metacognitive evaluation through specific embodied experiences, such as epistemic feelings (a feeling of attending, of knowing, a tip-of-the-tongue experience, an insight experiences.'[1071]

Proust finds that this metacognitive evaluation occurs within the speaker through questions like 'was my gesture appropriate'; 'was my speech clear' and, 'did my pointing identify its intended referent?'[1072] This cognitive evaluation encompasses what is referred to as

1067 Hannah Arendt op cit note 1015 at 241
1068 Joëlle Proust op cit note 185 at 266
1069 Ibid at 265
1070 Ibid.
1071 Ibid.
1072 Ibid.

"conversational metacognition", or a 'set of abilities that allow an embodied speaker to make available to others and to receive from them specific markers' – concerning what Proust terms their "conversing adequacy".[1073] This process can be identified by way of two procedures: first, self-prediction or self-assertion relies on external feedback in order to make a comparison of observed output with a stored norm: for instance, a person's feeling of knowing may assist them in identifying how much they know about a particular subject.[1074] Second, self-retrodiction or an interpretation by an individual of past events or actions is reliant on external feedback that is used to make a comparison between observed outputs with stored norms: for instance, there may be an immediate realisation that one's response to a particular issue may "feel" wrong.[1075]

What is critical to highlight with the two processes and their respective procedures, is that in both cases, metacognition appears to concern emotions and embodied feelings as opposed to abstract conceptual reasoning.[1076] Furthermore, these are individual metacognitive feelings that one can but does not need to communicate.[1077] In contrast to individual metacognitive feelings, conversational metacognition involves specific communication control processes because there are often anywhere between two and several actors involved in conversation.[1078] By virtue of this, identifying whether an embodied utterance as something specific needs repair or is satisfactory can be attained through both an internal comparison process as well as the: 'on-line linguistic and embodied response(s) from the recipients(s).'[1079]

Certainly, as Proust expresses: 'a … distinctive property of conversational metacognition is that it provides multilevel type of evaluation.'[1080] Proust continues to say that: 'communicating agents need to keep track of the various task dimensions that are structuring talk-in-interaction.'[1081] Because of this, agents must observe moment-by-moment turn-taking

1073 Ibid at 266
1074 Ibid at 267
1075 Ibid.
1076 Ibid.
1077 Ibid.
1078 Ibid.
1079 Ibid.
1080 Ibid.
1081 Ibid.

and sequence organization.[1082] Agents involved in conversation are also required to 'keep track of [their] ability to refer and to achieve [their] illocutionary goals.'[1083] For Proust:

> An intriguing consequence of this multidimensional aspect of conversational metacognition is that a communicator needs to operate simultaneously on different temporal frames of gestural discourse – from the short-lived evaluation of her capacity to retrieve a proper name (while keeping the floor) to the full-length appreciation of the success of a whole conversation.[1084]

As a result of the abovementioned, if the function of an utterance or gesture pertains to the evaluation by a speaker or recipient how– during a conversation in any given context – they have been doing, or how well they can hope to do, then such utterance or gesture is metacognitive.

Ultimately, Proust notes that a key feature of conversational metacognition is: 'checking one's (another's) ability to convey an intended message through speech and gestures.'[1085] It pertains to questions like whether both words and gestures produced were adequate – that is, true, understandable and appropriate?[1086] Conversational metacognition is accompanied by several reflexive questions on the part of the agent. Some of these reflexive questions include, but are not limited to: 'was the speaker, in a position to make [the words and gestures]?' and "was my emotional expression congruent? Was my utterance accepted?'[1087]

From a less conspicuous perspective, there are what Proust terms the "should I" questions, in which an agent engages with questions such as: 'should I speak of X, given my poor memory? Should I admit that I did not understand what he just told [me]?'[1088] Neither type of question outlined above need consciously be raised by the producer or the recipient, except in special circumstances (in other words, because trouble is bound to occur based on experiences from the past in comparison with current or expected performance).[1089] Having outlined the theory of conversational metacognition as it relates to features of multilevel forms

1082 Ibid.
1083 Ibid.
1084 Ibid. 267-8
1085 Ibid at 269
1086 Ibid.
1087 Ibid.
1088 Ibid.
1089 Ibid.

of evaluation between two or more communicating agents, I will now proceed to outlining the theory of conversational metacognition as it relates to norms of acceptance.

13.3 Conversational Metacognition and Norms of Acceptance

Speaking on norms of acceptance, Proust argues that there is a critical aspect to the theory of action – which she considers to be important – that has received little attention: namely the interaction occurring between mental agency and world-directed agency.[1090] Proust argues that acceptance, a manifestation of agency generally, constitutes mental actions in planning.[1091] For Proust, accepting is the most common mental action of all our daily life,[1092] finding that acceptances are made voluntarily.[1093] This cannot be said of beliefs because accepting is an epistemic action that involves deliberation.[1094] For example, when an agent accepts something, they regard the thing as true although it may not really be the case.[1095] Proust says what justifies accepting in such an instance is that on certain occasions, accepting something that one either believes or knows to be false is reasonable in the circumstances.[1096] Instances in which this is reasonable are those in which something may make plain an inquiry or where that thing is in close to the truth, or is within proximity of the truth for the purposes at hand.[1097]

Proust says that a feature of acceptance are feelings, and that feelings are epistemic because they express a 'degree of subjective uncertainty or sensed feasibility for a given task or outcome.'[1098] The values of these feelings are epistemic because they function to help a thinker in evaluating and recognising the dynamics of their memories, their own beliefs, and their plans in respect of either truth or adequacy.[1099] Proust points out that this feature of acceptance can prove to be troublesome in its consequences because: 'accepted propositions

1090 Ibid at 169
1091 Ibid at 170
1092 Ibid at 172
1093 Ibid.
1094 Ibid.
1095 Ibid.
1096 Ibid.
1097 Ibid.
1098 Ibid at 223
1099 Ibid.

are subject to contextual variation in their sensitivity to evidence and truth, for they cannot be freely agglomerated in a coherence-preserving way in contrast with beliefs.'[1100]

Another feature of accepting is that while judgements and beliefs are aimed solely at truth-tracking, acceptances appear to bring together both practical and epistemic goals.[1101] For example, Proust points out that if a person cannot afford to be late for work then they should accept, as policy, that the bus to get them to work in the nick of time may be late and they should take an earlier one.[1102] While the aforementioned points are interesting, the two features outlined above fail to offer what Proust calls a coherent and intelligible understanding of mental action as acceptance and its role in practical reasoning.[1103] This difficulty may be resolved by unpacking the proposition that acceptances are context specific considering that relevance, coherence and consistency apply within an existing plan or where a situation is modelled from the perspective of an agent.[1104]

Having briefly outlined the two aspects of the theory of conversational metacognition being (1) the features of multilevel type of evaluation between two or more communicating agents involved in conversation and, (2) norms of acceptance and their roles in forming notions of truth, it is important to note that while the discussions helped gain better insight into the theory of metacognition itself, both aspects of the theory outlined lend themselves to generality. This generality shall be discussed in greater detail below, and remedies to the generality will be engaged with by way of case studies. It is worth pointing out that the task of sourcing case studies did not come without its challenges, and these challenges, too, will be outlined and discussed below.

Once the issues of generality and the research challenges concerning the sourcing of case studies have been outlined, I shall proceed to applying the chosen case studies to the two aspects of the theory of conversational metacognition in question. This will be done in view of illustrating that metacognitive speech constitutes public deliberation or "live rhetoric" as the embodiment of democratic values facilitated by bodies legally mandated with reconciliation like the Gacaca courts in the Rwandan post-genocide context specifically.

1100 Ibid.
1101 Ibid at 173
1102 Ibid.
1103 Ibid.
1104 Ibid at 174

13.4 Addressing issues of the generality of the theory of Metacognition and research limitations concerning the sourcing of case studies to remedy this generality.

Considering the discussions of multilevel forms of evaluation between two or more communicating agents and norms of acceptance, admittedly, the theory of conversational metacognition unfortunately lends itself to generality. To remedy this and to highlight how conversational metacognition functions practically as public deliberation or "live rhetoric" (through speech embodying reconciliation occurring beyond the confines of bodies legally mandated with reconciliation), I have opted to isolate each aspect of conversational metacognitive theory outlined above and to illustrate how it plays out using a case study for each aspect. The case studies chosen are legal cases decided in the ICTR relating to crimes allegedly committed in the Rwandan genocide.

The first case study, the ICTR Trial Judgment of *The Prosecutor v Siméon Nchamihigo*,[1105] speaks to the first of the two aspects of the theory of metacognition in relation to multilevel type evaluation between two or more communicating agents. The primary focus of the analysis here is the 25 January 2007 cross-examination of Prosecution witness BRD with an intention to highlight how cross-examination as a procedure of court hearings is a quintessential illustration of conversational metacognition as it contains features of multilevel evaluation between two or more communicating agents through (1) moment-by-moment monitoring; (2) a turn-taking sequence by agents and, finally, (3) checking of one's (and one another's) ability to convey verbal messages that are adequate – that is, true, understandable and appropriate for the task at hand.[1106]

The second case study is the ICTR Trial Judgment of *The Prosecutor v Ferdinand Nahimana et al.,*[1107] and speaks to the second of the two aspects of the theory of metacognition as it pertains to norms of acceptance in shaping notions of "truth". The primary focus of the

1105 *The Prosecutor v Siméon Nchamihigo*, (Judgement and Sentence) Case No. ICTR-01-63-T, International Criminal Tribunal for Rwanda (ICTR), 12 November 2008, available at: *https://www.refworld.org/cases,ICTR,49216e9b2.html* [accessed 28 May 2022] (hereafter simply the "Nchamihigo Trial Judgement")
1106 Joëlle Proust op cit note 185 at 269
1107 *The Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza, Hassan Ngeze*, (Judgement and Sentence), Case No. ICTR-99-52-T, International Criminal Tribunal for Rwanda (ICTR), 3 December 2003, available at: *https://www.refworld.org/cases,ICTR,404468bc2.html [*accessed 29 May 2022] (hereafter simply the "Nahimana Trial Judgement")

analysis here is the transcript of the examination-in-chief dated 5 December 2002, which contains the testimony of a witness for the accused called witness 18. Through a textual analysis of the transcript of the examination-in-chief, the intention is to highlight that the norms of acceptance lie at the intersection between individual mental agency and world-directed agency, and thus inform an understanding of the notion of "truth".

Before discussing the two case studies to resolve the generality of the theory of conversational metacognition, it is necessary to outline the practical research challenges encountered while embarking on this research task. Broadly, there were limitations in the access and selection of legal cases on the Rwandan genocide: first, while there were numerous and expansive online resources containing decided legal cases, written transcripts of oral testimonies, audio and video recordings of participants of genocide cases in both judicial and quasi-judicial forums, some online resources required signing up for membership to gain access to materials contained therein. Sign-up on one seemingly rich online resource was attempted on a couple of occasions, but the attempt unfortunately proved futile as the domain administration never e-mailed to indicate receipt of the request for membership.

Second, for the online resources that did not require sign-up of membership in order to access material, there was an assortment of case law available in English, French and the Rwandan language of Kinyarwanda.[1108] Admittedly, owing to my linguistic limitation of speaking neither French nor Kinyarwanda, the resource materials that proved useful for the task at hand were intentionally limited to resources written in the English language. This linguistic limitation consequently limited the range of cases I could engage with. In respect of the cases presented in the English language that I could engage with, it is important to highlight that they nonetheless contained several untranslated phrases, words, and names of publications and organisations in French, Kinyarwanda or both. Where these untranslated phrases were relevant to the sections of work referred to, I was required to familiarize myself with them for use in my research and writing tasks. Where there were English translations of the words in French or Kinyarwanda, I appreciated that these translations bore the risk of having lost the

1108 According to Rule 3 of the ICTR Rules of Procedure adopted on 29 June 1995, English and French were the primary working languages to be used in proceedings, stating further that an accused or suspect shall have the right to use their own language other than English or French, but that counsel for the accused needed to apply to judge's chambers for leave to use such language.

depth of nuance and meaning that can occur in an exercise of language translation.[1109] Notwithstanding these challenges, the substantive engagement with the resource materials was not hindered because there was often a glossary of terms attached at the start of most of the resource materials encountered.

Third, because judicial and quasi-judicial proceedings have pre-specified and stringent procedures governing the presentation and re-presentation of oral and written information, in attempting to engage with the oral testimonies of laypersons involved in each case study chosen, information was presented by judicial or administrative staff involved in the textual documentation processes in a sifted and clearly transcribed manner in legal documents like the transcript of a cross-examination, for example.[1110] Furthermore, it became apparent that most of the cases and related documents in English contained oral testimony from participants that was already directly translated from another language into English, with some documents containing the phrase "No translation" in instances where the oral testimony of participants was presumably either inaudible in proceedings or was unable to be translated into English from another language.

Having consideration of the practical research limitations encountered in embarking on this task, it is imperative to proceed to the analysis of the two legal case studies used to remedy the generality of conversational metacognitive theory as it relates to (1) the features of multilevel type of evaluation between two or more communicating agents and, (2) the norms of acceptance respectively. This exercise will illuminate the importance of public deliberation or "live rhetoric" as it occurs beyond the confines of bodies legally mandated with reconciliation like the TRC and the Gacaca courts in South Africa and Rwanda respectively, revealing that, indeed, reconciliation is a future-continuous process that requires the "we" that constitutes the citizens of post-conflict democratic contexts to use speech as both communication and reason in societies constituting of free people governing themselves.

We shall now proceed to a discussion of the two case studies resolving the generality of the the theory of metacognition, beginning first with the case study resolving the generality of the features of multilevel type of evaluation between two or more communicating agents,

1109 Peter Newmark, *The Theory and the Craft of Translation*, Language Teaching, Vol. 9 Issue. 1, Cambridge University Press (1976), 23
1110 Most of these procedural rules were contained in the ICTR Rules of Procedure adopted on 29 June 1995

and then proceeding to the second case study resolving the generality of the norms of acceptance.

13.4.1 Case study resolving the generality of the theory of Metacognition as it relates to the features of multilevel type of evaluation between two or more communicating agents: The Prosecutor v Siméon Nchamihigo

The case study discussed below seeks to highlight the features of multilevel type of evaluation between two or more communicating agents involved in conversation. In order to meaningfully engage with the case study in question, I shall begin by briefly outlining the facts of the case study, then I shall proceed to apply features of conversational metacognition to the cross-examination document dated 25 January 2007 to show that it contains features of multilevel evaluation between two or more communicating agents,[1111] moment-by-moment monitoring and a turn-taking sequence by agents and,[1112] finally, checking of one's (and one another's) ability to convey verbal messages that are adequate – that is, true, understandable and appropriate for the task at hand.[1113]

The accused in the matter, Siméon Nchamihigo, stood trial for his role in mass killings in late April of 1994 at roadblocks erected in a prefecture of Rwanda called Cyangugu; for instigating killings at Kamarampaka Stadium; for the killing of three *Tutsi* girls and, for inciting civilians to kill refugees at two parishes, a school and a hospital. The witness named BRD, whose testimony was tested in the cross-examination document in question, alleged that a conversation with the accused led him to infer that the accused had killed several people including the three *Tutsi* girls in question.

Witness BRD as a communicating agent in terms of the theory of conversational metacognition is required to keep track of their ability to refer to and to achieve their illocutionary goals in a court processes like cross-examination.[1114] As articulated by Proust:

> An intriguing consequence of this multidimensional aspect of conversational metacognition is that a communicator needs to operate simultaneously on different

1111 Joëlle Proust op cit note 185 at 267
1112 Ibid.
1113 Ibid at 269
1114 Ibid at 267

> temporal frames of gestural discourse – from the short-lived evaluation of [their] capacity to retrieve a proper name (while keeping the floor) to the full-length appreciation of the success of a whole conversation.[1115]

Proust notes that there is a challenge in philosophical studies published thus far, namely that metacognition seems to be framed within a private context relating to an individual evaluating their own mental states.[1116] Cross-examination arguably addresses this concern because it thrusts individuals otherwise evaluating their own mental states in private conversation into the public arena that is manifest in the oral proceedings of the court. Thus, it is important considering the case study chosen to take note of the fact that conversational tasks differ from one context to another because there is effort that is particular to a philosophical conference, another of an ordinary conversation between friends, still another in a court of justice as with the case study in question.[1117]

It is not uncommon in cross-examination for witnesses in court hearings to have instances in which there is a breakdown of communication between them and the cross-examiner, a lack of understanding or both. These circumstances often result in a temporary stalling of the cross-examination process. For example, in the 25 January 2007 cross-examination of the Nchamihigo Trial Judgment,[1118] there is an instance where Mr Turcotte, the cross-examiner appearing on behalf of the accused, asks the Prosecution witness called witness BRD about the location of dead bodies in a specific locality according to the previous testimony of the witness, and the witness ultimately does not answer the question. This instance is interesting to critically unpack according to the theory of conversational metacognition and shall be discussed in detail later.

Before embarking on an analysis of the cross-examination, it is important to point out that arguably, cross-examination in court hearings is an expression of conversational metacognition. This is because cross-examination represents moment-by-moment monitoring and a turn-taking sequence by communicating agents through sets of questions the cross-examiner asks, which the witness must listen to, follow, understand, and answer. In turn, the cross-examiner must listen to, follow and understand the answers of the witness in order to

1115 Ibid at 267-268
1116 Ibid at 304
1117 Ibid at 285
1118 *The Prosecutor v Siméon Nchamihigo*: Cross-examination on Thursday 25 January 2007, at 1-13 (*Nchamihigo* cross-examination)

proceed to their next question in their cross-examination if satisfied about the previous answer. As such, it means that the parties to the conversation in the cross-examination are actively engaging in a metacognitive process where they are checking their own (and one another's) ability to convey verbal messages that are adequate – that is, true, understandable and appropriate for the task at hand.[1119] To highlight how this plays out practically, below is an excerpt of the cross-examination document in question, in which "Q" represents the questions asked by the cross-examiner, Mr Turcotte, and "A" represents the answers provided by witness BRD. The cross-examination excerpt reads:

> Q: thank you Mr. Witness. Yesterday you told us that you had gone to Gatandara. You also told us that you were disturbed by what you saw there. And, Mr. Witness, I would like to know whether you are in a position to tell us, when you left Kamembe to go to Gatandara in the direction of Bugarama, do you remember on which side of the road these people were found?
> A: Counsel, can you repeat your question? I did not quite understand it.
> Q: Very well, Mr. Witness. When you are travelling to Gatandara, let us say in the direction of the bridge, can you tell us on which side of the road you saw the dead bodies that you have told us you saw? Do you remember?
> A: Well, if you knew that area, I would be able to tell you whether it is your left or your right while going to Bugarama or to Kamembe. Do you know the region, so I can tell you whether it was on the left or right?
> Q: Mr. Witness, can you tell us the answer – or were you too disturbed at the time?
> A: I saw the dead bodies at Gatandara. I do not remember whether the dead bodies were on the left or on the right. Do you mean left on your way to Bugarama or right on your way to Kamembe?
> Q: if you are in a position to tell us, Witness, please tell us. If you cannot do so, then just say so and we will be done at this point.
> A: Well, I prefer that we move on to something else.[1120]

What can happen, as evidenced by the interaction above, is that while a distinctive property of conversational metacognition is multilevel type of evaluation, where one or both communicating agents are unable to evaluate the information before them, it affects the outcome of the task the question seeks to resolve in the conversation.[1121] In the conversation quoted above, Mr Turcotte asks the witness which side of the road the dead bodies were found, to which witness BRD asks for the question to be repeated once more, stating that he did not quite understand it.

1119 Joëlle Proust op cit note 185 at 269
1120 *Nchamihigo* cross-examination supra note 1118 at 2-3
1121 Joëlle Proust op cit note 185 at 267-268

This initial misunderstanding eventually determines the interaction of the two communicating agents for the next three reformulations of the initial question by Mr Turcotte. The reformulations are rendered futile by the two attempts at answers by the witness – answers that it must be noted contained questions themselves such as the witness asking Mr Turcotte: 'Do you know the region, so I can tell you whether it was on the left or right?' and 'Do you mean left on your way to Bugarama or right on your way to Kamembe?'[1122] While there is clearly moment-by-moment monitoring and turn-taking by each agent in the cross-examination, because sequence organisation is marred by the misunderstanding of the initial question by the witness, it arguably renders this specific component of the cross-examination metacognitively unsuccessful. This is because, though admittedly not articulated in this manner in the literature, it appears that the success of conversational metacognition is hinged on all three components to the theory of metacognition in relation to multilevel evaluation being met. For purposes of recollection, the three components are: (1) moment-by-moment monitoring; (2) a turn-taking sequence by agents and, finally, (3) checking of one's (and one another's) ability to convey verbal messages that are adequate – that is, true, understandable and appropriate for the task at hand.[1123]

That this part of the cross-examination is arguably metacognitively unsuccessful is manifest in that Mr Turcotte – on a third attempt to reformulate the initial question about which side of the road on the witness saw the dead bodies when leaving Kamembe to go to Gatandara in the direction of the bridge – gives the witness an option to concede to not being able to tell the court of the position of the dead bodies, to which the witness concedes, saying: 'well, I prefer we move on to something else.'[1124]

It is important to highlight that metacognitive processes can help reduce uncertainty about one's own capacities.[1125] In the instance described above, however, failure to adequately engage in the metacognitive process can increase uncertainty about one's own capacities. According to the theory of metacognition, at the individual level one may ask themselves reflexive questions such as:'should I speak of X, given my poor memory? Should I admit that I did not understand what he just told?'[1126] Because these reflexive questions often occur

1122 *Nchamihigo* cross-examination supra note 1118 at 3
1123 Joëlle Proust op cit note 185 at 269
1124 *Nchamihigo* cross-examination supra note 1118 at 3
1125 Joëlle Proust op cit note 185 at 268
1126 Ibid at 269

internally, it can prove difficult for a third party to a conversation between two or more communicating agents to ascertain whether the witness in-fact asked these reflexive questions to themselves in the cross-examination process. What is clear from the text of the cross-examination, however, is that witness BRD outwardly acknowledges his uncertainty by orally responding to the initial question by explicitly stating: 'counsel, can you repeat your question? I did not quite understand it.'[1127]

By doing so, witness BRD reveals, according to the theory of conversational metacognition outlined by Proust, that he is indeed engaged in a metacognitive state through his positionality as a witness in the process of cross-examination.[1128] This is because the oral acknowledgement that he did not understand the initial question is a cognitive marker much like "uhs", for example, which allows agents to convey to their audience that they are still formulating their speech.[1129] Likewise, gestures are cognitive markers because puzzled looks, eye-squinting, a pale face, tension and rigidity in body posture or in facial muscles could suggest that the speaker feels uncertain that they may be able to complete a turn – an example to this point is an unprepared candidate in an oral examination.[1130] Proust notes that many physical features expressed in conversation do not bear the meaning that the speaker intends.[1131] The textual transcripts of the case study in question unfortunately do not provide insight into the facial expressions, muscular movements or posture of the witness under cross-examination because they are presented within strict procedural constraints that inform the presentation of information and admissibility of non-verbal evidence in the court hearing of the Nchamihigo Trial Judgment.[1132]

According to Proust, engagement in conversational metacognition by agents may account for the kind of procedural self-knowledge which publicly monitors conversation moment-by-moment.[1133] This point may be relevant to the case study in question, and if this is to be accepted, perhaps the section of the cross-examination quoted above may not, as asserted earlier, actually signal an instance of unsuccessful metacognitive process on the part of the

1127 *Nchamihigo* cross-examination supra note 1118 at 2
1128 Joëlle Proust op cit note 185 at 268
1129 Ibid.
1130 Ibid at 270
1131 Ibid.
1132 This is informed by the ICTR Rules of Procedure adopted on 29 June 1994, specifically Rules 81 and 85 which determine the Records of Proceedings and Evidence and the Presentation of Evidence respectively.
1133 Joëlle Proust op cit note 185 at 269

witness in failing to follow and answer the cross-examiner's question. Instead, it may indicate the witness's metacognitive success through the mastery of this procedural self-knowledge.[1134]

If this is the instance, then witness BRD may arguably have outwitted Mr. Turcotte's cross-examination tactic about where exactly he saw the dead bodies – effectively saving his prior evidence of seeing the dead bodies from an attack on credibility. This is plausible for two reasons: first, because it must be remembered that witness BRD is, after all, the witness for the Prosecution and Mr Turcotte is appearing for the accused in the case and, second, the purpose of cross-examination is to test the evidence of a witness in the hope to expose weaknesses and deem their account unreliable or the witness themselves lacking credibility as a witness.

If the conclusion outlined above is to be accepted, then the initial conclusion that there was a failure on the part of the witness because of a lack of sequence organisation of one of three components needs to be reformulated. This reformulation would find, instead, that the witness's ability to throw off the sequence organisation component of conversational metacognition by evading answering the initial question posed by Mr. Turcotte – achieved through the witness's mastery of procedural self-knowledge that, moment-by-moment, publicly monitors and controls conversation– signals the metacognitive success of the witness, and consequently, the failure of Mr Turcotte's cross-examination tactic in that *specific* instance where the intention was to expose weaknesses in witness BRD's evidence or to deem them not credible as a witness in relation to seeing the dead bodies.

In fact, that the cross-examination continues beyond the witness not answering the initial question about the exact location of the dead bodies arguably signals that Mr Turcotte understands that he still has opportunities beyond this question to solve the probalistic reasoning task of exposing weakness in the evidence of the witness or deeming them not credible as a witness. This is noteworthy because the ability to solve a probalistic reasoning task is itself an achievement metacognitively,[1135] and cross-examination in its nature structures talk-in-action, and arguably allows for varying probalistic reasoning tasks to occur because it has a specified procedure, process and intended outcome. Thus, while the witness ultimately fails to answer the cross-examiner's initial question about where exactly he saw the dead bodies

1134 Ibid.
1135 Ibid at 268

at the locality in question, through the process and procedure inherent in cross-examination, both agents are still successfully engaging in multilevel type of evaluation of conversational metacognition because Mr Turcotte asks more questions thereafter, and the witness follows these questions, understands them, and attempts to answer them where possible. Essentially, the metacognitive process of monitoring moment-by-moment, turn-taking and sequence organisation begins anew in the same cross-examination process with a different question posed by the cross-examiner on the same issue, or a different question on another issue entirely.[1136]

Practically, this means that 'communicating agents need to keep track of the various task dimensions that are structuring talk-in-interaction.'[1137] On this point, it is critical to highlight that metacognitive capacities, including in conversational metacognition itself, are particular to certain tasks because responses furnished before in a similar task sets a specific standard for that particular task.[1138] This task-specific standard is then used by communicating agents to evaluate any judgement regarding varying aspects of anticipated or observed performance on the same task.[1139] For example, a witness in a cross-examination can judge that they can retrieve the name of a person or place because they have stored in their mind the dynamic properties of their prior attempt correlating with successful retrieval of that name.[1140] They do this by predicting their effectiveness, their propensity to make a mistake, and their temporal course in retrieving memory through an epistemic feeling.[1141] This kind of knowledge is procedural in nature and is likely to be put to use in subsequent conversations by the witness when they must decide whether it is appropriate to remember a person or place's proper name.[1142]

In order to illustrate task-specific metacognitive capacities, two examples have been chosen and will be discussed to highlight the absence and presence of task-specific forms of procedural knowledge respectively. The first example highlights that where there is an absence of task-specific forms of procedural knowledge acquired previously, a communicating agent will be unable to invoke their metacognitive capacities in that instance. This is because they

1136 Ibid at 267
1137 Ibid.
1138 Ibid at 284
1139 Ibid.
1140 Ibid.
1141 Ibid.
1142 Ibid.

have not performed the task before the moment they are asked and, therefore, do not possess the procedural knowledge that comes with prior task performance. The passage in question is from the same cross-examination document of the Nchamihigo Trial Judgment in which the cross-examiner, Mr Turcotte, asks witness BRD:

> Q: … When you say that you went to Gutandara, you stayed there for a very short time. That is what I understood. Can you give us the names of the people who were with you at the location?
> A: I no longer remember the people who were with me at that location.
> Q: Very well, Mr. Witness. Thank you. Am I to understand also that you cannot give us a description of what the three young girls we talked about were wearing?
> A: There you are trying to be clever. This was 12 years ago. How do you expect me to remember the clothes these young girls were wearing?[1143]

In the quote above, the witness struggles to recall the names of the people, saying he no longer remembered the people who were with him at the location in question. In his response, he highlights that there has been a passage of time spanning twelve years, hence his inability to also recall a description of what the three young girls in question were wearing.[1144] In fact, he proceeds to rhetorically ask Mr Turcotte how he expects him to remember the clothes the young girls were wearing considering that he cannot even recall the names of the people he was with at that moment in time over twelve years ago.[1145] These responses indicate that in the twelve years since the incident in question, the witness may have not previously had tasks requiring him to remember either names of the people he was with or what the three young girls were wearing. As such, he has not acquired the kind or procedural knowledge of these tasks to draw these details from prior task performance for current purposes in the cross-examination.

The second example, in contrast to the first, highlights that where there is a prior attempt at remembering the retrieval of a place's proper name, procedural knowledge of that name may exist. This procedural knowledge practically functions to make monitoring the numerous components of a task that structure talk-in-interaction between two or more communicating agents much smoother.[1146] The passage outlining the second example is also drawn from the cross-examination of 25 January 2007, and pertains to Mr Turcotte asking witness BRD about

1143 *Nchamihigo* cross-examination supra note 1118 at 3
1144 Ibid.
1145 Ibid.
1146 Joëlle Proust op cit note 185 at 284

fighting and the operation of bus services in a particular region during the Rwandan genocide. The passage of the cross-examination in question reads:

> Q: Is it correct to say, Mr. Witness, that at the time we are speaking about, there was no operational bus service in the region?
> A: Yes, I remember that there was a bus service in some neighbourhoods of Cyangugu. As you know, there was no fighting in Cyangugu.
> Q: I'm sorry; I did not understand your last sentence. What did you say exactly?'
> A: I said that there were no hostilities in Cyangugu?
> Q: Very well, I understand now. In April and May, there were no hostilities in Cyangugu. Is that what you are saying sir?
> A: Yes. That is what you should understand.
> Q: Thank you, Mr. Witness, I have understood you well.[1147]

What is interesting about the interaction outlined in the quote above is that the witness recalls the region Mr Turcotte refers to in his initial question, though Mr Turcotte did not himself mention it explicitly by name as Cyangugu. This arguably indicates that the witness, inferring from the topic about the operation of buses, had acquired procedural knowledge that the region implicitly referred to by the cross-examiner in this instance was Cyangugu. Indeed, considering that cross-examination can span a number of days, there may have been a prior occasion of the cross-examination from another date in the Nchamihigo Trial Judgment preceding that of 25 January 2007 where this location and its features in the genocide were spoken about.

What is also interesting to note in the quote above is the witness' sentence in which he assertively states to the cross-examiner that there being no hostilities in Cyangugu, saying: 'Yes. That is what you should understand.'[1148] This answer is a cognitive utterance because its function is to refer Mr Turcotte to the conversational subject matter: that as the witness had already stated, there were indeed no hostilities in Cyangugu at the time in question. It is also worth noting that this entire interaction occurred because Mr Turcotte decided to state that he did not understand witness BRD's last sentence in the first answer, and that he proceeded to ask witness BRD what he said exactly. In response to this, essentially reformulating a few words of Mr Turcotte's question into their answer, the witness says: 'I said that there were no hostilities in Cyangugu?'[1149]

1147 *Nchamihigo* cross-examination supra note 1118 at 2
1148 Ibid.
1149 Ibid.

While Mr Turcotte proceeds to say that he understood, he asks the initial question again but in a different formulation, saying: 'in April and May, there were no hostilities in Cyangugu. Is that what you are saying?'[1150] It is worth pointing out that the reiteration of the initial question by Mr Turcotte, although he previously said that he understood, is intentional as it functions to not only dispense of his duty as the cross-examiner, but it also indicates a cognitive utterance on his part because, ultimately, a key feature of conversational metacognition is: 'checking one's (or another's) ability to convey an intended message through speech.' [1151]

The back-and-forth interaction outlined in the quote above between witness BRD and Mr Turcotte arguably signals a discreet and subconscious exercise of self-reflexive questions on the part of each agent in the conversation.[1152] Some of these questions may include, but are not limited to: 'was I, as the speaker, in a position to make [the words and gestures]?'; should I speak of X given my poor memory?; 'was my utterance accepted?'[1153] In respect of the discreet and subconscious exercise of reflexive questions by each agent in conversation, it is worth recalling that Proust argues that these questions need not be raised consciously by either agent in conversation, except in special circumstances (in other words, because some kind of trouble is bound to occur as appears based on past experience juxtaposed with present or foreseeable performance).[1154]

The nature of cross-examination arguably constitutes a special circumstance of conversational metacognition. This is because cross-examination requires a conscious and explicitly articulated raising of otherwise self-reflexive questions – some of which are, by necessity, expressed aloud by either communicating agent as evidenced in the excerpts quoted – because cross-examination is intended to allow a cross-examiner to test the reliability of evidence by a witness or their credibility as a witness within court hearings. Therefore, through cross-examination, both Mr Turcotte and witness BRD were necessitated by the procedure inherent in cross-examination to engage in conversational metacognition concerning whether their respective words were adequate – that is, true, understandable and appropriate for the task at hand?[1155]

1150 Ibid.
1151 Joëlle Proust op cit note 185 at 269
1152 Ibid.
1153 Ibid.
1154 Ibid.
1155 Ibid.

Considering the discussions outlined in the analysis of this case study, from a metacognitive perspective, the cross-examination of the Nchamihigo Trial Judgment dated 25 January 2007 is arguably an embodiment of the key characteristics of conversational metacognition as it pertains to speech between two or more communicating agents. This is because the nature of cross-examination requires that speaking agents partake in a procedural and structured song-and-dance occurring between the cross-examiner and the witness that determines the efficacy of the cross-examination process in court hearings. In cross-examination, there are sets of questions being asked by the cross-examiner, which the witness must follow, understand, and answer. Likewise, the cross-examiner must listen, follow and understand the answers of the witness in order to proceed to their next line of question in the cross-examination.

Cross-examination as a feature of court process represents both a practical and palpable illustration of the features of multilevel type of evaluation between two or more communicating agents as expressed in the theory of metacognition. Having illustrated how this practically occurs by way of a case study, I shall proceed to the second case study in view of resolving the generality of the theory metacognition as it relates to the norms of acceptance.

13.4.2 Case study resolving the generality of the theory of Metacognition as it relates to the norms of acceptance: The Prosecutor v Ferdinand Nahimana

The case study discussed below seeks to discuss norms of acceptance as outlined in the theory of conversational metacognition to highlight how these norms affect notions of "truth". I shall begin by briefly outlining the facts of the case in question, after which I shall proceed to apply the theory of metacognition as it relates to norms of acceptance to the text of the examination-in-chief of the Nahimana Trial Judgment dated 5 December 2003 containing the testimony of a witness called witness 18.

The three accused, Ferdinand Nahimana, Jean Bosco Barayagwiza and Hassan Ngeza were charged in separate indictments but were tried jointly. They were all charged on counts of genocide, conspiracy to commit genocide and direct and indirect public incitement. Above and beyond these charges, Ferdinand Nahimana, the primary character of interest for this case study, was charged with superior responsibility under Article 3 common to the Geneva

Conventions and additional Protocol II. The Prosecution in the Nahimana Trial Judgment argued that Hassan Ngeze (an owner of a newspaper called *Kangura* that published anti-*Tutsi* sentiment from as early as 1991) and Ferdinand Nahimana (a University Lecturer and Professor who had a program on a radio station called *Radio Télévision Libre des Mille Collines* (RTLM)) had collaborated in a joint undertaking presented as a competition with allegedly sinister aims of pushing hateful anti-*Tutsi* ideology via mainstream media. The inference drawn from this was that the use of these media platforms by the two co-accused incited the *Hutu* audience of the newspaper and radio show to resent and proceed to kill *Tutsi* people in the lead-up to and during the genocide that began on 1 April 1994.

Before embarking on an analysis of the case study at hand, it is important to begin by outlining the role of metacognitive representation in determining how people's understanding and knowledge acquisition is shaped, thus allowing them to engage in metacognitive processes that can affect their notions of "truth". As Joëlle Proust highlights in her writing on the theory of metacognition, representation is an indicator, natural or conventional, whose function is to indicate what it does.[1156] An indicator is one of two *relata* in a nomological causal chain, with one being consequent to another.[1157] For example, Proust notes that fire causes smoke, therefore it follows that smoke indicates a fire.[1158] While this is accepted, Proust says it is crucial to note that smoke not only indicates fire, but also indicates all the properties and events associated with a fire such as the presence of oxygen, the absence of rain, things capable of burning and so on.[1159]

In respect of representation determining people's understanding and knowledge acquisition and its effect on formulating a notion of "truth", the Nahimana Trial Judgment highlighted the text of an article titled *The Ten Commandments* published in *Kangura* Issue No. 6 of December 1990 as being critical to the charge of inciting violence levelled at Hassan Ngeze and Ferdinand Nahimana. This is because the title of the article above is deceiving to the unsuspecting reader as one would presume the article's title expressly (re)presents sentiments expressed in the biblical text containing the Ten Commandments. Instead, it inverted the linguistic representation usually associated with the Ten Commandments by

1156 Ibid at 112
1157 Ibid at 112-13
1158 Ibid.
1159 Ibid.

inciting the *Hutu* audience it was directed at to foster animosity towards the *Tutsi* population. This animosity is arguably the product of a set of cognitive tasks where fluency approximates "truth" because through recurrent ways of thinking, people learn the ideology of such textual communication because in reading a few issues of the publication or listening to a radio show on it, they become fluent in the true content of the text.

It is worth pointing out that according to the theory of conversational metacognition, fluency tends to favour what worked in past performance rather than what is objectively true.[1160] Furthermore, fluency's effectiveness lies in its reliable correlation with both perceptual and memorial knowledge.[1161] Proust finds that when humans possess sensitivity to a norm of fluency, they can extract relevant feedback information for the neural performance of a task.[1162] As a result of this, humans are able to *feel* that task performance will be/was easy or difficult.[1163] The question, then, pertains to the rationality of an agent who is capable of accepting a proposition notwithstanding the proposition being false?[1164] Proust explains that there are forms of acceptance that are not geared at attaining the truth notwithstanding that they may, under certain circumstances, encourage truth.[1165]

Indeed, Proust finds that communicating agents are usually required to epistemically coordinate with other agents, resulting in forms of acceptance that can be driven by a norm of consensus.[1166] The question that looms large in the discussions of these theories, then, is how this manifests practically. This practical manifestation will be illustrated by way of critical analysis of excerpts of the examination-in-chief of the Nahimana Trial Judgment as it concerns a witness called witness 18. This is because witness 18 makes some interesting assertions that have a bearing on norms of acceptance, consensus and notions of "truth" conception when asked by counsel, Ms. Ellis, why he came to give evidence for the accused named Ferdinand Nahimana. The examination-in-chief is structured in a sequence of questions asked by Ms. Ellis (represented by "Q") and answers given by witness 18 (represented by "A"), and reads:

1160 Ibid at 129
1161 Ibid.
1162 Ibid at 130
1163 Ibid.
1164 Ibid at 174
1165 Ibid at 175
1166 Ibid.

Q: Mr. 18, you said you haven't met with Professor Nahimana since you left university. What was the relationship like with him when you were at the university? Was it that of a student, simply, or you[r] friends? That's what I'm asking you
A: the relationship between us was a relationship between a lecturer and a student.
Q: and you said you haven't met him since. Have you had any contact with him since leaving the university?
A: No. Since leaving the university, I've never been in contact with him.
Q: You've described the sort of person you found him to be from your knowledge. When students at the university spoke of their teachers, did they describe them all in the same terms of not?
A: That was the assessment of everyone there. It was the appreciation of every person there.
Q: And did they have the same assessment of all their other professors?
A: No. I would say that with regard to each lecturer, each lecturer had his own qualities and also there were different faculties, and students had their own assessments. But there were lecturers who actually assessed and conceded to be as wise men, and Ferdinand Nahimana fell in this category; and then there were other lecturers who had received a different assessment.
Q: why did you come to this Tribunal to give evidence for Ferdinand Nahimana?
A: first and foremost, I'd like to say that the five years I spent with him actually allow me to tell the truth regarding his life at the university. Secondly, he was my lecturer, and he was one the lecturers that I really appreciated.
Q: Thank you.[1167]

It is interesting that witness 18 asserts in the quote above that he is appearing as a witness for Ferdinand Nahimana because: 'there was an assessment of [the students at the university]….' continuing to say, '… that there were lecturers who [were] actually assessed [by the students at the university] and conceded to be wise men, and Ferdinand Nahimana fell in this category.'[1168] What witness 18 unknowingly reveals in these statements of the examination-in-chief is that Proust is correct to assert that the way consensus among a group of agents manifests practically is that agents have a propensity to take something as fact merely because others in their group also do.[1169]

This conclusion is amplified by his subsequent statements in which he states: 'there were other lecturers who had received a different assessment [from Ferdinand Nahimana]….'[1170] This alludes to witness 18, along with numbers of other university students, collectively coming to conclusions about the character of lecturers at the university. It is worth pointing out that it appears the students came to these conclusions not as individuals acting of their own volition within the broader student body, but perhaps in group settings based on

1167 *The Prosecutor v Ferdinand Nahimana*: examination-in-chief on Thursday 5 December 2002, at 16-17 (*Nahimana* examination-in chief)
1168 Ibid.
1169 Joëlle Proust op cit note 185 at 175.
1170 *Nahimana* examination-in-chief supra note 1167 at 17

group consensus, after all, witness 18 acknowledges that he and other students conceded to judgements of character of their lecturers. If this argument is to be accepted, it corroborates the argument within the theory of conversational metacognition that sometimes agents form their acceptance as a function of others, such as instances where a client is being defended in a court of law, where peace talks are up for discussion, or even running an exercise of organizational communication.[1171]

According to Proust: 'corresponding norms are different, agents should have a different assessment of their confidence when they are accepting …. a given position or set or propositions.'[1172] The scenario described, however, outlines a subjective ideal that is arguably indicated by the phrase "their confidence" and words like "should". In practical terms, alterative epistemic goals and associated norms prompt the adoption of specific information.[1173] That is to say, on one hand, there is an element of: 'exhaustivity (tracking the comprehensive true story about a matter at the risk of taking false propositions to be correct)'[1174] and on the other hand, there is accuracy (tracking only the truth of something at the risk of losing comprehensiveness).[1175] Proust notes that what one chooses between the two depends on the ends being pursued when considering whether one should accept something.[1176]

Proust notes that an aim that offers a picture that is adjacent to truth purposefully undertakes the risk of error.[1177] Proust finds that this is because in seeking to not miss target items, one accepts false positives.[1178] In contrast, if accuracy is the aim there will be an effort to produce only true statements at the risk of accepting misses.[1179] Proust therefore suggests that acceptances should be catalogued with their relevant norms, saying one does not simply accept propositions, they accept positions either for *accurate truth* or for *comprehensive truth*.[1180] In light of this point, it makes sense that when Ms Ellis asks why witness 18 came to the tribunal to give evidence for Ferdinand Nahimana, all that witness 18 furnishes as a response is:

1171 Joëlle Proust op cit note 185 at 175.
1172 Ibid
1173 Ibid at 174
1174 Ibid.
1175 Ibid.
1176 Ibid.
1177 Ibid.
1178 Ibid.
1179 Ibid.
1180 Ibid.

> First and foremost, I'd like to say that the five years I spent [at the university] with him actually allow me to tell the truth regarding his life at the university. Secondly, he was my lecturer, and he was one of the lecturers that I really appreciated.[1181]

It is worth noting that witness 18 in the quote above provides no clarity as to what the "truth" he speaks of is informed by. What is also interesting about the last sentence of the quoted excerpt of the examination-in-chief is that witness 18 assumes that because he "knew" Professor Nahimana for five years while at university, and that he "appreciated" him, that he consequently has the licence to speak on professor Nahimana's character considering the alleged crimes. Second, it is interesting that he (re)states his first reason in his second, deeming the restatement a literary tautology. Through this kind of reasoning, witness 18 assumes that his perception of the "truth" he thinks he possesses in relation to Professor Nahimana is plausible based solely on his prior interaction with him at university. Thus, he opts to accept a notion of "truth" under the norm of plausibility.[1182] Why this is worth pointing out is because based on the theory of conversational metacognition, norms of plausibility are arrived at based on probalistic beliefs in a thing.[1183] Considering that witness 18 arguably acknowledged in his testimony that his initial perception of Professor Nahimana from university was reached via consensus in a group setting, one would infer that what informed his subjective beliefs is group consensus rather than the autonomy of his own reasoning.

In contrast to norms of plausibility, norms of coherence underpin legal reasoning because inferences are drawn based on cumulative and wholistic assessments of *all* evidence before the court considering the task at hand.[1184] What the sentiments expressed by witness 18 in the text of the examination-in-chief elucidate is that norms of acceptance as cognitive tasks are critical to conceiving of a notion of "truth" because they highlight the complex interaction between individual mental agency and world-directed agency within the broader theory of action.

Considering the two aspects of the theory of conversational metacognition discussed in detail above by way of case studies for each aspect, it is evident that speech as both

1181 *Nahimana* examination-in-chief supra note 1167 at 17
1182 Joëlle Proust op cit note 185 at 180
1183 Ibid.
1184 Ibid.

communication and reason are not only pragmatic for processes of court, for example, but also for the transformation or *metanoia* of Rwandan Society both at an individual and collective level from survivor or accused or *Hutu* or *Tutsi* to the "we" that constitutes Rwandans. When this *metanoia* occurs, it sets the scene for the emergence of a sameness of intent or *homonoia* that allows those who identify as part of the collective that is Rwandan to actively maintain peaceful co-existence with one another in post-conflict Rwanda – therefore preventing what Agamben calls *stasis* or civil war.[1185]

In doing this, metacognitive speech as an expression of public deliberation or "live rhetoric" arguably allows for the emergence of the rhetoric of forgiveness beyond the confines of bodies legally mandated with reconciliation because it can occur in any other space between communicating agents forming part of the "we" that is Rwandan. This metacognitive speech has the potential to occur anywhere and at any time as long as people are invoking speech as both communication and reason, whether it be in a legal case in court or in the very villages, the marketplace, and the streets that both survivors and perpetrators spoke of with apprehension in the Gacaca Court hearings when they considered that they may one day come face-to-face with one another.

This is the nature of interaction between citizens nation-building in post-conflict contexts like Rwanda, South Africa and many more countries and regions across the world. This "live rhetoric", which is a critical component of conflict resolution, does not relinquish the state of its obligations to the body of citizens once legally mandated bodies or courts of law have completed their duties. It appears, instead, that this is the commencement of a different chapter to reconciliation and even forgiveness to maintain peace. The state itself is required – in tandem with citizens between themselves on the ground – to actively and continually engage in "live rhetoric", and this point is illuminated by the writing of Catherine Arthur on nation-building in conflict contexts. This is because Arthur highlights that nation-building and state-building overlap and are – to an extent – interdependent and mutually supportive, but that the former is primarily concerned with the symbolic aspects of the nation-state in relation to a national and even cultural identity, while the latter is concerned with establishing governing institutions and the political infrastructure of the state.[1186]

1185 Giorgio Agamben op cit note 286 at 16
[1186] Ibid at 1181

13.4.3 Nation-building by the state as an expression of "live rhetoric" for the maintenance of peace in post-conflict contexts

Catherine Arthur's work on post-conflict contexts is critical because she focuses on the importance of nation-building.[1187] Arthur highlights that nation-building and state-building overlap and are – to an extent – interdependent and mutually supportive, but that the former is primarily concerned with the symbolic aspects of the nation-state in relation to a national and even cultural identity, while the latter is concerned with establishing governing institutions and the political infrastructure of the state.[1188]

Arthur points out that nation-building is concerned with the objective of fostering unity among the population despite the diversity that exists, ultimately seeking to create a sense of allegiance on the imaginings of a nation-state.[1189] This is important because while nation-building may appear to be merely symbolic, from a pragmatic perspective, it offers a degree of stability or peace for the state.[1190] This is also critical because the nation-building initiative, beyond the timeframe within which bodies legally mandated with reconciliation operate, constitutes an active engagement with public deliberation or "live rhetoric" by the state itself.

Arthur finds that nation-building is often overlooked, though it is critical as a tool for peace building because it tangibly aids in the reconstruction of the nation after a conflict.[1191] She says that nation-building can be especially useful in instances where conflict occurred along the lines of ethnicity and ethno-nationalist sentiment for example,[1192] though she notes that it is a challenge when there is a legacy of violence and division .[1193] This is especially true in instances where nation-states attained their independence from colonial authorities because the attainment of independence often involved varying degrees of violence in the pursuit of self-determination.[1194]

[1187] Catherine Arthur, "Post Conflict Nation-building" in *The Palgrave Encyclopeaida of Peace and Conflict Studies*, (eds) Oliver P. Richmond and Gëzim Visoka (Switzerland, Springer Imprint)
[1188] Ibid at 1181
[1189] Ibid.
[1190] Ibid.
[1191] Ibid.
[1192] Ibid.
[1193] Ibid at 1183
[1194] Ibid.

Arthur says the pervasive legacies of violence compound on significant challenges that affect nation-building because even in countries where there has been no conflict, it is still a challenge to foster a sense of kinship, shared heritage and unity along ethnic, cultural and political lines.[1195] In relation to this point, it is worth recalling Giorgio Agamben's writing on *stasis* as stemming from the lack of interest or concern between blood kinship and citizenship,[1196] which, in the most extreme form, moves beyond a differences of opinion to reciprocal threats of violence manifest as civil war.[1197]

The state's role after conflict can potentially exacerbate rather than mitigate hostilities among people through othering and identity politics, giving rise to grievances that may threaten newly established peace.[1198] Arthur pinpoints this, in part, to the emotive nature of identity politics and the ideas of the nation and any nationalist sentiments.[1199] Thus, Arthur finds that the internal demographics of the new nation state, and even those of pre-existing nation-states, are critical for the success of post-conflict reconstruction[1200] It is understandable that identity politics are often emotive in nature because ethnicity, in the case of Rwanda's genocide, was the basis of conflict. Considering this, it makes sense that Alexandre Dauge-Roth argues that victims of the Rwandan Genocide would need to re-envision and reassert themselves in a future in which perpetrators walk among victims.[1201]

If like in Rwanda, for example, conflict occurs along ethnic lines, Arthur says the challenge to nation-building is greater because of sensitivities relating to the source of the conflict.[1202] It is in such a context that the state must be a prominent figure, appearing to be less emotive, and must aim toward a civic form of nationalism stepping away from looking towards ethnic or cultural homogeneity.[1203]

[1195] Ibid.
[1196] Giorgio Agamben op cit note 286 at 15
[1197] Philippe-Joseph Salazar, 'Compromise and deliberation', op cit note 82 at 149
[1198] Catherine Arthur op cit note 1187 at 1183
[1199] Ibid.
[1200] Ibid.
[1201] Alexandre Dauge-Roth op cit note 996 at 166-7
[1202] Catherine Arthur op cit note 1187 at 1183
[1203] Ibid.

Civic nationalism is concerned primarily with fostering inclusivity in internal demographics, such that even the way that the state formally represents different ethnic groups in the legal and political framework matters.[1204] Arthur finds that at the crux of successful nation-building, considering a background of conflict, is the construction and institutionalization of an official national identity – a distinguishable community of people set apart from other groups of people,[1205] such as "South African" in South Africa or "Rwandan" in Rwanda, for example.

Arthur notes that civic nationalism can be created using national anthems,[1206] rituals like observing annual national holidays and the existence of cultural artefacts of national value,[1207] the constitutions of nations affirming and enumerating the rights and responsibilities of citizens,[1208] visual symbols like flags of nations (some of which are designed by citizens),[1209] are all state policy as "live rhetoric" that is deliberately aimed at fostering cohesion and unity among the citizenry regardless of their ethnic, racial, linguistic differences or the legacies of conflict arising from such differences. Indeed, constant engagement with public deliberation as "live rhetoric" beyond the confines of bodies mandated with reconciliation can arguably set the scene for the potential emergence of Hannah Arendt's conception forgiveness as: 'the exact opposite of vengeance …. which re-acting against the original trespassing [which] far from putting an end to the consequences of the first misdeed, everyone remains bound to the process.'[1210]

This aligns with the writing of Kirk Simpson on the importance of truth recovery in post-conflict contexts in view of reconciliation efforts because Simpson highlights that the core political, social and legal objective of a truth recovery process after conflict is to overcome obstacles of a weak grasp of history relying on fabrication and myth, and to foster a consensual history that resists the dominant group's historiography.[1211] Therefore, as long as the

[1204] Ibid.
[1205] Ibid at 1184
[1206] Ibid at 1191
[1207] Ibid at 1189
[1208] Ibid at 1185
[1209] Ibid at 1189-1190
[1210] Hannah Arendt op cit note 1015 at 241
[1211] Kirk Simpson op cit note 157 at 132

interpretation of the past is critical and takes into account that individual recollections are often inescapably subjective, the truth recovery and peacebuilding process will be effective. [1212]

Ultimately, Arthur finds that the success of nation-building – invoking strategies to continue engagement with "live rhetoric" – directly impacts the maintenance of peace by the State.[1213] This aligns with writing of Aristotle who said that the object of the city (state), maintained by political partnerships between the citizens comprising of free men ruling themselves, is the chief good of citizens being able to achieve a share of the good life.[1214]

14. CHAPTER 14: CONCLUSION AND CLOSING REMARKS

Considering the critical role of public deliberation as "live rhetoric", it is worth recalling the primary thesis question: does the law have the authority to grant forgiveness to a perpetrator on behalf of a victim in bodies legally mandated with reconciliation in post-conflict democratic contexts? In light of the breadth of discussion in the different chapters of this thesis, a response to the question posed above will be attempted, drawing on various key discussions embarked on throughout the thesis project.

The primary thesis question on the law's authority to grant forgiveness to a perpetrator on behalf of a victim in bodies legally mandated with reconciliation in post-conflict democratic contexts, is premised on an understanding of reconciliation as occurring between two individuals in the presence of a third party in view of a specific political outcome, whereas forgiveness is personal, occurring without a specific political outcome and occurring between two individuals.

This thesis has argued that there exists a rhetorical gap between those who speak the language of the law on reconciliation, and those who speak the everyday language of forgiveness informed by a Judaeo-Christian rhetorical frame. It is argued that the gap is addressed by public deliberation or "live rhetoric", allowing for a divided citizenry in post-conflict contexts to transform (*metanoia*) and form a sameness of intent (*homonia*) in their community that not only prevents *stasis* (as reciprocal threat of civil war due to a difference of

[1212] Ibid at 131
[1213] Catherine Arthur op cit note 1187 at 1192
[1214] Aristotle, *Politics,* op cite note 214 at 5

opinion), which allows for the emergence of a "we" that constitutes either "South African" or "Rwandan" in each respective context. This is, in large part, because public deliberation as "live rhetoric" functions to keep everyone bound in the process towards reconciliation, peace and possibly even forgiveness.

This thesis has presented arguments to the effect that this "live rhetoric" was manifest in a number of ways, namely: as Judaeo-Christian religious rhetoric in the form of Kairos theology preaching to the public on matters of injustice and the need for atonement; language as policy that determines notions of "truth" in a free society in which peers governed themselves; through the values espoused by the law, whose authority is grounded in the juridical field; as part and parcel of the truth-shaping processes found in the hearings of bodies legally mandated with truth, justice, peace and reconciliation, or as the engagement of the memory archive by citizens in negotiating the political present – through an engagement with speech as not merely logos but also reason – the scene is set for the emergence of a kind of forgiveness that, as expressed by Arendt, constitutes: 'the exact opposite of vengeance, which acts in the form of re-acting against an original trespassing, whereby far from putting an end to the consequences of the first misdeed, everybody remains bound to the process.'[1215]

The entry-way for either of the listed avenues above to engage in "live rhetoric" is almost always underpinned by the ability to invoke speech as both communication and reason. It is not excessive to argue that speech as reason is possessed by all human beings, and is critical not only for the maintenance of peace and democracy in post-conflict contexts at the level of the state, but it also allows the processes of reconciliation and possibly even forgiveness to continue among individuals beyond the confines of bodies legally mandated with reconciliation because speech helps people distinguish between right and wrong, good and bad and other moral qualities.[1216] This sentiment applies even to those who simply bore witness in the Gacaca Courts of Rwanda, for example, for as Alexandre Dauge-Roth argued, bearing witness to one's own suffering and aftermath as a survivor should not be described as "having survived a trauma" but should rather be described as "still surviving"',[1217]

1215 Hannah Arendt op cit note 1015 at 241
1216 Aristotle, *Politics*, op cit note 214 at 11
1217 Alexandre Dauge-Roth op cit note 996 at 166-7

The notion that a survivor should be described as "still surviving" indicates that "the process" which Arendt speaks of is not a single moment in time manifest as the proceedings and hearings of the bodies legally mandated with reconciliation like the TRC or the Gacaca Courts in South Africa and Rwanda respectively. Rather, as succinctly articulated by a suspect in the Rwandan post-genocide context interviewed by Phil Clark: 'Reconciliation doesn't come from the sky. It comes bit by bit. It means living together, saying sorry, asking for forgiveness. It is much more than words – it is actions.'[1218]

Peacebuilding requires reconciliation as a pre-requisite, therefore, both reconciliation and forgiveness are fitting to describe "the process" that Arendt says binds everyone.[1219] After all, bodies legally mandated with reconciliation in post-conflict democratic contexts of South Africa and Rwanda functioned in much the same way as the funeral oration of ancient Athens. This is arguably because like the funeral oration, the power of these bodies – beyond the obvious power conferred by their founding legislation – lies in what Philippe-Joseph Salazar describes as their ability to elicit a crowd's participation in responses.[1220]

These bodies, much like the funeral oration of ancient Athens, also functioned to grant posthumous glory to the memory of the names of the dead from conflicts in South Africa and Rwanda.[1221] The function of this exercise of "live rhetoric" is to ensure that as the biblical text of Colossians 3:11 states, there is no longer Jew, Greek, Barbarian or Scythian – and in the South African and Rwandan contexts, no perpetrator or victim: not because one would seek to ignore such differences, but because the "we" constituting "South African" and "Rwandan" in the aftermath of the respective contexts of conflict functions to transform the differences of "perpetrator" and "Survivor" to a singular body of citizens. Thus, in line with the teaching of the apostle Paul in Colossians 3:11, not only should there be a rejection of privileging one difference over another, but with the creation of a "we" among the citizens of South Africa and Rwanda, the rule was – after the end of the conflict – that if one part suffers, every part suffers with it, and if one part is honoured, every part rejoices with it.

1218 Phil Clark op cit note 887 at 112
1219 Hannah Arendt op cit note 1015 at 241
1220 Philippe-Joseph Salazar 'An African Athens' op cit note 26 at 11
1221 Nicole Loraux, *The Invention of Athens* op cit note 14 at 41

The "we" constituting a body of citizens as either "South African" or "Rwandan" is effective as language policy because it helps foster relationships that were initially brokered in the bodies legally mandated with reconciliation. These bodies were critical, too, because through engaging parties in conversational metacognition, there was implementation of specific communication control processes because there are often anywhere between two and several actors involved in conversation.[1222]

Like the funeral oration, the bodies legally mandated with reconciliation also served their post-conflict contexts by functioning to silence internal conflicts that could lead to what Giorgio Agamben calls *stasis* or civil war.[1223] Furthermore, like the funeral oration of ancient Athens, the formation and capacity of bodies mandated with reconciliation was authorized by the law. In this respect, it is worth recalling that Pierre Bourdieu notes that as a quintessential form of legitimized discourse, the law exercises its specific power insofar as the element of arbitrariness is not recognized, which occurs by binding laypeople to a belief in the authority and neutrality of both the law and the jurists – what Bourdieu calls "the tacit grant of faith in the juridical order".[1224]

Importantly, that people in post-conflict democratic contexts of South Africa and Rwanda voluntarily submitted themselves to the jurisdiction of the Constitutional Court and the ICTR in legal cases like the *AZAPO* case and the *Nchamihigo Trial Judgment* respectively, indicates that as Pierre Bourdieu argued, the exercise of the law's specific power can only occur through the complicity of those who are dominated by it.[1225]

Notwithstanding the point on domination mentioned above, it is important to recall that Jacques Rancière proclaims that: 'politics is not made up of power relationships; it is made up of relationships between worlds.'[1226] Practically, the relationships between the worlds are underpinned by speech as both communication and reason,[1227] from which "live rhetoric" among the people of a state allows them to organise themselves in partnerships or political associations as peers in view of the chief good – that is, the preservation and advancement of

1222 Joëlle Proust op cit note 185 at 267
1223 Giorgio Agamben op cit note 286 at 16
1224 Pierre Bourdieu, *The Force of Law* op cit note 1 at 844
1225 Ibid.
1226 Jacques Rancière, *Disagreement* op cit note 1027 at 42
1227 Ibid at 11

the state,[1228] especially considering that as Aristotle argued, the singular person is not self-sufficing.[1229]

As Pierre Bourdieu points out: 'the law is the quintessential form of "active" discourse, able by its own operation to produce its effects.'[1230] He does not conceive of this argument to be excessive because while it seems that the law *creates* the world, it is actually the world that first *creates* law.[1231] After all, as Bourdieu argues, juridical practice defines itself in part – much like the practice of religion – through the intersection between the juridical field and the layperson's needs.[1232]

As such, the law's authority to implicitly inscribe the rhetoric of forgiveness in bodies legally mandated with explicitly articulated tasks of Truth Recovery, Justice, Peace and Reconciliation arguably arises out of the demand from the layperson who engages with these bodies – engaging through speech as logos and reason not as a legally competent actor, but as the layperson for whom a legally competent actor acts for and on behalf of.

1228 Aristotle, *Politics,* op cit note 214 at 201
1229 Ibid at 13
1230 Pierre Bourdieu, *The Force of Law* op cit note 1 at 838
1231 Ibid at 839
1232 Ibid at 841

BIBLIOGRAPHY

Primary Sources

Constitutions

Constitution of the Republic of South Africa, 1996.

Constitution of the Republic of France, 1958

Declaration of Independence, United States of America, 4 July 1776

Declaration of the Rights of Man and the Citizen, France, 26 August 1789

Statutes

South African:

Attorneys Act No. 53 of 1979

Group Areas Act No. 41 of 1950

Legal practice Act No. 28 of 2014

Native Trust and Land Act No. 18 of 1936.

Native (Urban Areas) Act No. 21 of 1923

Native (Urban Areas) Act No. 25 of 1945

Population Registration Act No. 30 of 1950.

Promotion of National Unity and Reconciliation Act No. 34 of 1995

Restitution of Land Rights Act No. 22 of 1994

Foreign:

Athenian decree of 403BC

Decree 2001-272 (Electronic Signatures) (France)

Decree no. 79-1037 of 3 December 1979 (France)

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)

Law 78-753 (Access to Information) (France)

Law 2000-230 (Evidence Law and Electronic Signatures) (France)

Law of 3 January 1979 (No. 79-18) (France)

Order of 25 March 2001 (National Archives' Services) (France)

Order of 25 March 2002 (Direction of National Archives) (France)

Ordinance of 2004 – 178 (*Code du Patrimonie*/National Patrimony (France)

(Organic Law No. 8/1996 of 1996) on The Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1994, 1 September 1996 (Rwanda)

United Nations Statute for the International Criminal Tribunal for Rwanda

Cases

South African:

Azanian People's Organization (AZAPO) and Others v. President of The Republic of South Africa and Others 1996 (8) BCLR 1015 (CC)

Ex parte: The Two councils, being the North Central and the South-Central Metropolitan Substructure Councils of the Durban Metropolitan area and Inner West Local Council of the Durban Metropolitan Council, Land Claims Court of South Africa, case number 15/96 (Cato manor Case)

Makulele Community Re: Pafuri area of Kruger National Park and Environs, Soutpansberg District Northern Province (LCC90/98) [1998] (Makulele Community Case)

Foreign:

The Prosecutor v Ferdinand Nahimana,Jean Bosco Barayagwiza, Hassan Ngeze, (Judgment and Sentence), Case No. ICTR-99-52-T, International Criminal Tribunal for Rwanda (ICTR), 3 December 2003, available at: *https://www.refworld.org/cases,ICTR,404468bc2.html [*accessed 29 May 2022]

The Prosecutor v Siméon Nchamihigo, (Judgment and Sentence) Case No. ICTR-01-63-T, International Criminal Tribunal for Rwanda (ICTR), 12 November 2008, available at: *https://www.refworld.org/cases,ICTR,49216e9b2.html* [accessed 28 May 2022]

Secondary Sources

Abel, Richard L., "Law books and Books about Law" in *Stanford Law Review*, Vol. 26, no. 1 (1973)

Agamben, Giorgio, *Stasis: Civil War as a Political Paradigm (Homo Sacer II, 2)* trans. Nicholas Heron (Stanford University Press)

Alexander, Broadie, "Scottish Philosophy in the 18th century", ed. Edward N. Zalta in *Stanford Encyclopedia of Philosophy* (Stanford University Press, 2017)

Antze, Paul and Lambek, Michael, (eds.), *Tense Past: Cultural Essays in Trauma and Memory*, (London, Routledge, 1996)

Anderson, J.K., "Book Review of Nicole Loraux" in *The Historian*, Vol. 50, No. 2 (Taylor & Francis, 1998)

Arendt, Hannah, *The Human Condition,* (Chicago, University of Chicago Press, 1958)

Aristotle's Nicomachean Ethics, (ed.) Christopher Warne (Bloomsbury Publishing, 2006)

Aristotle, *On Rhetoric*: A Theory of Civil Discourse, 2nd ed. trans. George A. Kennedy (Oxford University Press, 2007)

Aristotle, *Politics*, trans. H. Rackham, Vol. XXI (Harvard University Press, 1944)

Aristotle's Rhetoric. An Art of Character (University of Chicago Press, 1994)

Armitage, David, "The Declaration of Independence and International Law" in *The William and Mary Quarterly* (Omohundro Institute of Early American History and Culture), Jan 2002, Vol. 59, No. 1 (Jan. 2002)

Arthur, Catherine "Post Conflict Nation-building" in *The Palgrave Encyclopeaida of Peace and Conflict Studies*, (eds) Oliver P. Richmond and Gëzim Visoka (Switzerland, Springer Imprint)

Austin, J.L, *Sense and Sensibilia: How to Do Things With Word*s (Oxford University Press, 1962)

Barth, Karl, *Church Dogmatics.* Trans. G. T Thomson, (Eds.) Geoffrey Bromiley and Thomas F. Torrance. 5 Volumes in 14 parts (Edinburgh: T & T Clark)

Bell, Terry and Ntsebeza, Dumisa B., "Unfinished Business: South Africa, Apartheid and Truth" (Verso Books, 2003)

Beniger, James R., *The Control Revolution. Technological and Economic Origins of the Information Society* (Harvard University Press, Cambridge Mass.- London 1986)

Bigras, Pierre, "Aspects of the struggle: analysis of different segments of South Africa's anti-apartheid movement", *Monthly Review*, April 1986

Blaustein, A.P, *The Influence of the United States Constitution Abroad*, (Washington Institute, 1986)

Bourdieu, Pierre, 1987, *The Force of Law: Towards a Sociology of the Juridical Field*, The Hastings Law Journal, Vol. 38, Issue 5

Boyd-White, James, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life" in *University of Chicago Legal Review*, 52 (1985)

Brown, Robert McAfee, *Kairos: Three Prophetic Challenges to the Church,* (Grand Rapids: Eerdmans, 1990)

Bukovansky, Mlada, "The French Revolution" in *Legitimacy and Power Politics: The American and French Revolutions in International Political Culture* (Princeton University Press, 2002)

Calavita, Kitty, *Invitation to Law and Society: An Introduction to the Study of Real Law* (Chicago University Press, 2010)

Cassin, Barbara, (2001) "Politics of Memory: On Treatments of hate", *Javnost -The Public, "Democratic Deliberation and the Duty of Deliberation",* in *The Public* Vol. 8, No. 3

Cassin, Barbara and Goffey, Andrew, "Sophists, Rhetorics, and Performance; or How to Really Do Things with Words", in *Philosophy & Rhetoric,* 2009, Vol. 42, No. 4 (2009)

Chriost, Diamait Mac Giolla, *Language, Identity and Conflict: A comparative study of language in ethnic conflict in Europ and Eurasia* (Routledge, London, 2003)

Cicero: On Duties, eds. M.T. Griffin and E.M. Atkins (Cambridge University press, 1991)

Clark, Phil, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda,* in Law, order and restoration (Cambridge University Press, 2010)

Constitution of Athens. Trans. Kurt Von Fritz and Ernest Kapp. In *Aristotle's Constitution of Athens and Related Texts.* (New York: Hafner Publishing, 1950)

Cooper, Frederick, "Imperial Citizenship from the Roman Republic to the Edict of Caracalla" in *Citizenship, Inequality and Difference*, (Princeton University Press, 2018)

Darian-Smith, Eve, *Laws and Societies in Global Contexts: Contemporary Approaches* (Cambridge University Press, 2013)

Dauge-Roth, Alexandre, 'Testimonial Encounter: Esther Mujuwayo's dialogical Art of witnessing', (Sage Publications, 2009)

de Dieu Mucyo, Jean, "Minutes of the Symposium on Gacaca", Hotel Umabano, Kigali, 6-7 March 2000

Derrida, Jacques, *Archive Fever* (University of Chicago Press, Chicago – London, 1996)

Dickens, Charles, *A Tale of Two Cities* (Book 2, chapter 21) Penguin Classic Books, first published in 1859

Doxtader, Erik and Salazar, Philippe-Joseph, *Truth and Reconciliation in South Africa: the fundamental documents* (New Africa Books, 2007)

Drumbl, Mark, *Atrocity, Punishment and International Law,* (Cambridge, Cambridge University press, 2007)

Duchien, Michel, "Archives in France: The New Legislation of 1979" *Archivaria* 11 (January), 127 accessed on 10 September 2021 at: *https://archivaria.ca/index.php/archivaria/article/view/10843.*

Echevarría, Roberto G., *Myth and archive: A theory of Latin American narrative*. Second edition (Duke University Press, Durham - London 1998)

Errera, Roger, "The French Declaration of the Rights of man and the citizens of 1789", in *Proceedings of the Annual Meeting (American Society of International Law), Vol. 70* (Cmabridge University Press, 1976)

Fambry, Kyle and Harper, Raina, "Institutional Legitimacy Building in a context of Transition: The South African Land Claims Court", in *Public Administration Review*, 65:6, (Wiley Publishing, 2005)

Farge, Arlette and Foucault, Michel, *Disorderly Families: Infamous letters from the Bastille Archives*, ed. Nancy Luxon (trans.) Thomas Scott-Railton (Minneapolis, Minnesota University Press, 2016)

Farrar, Cynthia, *The origins of democratic thinking: The invention of politics in classical Athens* (Cambridge University Press, 1998)

Fay, Bernard, *The Revolutionary Spirit in France and America,* (Brace and Co., 1927)

Flavell, John H., "Metacognition and cognitive monitoring: A new area of cognitive developmental inquiry", *American Psychologist* Vol. 34, No. 10 (1979)

Foucault, Michel, *History of Madness,* ed. Jean Khalifa, trans. Jonathan Murphy and Jean Khalifa (New York, Routledge, 2006)

Furet, Francois, *The Old Regime and the Revolution*, Volume I, trans. Alan S. Kahan (University of Chicago Press, 2004)

Geertz, Clifford, *Local Knowledge: Further Essays in Interpretive Anthropology* (Basic Books, 1983)

Giddens, Anthony, *The Nation-State and Violence. Volume Two of A Contemporary Critique of Historical Materialism* (Polity Press, Cambridge, 1985)

Godechot, Jacques, *France and the Atlantic Revolution of the Eighteenth Century 1770-1799*, trans. Rowen H. Herbert (Free Press, 1965)

Guyot, Joseph-Nicolas, *Repertoire universel et raisonne de jurisprudence civil, criminelle, canonique et beneficiale*, Vol. 10 (Paris, Visse, 1785)

Habermas, Jürgen, *The Theory of Communicative Action (English) – Vol. 1: Reason and the Rationalization of Society* (London, Heinemann, 1984)

Hanlon, David, "The Chill of History: the Experience, Emotion and Changing Politics of Archival Research in the Pacific", *Archives and Manuscripts* Vol. 27, No. 1 (1999)

Heater, Derek, *A Brief History of Citizenship* (Edinburgh University Press, 2004)

Holiday, Anthony, "Forgiving and Forgetting: The Truth and Reconciliation Commission", in S. Nuttall & C. Coetzee (eds.), Negotiating the Past: The Making of Memory in South Africa, (Oxford, Oxford University Press, 2000)

Hunt, Lynn, *Politics, Culture, and Class in the French Revolution*, (University of California Press, 1984)

Institute for Contextual Theology, 'The Kairos Document: Challenge to the Church', 1985, accessed on 3 September 2021 at: *www.bethel.edu/~letnie/AfricanChristianity/SAKairos.html*

Inyumba, Aloisea, 'Report on the Consultative Meetings held at Grassrots Level by the Unity and Reconciliation Commission Executive Secretary', in NURC *Report on the National Summit of Unity and Reconciliation,* 2000

Jellinek, Georg, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History* [1985], (Henry Holt and Co., 1901)

Jones, Howard Mumford, "The Declaration of Independence: A Critique" in Proceedings of the American Antiquarian Society (1975)

Kaminer, Debra et al., "The Truth and Reconciliation Commission in South Africa: Relation to Psychiatric Status and Forgiveness Among Survivors of Human Rights Abuse", in *British Journal of Psychiatry*, 373 (2001)

Ketelaar, Eric, "Tacit Narratives: The meanings of Archives" in *Archival Science* 1, (Kluwer Academic Publishers, Netherlands),

Lash, Nicholas, *A matter of hope* (Notre Dame: University of Notre Dame Press, 1982)

Le Bruyns, Clint, (1995), *The rebirth of Kairos theology and Citizenship in South Africa*, in Missionalia Volume, 43. Issue. 3

Lederach, John Paul, "Five Qualities of Practice in Support of Reconciliation Processes", in R. Helmick and R. Petersen (eds.), *Forgiveness and Reconciliation: Religion, Public Policy and Conflict Transformation*, (Philadelphia; Templeton Foundation Press, 2001)

Lefebvre, Georges, *The French Revolution from its origins to 1793*, trans. By Elizabeth Moss Evanson (Columbia University Press, 1962)

Lint, Gregg L., "The American Revolution and the Law of Nations, 1776-1789", in *Diplomatic History,* Vol. 1, No. 1 (Oxford University Press, 1977)

Locke, John, "of The Dissolution of Government" in *Second Treatise of Government*, 1689 (Ryerson Univerity, 2022) at: *www.pressbooks.library.torontomu.ca/secondtreatiseofgovernment*

Loraux, Nicole, *the divided City: On memory and forgetting in Athens*, trans. Corrine Pache and Jeff Fort (Zone books, 2006)

Loraux, Nicole, *The Invention of Athens: The funeral Oration in the Classical City* trans. from French by Alan Sheridan, (Harvard University Press, 1986)

Ludwikowski, Rhett R., "The French Declaration of Rights of Man and Citizen and the American Constitutional Development" in *The American Journal of Comparative Law*, 1990, Vol. 38, Supplement. U.S. Law in an Era of Democratization (Oxford University Press, 1990)

Lumsden, Malvern, 'Breaking the Cycle of Violence', *Journal of Peace Research*, Vol. 34, No. 4 (Peace and Research Institute Oslo, 1997)

Lutz, Donald S., "The Declaration of Independence as Part of an American National Compact", Publius: The Journal of Federation, Vol. 19, No. 1 (Oxford University Press, 1989)

MacIntyre, Alasdair, *Three Revival Versions of Moral Enquiry: Encyclopedia, Genealogy and Tradition,* (London, Duckworth, 1990)

Madero, Marta, "Interpreting the Western Legal Tradition: Reading the work of Yan Thomas" in *Annales. Histoire, Sciences Sociales*, Vol. 67:1, 2012 (trans.) Kathleen Guilloux, (France, Editions de L'E.H.E.S.S.)

Marienstras, Elise and Wulf, Naomi, "French Translations and Reception of the Declaration of Independence" in *Journal of American History* Vol. 85, No. 4, (1999)

Mathisen, Ralph W., "*Peregrini*, *Barbari*, and *Cives Romani*: Concepts of Citizenship and the Legal identity of Barbarians in the later Roman Empire" in *The American Historical Review*, Vol. 111:4 (Oxford University Press, 2006)

Mazimpaka, Patrick, "Reconciliation and Democratization Processes", in *Reconciliation and Democratization: Experiences and Lessons Learned in Reconciliation and Democratization from Germany, South Africa, Namibia and Rwanda* (Kigali, National Unity and Reconciliation, 2003)

McKim, Donald K., *How I changed my mind, Karl Barth*. (Richemont, Virginia: John Knox Press, 1968)

Memoires, correspondances et maniscripts du général Lafayette, Publiés par sa famille, II,

Memorandum by the Parliamentary Committee of the General Council of the Bar of South Africa (October 1992), 1-2.

Merry, Sally E., "Legal Pluralism", in *Law and Society Review*, Vol. 22, No. 5 (Wiley, 1988)

Moradi, Suresh, "A Critical legal Study of the Declaration of the Rights of Man and the Citizen" in *Beijing Law Review*, 10 (Scientific Research Publishing, 2019)

Morris, R.B., *The Emerging Nations and the American Revolution* (Harper and Row, 1970)

Musya, Justus, (2012), *'Kairos' theology in Apartheid South Africa*, Churchman, Vol.126, Issue. 2

Nelken, David, "The "Gap" Problem in the Sociology of Law: A Theoretical Review" in *Windsor Yearbook of Access to Justice* (1981)

Newmark, Peter, *The Theory and the Craft of Translation*, Language Teaching, Vol. 9 Issue. 1, (Cambridge University Press, 1976)

Oxford World Classics: Cicero, "The Republic and The Laws", trans. D.H. Henry (Oxford University Press, 2009)

Pearlman, Laurie A., 'Psychological Trauma', lecture for 'Healing, Forgiving and Reconciliation' project, John Templeton Foundation Press (Radnor, Pennsylvania, 2001)

Pigou, Piers, "False Promises and Wasted Opportunities? Inside the South African Truth and Reconciliation Commission" in Deborah Posel & Graeme Simpson (eds), *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission (*Witwatersrand University Press, 2002)

Plato's The Republic, trans. Benjamin Jowett (New York: The Modern Library, 1941)

Plato with an English translation: The Laws trans. R.G. Bury (Harvard University Press, 1952)

Pocock, J.G.A., "Political Thought in the English-speaking Atlantic: I, The Imperial Crisis" in Pocock, ed., *The Varieties of the British Political Thought, 1500-1800* (Cambridge, 1995)

Posner, Ernst, "Some Aspects of Archival development Since the French Revolution," *American Archivist* Vol. 3, No. 3 (Society of American Archivists, 1940)

Proust, Joëlle, *The Philosophy of Metacognition: Mental Agency and Self-Awareness,* (Oxford University Press 2013)

Rakoye, Jack N. ed. "The Declaration of Independence" in *The Annotated U.S Constitution and Declaration of Independence*, (Harvard University Press, 2009)

Rancière, Jacques, *Aesthetics and its Discontentments*, (Cambridge: Polity, 2004)

Rancière, Jacques, *Disagreement, Politics and Philosophy*, Trans. Julie Rose (Minneapolis: University of Minnesota Press, 1999)

Rancière, Jacques, *Dissensus: On Politics and Aesthetics*, (Bloomsbury Publishing, 2010)

Rancière, Jacques, *The Ignorant Schoolmaster: Five Lessons in Intellectual Emancipation*. Trans. Kristin Ross (Stanford; Stanford University press, 1991. [*Le Maitre Ignorant*, Paris, Fayard, 1987]

Reilly, John, 1978, *Atonement in the church Dogmatics of Karl Barth*, (Sage publishing), Irish Theological Quarterly, Vol. 4, No. 1

Robinson, James Harvey, "The French Declaration of the Rights of Man, of 1789", in *Political Science Quarterly*, Vol. 14, No. 4, trans. Max Farrand (The Academy of Social Sciences, 1899)

Rogoff, Martin A., "Fifty years of Constitutional Evolution in France: the 2008 Amendments and Beyond" in *Jus Politicum*, No. 6 (2011)

Rousseau, Jean Jacques, "On the Social Contract" (1754), in Rousseau, *The Basic Political Writings*, trans. Donald Cress (Hackett, 1987)

Rwiza, Richard, "An African Liberation Theology" in Benezet Bujo and Juvenal Ilunga Muya (eds), *African theology in the 21st century*, II, 2 (Nairobi: Paulines Publications Africa, 2005)

Salazar, Philippe-Joseph, "An African Athens: Rhetoric and the Shaping of Democracy in South Africa", in *Rhetoric, Knowledge, and Society* ed. Charles Bazerman (Lawrence Erlbaum Associates, 2002)

Salazar, Philippe-Joseph, "Compromise and Deliberation: a rhetorical view of South Africa's democratic transformation" in *Social Science Information*, 2004, SAGE Publications (London, Thousand Oaks, CA and New Delhi), Vol. 43(2)

Salazar, Philippe-Joseph, "Joining Religion and Politics: The South African Rhetorical Presidency", in *Journal for the Study of Religion*, (2001), Vol. 14, No. 1, Religion, Rhetoric and Politics (Association for The Study of Religion in Southern Africa, 2001)

Sarkin, Jeremy, "The trial and Tribulations of South Africa's Truth and Reconciliation Commission", *South African Journal on Human Rights,* Vol. 12, No. 4 (1996)

Sartre, Jean-Paul, *Nausea* (trans.) L. Alexander (New York, New Directions Publishing, 1964)

Scott, James, *Seeing Like a State: How certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, New Haven – London 1998)

Seron, Carroll and Silbey, Susan S., "Profession, Science, and Culture: An Emergent Canon of Law and Society Research" in *Dictionary of Law and Society*, ed. Austin Sarah (Blackwell Publishing, 2004)

Shuman, Daniel W. and McCall Smith, Alexander, "Justice and the Prosecution of Old Crimes: Balancing Legal, Psychological and Moral Concerns" (American Psychological Association, 2000)

Simpson, Graeme, *A Brief Evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for societies in transition*, (Centre for the Study of Violence and Reconciliation, 1998)

Simpson, Kirk, *Truth Recovery in Northern Ireland: Critically Interpreting the Past*, (Manchester, Manchester University Press, 2009)

Somerville, John, "The Contemporary Significance of the American Declaration of Independence", in *Philosophy and Phenomenological Research*, Vol. 38, No. 4 (International Phenomenological Society, 1978)

Storey, Peter, "A different Kind of Justice: truth and Reconciliation in South Africa" in *The Christian Century* 114, No. 25 (1997)

Teitel, Ruti, "Transitional Jurisprudence: The Role of Law in Political Transformation", *Yale Law Journal*, Vol. 106, No. 7 (The Yale Law Journal Co. 1997)

The moment of Truth: The Kairos Documents, compiled and edited by Gary S. D. Leonard, (Ujamma Centre for Biblical and Theological Community Development Research, 2010)

The Offices (On Duties) trans. Thomas Cockman (1699), Book I (44 BBC)

Thomson, Alex, (2006), *Derrida's "Indecent Objection" in Journal For Cultural Research* Vol. 10, No. 4

Toynbee, Arnold J., *Hannibal's Legacy: The Hannibalic War's effects on Roman Life,* Volumes I and II, (Oxford University Press, 1965)

Van Maanen, John and Pentland, Brian T., "Cops and Auditors: The Rhetoric of Records", in: Sim B. Sitkin and Robert J. Bies (eds.), *The Legalistic Organization* (Sage Publications, Thousand Oaks, 1994)

Walbank, F.W., "Nationality as a factor in Roman History" in *Harvard Studies in Classical Philosophy, Vol. 76* (Harvard University Press, 1972)

Waldorf, Lars, "Mass Justice for Mass Atrocity: Rethinking Local Justice in Transitional Justice", *Temple Law Review*, Vol. 79, 2006

White, E.C, *Kaironomia: On the will to invert*, (London: Cornell University Press, 1987)

Williams, Bernard, "Truth, Politics, and Self-Deception" in Social Research Vol. 63, No. 3, Truth-Telling, Lying and Self-Deception (New School, 1996)

Wilson, Richard, "The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State" (Cambridge University Press, 2001)

Xenophon, *Hellenica,* Volume I: Books 1-4. Trans. Caleton L. Brownson (Cambridge, Massachusetts; Harvard University Press, 1918)