

'With no sanction for lying' – Recollecting the potential of a few dispossessing words

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1. These were strange words, for which there was little time and about which there was not much to say. One week before the 1994 election, *the* election, South Africa's *Mail & Guardian* (backed by BP Southern Africa and the Anglo American Corporation) presented its readers with an "easy-to-read guide" on the new Constitution—"our document," it declared, one "forged for our specific needs on the anvil of tough and lengthy negotiations." Such a guide was necessary, the paper suggested, as it was difficult to find a copy of this "immensely important document" that "gives ordinary people powers, rights, protections that they have never had before." Noting that the Constitution had yet only been published in two languages and launched without the benefit of a media campaign, the paper contended that it was a "vital document that is too little understood". Its terms, details, and ambiguities—the "Constitution is not perfect"—needed to be grasped by "ordinary citizens".¹

And so, over the course of eight small-print tabloid pages, the paper offered a summary (infused with more than a little explicit editorial commentary) of the chapters, including the Bill of Rights and the constitutional principles, of what it called—without any explanation, which amounted to a curious omission given the guide's articulated premise—the "transitional Constitution". For the most part unsurprising, the striking moment of this interpretative guide appears at the close, as it turns to the Constitution's final passage, "National Unity and Reconciliation", and declares that "the Constitution ends strangely with a section on the need for reconciliation", along with an instruction to Parliament "to pass an amnesty law for political crimes".²

The Constitution ends strangely. In its entirety? Relative to what? For whom? At a cost? The *Mail & Guardian's* judgment comes without elaboration or explanation. It smacks of a certain reservation, if not the sort of derision that signals relative inattention. What precisely are we talking about? What precisely is being said here? A strange ending, as when the words don't readily follow or properly add up, when they are out of place, estranged from that to which they are nevertheless tied? Or these words here do not quite belong here—they are a poor way to end "our document"?

¹ "Get to Know Your Rights: A point by point guide to the Bill of Rights and to the new Constitution", *Mail & Guardian*, Special Section, 22 April 1994 (print), 1. Not unrelated and quite telling, the same issue of the paper includes an advertisement by Exclusive Books, one that features a political party acronym-spouting giraffe without spots and a reporter (or a member of the Civil Cooperation Bureau?) in dark glasses and a trench coat asking "Que?". The ad copy reads: "South African for beginners. Man, as a Greek chap called Aristotle once said, is by nature a political animal. Indeed. But if you have tried figuring out who's who in the zoo these days? If you don't know your ANC from your elbow, see our huge range of books about South Africa" (*Mail & Guardian*, 22 April 1994, 16). The troublesome terms of the advert become all the more problematic as one recalls the ANC's longstanding claim that apartheid was a system that set human beings into a zoo of being.

² "Get to Know Your Rights", p. 7.

Or these words do not fit well with *our* defining words, or they call for words that are simply not *ours*, not words that are *our* own or words that are not *ours* to give?

What “ends strangely” may or may not contain a strange end.³ It is difficult to tell, save to say that the terms of that which settles is heard to close in an unsettling way. But, in the end, there was apparently little to be said and little need to say much more about this ending. It was self-evident or did not much matter – except that it wasn’t and it did. If, in the weeks prior to the election, the media seemed indifferent if not oblivious to issues addressed in the closing section of the interim Constitution (there will be a moment in which to ask after its proper name), it was not because these matters were new or secret.⁴ Indeed, they were concerns that had provoked significant attention and controversy during the long days and late nights of negotiations at Kempton Park.

In the moment, on the cusp of the election, however, the beginning promised by a strange ending did not yet have a clear referent, a referent that these last lines of the interim Constitution would soon enough call into question:

“National Unity and Reconciliation

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

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society.

The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.

With this Constitution and these commitments we, the people of South Africa, open a new chapter in the history of our country.

Nkosi sikelel' iAfrika. God seën Suid-Afrika

³ It’s curious to look at the before and after, that is, the reading of the interim Constitution’s close and the coverage of the post-election mood, one which featured dedicated attention and unquestioning celebration of “reconciliation in motion”. See *Mail & Guardian*, 13 May 1994.

⁴ In the weeks prior to the election, the silence is notable and puzzling. One (enthymematic) exception: an advertisement in the *Mail & Guardian* for the University of Cape Town’s “Democracy and Difference” Conference, an event promising panel discussions on “Transitions to Democracy”, “Demilitarization and the Recovery of Civil Society”, and “Combatting the Legacy of Violence and Fear” (*Mail & Guardian*, 22 April 1994, p. 22). The more decisive conference, of course, had already occurred in February, the IDASA-sponsored event, “Dealing with the Past”. For a detailed reflection on the incongruity of the silence, see Andre du Toit, “A Need for ‘Truth’-Amnesty and the Origins and Consequences of the TRC Process”, *International Journal of Public Theology*, 8(4), 2014, pp. 393-419.

Morena boloka sechaba sa heso. May God bless our country
Mudzimu fhatutshedza Afrika. Hosi katekisa Afrika.”⁵

Why concern ourselves with these words again? It is not that the 25th anniversary of the election somehow demands their recollection, more than likely as the basis for yet another “progress” report. And it is not to proclaim the timeless quality of these lines, whether as founding myth or abstract promise. It is rather that this strange ending asserts a question for now, a question that presses here and now, as apartheid remains, as it remains in the midst of a transition predicated on the continuity of law’s rule. Lacking a proper name, this passage names the question on which this turn may hinge, the rhetorical question of how to undertake and sustain a critique of legal violence, a critique that interrupts the law’s articulation, discloses the contingency of its founding words, and invites expression that refuses the (double) binding logic of its contract. Holding “no sanction for lying”, as Walter Benjamin put it, these lines at the end of the interim Constitution hold a question of language for now, a question that has haunted the South African transition since the first tentative days of “talks about talks” (and which likely runs back to the streets of 1970s Soweto and back further into the rise of Afrikaner nationalism) and which speaks quietly to a way in words to begin again.⁶

2. Cited and recited – over and over. Though perhaps still strange (or not), there is no denying that the last section of the interim Constitution is now ever so familiar, a ready commonplace about which and with which to speak. Twenty-five years on, so very much has now been said about these or some portion of these 298 words. So much has been said in their name. Over time, and within notions of history-making that it may well trouble, these few lines have steadily provoked, steadfastly defied the “interim” of the interim Constitution in which they appeared (only a portion of which, in a somewhat different tone, were carried and placed in the pre-ambule of the 1996 “final” Constitution). Nationally and internationally, they are one of the definitive referents of South Africa’s “negotiated revolution”, the turn that some touted as “miracle”, others count as undue compromise, and others still lament as a treasonous betrayal of nation and struggle. No even half-serious history of the transition from apartheid to non-racial democracy fails to overlook these words and make some note of their role in the work of history-making. It is a given that they are important. The question is how they matter. Precisely what do these lines say? What does this passage mean? What does this closing do? There are now so very many answers to these questions, far more answers, in fact, than there are reflections on the questions themselves.

⁵ Constitution of the Republic of South Africa Act 200 of 1993. Retrieved from: <https://www.gov.za/documents/constitution/constitution-republic-south-africa-act-200-1993> [Accessed 19 October 2019]. The section titled “National Unity and Reconciliation” is reprinted here as it appears on the South African government website. Also see: https://www.sahistory.org.za/sites/default/files/constitution_of_south_africa_1993.pdf [Accessed 19 October 2019].

⁶ Some of what follows draws from and deepens an earlier reading of the last lines of the interim Constitution, with a concern for the beginning of reconciliation as the history of an ongoing critique of violence. See Erik Doxtader, *With Faith in the Works of Words: The Beginnings of Reconciliation in South Africa, 1985-1995*, (Cape Town/Ann Arbor: David Philip/Michigan State University Press, 2009).

Pause, for a moment, to recall just a bit of the collection, some of what has been given and what's now taken as common cause about this passage.⁷ In more or less structural terms, it is held variously to be a demonstration of the negotiation process, the expression of a necessary compromise, and the remainder of what could not be done at the bargaining table; it is read as a constitutive element of an interim Constitution, a non-derogable and undecidable constitutional norm, the close and extension of a state of emergency, a case for popular sovereignty, a mechanism for transition with legal continuity, the basis of a new jurisprudence, a means of historical interpretation and history-making, a call if not a command for reconciliation, a source and rule of law, a legal and unconstitutional mandate, not least for "amnesty", and the "cause" of the Truth and Reconciliation Commission (TRC).

Functionally, the passage has been taken as an inducement to non-violence and cooperation, a political ideal and distraction, a rich and empty promise of progress, a visionary and undue compromise, an expression of (in)sufficient consensus, an agreement that enacts and debases law, performs and confounds recognition, enables and disrupts transition, and redistributes and conserves political and economic power. It has been held up as the performance and the debasement of reconciliation itself, which has fed views as to how it is ambiguous to the point of being meaningless, a powerful expression of nation-building spirit, an embrace and departure from liberalism, and a turn to theo-religious ideas that may or may not count as dogma and which may or may not serve the interests of democracy. It has been deemed a path toward and away from justice, and a paradigm-making and rule-degrading mode of transitional justice. It has been claimed to make and break law and to shirk and embrace norms of legal accountability in the midst of a crime against humanity, not least with respect to its symbolic (non)effects and (in)attentiveness to material inequality. It has been taken as an expression of ANC hegemony and its capitulation. It has been heard to sound the end of apartheid and quietly ratify its continuation.

In terms of its ethical-political meaning, some of which is already evident, the passage is taken as far-sighted bravery and near-sighted cowardice – that is, as both heroic and tragic. It is viewed as a path out of the confines of civil war. It is held up as evidence of compromised virtue, especially as it is heard to legitimise impunity, demean those who suffered and struggled against apartheid, and betray the demands of law and common decency. And yet it is also heard as a reflection of a virtuous compromise that advances both legal culture and civility, not least as it follows from and expresses a politics that resists systemic injustice while taking pains not to avoid the same old traps of revolutionary idealism. This justification has struck some as

⁷ This is not the space to catalogue. One of the most notable interpretations is the Constitutional Court's reading in the AZAPO case (*Azanian People's Organization (AZAPO) and Others v. President of the Republic of South Africa* 1996 (4) SA 672 (CC)). The Truth and Reconciliation Commission (TRC) itself included some passing discussion in its Final Report (see TRC, *Truth and Reconciliation Commission of South Africa Final Report*, Vol. 1, (Pretoria: Juta, 1998), pp. 48-102). Also see Lourens du Plessis, "Observations on the Amnesty and Indemnity for Acts Associated with Political Objectives in Light of South Africa's Transitional Constitution", *THRHR*, 57, 1994, pp. 950-981; Johnny de Lange, "The Historical Context, Legal Origins, and Philosophical Foundation of the South African Truth and Reconciliation Commission", in C. Villa-Vicencio and W. Verwoerd (eds.), *Looking Back, Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa*, (Cape Town: University of Cape Town Press, 2000), pp. 14-31; Andre du Toit, "The Moral Foundations of the South African TRC: Truth as Acknowledgment and Justice as Recognition", in R. Rotberg and D. Thompson (eds.), *Truth v. Justice: The Morality of Truth Commissions*, (Princeton: Princeton University Press, 2000), pp. 122-140.

naïve, a wilful blindness to the ways in which this passage may have ideologically imposed unity at the cost of the diversity that it touts.

3. In all of this, it is sometimes difficult to imagine what has not been said, or what might yet be said about this passage. There are so many accounts of what this *is* and *is not*. So many contentions as to what this does or does not *do*. So many judgments as to whether and how this is *good*. Whether or not it can even be gathered, all of this expression reflects a pervasive and deep curiosity. Undeniably, something here provokes—and keeps provoking. Something here is decidedly important and thoroughly ambiguous. Something here signals that this is a place to begin. More than metonym and less than commonplace, it is the place to begin to understand a beginning—a remarkable but unsteady turn forward and backward, a recursive and ongoing transition, and an incomplete transformation. In so much of the discussion, there is a clear though not always explicit assumption that this is the point from which one must start—here is the corner piece of the puzzle.

And so often, so it goes. What happens, sometimes subtly but often quite crudely, is that a compound question is turned into a picture puzzle, a problem in which the task is to discern and fit discrete pieces to an apparent and given end. In so much of what has been said about it, this passage, a passage that inspires so many outright expressions of wonder and invites so much inquiry, has been taken and figured as an instrument, a means to a given end, a mechanism which is assessed for whether and how well it has revolved one or more problems. Quite frequently, the wonder has been used as opportunity to get in the door, at which point it has been turned into pretence and recast as an object of scrutiny, the focus of an inquiry in which a cynical turn has been represented as so much measured reflection.⁸ So often, the passage's deep-seated and dynamic ambiguity is accused of being just so much ideological vagary or precarity-sponsoring inaction, an indictment that comes with a license to cut and separate the passage into "discrete" elements, all in order to assess its "actual" problem-solving power and determine precisely that for which it is responsible.

The instrumentalisation of the interim Constitution's close has been carried and sponsored by two popular readings. The first contends that this passage is not only the source but the cause of South Africa's Truth and Reconciliation Commission. On this popular view, it is a straight and unbroken line from the last lines of the interim Constitution to the first victims' hearings in East London. On this trajectory, the passage is folded into the TRC's authorising legislation, a move that obscures its larger and decidedly extra-legal history and reduces its meaning to the work of the Commission.⁹

The second reading, which is not necessarily exclusive of the first, cuts the passage into two pieces, often quite literally, and then focuses on one to the near

⁸ Richard Wilson offered an early and influential example of this tack, one that has been rather robustly mimicked. See Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa*, (Cambridge: Cambridge University Press, 2001).

⁹ The tendency is fed partly by the way in which the opening of the TRC's authorising legislation draws from the post-amble. For one example of this reading, see Drucilla Cornell, *Law and Revolution in South Africa: Ubuntu, Dignity and the Struggle for Constitutional Transformation*, (New York: Fordham University Press, 2014), pp. 54-55. On the contested and unsteady development of the TRC, see De Lange, "Historical Context", pp. 14-31; Doxtader, *With Faith in the Works of Words*, pp. 242-282.

exclusion of the other. The cut almost always happens between the fourth and fifth graphs, and most often serves to advance a consideration of the latter. The result is that it is now possible to read, for quite some time, on the implications of the passage's amnesty mandate without encountering its articulated concern for reconciliation or its contention that "there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation" – these notions are simply disappeared, without apparent irony.¹⁰

If the first reading peddles a convenient truism and the second counts as conceptually naïve, if not rather mercenary, the point here is not to indict reading habits but to underscore the widespread presumption that the last lines of the interim Constitution are best taken as a problem-solving instrument, one that can be both used and assessed as such. The cost of this assumption may be less a cost than a set of category mistakes – or the begging of several basic questions. For one, it may extract this passage from the transition in which it appears, a transition that, at least temporarily, suspends and then troubles historical accounts of cause and effect – the force of history – and norms of historical interpretation, not least as these are complicit if not constitutive of violence. So too, the reduction of this passage to a means in the service of some end forsakes the question of its language, that is, how its terms – and a voice that seems to speak from *outside* the Constitution in which it is contained – articulate the choices that compose the conditions of (its) reading; the ways in which the language of means renders language into the very means that cover the question of language, the question of what can be said in the midst of violence, and what role the assumption and use of language plays in the conflict to which these lines are addressed. And finally, closely related, there is a hope for certainty that underlies and motivates the instrumentalisation of this passage. For a quarter century now, the literature has filled itself with *the* definitive rendering of these words, even if to say that they are definitively ambiguous. *Here* is the singular account of their role in the transition. *There* is the enduring account of their singular virtue or tragic flaw.

To line up and look across accounts of this passage is to discover how a few words have been turned and then confronted with a demand for certainty – what does this *actually* mean and actually do? What here *is* (im)possible?

4. There are things that cannot be said, things best not uttered – for now. This passage, a collection of words that move inside and outside a transition-creating interim Constitution, this passage has no proper name – or it has several, the most fitting of which constitutes a rhetorical question. And so, contrary to so many definitive renderings, it has always been difficult to say precisely what this passage *is*. That which closes the constitutive act that ends statutory apartheid resists the attribution of identity. Such a lack may well be a perfect (non-tragic) flaw.

¹⁰ For one recent and rather overt example of this tendency, see D.M. Davis, "The South African Truth Commission and the AZAPO Case: A Reflection Almost Two Decades Later", in K. Engle, Z. Miller and D.M. Davis (eds.), *Anti-Impunity and the Human Rights Agenda*, (Cambridge: Cambridge University Press, 2016), p. 126. Similarly, Adam Sitze's "genealogy" of the TRC includes a consideration of the post-script that focuses almost exclusively on its amnesty mandate. This account, along with Sitze's concerns about the translation of *ubuntu*, shows little if any interest in the idea of reconciliation inside or outside the South African context. See Adam Sitze, *The Impossible Machine: A Genealogy of South Africa's Truth and Reconciliation Commission*, (Ann Arbor: University of Michigan Press, 2013).

This passage is not a “chapter” of the interim Constitution, at least as it was not assigned the conventional number and given how it seems to step back to declare the opening of a “new chapter”. So perhaps then what we have here is a “preface”, that is, what was written *after* in the name of articulating what is *prior*. Or, given its placement, perhaps this text is better called a “post-script” or a “post-amble” – a writing in the aftermath and an expression that both follows from and undertakes a movement. With these names, this text is attached to but not determined by that which precedes it, a relation that raises a question of status – this passage may be not so much a part of the whole as the part that steps back to articulate the conditions on which the whole depends, the grounds on which “this Constitution” rests and the meaning that it cannot itself express. If so, this justifies – a “fitting” name entails justification – another popular name for the passage: “epilogue”. What is said in closing, for closure, an ending whose end holds the question of *logos*, an afterword about the given word.¹¹

What then is the proper name of this passage entitled “National Unity and Reconciliation”? As it leaves the nation to float (does it modify unity or unity *and* reconciliation?) and then resists the popular (and academic) tendency to equivocate unity and reconciliation, this title itself suggests that the question is properly left open. Whatever this *is*, it is a provocation to reflect on the conditions of (not) belonging, a reflection that recollects apartheid’s obsession with the name, the power to control the words that attribute definition, delineate identity, and enforce unity *as* differentiation. Endowed with a title – and so with standing as part of the interim Constitution – this constitutive passage is constitutive precisely as it resists a name, its name, in the name of resisting apartheid law’s most basic gesture. Hence its perfect flaw – in lacking for a proper name, this passage opens the question of what stands before the law in the name of disclosing the grounds on which the law itself is constituted.

5. Whence ... perhaps in the name of talking about talk. Between those who embrace and those who criticise the epilogue, there is often a common concern for history, whether in the form of recovering truth, documenting experience, resisting amnesia, or fighting revisionism. In this light, it is a bit tedious to discover how little attention is paid to the history of the post-amble itself.¹² Almost nothing is said about the conditions of its authorship or the context of its appearance. In many investigations of the TRC, the epilogue is often presented as an *ex nihilo* beginning or a *de facto* element of the Promotion of National Unity and Reconciliation Act. For those concerned with the negotiations process and the writing of the interim Constitution, the post-script is usually presented in passing, a more or less necessary and more or less complicit moment of compromise, one designed to placate more or less threatening security

¹¹ The interim Constitution itself refers to the passage as a “provision” with equal status to all other parts of the text. In the well-known *AZAPO* case, the Constitutional Court’s majority decision used the term “epilogue”, a name also favoured by Salazar. See the preface to this issue of the Yearbook, as well as his seminal work on the transition. See Philippe-Joseph Salazar, *An African Athens: Rhetoric and the Shaping of Democracy in South Africa*, (London: Lawrence Erlbaum, 2002). “Post-amble” is also quite favoured, as seen in respective works by Andre du Toit, John Dugard, Paul van Zyl, Jeremy Sarkin and David Dyzenhaus.

¹² A fuller account of the history that follows can be found in Doxtader, *With Faith in the Works of Words*, pp. 199-242. Mamdani has recently given a bit of attention to the negotiations process. See Mahmood Mamdani, “Beyond Nuremberg: The Historical Significance of the Post-Apartheid Transition in South Africa”, in *Anti-Impunity and the Human Rights Agenda*, pp. 329-360.

forces, or more or less ensure the continuity of rule of law and the possibility of more or less power-sharing.

The truth of these accounts obscures three qualities of the post-amble's moment. The first and most obvious is the pervasive and diverse violence in which the Multi-party Negotiating Process (MPNP) operated (and which more than once arrived at its front door). In mid- and late 1993, parts of the country were still governed by a state of emergency, largely in the name of de-escalating partisan violence, including the bloody and widespread conflict in KwaZulu-Natal. As the white right pressed its political demands, including an assurance that the new dispensation would give due consideration to the creation of a volkstaat, it admitted to stockpiling weapons and announced various plans – the configuration of forces and the specific threats changed almost weekly – to disrupt the coming election. Inside the MPNP Negotiating Council, significant parties had voiced their principled objections to the process and then taken their leave, which then heightened perceptions that the ANC and the NP were running roughshod over the decision-making rules in order to dictate the terms of the ultimate settlement. If this cut – just a bit – into the legitimacy of the negotiations, the problem was compounded by discontent from within the two main parties, a shared sense that their respective principals were giving away too much for too little. Though the outcry was not as loud as it had been in 1990, the ANC and NP leadership continued to hear that they had betrayed their own cause.

Second, the passage that would become the post-amble emerged from a negotiating process that operated outside the law and addressed a deeply contested question about the future of the law's force and effect. On the one hand, a court ruled in 1993 that parties who objected to the form and content of the negotiating process did not have standing to seek legal redress.¹³ In short, it decided that the MPNP's aims fell outside the law and its decision-making rules did not amount to a binding contract. To this, the Court added, the negotiation's reliance on creating and reaching "sufficient consensus" was a process that rested on the good faith, trust, and understanding of those who chose to participate in what amounted to an exercise guided by and oriented to reconciliation.¹⁴ On the other hand, the epilogue appeared with an answer to the question of amnesty, a longstanding matter that had bedevilled negotiators and which many took to be crucial to the election insofar as both the ANC and NP worried out loud – perhaps tactically – about whether the old security forces and police would support the new government if the transition did not include some form of protection from prosecution.¹⁵

Third, it is not entirely clear how the post-script was written and precisely who approved its inclusion in the interim Constitution. To be sure, it was cobbled. And to

¹³ *Government of the Self-Governing Territory of KwaZulu v. Mahlangu and Another* 1994 (1) SA 626 (T) 635-638.

¹⁴ The filed briefs and the terms of the decision are intriguing and quite important in understanding the nature of the negotiations process and its use "sufficient consensus". For a rather detailed consideration, see Doxtader, *With Faith in the Works of Words*, pp. 181-198.

¹⁵ There is now a debate over whether the amnesty is better understood as indemnity or whether this "redefinition" obscures a fundamental quality of the transition. Compare Sitze, *Impossible Machine*" and Doxtader, "Easy to Forget or Never (Again) Hard to Remember? History, Memory and the 'Publicity' of Amnesty", in C. Villa-Vicencio & E. Doxtader, *The Provocations of Amnesty: Memory, Justice and Impunity*, (Cape Town: David Phillip, 2003) pp. 121-155. While this is not the place to take it up, the difference in views may turn partly on the difference between analogy and metaphor. Also see Du Toit, "A Need for 'Truth'".

be sure it was not attached to the interim Constitution when the latter was approved by the MPNP's Negotiating Council – and it seems possible if not likely that it was not approved at all.¹⁶ Beyond that, the available evidence suggests that the post-amble's two main parts were written in different places and by different people and then, in a moment that has never been openly acknowledged, combined and appended to the already ratified interim Constitution. Addressed to amnesty, the epilogue's fifth graph was likely written by two leading negotiators, the ANC's Mac Maharaj and the NP's Fanie van der Merwe. It does not appear, however, that the pair wrote the first four graphs, which may have been commissioned by a philosophically minded and high-ranking member of the ANC.¹⁷ Set out in six of the eleven official languages, the concluding plea for divine favour has not been claimed.

The post-amble is undertaken and appears in a difficult moment, one that it may have helped to create and which breaks (and breaks from) historically given forms and terms of expression. More precisely, the epilogue reflects and expresses "language trouble", the stasis that confounds and sometimes negates the ground, meaning, and function of language.¹⁸ This trouble is not (or not yet) a moment of choice – *stasis* is not crisis – so much as a set of questions regarding how to (re)constitute the rhetorical grounds of interaction and decision-making. The "historic bridge" named by the post-script is a metaphor that turns "Constitution" into a question, one that the Constitution itself cannot answer, particularly as the bridge spans an abyss that appears between past and future, a present moment in which trust remains depleted by deep division and shared reference remains a casualty of historical conflict. Under what conditions is it possible to hear, let alone listen to, a current or even former enemy? What, if any, commonplaces remain to support the pursuit of understanding and what norms of validity can support directed disagreement? Moreover, from deep in the abyss resonates the silence of so much "untold suffering" and a "legacy of hatred, fear, guilt and revenge". What has not been said and what cannot be expressed? How does one all at once overcome, recover, redress, and repudiate history? And, if all of this happens *on* the bridge, it cannot be forgotten that the bridge is built only as sworn enemies are able to step back from their own political vocabularies, come to other terms, and so face the charge of betrayal. How does one begin to speak beyond a cause to which one has firmly sworn and tied one's sense of self?

These questions remain without answers. As written, in the way that it was written, the epilogue speaks to the rhetorical damage done, the violence to language

¹⁶ There are conflicting claims on the matter and a lack of definitive evidence. There is rather clear consensus that the post-amble was not attached to the interim Constitution approved on 17 November 1993. Some sources involved in the writing of the epilogue have suggested that at least a portion of the text was written on 7 December in an ANC-National Party bilateral. This would have been after a 6 December special meeting of the Negotiating Council, though there is some question as to whether such a meeting was actually convened and what was on the agenda. Compare Doxtader, *With Faith in the Works of Words* and Du Toit, "A Need for 'Truth'". It would be interesting to re-read AZAPO with this ambiguity in mind, although the decision by the Transvaal court may have rendered the question of legitimacy moot.

¹⁷ For additional details about the authorship of the post-amble, see Doxtader, *With Faith in the Works of Words*, pp. 211-217.

¹⁸ Barbara Cassin, "Politics of Memory: On Treatments of Hate", *Javnost: The Public*, 8, 2001, pp. 9-22. Also see Giorgio Agamben, *Stasis: Civil War as a Political Paradigm*, trans. N. Heron, (Palo Alto: Stanford University Press, 2015).

that abides and the language that continues to do violence. Both recollecting the MPNP's "sufficient consensus" and articulating a legal mandate, it does so outside and inside of the interim Constitution's own language. In asking but not resolving the question of what "can now be addressed", the post-amble is far less summation than a compound and perhaps "improper" pause.

This pause is spatial, temporal, and conceptual. It is a break in procedure – its authorship defied accountability – undertaken in the name of that which it interrupts by disclosing that its promise remains precisely that – a promise. This "foundation" is not existing ground – it is not yet entirely here and it is not ready now (which may explain why the metaphor is mixed – bridges and foundations, though "footings" might have served better, not least in the name of getting to "standing"). It is interim. And, moreover, its actualisation is claimed to rest partly on the provision of amnesty, a law that mandates the suspension of the law's force and so breaks the continuity of its rule, a line that is further interrupted insofar as the post-amble is not simply a reminder but a remainder of the negotiating process from which the interim Constitution emerged. It recollects that the basis of law – and the basis of *this* law – is a sufficient consensus, a consensus deemed deficient by many and which reflects the failure of precedent, operates outside the law's rule, and grants no legal standing. Here and now, in the post-amble, the law's discourse (whether as subject-producing or a jurisprudence) begins within a beginning in which it cannot account for the conditions under which its rules are valid, justify the norms that govern its force, or provide the reasons that support its demand for obedience. If so, the post-amble's pause is an opening in which to ask after the status of law and whether its language is itself an element of the stasis that the law claims to overcome – and prevent.

The post-amble's pause unsettles the proper language of law, that is the "ordinary" language that law takes to be both property and propriety. It finds grounds to speak from within that which may foreclose expression. In the name of law, it discloses that the interim Constitution's promise of interaction and the possibility of agreement lies outside standing norms of legal (and extra-legal) accountability. It advocates a response-ability beyond the law's conventions of responsibility. In doing so, this passage that resists a proper name appears before the law, a condition and outcome of law, in the name of a beginning to which it cannot speak definitively. From precedent that can no longer serve as such to a *now* of what "can now be addressed" through the recovery of history – the telling "untold suffering" and the disclosure entailed in amnesty – it opens that chapter which is the future, a chapter which might be best entitled: the question of language as such.

6. A rhetorical question then – what is the potential of recognising (these) words? Today, it is rather difficult to find very many who want to puzzle over the post-amble's terms. There is little evident interest in taking up the question of their potential, the power of the words that compose the interim Constitution's strange ending. Indeed, these words now strike many as either too much or too little transitional justice. And few are keen to grapple with their appeal for reconciliation, a case that now seems nostalgic and which appears to trade in myth to the extent that it has little to say about the accumulation, distribution and exchange of material

power.¹⁹ Today, from old-guard to born-free, the post-amble seems a marker of unmet expectation and a source of disappointment, especially as it is read as a capitulation to political expediency, the beginning of the TRC's incoherent (or lost) plot, and a distraction from the work of reconstruction.

If these words announced the end of apartheid and did so in a way that enacted something of that end – i.e. made some history – they did not finish the job. Apartheid was ended, and so much of it has remained, a presence that has turned the post-amble into an open wound, a violence that confounds its own promise and perhaps amounts to a crime. There was, first, the matter of amnesty, a decision to suspend the Constitution's rule and allow perpetrators a chance to remain in the fold. Related questions followed, all of which remain. Did the post-amble help justify a transition with legal continuity at the cost of exposing how apartheid functioned in and through the law? How did its ambitious call interrupt the path to liberation's proper end at the same time that its abstract terms failed to offer a coherent vision of the transition's goal, the future on the far side of the bridge? Did its words fail, not least to convert hearts and minds in the name of reconciliation and unity?

Bad law? Broken law? Without rule of law? At the cost of moral law? Flaunting the laws of good words? These questions are the rub – or perhaps the truth: the strangely ending end of the interim Constitution holds the problem of (its) legal violence, a compound problem that is often reduced – or sharpened – to the contentions that the post-amble did not adequately structure and support a legally coherent transition and/or that it failed to define and advance a moral vision of transformation.

The epilogue neither solved how to end apartheid nor resolved what was to come next. A proper reply to this contention? Precisely!

The widespread and ecumenical disappointment that would relegate the post-amble to the past – if not the trash heap – may well misrecognise its call and the current relevance of its calling relative to the question of how – and why – apartheid remains. The instrumental reading of the epilogue may not serve. And, a deontic rendering may fair no better. This contested closing may be neither a *rule* of recognition with which to determine and sustain law's identity as such nor a *rule of recognition* through which to discover, name and instantiate the moral *telos* of law.²⁰ Instead, it may express and embody something of what Walter Benjamin grasped as a "pure means", a non-mediating and non-instrumental power in which abides a critique of legal violence, including its own, a critique that proceeds in a question of language that may have more than a little to do with the end of apartheid.²¹

Amnesty violates the rights of victims. Reconciliation may well be (il)liberal to fault. Unity is another name for peace without justice. In these terms, the post-script

¹⁹ The oft heard chestnut is that "reconciliation" is "symbolic" in the sense of "merely symbolic", that is, an immaterial and secondary concern. Among other things, this judgment forgets the possibility that a symbolic revolution may be symbolic "either because it signifies more than it effectuates, or because of the fact that it contests given social and historical relations in order to create authentic ones": Michel de Certeau, *The Capture of Speech and other Political Writings*, trans. L. Giard, (Minneapolis: University of Minnesota Press, 1997), p. 5.

²⁰ This is the question set out and left unresolved in the AZAPO decision.

²¹ Walter Benjamin, "Critique of Violence", in *Walter Benjamin: Selected Writings, 1913-1926, Volume 1*, trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), p. 241; Walter Benjamin, "Zur Kritik der Gewalt", in *Walter Benjamin Gesammelte Schriften vol. II.1*, (Frankfurt A.M: Surkamp, 1999), ss. 179-204.

enables, supports, and rationalises what Benjamin and Hannah Arendt understood as legal violence.²² Yes—there is little point in denying this and little point in making it the last word. In fact, for Benjamin, such criticism is better understood—or only comprehensible—as a premise. That is, there is no getting past this violence, no direct out, least of all from within the law itself. For all the wishes of the pacifists and those (e.g. certain Kantians) who contend for what turns out to be “formless ‘freedom’”, Benjamin held that the law seeks “a monopoly of violence” and does so in order to both protect its own ends and preserve itself as such, as both a means and end.²³ Thus, “if violence, violence crowned by fate, is the origin of law”, Benjamin observes that “all violence as means, even in the most favorable case, is implicated in the problematic nature of law itself.”²⁴ And it is just here, in the law’s gathering of violence in the name of its self-justifying creation and preservation, that “something rotten in the law is revealed”.²⁵ The name and form of this corruption is well-known and much discussed. It is nothing less than the exception, the state of exception in which law founds itself and through which it forgets the violence of its beginning—i.e. the contingency of its founding—in the name of concealing its endless interest to accumulate power over life and to do so for its own sake.²⁶

At its heart, Benjamin’s view of legal violence holds that as “all violence as a means is either law-making or law-preserving”, the law embraces myth over history and covers memory with fate.²⁷ This well-known claim, the focus of so many important readings of Benjamin’s position, may well encapsulate many of the expressed concerns over the post-amble.²⁸ And yet, not unlike so many readings of the epilogue, the extensive critical commentary on Benjamin’s claim is curious for the way it often sets aside a crucial question of language, one that appears in the middle of his argument and which is often taken for an aside or an untoward interruption.

“Is any nonviolent resolution of conflict possible?”²⁹ Benjamin’s answer is unequivocal, puzzling and altogether relevant to the question of the interim Constitution’s epilogue: yes, though it requires “unalloyed means of agreement”

²² Benjamin’s argument relies on the concept of “Rechtsgewalt” throughout, a concept that can be read in a number of ways, some of which are later picked up by Arendt in her work on imperialism and violence as such.

²³ Benjamin, “Critique”, pp. 242, 239. As Benjamin puts it, “the law-making character inherent in all (such) violence” sets law to fear any and all violence outside of its control as a threat to itself (p. 240).

²⁴ *Ibid.* 242-243. The position is rooted in Benjamin’s contention that, on one side, the law aims to “divest the individual, at least as legal subject, of all violence, even that directed only to natural ends” and that, on the other, that “in the exercise of violence over life and death, more than in any other legal act, the law reaffirms itself” (*Ibid.* 243, 241).

²⁵ *Ibid.* 242.

²⁶ Benjamin’s famous formulation: “When the consciousness of the latent presence of violence in a legal institution disappears, the institution falls into decay. In our time, parliaments provide an example of this. They offer the familiar, woeful spectacle because they have not remained conscious of the revolutionary forces to which they owe their existence” (*Ibid.* 244). There is a direct conceptual link here to Benjamin’s famous contention in the “Theses on History” that the exception has become the norm. Of course, this position underwrites Agamben’s work in *Homo Sacer*. See Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life*, trans. D. Heller Roazen, (Palo Alto: Stanford University Press, 1998).

²⁷ Benjamin, “Critique”, p. 243.

²⁸ Two of the most important: Jacques Derrida, “Force of Law: The ‘Mystical’ Foundation of Authority”, in D. Cornell (ed.), *Deconstruction and the Possibility of Justice*, (New York: Routledge, 1992), pp. 3-67; Werner Hamacher, “Affirmative, Strike”, *Cardozo Law Review*, 13, 1991, pp. 1133-1157.

²⁹ Benjamin, “Critique”, p. 244.

whose “subjective preconditions” are such attitudes and habits as the law cannot contain: “courtesy, sympathy, peaceableness, trust...”³⁰ Offering “indirect solutions” to “human conflicts related to goods”, Benjamin speculated that these pure means hold the potential for non-violence precisely as they “never lead to a legal contract”.³¹ Through the “technique” of the “conference”, they compose agreement in what is “wholly inaccessible to violence: the proper sphere of ‘understanding’ language”, a language in which, Benjamin contends, “there is no sanction (*Straflosigkeit*) for lying.”³²

No sanction for lying. Non-violent agreement: speaking with impunity. Not speaking without consequence or risk. Rather, speaking without threat of legal sanctions for “fraud”, without the law’s interest to “restrict the use of wholly nonviolent means because they could produce reactive violence”, the pure means that could threaten law—and so turn the tables—precisely as they recollect law’s contingent beginning and disclose the exception on which its power rests.³³ Such means do not appear “before” the law – Benjamin does not retreat to the very abstract idealism that he deems unable to sustain a critique of violence. They are manifest in the objectivity of stasis, that form of conflict that law fears most, precisely as it induces a “fear of mutual disadvantage” that motivates individuals “to reconcile their interests peacefully without involving the legal system.”³⁴ Though this non-violent work may find its limit in the conflicts between “classes and nations”, Benjamin holds that it is possible to take the “pure means in politics as analogous to those which govern peaceful intercourse between private persons.”³⁵ In both, the potential for non-violent agreement *is* a critique of legal violence, precisely as its pure means establish an exception to the law’s self-making and self-preserving exception, one that proceeds in terms to which the law itself has no standing to speak-sanction.

Now the last lines of the interim Constitution are recognisable – or, here they come into what Benjamin later called the “now of recognizability”, a flash in language that illumines the relation between “what-has-been and now” in order to clarify and perhaps “liberate the future from its deformation in the present”.³⁶ Precisely, this passage without a proper name constitutes an open exception, a double exception, in the name of a critique of violence. It discloses the exceptions on which (its) law is based and through which (its) law maintains itself. It emerges outside the law so as to recollect the beginning of law *and* it works inside the law so as to demonstrate the contingency of its rule in the face of apartheid’s crime. And, as it emerges from the MPNP, the post-script demonstrates that law is authored at the same time that it authors a mandate for amnesty which extends the law while disclosing the law’s crisis

³⁰ *Ibid.*

³¹ *Ibid.* 243-244.

³² *Ibid.* 244. This crucial idea exposes the deep connection between Benjamin’s 1921 Critique of Violence and his 1916 essay, “On Language as Such and on the Language of Man”, in *Walter Benjamin: Selected Writings, 1913-1926, Volume 1*, trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), pp. 62-74.

³³ Benjamin, “Critique”, p. 245.

³⁴ *Ibid.* And, insofar as this resolution unfolds outside the logic and “good faith” of the contract, it may yield violence and so threaten law’s monopoly.

³⁵ *Ibid.*

³⁶ Walter Benjamin, *The Arcades Project*, trans. H. Eiland and K. McLaughlin, (Cambridge: Harvard University Press, 1999), p. 462; Walter Benjamin, “The Life of Students”, in *Walter Benjamin: Selected Writings, 1913-1926, Volume 1*, trans. E. Jephcott, (Cambridge: Harvard University Press, 1996), p. 38.

of legitimacy. And, all of this as the post-amble assumes a constitutional status at the same time that it defines the conditions on which the Constitution's constitutive power depends.

This critique of legal violence resolves nothing, but recollects the question of language that remains. It stands and moves on the bridge it names, over an abyss and running between the law to which it commits itself and from which it takes leave. It appears in the midst of stasis, the language trouble that troubles the given word and so motivates a forum given to composing the form and content of a "sufficient consensus", a process of agreement-making whose rules can be broken with (legal) impunity and an agreement that does not amount to a contract. From an extra-legal forum predicated on the need to bracket the taken for granted language of its participants, the epilogue is composed in forums outside the forum itself, in spaces dedicated to the "understanding language" that the post-script itself advocates. And, at the same time, it stands for legal continuity and takes a stand inside the law, with a mandate for amnesty, the law's foreclosure of the ability to demand standing before the law and call out the force of its established rule.

The post-amble's recollection of language is a call to gather in the midst of dispossession and to undertake the gathering of a dispossessing question, a question that troubles the taken for granted word, the word used to assume, attribute, and inflict language as instrument. It is the recollection then of a beginning, an experience in which the given word is not given, when language abides as potential. This moment is uncomfortable, all the more so for those who assume the deepest of connection between human and logos, what might well be, in Benjamin's terms, the "myth" of *zōon logon ekhon*.³⁷ It can also be dangerous—potentiality has been used again and again to rationalise endless delay, the promise of the beginning that never arrives.

And this then is the hinge, the fulcrum on which the bridge may balance. The rhetorical history of apartheid is a crime against humanity unfolded through the "law" of language and the "language" of law, a maniacal commitment to the word's potential as an instrument of endless division and timeless distinction, a power that was then rationalised with the promise of a reconciliation that was ever and always yet to come (the Nederduits Gereformeerde Kerk minced no words in this regard). In the early stages of transition, there was never an extended public or political discussion of the immanent connection between language and apartheid, in part because the ANC's Marxism has always lacked for a philosophy of language (a shortcoming that Neville Alexander tirelessly endeavoured to remedy), in part because the first act of a liberating government cannot be to throw (its) language into radical question (something that Mandela nevertheless did do on occasion) and in part because the TRC failed to think beyond its own quite limited understanding of reconciliation, as a concept and practice that has long, long, long been concerned with the conditions and dilemmas of coming to words.

Now, however, there may be time. For now, there may be a moment to once again hear the post-amble's turn, the movement on the bridge that law cannot direct and which opens language as a question, including the question of how apartheid's instrumentalisation of language remains and the ways in which it continues to thwart transition and transformation. If more than a few would prefer not to listen — "Ag!

³⁷ Erik Doxtader, "Zōon Logon Ekhon—The (Dis)Possession of an Echo", *Philosophy & Rhetoric*, 50(4), 2017, pp. 452-472.

~ 'With no sanction for lying' – Recollecting the potential of a few dispossessing words ~

This is just more time given to just more talking in the midst of the dispossession" – perhaps it is time to pause and consider the extent to which material redress hinges on a certain sufficient consensus, a coming to agreement about how to define and sustain the process of deciding what counts as a just form of (re)distribution and a sustainable system of reconstruction. For now, this is surely reconciliation's most difficult work, a call to give up given words in the name of strange endings.

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