DISSOCIATIVE GRAMMAR OF CONSTITUTIONAL CRITIQUE?

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> Critique is essential to all democracy. Not only does democracy require the freedom to criticize and need critical impulses. Democracy is nothing less than defined by critique.
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> *– Adorno 1998:281*

Adorno's words could be read alongside Klare's critical focus on the political and moral dimensions of adjudicative law-making generally, and South African constitutional adjudication in particular. Klare (1998:150) asks: "Can we describe a method of adjudication that is politically and morally engaged, but that is *not* illicit 'judicial legislation'. Is there a post-liberal account of the rule of law suitable to the political challenges South Africa has set for itself?" In response, he calls for politically engaged forms of constitutional legal adjudication that conform to legal process in their efforts to spur social changes on a scale greater than liberal reform, but short of revolution. Coining the phrase "transformative constitutionalism" to signify "an enterprise of inducing large-scale social change through nonviolent political processes grounded in law", he engages head-on a question that has dogged neo-Marxist approaches to law: "[Is it] possible to achieve this sort of dramatic social change through law-grounded processes?" (*ibid*).

Leaving aside the well-known details of Klare's affirmative response to this question, the following paper considers a type of critique that might inform transformative adjudication in contemporary democratic environments. It addresses an element of adjudicative legal culture, and engages specifically the critical dimensions of what Klare refers to as the "professional sensibilities, habits of mind, and intellectual reflexes" (1998:166). A focus on critique in the context of transformative constitutionalism is foundational, because, as Van Marle (2009:288) points out, this sort of constitutionalism is itself a critical process "committed to transforming political, social, socio-economic and legal practices in such a way that it will radically alter existing assumptions about law, politics, economics and society in general". If this recognition necessarily takes one beyond the confines of conventional legal theory or jurisprudence, it also implies a unique form of critique situated "within a liminal space and time, a precarious and uncomfortable space and time or, following Gillian Rose, a space of double anxiety and sustained equivocation, a broken middle. It must be a site of active political action and struggle, of active engagement with law; a site that entails an unsettled and unsettling approach" (*ibid*:297).

Here, Van Marle raises the theoretical stakes by inviting reflection on a "critique of critique" within the context of constitutional law (2009:297). It also appears to challenge Klare's critical legal approach with its attachment to normatively founded criticism and 'progressive' social transformation. By contrast, critique that occupies an always uncomfortable space, an unsettled 'broken middle', defies settled definitions of critical practice, social advancement or progress. Embracing this 'unsettled and unsettling' approach, a broad "aesthetic turn" in legal thinking (involving philosophy, history, art and literature) has challenged constitutional arenas not to tackle complex socio-political matters through formalist legal language games or simply framed technical, administrative and scientific solutions. As Le Roux puts it:

> [...] the aesthetic turn in post-apartheid constitutionalism could be interpreted as a direct response to the need for a non-scientific and non-formalised style of public reasoning. That the rejection of science as a model of constitutional law should have resulted in a turn towards art (traditionally regarded as the direct opposite of science) is not at all surprising. (Le Roux 2006:107)

In a related view, Van der Walt (2005) sees post-apartheid constitutional adjudication as a public, cultural space for deliberative democratic discussions vital to the future of a democratic society; it should thwart modernity's seemingly relentless push towards private law in constitutional thinking, as well as an emphasis on formalist legal reasoning and individual rights.

These unsettled critical slants take for granted the historically situated dynamism and provisional nature of constitutional law, recognising that democratic, transformative constitutions demand appropriate forms of adjudication to embrace – rather than deny by *fiat* – the contingency of constitutionally defined limits. This places a unique inflection on how to conceive of adjudication within constitutional arenas. It also raises an important issue: what 'grammar' of critique might attach to publicly spirited, democratic and transformative constitutional adjudication? In responding to this question, the following chapter draws on aesthetic (literary and artistic) sources to clear conceptual grounds for a grammar appropriate to contemporary legal critique. It

begins by describing an influential, modern approach to critique (implicit too in Klare's formulation) that proceeded from founded judgements, before tackling the following question: what alternative critical grammar might work through the indeterminate dynamism of transformative constitutionalism, enabling practices of critique that operate by relentlessly reaching beyond current orderings? In response, I will propose a 'dissociative' grammar that conceives of critique as a practice not essentially tied to practices of founded judgement. In order to conceptualise the stakes of such critique, I refer to post-apartheid fiction and William Kentridge's ideas about his art.

If modern critique required critics to judge circumstances against absolute, ahistorical or universal criteria, the proposed approach points rather towards a dissociative grammar and practice of critique more able to work with the uncertainties, dynamism and intricacies of current constitutional horizons. At the outset, however, two caveats seem necessary. To begin with, this chapter's focus on such a critical grammar is rather ambitious on its own terms, enabling little more than an allusion to how that grammar might eventually inform transformative constitutional adjudication. Secondly, following Nietzsche and others, I consider law as always underway, a becoming and not a settled being (Pavlich 2011), so that the search for a dissociative grammar of critique explicitly attaches to dynamic rather than reified images of legal practice. In outlining this unconventional notion of critique, I refer to literary and visual art works to illustrate elements of this grammar, rather than offer an analysis of the works themselves. With these provisos in mind, how might one understand the notion of 'grammar' in context?

Grammar, critique and spades turned

> Essence is expressed by grammar. [...] Grammar tells us what kind of object anything is. (Wittgenstein 1983:371,373)

> Grammar, one may say, establishes the place of a concept in our system of concepts, and thereby in our world. It controls which other concepts, which questions and observations, are relevant to a particular concept. That is the sense, I believe, in which 'grammar tells us what kind of object anything is.' Grammar relates the concept of 'chair' to concepts like 'sitting' and 'mending' and 'lending'; which is to say that for something to be a chair, it must be such that a human being can sit on it, and sit on it in that way ... (Pitkin 1973:119)

Despite Wittgenstein's not always consistent use of the term 'grammar', one might infer from the above statements how, for him, grammar specifies ways to use particular words in a discourse, thus generating their meaning in context – that is, how words are used in given "language games" quite literally dictates their meaning (Wittgenstein 1983:107). Moreover, users learn how to use words in a language by getting to know the rules that specify appropriate ways of using words in particular language contexts (often by ostensive and performative definition, much like learning the rules of a game). This yields meaning for participants, and grammar encompasses the rules at hand. Through grammar, that is, rules for the use of words in language generate meaning and define 'essences' to frame how participants understand and relate to their worlds. But how might we understand the underlying grammar behind the meaning of a word like 'critique'? Wittgenstein's fleeting response provides that "[i]n their use of words one might distinguish 'surface grammar' from 'depth

grammar'" (1983:664), and Kripke helpfully elaborates: "By Surface Grammar we actually refer to all the formal grammatical rules, while by Depth Grammar we refer to the circumstances and relationships that dictate language use" (1982:96). In other words, 'surface grammar' embraces formal and specific grammatical rules that define for language learners and users how to use words in a given language context. These rules specify how a given word is to be used in a sentence and, as Wittgenstein suggests, make it sound 'right' to language users:

> What immediately impresses itself upon us about the use of a word is the way it is used in the construction of the sentence, the part of its use [...] that can be taken in by the ear. (Wittgenstein 1983:664)

But if hearing correctly may be relayed through direct rules, Wittgenstein notes that there is a rather less accessible element to grammar: "[...] the 'deep' aspect of this matter readily eludes us" (*ibid*:387); that is, underlying surface grammars, one finds an elusive 'depth' grammar, which ordinarily resides in unspoken conventions. Emerging from relational performances and being with others in a given context, this depth grammar is obscure, because it operates in the shadows of language, in the unspoken relations and forms of life that yield communicative conventions. Its operation is mostly silent, hidden to language users, but it may become apparent when perplexing misinterpretations strike at the heart of ordinary communicative interactions:

> [...] the problems arising though a misinterpretation of our forms of language have the character of depth. They are deep disquietudes; their roots are as deep in us as the forms of our language and their significance is as great as the importance of our language. (Wittgenstein 1983:111)[1]

One might extrapolate from these brief references to Wittgenstein that a grammar of critique will contain more or less articulated surface rules that render the particular views of critics in context meaningful; at the same time, its depth grammar ties unspoken critical practices more directly to the unarticulated ebb and flow of convention that attend to particular 'forms of life'. In other words, both depth and surface grammars of critique are tied ultimately to the rules, conventions and forms of life associated with, and that give rise to, meaning in a given language. No grammar is therefore universally fixed or valid; moreover, its emergence is contingent upon conventions within given forms of life that defy absolute justification. As Wittgenstein notes, the quest to justify conventions is only possible up to a point; there is always a moment where we find ourselves without meaningful ways to provide ultimate justification:

> If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'this is simply what I do.' (Remember that we sometimes demand definitions for the sake not of their content, but of their form.

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[1] This quote could also be taken to inform the 'deep' disquiet previously referenced in relation to legal theory's 'aesthetic turn' (Le Roux 2006; Van Marle 2003). Perhaps one might consider this turn as a deliberate attempt to render familiar meanings in constitutional legal theory strange and to work with 'misinterpretations' to develop a critical form of transformative constitutionalism. No doubt the implications for the forms of life that surround constitutional law could be profound.

> Our requirement is an architectural one; the definition a kind of ornamental coping
> that supports nothing.) (Wittgenstein 1983:217)

Wittgenstein's penetrating integrity on this matter faces head-on the contradictory and ultimately indeterminate yet 'architectural' requirement imposed upon many questions about the foundations of how we live and the meanings we promote. If nothing else, this demands caution from the outset: not everything can be articulated about critique or its grammar, and far less about whether one approach is necessary or not.

In sum, this Wittgensteinian-inspired formulation allows one to approach the grammar of critique with suitable modesty and without certainty; it also embraces the intractable indeterminacy of surface and depth grammars that generate the meaning of transformative, critical thinking. In exploring the indeterminate forms of life that spawn practices in the name of critique, any metadiscussion – a critique of critique – demands a certain diffidence. This attitude helps guard against an undue and yet pervasive conceptual arrogance that claims – with remarkable simplicity – the capacity to erect universally valid guidelines for accomplishing progressive social, legal and political change. Lest we forget, too many social disasters contain traces of such unwarranted assurances.

Judgemental grammars of modern critique

There is a constellation of signs – 'criticism', 'crisis' and 'critique' – whose surface grammar has over centuries been associated with images of judgement and the ability to specify privileged paths to true progress (Connerton 1980; Koselleck 1988). In modern contexts, the meaning of these words was increasingly associated with judging 'critical conditions', truth, and so on. Their surface grammar also reflected an enlightenment politics that contested the hegemony of divine revelation. Ultimately, the 'superstition', 'dogma' or 'despotic decrees' of religion and sovereigns were replaced by a reason-based regime of truth in which criticism served as a new, 'enlightened' master. It became the final arbiter of new truths. With this inflection, one might grasp the full significance of Kant's famous claim:

> [...] our age is, in especial degree, the age of criticism, and to criticism everything
> must submit. Religion through its sanctity, and law-giving through its majesty,
> may seek to exempt themselves from it. But they then awaken just suspicion, and
> cannot claim the sincere respect which reason accords only to that which has
> been able to sustain the test of free and open examination. (Kant 1958:7)

Basic to the 'enlightened' depth grammar implied here, critique revolved more and more around a critic's ability to serve as judge in matters of reason-based truth. As Connerton[2] succinctly puts it, with the landmark publication of Bayles' *Dictionnaire historique et critique* in 1697,

> Critique came to be seen no longer as a symptom of the sharpening opposition
> between reason and revelation. It was viewed as itself the activity which separated
> the two spheres. It was the essential activity of reason. (Connerton 1980:18)

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2   See Pavlich 2000:26-27.

Not surprisingly, perhaps, the idea of critique was subsequently associated with, even defined by, practises of judgement.

Yet the etymology of the term 'critic' suggests a rather different possibility, sharing as it does with 'critique', 'criticism' and 'crisis' a link to the Greek word *krinein*, which was associated as much with a capacity to decide as to judge (Ayto 1990). With its link to decision, *krinein* simultaneously connoted discerning, selecting, differentiating, sifting, and separating out (Koselleck 1988). Modern appropriations of 'criticism' or 'critique' tended to associate the practice with philological quests to find the authentic meaning of texts (Davis & Schleifer 1991), medical judgements about when the course of an unfolding illness had reached a 'critical condition' (Connerton 1980), and quests to judge the "justices" of particular events in legal settings (Pavlich 2000:25, 1996:18). Consequently, critical practices tended to be defined as ways to judge the truth or authenticity of something, or an "original condition" (Connerton 1980:17); hence, as Williams (1983:85) puts it, "[...] what is significant about the development of criticism, and of the critic and the critical, is the assumption of judgement as the predominant and even natural response".

In other words, as ideas about critique and criticism developed under modern conditions, so they came to be associated with practices of judging the truth, the authenticity, or the essence of given circumstances. Interestingly, both critics and judges were tasked with deciding on the truth of specified situations, diagnosing crises and intervening through legal remedy or prescriptive constitutional interventions. Traces of that judgemental critical grammar appear in Klare's critical legal studies: he articulates critique as a judgement that relies on 'progressive' criteria (for example, equality) to redress problematic social conditions through a 'transformative constitutionalism' that would assuredly guide society to an advanced state. Though different in appearance, both formalist and critical constitutional approaches proceed through not entirely unrelated models of founded judgement.

Although discussed in more detail elsewhere (Pavlich 2001, 2000), one might note here that modern criticism's emphasis on judgement dovetails with emerging disciplinary regimes of truth and their attachment to a gaze that operates through 'normalising judgement' (Foucault 1977a). To be sure, the association between legal judgement and normalising judgement is complex and context-specific. However, for our purposes here, suffice it to say that grammars of critique associated with founded judgement assumed an inordinately dominant position in modern contexts (Pavlich 2000). Moreover, the alignment between modern adjudication, critique and judgement, and between adjudicator, critic and judge, served to privilege the decisions as a cut, a litmus test; the point was not to reveal, but to judge the truth. The depth grammar is implicit: critique emerged as a practice of judging particular social conditions against criteria to advance a society's path to progress. That founding (if seldom articulated) grammar hovers almost imperceptibly over the unfolding Enlightenment conventions that came to define modern critique. But what surface grammar did those conventions enable?

Although multiple, modern surface grammars of critique tended to follow a three-fold rule structure that defined legitimate critical practices. To begin with, critics were to outline and formulate justified, founded and ahistorical normative criteria that defined

'ideal', 'progressive' or 'advanced' states of being (Benhabib 1986). Of course, there were many different ways to arrive at these criteria, and their content varied immensely from approach to approach. For instance, Kantian-inspired reflexive critiques sought metaphysically defensible and universally applicable ethical foundations – an approach echoed and yet developed by various critics. By contrast, praxis-orientated Marxists were more inclined to conceive of progressive critique as emerging from ideals generated through concrete historical struggles. Critical theorists, such as Habermas (1996, 1987), inflected a praxis orientation by calling for rational communicative practices of a 'discourse ethics' whereby participants of a 'deliberative democracy' delineate valid criteria. Though different, each of these approaches follows a surface grammar that requires them initially to define a progressive and/or rationally justified set of standards (ideals) as the markers, the foundational criteria, upon which any subsequent critical judgement will be based (Bernstein 1988). Thereafter, the surface grammar requires critics to describe – in analytically legitimate ways – a given social context or set of circumstances. Finally, critics were to *judge* context against criteria in order to prescribe change that would necessarily lead societies to more advanced orders. Even with many different conceptions of these stages, the underlying surface grammar remains, as does the attachment to practices of founded judgement. Without the latter, prospective critics are unlikely to be considered 'serious critics', or may even be deemed 'uncritical' (Pavlich 2005).

It is perhaps important here to review an associated critical promise to bring about social advancement through decisive critiques based on founded judgement. To be sure, this is an extraordinary promise to make, and one that is difficult to uphold. How could any ideal declare with certainty a universally valid guide to future social advancement or progressive social being? Even if one were prepared to overlook the inevitable imperialism of such conceptual certainty, it would be reckless to ignore the unparalleled bloodshed that over the centuries has flowed in the name of purportedly universal criteria: colonial images of 'civilization', eugenic science's racial hierarchies, Nazi visions of racial purity, Stalin's ideals of collective progress, apartheid's 'separate but equal' orders, etc ... These highly perilous yardsticks were not purged by modern grammars of critique; nor did the atrocities carried out under their auspices evaporate in an ethos of judgemental critique. Perhaps modern critics did not – and indeed could never – provide ahistorical guarantees against collective injustice, inequity, social exclusion or cruelty (Bauman 1994, 1987). Resilient beliefs in social progress assured by founded judgement may even have blinded participants to the dangers of asserting an intrinsic progress to modern social engineering (whatever visions might have driven the latter). Assertions of independently founded and progressive judgement also became increasingly difficult to sustain under what Bauman (1992:18) describes as social conditions fraught with an "ambient uncertainty". Whether referred to as postmodern or late modern, these conditions reflected an intractable disagreement about the very possibility of finding universal criteria and whether – as Lyotard's (1984) work argues – that quest is even vaguely credible.

Interestingly, one might note the extent to which Kant's critiques of aesthetic judgement (directed at beauty) appear to expand critical practices beyond that of founded judgement. As Kant puts it, to judge beauty, the critic must engage in a sort

of reflexive analysis that empathises with other judges; it is not a matter of referring to Archimedean criteria, but to a more publicly minded quest that puts the critic in the shoes of another judge. Developing Kant here, Le Roux notes:

> Aesthetic judgements therefore require not the impersonal operation of logic, but rather an imaginative and self-corrective dialogue with others, otherness and difference. Seen in this light, good taste embodies a critical sense for the public or a public spirit. A reflexive judgement of this sort has as its essential precondition the existence of a plurality of viewpoints. It is a mode of judgement that not only celebrates dialogical openness, but depends for its possibility on a resistance to any drive towards the formalisation or closure of this dialogical openness. (Le Roux 2006:115)

In such formulations, one detects rumblings of another series of questions: Were the distended promises of judgemental criticism doomed from the outset? Could one instead leave room for a less totalising version of critique? Is it possible to reinvigorate ideas about criticism through a grammar not predicated upon practices of founded judgement, but which nevertheless pursue ways to open up new social, political, cultural and indeed linguistic horizons?

Critique without founded judgement?

As noted, the term 'critic' harbours etymological links with the Greek *krinein*, which connoted practices of separating, perceiving, dividing, discerning, etc. This suggests another possibility: critique need not be tied to practices of founded judgement, and might even be conceived as an indeterminate, interpretative practice that unravels textures of contextual meaning. In other words, one could reimagine critique as permanently opening up given representations, rationales and practices that become settled as 'necessary' within an order, and thereby remaining permanently open to other forms of life. No doubt, interpretative work of this kind cannot expect to provide certain or absolute assurances. It might be seen to disrupt (say) unjust, or exclusive, meanings or practices that ensconce specific forms of life, permanently projecting out towards other life forms. This interpretative work would reorder familiar meanings and question taken-for-granted, everyday ideas and practices, and its aim might be to expose underlying assumptive universes by naming diktats that operate from within the silent shadows of preconception. Clearly, this idea of critique taps into experiences that reach beyond what currently exists; it is less aligned with questions of how to be than of how 'to become' (Pavlich 2011).

One might note that Barthes, some time ago, also referenced an approach to critique without judgement:

> So long as criticism had the traditional function of judging, it could not but be conformist, that is to say in conformity with the interests of the judges. However, the true 'criticism' of institutions and languages does not consist in judging them, but in perceiving, in separating, in dividing. (Barthes 1987:33)

Though not wanting to echo his aspirations to retrieve an authentic ('true') form of criticism, I nevertheless endorse his observation that judgemental grammars of critique privilege the underlying 'interests of the judges'. Those interests are reflected in the (implicit or explicit) criteria used to make critical judgements. An alternative

approach to criticism, says Barthes, might emphasise practices of perceiving over defining, separating over unifying, dividing over deciding, and discerning over judging. And he was certainly not alone it this view. Foucault echoes the call to envisage criticism beyond judgement in a rather lyrical passage:

> I can't help but dream of a kind of criticism that would try not to judge but to bring an oeuvre, a book, a sentence, an idea to life; it would light fires, watch the grass grow, listen to the wind, and catch the sea foam in the breeze and scatter it. It would multiply not judgements but signs of existence; it would summon them, drag them from their sleep. Perhaps it would invent them sometimes – all the better. (Foucault 1994:323)

Both positions refuse a modern blackmail that previously linked critique and founded judgement. They also point to the prospect of a different approach to critique, one that emphasises a reflective experience of becoming, and hence a kind of 'negotiating dissociation' from unfolding conditions that anticipate and welcome what might become. This approach involves a unique set of conventions and experiences of a different form of life.

The matter is, of course, complex. However, critical practices that do not define themselves through founded judgement suggest a different grammar. One might, for example, propose a kind of critique that works from a liminal threshold and is propelled variously through local engagements with the limits of social context, culture, language and legal framework to open up to new forms of life. The active gesture need not be one of founded judgement; rather, I suggest that critique could work through a 'dissociation' of familiar surface grammars and social processes in a quest to appropriate a future. As an event, the dissociative critique might strive to confront the indeterminate voids that support present limits and commence the always 'unsettled and unsettling' task of forging new horizons of meaning. To be sure, such an approach to critique can never offer the self-assurances of a firm *telos* that guarantees universally progressive societal transformation. Indeed, a dissociative grammar of critique deliberately works against totalising thought, including forms that claim to be necessary or universally valid. Its promise lies not in illusory universal ideals; instead, it remains forever open to other ways of thinking and becoming. Deluded closures may breed despotic acts. All this does not render an open grammar and experience of critique irrelevant to post-colonial contexts; on the contrary, it makes such critique pivotal. What that grammar might look like exactly, and how it could be articulated to legitimate the adjudicative processes of a transformative constitutionalism is a matter for continued discussion. However, echoing the 'aesthetic turn' previously noted, one might at least point to selected, but instructive, snippets of post-apartheid novels and art forms to help enunciate the outline of a grammar of dissociative critique.

Negotiating dissociation: a requiem for judgemental critique?

The comments below extend my earlier conceptions of (following Foucault) a govern-mental grammar of critique – 'how not to be governed thus' – and (drawing on Derrida) a deconstructive opening up to spaces beyond (Pavlich 2005, 2000). I continue to see congruent value in both trajectories; however, alluding to the surface and depth grammars of a dissociative critique that could be broadly attached to legal contexts,

and transformative constitutionalism in particular, might extend them. As an initial gesture, my allusions will speak briefly to how versions of Wittgenstein's depth and surface grammars could shape a dissociative critique.

Depth grammar I: precipitating dissociative critique

Existing within an everyday social ethos, participants seldom reflexively examine or challenge the limits that constitute them as particular kinds of contextual beings. The depth grammars through which they come to engage meaningfully, make sense of, and act in a social context remain hidden. Yet, precisely at those moments where limits to particular forms of life are experienced as deeply problematic, subjects inaugurate unusual processes to name aspects of their subjection; at such moments, focusing on given limit-horizons becomes possible. To be sure, experiencing these limits is important for subsequent transformations. However, the precipitating event required for the dissociations that might eventually enable significant social transformation usually requires a more sustained engagement with – and dissociation from – the unspoken conventions of a context. One might say that critical forms of life start at a moment which Foucault elsewhere refers to as a "preface to transgression" (1977b:29) – the point at which subjects are sufficiently discontented to contemplate actively 'how not to be governed thus'.[3] Whatever else, Foucault's insights here reference a critical grammar that provokes subjects to imagine the dissolution of themselves and their current ways of being, and to consider ways to live outside of what they have come to be.

In legal arenas, various promises of justice, or conceptions of injustice, are mostly the spurs for dissociative thinking. Here one might recognise Derrida's (2002) important considerations of justice as an infinite promise; something that can never be rendered finite and yet requires calculation from within finite contexts. Perhaps too, the immediacy of 'phrasing injustice' in context may often serve as an incentive to open up to porous limits through which new forms of life may emerge (Pavlich 1998). In either case, the experience of disruptive – 'unsettled and unsettling' – moments within a given order is less abstractly captured through the development of characters in several recent South African novels.

For example, a central character of Ingrid Winterbach's *Die Boek van Toeval en Toeverlaat* (*The Book of Happenstance*) (2006), Helena Verwey is profoundly shocked by the incidental theft of her valuable and beloved shell collection. Yet this disruptive event leads to an unexpected reflection on her seeming abandonment between life and death. It propels Helena to an unyielding reflection on – and naming of – the contingency through which her current life moves along a path towards its eventual dissolution. Recognising the pervasive coincidence of all that she does brings her to a surprising realisation: the orders that have contoured her comfortable and often self-assured forms of life have emerged from accidental events, ironic concurrences and sheer chance. One might think that embracing the 'happenstance' quality of her life would prove disabling. On the contrary, however, Helena shows that the

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[3]   See Foucault in Kelly 1994.

very acknowledgement of a contingent way of being incites a renewed quest for another life. Thus we find her actively transgressing the anchors – including her past absorption with a shell collection – that had stabilised her former being. This renewed vitality yields a certain calm, and by the end of the novel she experiences, without consternation, feelings of loss and hopeful anticipation that at once project her through and out of the ordering formations of existing forms of life.

From a rather different vantage, but also signalling a form of life where a dissociative critique could operate, Njabulo Ndebele's *The Cry of Winnie Mandela* (2003) – a fictional characterisation of Winnie Mandela – questions how lives obsessed with order tend to drown out the chaotic foundations that contour their contingent existence. The fictional Winnie tells us that there is a link between "housekeeping and order", between the everyday practices, spaces and arrangements that eventually all get "structured into the mind and reproduce in cities that are built into grids of order" (Ndebele 2003:106). She continues: "I think this kind of order is one of the central features of whiteness. We were all 'civilised' into it" (*ibid*). The subtle (and not so subtle) elements that order a given form of life are indispensable to its continuation. Ironically, disruption may even work to preserve that order, because the effects of "[...] the disruptiveness of disorder on a mind structured into order" can be profound: "[D]eliberate disruption can be used as a device to make you desire more order. It ensures your perpetual compliance to some overriding law of control. You are deprived of order in order to desire is even more" (*ibid*:107). Here Ndebele insightfully shows how order often attaches itself so elementally to subject identities that it satisfies "daily personal needs". Order may even become a "natural law" and, "[a]t that point, the origins of man-made control disappear forever. Recalling those origins can become an act of resistance punishable by death" (*ibid*).

With that in mind, the words spoken by a fictional Winnie Mandela arrest her everyday reliance on the limits of an existing form of life, seeking a kind of death that simultaneously opens up to an "instinctual knowledge". This residual knowledge grows stronger as her torturers empty "order out of [her]". Ndebele's Winnie Mandela understands that jettisoning a past order required an "[...] emptying out of my life. My law of resistance emerged from the gradual emptying out of my life. Here was my law: embrace disruption, and then rage against order instead of longing for it" (2003:107). Ndebele artfully describes the fundamental exertions associated with a disrupted being, at the same time suggesting elements of a depth grammar for dissociative critique; that is, emerging from one form of life, resisting its deep hold, has profound implications for subjects who defy, dissociate and welcome new forms of life. This is not a matter of simple choice or fashionable opinion. It is a rather more profound disruption that, if successful, leads to a partial dissociation of past ways of being and an opening up to new forms of living with others.

In their respective ways, Winterbach and Ndebele help us to understand how a dissociated critique may be precipitated from within given limit-horizons or historical orders. Their selected insights suggest that this critique could assume multiple forms; however, it always involves a recognition that things might be otherwise, or that existing limits and orders of life are neither providential nor essential. This

appreciation prompts difficult dissociative gestures that disrupt current orders and open up to the arrival of other ways of being. Reflective subjects who problematise their current lives concurrently welcome alternative futures and open up to what may yet come (Derrida 2000, 1999). If anything, this process involves liminal and disquieting events that lean permanently towards a future order recalibrated out of a variously rejected present. If there is a constant dimension to the depth grammar of a dissociative critique, it does not reside in specific reflections on limits, immediate calculations of injustice, or even the disordering of an order. Rather, it is the permanent recognition that any historical ordering may be dissociated. In fact, this could even be taken as an indeterminate 'law' of contingency, if by that we signal not regularity, but the perpetual and unforeseeable possibility of being governed otherwise. Thus, both order and its dissociation remain permanent possibilities; neither is ever fixed as a state or a law that cannot be undone. Recognising that disruption could invite stronger connections to an order, a dissociative critique may disrupt, but that disruption also reorders by installing new grammars and meanings. To change attachments to an existing order requires at least a recognition of their contingency, coupled with fundamental (life-changing) experiences through which other forms of life are actively sought. Ndebele's novel nicely exemplifies the indeterminacy of dissociative critique and emphasises – through the myth of Penelope who waits – the importance to social change of anticipation of another future, another form of life.

Depth grammar II: negotiating dissociation

Once precipitated, critique located at the threshold of ordering limits often involves undifferentiated experiences of the sheer voids beyond, negotiating a dissociation that taps into the chaos of what is deemed impossible from within historically ordered realms of possibility. An experience of this amorphous 'impossible' characterises a key moment of dissociative critique. The latter extends through the voids of porous limits of historical social orderings by naming contingent limit formations as somehow in need of change and iconoclastically opening up meanings to prospects of what may be. Such abstracted formulations of this aspect of dissociative critique's depth grammar may be illustrated by referring to the perceptive insights of selected post-apartheid fiction and visual art forms.

Consider, for example, David Lurie's disgraced life and fragile redemption in JM Coetzee's *Disgrace* (2000), as he confronts the crumbling order of his past academic world, the dissolution of apartheid structures, and the violent attack that signals so graphically the reordering of his daughter Lucy's farm. This attack, in which both are battered – Lucy is raped and Lurie set alight – provides a terrible allegory for disruptive events, which in this instance render the limits of an order porous and highlight in graphic ways the borders sustaining them. Facing up to the impossibilities of the absence that defined those borders, and contoured her past identity, Lucy fatalistically embraces what is to come, welcoming a responsibility to the absence-becoming-present of a disrupted ordering in the process of yielding to another future. Petrus, an erstwhile worker on Lucy's farm, whose status reverses in a new post-apartheid ordering, is initially silent on events, or uses words in a way that sounds odd to Lurie's ears. But as the narrative unfolds, Petrus' voice becomes confident and

more easily understandable as conditions that once appeared 'impossible' gradually surface as more than possibility. Lurie's inability to face the once impossible meanings that take shape through the events around him, and the disgrace that has disallowed a return to any semblance of his past academic life, lead him to another form of life, where the clear distinction between 'the human' and 'the animal' blurs.

The sheer allegorical force of the book may overwhelm, but for our purposes here it offers a nuanced description of how different characters experience limits and confront what previously seemed impossible. Coetzee's book also highlights how disruptions propel a negotiation of new life forms. To be sure, disruptions are not always as extreme and violent as the ones depicted in the novel, but they likely involve a profound disorientation that glimpses chaos and propels a reordering. This unsettled threshold can be described as the place from whence dissociation is negotiated and attempts made to project reordered lives out of previously imagined voids. Coetzee provides glimpses into how various characters negotiate dissociation, disgrace and the difficult life-changing experiences required for fragile accommodations to new conditions. Through such negotiations, subjects actively appropriate new grammars and lexicons as part of receding or emerging forms of life. In parenthesis, Winterbach's novel also suggests how such negotiations may return to past uses of language to appropriate new horizons of meaning. For example, Helena and Theo Verwey embark on a project to compile a dictionary of Afrikaans words that are no longer used, but which variously help to open new literary possibilities and ways to assemble meanings in changing socio-political contexts. The recovery of such words forms a backdrop to the coincidental happenings (happenstance) that the book narrates – and one might also note here how a language (Afrikaans) faces radically altering forms of life by attempting to recover lexicons in efforts to find traction in a context of shifting limit formations and orders.

Equally, William Kentridge's art develops from the threshold of an experience that wavers between the order of existing meaning horizons and the chaos of days past or those yet to arrive. His fascination reminds us of contingent repetitions and the scope of the terrain at hand: "[...] there's a lot of change from chaos to order and order back to chaos. *Da Capo*".[4] Noting the ever-incomplete indeterminacy involved in ordering chaos, or indeed the dissociations that render order chaotic, it also indicates the porous and never-ending residues of emerging conditions. Kentridge uses a film technique that eventuates a threshold terrain between order and chaos:

> I suppose the possibility of reversing film or tape is so seductive because of its immediately revealing what the world is like if time is reversed, what it would be like if we could remember the future. [...] Tear a sheet of paper in half and it restores itself without the smallest crease. There is an extreme politeness of objects; pull a book out of a shelf and when you replace it, the books at each side at the last instance shift just the right amount to make space. From chaos there is return to order. The page of text returns letter by letter, word by word into the pen, leaving the load of ink pregnant with infinite possibilities.[5]

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4   http://www.tate.org.uk/tateetc/issue15/kentridge.htm (Access date: 20 January 2011)

5   http://www.gallerytpw.ca/publications/pdf/1006-Kentridge.pdf (Access date: 5 February 2011)

Highlighting Kentridge's notion of 'remembering a future' in a context 'pregnant with infinite possibilities' provides a way to mark out the uncertainties of a threshold, dissociative topography. Having viscerally experienced disruptions to a limited ordering, critics at that threshold negotiate the prospect of moving beyond limit-formations by naming their contingent outlines and reaching out to other possible meaning horizons. These horizons are often framed as 'impossible' or infinite, without rules for language games, but as dissociative critics negotiate new orderings and rules for words, new sign constellations and associated forms of life, they engage a terrain considered chaotic from within a previous order. Kentridge's reference to *Da Capo* signifies the indeterminate, permeable, disordered, uncertain, unpredictable and relentless unfolding through which order and chaos contour social transformations. Often detected in words after the fact, this process traces an elusive depth grammar that negotiates dissociation and a redefined life calibrated out of a sustaining chaos.

Intimations of a surface grammar

Three illustrative techniques could transpire from such a depth grammar to become rules for a surface grammar and so guide practices of dissociative critique. First, Van Marle, in her discussion of Kentridge's potential insight for critique, points to the allegorical kinship between the indeterminate performances of criticism and drawing. She quotes Kentridge on this matter:

> I believe that in the indeterminacy of drawing, the contingent way that images arrive in the work, lies some kind of model of how we live our lives. The activity of drawing is a way of trying to understand who we are or how we operate in the world. It is in the strangeness of the activity itself that can be detected judgement, ethics and morality. Trains of thought that seem to be going nowhere but can't quite be brought to a conclusion. (Van Marle 2003:255)

The irresolute and scaled-down judgement referred to here is quite different from modern, criteria-based, 'founded' judgement. The indeterminate arrival of a drawing, an event that cannot occur without the practice of drawing, is allegorically akin to negotiating the dissociation of a social present and opening up to what is to arrive. In all this, there are no certainties, which means that all the more care, thought, or attention to detail and calculation are required as one pursues new orders from the backdrop of existing frames. But ultimately, the ethics to which Kentridge refers remains resolutely indeterminate. In this context, the practice of drawing could provide an exemplar for the sort of practices employed by dissociative critique in legal contexts.

Secondly, the required calculations involved in negotiated dissociations are contoured neither by absolute openings, nor by pointed judgemental closures. Here, privilege cannot be granted neither to closure, unity and gathering, nor to complete dissociation – none of these is ever fully possible, and they may even define death. However, in unfolding forms of life, the ever-contingent interplay between closure and openness, and the parasitic relations between order and chaos, critique and structure, are fully acknowledged. Techniques that recognise the heterogeneity involved in dissociative challenges to an order also thereby affirm their responsibilities to chaotic absent others who form the basis of all ordered sociality. One might here confront rules that

recognise the tendency to order and yet always preserve the chaotic contingencies that enable any ordering (including the one here articulated).

Finally, as should be clear, dissociative grammars of critique are involved not with defining being in absolute terms or specifying how ideally to be; they are concerned with becoming (Pavlich 2011). Therefore, such critique requires particular techniques for indeterminate performances that allow a society to unfold, to become in ways that are other than those that support current orderings. Though these are likely to be multiple, one might refer to Motha's (2009) rules for initiating a contingent version of *ubuntu* to inspire a transformative constitutionalism of becoming. Equally, Fitzpatrick's (2001) determinacy-responsiveness couplet may be considered as an important technique for understanding the indeterminacy of all determined legal decisions, including those with constitutional inflections. In emphasising becoming, these approaches to legal adjudication embrace the indeterminacy of a given decision and the order that it seeks to gather. One might extract from them a key grammatical rule to guide critique's practices of becoming other by enunciating refusals, interpretative openings and negotiations that create new forms of life.

Provocation

By way of a provocation in lieu of a conclusion, I might repeat that the critical grammar assembled above does not license given universes of meaning to close themselves off from further discussion by claiming to be necessary, certain, inevitable, universal, absolute, and so on. The depth and surface grammars of a dissociative critique allegorically compare the critic to a nomad in constant search of new forms of life, for existence beyond the limits of what currently is there. This critic's task is not to judge; it is to challenge and negotiate a dissociation of contingent limits that are contextually framed as unjust, unequal and exclusive. Critical practice would thus involve continuous interpretation that separates out, discerns and opens conventional meaning horizons; it might also provoke dissociations of (or at least elements of) current social orders. As Adorno recognised, critique is not simply a matter of resisting for the sake of resisting; it is intimately tied to democracy and the never-ending process of thwarting totalitarian socio-political and legal formations. Equally, dissociative critique's promise is to pursue a different life in the name of such noble – if never fully calculable – ideals as justice, equality and democratic patterns of association. It is precisely *because* these virtues are ultimately incalculable that the critic's task of undoing any so-called necessities of totalising calculations may become urgent. Criticism has no end, and its vitality is basic to imagining the promises of just, anti-totalitarian and democratic collective futures.

Projected more directly onto constitutional legal horizons in post-apartheid settings, the proposed grammar of critique may ponder law's capacity to adjudicate more broadly and to conceptualise its 'reasoning' as contingently deferred chains of meaning that themselves are always in flux. This grammar could allow for critique to embed itself in adjudicative processes, thereby promising a much more tentative transformative constitutionalism than is implied by Klare's explicit calculations of a progressive order. It might call for contingent calculations that work with different

preconceptions of justice, but which always remain attentive to the ways in which law limits, is limited by, and occupies an obdurately liminal place when it must decide or make its cuts. Whether this sort of posture could ever be 'licit' (far less 'orthodox') within the context of transformative constitutional adjudication remains, of course, to be conceived. Certainly, under current legal orders this would be a hard case to make. But there is another, perhaps more fundamental, matter. One must also recognise that any critical project associated with transformative constitutionalism – whether judgement-orientated or dissociative – always finds its expression at unique moments, namely those moments where events in context propel reflection upon limits, enable the 'phrasing of injustice', and entice a longing for the possible dissolution of, rather than an attachment to, a given ordering. Though the permanent possibility of this critical event happening must be preserved, I wonder whether the structure of critique isn't *essentially* parasitic, or at least residually dependent on the formation of order that grounds (by definition) any dissociation. To be blunt, without orderings of some kind, there is no critique, no critic, no criticism, and nothing to resist. One might then argue that dissociative critique could never be driven into the heart of transformative constitutional law. But I think, on the contrary, that it is precisely constitutional law's call to order – even in its transformative versions – that makes it such a fecund arena for the perpetual gaze of dissociative critique. The contours of dissociative critique's possible attachment to transformative constitutional adjudication may remain tenaciously undecided, but not so the democratic import of embedding its always unsettling thresholds into the heart of constitutional practice that 'cuts' and orders.

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