Law's Rule

Liberia and the Rule of Law

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Declaration

This thesis is my original work.

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Abstract

Law's rule is animated by an irresolvable contradiction. By definition 'the rule of law' is opposed to 'the rule of humans'; and yet law remains an inter-subjective phenomenon, enlivened by the very humans over whom it would rule. Thus the rule of law, set against the rule of humans, cannot be instituted in a way that finally separates law from its subjects.

This problem is a familiar one. In political theory, it underlies the paradox of how both law-maker and made-law can be sovereign at the same time. In legal theory, it underlies the concern over how judges, as the ultimate authority of law, can render impartial, dispassionate—objective—legal decisions, in service of the rule of law. For sociologists and anthropologists, and those working in the fields of peace-building and development, it underlies the debate over how to institute a legal order that upholds the rule of law in socially diverse situations.

In addressing this problem, the thesis takes up the challenge set down by Desmond Manderson in *Kangaroo Courts and the Rule of Law* (2012): to take seriously the contradiction in the rule of law as its animating condition. This means approaching the contradiction, not as a problem to be resolved, but as the very index of the life of law's rule. However, whilst the humanities provide the means, and literature the locus, of Manderson's seminal study, the social sciences provide the primary means of this thesis, with Liberia as its locus.

Thus it is by asking the question, *what takes place in the rule of law?*, and more specifically, *what is taking place in the rule of law in Liberia?*, that the thesis undertakes a study of the life of law's rule in a country that is on the frontline of the global spread of powerful ideologies. With Theodor Adorno's negative-

dialectical philosophy as guide, and based on fieldwork carried out in Liberia and the United States in 2013, the thesis examines how these ideologies inform the rule of law, and how the rule of law provides a medium for them to take place.

Part I begins with a reading of Adorno's negative-dialectical philosophy (Chapter 1), before examining the origins of the contradiction as a condition of law (Chapter 2), to show how this opens the rule of law to animation by different logics which inform how it takes place (Chapter 3). Part II then moves to Liberia to examine how the rule of law is taking place there, mediated by the logics of capital (Chapter 4), security (Chapter 5), and liberalism (Chapter 7), whilst providing a medium for these logics to take place. Critically, however, the thesis also shows how the rule of law and its institutional logics do not become identical, leaving the rule of law open to take place otherwise (Chapter 6). The thesis concludes by returning to the question of what this means for the rule of law in theory and in the practice of trying to institute it around the world.

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Prelude

being detained

Central Prison, Liberia, 21 August 2013

The Training and Development Officer from the Corrections Advisory Unit of the United Nations Mission in Liberia is standing outside the prison gate, her white skin marking her out as much as her blue UN insignia. I have crossed this street innumerable times before but have never noticed the 'corrections facility'. Its towering perimeter wall blends into the Ministry of Defence and military barracks that run alongside, but even these do not stand out in Monrovia; this could have been any other international NGO compound. The urban streetscape of Liberia's capital city is dominated by walls topped with razor wire and patrolled by private security guards. Perhaps originally built to keep out war-time looters, they continue to be built ten years after the cessation of armed violence by every household and business with enough capital to fear redistribution of their wealth. Standing in contrast to the squatter settlements that serve the rest of the city's nearly two million inhabitants—who reside in the hollowed out remains of war-torn buildings or in recycled shacks crowded into vacated plots of land and swamp—these walled compounds are one of most visible markers of urban life in post-war Monrovia, revealing in stark aesthetic form the equally stark socio-economic cleavage that runs deep through 'the peace'.

After I greet the UN officer outside the prison gate, she asks me to remind her about the purpose of my visit to Liberia's Central Prison. I explain that it is to help give context to what is taking place in Liberia's post-war rule-of-law reform process. She offers a few statistics on the prison before leading me to the main gate where a Liberian man stands guard. She signs me in and escorts me through the outside perimeter. Inside, we come to the gate of a second walled perimeter where another Liberian man stands guard. A UN Formed Police Unit contributed by Jordan is stationed in the narrow yard between these two walls, to provide additional support to the Liberian Corrections Officers in case of unrest. Passing through this second gate, we come to a third perimeter, a high metal fence with a gate that opens into the main prison yard.

In the centre of this sandy yard I am introduced to two male UN corrections officers who act as mentors to their Liberian 'counterparts'. As they offer more statistics about the individuals who are contained in the prison, to illustrate the object of their rule-of-law mission, I become distracted by the sight of the shipping

containers that serve as their office. There is something about these structures, in their constancy, in their iterability—capable of being hauled away at any moment, loaded on the back of a ship, to be set down in another country, in another hemisphere, to be of service again at any time—that jars with what I am being told by the UN officers about the need to address the plight of the individuals contained in the prison… but before I can develop that thought, the Superintendent arrives, and I am called to attention. A young Liberian man, the Superintendent leaves the impression of a fair and hardworking officer, with good intentions but limited resources. It is unfortunate that his warm smile is framed by the main prison building behind him, the glare reflecting off its concrete surface bleaching the man's portrait as we talk.

After the introductions, the UN officer and a prison guard escort me into this building, a two-story structure, the few clothes hanging from the rusty bars of its second-story windows offering the only hint of life inside. It has several cell-blocks, including two for armed robbery, plus the juvenile block. All of the men in this building are 'pre-trial detainees'; although, of the more than 960 men, women, and children in the Central Prison, some 800 are pre-trial detainees. Many have been in here for months and years, many, if not most, without access to legal representation or contact with the outside. The cells are also overcrowded, often with five or six or more men in a bare three-meter by three-meter cell. There are no beds, and I do not see mattresses for them to sleep on.

As we pass through a corridor a man calls out to me from behind the bars of his cell. He is highly articulate, with a North American rather than a Liberian English accent, and with a cutting wit. He demands to know who I am and what I am doing there. I explain that I am a researcher from a university studying the legal system reform process. His answer holds me in contempt: *'What more has to be studied? You don't need to do more research to see that the justice system is broken here'*. He underlines this sentence with his own experience as a 'pre-trial detainee': being detained for months (or was it years?), with neither trial nor access to a lawyer nor contact with anyone beyond these walls—*'and you speak of "the justice system"? There is no justice system here!'*

Figure 1. 'Nimba County Prison Inmates, Liberia'[1]

With his voice still reverberating through the corridor, the UN officer and prison guard escort me into a second, smaller building. It is even more chilling than the first. As I enter I am struck by an odour of stagnation, of living bodies slowly rotting—of men struggling to stay alive. When my eyes get accustomed to the dim light I see the condition of the cells, perhaps one-and-a-half meters wide and two-and-a-half meters long. Without space on the floor for each of the cell's five or six inhabitants to sit and sleep together, the men have set up a system of layered hammocks, three hammocks high, one above the other, the top hammock strung up three or four meters off the ground. The hammocks have been made by hand out of sacking, felt, and other recycled materials. I am told they break every now and again.

Unlike the other building, the walls in this one are covered in drawings. One piece in particular catches my eye as we are leaving. Drawn on the wall of an alcove off the main corridor, it is an exact representation of the Liberian coat of arms, with its image of a ship sailing towards the west African shore carrying the 'free people of colour of the United States' who would establish what would become the Republic of Liberia. Hanging over this coat of arms is a slightly larger

[1] [image omitted from digital version]

than usual banner—and here the prisoner's hand must have lingered a moment, a flicker of a smile must have crossed his face, for a moment, if not a great burst of laughter, shaking the foundations of the Central Prison as he reprinted the line: 'The love of liberty brought us here'.

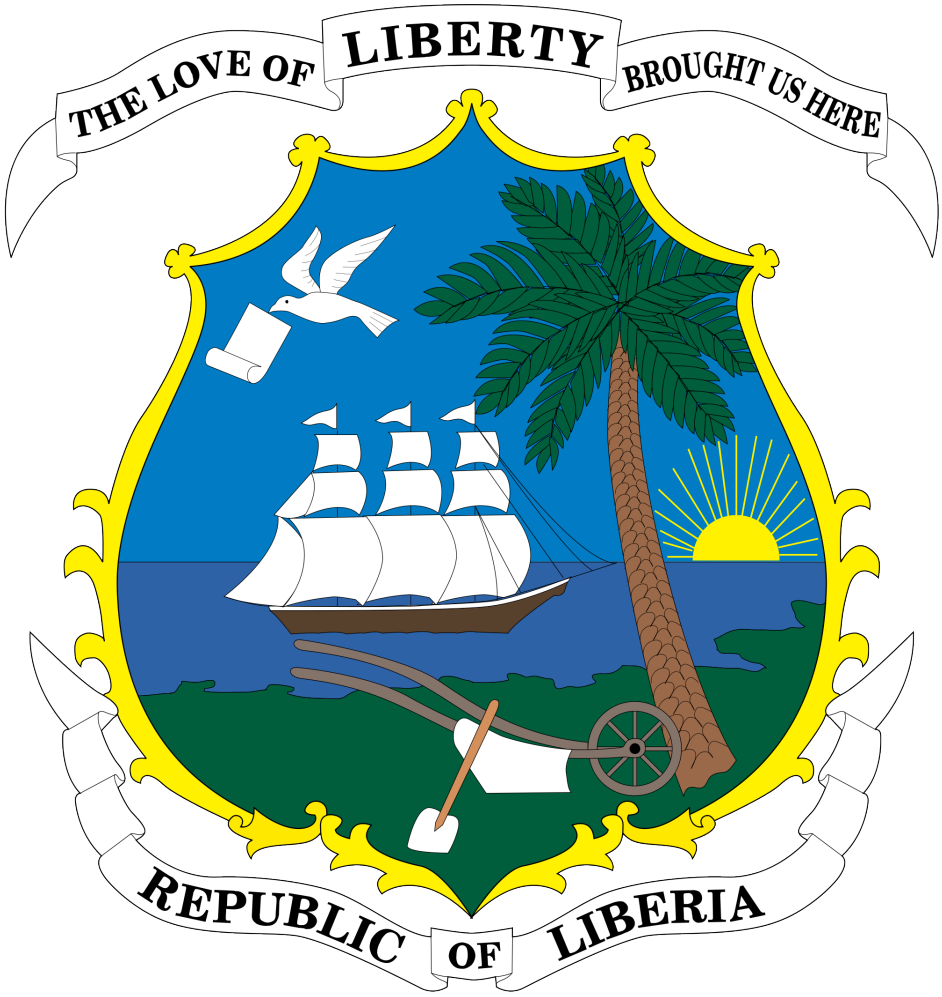

Figure 2. Liberian coat of arms[2]

[2] Source: http://commons.wikimedia.org/w/index.php?curid=8342459.

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A week later I receive an email from the Assistant Minister of Justice responsible for the Bureau of Corrections and Rehabilitation. It comes in reply to an email I had sent thanking her for enabling my tour of the Central Prison:[3]

I am struck by the final sentence. I wonder if the Assistant Minister's hand lingered over it as she wrote, like the hand of the prisoner who drew the Liberian coat of arms on the prison wall. Both sentences—*I wish you a safe flight back home*; *The love of liberty brought us here*—perform a piercing double act, setting down a fact in a way that it cannot escape its judgment. I am reminded of Shoshana Felman's definition of irony, as what 'precisely consists in dragging authority as such into a scene which it cannot master, of which it is not aware and which, for that reason, is the scene of its own self-destruction.'[4] Just as the man who drew the Liberian coat of arms on the prison wall condemned the institution that detained him, by pointing to a contradiction at its core—an institution, brought by foreigners as a promise of justice to come, set in opposition to the enslavement of black bodies, which had become the opposite, an institution in which those very bodies were being detained without trial—so too the Assistant Minister's words condemned me, as an extension of a long history of intervention by white men who arrive by ship and plane, to study and advise, on a situation 'you' have not lived and will not live, in any sense of the *longue durée*. Both sentences serve to remind: your place is elsewhere, and yet you judge us.

I cannot avoid the sentence, which hangs over this thesis like the banner over the coat of arms.

[3] [text omitted from digital version]

[4] Cited in Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), 127.

As I close the Assistant Minister's email, my mind returns to the scene of the Central Prison, an institution that is being rebuilt to serve 'the rule of law', containing subjects—children, women, men—whose inclusion within it is still deferred. As a matter of fact, these women, children, and men have been brought within its institution, as 'detainees'. Thus in the most physical way they are subject to it, as beings detained; the bodies rotting in the damp pit of its deepest recess testify to that fact. And yet, there they remain, outside the institution as a matter of right, being detained 'pre-trial' not simply in the sense that they have yet to see a lawyer, that they are yet to see a judge, that they are yet to see a law, but being detained pre-trial also in the sense that they are yet to be included as a normative matter within the institution that would judge them. The prisoner's remark to me—that 'there is no justice system here'—recalled the violence of an institution that, from the perspective of the subjects that find themselves within its jurisdiction, represents an endless deferral of justice.[5]

I am reminded of Franz Kafka's parable of the countryman who is left waiting outside the gate of the law, his access perpetually deferred despite the gate being created for him.[6] Where Kafka's countryman remains suspended in his own 'pre-trial' limbo, the children, men, and women in Monrovia's Central Prison have passed through three of its gates only to find themselves in the same position.[7] But it is also not the same position; it is *much* worse: a depersonalised position,[8] in which the bodies of these men, children, and women have been brought forcefully inside the law, made identical with its institution in the most visceral way, whilst their subjectivity remains outside, non-identical in the most violent way. Thus as subjects, they remain pre-trial, whilst as empirical individuals, their bodies undergo the most intense trial every moment of day and night.

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[5] See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', *Cardozo Law Review*, vol 11 (1989-1990).

[6] See Franz Kafka, *Before the Law*, trans Ian Johnston (Online: http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm, 2015 [1915]). I include an extended extract of Kafka's parable in Part 2 of Chapter 2.

[7] The term 'country people' is also commonly used in Liberia to refer to 'traditional' African-Liberians in distinction to 'modern' Americo-Liberians.

[8] In psychiatry the concept of 'depersonalisation' refers to *feeling unreal*, a 'disorder' characterised by 'estrangement from the self, body, or surroundings': see 'Depersonalization/Derealization Disorder' in American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition: DSM-5* (Arlington: APA Publishing, 2013).

Kafka's parable evokes a terrific mental image of what I will later argue is the contradictory condition of law. But when I entered the cell-blocks of Monrovia's Central Prison, it *smelt* like I had entered an epicentre of what Achille Mbembe has called a 'death-world'—a form of 'social existence', created through an expression of sovereignty, 'in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.'[9] When my eyes grew accustomed to the dim light, the sight only reinforced the smell. Describing how 'necropower' operates, Mbembe recalls Frantz Fanon's description of 'the town belonging to the colonized people'.[10] What I saw fit his description, of 'a place of ill fame, peopled by men of evil repute', 'a world without spaciousness; men live there on top of each other', 'starved of bread, of meat, of shoes, of coal, of light'.[11] What I saw was a prison whose inmate population, by legal definition people of ill fame, is kept alive on one meal a day,[12] deprived of exercise in the yard,[13] stacked one on top of the other in their cells. And what I heard was a sound that still reverberates through the prison's corridors, questioning the justice of the institution that detains these men, women and children.

I recall the shipping containers that serve as the offices of the UN rule-of-law reformers in the Prison. They appear to manifest the logic of a necropower that treats humans in an exchangeable manner, in which full-fledged subjects become numerous bodies—a logic that appears to animate the prison, its institution populated by bodies that give it life as an institution while it simultaneously denies their subjectivity as human beings. Thus the inmate population is kept alive on one meal a day; strategic plans are implemented to ensure they are not killed by Ebola[14]—whilst justice remains deferred. The result

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[9] Achille Mbembe, 'Necropolitics', *Public Culture*, vol 15, no 1 (2003): 40 (italics in original).

[10] Cited in ibid, 26-27.

[11] Ibid.

[12] As I was told during my tour of the Central Prison, during which I also visited the outdoor kitchen where the day's meal was being prepared.

[13] As I was also told during the tour of the Central Prison, the threat of riots and prison breaks, combined with the lack of corrections officers, meant that prisoners were being denied regular exercise in the yard.

[14] See the interview with Catherine Marchi-Uhel, Principal Rule of Law Officer, United Nations Mission in Liberia, in which she answers the question, 'What is UNMIL Rule of Law doing to support the government and people of Liberia in the fight against Ebola?': www.youtube.com/watch?v=moxxYytokNg. See also UN Security Council, 'Twenty-ninth progress report of the Secretary-General on the United Nations Mission in Liberia', UN Doc S/2015/275 (23 April 2015), para 52.

is a twisted answer to Mbembe's critique of the West's seeming inability to appreciate that all humans—including Africans—'have, concretely and typically, the same flesh'.[15] Systematically this critique has been turned around by a logic of exchange that operates on every body in the same way. What Mbembe's 'flesh and body' was supposed to signify—'the *idea of a common human nature, a humanity shared with others*'—has been stripped of its humanity, leaving an approach that concretely, and typically, deals in bodies but not subjects.[16]

I am left to consider how this scene is both metaphorical[17] and very real, representing something general—a common experience—and something particular—the singular experience of women, children, and men who are, here and now, being detained in Liberia's Central Prison. Because of this—because the prison scene also points to something more than a particular problem with *this* prison, for *these* individuals, right *now*—the answer too must lie both inside and outside these prison walls. If so, the problem will not be resolved by fixing Liberia's Central Prison. Fixing the infrastructure of the legal system, processing the back-log in cases, hauling the bodies of these men, women, and children before a judge: this will not resolve the problem of being detained 'pre-trial'.

Since the declaration that founded the republic of Liberia, the overwhelming majority of Liberia's 'country people' have been pre-trial detainees, included as a factual matter within the bounds of the republic whilst being excluded as a normative matter from its institutions. History has shown, the problem is not just how to strengthen the objective conditions of the legal system, so the bodies of its subjects might access it more easily; *but how to respond* to the dissonance in its institution, not just in Liberia but as a common experience, whereby law remains separate from the humans who enliven it as its subjects and yet takes place in and through them?

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[15] Achille Mbembe, *On the Postcolony* (Berkeley: University of California Press, 2001), 2.

[16] Ibid, 2 (italics in original). This result resembles Mbembe's later work on necropolitics, where he develops his concern with 'figures of sovereignty whose central project is […] *the generalized instrumentalisation of human existence and the material destruction of human bodies and populations*', and how these figures of sovereignty 'are what constitute the *nomos* of the political space in which we still live': Mbembe, 'Necropolitics', 14 (italics in original).

[17] 'Metaphorical' in the sense that the prison scene is 'representative or suggestive of something else': 'metaphor, *n.*', OED Online, March 2016.

Introduction

Liberia and the rule of law

1 The rule of law and Liberia

'What more has to be studied? You don't need to do more research to see that the justice system is broken here!'[1]

There is a towering literature on the concept of the rule of law,[2] and yet there is relatively little scholarship on the life of the concept, on the material ways in which this proposition—'the rule of law'—takes place.[3] There is even less scholarship on law's rule that combines social-scientific research with the critical theoretical insights of the humanities, from cultural studies to aesthetic theory and philosophy. But that does not answer the prisoner's question; quantitative analysis never answers the question of *why*. Regardless of how much has been written, the reason for another study has to be qualitative, and ethical: the answer must speak to the prisoner in his cell—speak to him directly, face to face, and find its justification in that exchange.

The challenge I take up in this thesis is exactly that: to answer the prisoner's question in a way that speaks to his experience. In doing so, the thesis aims to examine two problems. The first is a general theoretical problem with 'what takes place in the rule of law'. The second is a particular historical-material problem with 'what is taking place in the rule of law in Liberia'.

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[1] See Prelude.

[2] See Tom Bingham, *The Rule of Law* (London: Penguin Books, 2011); Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1948); Bob Fine, *Democracy and the Rule of Law: Liberal Ideals and Marxist Critiques* (Sydney: Pluto Press, 1984); James E Flemming, ed *Getting to the Rule of Law: Nomos L* (New York: New York University Press, 2011); Friedrich Hayek, *Law, Legislation and Liberty*, vol 1 (Oxon: Routledge, 1973); Martin Krygier, 'The Rule of Law', in *Oxford Handbook of Comparative Constitutional Law*, ed Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012); Franz Neumann, *The Rule of Law: Political Theory and the Legal System in Modern Society* (Leamington Spa: Berg, 1986); Joseph Raz, *The Authority of Law*, 2 ed (Oxford: Oxford University Press, 2009); Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', *Southern California Law Review*, vol 74 (2001); Ian Shapiro, ed *The Rule of Law: Nomos XXXVI* (New York: New York University Press, 1994); Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge: Cambridge University Press, 2012).

[3] On this lack of attention to the life of the rule of law, see Erik G Jensen and Thomas C Heller, eds, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003). More generally, there is considerable literature on the life of *law*, if not its 'rule'. See Lawrence Douglas, Austin Sarat, and Martha Merrill Umphrey, 'Theoretical Perspectives on Lives in the Law: An Introduction', in *Lives in the Law*, ed Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Ann Arbor: University of Michigan Press, 2006); Austin Sarat and Thomas R Kearns, 'The Cultural Lives of Law', in *Law in the Domains of Culture*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1998); Austin Sarat and Thomas R Kearns, eds, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993).

Aim one—the general problem. By 'what takes place in the rule of law' I mean two things. On one hand, I mean how does this proposition—the rule of law—manifest in everyday life? The aim here is to examine the general dynamics or form of the rule of law as a material concept, circumscribed by people, place, and time.[4] But this is not just about *how* law's rule 'takes place'.[5] It is also about what takes place *in* the rule of law. Rather than approach the rule of law as a coherent concept that takes place in different ways, I am interested in how law's rule is itself inherently contradictory as a concept. Thus by asking 'what takes place in the rule of law', I aim to enquire into both what animates law's rule (giving it form and substance) and how law's rule manifests (as a physical reality).

Aim two—the particular problem. At the same time, because nothing takes place in general, this line of enquiry can only extend as far as a theoretical understanding of the dynamics of the life of law's rule. This might provide a critical lens with which to examine the rule of law as a common experience, but what *actually* takes place in the rule of law remains circumstantial: mediated by the contexts that surround it in space and time. That is why I ask the second, historical-material question, of 'what is taking place in the rule of law in Liberia'.[6] The aim here is to create a singular portrait of the life of law's rule through a sociological study of the rule of law in Liberia.

I set out these two problems in more depth below. Before I do, however, it is helpful to state the overall arguments I make in examining these problems through the thesis. I make three arguments: on the rule of law in general, as a common experience; on the rule of law in Liberia, and its particular experience there; and on the study of the rule of law.

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[4] On the 'place' of law, see Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey, 'Where (or What) Is the Place of Law? An Introduction', in *Place of Law*, ed Austin Sarat, Lawrence Douglas, and Martha Merrill Umphrey (Ann Arbor: University of Michigan Press, 2003). On law and space, see also Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, 'Space and Legal Pluralism: An Introduction', in *Spatializing Law*, ed Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths (Abingdon: Ashgate, 2013). On law and time, see Keebet von Benda-Beckmann, 'Trust and the Temporalities of Law', *Journal of Legal Pluralism and Unofficial Law*, vol 46, no 1 (2014).

[5] I use the terms 'rule of law' and 'law's rule' interchangeably to refer to the notion of the sovereign position of law, and not to a particular conceptual schema that describes its achievement (whether 'thick' or 'thin') or a political ideal. Similarly, by the 'institution of the rule of law' I mean the attempt to institute the sovereign position of law.

[6] The question of 'what is taking place' is an historical-materialist one in the sense that it is concerned with what Walter Benjamin describes as 'the relation of what-has-been to the now': see Walter Benjamin, *The Arcades Project*, trans Howard Eiland & Kevin McLaughlin (Cambridge: Belknap Press, 1999), 463.

Argument one—on the general problem. I develop the first, general argument in answer to the question of 'what takes place in the rule of law'. There are two parts to this. The first part of the argument is that the concept of the rule of law is enlivened by a struggle to make law predominant over its subjects, at the same time as law is given form, and takes form, in and through those subjects' lives and interactions. To really understand 'the rule of law', one must see this contradictory affair as the beating heart of the concept—indeed as the very *life* of law's rule. However, my aim is not just to examine how the concept is animated by a contradiction that makes 'the rule of law' both separate and inseparable from 'the rule of humans'. What makes this argument critical is that it enables one to see how law's rule can be instituted in a way that makes it hostile to life, whilst remaining open to its ethical possibilities as a social institution. This is the second part of the argument: that the contradiction in the rule of law makes it an essentially lively concept, for worse, but always also for better.

Argument two—on the particular problem. The argument I make through the case study of the rule of law in Liberia also has two parts. On one hand, I argue that different logics can be seen to inform the institution of the rule of law in Liberia. On the other hand, I argue that the rule of law can be seen to provide a medium for these logics to take place in the country.[7] More specifically, I argue that the institution of the rule of law is at the epicentre of a colonising power in Liberia that makes subjects into living dead through acts of sovereign expression. This 'colonising power' is not a state, or an organisation, or an institution. It is a logic—specifically, the logic of capital.[8] Operating through law as its forceful medium, this logic renders subjects as mere objects, creating the kind of death world described by Mbembe.[9] At the same time, I argue that other logics are informing the rule of law in Liberia, whilst taking place through its institution. One is the logic of security, which makes the rule of law into an institution for securing order and

[7] By 'logic' I mean *informative reasoning*, that is, reasoning that informs social constructions.

[8] I address the logic of capital in Part 1 of Chapter 4. In short, by 'capital' I mean *power over life*. This understanding goes back to Roman law, where, 'Of Public Judgments, some were 1. CAPITAL; in which the Punishment prescribed was Death; which Death was (1) Natural; such as took away the Life of the Criminal. (2) Civil; such as took away his Liberty, or his Citizenship.' Samuel Hallifax, *An Analysis of the Roman Civil Law, Compared with the Laws of England* (Cambridge: printed by J Archdeacon Printer to the University, 1774), 116-117. As a logic, 'capital' is not material in itself and is merely informative, acquiring its materiality through other mediums—such as the institution of the rule of law.

[9] See note 9 in Prelude.

stability—indeed for securing the regime of capital.[10] Another is the logic of liberalism, which makes the rule of law into an instrument of social change.

Taken together, these three logics (of capital, security, and liberalism) can be seen to inform what is taking place in the rule of law in Liberia. And yet the rule of law never becomes identical with its institutional logics. This returns to the general argument of the thesis—that the rule of law is defined by a restless struggle to make law predominant over its subjects, at the same time as law is given form, and takes form, in and through those subjects' lives and interactions. As a result of this contradiction in the rule of law, its institution is never completely closed to its subjects, who remain, as the very life of law's rule.

Argument three—on the study of the rule of law. The third overarching argument that I pursue through the thesis is a methodological one. The argument is for an approach to research that brings the critical theoretical insights of the humanities to bear on social scientific research, bringing the subjective experience and construction of reality together with its objective examination in a way that makes each critical to the other.

There are four parts to this Introduction. In the rest of the first part, I address in more depth the two main problems of the thesis, on the rule of law in general and in Liberia, and the argument I make in examining them. In Part 2, I address the third argument on theoretical approach. I then outline in Part 3 the research design and methods used to examine the rule of law in the case of Liberia. Finally, in Part 4, I outline the chapters of the thesis.

A What takes place in the rule of law?

As the 'index of non-identity',[11] the logical contradiction marks the fissure between positive and negative—between what is posited and what remains as the negation of that position. As an imperfect separation that enables the two sides to interact without absolutely converging or diverging, this fissure has the structure of a chasm: both *chaotic*, its opening denying closure and therefore stable order, and *chiastic*, the inseparability of the opposed sides forming a stable order. Like the

[10] By 'regime' I have in mind what the Oxford English Dictionary describes as a 'system of rule, governance, or control; a system of organization; a way of doing things, esp. one having widespread influence or prevalence': 'regime, *n.*', OED Online, December 2015.

[11] See Theodor W Adorno, *Negative Dialectics*, trans Dennis Redmond (2001), 16-18.

abyss of ancient cosmology—the primordial ocean that underlies the earth, upon which the ground takes its place—the chasm is an unfathomable space of energy, of destruction and creativity.

As a 'reflection-category',[12] the contradiction allows one to locate this fissure in an apparently solid position and peer inside the chasm. That is the focus of this thesis: to peer through the crack in the rule of law. What this shows, I argue, is an irresolvable contradiction in the rule of law. The contradiction is that, by definition 'the rule of law' is opposed to 'the rule of humans'—an opposition considered so essential to its institution that an elaborate modern mythology has been constructed in the West to ensure the two remain separate, so the humans who inform the law are not seen to corrupt its rule;[13] and yet law remains an inter-subjective phenomenon, enlivened by the humans over whom it would rule.[14] Thus the rule of law, set against the rule of humans, cannot be instituted in a way that finally separates law from its subjects.

This contradiction is not particular to the rule of law, however. It is the very condition of modern institutionalisation, when an institution cannot depend on God, tradition, or any other transcendental source to secure its foundations, which ultimately come to rest upon—or rather *in*, and *through*—its subjects.[15] This inserts a contradiction into the basis of the institution: 'it' can never be absolutely identical with its subjects, whose difference defies such unity and closure; and yet it can never be absolutely separate from its subjects, who constitute its grounds as an entity.[16]

The result for the institution of the rule of law is a familiar one. In political theory, it underlies the paradox of how both law-maker and made-law can be

[12] Ibid, 148-149.

[13] See, eg, Paul Kahn, *The Reign of Law: Marbury v Madison and the Construction of America* (New Haven: Yale University Press, 1997).

[14] In other words, 'law gains its sustenance' through persons: Douglas, Sarat, and Umphrey, 'Lives in the Law: An Introduction'. On the 'everyday life of law', see also Sarat and Kearns, *Law in Everyday Life*; Daniel Jutras, 'Legal Dimensions of Everyday Life', *Canadian Journal of Law and Society*, vol 16 (2001). For a seminal sociological study of law's life on the ground, see Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans W L Moll (Cambridge: Harvard University Press, 1936).

[15] See Jacques Derrida, 'Declarations of Independence', in *Negotiations: Interventions and Interviews, 1971-2001*, ed Elizabeth Rottenberg (Stanford: Stanford University Press, 2002), 46-54.

[16] See ibid, 47-48. On the problem of institutional integrity, see also Philip Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992), Chapter 12.

sovereign at the same time.[17] For sociologists and anthropologists, and those working in state-building and development, it underlies the debate over how to build a legal order that upholds the rule of law, when, as Thomas Carothers observed in his critique of the field of international rule-of-law promotion, 'law is also a normative system that resides in the minds of the citizens of a society'.[18] Perhaps most familiar of all, in legal theory, it underlies the concern over the act of judging, or more broadly articulations of 'the law'. Put simply, the concern is how to deal with the fact that judges, as the last instance or ultimate authority of law, are supposed to render impartial, dispassionate—*objective*—legal decisions, free from bias, from political persuasion, free indeed from any subjective influence.[19] Since Aristotle, to achieve *this* is to achieve the rule of law.[20]

In each case that is the problem, at least from one perspective: *how* to achieve this—how to finally separate the rule of law from the rule of humans and institute the former in a way that ensures it is law, ultimately, that rules. From another, critical perspective, such an end is seen to be futile at best, and dangerous at worst, in that its achievement would be no more than a delusional state in which the rule of law serves to mask, or wig, the rule of particular humans (with what remains subjective masquerading as objective). From this perspective, the ideal of the rule of law should be abandoned and replaced with another.[21]

Neither of these responses to the problem is satisfactory. As Desmond Manderson writes in *Kangaroo Courts and the Rule of Law*, neither actually deals

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[17] For discussion of this problem, see Brian Z Tamanaha, 'The Rule of Law for Everyone?', *Current Legal Problems*, vol 55, no 1 (2002): 105-109.

[18] Thomas Carothers, 'The Problem of Knowledge', in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed Thomas Carothers (Washington: Carnegie Endowment for International Peace, 2006), 20.

[19] On how this is not the case, see, eg, Susan U Philips, *Ideology in the Language of Judges: How Judges Practice Law, Politics, and Courtroom Control* (Oxford: Oxford University Press, 1998). For another examination of the tensions this creates, and how these tensions animate the rule of law, see Keith J Bybee, *All Judges Are Political—Except When They Are Not: Acceptable Hypocrisies and the Rule of Law* (Stanford: Stanford University Press, 2010).

[20] As Manderson notes, in discussing Aristotle's differentiation between rule by 'the best men' and rule by 'the best laws': 'The intrusion of subjectivity and discretion into decision-making was for Aristotle precisely the unwelcome influence of "a wild animal"—meaning a human being—whose "appetite" and "passion" would undermine the process of pure reason. For Aristotle then, the neutral application of prior laws by a process of pure deduction was necessary to a sound polity.' Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), 71.

[21] See ibid, 2-3. Manderson uses the term romanticism 'to identify this appeal to some transcendent idea or ideal capable of overcoming, exceeding or curing the law', giving as examples politics, ethics, and literature: ibid, 3.

with the challenge posed by the contradiction.[22] The first evades it by dismissing the problem as not a real one; the second simply accepts it as a fatal flaw. But if the rule of law is to be taken seriously, the challenge is not to find a way to overcome its contradictoriness once and for all, for fear of its implications; nor is it to find a more perfect ideal to replace that of the rule of law. Rather, as Manderson writes, the challenge is 'to address more seriously' the implications of the problem,[23] which means taking seriously the contradiction as the *condition* of law's rule.

That is the challenge I take up in this thesis: to examine the implications of the contradiction in the rule of law, as its animating condition. My purpose in this is not to shine a light on its indeterminacy, however, to show that its grounds are essentially fluid. As a proposition,[24] the grounds of the rule of law *are* essentially fluid, but what makes this of critical importance is the forms of violence it enables as well as the ethical possibilities it holds out.[25] By peering through the crack in the rule of law, my concern is therefore *material*: to see how the rule of law takes place, and how its chasmic structure enables it to take place in multiple and contradictory ways, for worse, but always also for better. For worse, because this means the rule of law can become animated in ways that are hostile to life, despite the best intentions; always also for better, because this makes such ordering unstable and therefore disposed to transformation, and moreover, it ensures law's rule remains open to the subjects who make the concept a lively one.[26]

Revisiting the scene of Liberia's Central Prison at the beginning of the thesis reveals an extreme instance of this concern. As a 'corrections facility', the Prison can be seen to be a response to the radical separation between the national law of Liberia and its subjects, a deviancy that contradicts the definitive rule of law. For those who are concerned with upholding the sovereign position of the national law, the prison provides a resolution to the problem of violations of the law. The

[22] See ibid, Chapter 1.

[23] Ibid, 2. Manderson then proceeds 'to build a distinct conception—a truly modernist conception, and ultimately a literary conception—of a post-positivist and post-romantic rule of law': ibid, 4.

[24] One implication of the chasmic structure of an institution is that it makes its position a *pro-position*, or a becoming-position. This means the rule of law is always obtaining its form in response to an openness that negates its given form. I discuss this in Chapter 3.

[25] This engages with the work of Walter Benjamin, Jacques Derrida, and Peter Fitzpatrick in particular, as well as—although in an indirect way—that of Theodor Adorno. See Chapters 2 and 3.

[26] As Manderson writes: 'ceaseless movement and chronic instability do not mark the collapse of the rule of law. It is its—and our—predicament and virtue.' Manderson, *Kangaroo Courts*, 7.

prison provides the *corrections facility*—the institution that facilitates the removal from society of those who contradict the definitive rule of the national law.[27]

As a result of this response, law's supremacy over its subjects is being physically reinforced; and yet this does not resolve the underlying contradiction. Offensive bodies might have been brought within the law, but as subjects they remain outside. The result is a form of civil death, with the body kept alive whilst being denied its rightfulness as a subject.[28] What is more, in this form, the institution of the rule of law might serve a regime that requires living bodies but not subjects.[29] This might reaffirm the sovereign position of 'the law', but it fails to resolve the underlying contradiction, which becomes a concrete part of law's rule in its manifest form. Not only does this *not* resolve the separation, it makes it less visible, by sequestering the women, men, and children who embody the contradiction and whose physical presence in the community exposes to view the crack in the rule of law.

The scene of Liberia's Central Prison thus shows how law's rule can become fortified in a way that makes it hostile to life, and how this is informed by the response to its contradictoriness as a proposition. This returns to Mbembe and the question of how the institution of the rule of law might be at the epicentre of a colonising power that makes subjects into living dead through acts of sovereign expression.[30] At the same time, the contradiction that makes the rule of law potentially hostile to life is also a source of *hope*. What makes the contradiction hopeful is that it ensures 'the rule of law' is never equivalent with the ways in which it takes place. The rule of law as a proposition never becomes identical with the rule of law as instituted. Instead, law's rule remains open to take place otherwise, that is, in other ways. Because the contradiction is never actually resolved, its fortification remains unstable and therefore disposed to transformation. *This* is its

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[27] See also Benjamin's discussion of the 'possibility that the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the end that it may pursue but by its mere existence outside the law.' Walter Benjamin, 'Critique of Violence', in *Walter Benjamin: Selected Writings, Volume 1, 1913-1926*, ed Marcus Bullock and Michael W Jennings (Cambridge: Belknap Press, 2002), 239.

[28] Recall the meaning of 'capital' introduced on note 8 above. In Roman Law, civil death was a form of capital punishment that potentially resulted in a loss of citizenship. I discuss this in Chapter 4.

[29] On what I mean by 'regime', see note 10 above.

[30] See Prelude.

ethical possibility as much as its threat: its 'illimitable openness' to the subjects who enliven it.[31]

Thus it is by asking the general question of 'what takes place in the rule of law' that the thesis sets out to examine how the rule of law obtains its form (is *informed*, as a physical matter) through the different responses to its contradiction, as well as how it provides a medium for these responses to take place. However, whilst this is useful for understanding as a theoretical matter the general dynamics of what takes place in the rule of law as a common experience, it reveals nothing about the singular ways in which law's rule actually manifests in any particular instance. That is why I ask the second, historical-material question, of 'what is taking place in the rule of law in Liberia'.

B What is taking place in Liberia?

Liberia's first settlements were established in the early 1820s by the American Colonization Society, a philanthropic organisation established with the aim of transporting 'the free people of color of the United States' to 'Africa (or elsewhere)'.[32] When Liberia declared itself a 'Free, Sovereign and Independent State' in 1847,[33] it did so as an African-American republic. The Constitution the Americo-Liberian rulers adopted at independence therefore unsurprisingly recalled the US Constitution, including its national legal system and Common Law tradition.[34] This Constitution provided the foundation for the national law for the next 137 years.

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[31] On law's 'illimitable openness' or 'responsiveness', see Fitzpatrick's work on law, eg, Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001); Peter Fitzpatrick, 'Why the Law is also Non-Violent', in *Law, Violence and the Possibility of Justice*, ed Austin Sarat (Princeton: Princeton University Press, 2001); Peter Fitzpatrick, 'Foucault's Other Law', in *Re-Reading Foucault: Law, Power, Rights*, ed Ben Golder (Oxon: Routledge, 2013); Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Oxon: Routledge, 2009). On how law's inter-subjective foundations can pose a threat to the rule of law, see Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006). For a response to Tamanaha's argument, see Manderson, *Kangaroo Courts*, 82-85.

[32] See constitution of 'The American Society for Colonizing the Free People of Color of the United States', in *A View of Exertions Lately Made for the Purpose of Colonizing the Free People of Color, in the United States, in Africa, or Elsewhere* (Washington: printed by Jonathan Elliot 1817), 11–12.

[33] Declaration of Independence of Liberia (1847).

[34] See Constitution of the Republic of Liberia (1847). See also Charles Henry Huberich, *The Political and Legislative History of Liberia*, vol 1 and 2 (New York: Central Book Company, 1947).

At the same time, the vast majority of Liberians—west Africans whose ancestors knew the lands of Liberia long before the republic was an idea, and who were largely excluded from its realisation as a nation-state—were not included as signatories of either the Declaration of Independence or the Constitution of the Republic. Rather they were systematically excluded, by design and/or effect, from being full legal subjects of Liberia. Instead, for most of the nineteenth and twentieth centuries, Liberia's national law was used to secure order and stability, ensuring the republic's ruling minority could extend and maintain their control over the country and its diverse peoples and lands.

Thus grounded as a normative matter in less than five percent of the subjects over whom it claimed and exercised jurisdiction, the Americo-Liberian republic failed to maintain within itself the basis of its ongoing existence as a modern institution, leaving its foundations effectively groundless. The result was revolution and the eventual overthrow of the Republic in 1980, with a coup d'état led by the young 'indigenous' man, Master Sergeant Samuel Doe. The coup precipitated the devastating civil wars of the 1990s and early 2000s that killed a quarter of a million people, displaced millions more,[35] and destroyed the institutions and infrastructure of the State of Liberia.

The first civil war broke out at the end of 1989, when the National Patriotic Front of Liberia (NPFL), under the command of Charles Taylor,[36] led an attack against the Doe Government. The toppling of Doe's regime did not end the war, however, with Taylor having to fight for control of Monrovia against rival factions. In 1993, the United Nations deployed the UN Observer Mission in Liberia,[37] to oversee attempts to resolve the conflict. However, the 'turning of the tide' did not come until 1996, with 'the restoration of a climate of security' and the 'successful organization and conduct of the elections' that resulted in Taylor becoming President of the Republic.[38] With the democratic election of Taylor to the

[35] Forced Migration Online notes: 'The extent of indiscriminate violence and civil unrest during the civil war was such that virtually all of the country's approximately 3 million people had to flee their homes at one time or another, sometimes for a few weeks and in many cases for several years. However, official figures estimate that 1.2 million were internally displaced and 700,000 were refugees at the war's end.' Shelly Dick, *FMO Country Guide: Liberia*: http://www.forcedmigration.org/research-resources/expert-guides/liberia/fmo013.pdf, 11.

[36] See, eg, Colin M Waugh, *Charles Taylor and Liberia: Ambition and Atrocity in Africa's Lone State State* (London: Zed Books, 2011).

[37] UN Doc S/Res/866 (22 September 1993).

presidency in 1997, the UN Observer Mission was replaced by the UN Peace-building Support Office in Liberia.[39]

The state of peace under Taylor's presidency was short-lived, with Liberia again breaking out in civil war in 1999. The war lasted, with intermittent fighting, until Taylor's forced resignation in August 2003 and the signing of a Comprehensive Peace Agreement.[40] As part of the peace agreement, a Multilateral Force authorised by the UN Security Council,[41] and led by Nigeria through the Economic Community of West African States, oversaw the transition.[42] Within a few months, this Force was replaced by the UN Mission in Liberia (UNMIL), mandated to oversee and facilitate the transition to democracy.[43]

In 2005, Liberia held successful elections, with Ellen Johnson Sirleaf taking office as President of the Republic in 2006. Sirleaf was re-elected in 2011. With the transition to democracy, UNMIL's peace operation also shifted from a traditional peace-keeping to a more multi-dimensional peace-building operation.

The year 2013—the year I carried out fieldwork in the country—marked a decade of post-war government in Liberia committed to instituting the rule of law as a core pillar of its state-building and development agenda. It also marked a decade of a UN peace operation in the country with a mandate to support 'the establishment of a state based on the rule of law'.[44] If this marks a critical break in the history of the republic, then the extent to which the old contradiction remains

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[38] UN Doc S/1997/712 (12 September 1997), *Final Report of the Secretary General on the United Nations Observer Mission in Liberia*, paras 24-25 and 28-30. That the elections were seen as a core benchmark of success of the UN Observer Mission is made clear in UN Doc S/1997/643 (13 August 1997), *24th Progress Report of the Secretary General on the United Nations Observer Mission in Liberia*, para 45 ('With the establishment of a democratically elected government in Liberia, the principal objective of UNOMIL has now been achieved').

[39] See UN Doc S/1997/817 (22 October 1997).

[40] For the text see UN Doc S/2003/850 (29 August 2003), Annex.

[41] UN Doc S/Res/1497 (1 August 2003).

[42] On the transition, see Jeremy Matam Farrall, 'The Liberian Transitional Peace Process, 2003-2006', in *Building Democracy and Justice after Conflict: Working Paper #6* (Canberra: RegNet, 2010).

[43] UNMIL's initial mandate is set out in UN Doc S/Res/1509 (19 September 2003). For discussion and evaluation of the activities and performance of UNMIL during the transitional period, see Jeremy Matam Farrall, 'Recurring Dilemmas in a Recurring Conflict: Evaluating the UN Mission in Liberia (2003–2006)', *Journal of International Peacekeeping*, vol 16 (2012). For analysis of the period between 2003 and 2013, see Shane Chalmers and Jeremy Matam Farrall, 'Securing the Rule of Law through United Nations Peace Operations in Liberia', *Max Planck Yearbook of United Nations Law*, vol 18 (2014).

[44] UN Doc S/Res/1509 (19 September 2003), preambular para 7.

makes the question of what is taking place in the rule of law especially important for Liberians.

For one, beginning again after a revolution and wars that have left Liberia in a fractious state, the institution of the rule of law holds out the possibility of being together as Liberians not just as a matter of fact but also as a matter of right. At its core, this is a thesis on pluralism; its driving concern is what it means for law to rule given law's *essential* pluralism.[45] The tension this creates is well-known: on one hand, the rule of law is set against the arbitrary exercise of power, with everyone equally before the law; on the other hand, there is need for discretion in law, to ensure it remains responsive to the plurality of difference that enlivens it. This is a common problem with the rule of law, but the problem is especially acute for Liberia, which remains to a great extent a state without a nation. Whilst the peoples who constitute 'Liberia' generally identify as citizens of the republic,[46] the identity hardly reaches deep into the social. In this context, the institution of the rule of law might provide a common bond that could help in the short term to hold the nation together, whilst over time enable the deepening of its social connections. To do this, however, the rule of law must remain responsive to the normative differences that animate Liberia, if its institution is not to become a medium of violence, or simply irrelevant.

A second reason why the question of what is taking place in the rule of law in Liberia is important is that, as a fractious post-war state, in which 'the rule of law' is being promoted by both domestic and foreign actors as central to its peace and development, Liberia is a site that is especially open to colonisation by transnational regimes that function para-sitically. Capitalism exemplifies the model of a parasitic regime that requires other bodies for its own sustenance without needing to care for the other in itself, in its treatment of everything as exchangeable and therefore nothing as valuable in itself. As a logic, capitalism operates in the chasm that separates subject and object. By reifying this distinction, which becomes structural, it enables the exploitation of an object as mere object whilst passing the swindle off as 'the reality'. Thus the woman

[45] I discuss this in Part 2 below, as well as in Part 2 of Chapter 3.

[46] The fact that there are 31 languages spoken in Liberia, 27 of which are 'indigenous', in a country with a population of approximately 4 million, gives a sense of Liberia's social diversity. See the entry for 'Liberia', *Ethnologue: Languages of the World*: http://www.ethnologue.com/country/LR.

becomes a human resource; the forest becomes a natural resource; and in either case the subject is reduced to an object of exchange as a matter of common sense.

The chasmic structure of the rule of law enables it to be regulated by such a regime, the logic of which becomes *its* logic as a social institution. As I showed above in the case of Liberia's Central Prison, responses to the contradiction in the rule of law inform how the rule of law manifests as a reality. By informing how the contradictoriness in the rule of law is dealt with, for instance by emphasising the separation of subject and object and denying their inseparability, a regime can inform how the rule of law takes place. To the extent that a regime such as capitalism informs the course of events, such as a post-war state-building and development strategy, the logic that informs the regime might inform the institutions created to realise the strategy.[47] The problem, however, is not only that the rule of law is open to mediation by the regimes that circumscribe its institution, informing how it manifests; the problem is also that this makes the rule of law a medium of these regimes, enabling their operation. Thus the same dissonance that enables an institution to be built on the backs of subjects as a factual matter without becoming identical with them as a normative matter, and to sustain itself parasitically in this way, can be exploited by a regime to its own ends.

The circumstances that surround the attempt to establish a state based on the rule of law in Liberia include not only the spread of a transnational economic regime that desires the country's natural and human resources but could not care less about its subjects. It also includes the intervention of a liberal-internationalist regime that tends to treat every recognised subject as equivalent, thereby reducing them to an empirical individuality that denies their subjective differences. As an 'empirical individual', the subject becomes the object of a universal subjectivity that makes it not only legitimate but a categorical humanitarian imperative to assist in developing it to its full potential as such.[48] Capitalism and liberalism are not the only regimes circumscribing what is taking place in Liberia post-war, nor is the rule of law only informed by powerful transnational regimes. In a country where the institutions of the nation-state are weak or non-existent, and therefore relatively ineffective mediums, the rule of law remains especially open to take

[47] On the regulatory influence of capitalism, see also John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham: Edward Elgar, 2008).

[48] See also Gerry Simpson, 'Humanity, Law, Force', in *Strengthening the Rule of Law through the UN Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016).

place in ways that defy the logics of these regimes. The result is a site in which the problem of what takes place in the rule of law is both extremely lively and at the frontline of the contemporary global growth of para-sitic regimes that operate through domestic institutions.[49]

2 Approaching the rule of law and Liberia

A philosophical problem underlies this thesis: how to respond to the dialectic of subject and object, that is, their simultaneous separation and inseparability. In short, the problem arises out of the confusion of 'being' (subjectively) and 'existing' (objectively), where the two are never completely separate (a subject being always informed by an objective existence), but also never in perfect harmony or unity (objective existence always being made sense of subjectively).[50]

This dialectic, whereby subject and object inform each other without becoming identical, is not problematic in itself.[51] The problem arises when there is an insistence on *identity*. This can happen in two ways: (1) by separating subject and object and making them identical with themselves; and (2) by collapsing subject and object and making them identical with each other. At its extreme, postmodernism slips into the first conceit, in its radical critique of objectivity. By emphasising the indeterminacy of every posited identity, subject and object are held in total non-identity, which loses sight of the inseparability of the two. In effect this total non-identity, which turns the chasm into a black hole, becomes another form of identification, the two that are never one (as subject-object) becoming two ones (as subject / object). At another extreme, analytical-positivism slips into the second conceit, in its pursuit of objectivity.[52] In the desire to be at one

[49] I do not mean domestic *as opposed to* international or transnational. I mean domestic as the locale of the institution, which might be international or transnational at the same time. In this sense, a 'domestic institution' operates as a site or medium of inter-normativity, that is, as a site where what is international or transnational becomes also domestic. For discussion of 'sites of inter-normativity', see Jutras, 'Legal Dimensions of Everyday Life'.

[50] On this problem, see Adorno, *Negative Dialectics*, in general, and in particular Part I, Section II: Being and Existence at 104-136. See also Theodor W Adorno, 'The Actuality of Philosophy', *Telos*, vol 31 (1977). I also discuss the subject-object dialectic in Part 2 of Chapter 1.

[51] On the concepts of subject/ivity and object/ivity, and their negative-dialectical relation, see, eg, Adorno, *Negative Dialectics*, 18-19, 21-22, 144-146, 176-177. See also Theodor W Adorno, *Hegel: Three Studies*, trans Shierry Weber Nicholsen (Cambridge: MIT Press, 1963), 4, 63.

[52] By 'analytical-positivism' I mean broadly the tendency to equate what *is* with what is posited as 'is' through the act of analysis. For instance, legal positivism is marked by the tendency to equate

with existence, positivism loses sight of the separation of subject and object, collapsing the two, being and existence, which are irreducible to the one.

Neither position holds on its own, because each fails to maintain the truth of the other within it. This is where poststructuralism offered a way forward, by maintaining *both* positions in an irresolute dialectic that provides a response to the 'double demand of modernity' (as Peter Fitzpatrick puts it): 'the demand for assured position integrated with a responsiveness to all that is beyond position, a demand to be met now without resort to erstwhile solutions of a transcendent kind.'[53] Manderson has summarised the poststructuralist response to this demand as '[t]he search for mobile signifieds beneath constant and iterable signifiers'.[54] In other words, a poststructuralist (re)search agenda is critically attentive to the subjects that enliven the structures that take their name whilst remaining non-identical to them. Thus what is signified remains mobile in that it is always *more* and always *other* than its identifying marks, which remain constant and iterable because they are not empirically fixed to what they signify.

This returns to the problem of institutionalisation. Never identical with its subjects, an institution can persist in the absence of the empirical individuals who come and go from time to time. Indeed, its integrity as an institution depends on this separation. Thus as a social structure an institution might remain constant and iterable whilst the empirical individuals that enliven it remain mobile; and yet an institution is never absolutely separate from these individuals, who, *as subjects* and not as mere bodies, constitute its grounds as an entity. Thus the integrity of an institution also depends on it maintaining within it the subjectivity of the individuals who are of its essence, without becoming identical with them.[55]

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what is law with what is posited as 'the law'. Similarly, scientific methodologies are marked by the equation of what *is* with what is apparent to observation.

[53] Fitzpatrick, *Modernism and the Grounds of Law*, 2.

[54] Manderson contrasts this with structuralism, which he characterises as '[t]he search for constant signifieds beneath mobile signifiers'. Desmond Manderson, 'The Metastases of Myth: Legal Images as Transitional Phenomena', *Law Critique*, vol 26 (2015): 208-209.

[55] To reiterate another image to signify this point, an image evoked by 'Proust's narrator' and reiterated by Spivak in her 'Translator's Preface' to Derrida's *Of Grammatology*: 'I was not one man only […] but the steady advance hour after hour of an army in close formation, in which there appeared, according to the moment, impassioned men, indifferent men, jealous men… In a composite mass, these elements may, one by one, *without our noticing it*, be replaced by others, which others again eliminate or reinforce, until in the end a change has been brought about which it would be impossible to conceive if we were a single person'. 'What, then', Spivak asks, 'is the […] identity?' Gayatri Chakravorty Spivak, 'Translator's Preface', in Jacques Derrida, *Of Grammatology* (Baltimore: The Johns Hopkins University Press, 1997), xi.

The subject-object dialectic is the constitutive logic of the institution. It is also the constitutive logic of law, and its rule, as I turn to discuss in a moment. A thesis that is concerned with the problem of the rule of law must therefore consider how it approaches this philosophical problem, and how its approach addresses both of the 'double demands of modernity' at the same time.[56]

A Theoretical approach

The philosophy set out by Theodor Adorno in his work *Negative Dialectics* is directed at this very problem.[57] At its crux, negative dialectics is nothing more than 'the consistent consciousness of non-identity'.[58] This is 'dialectical' in the sense that it places every thesis, or identity, in relation with its antithesis, or non-identity. However, this is a *negative* dialectic, rather than a positive one, in that the equation of thesis and antithesis, identity and non-identity, is not seen to end in synthesis. The equation, which would make a thesis identical with its object, is always seen to be inadequate. Every synthetic end is seen as another identification, another act of articulation, the truth of which remains in relation to the ways in which it is more and other than articulated. This results in a restless negativity,[59] a constant overturning of one-sided positions.[60]

This is set against the academic tendency to separate, analytically, subjective and objective dimensions, with the social sciences doing objective research, and the humanities doing subjective research. To the extent that this crude division is accurate, it is problematic. It is problematic because the social

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[56] See note 53 above.

[57] The central text I engage with is Adorno, *Negative Dialectics*. Others include Adorno, *Hegel: Three Studies*; Adorno, 'The Actuality of Philosophy'; Theodor W Adorno, *Metaphysics: Concept and Problems (Lectures, 1965)*, trans Edmund Jephcott (Stanford: Stanford University Press, 2000); Theodor W Adorno, *Aesthetic Theory*, trans Robert Hullot-Kentor (New York: Continuum, 2004); Theodor W Adorno, *Minima Moralia: Reflections from Damaged Life*, trans E F N Jephcott (London: Verso, 2005); Theodor W Adorno, *History and Freedom: Lectures 1964-1965*, trans Rodney Livingstone (Cambridge: Polity Press, 2006); Theodor W Adorno, *Lectures on Negative Dialectics: Fragments of a Lecture Course 1965-1966* (Cambridge: Polity Press, 2008).

[58] Adorno, *Negative Dialectics*, 16-18.

[59] In this Adorno's *Negative Dialectics* sits alongside Jean-Luc Nancy, *Hegel: The Restlessness of the Negative*, trans Jason Smith and Steven Miller (Minneapolis: University of Minnesota Press, 2002).

[60] To a significant extent this approach informed the work of the first generation of scholars affiliated with the Frankfurt Institute for Social Research Commonly known as the 'Frankfurt School'. This includes, relevantly to this thesis, Walter Benjamin, Max Horkheimer, and Herbert Marcuse. See, eg, Susan Buck-Morss, *The Origin of Negative Dialectics: Theodor W Adorno, Walter Benjamin, and the Frankfurt Institute* (New York: The Free Press, 1977).

sciences have a disciplinary advantage when it comes to empirical research, just as the humanities have an advantage in their attention to what remains more and other than observed and described as empirical.

The problem can be seen with respect to the study of law, where the separation between 'law as object' and 'law as subject' is as real as it is artificial.[61] On one side, approaching law as an object of study risks losing sight of its subjective qualities: it risks treating law and its rule in a way that reifies its institutional separation from the experience of the subjects who enliven it. On the other side, approaching law subjectively risks losing sight of its objective qualities: it risks treating law and its rule in a naïvely relativistic way that fails to maintain how the institution has a structure that makes it more than its subjects.

Because law is both subjective and objective, and neither of these alone, the problem is how to bring the two together in the study of law without losing sight of the differences. In other words, the problem is not how to overcome the differences between the humanities and social sciences, by merging subject and object into some third basis for thinking about law (producing a kind of Gonzo methodology).[62] The problem is how to avoid separating the two entirely and privileging one over the other, without collapsing the two in disregard of their differences—how to maintain their differences whilst bringing them together in their critical relation to each other.

Negative dialectics is directed at exactly that.[63] The critical strength of Adorno's philosophy is its capacity to maintain the separation of what is 'subjective' and what is 'objective' as well as their inseparability, that is, the negative-dialectical relation of subject and object.[64] In this, Adorno's negative-

[61] For a discussion of the different approaches to law in the fields of 'socio-legal studies' and 'law and the humanities', with a tendency in the former to approach law as an object of study, and in the latter as a subject of study, see Desmond Manderson, 'AD 2014: A Review essay of Eve Darian-Smith, *Laws and Societies in Global Contexts—Contemporary Approaches '*, *Law and Humanities*, vol 8, no 1 (2014). See also Austin Sarat, 'Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship', in *The Blackwell Companion to Law and Society*, ed Austin Sarat (Online: Blackwell, 2004); Austin Sarat, Matthew Anderson, and Cathrine O Frank, 'Introduction: On the Origins and Prospects of the Humanistic Study of Law', in *Law and the Humanities: An Introduction*, ed Austin Sarat, Matthew Anderson, and Cathrine O Frank (Online: Cambridge University Press, 2016).

[62] The Gonzo reference is of course to Hunter S Thompson, whose style of journalism was famous for bringing together the most precise factual investigation with his freakish experience of the facts.

[63] Poststructuralism has this potential in it as well, and yet it has struggled to advance its research agenda within the social sciences. I consider this further in Part 2 of Chapter 1, where I address the similarities and differences between Adorno's negative dialectics and Derrida's deconstruction.

[64] I examine the 'subject-object dialectic' in Part 2 of Chapter 1.

dialectical philosophy is able to bring together the disparate disciplines of the social sciences and the humanities without amalgamating them in disregard of their differences. I address how it does this in more detail in Chapter 1. Rather than go into the philosophical discussion here, however, it is more useful to introduce how it does this in the context of the thesis, both conceptually, in thinking about the problem of law and its rule, and methodologically, in carrying out a research project on the rule of law in Liberia.

B Approaching the concept of law

Negative dialectics places every concept into dialogue with its object—with what a concept seeks to articulate—without seeking a final reconciliation, or becoming nihilistic because of the impossibility of such reconciliation.[65] One of my primary concerns in this thesis is to examine what this means for the concept of law, and by extension, law's rule. This is also one of the main contributions I seek to make through the thesis, to the extent that it succeeds in driving Adorno's negative-dialectical philosophy into the realities of law.[66]

I begin by approaching the concept of law as the articulation of normativity. There are two ways to look at this. One is from the standpoint of law as the expressive subject that articulates the sentence, 'the law is this'. From this perspective, law is not an object of study ('the law'), but an expressive subject, 'law', which gives form to existence, as its object, always as a normative matter. *By law:* 'the law is this'. And yet the view from this perspective is unsettled: the subject can see how every act of articulation, of expressing what 'is' ('the law'), is a leap of faith, over what remains in between what *is* (in actuality) and what is predicated as 'is'—how 'this' is and is not what it is expressed to be by law. This is about seeing the contradiction in law from the non-naïve perspective of law-as-subject, a contradiction that animates every expression of 'the law'. The second perspective then switches standpoints, to take the view of the subject within jurisdiction, whose experience of law is neither wholly circumscribed by 'the law'

[65] See also Erik Doxtader, 'Reconciliation - A Rhetorical Concept/ion', *Quarterly Journal of Speech*, vol 89, no 4 (2003).

[66] Introducing *Negative Dialectics*, Adorno stated the aim of his book: 'to drive it [negative dialectics], according to its own concept, into the realm of reality': Adorno, *Negative Dialectics*, Prologue.

as expressed, nor wholly outside 'the law'. Rather than seeing 'law', as subject, this second point of view is about seeing 'the law', as object, from the perspective of the subject whose experience is the very object of law. And the view from here is equally unsettled, with the subject's experience of law neither as predicated nor simply free from predication.

In sum, these two viewpoints are concerned with law as a subjective and as an objective phenomenon: from the first perspective, how law *gives form* to the world, as a subjective matter; and from the second perspective, how the law *takes form* in the world, as an objective matter. The point, however, is that neither view is adequate on its own. As Adorno writes, 'dialectics [is] not a standpoint'.[67] As a dialectical phenomenon, law is *both* the positive expression *and* what remains more and other than expressed. Just as negative dialectics is directed at the consistent consciousness of non-identity, a negative-dialectical approach to law is directed at making law's non-identical aspects critical to its concept. In more concrete terms, it is about making the prisoner's experience central to the concept of the rule of law, rather than treating him as excess that must be remanded in a corrections facility in order to uphold the absoluteness of the rule-of-law concept.

Approaching law in this way is not just an academic exercise. As an academic exercise, its importance is that it makes law *essentially* plural, by bringing—and more importantly, by keeping—law in dialogue with the subjects who enliven its forms as a normative matter. The result is a 'legal pluralism' that locates the pluralism *in* law, rather than being a description of the relation between different legal orders, as it is most often thought about.[68] By approaching law as only really meaningful, or 'whole', when seen in relation to the subjects who are within jurisdiction whilst remaining excluded from its expressions as a normative matter, pluralism becomes law's essential condition. But it must be

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[67] Ibid, 16-18.

[68] For a review of this literature, see Miranda Forsyth, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (Canberra: ANU E Press, 2009), Chapter 2. See also Sally Engle Merry, 'Legal Pluralism', *Law and Society Review*, vol 22, no 5 (1988). I find the most compelling approach to legal pluralism in Macdonald's work on a 'critical legal pluralism'. For an introduction, see Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a *Critical* Legal Pluralism?', *Canadian Journal of Law and Society*, vol 12 (1997). Macdonald develops this further in Roderick A Macdonald, 'Custom Made - For a Non-chirographic Critical Legal Pluralism', *Canadian Journal of Law and Society*, vol 26, no 2 (2011). See also Austin Sarat and Thomas R Kearns, 'Responding to the Demands of Difference: An Introduction', in *Cultural Pluralism, Identity Politics, and the Law*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 2001). I address the question of law's pluralism in Part 2 of Chapter 3.

emphasised: this is a dialectical, and not an analytical, approach. The result is not an array of individuated laws, separated into an indissoluble pluralism. As much as law is seen to be essentially plural, law is also seen to be essentially *singular*. On this approach, law is as much in-common as it is experienced in different ways.

A negative-dialectical approach thus enables one to appreciate the chasmic structure of law, whereby law is simultaneously singular, incorporating all subjects within jurisdiction, and plural, taking place in non-identical ways, enlivened by the subjects over whom law rules. This is important for understanding law and its rule as a common experience, but it is especially important when it comes to the question of what is taking place in the rule of law in Liberia. That is because it provides a way of approaching a problem that has confronted scholars and practitioners working in the field of 'law and development' or 'rule-of-law promotion' since the earliest colonial interventions.[69]

The 'problem' is how to institute a singular rule of law in a situation of legal pluralism.[70] On one side, the answer to this problem is to attempt to erase all traces of pluralism. This is the attitude of many of the members of Liberia's national legal profession, who see other expressions of law, whether 'customary' or 'traditional', as eventually withering away with modernisation.[71] It is also the attitude of many Western government officials, who do not even recognise the existence of different expressions of law within the nation-state.[72] On another side,

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[69] For a history of this field, see David M Trubeck, 'The "Rule of Law" in Development Assistance: Past, Present, and Future', (unpublished paper, 2003): https://media.law.wisc.edu/s/c_8/mg3md/ruleoflaw.pdf. See also David M Trubeck, 'Law and Development in the Twenty-first Century', *University of Wisconsin Law School Legal Studies Research Paper Series Paper No. 1178* (2011); Michael Zürn, André Nollkaemper, and Randy Peerenboom, eds, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge: Cambridge University Press, 2012); John Hatchard and Amanda Perry-Kessaris, eds, *Law and Development in the 21st Century: Facing complexity in the 21st Century* (Oxon: Routledge, 2003).

[70] For two recent studies of this problem, see Forsyth, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu*; Laura Grenfell, *Promoting the Rule of Law in Post-conflict States* (Cambridge: Cambridge University Press, 2013). For another approach to this problem, see Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development', *Hague Journal on the Rule of Law*, vol 3, no 1 (2011).

[71] I discuss this in Part 2 of Chapter 7. Grenfell makes a similar observation with respect to the attitude in many international organisations: see Laura Grenfell, 'The UN and "Rule-of-Law Constitutions"', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016), 128.

[72] For instance, in 2007, in explaining why Australia voted against the *United Nations Declaration of Indigenous Peoples Rights*, Australia's Ambassador to the UN, Robert Hill, argued that '[c]ustomary law is not "law" in the sense that modern democracies use the term; it is based on culture and tradition', effectively limiting 'law' properly so-called to 'State law', and by startling implication, leaving Liberia, amongst many other parts of the world where the law of the state is dysfunctional

where differences in law are recognised, the answer is to establish a hierarchical Constitution that places 'other law' in a position of subordination to a higher (national) law, with any contradiction in law resolved in favour of the higher law. Yet another approach might advocate a radical separation of law, seeking to avoid contradictions in law by decentralising legal authority.[73]

However, none of these responses takes seriously the challenge posed by law's pluralism. This is the same challenge noted at the beginning of the Introduction: to take seriously the implications of the contradiction in law, which manifests in its simultaneous singularity and plurality. This problem cannot be wished away, nor can it be overcome through the establishment of a hierarchical constitutional system or the decentralisation of legal authority. The problem remains in any case because it is the condition of law in its *every* expression.

A negative-dialectical approach enables one to appreciate this—the chasmic structure of law, and its rule—and therefore to appreciate the nature of the problem of trying to institute the rule of law in Liberia (or elsewhere). More critically, this approach then enables one to analyse the different responses to the contradiction—to see how these responses inform the rule of law as a material phenomenon, and how the rule of law provides a medium for them to take place.

C A methodology of the imagination

Carrying out this research gives rise to a further problem of methodology: how to examine 'the empirical'. From a negative-dialectical perspective, the act of identifying an object of study is seen to cut that object short, leaving an identity that has its truth in relation with what remains non-identical to its conceptualisation. This leaves the empiricist in the most wonderful paradox, suspended in an imaginarium between subjectivity and objectivity: thinking an object as it is, in fact the empiricist thinks the object otherwise; grasping the object as a matter of fact, the empiricist grasps the fact as a matter of theory.

The approach I take to this problem is not to seek to resolve the paradox, but to make it critical to research. To use Adorno's term, the task is to develop a

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and/or irrelevant in everyday life, almost entirely lawless. See UN Doc A/61/PV.107 (13 September 2007), 11. See also Grenfell, *Promoting the Rule of Law in Post-conflict States*, 54.

[73] See also Sarat and Kearns, 'Responding to the Demands of Difference: An Introduction'.

more *exact imagination*: 'an imagination that remains strictly confined to the material offered it by scholarship and science and goes beyond them only in the smallest features of its arrangement, features which of course it must produce of itself.'[74] If the critical function of the scholar's imagination is its productive arrangement of research material, this is both negative and positive: negating the given objectivity of things, at the same time giving form to everything as the material of reason. As intellectual labour, this work is what gives the material its scientific value. Without critically engaging the imagination, things would remain in the realm of myth: treating material as purely objective in itself, the rational empiricist remains blind to its subjective conditioning,[75] just as the relativist who treats material as purely subjective remains blind to its objective conditioning.

Following Adorno, I approach 'the empirical' as the phenomenon that plays out in ways which always defy its rational conception. What is empirical is what the researcher imagines it to be as a conceptual matter and thereby renders imaginary, leaving a concept of the empirical that interpolates the empirical. This is an act of interpellation in that the researcher calls what is empirical to attention by identifying it according to its concept. In this the rational empiricist displaces the object of study twice over, the first time in thinking the concept into existence out of the object, and the second time in affirming the existence of this concept in place of its object. To avoid displacing its object for the second time and to move beyond the pure fiction of rationality, a conceptual schema—whether of law or of a project such as this one—must engage the empirical through the imaginary.[76]

The lesson for the social scientist is this: rather than approach the object of study directly and try to lay hold of it with the most adequate conceptual schema possible, approach it *indirectly*, through an arrangement that encircles the object from its points of difference. 'Solely constellations represent, from without, what the concept has cut away from within, the "more", which the former wishes to be, so very much as it cannot be the latter.' Adorno continues: 'By gathering around

[74] Adorno, 'The Actuality of Philosophy', 131. The translation here is from Shierry Weber Nicholsen, *Exact Imagination, Late Work: On Adorno's Aesthetics* (Cambridge: MIT Press, 1997), 4.

[75] See Adorno, *Negative Dialectics*, 23-24.

[76] For further discussion, see Shane Chalmers, 'Law's Imaginary Life on the Ground: Scenes of the Rule of Law in Liberia', *Law and Literature*, vol 27, no 2 (2015): 181.

the thing to be cognized, the concepts potentially determine its innermost core, thinking to attain what thinking necessarily stamped out of itself.'[77]

In my appropriation of this constellational approach, the concepts that gather around the object to be cognised and 'potentially determine its innermost core' are the object's negative identities, that is, the ways in which it is other than expressed by its concept. This is not a purely negative result. Again, the point is to bring 'positive' and 'negative' together in an unholy alliance. To put it one way, the result is a *negative position* (or to put it another way, a posited negation). For instance, the object of Chapter 6 is 'the national law of Liberia', which I present through a constellation of scenes configured to show how the national law is taking non-identical form on the ground. *Subverted*; *perverted*; *ignored*; *inverted*: viewed from these negative vantage points, from these points of fundamental difference, the image of the 'the national law' is seen configured in ways that reveal something more of its true identity. Critically, this 'true identity', or 'innermost core' of the object, is only ever grasped *negatively* and *partially*: as a non-truth—identifying the phenomenon in the ways it is other than conceived; and as a non-whole—without identifying once and for all how it is otherwise.

Thus it is in the refuse of scattered off-cuts that the crystal of the totality is to be discovered; not the totality *itself*, but in the assemblage of the smallest and least remarkable data, a composite that refracts a dialectical image of it.[78] And whilst it is a 'dialectical image' that is illuminated through this discursive configuration, and not some absolute reality, this is nonetheless real; indeed, by representing the object configuratively, through the imaginative work of the scholar, one might obtain an image of it that is *more real* than the law of reason would admit on its own.

This is the approach I take to the concept of the rule of law; and this is the kind of portrait that I have attempted to create as a result, portraying through a constellation of scenes the life of law's rule in Liberia.

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[77] Adorno, *Negative Dialectics*, 164-166.

[78] See Benjamin, *The Arcades Project*, 461, 462. On the metaphor of 'refraction', see Manderson, 'AD 2014', 79.

3 Research design

Beyond the borders of Western nation-states and a few others, the world appears to be a dark place when it comes to the rule of law. Literally dark: on the influential World Justice Project map depicting 'rule of law around the world', most non-Western states are several shades darker than the enlightened Western ones, and Africa remains largely a blank space:

Figure 3. 'Rule of Law Around the World'[79]

This would seem to make the choice of the west African republic of Liberia an unpropitious site to study the life of the rule of law. But then, the claim that there is 'no rule of law' almost anywhere outside of Western states is suspicious. For one, it brings to mind the colonial argument that there was 'no law' outside of civilised nations. Whilst that argument has been thoroughly discredited, even if the occasional influential representative still repeats it,[80] it is remarkable that just when the majority of the world's peoples have finally won recognition of their laws as 'law', these laws are deemed inadequate to the task of governing. At the same time, it recalls the racist trope that equates the civilised West as being governed by

[79] [image omitted from digital version]

[80] See note 72 above.

reason (through the orderly rule of law) and the savage others as being governed by passion (through the arbitrary rule of humans).[81]

In deciding to study the rule of law in Liberia, I designed my research to challenge both of these distinctions: between the 'existence' or 'non-existence' of the rule of law, and between 'the rule of law' or 'the rule of humans'. This is not to homogenise the rule of law, to the point that it is simply everywhere. My argument is that the rule of law never 'exists' in any case, but rather describes a restless struggle to make law predominant over its subjects at the same time as it is given form, and takes form, in and through those subjects' lives and interactions. Whilst this is a common experience, and in that sense the rule of law might be everywhere, it takes place in singular ways, and in that sense it would be different everywhere. Nonetheless, on this argument, a research design that aims to examine the life of law's rule would open up most places in the world, if not everywhere. Why, then, a *single* case study rather than a multiple or comparative case design? And why *Liberia* as that single case?

A Case study

In asking 'what is taking place in Liberia', I am approaching the experience of the rule of law there as a particular instance of my general concern with 'what takes place', and not as an example. The difference is slight but critical to understanding why I chose a single case rather than multiple cases.

Whereas an example is entirely in the service of something else, its every aspect pointing to what it is supposed to exemplify, an instance is both generic and singular, pointing to a general claim (as 'an instance of') whilst maintaining its own

[81] The impression of a disturbing continuity between the colonial claims of 'no *law*' and the contemporary claim of 'okay law, but no *rule* of law', as well as the distinction between the rational West and the impassioned Others, is reinforced by the emergence of the rule of law as a concern of the UN Security Council. In 1961 the Council made its first reference to the rule of law in a resolution '*[n]oting with deep regret and concern* […] the general absence of the rule of law in the Congo'—the very heart of darkness. See UN Doc S/Res/161 (21 February 1961), Part B, preambular para 2. For an economic analysis of the narrative of lack in rule-of-law assistance, see also Taylor's argument that creating an impression of a lack of rule of law functions to establish market-demand for rule-of-law products: Veronica Taylor, 'Big Rule of Law©®℠™(pat.pending): Branding and Certifying the Business of the Rule of Law', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall, and Hilary Charlesworth (Oxon: Routledge, 2016). See also Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (New York: Wiley-Blackwell, 2008).

singular presence in time and space (as 'being present' in 'this instant').[82] As a result, whereas an example seeks to establish a positively servile relationship with its master claim, instances remain ambivalent, both serving to support and to contradict the claim upon it.[83] This is critical from a scholarly standpoint because it does not require the data to fit a theoretical claim in any absolute way, and instead treats the contradictions between data and theory as integral to the study; and it is critical from an ethical standpoint because it lessens the violence that is done to data when exploited in a theoretical work such as this one, by treating the case with singular care and not totally obliterating its divergent particularities. By implication, a thesis must be concerned with its case as unique and incomparable as much as it is seen to be generic.

That is how I approach the experience of the rule of law in Liberia: as both singular and generic, with the singularities of *what* takes place in the rule of law in this case differing from other cases, but with the general dynamics of *how* the rule of law takes place remaining common.[84]

If that is the rationale for choosing a single case, what is the rationale for choosing Liberia as that case? There are both impartial and partial reasons, based on a methodology that has no direct interest in Liberia apart from the criteria used to select the case, and yet requires a singular interest in the case. On the impartial side, I used three criteria to select the case: (1) a state recently emerged from war, (2) host to an active international peace operation with a strong emphasis on rule-of-law reform, (3) with English as a vernacular language. I imposed the third criterion to make the task of research easier for a monoglot Anglo-Australian researcher. I imposed the first two criteria on the basis that I thought it would be easier to observe the conflicted life of law's rule in a state still ruptured by war, where the state's institutions are dysfunctional or non-existent and (to turn Tamanaha around) there is a high degree of 'sharp disagreement over the social good', where 'law is perceived as a powerful instrument', where people 'endeavor

[82] See 'instance, *n.*', OED Online, December 2015.

[83] Compare John Rawl's method of 'reflective equilibrium'; see, eg, Norman Daniels, 'Reflective Equilibrium', in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2013 Edition): http://plato.stanford.edu/archives/win2013/entries/reflective-equilibrium/.

[84] Whilst this is incompatible with a research design that amasses multiple exemplary cases in service of the thesis, it does not rule out a study of multiple instances, nor does it make comparison impossible. However, a study of multiple instances would be difficult to do within the scope of this thesis, given the necessary depth and care with which each case would have to be treated.

to seize or co-opt the law in every way possible', where they attempt 'to fill in, interpret, manipulate, and utilize the law to serve their own ends', indeed where law cannot be extricated from 'social, political, religious, and economic disputes'.[85] If all of that animates the rule of law, as I argue, rather than being set in definitive opposition to it, then my hypothesis in designing the project was that 'what is taking place in the rule of law' in a post-war state would be highly animated, making data collection and analysis easier than in a site such as Australia, where the conflicts are less easy to observe as a result of strong state institutionalisation.

That is why I selected a site recently emerged from war. The reason for selecting a site that is host to an active international peace operation with a strong emphasis on rule-of-law reform is two-fold. (1) It adds an international dimension to a domestic struggle over the rule of law, in the form of an intervention led by the UN that has an active, long-running, and well-funded rule-of-law reform mandate. (2) This makes the question of what is taking place also a question of what is taking place in an international intervention in the rule of law, exposing to critique a transnational industry that holds itself out as assisting in the establishment of the rule of law. A thesis that examines what is taking place in the rule of law might therefore offer a critical view of what is taking place in this intervention, with implications for the practice of rule-of-law assistance around the world.

B Research methods

The core of the research for the case study involved six-months fieldwork in Liberia in 2013. During this time I gathered material using qualitative research methods combining getting a feel for the place, hearing from people on the ground, observing what is going on, as well as reading documentary material.

[85] Tamanaha cautions that the institution of the rule of law must be sequestered from everyday political conflict to protect it from becoming a means through which actors struggle for power: 'The root danger can be stated summarily. In situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends. This will spawn a Hobbesian conflict of all against all carried on within and through the legal order. […] Spiraling conflicts will ensue with no evident halting point or termination short of exhaustion of resources or total conquest by one side.' Tamanaha, *Law as a Means to an End*, 1-2. I discuss this further in Part 2 of Chapter 3.

Figure 4. Field sites in Liberia[86]

For four of the months I was in Monrovia, Liberia's capital city (with a population of approximately 1.5 million, out of a total population of 4 million). In Monrovia I examined the work being done to establish the rule of law by government and international actors, foremost the UN Mission in Liberia, but also bilateral development agencies, and international and national NGOs. For this I conducted interviews,[87] gathered official documents, newspaper articles, and radio programs.

[86] Thanks to Karina Pelling at CartoGIS, ANU College of Asia and the Pacific, for producing this map.

[87] This includes 78 official interviews. For the list of interviews, see the Appendix. In addition, I had many conversations that were not officially interviews but were no less informative.

Figure 5. Benson Street, central Monrovia, where I would buy my daily groceries from the market women (beneath the umbrellas) whilst pondering the meaning of the life of the rule of law[88]

For the other two months, I conducted fieldwork outside Monrovia in Edina (Grand Bassa County), Gbarnga (Bong County), Harper (Maryland County), Robertsport (Grand Cape Mount County), Sanniquellie (Nimba County), Voinjama (Lofa County), Zorzor (Lofa County), and Zwedru (Grand Gedeh County).

The purpose of visiting the rural sites was to follow-up on what I learnt about the rule-of-law reform process, to see how it was taking place across the country. I did this through a combination of observation and interviews with actors engaged in the implementation of rule-of-law reform programs, including government officials (magistrates, police, and administrative officials), UN officials, international and national NGOs, civil-society actors, journalists, and through conversations with people I encountered in the communities.

[88] [image omitted from digital version]

Figure 6. Voinjama, capital of Lofa County and one of biggest towns in Liberia[89]

During the fieldwork, I also visited New York to conduct interviews with staff in the UN Headquarters working on global issues of rule-of-law assistance, and visited the Liberian archives at the University of Indiana to gather historical material on Liberia.

The fieldwork is complemented by deskwork, including document analysis and a review of scholarly and practice-based literature. It is also complemented at points by the analysis of artworks, including photography, painting, and literature.

4 Chapter outline

There are two parts to the thesis. The first concerns the rule of law as a general proposition, in answer to the question of what takes place in the rule of law. The second concerns the rule of law in Liberia, in answer to the question of what is taking place in the rule of law there.

[89] Photograph by Shane Chalmers. The population of Voinjama is approximately 30,000.

Part I begins with a reading of Adorno's negative-dialectical philosophy that draws out the main points relevant to the thesis (Chapter 1). I then begin driving these points into the reality of law's rule, first by examining the origins of the contradiction in law (Chapter 2), and then by examining how this contradiction structures the rule of law, opening it to different logics, which inform how the rule of law takes place whilst taking place through it (Chapter 3).

Part I ends with an outline of the two theoretical frameworks that inform the study of the rule of law in Liberia. These frameworks are based on the arguments developed in Chapters 2 and 3. The first framework is concerned with the contradiction in law and the consequences for law's rule; the second is concerned with the forms of violence this enables as well as the ethical possibilities it holds out. These two concerns frame each chapter in Part II of the thesis.

The study of the rule of law in Liberia begins in Chapter 4. The first concern here is how the idea of 'Liberia' was *given form* through law from its conception as an idea of liberty at the beginning of the nineteenth century to its consolidation as a nation-state in the twentieth century. The second concern is how a particular logic informed the making of Liberia in the nineteenth and twentieth centuries through the super-imposition of a representational framework over peoples and lands in west Africa that culminated in a state of civil death for the majority of Liberians. The logic, I argue, is the logic of capital.

At the end of Chapter 4, I consider the Liberian Government's twenty-first century vision for re-making the republic post-war—a vision that suggests a continuation, if not an intensification, of the institutionalisation of the logic of capital. This raises a question, which I address in the subsequent chapters. How is the Government working to realise its vision of peace, given the violence of the logic that informs it?

Chapter 5 addresses this question by examining what is taking place in the attempt to secure peace in Liberia with the assistance of a UN peace operation. On one hand, my concern here is how Liberia is being *given form* by law in the twenty-first century in the attempt to establish a state based on the rule of law. To this end, I examine the work that is being done by both the Government and the UN to realise the Government's vision of Liberia. On the other hand, my concern is with how a logic of security is informing this work.

The analysis in Chapter 5 shows an attempt to secure peace through the establishment of a state based on a forceful rule of law. Not only is this turning the rule of law into a medium of the state's security sector, but it is also enabling the logic of security to take place through the institution of the rule of law. Bringing 'justice' within this security complex is supposed to make the arrangement bearable. However, this raises a question: how just *is* the justice of this arrangement?

Chapter 6 addresses this question in examining how law is *taking form* on the ground post-war. Again there are two concerns here. One, I am concerned with how the contradiction in law opens law up to take form in contradictory ways, enlivened by its subjects. The result is an inordinate rule of law, with law taking form on the ground in ways that make it simultaneously not law. Two, I am concerned with how this is a matter of justice—with how this contradiction in law opens the national law up to take form in ways that might make it just.

This raises a critical problem. The implication of the analysis in Chapter 6 is that the arrangement of 'peace through justice' *requires* an inordinate rule of law—a rule of law that remains responsive to the contradictory demands of justice it confronts on the ground. The problem is that such a state of peace would be based upon a contradictory logic. Indeed, it would require facing the contradiction in law and its rule rather than attempting to resolve or dismiss it. Whether, and how, such a critical approach to law's rule might be instituted is the question to which I turn in the final chapter (Chapter 7).

The first concern in Chapter 7 is the 'process of law'—how law takes place in-between the expression of law as 'the law' and the experience of law as always otherwise than 'the law' as expressed. Arguing that the critical function of a legal system is to mediate this contradiction in law, I examine the work of the Government of Liberia and its international partners to reform the national legal system. I also compare this reform with unofficial efforts being taken to deal with the contradiction in the rule of law. At the same time, I am concerned with the *quality* of these systems of law. By quality I mean how a legal system deals with the contradiction in law. Thus a legal system might 'over-mediate' law, articulating the law from a standpoint that is set against its subjects. It might also 'under-mediate' law, with law being all-but indistinguishable from what its subjects express it to be.

The ethical potential of a legal system is its capacity to remain responsive in the process of articulating the law.

In the case of Liberia, the analysis in Chapter 7 shows a national legal system that is being reformed in a way that risks over-mediating law, making it a medium for a modern-liberalist agenda for transformation as well as an instrument of domination used to secure 'peace and stability' without justice. At the same time, the national legal system remains extremely dysfunctional, marked by corruption of the police and courts as well as incidences of mob violence. Both the acts of official corruption and 'mob justice', I argue, are expressions of under-mediated law. Alongside this, however, outside the national legal system, communities are mediating expressions of the law in ways that make the process genuinely responsive. What is critical about these community 'peace-builders' is not the law that takes form through their mediation, but *how* the process makes conflict the basis of a legal resolution.

The thesis concludes by considering the implications of the analysis of the rule of law in Liberia, drawing out the twin-strands that frame each chapter of the case study, before returning to the question of what this means for the rule of law both in theory and in the practice of trying to institute it around the world.

PART I

Chapter 1

negative dialectics

1 Inspiration

This thesis is inspired by Theodor Adorno's *Negative Dialectics*.[1] I say 'inspired by' because Adorno's book remains for me incomprehensible in the whole, as a dialogue with a philosophical tradition and its corpus that I have yet to master, and yet comprehensible in part, as an excursus on a critical mode of thinking that accords with my own negative tendency and strikes against my more positive compulsion.[2] It is this part of the book (its dialectical 'logic'), rather than the whole (its wide-ranging critique of European philosophy), that informs my thinking throughout the thesis. Of course this begs the question of whether it is possible to extract 'negative dialectics' in this way from *Negative Dialectics*, as if it were an essence to be extracted from the bodily excess of a timeless and placeless specimen; and moreover whether this essence might then be injected into this specific study of the rule of law and Liberia. The question is critical, and part of my aim in this chapter is to answer that question, to set out why the approach I take here is not only justified but *required*.

I also say this thesis is inspired by Adorno's *Negative Dialectics* because inspiration—as a 'breathing in'—is perhaps the most apt form of engagement with this particular work. If to breathe in is to inhale a vital substance, it is only ever a partial act; to take just one breath would be to stop breathing—. And if Adorno sought to do anything in setting out his dialectical philosophy in *Negative Dialectics* it was to break thought from its self-contentment and turn it without relent towards what it can only ever fail to grasp in one breath. The worst possible way to read *Negative Dialectics*—a way of reading that Adorno's style of writing ruthlessly works against—would be to attempt to consume it, to look in it for some conceptual whole, some self-sufficient thought-product that might be resold on the market under a new name. Certainly it does not provide a framework that might be re-assembled here or elsewhere, upon which to hang one's research material.

But inspiration is even more negative than that. If to breathe in is to inhale a vital substance, the act of inhalation is not only always partial but also renders the

[1] There are two English translations of *Negative Dialectics*. I rely primarily on the translation by Dennis Redmond published online: http://members.efn.org/~dredmond/ndtrans.html. All references in the thesis are to this version. At times I have also cross-checked this translation against the original German *Negative Dialektik* (Frankfurt am Main: Suhrkamp Verlag, 1966).

[2] Throughout the thesis I use 'negative' and 'positive' in the sense of 'negate' and 'posit', rather than in a normative sense.

desired substance stagnant, stripping it of its oxygen. In this act—which is also the act of thinking—what is so essential to it is now, on passing into it, the opposite of what was sought and what must be sought again and again. This is what negative dialectics provides as an approach to thinking: a self-consciousness of the continuous breathing-in that is always partial and always destructive of the very material that is necessary to it. Always partial and always destructive—but in this, always inspired, always *alive*.

This, then, by way of introduction, is the philosophical approach that inspires the thesis: an approach that defies not only the very book that would deliver it wholesale to the market but also any attempt to pin 'it' down. To clarify what I mean by this, I begin again in Part 2 of the chapter by setting out my understanding of 'negative dialectics'. This involves drawing out five aspects from Adorno's philosophy that are central to this thesis: (1) the subject of experience, through a discussion of the subject-object dialectic; (2) how understanding this is a matter of justice; (3) the problem of conceptualisation; (4) the logical law of contradiction; and (5) the dialectical dimensions of determination and infinitude. I conclude in Part 3 by returning to what this means for the thesis.

2 Negative dialectics

A The subject of experience

Writing in the aftermath of two world-wars, having lived through the eclipse of German National Socialism and European Fascism, living through the one-dimensional flattening of the world and its qualitative reduction to exchange-value,[3] and in reflection on the failed realisation of the Marxist concept of history,[4]

[3] To use the phrase made famous by Adorno's intellectual companion, Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (Boston: Beacon Press, 1966). See also Theodor W Adorno, *Negative Dialectics*, trans Dennis Redmond (2001), 53-54, 63-65. For a discussion of the reduction of the world to the logic of exchange, see ibid, 149-151, 190-193.

[4] Adorno famously begins *Negative Dialectics* with the line: 'Philosophy, which once seemed outmoded, remains alive because the moment of its realization was missed. The summary judgment that it had merely interpreted the world is itself crippled by resignation before reality, and becomes a defeatism of reason after the transformation of the world failed.' Adorno, *Negative Dialectics*, 15-16. In this Adorno is reflecting on the failed communist transformation and the Marxist position that philosophy 'merely interpreted' the world—that it pointed through Marx to

Adorno's *Negative Dialectics* is nothing if not a total assault on totalitarianism. And for Adorno there is nothing more totalitarian in thought than the reduction of the experience of the world to a synthetic identity with its conceptualisation. The annihilation of that which fails to live up to its concept, and which always fails to live up to its concept, can only ever result from such identity thinking—whether the concept is the *Volk*,[5] an object's exchange-value, or indeed an expression of law.

To understand this concern it is necessary to understand what is meant by 'experience'. For Adorno, this concept describes the experience of contradiction that arises out of the confusion of 'being' (subjectively) and 'existing' (objectively), where the two are never completely separate (a subject being always informed by an objective existence), but also never in perfect harmony or unity (objective existence always being made sense of subjectively).[6] This is the experience of the subject-object dialectic, whereby subject and object inform each other without becoming identical.

As such, the concept of experience is not directed at a pure or original knowledge of existence, nor a perfect state of being, but rather a condition of not knowing, and not being, in any absolute way.[7] As Adorno writes, 'what experience is concerned with at any particular moment is the animating contradiction of such absolute truth.'[8] This means that a subject is never at one with its object. But it also means a subject is never at one with *itself*. This is not the kind of monadic experience of the autonomous and self-determining neoliberal subject.[9] For Adorno, as for Hegel, the subjectivity of the individual is also contingent and

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the logical overthrow of capitalism in the ultimate act of historical negation—a position that was 'crippled' by the historical experience of first half of the twentieth century.

[5] 'The people', or *Volksgemeinschaft*, of German National Socialism.

[6] On this problem, see Adorno, *Negative Dialectics*, in general, and in particular Part I, Section II: Being and Existence at 104-136. See also Theodor W Adorno, 'The Actuality of Philosophy', *Telos*, vol 31 (1977).

[7] As Adorno writes in the introduction to his study of 'the experiential content of Hegel's philosophy', the concept of experience as used here 'is not intended to capture phenomenological "ur-experience"; nor, like the interpretation of Hegel in Heidegger's *Holzwege*, is it intended to get at something ontological, the "Wort des Seins" [word of Being] or the "Sein des Seinden" [Being of beings].' Theodor W Adorno, *Hegel: Three Studies*, trans Shierry Weber Nicholsen (Cambridge: MIT Press, 1963), 53.

[8] Ibid. See also Adorno, *Negative Dialectics*, 21-22.

[9] See also Nancy's caution against mistaking the Hegelian concept of subject for an 'ideological notion […] that is nonphilosophical, individualist, egoist, and "liberal" […]'—a caution that applies equally to Adorno's concept of subject. Jean-Luc Nancy, *Hegel: The Restlessness of the Negative*, trans Jason Smith and Steven Miller (Minneapolis: University of Minnesota Press, 2002), 4-5.

objectively determined,[10] 'the subject' always an objective form, constituted historically and in relation to nature,[11] and therefore never absolutely individual.[12] At the same time, the subject comprises self-conscious individuals who recognise themselves and demand to be recognised as singular manifestations of subjectivity. Thus the subject is both objective and subjective, generic and singular, and none of these in itself. It cannot be untangled or resolved and remains suspended in an experience that is of the animating contradiction of absolute truth.

In sum, this is the concept of experience that informs Adorno's negative-dialectical philosophy: the experience of a subject that is both common and individual, determined and self-determining, an objective part of a whole—and therefore knowable only through empirical study of the whole—and yet irreconcilably apart from this totality—and therefore knowable only in its singular situation.[13] And this contradictory experience animates every claim to truth—to knowing the world objectively, to being at one with it subjectively.[14]

B A matter of justice

In approaching the experience of the subject in this way, negative dialectics shares common ground with poststructuralism.[15] This can be seen in their view of the

[10] See, eg, Adorno, *Hegel: Three Studies*, 63. Nancy's articulation of the Hegelian concept of 'subject' also fits Adorno's and is helpful here: 'The Hegelian *subject* is not to be confused with subjectivity as a separate and one-sided agency for synthesizing representation, nor with subjectivity as the exclusive interiority of a personality. Each one of these can be *moments* among others of the *subject*, but the subject itself is nothing of the sort. In a word: the Hegelian subject is in no way the *self all to itself*.' Nancy, *Restlessness of the Negative*, 4-5.

[11] The concepts of 'nature' and 'history' are central to much of Adorno's work. For an overview of these concepts, see Susan Buck-Morss, *The Origin of Negative Dialectics: Theodor W Adorno, Walter Benjamin, and the Frankfurt Institute* (New York: The Free Press, 1977), Chapter 3.

[12] As Adorno writes: 'everything through which he [the empirical individual] is specifically constituted as a cognitive subject, hence, that is, the logical universality that governs his thinking, is, as the school of Durkheim in particular has shown, always also social in nature.' Adorno, *Hegel: Three Studies*, 63. See also Marcuse's discussion of 'subject' in Hegel's philosophy: Herbert Marcuse, *Reason and Revolution: Hegel and the Rise of Social Theory* (New York: Humanity Books, 1999).

[13] See also Adorno, *Negative Dialectics*, 21-22.

[14] Compare Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 54. 'The persistent failure to account for the social in terms of the totality or in terms of a distinct particularity was a productive failure in that it showed there was something of the totality and of the particularity "in" society. The totality was transposed in terms of infinite possibility and the particularity in terms of determinate being-in-common. Yet, as we saw, these dimensions of the social can neither "be" in or of themselves nor causally combine in some relational way.'

[15] Perhaps the most important common influence in this respect was Nietzsche, to the extent that Nietzsche was responsible for diagnosing the condition of the modern subject as one of maddening

modern experience as one of irreconcilable contradiction, as well as in their approach to this condition.[16] For one, each takes social structures seriously, from the more exploitative forms to the more critical, and more social ways of being together, without need for transcendental affirmation.[17] Moreover, in contrast to the postmodernists who became enchanted by the thought of indeterminacy, and the trenchant positivists who cannot let go of their desire for certainty and stability, Adorno's critical concern, as that of poststructuralism, is not to resolve the subject's contradictory experience but to make it *critical* to every resolution.[18] In this, the concern of Adorno's negative-dialectical philosophy, as that of Derrida's philosophy of deconstruction, is to work against the domination that results from any attempt at resolving the contradictory experience that leaves subject and object as separate as they are inseparable. And for both, this is a matter of justice.

For Adorno, any attempt to resolve or dismiss the subject-object dialectic would either separate the two entirely, in an analytical fashion that conceives of

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contradiction: of being, on irreparably shattered ground of knowing—ground solid enough to walk upon, but if one pauses for closer inspection, entirely fractured, held together superficially by the mass of soles that continue to walk together. See Friedrich Nietzsche, *The Gay Science*, trans Walter Kaufmann (New York: Random House, 1974). In particular, see the story of 'the madman' in section 125, along with sections 108 and 343. See also Friedrich Nietzsche, *Thus Spoke Zarathustra: A Book for All and None*, trans Walter Kaufmann (New York: Viking Press, 1966), Prologue and section XXV. For an overview of Nietzsche's influence on Adorno, see Gillian Rose, *The Melancholy Science: An Introduction to the Thought of Theodor W Adorno* (London: Macmillan, 1978), 11, 18-26.

[16] Derrida, who perhaps above all was responsible for poststructuralist scholarship, came to acknowledge the relation between his work and Adorno's in a speech he delivered in acceptance of the Theodor-Adorno Prize in 2001, published as Jacques Derrida, *Fichus* (Paris: Galilee, 2002). In that speech, Derrida acknowledges Adorno as an 'adopted father', as well as the commonality between Adorno's dialectical philosophy and his own philosophy of deconstruction. Writing on this speech, Deranty notes: 'In this text, Derrida clearly presents deconstruction as sharing the spirit of Adorno's negative dialectic, and Benjamin's mystical enlightenment. He seems to imply that his own way of doing philosophy is a viable Adornian alternative to the other Adornian heritage, the rationalistic, academic style of Critical Theory as it is now conducted in Frankfurt [under Jürgen Habermas]. Indeed, paradoxically, and Derrida's speech in Frankfurt made this particularly evident, Adorno's inspiration survives intact rather in the remnants of French post-structuralism (e.g. in the writings of Giorgio Agamben) than in contemporary Critical Theory with its harsh criticism of the previous generation.' Jean-Philippe Deranty, 'Adorno's Other Son: Derrida and the Future of Critical Theory', *Social Semiotics*, vol 16, no 3 (2006): 432. On the relation between Adorno's philosophy and poststructuralism generally, see Peter Dews, 'Adorno, Post-Structuralism and the Critique of Identity', *New Left Review*, vol 157 (May-June 1986).

[17] See, eg, Giorgio Agamben, *The Coming Community*, trans Michael Hardt (Minneapolis: University of Minnesota Press, 2009); Jean-Luc Nancy, 'Of Being-in-Common', in *Community at Loose Ends*, ed Miami Theory Collective (Minneapolis: Minnesota University Press, 1991). See also Fitzpatrick's work on law and sociality, eg, Fitzpatrick, *Modernism and the Grounds of Law*; Peter Fitzpatrick, 'Leveraging Leviathan', in *After Sovereignty: On the Question of Political Beginnings*, ed Charles Barbour and George Pavlich (Oxon: Routledge, 2009).

[18] For instance, the polarisation between structure and agency is not to be resolved by collapsing the two into a concept of 'structuration' any more than they are to be held apart in an either/or debate. For a critique of Anthony Gidden's concept of 'structuration', see Fitzpatrick, *Modernism and the Grounds of Law*, 51.

the subject as wholly subject and the object as wholly object; or else it would elide the one in pronouncing a unity of the two, in a totalitarian fashion that conceives of an equivalence of subject and object.[19] An example of the former analytical separation is the subject of Enlightenment who sees the world as his object and whose rights as an individual are inviolable—in both cases failing to recognise the extent to which his subjective existence is constituted in the very objective spheres, natural and historical, from which he thinks himself free as a rightful individual. An example of the latter totalitarian elision would be the state in which the individual subject is no longer recognised apart from the whole, which is held up as the objective form of the absolute subject—failing to recognise the extent to which 'the whole realizes itself only in and through the parts, only through discontinuity, alienation, and reflection'.[20]

This is a matter of *justice* in that to speak of 'the subject' in absolute terms is to ignore the ways in which individual manifestations of subjectivity diverge from it, becoming objects of indifference, and as such, being, exposed to violence.[21] Likewise, to speak of 'objectivity' in absolute terms is to overlook the ways in which objects are constituted subjectively, thus concealing their historical concretion, and as such, exposing the subject to violence through its historical exclusion from what is objective whilst allowing for the perpetuation of domination within the production of the object/ivity.[22]

Derrida's philosophy of deconstruction works in a similar way to expose the untruth of binary oppositions and the exploitation that congeals in the space between them.[23] However, in revealing the untruth of binary thinking, Derrida

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[19] As Adorno writes: 'The subject is in truth never wholly the subject, the object never wholly the object; nevertheless both are not to be pieced together out of a third, which would transcend them.' He continues: 'The duality of subject and object is to be critically maintained against the totality claim which inheres to thought.' Adorno, *Negative Dialectics*, 176-177.

[20] This quote is Adorno on Hegel's concept of 'totality': Adorno, *Hegel: Three Studies*, 4. See also Adorno, *Negative Dialectics*, 18-19 and 21-22.

[21] An example I consider in this thesis is liberalism, which, as noted in the Introduction of the thesis, tends to treat every recognised subject as equivalent, thereby reducing it to an empirical individuality that denies its subjective differences. As an 'empirical individual', the subject becomes the object of a universal subjectivity that makes it not only legitimate, but a humanitarian imperative, to assist in developing it to its full potential.

[22] For example, see Marx's critique of capital: Karl Marx, *Capital: A Critique of Political Economy: Volume 1* (London: The Electric Book Company, 1998 [1887]).

[23] The logic of negative dialectics is also one of 'disassembly'—Adorno uses the word *Zerfalls*: decay, decomposition, disintegration. Like Derrida, Adorno is careful to emphasise that this 'is neither solely a method nor something real in the naïve understanding of the term'. 'Not a method' because the dialectical form of things is objective, 'the unreconciled thing, which lacks precisely

neither collapses the two into the one, nor dismisses their relation outright. Deconstruction does not aim to do away with difference any more than negative dialectics; the opposite, it is motivated by an ethical concern for the singularity of the other in its utter difference—hence the two are never reduced to the one. And yet the justice of deconstruction is not to be found in suspending the subject in an infinite plurality of difference—hence the two are never cleaved from one another.[24] Rather, the justice of deconstruction, like that of negative dialectics, is in the experience of contradiction: in *recognising* difference, always *different* from its recognition.[25]

There are two sides to this, neither tenable on its own. (1) In *recognising* difference, difference is affirmed (cognised)—thus what is different is cut short by the identification of what is different.[26] This is difference as 'distinction, inequality, or discernibility'.[27] (2) Recognising what is different as *unrecognisably* different, difference is not affirmed (not cognised)—thus what is different is left open to what is different. This is difference as 'deference', deferring what is different to what is different to its cognition here and now, expressing 'the interposition of delay, the interval of a *spacing* and *temporalizing* that puts off until "later" what is presently denied, the possible that is presently impossible.'[28] Critically, neither position holds on its own. What is different must be articulated for it to be meaningfully spoken of, but this reduces difference to a self-referential identity—to absolute sameness, 'the order of the *same*';[29] and so the meaning must be deferred, but this suspends what is different in indeterminate space—as absolute difference, 'nonidentity';[30] and so what is different must be articulated… and

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that identity which the thought surrogates, is contradictory and blocks every attempt at unanimous interpretation'. And yet not 'simply real: for contradictoriness is a reflection-category, the thinking confrontation of concept and thing.' See Adorno, *Negative Dialectics*, 148-149.

[24] My understanding of deconstruction, and its relation to justice, is based on a reading of Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', *Cardozo Law Review*, vol 11 (1989-1990). For his critique of structuralism, see also 'Structure, Sign and Play in the Discourse of the Human Sciences' in Jacques Derrida, *Writing and Difference*, trans Alan Bass (London: Routledge Classics, 2001).

[25] On deconstruction as justice see Derrida, 'Force of Law'.

[26] To 'cognise' is to 'become conscious of; to make (anything) an object of cognition': see 'cognise, *v.*', OED Online, December 2015.

[27] Jacques Derrida, 'Differance', in *Literary Theory: An Anthology*, ed Julie Rivkin, and Michael Ryan (Malden: Blackwell, 2004), 279.

[28] Ibid.

[29] Ibid.

[30] Ibid.

around it goes. To cut things short, there can be no justice in either *affirming* difference absolutely or in absolutely *deferring* difference.

Doing justice to the subject, whether approached by way of negative dialectics or deconstruction, requires respecting this contradictory experience, which requires a restless process of recognising how the subject is always other than its identified forms. This does not mean refraining from the act of identifying, which for Adorno would mean to stop thinking altogether,[31] which would mean 'not even the simplest operation could be thought through, there would be no truth, everything would be emphatically nothing';[32] and for Derrida would mean suspending the possibility of justice indefinitely, which would be unjust, 'for only a decision is just'.[33] This is the paradox for both Adorno and Derrida: the decisive cognition is as *necessary* as it is *violent*, moving towards truth as much as it is untrue in itself, as just as it is never '*presently* just, fully just'.[34] As Derrida writes, in summarising the problem: 'the ordeal of the undecidable […] must be gone through by any decision worthy of the name', an ordeal that 'is never past or passed', never 'surmounted or sublated' in the decision, but 'remains caught, lodged, at least as a ghost—but an essential ghost—in every decision, in every event of decision.'[35] Truth and justice are *in* this experience of contradiction, an experience that animates every act, every judgment, every thesis.

C Concepts and the non-conceptual

As a philosopher and as a social scientist, Adorno's concern was the violence that is done to life the moment un-dialectical 'identity thinking' is reified in society. Adorno saw this in Nazi Germany, where such thinking facilitated the Holocaust through the ideological equation of the proper subject of human life with the concept of *Volksgemeinschaft*,[36] reducing any non-identical forms of subjectivity to

[31] As he writes, 'to think means to identify': Adorno, *Negative Dialectics*, 16-18.

[32] Ibid, 18-19. See also at 114-116: 'The thought, which wishes to think the inexpressible through the sacrifice of thought, falsifies it into that which it would like least to be, the gratuitous absurdity [*Unding*] of an utterly abstract object.'

[33] See Derrida, 'Force of Law', 963.

[34] Ibid.

[35] Ibid, 965.

[36] The concept of a 'people's community' that became central to the ideology of German National Socialism.

eliminable objects. He saw it in the capitalist-economic reduction of everything to equally exchangeable units. He saw it in a scientific mode of research that treats the isolated object as matter of fact. Above all, he saw it in the modern bureaucratic state, in its drawing together of all of these conceits in the administration of life—identifying subjectivity according to circumscribed categories, rationalising everything instrumentally according to a concept of exchangeability, based on a model of truth that resembles an 'ideology of the positive' that equates what is real with what is identified.[37] Adorno's concern, both in *Negative Dialectics* and in his critical sociology,[38] is to work against this potential violence by insisting on opening thought up to that which remains otherwise than thought, rendered non-conceptual under the order of the concept.[39]

Having set out what is at stake in this, both in terms of the subject's contradictory experience, and how facing the contradiction is a matter of justice, I now turn to the underlying problem, or mechanism, that is, conceptualisation. This is also where a negative-dialectical approach diverges from deconstruction. In sum, where Derrida's philosophy remains focused on subjective constructions, Adorno's negative dialectics is directed at seeing through these constructions to the reality they articulate. In this, Adorno is primarily concerned with what conceptualisation does to its object, and ensuring that the object is not lost sight of.

The German word *begreifen* is a keyword for Adorno, as it was in Hegel's philosophy, and plays on the dual meaning of 'grasp', as both a physical and a mental enclosure.[40] This is 'understanding' as an act of turning objective sense over to conscious thought, in order to *make sense* of the subject's experience of life. This is never an entirely abstract act: thinking always involving taking hold of objects, physically, sensationally, in the attempt to comprehend the experience of them, consciously, rationally. For Adorno, there is no thought without an objective basis,[41] just as 'thinking without the concept is nothing of the sort'.[42] That is,

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[37] See Adorno, *Negative Dialectics*, 61-63. These examples are 'un-dialectical' in the sense that each reifies the positive identity as the truth of the matter, rather than maintaining the truth of the identity in its relation with its non-identity.

[38] See also Matthias Benzer, *The Sociology of Theodor Adorno* (Cambridge: Cambridge University Press, 2011).

[39] As Adorno writes in the Prologue to *Negative Dialectics*: 'With logically consistent means, [negative dialectics] attempts to put, in place of the principle of unity and of the hegemony of the supra-ordinated concept, that which would be outside of the bane of such unity.'

[40] See, eg, Nancy, *Restlessness of the Negative*, 5.

[41] See Adorno, *Negative Dialectics*. See also Adorno, 'The Actuality of Philosophy'.

concepts are never purely subjective but always in relation to an object, always with an object in mind, as little as it might be recognised; and yet the relation between thought and object is never *immediate* but mediated conceptually, the material of thought being an irresolvable confusion of conceptualised things.

Thus for Adorno the problem of conceptual violence is terrifyingly real, not merely the conceit of the intellectual but of the conscious subject who acts in the world.[43] Concepts, as technological innovation, as much as a way to appreciate things, provide the cognitive tools that facilitate the subject's conceited mastery of the world, that is, domination. Adorno's critique of conceptual violence does not aim to do away with theorisation, seeing such an end as no less conceited than the fetishisation of thought, and no less violent, leaving the subject blind to how things continue to be mediated subjectively, and therefore prone to domination without second thought. But the driving concern of negative dialectics is to work against the privileged thought of the subject, which always comes at the expense of the object. With a deep love of language and thinking, Adorno was motivated by a care for the object, critically aware of the violence done to it in the act of articulation, as a conscious act of the subject. For Adorno, the contradiction is irresolvable: the solution, neither to stop thinking out of respect for the object, nor to think that thought can be perfected so as to be at one with the object; no solution, but to seek to open concepts up to their object without making them the same as thought. This is about maintaining an uncompromising respect for the primacy of the object, not by withdrawing from the act that would violate it, articulation, but by making the negative-dialectical relation of subject and object critical to every act of articulation. That is what it means for negative dialectics to be directed at 'the consistent consciousness of non-identity'.[44]

Key to making sense of this is the concept of the non-conceptual. This is the 'more' in the formulation, 'what is, is more, than it is.'[45] What *is*, encompassed, 'is',

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[42] Adorno, *Negative Dialectics*, 104-107. See also ibid, 16-18, 19-21, 114-116.

[43] Compare Austin Sarat and Thomas R Kearns, 'Introduction', in *Law's Violence*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1995).

[44] Adorno, *Negative Dialectics*, 16-18. In this, negative dialectics is just another name for critical thinking—indeed for Critical Theory—demanding attention to what is excluded from and oppressed by every attempt at identification. On the relation between negative dialectics and the Critical Theory of the Frankfurt School, see Buck-Morss, *Origin of Negative Dialectics*. On Critical Theory, see also Max Horkheimer, 'Traditional and Critical Theory', in *Critical Theory: Selected Essays* (New York: Continuum, 2002).

[45] Adorno, *Negative Dialectics*, 163-164.

and what is *more*, remains non-conceptual; being, as thought, reduced to a lifeless form in the hands of the subject. To grasp this, precisely what cannot be grasped, it is worth a brief excursion through a passage from Sartre's novel, *Nausea*:

> For the moment it's the jazz that's playing; there's no melody, only notes, a host of little jolts. They know no rest, an unchanging order gives birth to them and destroys them, without ever giving them time to recover, to exist for themselves. They run, they hurry, they strike me with a sharp blow in passing and are obliterated. I should quite like to hold them back, but I know that if I managed to stop one, nothing would remain between my fingers but a vulgar, doleful sound.[46]

This is what negative dialectics seeks to open up to thinking without making it the same as thought: a world that exists otherwise from birth to death, in restless opposition to what would pin it down definitively, its objects striking the subject sharply, whose every attempt to grasp them renders them lifeless. At a standstill, held firmly between the subject's fingers, its objects become doleful (suffering in abject discontent) as opposed to playing out in a moment of jazz the notes of which know no melody or rest. And it is this critical recognition in the moment of self-reflection ('I should quite like to hold them back, but I know that if I managed to stop one, nothing would remain between my fingers but a vulgar, doleful sound') that negative dialectics insists upon in thinking.

For Adorno, this is where philosophy (by which he has in mind a European tradition of philosophy 'since Plato', and German idealism in particular) has persistently failed, either dismissing from the outset the non-conceptual as 'transient and inconsequential' and of no interest, or else, when it has taken an interest it has done so 'in vain', merely ending up with new conceptualisations of the non-conceptual.[47] Adorno criticises Hegel's dialectic, like every version of

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[46] Jean-Paul Sartre, *Nausea*, trans Robert Baldick (Harmondsworth: Penguin Books, 1965), 36-37.

[47] Adorno, *Negative Dialectics*, 19-21. Sartre's existentialism came close to what negative dialectics hopes to achieve in its attempt to 'break out of conceptual fetishism', in its attention to the moment of experience, and Adorno praises Sartre's early works of fiction in particular in this respect. However, even existentialism does not escape critique, as ultimately affirming an absolute subjectivity 'indifferent towards every objectivity': see ibid, 58-61. In this, Sartre pushed the subject's individual freedom too far, idealising the decisive act of the subject, the decision, resulting in a false liberation, the subject thought separate from its objective conditions. Meanwhile, the object continues to strike the subject unsettlingly, like Derrida's 'ordeal of the undecidable', neither 'surmounted or sublated' in the subject that decides. Thus despite a critical concern for existence beyond the structural order of things, for what is non-conceptually apart from the given modes of being, Sartre's philosophy swung to the opposite extreme; reifying the non-conceptual, existentialism lost sight of the subject of experience the moment it lost sight of its objectivity. For Adorno's critique of existentialism, see ibid. For a response to Adorno's critique, see David Sherman, *Sartre and Adorno: The Dialectics of Subjectivity* (Albany: SUNY Press, 2007), 75-78.

dialectics before and since, for this reason. Adorno's critique is that the Hegelian system lost sight of its object the moment it was held out as wholly identifiable with the subject.[48] This is critically problematic in that the dialectic fails to maintain its negative thrust and ultimately affirms the possibility of a synthesis of subject and object, of reason and reality. Hegel's dialectic thus results in the domination of the object by the 'primacy of the subject',[49] the experience of contradiction ultimately resolved by sublating the object as an aspect of the absolute subject. In this, Adorno writes, 'Hegel is, like Kant and the entire tradition, including Plato, a partisan of the One.'[50] Any approach to thinking that strives for such unity—for a resolution between thought and what thinking seeks to comprehend—is to be criticised, and is criticised ruthlessly in *Negative Dialectics*, just as much as an approach that would separate out the two definitively.

Having said that, Hegel's dialectic remains critical. Adorno's aim in critiquing it is not to trash it but to *release* it, in both meanings of the word: to free it from its confinement, and to work upon it as one's own. Adorno's critique aims to retrieve the negativity in Hegel's philosophy that was so essential in his *Phenomenology*,[51] and push it to its logical end-point, which is without end, a restless overturning of every point.[52] Just as Adorno's negative dialectic aims to open up thinking to the non-conceptual *through* concepts, as instruments of analysis, to release what is dynamic in them, the energy contained in concepts breaking the word of their current lease—the same is true of Adorno's *Negative Dialectics* with respect to Hegel's philosophy. It is in releasing Hegel's dialectical system through its critical treatment in *Negative Dialectics* that Adorno aims to open up the conceptual to the non-conceptual without making them the same.

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[48] As Adorno writes: 'Hegel's substantive philosophizing had as its fundament and result the primacy of the subject or, in the famous formulation from the introduction to *Logic,* the identity of identity and non-identity.' Adorno, *Negative Dialectics*, 18-19.

[49] Ibid. See also 48-50.

[50] See ibid, 158-161.

[51] As Adorno writes: 'As early as the introduction to the *Phenomenology* he [Hegel] gets to the very border of the consciousness of the negative essence of the dialectical logic he is expounding. Its command—to gaze purely at each and every concept until it moves itself, becomes non-identical with itself, by virtue of its own meaning, hence of its identity—is one of analysis, not synthesis. What is static in the concepts is supposed, so as to satisfy these latter, to release what is dynamic out of itself, comparable to the commotion of the drop of water under a microscope. […] Dialectics means, objectively, the breaking of the identity-compulsion through the stored-up energies which are bound up in its concretizations': ibid.

[52] In this Adorno's *Negative Dialectics* sits alongside Nancy's *Hegel: The Restlessness of the Negative*.

D The law of contradiction

The contradiction is central to this mode of thinking, as the 'index of non-identity'.[53] It is therefore important to introduce it here in greater depth. In this it is useful to consider Adorno's formulation: 'Since however this totality [of the concept] is formed according to logic, whose core is constructed from the proposition of the excluded third, everything which does not conform to such, everything qualitatively divergent assumes the signature of the contradiction.'[54]

In logic, at least in the European tradition since Aristotle, the 'law of the excluded third' purports to establish a clear line of separation between two contradictory propositions: 'X' is *either* true (it is 'X') *or* it is not true (it is 'not X'). Whatever fails to live up to the categorical demands of this distinction is relegated to the condition of the contradiction, which is the excluded third proposition: 'X' is true *and* it is not true (it is 'X' and it is 'not X'); and conversely, what is expressed as 'X' is *neither* 'X' *nor* 'not X' (the expression neither true nor not true). Both of these perspectives on the contradiction are instructive and need to be kept in mind.[55]

To understand how this contradiction informs the concept it might help to think about how, as a form of expression, a concept represents what has been squeezed out of its object. What has been squeezed out ('ex-pressed') in the process of conceptualisation, and re-presented as the concept, is 'X'; everything else is 'not X'. But of course, what also remains—neither wholly 'X' nor wholly 'not X'—is the remnant waste from which 'X' has been squeezed. In the logical move to distinguish 'X' from 'not X' this leftover becomes non-conceptually other. It is not identical with 'X' because the expression merely re-presents what has been squeezed out of its object; thus in their relation they are not the same. But this leftover is also not entirely in the category of 'not X'. It is after all the very object of expression: it is the non-identity of identity, expelled as the non-conceptual in the act of giving expression to the concept; thus in their difference they are not unrelated. Suspended in a state of abjection, what is expressed as 'X' remains

[53] Adorno, *Negative Dialectics*, 16-18.

[54] Ibid.

[55] On the need to take both perspectives on the contradiction, from the point of view of subject and object, see Adorno's essay on 'The Experiential Content of Hegel's Philosophy' in Adorno, *Hegel: Three Studies*, 78.

neither 'X' nor 'not X'. From the standpoint of what is expressed as 'X', it is neither identical to its concept nor entirely separate from it.

That is from the non-conceptual point of view of the object of articulation. However, as noted, there is a second perspective on the contradiction, from the point of view of the expressive subject. From this standpoint, 'X' *is* 'X', precisely as it says it is. To dispute the logic of that, from a conceptual perspective, would be self-contradictory, which is absurdity.[56] *And yet:* 'The non-naïve thought knows how little it encompasses what is thought, and yet must always hold forth as if it had such completely in hand'.[57] Whilst 'X' *is* 'X', as it says it is (holding forth 'as if it had such completely in hand'), even from the standpoint of the concept it is patently obvious that it is also not what it seeks to express, despite what it says ('the non-naïve thought knows how little it encompasses what is thought'). To understand conceptually what it means for 'X' to be 'X' therefore requires understanding the absurdity in which the concept is at the same time not what it expresses itself to be. Thus it is 'X' and it is 'not X'. To fail to maintain this self-contradictory understanding at the core of the concept would be to raise the concept to the level of the object at the expense of the object. To insist, for example, that what is expressed as 'X' *is* 'X'., would be to ignore the experience of what can only ever be other than its expression. In this the concept would displace its object twice over, the first time in thinking the concept into existence out of its object, and the second time in reaffirming the existence of the concept in place of its object. This is the kind of totalitarian thinking that negative dialectics works against, by insisting upon the absurdity of contradiction over the violence of affirmation.

By insisting on critical thinking, the intent of negative dialectics therefore is not to break the law of the excluded third or have it struck off the books; it is much more radical than that.[58] Adorno accepts that the contradiction describes the logical form of conceptual thought. 'Identity thinking' is an insatiable conceit, incapable of satisfaction with its object, but it is nonetheless a condition of

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[56] On the definition of absurdity as self-contradiction, see Thomas Hobbes, *Leviathan* (Oxford: Oxford University Press, 2008 [1651]), 88.

[57] Adorno, *Negative Dialectics*, 24-27.

[58] Etymologically the word 'radical' relates to the form of the root, as in: 'Of, belonging to, or from a root or roots; fundamental to or inherent in the natural processes of life, vital; *spec.* designating the humour or moisture once thought to be present in all living organisms as a necessary condition of their vitality.' See 'radical, *adj.* and *n.*', OED Online, December 2015. Negative dialectics is radical in this sense, in that it is directed at showing how the contradiction is at the root of thinking.

thinking. Adorno could not be clearer about this: 'To think means to identify.'[59] To think 'X' means to have in mind a concept of what is 'X', and therefore what is 'not X'. Whilst negative dialectics does not seek to overthrow this law, it does seek to reintroduce the 'excluded third' back into the equation, as the condition of thinking.

Thus the contradiction is not a problem to be ashamed of and hidden from sight or cleaned up with obsessive scrubbing; either way it will remain, perhaps better hidden or else as the stain one tries to ignore. Negative dialectics has no interest in cleaning the surface of thought through better and stronger analysis. To seek such clarity—to determine analytically whether something *is* 'X' *or* 'not X'—is simply to reaffirm the hegemony of the subject over its object, and negative dialectics has no interest in facilitating the subject's desire to control existence. Of course dialectics cannot do without such distinctions: the concept is no less the material of dialectical analysis than is the object that contradicts it. But rather than fetishise the concept, a negative-dialectical approach draws attention to the confusion that results when concepts clearly face their contradiction—to the ways in which what is expressed as 'X' is neither 'X' nor 'not X', and how 'X' itself is always also 'not X'. In short, the intent of negative dialectics is not to resolve the contradiction but to draw attention to it as the untruth of the matter.

E Determination and infinitude

At its most basic 'negative dialectics' is therefore just another name for 'critical thinking', striking at the limits of thought, demanding attention to what is excluded from and oppressed by every attempt at identification.[60] As a critical mode of thinking it is a constant reminder that concepts are wholly inadequate to their task of determining the truth of things, that the truth of a concept lies and lies in its relation with its contradiction.[61] This is what Adorno means when he writes: 'Its name says to begin with nothing more than that objects do not vanish into their

[59] Adorno, *Negative Dialectics*, 16-18.

[60] On the relation between negative dialectics and the theoretical approach of the first generation of 'Frankfurt School' scholars, which Adorno's colleague Max Horkheimer termed Critical Theory, see Buck-Morss, *Origin of Negative Dialectics*. On Critical Theory, see also Horkheimer, 'Traditional and Critical Theory'.

[61] Adorno, *Negative Dialectics*, 16-18.

concept, that these end up in contradiction with the received norm of the *adaequatio*.'[62] What *is*, grasped by thought, always ends up in contradiction with what thinking mistakes for its truth according to the maxim *veritas est adaequatio rei et intellectus* ('truth is the equation of thing and intellect').[63]

This is where negative dialectics 'transgresses'[64] against the dominant European tradition of dialectical philosophy: in maintaining that the truth never emerges in any affirmative way. Unlike the positivist version of dialectics that Adorno critiques, exemplified by the formulation of the 'negation of the negation' as a method of determining the truth of the matter,[65] negative dialectics seeks to reveal how little of the object is present in the material, that is, the untruth of the matter. 'Dialectics [is] not a standpoint', Adorno emphasises:[66] dialectics does not culminate in a truthful exposition any more than it might be used to defend a proposition. There is no such position, no point at which one might stand and look back having finally reached 'the truth'; there is only the constant overturning of the ground on which one stands, as the overturning of the truth in light of its untruth. To take dialectics as a standpoint for determining what is true would be to grind to a halt in a cloud of dust while the world carries on.

The constant movement of negative dialectics and its attention to untruth is not, however, a hopeless descent into relativism or nihilism. Whilst negative dialectics rejects every affirmation of truth, it equally rejects relativism's false individualism, in which the autonomous and self-determining subject is the locus of truth by virtue of its absolute separation from anything objective apart from itself. For Adorno, there is no doubt that there is an actuality beyond the self-conscious subject, that informs the subject, whilst being transformed by it. The point is not that there is no objective truth: the point is that what is objectively true is never *grasped*, comprehensively; existence reducible to a concept of being

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[62] Ibid.

[63] I am assuming 'the received norm of the *adequatio*' refers to this maxim, as formulated by Thomas Aquinas. This is in keeping with the point being made by Adorno, but he does not make his reference explicit. However, whether or not Adorno is referring to Aquinas specifically is not relevant. The point is the reification of this maxim—how, as Goris and Aertsen note, 'the definition of truth as the "conformity of the thing with the intellect" (*adaequatio rei et intellectus*) rose to hegemony': Wouter Goris and Jan Aertsen, 'Medieval Theories of Transcendentals' in ed Edward N Zalta, *The Stanford Encyclopedia of Philosophy* (Summer 2013): plato.stanford.edu/archives/sum2013/entries/transcendentals-medieval/.

[64] See Adorno, *Negative Dialectics*, Prologue.

[65] See ibid.

[66] Ibid, 16-18.

no more than knowledge is reducible to a determinate system of thought.[67] But this also does not end in a nihilistic position of indeterminacy. Rather, as Adorno states in the opening paragraph of the Prologue to *Negative Dialectics*, this approach seeks to emancipate dialectics from any form of affirmation 'without relinquishing anything in terms of determinacy.'[68]

What Adorno means by 'determinacy', and how negative dialectics moves thought towards the determinate without succumbing to affirmation, is what makes this mode of thinking so critical and so necessary to intellectual work. One way to think about this is the relation just touched upon, between what is 'real', as a claim to *the* truth, and what is 'actual', *in* truth. Thus on one side: what is actual, rendered as what is real, reality represents existence in stucco finish, plastered over with a calcareous substance that imitates stone.[69] On the other side: truth in actuality, always more than realised, always penetrates through; the cement wears away with time, dissolves under changing conditions, an interior becomes exposed to an exterior, revealing the gaps, requiring a fresh rendering, a fresh reality.

There are two dimensions at play here: what is actual, which is infinitely realisable, always *more* in truth than what 'is' the truth; and what is real, which is by definition how things are, precisely what 'is' without more. In poststructuralist terms, these two dimensions correspond to determinacy and indeterminacy, as the relation between what is fixed in itself and what is always beyond itself, outside of itself, exterior to itself.[70] For Adorno, as in poststructuralism, both dimensions are always in play. *Reality*: never an ambivalent statement, always an expression of what 'is' actual; whilst what *is* actual: never restricted by its definition as 'is', always overflowing the order of things, always taking form in other ways.

This is not a binary code, switching from one to the other. The point is dialectical, posing truth *in-between* the proposition and the exposition, in-between

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[67] See Adorno's critique of ontology, in particular Heidegger's: ibid, Part I.

[68] Ibid, Prologue.

[69] See 'stucco, *n.*', OED Online, December 2015.

[70] With thanks to Peter Fitzpatrick for drawing my attention to the notion of 'exteriority' as a parallel way of thinking about Adorno's notion of 'more'. My understanding of exteriority is primarily informed by Fitzpatrick's discussion of it in relation to law: see, eg, Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Oxon: Routledge, 2009), 71. See also Fitzpatrick, *Modernism and the Grounds of Law*, 5, 62. On the concept of the 'exterior' or 'outside', see also Maurice Blanchot, *The Step Not Beyond*, trans L Davis (Albany: SUNY Press, 1992); Michel Foucault, 'Maurice Blanchot: The Thought from Outside', in *Foucault/Blanchot* (New York: Zone Books, 1987); Maurice Blanchot, *The Infinite Conversation*, trans Susan Hanson (London: University of Minnesota Press, 1993).

real definition and actual infinitude, in-between finite reality and infinite actuality. This is the *movement* towards truth. Exposing the truth to its untruth, as what is beyond its determinate position, the truth, made to tremble, must move out of itself, beyond itself, towards an other position, if it is to survive and not turn to dust. *And yet* there is no movement without position; infinitude without definition, even less substantive than dust.[71] The truth must stake its claim in real ground, take up position, against the thought of infinity, so that it might tremble in-between, never resting on one or the other, becoming, *in* truth, neither wholly determinate nor wholly indeterminate.[72]

Bringing this back to Adorno's concern with identity thinking, it is by focusing attention on the non-identical—on difference as the untruth of identity—that negative dialectics moves thinking closer to truth. This is the 'determinacy' that Adorno sought to pry from the grip of affirmation. Determination here does not mean bringing the facts into perfect focus in an attempt to see their absolute objectivity, as if objects could be dragged before a microscope as brute facts and known as such without a mediating thought.[73] And whilst thought always falls short in its mediate attempt to identify what is under the microscope, the microscope is not to be trashed in a fit of subjectivity. The opposite: in light of the immanent potential of reason to become irrational the moment it loses sight of its object, which is every moment,[74] and the blind terror of a rational thought that has no particular concern for its object, negative dialectics is driven by a care for the most marginal datum,[75] as that which is either overlooked or else registered indifferently on a graph. 'Dialectics develops the difference of the particular from

[71] As Adorno writes: 'By virtue of its differentiation from nothingness, even the most indeterminate something would be, contrary to Hegel, not something purely and simply indeterminate.' Adorno, *Negative Dialectics*, 174-175. He goes on to write: 'This refutes the idealistic doctrine of the subjectivity of all determinations.'

[72] See Nancy, *Restlessness of the Negative*. In particular see his discussion of 'restlessness' (3-7), 'becoming' (8-13), and 'trembling' (40-45). On 'truth', see also Adorno, *Negative Dialectics*, 21-22, 43-45, 50-53, 57-58, 61-63, 107-111, 114-116, 132-134. On 'infinity', see also ibid, 24-27.

[73] As Adorno puts it: 'Philosophy, Hegel's included, invites the general objection that insofar as it would have compulsory concepts as its material, it already characterizes itself in advance as idealistic. As a matter of fact none of them, not even extreme empiricism, can haul off the *facta bruta* and present them like anatomical cases or physics experiments; none, as so many paintings tempt one to believe, glue specific things onto the text.' Adorno, *Negative Dialectics*, 23-24.

[74] See Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment*, trans John Cumming (New York: Continuum, 1998).

[75] 'It compels thinking to linger before the smallest of all things.' Adorno, *Negative Dialectics*, 43-45.

the generality, which is dictated by the generality', Adorno writes;[76] which is to say: where reason dictates what is real through its conceptualisation of reality—which is always a generalisation to an extent, and its immanently irrational aspect—negative dialectics responds by holding up in reflection the difference of the particular, which is nothing other than the non-conceptual untruth of the identified reality.

And yet the particular *needs* the general, is always an aspect of the general, without which the particular would become meaningless in its absolute singularity, disconnected from everything, mere nothingness. And yet again, the caution: 'So little as the particular would be determinable without the general, by which it is identified according to current logic, so little is it identical with it.'[77] Because the difference of the particular is what is different from its conceptualisation ('dictated by the generality'), what is different 'assumes the signature of the contradiction'.[78] As contradiction, difference is 'the non-identical under the aspect of identity'.[79] This must be kept in mind above all because, to repeat, dialectics is not a standpoint: it is not about discovering and celebrating 'the truth' of reality, even of the most particular kind. The particular is no more true than the general. The moment difference is heralded as anything more positive than a sign of non-identity, it takes on an affirmative appearance—an identity—which would be as untrue as the identity from which it has been excluded. What is otherwise, reified to an identity of the Other, becomes an oppressive conceit.[80] Just as deferring difference indefinitely would result in 'the gratuitous absurdity [*Unding*] of an utterly abstract object',[81] affirming difference would cut short the very object of concern. Again, the point is in the relation between the two, never withdrawing into particularity, out of respect for difference, in condemnation of generalisation as 'bad equality', but also never

[76] Ibid, 18-19.

[77] Ibid, 174-175.

[78] Ibid, 16-18.

[79] Ibid.

[80] As Adorno writes: 'The critique of ontology does not aim at any other ontology, nor even at one which is non-ontological. Otherwise it would merely posit an Other as what is simply and purely first; this time not the absolute identity, being, the concept, but the non-identical, the existent, facticity. Therein it would hypostasize the concept of the non-conceptual and treat it counter to what it means'. Ibid, 139-140.

[81] Ibid, 114-116. See also 118-121.

sublating the particular in awe of the general, reducing difference to sameness—both paths to ignorance.

And so whilst it might be said, as I just have, that negative dialectics moves thinking closer to truth, this is not about determining the truth of what is non-conceptually other any more than it is about affirming a truthful identity. Moving thinking closer to truth is nothing more than the restless overturning of the untruth that accumulates in the pursuit of such an elusive truth. That is why negative dialectics is, at its crux, 'the consistent consciousness of non-identity'.[82]

3 The possibility of philosophy

Introducing *Negative Dialectics*, Adorno stated the aim of his book: 'to drive it [negative dialectics], according to its own concept, into the realm of reality'.[83] The purpose of this chapter has been to draw out five aspects from Adorno's negative-dialectical philosophy that are central to this thesis, both in terms of the arguments I make about the rule of law in general and in Liberia, as well as the methodology for making these arguments. Beginning in the next chapter, my aim is to drive these aspects of Adorno's philosophy into the realities of law, and its rule. On one hand, this means seeing how the subject-object dialectic structures law's rule, opening it up to contradiction; on the other hand, it means seeing how the contradiction makes law's rule a medium of violence, but also potentially a medium of justice.

To a significant extent, this is a matter of *logic*. The logical law of contradiction, as well as the polarised dimensions of determination and infinitude, are abstractions that describe a problem of thoughtful engagement with the world. They are problems that flow from a rational attempt at making sense of experience. However, what makes Adorno's negative-dialectical philosophy so critical to social research is that it shows how this is also a *matter* of logic. For Adorno, the problem of conceptualisation is the problem of what it does to life.[84] Negative dialectics is directed at examining reality without slipping into the conceit of a realism that seeks to unify the real with the rational, as much as it is

[82] Ibid, 16-18.

[83] Ibid, Prologue.

[84] See notes 23 and 43 above.

directed at examining the rational without slipping into an idealism that loses total grip on the real.

This is the possibility of Adorno's negative-dialectical philosophy—the possibility of examining the relation between logic and matter, between the rational and the real, between concepts and what is rendered non-conceptual, to make each critical to the other. This is about opening up the conceptual to the non-conceptual, without holding one's breath.[85] It is also about opening up the thesis to its possibility.

[85] Or as Adorno puts it, 'the utopia of cognition would be to open up the non-conceptual with concepts, without making it the same as them.' Adorno, *Negative Dialectics*, 19-21.

Chapter 2

articulation of normativity

1 Law as is

Law's rule is animated by an irresolvable contradiction. The aim of this chapter is to examine the origins of that contradiction, by driving negative dialectics into the reality of law.

The examination begins with a simple structure, the predicate sentence, of the form subject–copula–predicate: 'it is this'. My argument is that this is also the structure of law, or more specifically, that *law is the copula writ large*: a dialectical medium connecting subject and object, making an existential judgment as to how things 'are' into a corporeal sentence on and of what *is*, at the same time making a grammatical sentence on and of how things 'are' into an actual judgment as to what *is*.

I develop this argument in Part 2 of the chapter by examining law as the articulation of normativity. This involves seeing law from three perspectives: (1) from the standpoint of law as the expressive subject that articulates the sentence 'the law is this'; (2) from the standpoint of the subject within jurisdiction, whose experience is articulated by the sentence 'the law is this'; and (3) from the perspective of the process of law, playing out between the expression of law as 'the law' and the experience of law as always otherwise than 'the law' as expressed.

By examining the concept of law as the articulation of normativity in this way, following the logic of the subject-object dialectic, my aim is to draw out law's chasmic structure. My argument is that the contradiction in law, which makes its institution both separate and inseparable from its subjects, also structures the contradiction in the rule of law, which remains separate and inseparable from the rule of humans. As such, this chapter enables me to peer through the crack in law's rule in the chapters that follow.

A The predicate sentence

But first, the predicate sentence, and never far from the scene, Adorno:

> The cult of being lives by the ancient ideology of the *idola fori* [idols of the market place]: that which thrives in the darkness of the word being and the

> forms derived from it.[1] 'Is' establishes the context of the existential judgment between the grammatical subject and the predicate and thereby suggests something ontic. At the same time, taken purely by itself, as the copula, it means the general categorical matter-at-hand of a synthesis, without representing something ontic. Heidegger draws the ontological purity from the logicity of the copula, thus suiting his allergy against the factical; from the existential judgment however the memory of the ontic, which then permits it to hypostasize the categorical achievement of the synthesis as a given fact. To the 'is' there does indeed correspond a 'matter-at-hand': in every predicative judgment the 'is' has its meaning just as much as the subject and the predicate. The 'matter-at-hand' is however intentional, not ontic. The copula fulfils itself according to its own meaning solely in the relation between the subject and the predicate. It is not independent.[2]

In this passage Adorno identifies two aspects of the copula: (1) *In-between* the grammatical subject and predicate, it establishes 'the context of the existential judgment'. It holds up the sentence as a sentence on and of life, convicting 'it', what *is* in actuality always more than predicated, of being, identifiable, accountable, expressible: 'it is *this*'. At least that is what it holds up—life behind bars. (2) *By itself*, however, as a grammatical operative, the copula merely performs a synthetic function, combining 'it' and 'this', subject and predicate, in a single sentence on and of words, convicting it of this, identifying one with the other, sententiously.

Thus *by itself* the copula re-presents nothing actual, or nothing more than what 'is', in its purest form, discourse—the stuff of ideology as much as idols. And yet this word-play is almost never *for itself*. Used seriously, its intention is to make sense of existence; like the idol, it is intended to signify nothing in itself and always something more. Thus the two aspects of the copula are not simply separate; they

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[1] Francis Bacon considered 'four classes of idols which beset men's minds': those of the *tribe*, corresponding to the common mind of the generic human subject; those of the *cave*, corresponding to the individual mind of the human subject; those of the *market place*, corresponding to an inter-subjective social mind; and those of the *theatre*, corresponding to a traditional mind. See Francis Bacon, *The New Organon, or True Directions concerning the interpretation of Nature*, trans James Spedding, Robert Leslie Ellis, and Douglas Denon Heath (Adelaide: ebooks@Adelaide, 2014 [1620]), Aphorisms, XXXVIII-XLIV. Relevant to this discussion is the third class, the idols of the market place: 'There are also Idols formed by the intercourse and association of men with each other, which I call Idols of the Market Place, on account of the commerce and consort of men there. For it is by discourse that men associate, and words are imposed according to the apprehension of the vulgar. And therefore the ill and unfit choice of words wonderfully obstructs the understanding. Nor do the definitions or explanations wherewith in some things learned men are wont to guard and defend themselves, by any means set the matter right. But words plainly force and overrule the understanding, and throw all into confusion, and lead men away into numberless empty controversies and idle fancies': ibid, Aphorisms, XLIII.

[2] Theodor W Adorno, *Negative Dialectics*, trans Dennis Redmond (2001), 107-111.

are also inseparable. *Crossing one way:* the intention of the linguistic synthesis, to perform a real function, to determine the matter-at-hand: 'it is *this*?'—a serious question. *Crossing the other way:* from the existential judgment, a memory of the ontic pervades what remains purely synthetic, the grammatical construct becoming real: 'it is this!'—a serious answer. *Now both are real:* the actual problem that needs to be judged, a sentence handed down, as much as the sentence that allows for the matter to be spoken of, and therefore taken in hand, and dealt with.

Thus the copula, most meaningful *by itself*, 'is not independent', its meaning always *in-between* what *is*, in actuality, and how it 'is', expressed, enlivening both through the contra-diction. What *is*, in actuality, contradicting how it 'is', expressed; what 'is', expressed, contradicting how it *is*, in actuality. The 'matter-at-hand': always this contradictory configuration of what is objective and what is subjective. Holding this material, as an idol, the subject does not have in hand what it intends to grasp, as *is*. To think the matter-at-hand, as *is*, the subject makes the fatal mistake, making the sentence on and of words into a sentence on and of life. That is why it must not be forgotten that the matter-at-hand is *intentional* and not ontic, intending to hold up what 'is' as how things *are*, without actually upholding how things *are* as what 'is'. To forget this is to forget that 'the *Idols of the Market Place* are the most troublesome of all—idols which have crept into the understanding through the alliances of words and names', words and names that beget other words and names, defining each other and not the objects with which they deal.[3] And yet, the configuration is no idle form. What *is*: brought into being through an act of copulation. Mediating between what *is* and how it 'is' expressed, copulation gives existence a name, being, even more apparent, more *alive* even, at the same time condemning it to idol form, at risk of existence, being, no more than a fetish.

And so, the copula, is, a dialectical medium, making an existential judgment as to how things 'are' into a corporeal sentence on and of what *is*—out of the subjective verdict, an objective sentence; at the same time making a grammatical sentence on and of how things 'are' into an actual judgment as to what *is*—out of the subjective sentence, an objective verdict. 'Is': connecting subject and object through the lines of the conscious mind.

[3] Bacon, *The New Organon*, Aphorisms, LIX. See also note 1 above.

B The predicate sentence of law

If that is the copula, a dialectical medium, synthesising sentences on and of words, that are sentences on and of the world, reflecting the subject's experience of separation and yet inseparability, then what does it mean to say that *law is the copula writ large*?

It means the same, with one forceful difference: *the law is this*—a sentence over life, like every other, and yet like no other. 'The law is this': a sentence like every other, it remains *intentional* and not ontic, *normative* and not definitive; like no other, its hypostasisation is rock-solid. 'The law is *this*', the legal authority states, to which the response can be heard, '*this* is not law', to which the legal authority re-states, *'the law* is *the law*'. 'This', what even the greatest scientific mind non-naïvely refrains from claiming to know absolutely, holding up only a fractured probability of what this 'is', the legal authority renders stone-cold fact.[4] *And yet*, rendered in stucco finish, the sentence plastered over with a calcareous substance that imitates stone, the basis always penetrates through. The voices talk back, 'this is *not law*': a sentence on and of law, convicting it of inadequacy, as 'is', requiring a response that is more than an affirmation of what is 'the law'.

My aim in the rest of the chapter is to examine the implications of this—of seeing law as the copula writ large. I do this in the next part of the chapter by considering law as the articulation of normativity from three perspectives.

(1) The first perspective is from the standpoint of law as the expressive subject that articulates the sentence, 'the law is this'. This means looking at things *through law*—seeing law not as an object of study ('the law'), but as an expressive subject, 'law', that gives form to existence, as its object, always as a normative matter. This is the 'outside' perspective, in poststructuralist terminology, the view from the exterior: law, as subject, looking in at its legal creation non-naïvely. This is also what I refer to as the conceptual perspective. And the view from here is unsettled: the subject can see how every act of articulation, of expressing what 'is' ('the law'), is an idolistic leap of faith, over what remains in between what *is* and what is predicated as 'is'—how 'this' is and is not what it is expressed to be by law. In short, this is about seeing the contradiction in law from the non-naïve

[4] See Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat*, trans Marina Brilman and Alain Pottage (Cambridge: Polity, 2010).

perspective of law-as-subject, a contradiction that animates every expression of 'the law'.

(2) The second perspective is from the standpoint of the subject within jurisdiction, whose experience of law is neither wholly circumscribed by 'the law' as expressed, nor wholly outside 'the law'. Rather than seeing 'law', as subject, this second point of view is about seeing 'the law', as object, from the perspective of the subject whose experience is the very object of law. This is the inside perspective of the grammatical subject of the predicate sentence, that experiences the reality of the sentence, 'the law is this'. This is also what I refer to as the non-conceptual perspective, the abject perspective, of the subject whose experience of law is neither as predicated nor simply free from predication.

These first two viewpoints are concerned with law as a 'subjective' and as an 'objective' phenomenon: from the first perspective, how law *gives form* to the world, as a subjective matter; and from the second perspective, how the law *takes form* in the world, as an objective matter. And yet: 'dialectics [is] not a standpoint'.[5] Having considered law from these two separate standpoints, in positive-analytical fashion, the next task is to confuse things, in negative-dialectical fashion.[6] Thus a third perspective is needed.

(3) If the first perspective provides a view of the pendulum in motion from an external standpoint, observing how it swings back and forth between poles—how what 'is' is also not as *is*; and if the second perspective provides a view of things riding the pendulum, attempting to stay un-nauseated, made dizzy by the experience of an existence neither as 'is' nor not as 'is'; then this third perspective provides a view on the process itself. This is about seeing how 'law' *becomes* 'the law' and how 'the law' *becomes* 'law', and how this process of becoming takes place in the interplay between the two poles of law as expressive subject and the law as object of expression, which is no place at all but a constant movement. This interplay animates law, making it both dominating and emancipating, violent and non-violent; and it is this, as I examine in Chapter 3, that animates law's rule.

[5] Adorno, *Negative Dialectics*, 16-18.

[6] Dialectical analysis is 'confusing' in the sense that it does not just separate out *everything* into discrete *things*, as in positivist analysis, but also focuses on how these analytically separated things are fused together (con-fused).

2 Articulation of normativity

A Acts of articulation

Law is *articulate*. As an expressive subject, law articulates how things are, giving form to reality through its expression as 'the law'. By law: *this is the law*. This is law as 'articulation' in the most basic sense of the term: 'to give expression'. This is 'law', without definite article, without determinate form in itself—an act of *giving form*, of making express, what remains otherwise unexpressed.

Law is also *imaginative*, its expressive scope as limited as the human imagination. Thus law might articulate things linguistically, through acts of writing, speaking, and singing, as well as through other expressive modes, such as dance, sculpture, painting, weaving—indeed through any cultural artefact, through any spatial arrangement, through any act by which the subject gives form to things.[7]

Infinitely imaginative, law nonetheless has a definite object in mind: to articulate normativity. By 'normativity' I mean the quality of being normative: as *prescription*, it is the subjective sentence on life, which subscribers render real by acting upon with conviction, making what is intentional into something ontic. To the serious question, 'it is *this*?', the serious answer, 'it *is* this'. What 'is': always a normative statement, rendered real by its affirmation, as *is*. The child asks: 'the tree is the soil?' The parent answers negatively, cutting the tree from the ground it inhabits, from the air it breathes, from the birds it nests, and affirms, 'the tree is *this*'. Expressing what 'is': always an act of articulating normativity. Likewise 'law': giving form to how things *are to be* by expressing how things ought to be, giving form to how things *ought to be* by expressing how things are to be. Thus the

[7] See Roderick A Macdonald, 'Custom Made - For a Non-chirographic Critical Legal Pluralism', *Canadian Journal of Law and Society*, vol 26, no 2 (2011). See also Austin Sarat, 'What Popular Culture Does For, and To, Law', in *Imagining Legality: Where Law Meets Popular Culture*, ed Austin Sarat (Tuscaloosa: University of Alabama Press, 2011); Austin Sarat and Thomas R Kearns, 'The Cultural Lives of Law', in *Law in the Domains of Culture*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1998); Jessica Silbey, 'Images in/of Law', *New York Law School Law Review*, vol 57 (2012-2013).

expression of law 'gives legal form to life and life to law' as matter of jurisdiction.[8] Juris-diction—the expressive act of law—'gives us the structure of our existence.'[9]

If 'law', without definite article, is a subjective-expressive act of giving form to what is real and what is ideal, jurisdictionally, in a way that the two—reality, and how it is imagined ideally according to law—cannot be separated or finally resolved, then 'the law', with definite article, is the expression that takes form in this act. As an expression *of* law, 'the law' takes form as a dialectical image of how things *are to be* and how things *ought to be*, brought together in a flash, creating a distinct sense of how things are to be *because that is how they ought to be* and of how things ought to be *because that is how they are to be*.[10] Expressed together authoritatively in an imaginative act of law, what remains normative becomes a matter of common sense: 'this *is* the law'; whilst, as an image, the matter of 'the law' is also actually real, giving form to existence regularly.[11]

(i) acts of domination

This is the fantastic reality of law, as an imaginative act of articulating normativity. But like the most powerful fairy tales, there is a violent side to this. To the extent that law is imaginatively articulate, law *articulates*, which is not only 'to give expression', but at the same time and in the process, 'to bend at the joint'.[12] Thus what is expressed as 'the law' is bent in the act of articulation. The expression that

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[8] As Dorsett and McVeigh show in their study of jurisdictional thinking: Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Oxon: Routledge, 2012), 1.

[9] Ibid. See also Peter Rush, 'An Altered Jurisdiction: Corporeal Traces of Law', *Griffith Law Review*, vol 6 (1997); Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford: Stanford University Press, 2014); Austin Sarat and Thomas R Kearns, 'Editorial Introduction', in *Rhetoric of Law*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1996).

[10] On 'dialectical images', see Walter Benjamin, *The Arcades Project*, trans Howard Eiland & Kevin McLaughlin (Cambridge: Belknap Press, 1999), 461-463.

[11] This account of law appears to resemble the one developed by Fitzpatrick in his work on law. Fitzpatrick famously articulates a view of law in terms of a polarity between an indeterminate law, an illimitable law, which is not circumscribed by grounds of its own, on one side, and the determinate laws that lay down the law in the most definite terms, on the other side. See, eg, Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001). At least to begin with, the similarities between Fitzpatrick's view and the one I present here are due to the affinities between a negative-dialectical approach and a poststructuralist one. However—and as Fitzpatrick might point out—because one is always 'beginning again' (see note 23 below), the affinity has been refined and strengthened by my reading of Fitzpatrick's work. I return to discuss Fitzpatrick's influence below, in thinking about 'the process of law', which is concerned with the problem of dealing with the contradictory nature of law. This is where Fitzpatrick's work on responsiveness is especially important to the approach to law I articulate here.

[12] See 'articulate, *v.*', OED Online, December 2015.

takes form as 'the law' is an image of things articulated: giving form to things, law, the expressive subject, does not simply express how things are because that is how things *are*, purely objectively, but represents how things are because that is how they ought to be.[13]

This is the origin of the 'originary violence' of law discussed by Walter Benjamin, Jacques Derrida, and Peter Fitzpatrick. Before getting to Benjamin, Derrida, and Fitzpatrick, however, first Adorno, who also points at this, the originary violence of law, in *Negative Dialectics*, when he addresses 'the juridical sphere' in reflection on Hegel's *Philosophy of Right*:

> Law [*Recht*] is the Ur-phenomenon of irrational rationality. In it the formal principle of equivalence becomes the norm, everyone is measured by [the] same standard. Such equality, in which differences perish, gives a secret impetus to inequality; persisting mythos in the midst of an only apparently demythologized humanity. The norms of law [*Rechtsnormen*] cut short what is not covered, every experience of the specific which is not preformed, for the sake of the seamless systematic, and then raises instrumental rationality to a second reality *sui generis*. […] The entire juridical realm is one of definitions. Its systematic commands, that nothing shall pass into it, which could escape from its closed circle, *quod non est in actis* [which is not in the act/deed]. This enclosure, ideological in itself, exerts real violence through the sanctions of law [*Sanktion des Rechts*] as the socially controlling authority, particularly in the administered world.[14]

In its '*very form*', Adorno writes, law '*expresses domination*, the yawning difference of individual interests from the whole'.[15] As an expressive form—as an instrument of rationality—'the norms of law cut short what is not covered, every experience of the specific which is not preformed'—precisely what is non-identical to 'the law'—and raises this rationalised reality, this legal identity, to the level of a second nature.[16] Whatever fails to live up to this reality, this second nature, given form

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[13] See also Austin Sarat and Thomas R Kearns, 'Introduction', in *Law's Violence*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1995).

[14] Adorno, *Negative Dialectics*, 303-305.

[15] Ibid, 305-306 (my italics).

[16] Adorno uses the concept of 'second nature' to refer to rationalised reality, that is, a reality that is *thought real*, in two senses: mediated by thought, and mistaken for being natural. Buck-Morss summarises the concept of second nature as 'a negating, critical concept which referred to the false, mythical appearance of given reality as ahistorical and absolute.' 'As Adorno employed the term in his own writings, "second nature" was one of a constellation of critical concepts together with "fetish", "reification", "enchantment", "fate", "myth", and "phantasmagoria", which were used to see through the mysterious "natural" appearance of objects in their "given" form to the historical dimension of their production. The purpose of such analysis was to destroy the mythical aura of

through its expression as 'the law', experiences law antagonistically. Thus law 'expresses domination': the law, always an inadequate expression of what *is*, nonetheless imposed on things, demands categorical conformity, under real threat of penalty. And this results from the chasmic structure of law—from the *yawning difference* that separates the empirical individual from the institution of law.[17]

In outlining this view of law, Adorno cites Hegel, specifically Hegel's observation that 'law' [*Recht*] and 'the real world of law' [*Rechts*] are 'grasped through thought,'

> that through thought the form of rationality, namely universality and determinacy, is given, this, the law [*Gesetz*], is what that feeling which reserves itself at will, that conscience which places law [*Recht*] in the subjective conviction, looks at with grounds as what is most hostile to itself. It perceives the form of legality [*Form des Rechten*], as one of duty and one of the law [*Gesetzes*], as a dead, cold letter and as a fetter; for it does not cognize itself in it, hence is not free in it, because the law [*Gezetz*] is the rationality of the thing, and this latter does not permit the feelings to warm to its own particularity.[18]

In other words: the individual subject, who experiences law/*Recht* in the form of what 'is', expressed as 'the law'/*Gesetz*, experiences it 'as a dead, cold letter and as a fetter'. The distinction here between '*Recht*' and '*Gesetz*' is critical, as the distinction between 'law' and 'the law'. *Recht*, as law—*expressing* right—gives form as a conceptual matter to things, as 'this, the law [*Gesetz*]'; thus the law, as *Gesetz*—*an expression of* right—takes form as 'the rationality of the thing', as matter of law. And as the rationality of the thing—as a conceptualisation of how 'things are' by right—the law is experienced hostilely by a life that overflows rationality, that refutes its sentence and continues to play out beyond the grasp of every rational order. Everything remains non-identical to law's imagination of things, and so nothing is recognisable in the law apart from its image, which is never adequate. Law, addressed to its images of *things*, dominates *everything*.

Adorno thus points to both meanings of articulation: to give expression, and to bend at a joint. Adorno's apparently pessimistic verdict is concerned with the

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their legitimacy.' Susan Buck-Morss, *The Origin of Negative Dialectics: Theodor W Adorno, Walter Benjamin, and the Frankfurt Institute* (New York: The Free Press, 1977), 55.

[17] This returns to the meaning of 'chaos' discussed in the Introduction, as a 'yawning gulf, chasm, or abyss'; see also 'chaos, *n.*', OED Online, December 2015.

[18] Cited in Adorno, *Negative Dialectics*, 303-305.

real consequences of articulation, in this case, the consequences of law as the articulation of normativity. *Everything*, cut short by the norms of law: every *thing*, raised to a second reality *sui generis*, as the material of law. In giving expression to reality in terms of 'the law', acts of law, as acts of articulation, are seen to bend reality, giving form to it as what, from the conceptual perspective, *is*, imagined to be its proper, natural form. Thus in the act of articulation, what 'is' is raised to a second nature, that of *the law*; and in the process, what *is*, now identified with the rational reality of a law that is expressed *sui generis*, is cut short, becoming non-identical with what is 'the law'. What is 'more': becoming the stain of an irrational rationality that will not entirely vanish.

Thus the violence of law has its 'origin' in the contradictory experience of being, inseparably apart. Copulation, which holds out the hope of an existential synthesis, producing the one out of the two, produces difference as much as sameness, a third that is neither the one nor the other, nor simply whole in itself, but what *is*, inseparably apart. The law that takes form through the Act is this: no synthesis in fact, but a configuration that nonetheless establishes the context of the existential judgment. 'The law is the law', as the sentence holds out, but what 'is' the law *is* also always otherwise, as experienced by the subjects within jurisdiction. The violence of law originates *in* this contradiction, *in-between* the synthesising act and the demand that what has been disseminated must conform to the synthetic prescription in the way it lives. That is, the violence is in the statement, 'the law is *this*', intensified and made terrifyingly real in the re-statement, '*the law* is *the law*', silencing the voices that say '*this* is not law'.[19]

(ii) acts of emancipation

The violence of law has its origin in the contradiction, but the contradiction also originates the law. Put simply, there would be no law to speak of without it being

[19] Macdonald has articulated the concrete experience of this in his work on legal pluralism. For an introductory paper on this, see Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a *Critical* Legal Pluralism?', *Canadian Journal of Law and Society*, vol 12 (1997). Macdonald develops this further in Macdonald, 'Custom Made'. The point relevant to this discussion is summarised in the following passage: 'As agents, legal subjects understand the normativity of law as originating in their own actions and interactions; that is, they learn about law, first and foremost, from themselves. This is not to say that that they reject the *word*. What they reject is the notion that the pre-existing *word* and accompanying institutional rituals, sacraments, and dogma are the source and force of law. […] The meaning of the *word* is to be understood in actions and interactions'. Ibid, 311 (italics in original). I discuss this further in Part 2 of Chapter 3.

spoken of. Inarticulate, law remains implicit at best: sensed but its sense never made explicit. The act of articulation is *required* for law to be *the law*. As such, the violence that flows from law's contradictory nature is not simply a matter of law-as-subject dominating its object. This violence is also hopeful, also emancipatory. At least these are the claims I now turn to examine.

Adorno does not examine this directly, in terms of law, but this is the implication of his treatment of conceptualisation as a means of both domination and emancipation discussed in Chapter 1. Recall: as an act of domination, a concept cuts short what it intends to express, as its object; and yet, without giving form to the object conceptually, the object would remain unrecognised, sensed but not *made sense* of. Rather than existence cleaved into what is conceptual and what remains non-conceptual, existence would remain meaningless, never being, made sense of (being as nothing). Or rather, because humans, as conscious subjects, are thinking subjects, always making sense of existence, the result of not actively thinking would be to abandon the object to how it is nonetheless recognised by other articulate subjects (being as given). Conceptualisation, as *re-conceptualisation*, is therefore emancipatory to the extent that it works to overturn the untruth of what has been given, moving the concept towards its non-conceptual aspect.

Bringing this to bear on the concept of law, to begin with, merely sensing what is law as a normative matter might be sufficient most of the time, but when my sense of what is law and your sense of what is law come into conflict, a decision has to be made as to what is *the law*. Whilst this decision necessarily cuts short both senses of law, yours and mine, to a greater or lesser extent, in articulating a common sense of law ('the law is this'), the decision is nonetheless necessary if the conflict is to be resolved by law. The legal decision might substitute a harshly singular untruth—'the law is *this*'—for the amorphous truth that is most just in respect of an infinite plurality of difference, but the definite injustice of a decisive law is nonetheless more just than the indefinite justice of an indecisive law. The decisive cognition is as necessary as it is violent, as just as it is never fully just.[20]

As Fitzpatrick writes, 'the "original" violence pertaining to law' is the 'incessant violence which inevitably follows from there not being an origin and

[20] See Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', *Cardozo Law Review*, vol 11 (1989-1990). See also the discussion of this in Part 2 of Chapter 1.

from law having to originate in each act of legal decision.'[21] Thus every act of legal decision-making—stating 'the law is *this*'—gives form to law as a 'fresh judgement'.[22] *And yet*, what is 'the law' remains *intentional* and not ontic. The result is that what 'is' the law remains in need of a fresh judgment, either to affirm that 'the law' *is*, in fact, 'the law', or else to amend the initial act, to answer the question, 'the law is this?', with a new statement, 'the law is *this*'.

Articulating what is the law becomes even more imperative when the situation is not simply one where you and I, amongst others, have a sense of law as a normative matter and every now and again need to articulate what is the law to avoid or resolve conflict, but when what is the law *has already been* articulated. In this situation, the question of justice is not simply to decide what is the law for the first time—to make common sense of what is law in relation to your sense and my sense—but to do this also in relation to a previous expression of law. The legal decision is emancipatory in this situation in that it is an act of 'beginning again',[23] holding out the potential of deciding again what is 'the law' in response to the experience of legal subjects. This is about overturning the untruth of the law, as the injustice of the law, by moving it towards what is more, true and just.

I continue to examine the implications of the emancipatory aspect of acts of articulation in the section below on 'the process of law', when I discuss Fitzpatrick's work on responsiveness. Before I get to that, however, I need to say something more about the experience of law as the articulation of normativity from the second perspective, that of the subject within jurisdiction.

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[21] Fitzpatrick, *Modernism and the Grounds of Law*, 80-81. As Fitzpatrick makes clear, whilst an indecisive law is no such thing, *the law* is decisive. Thus like the copula, law establishes 'the context of the existential judgment', and in this, it establishes the grounds of violence. Benjamin also pointed to this originary violence of law in his 'critique of violence': see Walter Benjamin, 'Critique of Violence', in *Walter Benjamin: Selected Writings, Volume 1, 1913-1926*, ed Marcus Bullock and Michael W Jennings (Cambridge: Belknap Press, 2002). See also the discussion of this in Derrida, 'Force of Law'.

[22] See Fitzpatrick, *Modernism and the Grounds of Law*, 80-81.

[23] I use 'beginning again' in the sense discussed in Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Oxon: Routledge, 2009), 123. According to Golder and Fitzpatrick, the notion of 'beginning again' is central to Foucault's understanding of the ethical possibility of law. For Foucault, 'society can exist only by means of the work it does on itself and on its institutions', and thus 'we are always in the position of beginning again'.

B Being abject before the law

In the previous section I took the standpoint of law as the expressive subject to see how law acts to give form to existence, bending it in the act of calling it into being. From this perspective, 'the law' is law, but it is also not identical with what law seeks to express through its conceptual schemas. This makes law's acts of articulation both dominating, with 'the law' cutting short its object, and emancipating, as an act that might re-form 'the law' to move it closer to its object, by remaining consistently conscious of non-identity.

So much can be seen by taking the standpoint of law as the expressive subject looking upon its legal creation non-naïvely. However, there is another side to this, which is the experience of the subject within jurisdiction. The question here is: what does the contradiction that animates law, making it both dominating and emancipating, look like from an 'objective' standpoint? This question switches perspectives to make law in its given form the object to be comprehended from the standpoint of the subject that finds itself before the law.[24] As I now turn to discuss, this perspective focuses on how 'the law', never simply as *is*, is never simply experienced as given. Again, there are two dimensions to this. For one, how a subject of law experiences what *is* law is never identical to what is expressed as 'the law';[25] and yet a subject's experience of what is law is never entirely outside the law either, insofar as law speaks to subjects' experience jurisdictionally.[26]

For the subject who experiences law in this way, as always other than given, and yet must answer to the law, *as given*, by force of law, this is an abject experience of being, 'cast off or away, esp. as being vile or unworthy; refuse, scum, dregs. Chiefly *fig.* of persons.'[27] This experience of abjection is the 'objective' experience. In the inspired act of giving form to the law, the object of law—the very experience of its subjects—is both law's vital material and its toxic waste

[24] The difference between these two points of view is the difference between the conceptual and non-conceptual perspectives on the contradiction discussed in Chapter 1. From the conceptual perspective (the articulate perspective, examined in the previous section) 'the law' as expressed *is* law, but also not law; whilst from the non-conceptual perspective (the abject perspective, examined here) what *is*, expressed as 'the law', is neither 'the law' nor not 'the law', but always more.

[25] As discussed in Chapter 1, what is expressed as 'X' is never entirely 'X'.

[26] Again, as discussed in Chapter 1, what is expressed as 'X' is never entirely 'not X'.

[27] 'Abjection, *n.*', OED Online, December 2015.

('refuse, scum, dregs'), expelled with every breath.[28] Thus the subject, who experiences law objectively, experiences it abjectly.

Adorno, commenting on Hegel's *Philosophy of Right*, sums up the absurdity, and the violence, of this experience:

> That the individual feels so easily wronged, when the antagonism of interest drives it into the juridical sphere, is not, as Hegel would like to argue, its own fault, such that it would be too deluded to recognise its own interest in the objective legal norm and its guarantee; rather it is that of the constituents of the legal sphere itself.[29]

The abjection felt by the subject that fails to recognise its experience in the objective legal norm is not delusional but entirely *rational*; it is not a symptom of the irrationality of the subject but of the law itself. Thus it is in the experience of the subject that the rationality of the objective norms of law is shown to be irrational; that what is rational to the law is irrational to what is before it. And this—being, non-identical before the law, as a normative matter—is the original and unshakeable legal experience. As Adorno writes: *law is the Ur-phenomenon of irrational rationality*.[30]

And so the subject within jurisdiction always finds itself in a state of being abject before the law, as a *physical* matter—as the subject who stands before a magistrate; but also as a *temporal* matter—as the subject whose sense of normativity is felt before it is articulated in terms of the law; and as a *sequential* matter—as the subject whose sense of normativity is given form by law and superseded in the process.[31] Coming before the law in every sense, as 'worthy' of a law that takes its name, and yet—being, 'vile or unworthy; refuse, scum, dregs'[32]—never able to finally enter into it, physically, temporally, sequentially, the subject of law remains suspended on the threshold.

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[28] On 'inspiration', see Part 1 of Chapter 1.

[29] Adorno, *Negative Dialectics*, 303-305.

[30] Ibid. See also note 14 above and accompanying text.

[31] But it is important to keep in mind the three meanings of 'supersede', as a *sequential movement* that *marks the end* of what is being superseded, but also as a *deferral*. The third meaning is especially important to keep in mind, because it redirects the flow of events, backwards. An act of supersedence is never simply a uni-linear development, but also a deferral of what remains in parallel existence, delayed, and therefore still potentially to come. This is important because it points to how what is superseded is never totally obliterated but rather remains latent. For these three meanings of 'supersede', as a sequential movement, as marking an end, and as a deferral, see the entry for 'supersede, *v.*', OED Online, December 2015.

[32] See note 27 above.

Perhaps this is also the experience of Kafka's countryman 'before the law', who never passes into the law, nor walks away from its gate.[33] If Adorno could have spoken with Kafka's countryman he might have said up front: 'Its systematic commands, that nothing shall pass into it, which could escape from its closed circle';[34] which would be to say: under the order of law, only *nothing* shall pass into the law ultimately, whilst being, suspended otherwise on the threshold.[35] The gate, as the concept, opens to its object at the same time as it refuses entry to that which remains abject before it. And so this law, which takes your name and talks to you, is neither for you nor not for you.

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[33] See Franz Kafka, *Before the Law*, trans Ian Johnston (Online: http://records.viu.ca/~johnstoi/kafka/beforethelaw.htm, 2015 [1915]).

> Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment. The man thinks about it and then asks if he will be allowed to come in sometime later on. 'It is possible', says the gatekeeper, 'but not now'. The gate to the law stands open, as always, and the gatekeeper walks to the side, so the man bends over in order to see through the gate into the inside. When the gatekeeper notices that, he laughs and says: 'If it tempts you so much, try going inside in spite of my prohibition. But take note. I am powerful. And I am only the lowliest gatekeeper. But from room to room stand gatekeepers, each more powerful than the last. I cannot endure even one glimpse of the third.' The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks, but as he now looks more closely at the gatekeeper in his fur coat, at his large pointed nose and his long, thin, black Tartar's beard, he decides that it would be better to wait until he gets permission to go inside. The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years. […] Finally his eyesight grows weak, and he does not know whether things are really darker around him or whether his eyes are merely deceiving him. But he recognizes now in the darkness an illumination which breaks inextinguishably out of the gateway to the law. Now he no longer has much time to live. Before his death he gathers up in his head all his experiences of the entire time into one question which he has not yet put to the gatekeeper. He waves to him, since he can no longer lift up his stiffening body. The gatekeeper has to bend way down to him, for the difference between them has changed considerably to the disadvantage of the man. 'What do you want to know now?' asks the gatekeeper. 'You are insatiable.' 'Everyone strives after the law', says the man, 'so how is it that in these many years no one except me has requested entry?' The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, 'Here no one else can gain entry, since this entrance was assigned only to you. I'm going now to close it.'

[34] Adorno, *Negative Dialectics*, 303-305.

[35] For a similar reading of Kafka's parable, see Peter Fitzpatrick, 'Necessary Deceptions: Kafka and the Mystery of Law', (forthcoming). See also Fitzpatrick, *Modernism and the Grounds of Law*, 80-81. '[…] So, tying law to the violence of the origin entails not an origin whose violence has a fixed and forceful palpability, but an origin pervaded by what is non-existent, an origin whose violence is constantly impelled by that very *nothingness*. Not only do we see law here imbued with originating violence, but we also find it fully occupying the place of the origin. *There can be nothing before this law*. Or, putting that at a tangent, what is before this law can only be *nothing*. Or, putting it at another tangent, law ultimately comes from nowhere and is not beholden to anything before it. […]'

C The process of law

'Dialectics [is] not a standpoint'; and yet so far this examination of law as the articulation of normativity has approached law from two standpoints. This is necessary to see law as the copula writ large, but wholly inadequate. The problem with points of view, even when precariously grounded in contradiction, is their fixation: they still seek to put things in their place. 'Law' and 'not law', 'identity' and 'non-identity', 'subject' and 'object', and every perplexing combination of these: the result remains a punctuated arrangement. Recall the general question this thesis seeks to answer: *what takes place in the rule of law?* What is missing from this chapter so far is an examination of the very *process* of 'what takes place', the passage *in-between* law's states of fixation.

The question here is no longer *what* takes place: the *fact* that 'law' is 'the law' and not 'the law'; the *fact* that what is expressed as 'the law' is neither 'law' nor not 'law'. The question here is the *taking place* of 'what': *how* 'law' becomes 'the law', and *how* 'the law' becomes 'law', without the two ever becoming equivalent. It is this (im)possibility of 'law's becoming'—of law becoming the law and the law becoming law—that I take up in this final section.

In part this is about the emancipatory violence discussed at the end of the first section of this part, on 'acts of articulation', which makes every act of law an act of 'beginning again',[36] holding out the possibility of deciding again what is 'the law' in response to the abject experience of the subject. As discussed, this is about overturning the untruth of the law, as the injustice of the law, by moving it towards what is more, true and just. However, it also has to do with what Fitzpatrick points to as the *non-violence* of law.[37]

If the violence of law is its rational aspect as the articulation of normativity—law's every act cutting short its object—then the non-violence of law is its non-rational aspect, its *openness* to what remains its object, non-conceptually other.[38] As I showed in the discussion of the 'predicate sentence of law', whilst law, as the copula, is most meaningful *by itself*, its expressions are nonetheless mere

[36] See note 23 above.

[37] See Peter Fitzpatrick, 'Why the Law is also Non-Violent', in *Law, Violence and the Possibility of Justice*, ed Austin Sarat (Princeton: Princeton University Press, 2001).

[38] See also Fitzpatrick, *Modernism and the Grounds of Law*, 78.

word-play if it does not also establish 'the context of the existential judgment'. For law, as the copula, to be *really* meaningful, its sentences on and of words must become sentences on and of life. But this means law must be *open* to life, as its object, as much as its acts cut short existence by rendering its own sentences as what is real. In short, for law to become the law in fact and not just in word, law must remain open to becoming the law always in respect of the fact of its being otherwise.

Following Adorno, this means ensuring law remains open, as a conceptual matter, to what is not the law, as a non-conceptual matter, without making the two the same—ensuring acts of law remain 'consistently conscious of non-identity' in the process of articulating identity lawfully. This is also to follow Fitzpatrick in thinking about the responsiveness of law. Before I get to Fitzpatrick and the possibility of responsiveness in law, however, I need to continue with Kafka, because perhaps what is most interesting about his parable here is what it suggests about law's non-violent aspect, as much as its violent aspect, and therefore its ethical possibility.

In his parable 'Before the Law',[39] Kafka's gatekeeper tells the countryman at the outset that he cannot be admitted to the law 'at the moment', although 'it is possible' he will be allowed entry later. From the abject perspective, this possibility seems like an insidious conceit. For the countryman before the law, it is this possibility that makes law seem *omnipotent*, giving its gatekeeper—which is only its first gatekeeper—an overbearing power to refuse entry. This appears to be an insidious conceit because, if the possibility of entering was *not* held out, it would not be possible for the gatekeeper to withhold entry. It is the very possibility of admission that gives law its power to exclude; and so the countryman sits and waits in abjection, refused entry for the moment, but in anticipation of the possibility of being admitted later, through a gate that was after all made for him. From this perspective, it is the possibility of law giving form to how things ought to be, determinately, as an objective matter, that enables 'the law' to take form, to transform everything into 'the norms of the law', whilst also leaving its object at the gate, as 'unworthy' of finally entering into the law. And perhaps that is the contradictory possibility of law, seen non-conceptually: a violently insidious

[39] Reproduced in note 33 above.

conceit, a trick that allows law to constitute itself as *the law* out of its object at the expense of its object.

And yet, shifting standpoints to take the conceptual point of view, the opposite is also apparent. From this perspective, the possibility of law being open to its object is not its power to exclude its subjects from the law, but rather a reflection of its need to be attuned to what it is *powerless* to include: the experience of the subject. From this perspective, the subject's experience cannot finally pass into law and become its objective experience of 'the law', not because law is omnipotent, but because law is *impotent*. From this perspective, even if Kafka's gatekeeper wanted to admit the countryman he would have been powerless to do so—law, the expressive subject, always ultimately failing in its effort to articulate things 'objectively'.

Thus what appears to be an insidious conceit, is, from one perspective, and from another, is merely a reflection of law's insatiable need to reach out to what it is powerless to grasp. 'You are insatiable,' Kafka's doorkeeper says to the countryman at the end of the parable… The sentence hangs between the doorkeeper and the countryman, implicating them both. The subject before the law is insatiable, spending his life seeking entry into a law that never admits him entry nor refuses him absolutely (the possibility is there; the gate is made for him after all). But so too is law as the expressive subject insatiable, unable to grant admission to what by its own designs it is intended to admit. And yet, without the possibility of satiation hanging between them, bringing them together in this maddening way, the countryman would go elsewhere, seeking law in other ways, and the law would become uninspired, taking one last breath before becoming entirely instrumental rationality without any redeeming quality.

It is in light of this absurd portrayal of law that Fitzpatrick's work on responsiveness becomes urgent; because responsiveness is nothing other than how to deal with law's contradictoriness in a way that makes its possibility its *ethical* possibility. As mentioned above, Fitzpatrick articulates a theory of law that is very similar to the one I have outlined here, in terms of a polarity between an indeterminate law, an illimitable law that is not circumscribed by grounds of its own, on one side, and the determinate laws that lay down the law in the most definite terms, on the other side. In Fitzpatrick's work, these two polarised dimensions are as integral to each other as they are disparate. Law would remain

impotent if it were entirely beyond delimitation, just as the laws would begin to crumble if they were absolutely fixed. Law must be grounded, just as the grounded laws must remain responsive to what remains otherwise indeterminate. Returning to the terms I have been using: 'law' (without definite article) must take form as 'the law' (with definite article), and yet to be *law*, it must always also be more than 'the law' as expressed. This is about law becoming the law in ways that respect its being unconditionally otherwise. As Fitzpatrick puts it:

> 'The law' thence would be an unconditional law of utter responsiveness to the other, a responsability, to revive an old usage. This could only be a law incapable of containment. Yet, without more, such a law would be a mere dissipation. So, that law would depend for its realization on the conditional and conditioned 'laws' to give it determinate effect. The determinate laws, in turn, depend on the unconditional law, the responsive law, for their own continuing existence.[40]

This law, 'incapable of containment', is law in its non-conceptual aspect. And yet, '*without more*, such a law would be a mere dissipation': what is more, must be breathed in and given expression to as 'the law', if it is to be more than indeterminate vapor. But—and this is the critical move—'the determinate laws, in turn, depend on the unconditional law, the responsive law, for their continuing existence': expressed as 'the law', law is stripped of its vital substance, becoming toxic waste, and again 'such a law would be a mere dissipation'. That is why law in its conceptual aspect, as the articulation of normativity, must remain responsive, to ensure it does not cease to be law. Just as the non-conceptual *more* requires concepts of what 'is', concepts of what 'is' must remain open to what *is* beyond their order. In this sense 'responsive law' is inspired law, a law that remains open to its non-conceptual aspect at the same time as it gives expression to the law determinately. Being responsive—being responsable, 'to revive an old usage'[41]—is to continue breathing, to revive an even older usage.

Thus the 'problem' of law for Fitzpatrick, which is also law's 'possibility', is found in the tension between its infinitude and its determinacy, in the *process* that plays out in-between 'law' and 'the law'.[42] This process makes law an abject experience for subjects before the law, but it also holds open the law to being

[40] Peter Fitzpatrick, 'The Revolutionary Past: Decolonizing Law and Human Rights', *Metodo: International Studies in Phenomenology and Philosophy*, vol 2, no 1 (2014): 128.

[41] See note 40 above.

[42] See discussion of 'determination and infinitude' in Chapter 1.

otherwise. Thus on one side, the process of becoming makes the law a terribly fallible conceit, and a potentially violent instrument of domination. As Fitzpatrick emphasises in his reading of Kafka's *The Trial*: 'There is no trial. Or the title could be translated as "the process". There is no process.'[43] Fitzpatrick's point is that *The Trial*, or *Der Prozess*, has this closed dimension to it, describing a legal process that cuts short its object, the experience of the protagonist K., refusing entry to a subject who remains abject before it. The process of law, by which law becomes not law the moment it opens its mouth to articulate the law, is, from this perspective, not a genuine process at all. In this limited form, 'the trial, the process, is in-terminable', never admitting its object, it remains a closed circle.[44]

But there is of course more to the process—just as there is more to *The Trial*. The process of law's 'becoming' is also its ethical possibility. Fitzpatrick draws this out in his reading of Kafka, showing how in Kafka's writing: 'With law, there is always an "opening" as well as a "closing", a possibility somehow embedded there'.[45] This is the possibility of becoming law through a process that is always interminable, but in its infinite—or 'illimitable'—attunement to what is more than it is, also always open to its object. In short, law is always *beginning again*, opening it up to being, otherwise.[46] This 'position of beginning again' is not a proposition (a 'beginning-position') for finally reaching the truth of the matter of law. Being, 'always in the position of beginning again', is no such position at all: it is not a standpoint, but an insistence on the constant overturning of the grounds of the law in respect of the ever-new ways of 'relating to others and being-together'.[47]

This is the critical aspect of the process of 'law's becoming': remaining consistently conscious of how law, as the articulation of normativity, is an opening and a closure, both at the same time, making one critical to the other. Law, as the articulation of normativity, is never wholly open, because then the process would be as good as closed, interminable in the sense of always being without closure,

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[43] Fitzpatrick, 'Necessary Deceptions'.

[44] Ibid.

[45] Ibid.

[46] As discussed above, in note 23, Golder and Fitzpatrick point to how 'beginning again' is central to an understanding of the ethical possibility of law. Citing Foucault they note how 'society can exist only by means of the work it does on itself and on its institutions', and thus 'we are always in the position of beginning again'. They continue: 'It is this constituent attunement to alterity, to new ways of relating to others and of being-together, that constitutes the sociality of Foucault's ethical project.' Golder and Fitzpatrick, *Foucault's Law* 123.

[47] Ibid.

difference deferred indefinitely, being as nothingness. But law, as the articulation of normativity, is also never wholly closed, because then the process would become wholly irrelevant, never open to its object, objectless absurdity, and total violence. Never one or the other by itself, but also never absolutely fused together, the two becoming one only to blind the subject as to how the unity is like the promise of false idols. Or as Fitzpatrick writes, reflecting on *The Trial*: 'The opening and the closing fuse in our being drawn into the emanant radiance of the law—"a radiance that streams forth inextinguishably from the door of the Law".'[48] The radiance of the law that appears to transcend its contradictory condition is blinding, leaving the subject no less abject but much less capable of mediating the contradiction.[49]

3 Opening up to the rule of law

The question that runs through this thesis in many different ways is what takes place in the act of articulation. This question is the critical concern of negative dialectics, as I showed in my reading of Adorno's philosophy in Chapter 1. To understand the implications of this question for law, I began this chapter by considering a simple structure, the predicate sentence, of the form subject–copula–predicate: 'it is this'. In examining this structure, I showed how the copula is a dialectical medium, connecting subject and object without overcoming their separation. I then argued that this is also the form of law—that law is the copula writ large—an argument I developed in Part 2 by examining law as the articulation of normativity.

The point I pursued is that, if giving express form to *things* contradicts *everything*, which remains the ways in which things are not as expressed, then in the act of articulating what 'is' by law, 'the law' as expressed remains non-identical with what it seeks to express. As I showed, this can be terribly violent, with law's acts of articulation dominating its object by cutting it short through the norms of law. But it can also be emancipatory, with every new act of articulation re-forming what has been expressed as the law, potentially bringing law closer to its subjects.

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[48] Fitzpatrick, 'Necessary Deceptions'.

[49] See also Panu Minkkinen, 'The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka', *Social and Legal Studies*, vol 3, no 3 (1994).

At the same time, law's non-violent aspect—its 'illimitable openness'—means that law must remain open to life, as its object, as much as its acts cut short existence by rendering its own sentences as what is real. Thus for law to become the law in fact and not just in word, law must remain open to becoming the law in respect of its being otherwise. This is what makes the process of law both responsive and 'responsable'.[50]

The remaining chapters of the thesis are concerned with what this concept of law means for law's *rule*. If the institution of law is animated by a contradiction that makes its expressions both law and not law, then where does this leave 'the rule of law' as a theoretical proposition and as an empirical reality?

[50] See note 40 above.

Chapter 3

instituting law's rule

1 A proposition

The chasmic structure of law examined in the previous chapter gives rise to a critical question in both theory and practice: where does it leave 'the rule of law' as a proposition?

The argument I make in this chapter is that it leaves it in a very *fertile* position. Animated by a contradiction between the intention of instituting an objective order that separates law from its subjective basis—so that it is law, and not humans, that rules—and yet the impossibility of achieving that separation, law's rule cannot be closed off to its subjects. As an institution, the rule of law must remain open to what its conceptual schema does not wholly admit: the subjects who enliven it whilst remaining abject before it. This is not a resolute position, because the rule of law, like every modern institution, always cuts short as a normative matter the subjects upon whose backs it is to be found. But this is also not a hopeless position, because it exposes both the possibility and the necessity of its responsiveness as an institution to the subjects who enliven it. Thus law's rule is enlivened by a dialectic that makes 'the rule of law' not only a violent conceit but also a critical institution of social life.

I make this argument in two steps. In the first (Part 2), I examine 'the definitive theory of the rule of law' to show how 'the rule of law' and 'the rule of humans' are separate, and opposed, but also inseparable, and constitutive, and how this places the institution on fluid grounds, neither entirely negating its possibility nor giving it a determinate position. To do this, I begin by considering how legal pluralism, understood as a diagnostic of the normative differences that animate law's life on the ground, reflects the contradiction in the proposition of the rule of law. That is, as a reminder of the subjectivity of law, legal pluralism reflects the problem that the rule of law cannot be closed to its subjective situation through the institution of legal order. With this in mind, I then turn to the theory of the rule of law to show how, as a proposition, it is set against the very arbitrariness that results from law's pluralism. Thus the need for discretionary treatment by law, to ensure the law remains responsive to the plurality of difference that confronts it, comes up against the need for standard measures of law, to ensure the law is not exercised arbitrarily but applies equally to everyone.

In the second step (Part 3), I turn to the problem of 'instituting the rule of law' in practice. Having established the chasmic structure of the rule of law, the question remains: where does this leave its institution as an empirical matter? I address this question by considering how the chasmic structure of the rule of law opens it to animation by different 'logics', which inform how it takes place. In doing this I show how a theo-logic once sought to resolve the contradiction in the rule of law by invoking God as the ultimate authority. In this way, the sovereign position of the law-maker could be upheld at the same time as the sovereign was held subject to the law, through the logic of a natural law that ultimately made law, and not humans, supreme. Likewise, I show how a mytho-logic now operates to resolve the contradiction by naturalising the institution of the courts as the objective arbiter of the rule of law, ensuring law-maker is subject to law at the same time as law is subject to law-maker, as a matter of law. Thus, just as the objective authority of God once ensured it is law, in the end, and not humans, that rules, now it is the objective authority of the courts that ensures it is law, in the end, and not humans, that rules. However, neither the theological natural law nor the mythological judicial objectivity ultimately resolves the contradiction, leaving law's rule open to other logics, and in particular other ideologies such as capitalism, to inform how it takes place. This, I argue, is what enables para-sitic regimes to colonise a place and people through the institution of the rule of law.

2 The definitive theory of the rule of law

The subjective nature of law, which makes 'the law' more than the output of an institutionalised production process,[1] poses a problem for a definitive theory of the rule of law. The problem is that by definition 'the rule of law' is opposed to 'the rule of humans',[2] and yet law remains an inter-subjective phenomenon; thus the rule of law, set against the rule of humans, cannot be instituted in a way that finally separates law from its subjects. In examining this problem here, I begin by

[1] See Chapter 2, where I discussed how law does not merely have an objective form, as something that might be 'made' and 'received' as a pre-fabricated order and erected over the heads of humans, but is also always enlivened in and through the subjects of law.

[2] This has been the case since Aristotle: see Part 16, Book 3 of his *Politics.* For an historical overview, see Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004). See also Brian Z Tamanaha, 'The Rule of Law for Everyone?', *Current Legal Problems*, vol 55, no 1 (2002).

considering the phenomenon of 'legal pluralism'. This extends the discussion of the concept of law in the previous chapter to show how law is animated by a plurality of difference, which, as I go on to discuss, is the very 'problem' of the rule of law.

A Law's pluralism

(i) a relational legal pluralism

'Legal pluralism' is now a core theme of socio-legal scholarship.[3] A dominant tendency within this field is to approach legal pluralism as a question of the relation between different forms of law, or 'legal orders'.[4] For social scientists observing the law 'objectively', in the forms it takes on the ground, the problem is how apparently distinct legal orders—such as the national legal order of a state, the customary legal order of a people within a state, and the international legal order between states—intersect and interact with each other, informing each other whilst remaining apart from one another as forms of law. To quote the definition given by Brian Tamanaha, which is representative of this approach, '*legal pluralism* refers to a context in which multiple legal forms coexist'.[5] The problem, in other words, is that law, in 'a context of legal pluralism', takes form in different, multiple and often contradictory, ways.

For instance, take the following two forms of law: the 'national law of Liberia' and the 'traditional law' of one of Liberia's communities. As forms of law, they appear to be very different, with one representing the Anglo-American

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[3] For a review of this literature, see Miranda Forsyth, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (Canberra: ANU E Press, 2009), Chapter 2. See also Sally Engle Merry, 'Legal Pluralism', *Law and Society Review*, vol 22, no 5 (1988). I find the most compelling approach to legal pluralism in Macdonald's work on a 'critical legal pluralism'. For an introduction, see Martha-Marie Kleinhans and Roderick A Macdonald, 'What is a *Critical* Legal Pluralism?', *Canadian Journal of Law and Society*, vol 12 (1997). Macdonald develops this further in Roderick A Macdonald, 'Custom Made - For a Non-chirographic Critical Legal Pluralism', *Canadian Journal of Law and Society*, vol 26, no 2 (2011). I discuss this approach further below. See also Peter Fitzpatrick, 'Law and Societies', *Osgoode Hall Law Journal*, vol 22, no 1 (1984); Emmanuel Melissaris, *Ubiquitous Law: Legal Theory and the Space for Legal Pluralism* (Farnham: Ashgate, 2009).

[4] See, eg, Sally Falk Moore's conceptualisation of legal pluralism in terms of 'semi-autonomous social fields': Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge, 1978).

[5] Brian Z Tamanaha, 'The Rule of Law and Legal Pluralism in Development', *Hague Journal on the Rule of Law*, vol 3, no 1 (2011). See also Brian Z Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism', *Journal of Law and Society*, vol 20, no 2 (1993); Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, vol 30 (2008).

Common Law tradition, and the other representing the law of a west African community's own sacred institutions. And yet, when attempting to pinpoint the line of division between them, empirically—the points in fact at which the two forms are as separate as their description implies—the analyst becomes confused. The analyst becomes confused because the description is not wrong: 'the national law of Liberia' is *not* the same as the 'traditional law' of the community; the difference could not be blanker. *And yet*, there is, in fact, no discernible line. On the ground, what the analyst discovers is that at the very point where a line should demarcate the difference, the line recedes, or multiplies, or disappears altogether. The more the analyst examines where the line finally cuts, in fact, between the two forms, the more confusing the task becomes. The analyst is thus confronted with a perplexing situation: two different forms of law that are no different at the very points of their difference.[6]

To move forward with the analysis, the analyst might turn back to the conceptualised forms themselves to demonstrate their discrete singularity. Thus the 'traditional law' of the community, and the 'national law' of Liberia, are different—that much is clear. The question then becomes how these two different forms relate to each other, to account for the empirical fact of their non-difference. Taking this approach to the problem, the line can be drawn at any reasonable point between the forms, and the resulting empirical confusion becomes a *relational* problem. The fact of their 'relationship' covers for the empirical inadequacy of the linear distinction between the forms, allowing for the line to be drawn with renewed conviction.[7] Relational analysis in this way allows the analyst to bracket the empirical confusion within an *excessive* concept, 'the relationship'.[8] Whatever

[6] Chapter 6 examines particular instances of this problem in the case of Liberia. To give one example here: In many parts of Liberia, the authority of the national law is subject to the authority of local law, with authorities of the national legal system also subjects of local law. Thus a Liberian National Police officer (an authority of 'the national law'), who is also a subject of a 'local legal order', can be seen to enforce the national law in a way that is informed by the local law. In such a situation, in which both 'national law' and 'local law' are embodied in the same authority/subject, and 'takes place' through their legal act (in this case law enforcement), what takes form as 'the law' becomes a confusion of both. As I examine in Chapter 6, in Liberia this can be seen not only in the case of Police, but also Magistrates, whose legal acts embody both national and local laws, as well as in the behavior of individual citizens and whole communities.

[7] Such relational concepts include 'intersection', 'interaction', 'intertwining', 'overlapping'.

[8] See also Nancy's observation: '(I could speak of it in terms of "relation", except that "relation" is still too exterior for something which does not allow separation of interiors from exteriors.)' Jean-Luc Nancy, 'Of Being-in-Common', in *Community at Loose Ends*, ed Miami Theory Collective (Minneapolis: Minnesota University Press, 1991), 4. See also at page 7.

remains in fact outside the conceptualised form is excess that is accounted for in the relationship.

The benefit of this approach is a matter of control. Whereas on the ground, the 'local law' is indistinguishable at its most critical points from the 'national law', back in the Academy the two forms may be cleaved apart and a relationship established to deal with the confusion. (The added benefit is that one form of law might then be made predominant over all others—but more on this in a moment.) There is a high cost to overcoming the confusion in this way, however. No longer confusing the forms of law, the fact of their non-difference becomes *sameness*, as forms of law, and their difference becomes a matter of comparison rather than singular appreciation. Equivalence, and not omnivalence, becomes the order of things. The contradiction that gave rise to the confusion between the forms of law, and that enlivens law on the ground, is no longer in plain sight. Instead it is contained within a relationship that serves to protect the autonomy of the identified forms of law by ensuring that any transgression beyond the accepted ways in which law might take form can be dealt with as a violation of the relationship.

This problem of 'legal pluralism' is only disturbing, or even surprising, however, if one thinks that the normal situation is one where law takes coherent, orderly form, free from internal difference. Thus the law of the state, properly speaking, is a coherent legal order; and any manifestations of difference are treated as not-law—a resolution that affirms the coherence of what is *the law* and renders contrary expressions of law as nothing of the sort. On this positive-analytical approach, coherent legal order is the primary unit of understanding, to the point that it is naturalised as the equivalent of 'law'. 'Legal pluralism' then represents a distortion of law, as a distortion of legal order; it becomes a secondary condition that is used to explain a troubling exception to the perceived norm of law. On this approach, legal pluralism is 'produced' when the natural order of things is thrown into disarray. As Tamanaha writes: 'Colonization thus produced legal pluralism, grafting or erecting a variegated mix of legal systems: transplanted state legal systems focused on matters of government and commerce, alongside modified indigenous laws and institutions, with mutual interpenetration

and hybrid combinations of both.'[9] Seen in this way, 'legal pluralism' is similar to the notion of 'hybridity', which is likewise premised on there being pure or typical forms of law which then become mixed to form atypical, hybridised forms. Thus '[t]he potential combinations that can arise in legal pluralism are limitless',[10] but only because legal pluralism is approached as a *combination* of legal orders.

(ii) a critical legal pluralism

In contrast to this positive-analytical approach, if law is seen to be animated by difference at its very origin, as I argued in Chapter 2, with 'the law' enlivened in and through its subjects, making law as multiple and conflicted as any social body, then 'legal pluralism' is just another way of describing the differences in law in its *every* form. On this approach, legal pluralism does not describe a divergence from the norm of law, caused by colonialism or globalisation,[11] but rather the normative nature of law itself, as a subjective phenomenon. In other words, *legal pluralism* is the natural state of law, as much as is legal order. Whilst colonialism and globalisation no doubt intensify the differences in law, they do not 'produce' legal pluralism. Production implies the creation of something secondary out of something primary. For legal pluralism to be a product, a secondary condition, then there has to be a primary state of law in which differences are absent from its expression in a legal order. By implication, once upon a time there must have been a primal state where law took form homogenously, and a possible end of history where law becomes 'unified' and once again takes form homogenously. As Fitzpatrick has shown, the notion of a legal order free of difference, particularly as a description of a primal legal order, is the stuff of myth, and more critically, it is the stuff of the very mythology of a modern law that finds 'legal pluralism' to be a disturbing perversion of law's natural state.[12]

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[9] Tamanaha, 'Rule of Law and Legal Pluralism', 6. Tamanaha goes on to note: 'Colonization brought on the first wave of legal pluralism, as described above. A second wave is occurring today, consisting of two distinct strains. Legal norms and institutions attached to global capitalism (the first strain) and to liberal democratic democratic norms (the second strain)': ibid, 9.

[10] Ibid.

[11] Ibid.

[12] Peter Fitzpatrick, *The Mythology of Modern Law* (Oxon: Routledge, 1992); Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001).

In contrast to the positive-analytical treatment of legal pluralism as a perversion of the norm of law, I approach legal pluralism here as a diagnostic of the normative differences that animate law's life on the ground in its *every* form. This view is informed in particular by Roderick Macdonald's work on a 'critical legal pluralism'.[13] Macdonald's approach to legal pluralism has a negative-dialectical drive to it, in its restless determination to overturn one-sided analyses, in this case by showing how law gives form to the normativity of its subjects, structurally, as much as the law takes form normatively through its subjects, as legal agents, and how this dialectic of law and normativity takes place by modes limited only by the social imagination and circumstance.

Macdonald's concept of 'custom made' law captures this view of legal pluralism especially well, as a term that brings together two apparently contradictory concepts, holding them together in a way that the two become confused without entirely merging, becoming one whilst remaining polarised.[14] *Thus on one side*: 'custom', what is by nature unthinking practice; an implicit way of doing things, as what is habitual, what is customary goes without saying and without reason. Or as Macdonald sums up this usual appreciation of custom: 'it is common to explain customary rules as nothing more than conventions of long usage that emerge from repetition (usually an unthinking or unconscious repetition), and therefore the product of arbitrary, non-rational action.'[15] *And so on the other side:* what is 'made'—*real* law; which is to say, real law is *made*. This is the thought that law's normative status as 'the law' has its source in the act of articulation, as a process that takes what is otherwise raw and gives it form as 'the law', as matter of law.[16]

For Macdonald, the problem is not that these two positions—what is 'custom' and what is 'made'—are simply untrue; the problem lies in affirming their untruth, by failing to grasp how each is untrue *in itself*. This is about 'the independence' of what is 'customary law' and what is 'statutory law' but also the

[13] See Kleinhans and Macdonald, 'Critical Legal Pluralism'; Macdonald, 'Custom Made'.

[14] Macdonald, 'Custom Made'.

[15] Ibid, 317. As an example of this appreciation of custom, Macdonald refers to Austin's explanation of customary rules 'as merely proto-law' in John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, 4 ed, vol 1 (London: John Murray, 1879), 100f.

[16] See Macdonald, 'Custom Made', 316-317.

'interdependence of these two forms'.[17] *Thus crossing one way:* the act of articulating normativity gives form to law, making what is 'customary' into what is 'statutory'; 'the law' is therefore custom made in the sense that it is the outcome of a process of rendering (in stucco finish). *But crossing the other way:* the term 'custom made' also points to the restless 'customizing of our explicit and formal normative creations', which makes 'the law' real through the everyday acts of subjects.[18] This is the *critical* aspect of Macdonald's critical legal pluralism: seeing law as a subjective act of articulating normativity, without becoming blind to how the subjects of law, being 'made over' by the law, are also always making over the law, as their own. As such, law is 'autobiographical' and not simply dictation, with the act of subscription by so-called law-receiving subjects being no less formative of law than the act of prescription by the so-called law-giving or law-making subject.[19]

Recall the logic of the subject-object dialectic: the subject, always generic and singular, determined and self-determining, an objective part of the whole—and therefore knowable only through empirical study of the whole—and yet irreconcilably apart from this totality—and therefore knowable only in its singular situation.[20] Likewise law: generic to the extent that it expresses a common sense of how things are and how things ought to be, and yet singular to the extent that it is always performed in and through individual subjects, acting in concert. Thus what is 'the law' is determined by 'law-receiving' subjects (for example citizens), as much as 'the law' is the product of a self-determining 'law-making' subject (for example parliament). Law is therefore an objective part of a social whole, structuring how a people is together as how it ought to be together; and yet law is also irreconcilably apart from this totality, with its life in the experiences of every single subject.

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[17] Ibid, 317.

[18] Ibid, 326. On the concept of 'everyday life' and its relation to law, see also Austin Sarat and Thomas R Kearns, eds, *Law in Everyday Life* (Ann Arbor: University of Michigan Press, 1993); Daniel Jutras, 'Legal Dimensions of Everyday Life', *Canadian Journal of Law and Society*, vol 16 (2001). For a seminal sociological study of 'law's life on the ground', see Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, trans W L Moll (Cambridge: Harvard University Press, 1936).

[19] See Kleinhans and Macdonald, 'Critical Legal Pluralism', 46. For a contemporary example of this, see Imelda Deinla and Veronica Taylor, 'Towards Peace: Rethinking Justice and Legal Pluralism in the Bangsamoro', *RegNet Research Paper 2015/63* (2015); Imelda Deinla and Veronica Taylor, 'An Annotated Bibliography on Justice and Legal Pluralism in Mindanao: Ways for Women to Participate in Peacebuilding (Philippines)', *RegNet Research Paper 2015/64* (2015).

[20] See Part 2 of Chapter 1.

The crucial point here is what this reveals about the intrinsic plurality of law and the 'law-maker'. As Kleinhans and Macdonald write in their introductory paper on 'what is a *critical* legal pluralism':

> By highlighting the dynamics of reciprocal construction, a *critical* legal pluralism legitimates interpretations of law apart from those endorsed by officials—whether these be institutional office-holders such as judges within a political State, or whether they be empirically identified community spokespersons, or whether they be the scholastic investigators themselves. The law is within all members of any society that purports to recognize them as legal subjects. This constructivist aspect of legal pluralism is what gives this law its true authority.[21]

Literary scholars have long-understood this—how texts are 'authored' in the relation between writer and reader, who are themselves never writing and reading as isolated individuals.[22] Thus the 'authority' of the text, never resting on itself, is always authorised in a contra-dictory interplay of subject and object, mediated historically, socially. Likewise the legal Act, like any literary text, is a dialogical work, drafted not in isolation but in an historical context, penetrated through-and-through by what is not apparently in it, by what has been and what is otherwise;[23] authored—*'truly authorised'*[24]—not merely by an institution-as-author but also by subjects-as-readers. As examined in the previous chapter, law is never simply an act that gives form to 'the law' objectively, as 'is' on the books, but is also always an active performance, with the law taking form subjectively. And yet law is also never simply what goes without saying—is never simply otherwise than 'the law'—any more than law is simply what is said to be 'the law'. What is law is always both 'the law' and not 'the law', and is always experienced this way by its subjects, whose experience, as the object of law, is neither of 'the law' nor not of 'the law'.

As a result, on this approach, the problem of 'legal pluralism' becomes the problem of how the difference that animates law on the ground, resulting in apparently different and contradictory forms of law, is a matter of expression. For

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[21] Kleinhans and Macdonald, 'Critical Legal Pluralism', 46 (italics in original).

[22] See Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), Chapter 6.

[23] See also Austin Sarat and Thomas R Kearns, 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction', in *History, Memory, and the Law*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 2009).

[24] Kleinhans and Macdonald, 'Critical Legal Pluralism', 46 (see quote above).

instance, if the problem is to understand the relationship between 'statutory', 'customary', and 'international' law in a given situation, rather than approach the problem at the point of the conceptualised forms of law, and proceed to examine how these forms intersect and interact, thereby treating subjects of law merely as units of analysis within this social complex, the task is to enquire into how the subjects of law are also giving expression to 'the law'.[25] On this approach, 'law' (without definite article) is a singular phenomenon with an infinite plurality of difference within its expressive range, giving form to 'the law' (with definite article) in multiple and contradictory ways. 'Legal pluralism' thus describes the difference *within* law, as itself always multiple and contradictory, and it is this difference—this pluralism—that manifests on the ground in the multiple and contradictory observable forms of law.

As I discuss in the next section, when this critical approach to legal pluralism is brought to bear on 'the rule of law', the question is no longer how best to 'deal with' the fact that law manifests in multiple forms within a social body, for instance, by trying to regulate them by establishing a hierarchical relationship between 'statutory', 'customary', and 'international' laws under a national constitution. Rather, the question is how to deal with the plurality of difference within law itself, whether this difference manifests within what appears to be a *single* legal order, such as the national law of a state, or in multiple orders.[26]

In summary, if law is approached in a positive-analytical mode, as taking form in coherent orders, then it will be disturbing to discover that the boundaries of these legal orders do not exist on the ground; that, in fact, law takes form in multiple and contradictory ways that endlessly subvert its proper ordering. On this approach, 'legal pluralism' is a diagnostic of disease in the proper legal ordering. For those who hold onto a concept of the rule of law that is stable and orderly, in which a plurality of laws are tolerated as long as they are subordinate to a higher law that regulates the different forms, 'legal pluralism' presents a relational problem that might be brought under control without compromising the singular rule of law. However, such an approach, which treats difference in law as a (dangerous) deviation from the norm of legal order, misses the critical

[25] See ibid.; Macdonald, 'Custom Made'.

[26] See also Austin Sarat and Thomas R Kearns, 'Responding to the Demands of Difference: An Introduction', in *Cultural Pluralism, Identity Politics, and the Law*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 2001).

implications of law's pluralism, and therefore can only fail in its intentions to regulate the phenomenon, becoming potentially violent, and ultimately unstable. The fundamental play of difference that animates law requires an approach that treats law as *both* singular *and* plural, and therefore law's rule as *essentially* contradictory. If 'law', and 'legal order', is approached as being enlivened by a plurality of difference, then 'legal pluralism' becomes the problem of law itself. It also, as I now turn to discuss, becomes the problem of the rule of law, which is set against, and therefore enlivened by, the very plurality of difference that makes law arbitrary in its expression.

B Rule and discretion

Legal pluralism presents a critical challenge to law's rule because it reflects the contradiction that is at its heart as a proposition. On one hand, the implication of law's pluralism is that the institution of the rule of law is *necessary* for social order, requiring a common bond of law to connect subjects in some union. On the other hand, the implication of law's pluralism is that the institution of the rule of law cannot be equated in any resolute way with 'stable order'. In short, legal pluralism, as a reminder of the subjectivity of law, reflects the disturbing problem that the rule of law cannot be closed to its subjective situation through the institution of legal order.

This problem can be seen for instance in the work of Albert Dicey, the English jurist famous for popularising the term 'the rule of law' in the nineteenth century.[27] Like theorists before and after him, Dicey set the rule of law in opposition to a regime in which law is exercised arbitrarily by those in government.[28] As Dicey writes: 'It means, in the first place, the absolute supremacy

[27] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1948), Chapter IV.

[28] Ibid. One of the most compelling contemporary arguments linking the rule of law to the ideal of non-arbitrariness is made by Martin Krygier: see, eg, Martin Krygier, 'The Rule of Law and 'The Three Integrations'', *Hague Journal on the Rule of Law*, vol 1, no 1 (2009); Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in *Relocating the Rule of Law*, ed Gianluigi Palombella and Neil Walker (Oxford: Hart Publishing, 2009); Martin Krygier, 'The Rule of Law', in *Oxford Handbook of Comparative Constitutional Law*, ed Michel Rosenfeld and András Sajó (Oxford: Oxford University Press, 2012); Martin Krygier and Adam Czarnota, eds, *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Dartmouth: Ashgate, 1999); Martin Krygier, Adam Czarnota, and Wojciech Sadurski, eds, *Rethinking the Rule of Law after Communism* (Budapest: Central European University Press, 2005). For one of the earliest extant arguments setting the rule of law in

or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.'[29] As can be read in this quote, Dicey is especially concerned with the arbitrariness of discretionary treatment by law. Whilst Dicey does not conflate 'arbitrariness' and 'discretion', he brings the two together in opposition to the rule of law. Thus he writes, 'the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint', before observing:

> a study of European politics now and again reminds English readers that *wherever there is discretion there is room for arbitrariness*, and that in a republic no less than under a monarchy discretionary authority on the part of the government must mean insecurity for legal freedom on the part of its subjects.[30]

In formulating his concept of the rule of law, Dicey was looking across the English Channel at continental European systems of government, where he saw a wide exercise of discretion by law.[31] He contrasted this with what he saw as a fundamental principle of the British constitution: that what is expressed by law should be applied equally to everyone, regardless of their position. Thus for Dicey the rule of law is about 'equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts'.[32] Elsewhere Dicey sharpens his definition of 'equality before the law', making its point 'the universal subjection of all classes to one law administered by the

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opposition to a regime in which law is exercised arbitrarily by those in government, see Aristotle, *Politics*, Book 3, Part 16. More generally, see Tamanaha, *On the Rule of Law*.

[29] Dicey, *Introduction to the Study of the Law of the Constitution*, 202.

[30] Ibid, 188 (my italics).

[31] As Dicey observes: 'Modern Englishmen may at first feel some surprise that the "rule of law" (in the sense in which we are now using the term) should be considered as in any way a peculiarity of English institutions […] Yet, even if we confine our observation to the existing condition of Europe, we shall soon be convinced that the "rule of law" even in this narrow sense is peculiar to England […] In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the government in England'. Ibid, 188. Dicey then considers the situation of Europe in the eighteenth century: 'During the eighteenth century many of the continental governments were far from oppressive, but there was no continental country where men were secure from arbitrary power. The singularity of England [as the only exception to this situation] was not so much the goodness or the leniency as the legality of the English system of government'. Ibid, 189.

[32] Ibid, 202-203.

ordinary courts'.[33] This principle of equality before the law remains fundamental to a liberal concept of the rule of law.

And yet, like the Legal Realists and Critical Legal Studies scholars who would critique the rule-fundamentalism of legal formalists in the twentieth century, Dicey also recognised the *essentiality* of discretion in law, to ensure it remains responsive to the differences that animate everyday life. As an English Common Law jurist, Dicey was especially aware of the importance of discretion in judicial decision-making. However, like many Anglo-American legal scholars to follow, Dicey approached the tension between the need for standard measures of law (rules) to ensure equality before the law, and the need for differential treatment by law (discretion) to ensure the law remains responsive to those who are abject before it, from the perspective of a philosophical tradition that sees differential treatment as a threat to social cohesion. From this liberalist perspective, political society is formed by autonomous individuals contracting together on an equal basis. On this basis, differential treatment by the political organs of the social body is seen as a threat to cohesion, driving a wedge between individuals who are thought to be separate to begin with. With the 'state' conceived as a formation of individuals, who are individuals *first* and only then *in society*, the fear is that these separate individuals will fall apart if there is differential treatment. Difference is thus a primary vulnerability of the nation-state, as conceived in these liberalist terms, and the standard measure—the rule—is a primary value of law that works to ensure it does not fall apart.

Thus mindful of the importance of the standard measure of law to the liberal rule-of-law principle of equality before the law, and fearful of the challenge that discretion in law poses to this principle, Dicey set the rule of law against the exercise of legal discretion; and yet at the same time, he did not naïvely advocate a legal system without any exercise of discretion. And it is *here*—in his non-naïve view of how law takes place—that the crack in the proposition of 'the rule of law' can be seen. As the passages quoted above show, for Dicey, the rule of law 'excludes the existence of arbitrariness', and therefore must exclude the exercise of discretion, for the reason that 'wherever there is discretion there is room for arbitrariness'; but with an eye to how law takes place, Dicey stopped short of an absolute exclusion of discretion, excluding only 'wide discretionary authority on

[33] Ibid, 193.

the part of the government'. In this, the rule of law, set in opposition to arbitrariness, could not be entirely closed to the exercise of discretion, and is thus left open to arbitrariness.

Dicey's ambivalence—setting the rule of law against arbitrariness, and yet, unable to close it entirely, leaving it open to arbitrariness—does not reflect his shortcomings as a legal theorist. Rather, his ambivalent theorisation of the rule of law reflects a contradiction that is at its core as a proposition, making the rule of law both necessary and impossible. There is a passage in Thomas Hobbes' *Leviathan* that provides a striking image of this 'problem'. Peter Fitzpatrick draws attention to this image in his reading of Hobbes, where he addresses how (citing Hobbes):

> the very laws made by Leviathan, the civil laws, are found in a sense to bind Leviathan, for, just as 'men' have been able to create a sovereign Leviathan, 'so also have they made Artificiall Chains, called *Civill Lawes*, which they themselves, by mutual covenants, have fastened at one end to the lips of that Man, or Assembly, to whom they have given the Soveraigne Power, and at the other end to their own ears'.[34]

The image of a chain connecting subjects and sovereign evokes a relationship that recognises the supreme authority of an institutional expression of law, whilst binding the institutional organ of articulation—the lips of the sovereign—to the bodies of its subjects, whose every movement pulls upon, persuades, aggravates, and no doubt slurs its expression of law. If this is the 'objective' institutional structure of the rule of law, whereby both ruler and ruled are regulated by a common bond of law, then it is an institution that is not set over and above the heads of its subjects in a detached way, but is attached directly to their every push and pull.

C The irresolute rule of law

This contradiction, whereby the rule of law is set against the arbitrary exercise of power at the same time as it is essentially arbitrary, is irresolvable. Indeed it has frustrated legal scholars both before and after Dicey, in one way or another. As

[34] Peter Fitzpatrick, 'Legal Theology: Law, Modernity and the Sacred', *Seattle University Law Review*, vol 32 (2009): 332. See also Peter Fitzpatrick, 'Leveraging Leviathan', in *After Sovereignty: On the Question of Political Beginnings*, ed Charles Barbour and George Pavlich (Oxon: Routledge, 2009).

Tamanaha remarks: 'The idea of "the rule of law, not man", powerful as it is, has been forever dogged by the fact that laws are not self-interpreting or applying. The operation of law *cannot be sequestered from human participation*.'[35] Nonetheless, the modern compulsion is to seek to resolve the contradiction. Thus, despite Tamanaha's observation that law cannot be sequestered from human participation, the implication of this appears to be so disturbing that he goes on to argue that the rule of law must be sequestered from everyday political struggles to protect it from becoming a means through which actors struggle for power. 'The root danger can be stated summarily', Tamanaha writes:

> In situations of sharp disagreement over the social good, when law is perceived as a powerful instrument, individuals and groups within society will endeavor to seize or co-opt the law in every way possible; to fill in, interpret, manipulate, and utilize the law to serve their own ends. This will spawn a Hobbesean conflict of all against all carried on within and through the legal order. Rather than function to maintain social order and resolve disputes, as Hobbes suggested was the role of law, combatants will fight to control and use the implements of the law as weapons in social, political, religious, and economic disputes. Law will thus generate disputes as much as resolve them. […] Spiralling conflicts will ensue with no evident halting point or termination short of exhaustion of resources or total conquest by one side. Such struggles over and through law are openly visible today, and worsening.[36]

This view of the rule of law—and indeed this view of Hobbes' *Leviathan*—is in stark contrast to the one presented by Hobbes, as combining institutional structures with an inter-subjective agency in a way that the two are neither harmoniously unified nor entirely separable. If the institutions of legal order cannot be separated from the subjects of law, then isolating the rule of law from the 'social, political, religious, and economic disputes' and 'sharp disagreements' that animate a social body would itself threaten the rule of law. To isolate the institution of the rule of law from everyday life, to isolate it from the disorder and instability that animates every social body, would be to cut the chain that binds the lips of the sovereign to its subjects and raise the institution to a place beyond the reach of the many, to be guarded by a select few. Even *if* this could be achieved, it

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[35] Tamanaha, *On the Rule of Law*, 123-124 (my italics). See also generally Manderson's work on the rule of law, in which he responds to this 'crisis': Manderson, *Kangaroo Courts*.

[36] Brian Z Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006), 1-2. See also Manderson's response: Manderson, *Kangaroo Courts*, 82-85.

would leave an authoritarian in the place of Hobbes' much more democratic Leviathan, which Hobbes did not present as being in simple opposition to a situation of 'conflict of all against all' but rather as the *institutionalisation* of this conflict. Contrary to the popular narrative repeated by Tamanaha, that was the point of Leviathan: to ensure that 'the conflict of all against all' *would be* 'carried on within and through the legal order', rather than outside of it, which would be a 'state of nature'.[37]

As Manderson shows in *Kangaroo Courts and the Rule of Law*,[38] and as Fitzpatrick observes with his 'heretical' reading of Hobbes' *Leviathan*,[39] it is the very 'polarisation' within a social body—its conflicts, its sharp disagreements—that enlivens the rule of law, keeping law from becoming authoritarian or lifeless.[40] Given this, the answer to the problem is not to make order and stability the defining quality of the rule of law, and to seek to achieve this by placing the rule of law beyond the everyday political processes that are seen to afflict social life. The desire to sequester law from the struggles that constitute every socio-legal order, to ensure the realm of law's rule remains one of unity and stable order, can only have the opposite effect, imposing on the rule of law the rule of particular humans who want to control it by conserving it under the order of their particular concept. This is no less arbitrary, and potentially more dangerous, than the threat Tamanaha identifies, because it subjects to domination what remains, as life, beyond the confines of any conceptual order.

At the same time, 'the rule of law' cannot be *equivalent* to 'the rule of humans', any more than law's rule can be sequestered from the political struggles that animate the social body. *This* is the paradox. On one hand, Tamanaha is correct

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[37] See Fitzpatrick, 'Leveraging Leviathan'. For a critique of Tamanaha's approach to the rule of law, see also Manderson, *Kangaroo Courts*, 82-85.

[38] And elsewhere; see, eg, Desmond Manderson, 'The Law of the Image and the Image of the Law: Colonial Representations of the Rule of Law', *New York Law School Law Review*, vol 57 (2012); Desmond Manderson, 'Modernism, Polarity, and the Rule of Law', *Yale Journal of Law and Humanities*, vol 24 (2012); Desmond Manderson, 'Klimt's Jurisprudence - Sovereign Violence and the Rule of Law', *Oxford Journal of Legal Studies*, vol 35, no 3 (2015).

[39] And elsewhere: see, eg, Fitzpatrick, *The Mythology of Modern Law*; Fitzpatrick, *Modernism and the Grounds of Law*. This is how Fitzpatrick has described his reading of Hobbes's *Leviathan*, as 'heretical'.

[40] The term 'polarisation' is from Manderson: see Manderson, *Kangaroo Courts*, 6. ('In the notion of polarity—of the continuance rather than the dissolution or resolution of contradiction—we can discern traces of an alternative understanding, a very modernist understanding, that represent the multi-vocal experience and unresolved contradictions of human discourse not just as the fate of law but as its most important asset.') See also Manderson, 'Modernism, Polarity, and the Rule of Law'.

to fear the implication of 'the rule of law' becoming no different to 'the rule of humans', as this would totally negate its integrity as an institution. On the other hand, as Tamanaha also observes, 'the rule of law' cannot be separated from 'the rule of humans', without turning it into a lifeless institution, and potentially an instrument of domination. Tamanaha attempts to resolve this contradiction by identifying the kind of human participation that should be kept out of law, and the kind of human participation that should be allowed to animate law; but again, this imposes on the rule of law the rule of a particular person or groups of persons who hold themselves out as the arbiters of the rule of law. Rather than resolve the original contradiction, the contradiction remains, with the rule of law no less arbitrary, and potentially more oppressive.

The implication of this argument is that law's rule has to be seen as an irresolute process, its 'end' being *in* the endless oscillation between 'assured stability' and 'infinite variety'. As Fitzpatrick writes:

> The modern rule of law, with its avowal of assured stability and ultimacy of determination, seems closer to the condition of the primal horde [described in Freud's *Totem and Taboo*]. For law to rule, however, it must also embrace the opposite attributes. Law, as the rule of law, has to be ever-responsive and indeterminate, capable of extending to the infinite variety which constantly confronts it.[41]

In the end there is no 'halting point' or 'termination' that neatly separates a state of conflict from a state of peace, any more than law can be sequestered from those who 'fill in, interpret, manipulate, and utilize' it.[42] These two 'states'—one where law rules unanimously in an orderly and stable fashion, the other where the rule of law is indistinguishable from the arbitrary rule of humans—are not simply separate, they are also inseparable. This is the chasmic structure of the rule of law: both *chaotic*, its opening denying closure and therefore a stable order, and *chiastic*, the inseparability of the opposed sides forming a stable order.[43] This does not make the rule of law simply chaotic, without any order or stability. The point is that the order and stability of the rule of law is inseparable from the play of social life, which is itself animated by an infinite plurality of difference. Thus the principle

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[41] Fitzpatrick, *Modernism and the Grounds of Law*, 2. See also generally Manderson, *Kangaroo Courts*.

[42] See Tamanaha's quote cited in note 36 above.

[43] On the chasm as both 'chaotic' and 'chiastic', see Part 1 of the Introduction.

of 'equality before the law', which in the liberalist tradition of Anglo-American legal scholarship is supposed to justify the standard measure of law, comes up against the abject experience of the subject before the law—an experience that calls for differential treatment by law.[44]

3 Instituting the rule of law

So far in this chapter I have argued that the modern compulsion to pursue a definitive separation between 'the rule of law' and 'the rule of humans' (despite acknowledging their inseparability) does not resolve the contradiction, which remains the index of the life of law's rule—both as an indication of what threatens it *and* makes it a possibility. However, recognising the chasmic structure of the rule of law does not resolve the problem. The question remains: how to respond to the contradiction between the intention of instituting an objective order that separates law from its subjects as a normative matter (to ensure it is law, and not humans, that rules), and yet the impossibility of achieving that separation (without making law irrelevant, or worse, a mere instrument of domination)? In short, what does it mean to institute 'the rule of law' if its presence cannot be equated with the absence of the rule of humans?

The purpose of this part of the chapter is to examine how this 'problem' afflicts the practice of instituting law's rule. To do this, I begin again with the modern problem of institutionalisation, which makes an institution simultaneously separate and inseparable from the subjects who enliven it. I then turn to show how this contradiction has been addressed through 'resolutionary logics' that seek to secure the foundations of the institution of the rule of law.

A The act of institution

As noted in the Introduction to the thesis, the problem of the rule of law is also the problem of modern institutionalisation, when an institution cannot depend on God,

[44] Feminist legal scholars have been at the forefront of demonstrating why legal equality requires the unequal application, or rather, the equitable application, of law. See, eg, MacKinnon's concept of 'substantive equality': Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989). See also Michael Rosenfeld, 'Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal', *California Law Review*, vol 74 (1986); Sarat and Kearns, 'Responding to the Demands of Difference: An Introduction'.

tradition, or any other transcendental source to secure its foundations, which ultimately come to rest upon—or rather in, and through—its subjects. The problem is that this inserts a contradiction into the basis of the institution: 'it' can never be absolutely identical with its subjects, whose difference defies such unity and closure; and yet it can never be absolutely separate from its subjects, who constitute its grounds as an entity.

Derrida considers this problem in his essay on 'Declarations of Independence', where he examines the act of articulation that is said to found an institution.[45] The problem for Derrida is the inability to decide whether the instituting act is *constative*—a mere statement of what *is* as matter of fact—or *performative*—bringing about the fact through the act of articulating what 'is'. For instance, in the Declaration of Independence of the United States of America, which Derrida is examining, 'the good people' declare their freedom and independence. On one hand, this suggests a statement of fact (what *is*), which the Declaration then enshrines in law (as what *ought to be*). On this view, the instituting act, as an act of articulation, appears to make what is matter of fact into matter of right, by law. On the other hand, it also appears that the subject who signs the Declaration 'by right'—the good people—*creates* its subjectivity in fact, as a free and independent people, through the act of signature. That is because, while '[t]he "we" of the Declaration speaks "in the name of the people" […] these people do not exist. They do *not* exist as an entity, the entity does *not* exist *before* this declaration, not *as such*.'[46] The signature, as matter of right, therefore appears to create the signer, as matter of fact, in a 'fabulous retroactivity' that transforms what *ought to be* into what *is*, the very condition for making 'what ought to be' into 'what is'.[47]

This leaves two contradictory possibilities. As Derrida asks: 'Is it that the good people have already freed themselves in fact and are only stating the fact of this emancipation in the Declaration? Or is it rather that they free themselves at

[45] Jacques Derrida, 'Declarations of Independence', in *Negotiations: Interventions and Interviews, 1971-2001*, ed Elizabeth Rottenberg (Stanford: Stanford University Press, 2002). See also Seyla Benhabib, 'Democracy and Difference: Reflections on the Metapolitics of Lyotard and Derrida', *Journal of Political Philosophy*, vol 2, no 1 (1994); Jacques de Ville, 'Sovereignty without Sovereignty: Derrida's *Declarations of Independence*', *Law and Critique*, vol 19 (2008); Bonnie Honig, 'Declarations of Independence: Arendt and Derrida on the Problem of Founding a Republic', *American Political Science Review*, vol 85, no 1 (1991).

[46] Derrida, 'Declarations of Independence', 49.

[47] Ibid, 50.

the instant of and by the signature of this Declaration?'[48] The first (constative) possibility is a movement from fact to norm, whereby 'what is now' is recognized and enacted by law to bring about 'what ought to be now'. The second (performative) possibility is a movement from norm to fact, whereby 'what ought to be now' is recognized and enacted by law to bring about 'what is now'. The problem, for Derrida, is in deciding which of these movements is at work in the instituting act; and the resolution to the problem, Derrida argues, is precisely in its irresolution. The *undecidability*—the incoherent oscillation between the two positions—is '*required* to produce the sought-after effect'.[49]

Thus to begin with, the instituting act is clearly performative: 'Such an act does not come back to a constative or descriptive discourse. It performs, it accomplishes, it does what it says it does'.[50] And yet this performance remains *intentional*, and not ontic;[51] it requires an ongoing engagement by 'the signers', an ongoing performance, for it to achieve what it says it achieves.

> Although in principle an institution—in its history and in its tradition, in its offices and thus in its very institutionality—must render itself independent of the empirical individuals who have taken part in its production, although it has in a certain way to mourn them or resign itself to their loss, even and especially if it commemorates them, it turns out, precisely by reason of the structure of instituting language, that the founding act of an institution—the act as archive as well as the act as performance—*must maintain within itself the signature*.[52]

But this is problematic because it appears to leave an instituting act that 'does what it says it does', that can never *finally* achieve its intention, that can never quite do what it says it does—at least never yet. Without a solid, constative beginning, and without a solid, constative end, the institution becomes suspended in an ongoing performance, an endless deferral. Positioning both 'beginning' and 'end' *in* the instituting act, the foundations of the institution remain ever in need of founding. To have 'the sought-after effect'—a constative state in which the instituting act actually does what it says it does—something has to ground this

[48] Ibid, 49.

[49] Ibid.

[50] Ibid, 47.

[51] Ibid.

[52] Ibid, 47-48 (italics in original). On the significance of the 'signature', see also Jacques Derrida, 'Signature Event Context', in *Limited Inc*, ed Gerald Graff (Evanston: Northwestern University Press, 1988).

performance. As Derrida writes: 'for this Declaration to have meaning *and* an effect, there must be a last instance'.[53] In the case of the US Declaration of Independence, 'God is the name—the best one—for this last instance and this ultimate signature'.[54] By appealing to God as the last instance, as what conjoins 'the *to be* and the *ought to be*, the constation and the prescription, the fact and the right', the performative acquires a constative quality.[55]

The problem of institutionalisation raises two issues relevant to this chapter on the rule of law. The first is the paradoxical nature of the institution, which makes it simultaneously performative and constative. This returns to the discussion in Chapter 2 of the predicate sentence. On one hand, the instituting act, like the predicate sentence, is a play on and of words: *by itself*, it merely performs a synthetic function, stating 'what ought to be now' as 'what is now'. Thus, by itself, the instituting act, as an act of articulation, represents nothing actual, or nothing more than what 'is', in its purest form, discourse—the stuff of ideology as much as idols. *And yet:* 'It performs, it accomplishes, it does what it says it does': the sentence on and of words becoming a sentence on and of life. Thus the institution remains *intentional* and not ontic, *normative* and not definitive; and yet it is nonetheless *real*, nonetheless empirical. On one side, there is an objectivity to it; it has determinate 'position', so to speak. On the other side, its foundations are subjective; and so to speak, it is positioned over an abyss.[56] As a result, 'it' (the institution as matter of fact) is enlivened by an other, or rather by others, who give it life, which is problematic because these others remain simultaneously separate and inseparable from the institution, undermining its integrity as an autonomous entity at the same time that they constitute it as an autonomous entity. This is the chasmic structure of the institution that I examined in the previous part of the chapter with regard to the definitive theory of the rule of law.

This chasmic structure of the institution gives rise to the second issue: *how to respond to the contradiction?* How to respond to a situation that appears to defy

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[53] Derrida, 'Declarations of Independence', 52.

[54] Ibid. As the US Declaration of Independence states: 'We therefore the Representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do in the Name and by the authority of the good People of these Colonies solemnly *publish* and *declare*, that these united Colonies are and of right ought to be *free and independent states*.' See ibid, 51.

[55] Ibid, 51-52.

[56] As the 'abyss' of ancient cosmology, the primordial ocean that underlies the earth, upon which the ground takes its place. See Part 1 of the Introduction.

logic, where the institution is simultaneously objective and subjective, with a constative quality that is based on an ongoing performance? Or to use the language of the previous chapter: how to respond to a situation where the very thing that establishes 'the context of the existential judgment' (giving the institution its objectivity as an entity) is a subjective act, an act of articulation? This is the question that I consider in the remaining section of the chapter.

B Logics of resolution

The question haunts theorists of the rule of law. *How can law rule over the subject that is its source?* Or to put that another way: how can law rule over its maker, whether that maker is a monarch or 'the people'? Or again, to put it in the terms I have been discussing here: how can what is established through an act of articulation be the author(ity) of the act of articulation? The logical answer to this problem is that it is simply impossible. The law-maker, as sovereign, *cannot* be subordinate to the law it makes, any more than the signature can create the signer in a fabulous retroactivity that transforms what ought to be into what is:[57] that would be self-contradictory—pure absurdity. It would be a situation where the law-maker and the made-law are *both* sovereign at the same time.[58]

This is precisely what Dicey appears to suggest in his chapter on 'The Rule of Law: Its Nature and General Applications', which begins with the observation:

> Two features have at all times since the Norman Conquest characterised the political institutions of England.
>
> *The first of these features is the omnipotence or undisputed supremacy throughout the whole country of the central government*. This authority of the state or the nation was during the earlier periods of our history represented by the power of the Crown. The King was the source of law and the maintainer of order. The maxim of the courts, *tout fuit in luy et vient de lui al commencement* [all was his, and all proceeded originally from him], was originally the expression of an actual and undoubted fact. This royal supremacy has now passed into that sovereignty of Parliament which has formed the main subject of the foregoing chapters.
>
> *The second of these features, which is closely connected with the first, is the rule or supremacy of law*. This peculiarity of our polity is well expressed in

[57] See note 47 above.

[58] For a discussion of this problem, see Tamanaha, 'The Rule of Law for Everyone?', 105-109.

> the old saw of the courts, '*La ley est le plus haute inheritance, que le roy ad; car par la ley il meme et toutes ses sujets sont rules, et si la ley ne fuit, nul roi, et nul inheritance sera*' ['the law is the greatest heritage that the King has for by the law he and all his subjects are governed, and if the law did not exist, there would be no King and no heritage'].[59]

On the face of it, Dicey's observation appears contradictory. How can *both* law and law-maker be supreme? On one hand, the law-maker is said to have undisputed supremacy; on the other hand, it is said to be *by law* that the law-maker is supreme. Indeed, it is said that by law the law-maker *exists* as an entity; and yet it is this very law-maker that is said to be the *source* of law—the source of the law that brings the law-maker into existence. Logically, something is missing from this analysis. Something else—something from outside this tautological proposition—must intervene, to ground the institution of the rule of law and make it possible ('to have meaning *and* an effect, there must be a last instance').

In the case of the US Declaration of Independence, as Derrida shows, God is what intervenes from outside and above to provide 'the last instance'. By invoking God as the ultimate authority for the act of articulation, its subjective basis comes to rest not on an abyssal indeterminacy but on an unchanging truth. Likewise, God has from time-to-time provided the last instance for grounding the rule of law in Europe. Thomas Aquinas addressed the problem in his thirteenth century *Treatise on Law*, in considering the question of 'whether all are subject to the law?'[60] First he sets out the problem, or objection: '*Obj. 3.* Further, the jurist says that *the sovereign is exempt from the laws.* But he that is exempt from the law is not bound thereby. Therefore not all are subject to the law.' Aquinas then sets out his argument in response:

> *Reply Obj. 3.* The sovereign is said to be *exempt from the law*, as to its coercive power; since, properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign. Thus then is the sovereign said to be exempt from the law, because none is competent to pass sentence on him, if he acts against the law. Wherefore on Ps. L. 6: *To Thee only have I sinned*, a gloss says that *there is no man who can judge the deeds of a king*.—But as to the directive force of law, the sovereign is subject to the law by his own will, according to the statement *(Extra, De*

[59] Dicey, *Introduction to the Study of the Law of the Constitution*, 183-184 (my italics). The translation of the 'old saw of the courts' is from Chief Justice Robert French, 'Public and Private Law: the Intersection', La Trobe Lecture, 30 October 2009.

[60] Thomas Aquinas, *Treatise on Law (Summa Theologica, Questions 90-97)* (Chicago: Henry Regnery Company, 1949), Question 96, Article 95.

> *Constit.* cap. *Cum omnes)* that *whatever law a man makes for another, he should keep himself. And a wise authority says: 'Obey the law that thou makest thyself.'* Moreover the Lord reproaches those who *say and do not;* and who *bind heavy burdens and lay them on men's shoulders, but with a finger of their own they will not move them* (Matth. xxiii. 3, 4). Hence, in the judgement of God, the sovereign is not exempt from the law, as to its directive force; but he should fulfil it of his own free-will and not of constraint.—Again the sovereign is above the law, in so far as, when it is expedient, he can change the law, and dispense in it according to time and place.

In this passage, Aquinas begins by upholding the sovereign's position above the law, on the rational basis that, 'properly speaking, no man is coerced by himself, and law has no coercive power save from the authority of the sovereign'. But having done that, he then *also* upholds the rule of law, by holding the sovereign 'subject to the law'. The result would appear to be a situation where both law and law-maker rule, with one subject to the other—and thus a return to the paradox. Aquinas gets out of the paradox, however, by making the sovereign subject to the law, not by the coercive power of the law made by the sovereign, but by 'the judgement of God'. By invoking God as the ultimate authority, 'all are subject to the law', including the law-maker—a resolution that does not contradict the supremacy of the sovereign but also does not exempt the sovereign from the rule of law.

That resolution might be acceptable in times when the judgement of God has real force of law, but as a modern, post-Enlightenment proposition, 'the rule of law' cannot depend on a God-given law to secure the grounds of its institution. This leaves a problem: because the scientific-positivism that informs the modern Western view of law cannot provide an external, or transcendental, authority to break the tautology and secure the grounds of law's rule over the subjects who enliven it, its institution is left in the impossible position. And so again the question: *how is it possible?* How is the contradiction dealt with?

The usual answer is not to face the contradiction at all—to deal with it by trying to cover it up. This follows the modern fear that this precarious situation, whereby the objectivity of the rule of law is subjective—acquiring its constative quality through a social performance—is too fragile, and dangerous, to

acknowledge. To foreground the contradiction as the animating condition of the rule of law would, it is feared, threaten the rule of law.[61]

To protect the institution, the subjective/performative basis of the rule of law is covered over as much as possible by a modern mythology that functions in much the same way as God once did, providing a semblance of rationality to what otherwise defies logic. The focus of this modern mythology is on the judiciary, to ensure the last instance of law—its adjudication in the courts—is seen to be an objective one, carried out by independent, impartial officers whose professionalism ensures it is law, and not humans, that ultimately rules.[62] And indeed, *this* is what appears to resolve the contradiction in the passage by Dicey quoted at the start of this section, where he sets out the simultaneous rule of law and law-maker.[63] In that passage Dicey observes that '[t]he King was the source of law', a fact he establishes by repeating '[t]he maxim of the courts, *tout fuit in luy et vient de lui al commencement* [all was his, and all proceeded originally from him].' So here is the familiar paradox: the 'source of law' is the King, and the source of the King's authority is law… but now on closer inspection, something *does* intervene to break the maddening tautology. In the end it is *the courts* that declare the sovereignty of the King. Just as for Aquinas the judgement of God provides the last instance that makes the law-maker subject to the law, for Dicey it is the judgement of the courts that provides the last instance.

This is the modern mythology of the rule of law: faced with a situation in which 'the rule of law' and 'the rule of humans' cannot be finally separated—in which *both* law and humans rule—the institution of the courts provides the last instance to secure law's rule over humans (whose subjection to law is in the final instance enforced by the courts) without compromising their position as the source of law (which again is upheld in the last instance by the courts).[64]

Of course, having resolved the contradiction in the proposition of the rule of law, whereby both law and law-maker rule simultaneously, by making the courts the ultimate authority of the institution of the rule of law, a new problem appears:

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[61] See Tamanaha, *Law as a Means to an End*.

[62] As Tamanaha notes: 'The standard twofold construction is, first, to identify the judiciary (comprised of legal experts) as the special guardians of the law, and, second, to deny the presence of the individual who is the judge': Tamanaha, *On the Rule of Law*, 123-124.

[63] See note 59 above.

[64] See, eg, Cheryl Saunders and Katherine Le Roy, eds, *The Rule of Law* (Sydney: The Federation Press, 2003), 2.

how do the courts of law escape the paradox of the modern institution? If the chasmic structure of the institution makes the foundations of the judiciary subjective—if the courts are also, so to speak, positioned over an abyss—then does this not undermine *its* position as the last instance? If 'it'—the institution of the courts—is enlivened by an other, or rather by others, who give it life, does this not make *them* the authority? And are 'they' none other than the subjects of law, who are now signing the instituting act under the disguise of a wig?

In sum, if the problem before was the inability to decide whether it is law or humans that rules, because *both* appear to rule simultaneously, then the courts are supposed to resolve this paradox by providing an objective standpoint, a last instance that makes humans subject to law at the same time as law is subject to them. The problem, however, is that this last instance, which is supposed to intervene in the social performance and make it constative/objective, is itself a social performance, and once again the whole edifice comes to rest over the abyss. To ensure that does not happen, in fear of the consequences, the modern imperative is to ensure the courts are seen to be wholly objective. Thus it is the mythological objectivity of the courts that secures the grounds of 'the rule of law' as a proposition, by plastering over the crack that reveals its abyssal nature.[65] Recognising the contradictory structure of the institution, as both performative and constative, subjective and objective, the modern answer is to sublate the performative/subjective aspect in a mythological judicial objectivity.[66]

In this way, positive law is 'mystified into a law of nature',[67] becoming a 'second-natural' law,[68] the logical structure of which would have surely struck

[65] Or as Meghan Walsh puts it, with respect to the mythological objectivity of science: 'In this world of double-blind trials and peer-reviewed articles, objectivity rules all. Otherwise cracks open up and doubt seeps in, rotting the very foundation science is built upon.' Meghan Walsh, 'It's the end of the world—How do you feel?', *Fast Forward*, 25 October 2015: http://www.ozv.com/fast-forward.

[66] 'Sublation' here refers to a synthetic resolution to the contradiction, whereby the contradictory positions are brought together in a third position that maintains the two positions whilst overcoming or transcending the contradiction between them. Of course, on a negative-dialectical approach, the synthetic resolution is seen to remain contradictory—the act of sublation just recreates the contradiction anew in the third position. Thus the contradiction between law-maker and made-law is resolved by resort to the courts—but rather than actually resolving the contradiction, it becomes the condition of the courts.

[67] The phrase is Karl Marx's: 'The law of capitalist accumulation, mystified into a law of nature, expresses therefore in fact only that its nature excludes every such decrease in the degree of exploitation of labor or every such increase of the price of labor, which could seriously endanger the continual reproduction of the relationships of capital and its reproduction on a constantly expanded level. It cannot be otherwise in a mode of production, wherein the laborer is there for the necessity of valorization of extant values, instead conversely of the objective wealth for the

Aquinas as a secular riff on his own natural law theory. As Adorno writes, 'the constitutive forms of socialisation, of which that mystification is one, maintain their unconditional supremacy over human beings, as if they were divine providence.'[69] By 'that mystification', Adorno is referring specifically to 'the law of capitalist accumulation' and how it has become such a structural part of society that it appears to be as rock-solid as a law of nature; or, as Adorno writes, how it has become 'nature-like due to the character of its inescapability under the dominating relationships of production'.[70]

What I have sought to show here is how the chasmic structure of the rule of law opens it up to such 'constitutive forms of socialisation'. Whether the constitutive logic follows a theology of natural law or a mythology of positive law, the performative act of institution is rendered constative by invoking an authority the objectivity of which is set beyond question. In each case, '[t]he natural lawfulness of society is ideology, to the extent it is hypostasized as an immutable given fact of nature'.[71] Where once it was God, or tradition, now it is science, or capitalism, that provide these 'constitutive forms of socialisation' that plaster over the abyss. As such, these naturalised and naturalising logics (of which God, science, and capitalism are just three) enable a social institution such as the rule of law to take form, by providing the constative basis (the last instance) for the performance to go on, whilst providing a medium for the logic to reproduce itself through the institution. Thus Aquinas' theory of the rule of law was as much an instantiation of the King's sovereign authority as it was an instantiation of a theological rule of law.

4 Conclusion

A The reality of law's rule

My aim in this chapter has been to take the approach to law developed in the previous chapter and drive it into the reality of law's rule. To do this, I began by

developmental needs of the laborer.' Cited in Theodor W Adorno, *Negative Dialectics*, trans Dennis Redmond (2001), 347-351.

[68] On the concept of 'second nature', see note 16 in Chapter 2.

[69] Adorno, *Negative Dialectics*, 347-351.

[70] Ibid.

[71] Ibid.

returning to the concept of law as the articulation of normativity to show how 'the law' is intrinsically plural. Law's pluralism, I argued, is a reflection of the differences that animate the law as a social form, and not a secondary condition produced out of the intersection or interaction of primary legal orders. By implication, legal pluralism is a condition of legal order itself, and not a problem of how to regulate the relationship between different forms of law. Or to put that another way: the problem of the relationship between different legal orders is also the problem of legal order itself—and both are the 'problem' of the rule of law.

I showed this in Part 2 of the chapter by examining the tension in the proposition of 'the rule of law', between the need for standard measures of law, to ensure the law does not become an arbitrary expression of power, and the need for discretionary treatment by law, to ensure the law remains responsive to the differences that enliven it.

Having established the chasmic structure of the rule of law through the examination of its definitive theory, I then turned in Part 3 to the problem of institutionalisation, and how the simultaneous objectivity and subjectivity of the institution of the rule of law gives rise to an anxiety that scholars have sought to dispel through resolutionary logics. However, far from dispelling the contradiction, these logics are enchanting, functioning as 'constitutive forms of socialisation' that plaster over the cracks in the rule of law and render its institutional foundations solid. Whether the ultimate authority is the judgment of God or the judgement of the courts—or, as I examine in the next chapter, the logic of capital—the performative/subjective nature of the instituting act becomes hypostasized into a constative/objective form that is as unquestionable as a law of nature. On one hand, the logical resolution appears to secure the grounds of the rule of law, enabling it to take place; on the other hand, it makes the institution a medium of a logic that remains as natural as it is artificial, a social-historical construct that, through its institution, informs life. This, as I now turn to examine in the case of Liberia, is what enables a para-sitic regime to colonise a place and people, by providing the constituting logic that secures the institution of the rule of law, but without the rule of law and its institutional logics becoming identical, leaving it open to take place otherwise.

B Framing Liberia

In addressing the question of what takes place in the rule of law, in this first part of the thesis I have sought to provide a rational way of understanding a contradictory theory, rather than a rational resolution to that theory. The result is a concept of the rule of law animated by an irresolvable contradiction that makes law's rule simultaneously separate and inseparable from the subjects that enliven it. Whilst this conceptualisation is useful for understanding as a general theoretical matter 'what takes place in the rule of law' as a common experience, it reveals very little about the singular ways in which the rule of law actually takes place in any particular instance. That is why I ask the second, empirical question, of what is taking place in the rule of law in Liberia. The next four chapters address this empirical question.

Two theoretical frameworks inform the empirical analysis of the rule of law in Liberia. The first is concerned with the chasmic structure of law. The second is concerned with how this chasmic structure opens the rule of law up to mediation by different logics, which both inform how the rule of law takes place, whilst taking place through law's rule. To assist the reader in understanding the structure of these chapters, the following is an outline of the two frameworks.

(i) framework 1: the articulation of normativity

The first framework is based on the conceptualisation of law as the articulation of normativity developed in Chapter 2. Recall that this provides three perspective on law. The first is the 'articulate perspective', from the standpoint of law as the expressive subject that articulates the sentence 'the law is this'. The second is the 'abject perspective', from the standpoint of the subject within jurisdiction, whose experience is articulated by the sentence 'the law is this'. The third perspective is on the process of law that plays out between the expression of law as 'the law' and the experience of law as always otherwise than 'the law' as expressed. The four chapters in Part II follow this schema, with Chapters 4 and 5 taking the articulate perspective, Chapter 6 taking the abject perspective, and Chapter 7 taking the perspective on the process of law.

Chapter 4 focuses on how 'Liberia' was given form by law in the making of the 'First Republic' (1820s–1980),[72] whilst Chapter 5 focuses on the post-war peace-building process, to see how Liberia is being given form by law in the twenty-first century. Thus both chapters take the standpoint of law as the expressive subject. However, there is a difference. Whereas Chapter 4 is concerned with an affirmation, 'Liberia is *this*' (by law), Chapter 5 is concerned with a *re*-affirmation, '*Liberia* is *Liberia*' (by law).

Chapter 6 then switches perspectives to take the standpoint of the subject within jurisdiction. This is the abject perspective. If Chapter 4 is concerned with the statement, 'Liberia is *this*' (by law), focusing on the making of Liberia in the nineteenth century; and if Chapter 5 is concerned with the re-statement '*Liberia* is *Liberia*' (by law), focusing on the consolidation of the nation-state post-war; then Chapter 6 is concerned with the voices that talk back, saying '*this* is *not law*' in a way that requires a response that is more than yet another affirmation that '*the law* is *the law*'.

Finally, Chapter 7 takes the third perspective of the process of law playing out between the expression of law as 'the law' and the experience of law as always otherwise than 'the law' as expressed. If Chapters 4, 5, and 6 each show, from two different perspectives, how law's rule remains contradictory despite the best efforts at resolving its contradictory nature, then Chapter 7 addresses the question of how to deal with the contradiction.

(ii) framework 2: the informative logics

The first theoretical framework is concerned with the chasmic structure in law and the consequences for instituting the rule of law. The second framework is concerned with how the chasmic structure opens up the rule of law to mediation by different logics, which both inform how the rule of law takes place, whilst taking place through the institution of law's rule.

[72] Historians often use the term 'First Republic' to refer to the period between 1847, when Liberia declared itself a Sovereign and Independent State, and 1980, when a coup d'état led by the young 'indigenous' man, Master Sergeant Samuel Doe, overthrew the Amerio-Liberian regime that had governed Liberia since 1847. Under Doe's regime, the Constitution of 1847 was replaced by the Constitution of 1984. The 1984 Constitution is still in effect in 2015, although a process in underway to substantially amend the Constitution.

Thus Chapter 4 is concerned with how a logic of capital informed the articulation of 'Liberia' in the making of the First Republic, whilst Chapter 5 is concerned with how a logic of security is informing the consolidation of 'Liberia' post-war. In both instances, these logics can be seen to operate in the chasm that separates subject and object. In the case of the logic of capital, the distinction is reified, thus enabling the exploitation of an object *as mere object* whilst passing the swindle off as 'the reality'. In the case of the logic of security, the distinction is plastered over, making the security of the state synonymous with the security of society and its members. As I show in both instances, not only do these logics inform how the rule of law takes place, but the institution of the rule of law can also be seen to provide a medium for these logics to take place.[73]

Neither the logic of capital nor the logic of security resolves the contradiction, however, with subject and object remaining as separate as they are inseparable. With this in mind, Chapter 6 is concerned with how the rule of law remains 'illogical', that is, how it remains fundamentally contradictory. Thus Chapter 6 examines how the national law of Liberia is taking place in ways that defy logic. Both accepted and repudiated at the same time, the law on the ground is seen to be law only to the extent that it is also not law.

Finally, Chapter 7 turns to the question of how to deal with the contradiction in law's rule, given its irresolvability. In addressing this question, I examine how a logic of liberalism is informing the Government's efforts to reform the national legal system, and in turn, how the reform of the national legal system is providing a medium for the logic of liberalism to take place in the country. At the same time, I examine how an 'illogical' approach that makes the contradiction critical to the legal system might ensure law's rule remains responsive to the subjects who enliven it.

The aim of these two frameworks is to provide a conceptual medium with which to drive negative dialectics into the realities of the rule of law in Liberia. The result of this theoretical work, I hope, is greater respect for the empirical realities of Liberia and the rule of law, and not less.

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[73] By focusing on the logic of capital in the making of the First Republic, and the logic of security in the re-making of Liberia in the twenty-first century, I do not mean to imply these logics are time-bound in this way. If anything—and as I discuss at the end of Chapter 4—the logic of capital continues to inform the re-making of Liberia post-war, just as the logic of security informed the articulation of Liberia from the very first days of its settlement in the 1820s.

PART II

Chapter 4

civil death in the dominion of freedom

1 Overlooking the capital

Three castles stand on the rise of Cape Montserrado. Looking up from amongst the market women on Benson Street,[1] they can be seen looming over Liberia's capital city. There is not a road or laneway in central Monrovia without a view of at least one of these towering structures, and if there is such a street, I am sure it does not escape their shadow.

When I say three castles, I mean an embassy, a temple, and a hotel. Looking up Benson Street, one's gaze is arrested first by the embassy. Operated by the United States of America, this newly-completed complex shines white on the hill, although there are rumours that it reaches even deeper beneath the surface. On the other side of the street, and slightly higher up the rise, stands the Grand Lodge of Masons of the Republic of Liberia. The Masonic Temple's run-down exterior, still visibly scarred by munitions from the civil wars of the 1990s and early 2000s, reflects the overthrow of the Americo-Liberian regime that once governed the Republic from within its walls. However, it is on the rise. Like the embassy, it is once again functioning as a stronghold, its membership representing power in Liberia.[2]

Above both, standing on the very top of the hill, is Ducor Hotel, or what remains of the five-star resort. Once owned by Intercontinental, it is now a hulking eight-story concrete shell.

[1] For a photograph of Benson Street, see Figure 5 in the Introduction.

[2] During my daily walk up Benson Street I would see through the windows in its grimy battle-scarred front wall the silhouette of elegant people appearing to dance in a brightly lit ballroom. The Roster of Grand Masters of Liberia provides an inventory of some of the most powerful figures in Americo-Liberian history, from the first President of the Republic, Joseph J Roberts, to the last, William R Tolbert, Jr. (See Grand Lodge of Masons, AF & AM, Republic of Liberia: http://www.grandlodgeofliberia.org/.) Whilst the Masons lost power with the revolution and coup that overthrew the Americo-Liberian oligarchy—the two being practically one—its power as an institution in Liberia is increasing again. As a Lebanese-Liberian business-man told me, if one wanted to succeed in Liberia one had to be a member of the Masons.

Figure 7. Overlooking the capital from inside Ducor Hotel, September 2013[3]

For several years after the cessation of armed conflict in 2003, the hotel was occupied by homeless Liberians, only for them to be evicted by the Government in anticipation of its renewal as a glamorous resort, a symbol of 'Liberia Rising'.[4] In the years before the overthrow and killing of Muammar Gadhafi in 2011, Libya and Liberia had re-established relations, and Libya was in the process of investing in Liberia. One investment was to be the restoration of the Ducor Hotel. This would have been Colonel Gadhafi's castle on the hill, but for the US-led intervention in Libya. The significance of this would not have been lost on Liberians, whose country was throughout the second half of the twentieth century both a base for the US to advance its cold-war interests in the region,[5] and on the front lines of Libyan-trained revolutionary movements in west Africa.[6] For Liberians looking up

[3] [image omitted from digital version]

[4] This is the name of the government's 'visioning exercise' of 'Liberia's economic, political, social and human development over an 18-year timeframe (2012–2030)': see Republic of Liberia, *Agenda for Transformation: Steps Toward Liberia RISING 2030. Liberia's Medium Term Economic and Development Strategy (2012–2017)* (Monrovia: Republic of Liberia, 2012), 9. See also Chapter 2 and Chapter 5.2 of the *Agenda for Transformation*.

[5] See D Elwood Dunn, *Liberia and the United States during the Cold War: Limits of Reciprocity* (New York: Palgrave Macmillan, 2009).

[6] See, eg, Colin M Waugh, *Charles Taylor and Liberia: Ambition and Atrocity in Africa's Lone State State* (London: Zed Books, 2011), Chapters 5 and 9.

from the market on Benson Street, these three castles—representing the USA, Colonel Gadhafi, and Liberia's ruling class—would have reflected this familiar history of the three powers that had shaped the Republic in the twentieth century. Instead, three months after the killing of Gadhafi, the US opened its new embassy complex on the hill overlooking Monrovia, leaving two castles and the crumbling shell of a hotel.

But this crumbling shell of a hotel must not be overlooked as a mere structure. It is *precisely* as a hollowed-out site, a remnant of something more, that the hotel is the castle of the three to which the most critical attention should be paid. That is because of its radical difference from both the embassy and the temple. Unlike them, it is a *res fungibilis*—a thing entirely fungible—a castle that defies its very castle-ness.

A The logic of capital

In his *Lectures on Jurisprudence, or the Philosophy of Positive Law*, John Austin defines a 'fungible thing' as 'a thing whose place, lieu, or room, may be supplied by a thing of the same kind, or even by a thing not of the same kind, as money in the form of damages'.[7] How he reaches this definition is instructive, because what it reveals is a logic that, at its extreme, makes a thing (1) indeterminate, (2) movable, (3) general.

(1) Austin begins his lecture 'on certain distinctions among things' by showing how in Roman law, a thing, or *res*, in 'the most extensive sense' 'embraces every object […] which may be the subject or object of a right or duty', including persons; thus 'a slave is styled a thing'.[8] He contrasts this most extensive meaning of 'thing' with how the word is used in 'ordinary discourse or parlance': 'When we speak of a thing, we usually mean an object which is sensible and permanent, and which is not a person'.[9] He then contrasts the extensive Roman law meaning and the narrower 'ordinary' meaning with the meaning in English law, which, he concludes, oscillates between the two. The result, he writes, is that, '[i]n the

[7] John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*, vol 2 (London: John Murray, 1873), 807.

[8] Ibid, 802. 'Acts and forbearances' make up a third category of thing embraced by this 'most extensive sense'.

[9] Ibid.

language of English law, it would not appear that the term "*thing*" has any determinate import'.[10] 'In short, the extension of the term *thing* is so extremely uncertain, that if it were expelled from the language of law, much confusion would be avoided.'[11]

(2) Rather than expel the term 'thing' from the language of law, Austin seeks to resolve the confusion by limiting his analysis of things to 'permanent sensible objects which are not persons'.[12] He then goes on to describe the division of such things into 'things immovable' and 'things movable'. On one side: 'Physically, Immovable things are such as cannot be moved from their present places; or cannot be moved from their present places without an essential change in their actual natures.' On the other side: 'Physically, Movable things are such as can be moved from the places which they presently occupy, without an essential change in their actual natures.' This division is qualified, however, by a category that cuts across both of these. This third category contains 'things which are physically movable' but which are 'immovable by institution'. That is, 'the thing, though physically movable, is arbitrarily annexed to an immovable thing, so as to be considered as a part of it, and to be comprised in its name' (such as an heirloom).[13] So here we learn that a thing might have an 'actual nature' and an 'institutional nature'—which is not so remarkable, merely pointing to a thing that acquires its 'essential nature' through an actual or social fixation. But we also learn of a category of thing that is thought to be movable without an essential change to either its 'actual' or 'institutional' nature. *This* is a remarkable thought: a thing that remains essentially the same *in any context*; a thing with a constancy in itself that makes it infinitely iterable.

(3) Austin then considers a further division of things into 'specifically determined' things (*the* house) and 'generally determined' things (*a* house).[14] What is remarkable here is what is meant by 'specific'. What we learn is that, 'in the language of logicians', a specifically determined thing is a thing determined by

[10] Ibid, 803. To be clear, the indeterminacy here is the inability to decide whether a 'thing' is only 'an object which is sensible and permanent', or whether it also embraces humans and 'acts or forbearances'.

[11] Ibid.

[12] Ibid, 804-805.

[13] Ibid, 805.

[14] Ibid, 805-806.

its 'species', that is, by reference to a general class; whilst 'in the language of jurisprudence', it is a thing determined in its particularity.[15] The suggestion is that, in the language of jurisprudence, 'species' came to mean *the opposite* of its logical meaning, to mean 'particular' rather than 'general'; although there is always the other possibility, that 'species' retained its meaning, pretending to mean 'particular' but still meaning 'general'. Which is it?

Austin begins by telling us that, 'in the language of logicians', 'specific performance would mean something totally different from what it actually denotes' in the language of jurisprudence: 'It would not mean a performance of an obligation in the very terms of it; for instance, by conveying *that* specifically determined house; but would be equally applicable if I merely conveyed *a* house, or something in lieu of one.'[16] This leads Austin to conclude that 'specific', although general as a matter of logic, is particular as a matter of law. And so it would seem 'species' *did* take on its opposite meaning in the language of the law. And yet things are not quite so clear. As Austin goes on to explain, 'almost the only ground for enforcing specific performance is, that nothing else can completely supply the place of that very thing for which the party contracted', which, he emphasises, is almost never the case, for the reason that 'money in the form of damages' would almost always suffice. In other words, whilst a 'specific thing' means *this* thing here, and not another like it, this thing here is almost never so singular that it cannot be replaced by money, that is, *given a general value*. And so it would seem 'species' *did* retain its meaning after all, with what is specific remaining generalisable in the language of the law.

But yet again, there remains the division with which Austin begins, between 'specifically determined' things (*the* house) and 'generally determined' things (*a* house). If this division is to be meaningful, then the two (specific and general) cannot simply be the same. And so, it would seem, there is a third possibility. If 'specific' is not a wholly particular designation in the language of law, but also not wholly general, then it must be a designation that is particular *and* general at the same time. Passing into the language of jurisprudence, 'species' appears to have

[15] Ibid, 806-807. 'In the language of logicians, a *genus* is a larger class, and a *species* is a narrower class contained by the *genus*', whereas 'the word specific [used in the law with respect to a thing] corresponds to the term *species* of the Roman jurists, with whom *species* always meant an individual'.

[16] Ibid, 806.

acquired both meanings; thus as an object of law, a thing remains particular and general—its singularity always determined to an extent by a general value.

Taken together, this lecture by Austin reveals a logic operating through the 'philosophy of positive law' that, at its extreme, renders an object entirely fungible *whilst maintaining the appearance of object-ness*. Understood as a 'movable species', a thing is simultaneously the opposite of a thing, understood as a 'sensible permanent object'. Austin summarises this when he notes with approbation how, '[i]n the language of the German jurists, fungible things are styled "*vertretbar*"—representable.'[17] What is able to be represented, *ad infinitum*, without any essential change to its nature, is the thing styled *vertretbar*. What is representable is not an object in its singularity but a thing that combines a particular object with a general value, making the object generalisable through the representational framework. The object represented is not actually present as 'the thing', and is only presented as such, synonymous in the language of the law. As Louis Marin writes, '[s]uch would be the first effect of representation in general [...] not presence but effect of presence. It is surely not the same, but it is as if it were, and often better than, the same.'[18] But this is not just a matter of substitution of the thing for its object: to represent is also 'to show, to intensify, to duplicate a presence'.[19] The thing, presented as *the same* as the object, authorises the actual presence of the object. In other words, the object acquires its *legitimate* presence, as a thing, through the representational framework. As Marin writes, '[s]uch would be the second effect of representation in general, to constitute a subject through reflection of the representational framework'.[20] Thus the thing appears to be more real than the object it represents, through the reflection of the framework onto the object, rendering the two synonymous (in the language of the law).

This suggests an elaboration to Austin's division of things into 'things movable' and 'things immovable'. On this analysis, a fungible thing is the opposite of a thing 'immovable by institution': it is a thing *movable by institution*. Recall, a thing *immovable* by institution is a physically movable object that is 'arbitrarily annexed to an immovable thing, so as to be considered as a part of it, and to be

[17] Ibid, 807.

[18] Louis Marin, *Portrait of the King* (Minneapolis: University of Minnesota Press, 1988), 5.

[19] Ibid.

[20] Ibid, 5-6.

comprised in its name' (such as an heirloom). In reversal of this, a thing *movable* by institution is an object that cannot be moved from its present place without an essential change in its actual nature, that is arbitrarily annexed to a movable thing, so as to be considered as a part of it, and to be comprised in its name. Thus an object is made fungible by making it synonymous with (comprised in the name of) a movable thing with a general value—the two remaining separate, and yet annexed through the representational framework of law. As a movable species, the actual object takes on the appearance or outward form of a fungible thing, much like the sacrament of the Eucharist, which makes the very body and blood of Christ representable 'under the *Species* of bread & wine'.[21]

In summary, the representational framework examined by Austin in his lecture 'on certain distinctions among things'—specifically, the representational framework of English law in the nineteenth century—reveals a logic that can transform singular objects into their opposite, movable species. If only the alchemists had known, as they sweated over a fiery kiln trying to turn base metals into the universal currency, the lawyers had the recipe! Functioning at levels of generality, this logic substitutes for the object a thing that remains essentially the same in any context, with a constancy that makes it infinitely iterable, and presents that thing as if it were the object. By reflecting this logic onto the object, as one might paint a structure with bright light, the object acquires its real objectivity as a thing of the law.

But what of the actual object? What happens when the light goes out? What is left of the object when the thing moves on? Marin tells us: '[t]he first effect of the representational framework and the first power of representation are the effect and power of presence instead of absence and death'.[22] What Marin means is that representation can present anew what is absent or dead: '[s]omething that was present and is no longer is now represented'.[23] As a result, when the thing moves on—when the representational framework ceases to be reflected onto the object—what is left in the place of the thing is absence, death, an object that remains to be

[21] 'Species' also contains these meanings: 'appearance; outward form'; and 'the visible form of each of the elements of bread and wine used in the sacrament of the Eucharist', for instance, 'they denie the true body of Christ to be really in the sacrament of the Eucharist under the *Species* of bread & wine': see 'species, *n.*', OED Online, September 2015.

[22] Marin, *Portrait of the King*, 6.

[23] Ibid, 5.

seen, as the hotel on the hill, as a hollowed-out site. At least that is the case for an object such as the Ducor Hotel, which before acquiring its presence as a 'real asset', was absent from the hill overlooking Monrovia. But what of an object that was not dead or absent before becoming animated as a thing? What of an object that was still present and is now re-presented? What happens to that object when the thing moves on?

One answer is suggested by what happens through the investment of capital. An 'investment' is literally an outer covering. Three dictionary definitions catch the eye: (1) 'Refractory material which can be used to embed or surround an object and then is allowed to harden'; (2) 'The surrounding or hemming in of a town or fort by a hostile force so as to cut off all communication with the outside'; (3) 'The investing of money or capital […] the conversion of money or circulating capital into some species of property'.[24] The first definition points to the effect of investment: by encasing an object within a hard layer that refracts light, it creates a new reality by simultaneously blocking the light, and therefore one's sight, from penetrating to the actual object. When one looks at the thing invested ('the investment'), one sees a simulacra—a general value in the place of a singular object.

The second definition then points to the violence of this: assimilating the object involves a use of force that is hostile to the object. There is perhaps no better portrayal of this than the 1982 movie *The Thing* directed by John Carpenter, about 'a parasitic extraterrestrial life-form that assimilates other organisms and in turn imitates them'.[25] This Thing is an alien species that is able to take on the particular form of its host without becoming identical, much like the movable species of thing analysed by Austin. As an 'extraterrestrial life-form', the Thing originates from outside any actual object that is to be found on this earth; indeed, it originates in the language of science-fiction,[26] much like the thing of jurisprudence. And as a 'parasite', the Thing needs other living bodies for its sustenance, without needing to care for the other in its self. Indeed, the Thing *kills* its host in the process. Thus when the Thing moves on, it leaves behind a corpse.

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[24] 'Investment, *n.*', OED Online, September 2015.

[25] '*The Thing* (1982 Film)', *Wikipedia*, 16 November 2015.

[26] And in particular the novel upon which the movie is based, by John W Campbell, *Who Goes there?* (Rocket Ride Books, 1938).

The third definition of investment then points to an example that operates through the logic of this violent realism: money, or capital. What is 'capital'? Again the dictionary provides a useful set of definitions.[27] As a noun, 'capital' means: (1) a 'real asset' 'possessing a monetary value'; (2) the 'holders of wealth as a class; capitalists'; and (3) 'any source of profit, advantage, power'. Thus the first definition points to capital as the thing of investment: operating through a violent realism straight out of science-fiction, it possesses its object by assimilating it within a generalisable value, the object becoming a movable species.[28] The second definition points to the existence of a class within which this thing circulates, giving the class its name (capitalists) whilst maintaining its realism through its circulation within this class. In other words, without capital, this class would cease to exist; like the bodies consumed by Carpenter's Thing, once the Thing has taken over, their continued existence as a class depends on it. Likewise, without this class, capital ('as the thing of investment') would cease to be a 'real asset'; without hosts, the Thing would die.

But the third definition points to a much more general meaning of 'capital': *power*. Indeed, as an adjective, 'capital' was first used to mean a quality of power, as in 'standing at the head'.[29] But more than just power: *power over life*. Thus, 'relating to the head', the term capital initially meant 'of an enemy or enmity: deadly, mortal'; 'involving loss of the head or life'; 'that causes death, fatal'.[30] This understanding of capital also goes back to Roman law,[31] where

> Of Public Judgments, some were 1. CAPITAL; in which the Punishment prescribed was Death; which Death was (1) Natural; such as took away the Life of the Criminal. (2) Civil; such as took away his Liberty, or his Citizenship. 2. NOT-CAPITAL; in which the Punishment prescribed was short of Death, Natural or Civil.[32]

One form of capital punishment was literally decapitation—the loss of one's head. If the head was a symbol of power, to lose one's head was the ultimate loss of

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[27] See 'capital, *adj*. and *n*.*2*', OED Online, September 2015.

[28] 'Species' of course also holds this meaning in it, as 'coinage, coin, money, bullion': see 'species, *n*.', OED Online, September 2015.

[29] 'Capital, *adj*. and *n*.2', OED Online, September 2015.

[30] Ibid.

[31] See also etymology, ibid.

[32] Samuel Hallifax, *An Analysis of the Roman Civil Law, Compared with the Laws of England* (Cambridge: printed by J Archdeacon Printer to the University, 1774), 116-117.

power, and to take another's head was the ultimate exercise of power. But one did not need to lose one's head literally to suffer capital punishment. 'Civil death' included 'degradation to slavery', 'superseded by condemnation to the mines', which included being 'sent into the mines themselves' or 'to some smelting-house or other works connected with the mines'.[33] It also included deprivation of citizenship.

B Overview

I began this chapter by describing the scene of three castles overlooking the capital of Liberia. Of the three, I said the most critical attention should be paid to the hotel rather than the US Embassy or the Masonic Temple. This might seem like an odd choice. Why would it be more important to scrutinise the crumbling shell of a hotel than the seat of power of two groups who arguably influence the course of events in Liberia like no other? The answer, I said, is because of the hotel's radical difference from both the embassy and the temple. Unlike them, it is a *res fungibilis*—a thing entirely fungible—a castle that defies its very castle-ness. As 'castles', the embassy and the temple are immovable by institution; they could of course change locations, but they must remain the Embassy of the United States in Monrovia and the Grand Lodge of Masons of the Republic of Liberia. In short, they have an essential institutional nature that binds them in certain ways to the places they occupy and the subjects who inhabit them. This is also their weakness, to the extent that, should their institutions be destroyed, so too would be the power they represent.

The hotel, by contrast, is a movable species of thing without any essential nature in itself. It is a capital investment that takes the form of a castle on the hill, its 'essential nature' remaining separate from the object it encases in marble and glass, and when it moves on, it leaves behind a hollowed-out site, a form of death. Para-sitic, it lives off of other objects, destroying them in the process. And because, as a species, the thing that once animated the site of the hotel is without its own actual or institutional nature, the power it represents cannot be destroyed by destroying either object or institution. As a real asset, as a class, and as a power

[33] Patrick Mac Chombaich de Colquhoun, *A Summary of the Roman Civil Law*, vol III (London: V and R Stevens and Sons, 1849). See also Hallifax, *Analysis of the Roman Civil Law*, 117.

over life, it is *essentially* a logic; and it is a logic that can be found to operate through the institution of law, its rule becoming synonymous with law's rule.

What is more, its object is indeterminate. To paraphrase Carpenter's *The Thing*, no subject is safe from this thing! Despite Austin's positive-analytical heroicism, dividing persons from things with the formidable strokes of his pen, the logic of the representational framework is not so easily circumscribed. Recall: 'Taken with the most extensive sense, it embraces every object […] which may be the subject or object of a right or duty'.[34] This includes humans, if, or *when*, they are treated as 'persons considered mere subjects of rights: that is to say, considered as the subjects of rights residing in other persons'.[35] Such a person is not a human but a thing because, on this analysis, humans are considered rightful *in themselves*. As Austin's influential forbear, John Locke, argued, 'every man has a property in his own person; this nobody has any right to but himself'.[36] A slave is thus styled a thing, as a mere subject of rights residing in another and not in themself.

Following this logic, what of the human who is treated as an empty vassal whose subjectivity can only be fulfilled through the investment of rights residing in an other?[37] What, for instance, of an African man who is thought to be fully human only once he is invested with the rights thought to reside in an American man? Does this make him not human but thing? If a slave is a thing because he is not rightful in himself, and might only be considered human if the rights residing in an other are invested in him, making him free, then what of the subject of human rights who does not, in fact, already have those rights?[38]

The answer I examine here is that the logic of making an object rightful is the logic of capital, whether the object of rights is land or human or otherwise. Invested with a general value, a universal currency—a 'human right', a 'property

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[34] Austin, *Lectures in Jurisprudence*, 802.

[35] Ibid.

[36] John Locke, *The Second Treatise of Government and a Letter Concerning Toleration* (New York: Dover, 2002), para 27.

[37] I say 'empty *vassal*' because a vassal, as 'a base or abject person; a slave', is nothing other than a vessel of an other subjectivity. See 'vassal, *n.* and *adj.*', OED Online, December 2015.

[38] This question follows in a critical theoretical tradition. See, eg, Arendt's critique of human rights in Hannah Arendt, *The Origins of Totalitarianism*, 3 ed (London: Allen & Unwin, 1967). See also Emma Larking, *Refugees and the Myth of Human Rights: Life Outside the Pale of the Law* (Farnham: Ashgate, 2014); Jacques Rancière, 'Who Is the Subject of the Rights of Man?', *South Atlantic Quarterly*, vol 103, no 2/3 (2004).

right'—the object loses its own subjectivity and is reduced to a mere object of rights residing in an other. If the object of rights is a human, this logic substitutes for the singularity of the human, a person that remains essentially the same in any context, with a constancy that makes them infinitely iterable, and presents that person as if they were the human. By reflecting this juristic logic onto a human, as one might shine a light onto a dark face, the human acquires their *real* humanity as a person of the law.[39]

I now turn to examine how this logic informed the articulation of 'Liberia' from its conception as an idea of liberty at the beginning of the nineteenth century to its consolidation as a nation-state in the twentieth century. Operating through the law as its forceful medium, this logic informed the making of Liberia through the super-imposition of a representational framework over country in west Africa that sought to render its lands and peoples productive as territory and citizens. Having begun with an idea of liberty that was supposed to make free all of Africa, the result is a state of civil death, and eventually, revolution and war.

2 *Res colōnia*

A The idea of Liberia

> But here the thing is impossible: a slave cannot be really emancipated. You cannot raise him from the abyss of his degradation. You may call him free, you may enact a statute book of laws to make him free, but you cannot bleach him into the enjoyment of freedom.[40]
>
> *Christian Spectator*, 1824

By the turn of the nineteenth century it was no longer possible to ignore the immanent problem of slavery in the United States of America, that is, freedom. Two versions of this problem in particular concerned the slave-holders who, in 1816, founded the American Society for Colonizing the Free People of Color of the United

[39] See also Gerry Simpson, 'Humanity, Law, Force', in *Strengthening the Rule of Law through the UN Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016).

[40] 'Review of the Reports of the American Colonization Society, from the Christian Spectator', in American Colonization Society, *Seventh Annual Report of the American Society for Colonizing the Free People of Colour of the United States* (Washington: printed by Davis and Force, 1824), 90.

States, and who, eight years later, would name their colonial experiment in west Africa 'Liberia'.[41]

(1) With the abolition of the slave trade nationally, along with the abolition of the institution of slavery in an increasing number of states, humans who had once been styled a movable species of thing were gaining their legal status as persons. Slavery, which always contains (holds within, and withholds from manifesting) a condition of freedom, was visibly giving rise to its opposite. For slave-holders this was problematic because it was making visible a contradiction in the concept of slavery that threatened to destabilise its institution. The presence of free people of colour in the United States presented a possibility—the free African-American—which contradicted the norm—the enslaved African in America. Against the non-human characterisation of Africans in America that justified their enslavement in the language of the law, here were *African-Americans*. This was seen as a threat to the institution of slavery still foundational in many parts of the country, because the appearance of this possibility threatened to awaken their slaves from docility, or worse, excite them to rebellion, with bloody consequences.[42] Securing the institution of slavery depended on keeping their slaves docile, which depended on maintaining a reality in which emancipation was impossible to imagine.

(2) At the same time, as persons, free people of colour in the United States still suffered a form of civil death, 'de-graded', if not by law, then by effect. As the *Christian Spectator* observed in 1824, in its review of the reports of the American Colonization Society: 'A barrier more difficult to be surmounted than the institution of the *Caste*, cuts off, and while the present state of society continues

[41] For a history of the American Colonization Society, see Eric Burin, *Slavery and the Peculiar Solution: A History of the American Colonization Society* (Gainesville: University Press of Florida, 2005). For a history of the origins of Liberia, see also Amos J Beyan, *African American Settlements in West Africa: John Brown Russwurm and the American Civilizing Efforts* (New York: Palgrave Macmillan, 2005); James Ciment, *Another America: The Story of Liberia and the Former Slaves who Ruled it* (New York: Hill and Wang, 2013); Claude A Clegg III, *The Price of Liberty: African Americans and the Making of Liberia* (Chapel Hill: University of North Carolina Press, 2004); William Jay, *An Inquiry into the Character and Tendency of the American Colonization and American Anti-Slavery Societies*, 4 ed (New York: R G Williams, 1837); Tom W Shick, *Behold the Promised Land: A History of Afro-American Settler Society in Nineteenth-Century Liberia* (Baltimore: Johns Hopkins University Press, 1980).

[42] See, eg, the discussion at one of the first meetings of the American Colonization Society, in *A View of Exertions Lately Made for the Purpose of Colonizing the Free People of Color, in the United States, in Africa, or Elsewhere* (Washington, DC: printed by Jonathan Elliot, 1817), 4-11, and see in particular the statement of John Randolph at 9-10.

must always cut off, the negro from all that is valuable in citizenship.'[43] Although no longer legally things, the freedom of these free people of colour was being visibly contradicted by a virtual enslavement that operated, like the caste system on the Indian sub-continent, as a social rather than formally legal condition. The result, in the view of the *Christian Spectator*, was a form of slavery 'never heard of […] in any country, ancient or modern, pagan, Mahommedan, or christian'.[44] By 'slavery' the *Christian Spectator* did not mean physical bondage: 'We do not mean here to speak of slavery as a system of bonds and stripes and all kinds of bodily suffering'.[45] What made slavery in the United States 'more ominous in its character and tendency than any similar system which has ever existed' was that its condition did not cease with legal emancipation.[46] As a supporter of the American Colonization Society stated in 1833, free people of colour in the United States were 'nominally free, it is true, but virtually slaves—a proscribed and degraded caste, whose liberty (if liberty it may be called) is but negative, giving them but little, and exacting from them every thing.'[47]

In summary, these are the two main ways in which the problem of slavery was manifesting in the United States at the turn of the nineteenth century, as far as the American Colonization Society and its supporters were concerned. On one side, the presence of free people of colour contradicted the presence of unfree people of colour, destabilising the institution of slavery by making visible the contradiction that underwrites it. On the other side, the ongoing 'virtual enslavement' of these free people of colour contradicted their presence as free people in the United States. Wherever one looked, black people appeared simultaneously free and unfree, never wholly slaves, and yet never wholly citizens—their degradation as things contradicted by the appearance of their freedom as humans; their freedom as humans undermined by their abyssal degradation as things.[48]

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[43] 'Christian Spectator', in American Colonization Society, *Seventh Annual Report*, 87.

[44] Ibid, 88-89.

[45] Ibid.

[46] Ibid, 90.

[47] 'Motion of Z C Lee, Esq, seconded by Hon J W Taylor', in American Colonization Society, *Sixteenth Annual Report of the American Society for Colonizing the Free People of Colour of the United States* (Washington: printed by James C Dunn, 1833), x.

[48] See also John Seh David, *The American Colonization Society and the Founding of the First African Republic* (Bloomington: iUniverse, 2014), Chapter 3.

The founders of the American Colonization Society conceived of 'Liberia' as the solution to this double-sided problem. Creating a colony 'in Africa (or elsewhere)'[49] for these free people of colour was conceived as the solution, because the problem was understood as the *appearance* of free black bodies in the United States. Thus the institution of slavery, they argued, would remain insecure as long as the possibility of emancipation was made apparent by the presence of people of colour freely walking the streets. At the same time, they argued, emancipation itself would remain merely apparent as long as these free people of colour remained in the United States: here they would only ever experience the *semblance* of freedom, and not *real* freedom; for '[h]ere the thing is impossible: a slave cannot really be emancipated'.[50] In short, whether they walked free or laboured in bonds, a person of colour remained a thing in the United States, but *seeing* them walk free was both fanciful and dangerous because it gave the appearance of another, unreal reality that threatened the real asset of slavery by revealing the crack in its logic.

And so 'Liberia' was conceived at the beginning of the nineteenth century as an alternative to bleach:[51] a way of making free the free people of colour of the United States, by making their black bodies disappear altogether. If making their skin white with a liberal dousing of bleach was not a Christian solution to the perceived problem of the appearance of free people of colour in the United States, then the next best solution was to make them invisible, by colonising them in Africa (or elsewhere). To quote the slave-owning member of the American Colonisation Society, General Harper, who coined the name in 1824:

> I have thought of a name that is peculiar, short, and familiar, and that expresses the object and nature of the establishment—it is the term LIBERIA; and denotes a settlement of persons *made free*: for our Colony may with truth be called the home and country of freedmen, in contradistinction to the slaves of whom they once formed a part.[52]

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[49] See 'Constitution of the American Society for Colonizing the Free People of Color of the United States', in *A View of Exertions Lately Made*, 11-12.

[50] 'Christian Spectator', in American Colonization Society, *Seventh Annual Report*, 90. See also American Colonization Society, *Sixteenth Annual Report*, v, xvii.

[51] See the passage from the *Christian Spectator*, cited in note 40 above: 'But here the thing is impossible: a slave cannot be really emancipated. You cannot raise him from the abyss of his degradation. You may call him free, you may enact a statute book of laws to make him free, but you cannot bleach him into the enjoyment of freedom.'

[52] American Colonization Society, *Seventh Annual Report*, 5-6 (italics in original).

Liberia was thus born as a radical concept of liberty, directed at making the free positively free (whilst, incidentally, making the unfree positively unfree).[53] As the American Colonization Society proclaimed in its address to the people of the United States on the tenth anniversary of the Colony in west Africa, speaking of the condition of the African-American settlers there: 'In Liberia, he exhibits not the semblance, but the reality of freedom'.[54] If the United States would be known as the land of the free, then Liberia would be known as 'the land of the free'd.'[55]

But there is also a third way in which 'Liberia' was conceived as a force of liberty. Not only would colonisation emancipate the free people of colour of the United States (whilst securing the bonds of slavery there), but the establishment of an African-American colony in Africa would, it was said, also provide a model of civilisation that would lead to the emancipation of all of Africa's peoples.[56] This was the great humanitarian mission of the day: to make Africans free from enslavement to their traditional ways—or as one of the founders of the American Colonization Society proclaimed in an initial meeting of the organisation: '[i]t is the hope of redeeming many millions of people from the lowest state of ignorance and superstition'.[57] Through this colonisation mission, 'civilization and the christian religion would be introduced into that benighted quarter of the world'.[58] Or as another supporter wrote:

> When she shall have done the work, Sir, it will be seen that the new world will have sent back to the old, the most sublime empire of reason and law, ever known to mankind. She will have planted in a land, once illustrious, but long darkened by superstition and despotism, the institutions of civil and

[53] On the connection between the colonisation mission and the desire to secure the purity of white America, see also the 'Memorial of the President and board of Managers of the American society for colonizing the free people of color of the United State', submission to Congress, in *A View of Exertions Lately Made*, 14.

[54] American Colonization Society, *Address of the Managers of the American Colonization Society, to the People of the United States* (Washington, DC: printed by James C Dunn, 1832), 4.

[55] Ibid, 11.

[56] See, eg, 'Review of Christian Spectator', in American Colonization Society, *Seventh Annual Report*, 86: 'Such is the history of the American Colonization Society. Its *design* is general—the benefit of the whole African race. Its plan of *operation* is specific, the establishment on the coast of Africa of a colony of *free* people of colour from America' (italics in original). See also Burin, *The Peculiar Solution*, 13-14.

[57] Statement of Elias Caldwell, in *A View of Exertions Lately Made*, 7. See also Ciment, *Another America*, 9.

[58] Statement of Elias Caldwell, in *A View of Exertions Lately Made*, 7. On the aims of the colonisation mission, see also American Colonization Society, *Seventh Annual Report*, 7.

> religious liberty; and savage men will feel their influence, and be converted to civilization and Christianity.[59]

This was the light that the American Colonization Society hoped to shine on the lands and peoples of Africa: *Liberia*, a beacon for the empire of logos and law, enabling the growth of the institutions of liberty in a long-darkened land. 'From them, under Heaven, the voice has gone forth—"let there be light in Africa".'[60] *And savage men will feel their influence*.

B Beyond the littoral

> I beg most respectfully to call Your Excellency's attention to this important and valuable section of country a primeval forest, heavily timbered and watered by the beautiful Manah River, brooks, rivulets, and creeks on all sides – just such a site as would be desirable for the building up of one or two good large towns and villages without the least molestation from any one. We should lose no time in taking possession of and occupying this point with as little delay as possible.[61]
>
> *Report of the Special Commissioner for the Demarkation of the Anglo Liberian Boundary*, 1903

In 1903 the erstwhile Colony of Liberia celebrated its fifty-sixth anniversary as the Republic of Liberia. The African-American settlers had declared Liberia a Free, Sovereign and Independent State in 1847,[62] making it the only independent African republic at the time, and the only other 'black republic' in the world after Haiti. One of the main reasons for the declaration of independence was to gain legal recognition as a member of the international community of states, to empower the government to collect customs duties from foreign merchants.[63] The problem was summarised by a British Commodore in a letter to the Americo-Liberian Governor in 1844:

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[59] American Colonization Society, *Sixteenth Annual Report*, xvii.

[60] 'Motion of Z C Lee, Esq, seconded by Hon J W Taylor', in ibid, x.

[61] *Report of the Special Commissioner for the Demarkation of the Anglo Liberian Boundary* (Monrovia: 10 August 1903), 8-9.

[62] Declaration of Independence of Liberia (1847).

[63] See Yekutiel Gershoni, 'The Formation of Liberia's Boundaries, Part 1: Agreements', *Liberian Studies Journal*, vol 17, no 1 (1992).

> For the rights in question, those of imposing custom duties and limiting the trade of foreigners by restrictions, are sovereign rights, which can only be lawfully exercised *by sovereign and independent states, within their own recognized borders and dominions*. I need not remind your excellency that this description does not apply to 'Liberia' which is not recognized as a subsisting state, even by the government of the country from which its settlers have immigrated.[64]

The settlers' Declaration three years later, that Liberia is a 'Sovereign and Independent State', was their answer to the British Commodore. And the Declaration succeeded in bringing the Americo-Liberian people their desired status in international law of nation-statehood—although Britain would have to be reminded from time to time that this description did apply to Liberia.

After Liberia's declaration of independence in 1847, European recognition of Liberia's international personality remained qualified in two ways in particular. As the 'scramble for Africa' intensified in the 1880s, Britain and France made clear that, if Liberia was to subsist as a sovereign and independent state, and not be annexed to either of their colonial empires, it had to have recognised borders and exercise dominion over the peoples within that territory (as the British Commodore had noted in 1844). The problem was that, since its inception, Liberia had remained an unbounded idea. As a beacon for the empire of reason and law in a long-darkened continent, 'Liberia' was supposed to be without limit in Africa.[65] This was not just metaphorical; *physically*, Liberia was supposed to reach 'indefinitely into the interior' of Africa. As the American Colonization Society wrote in an 'Address to the People of the United States' in 1832, in its *Description of the Colony*: 'The tract of country under the Colonial jurisdiction […] extends from one hundred and fifty, to two hundred miles along the coast, and indefinitely into the interior.'[66] Liberia's littoral reach might have been limited by the encroaching forces of Britain to the north-west and France to the south-east, but beyond the littoral, Liberia's constitution was left entirely open.[67] At least that was the original

[64] 'Letter dated September 9, 1844 sent by Commodore Jones of the HMS Penelope to Joseph Jenkins Roberts, governor of the Liberian commonwealth', cited in ibid, 25 (my italics).

[65] See also Gershoni, 'Liberia's Boundaries, Part 1', 26, 30-31.

[66] American Colonization Society, *Address of the Managers*, 11. See also American Colonization Society, *A Few Facts Respecting the American Colonization Society and the Colony at Liberia* (Washington, DC: printed by Way and Gideon, 1830), 5; Gershoni, 'Liberia's Boundaries, Part 1', 26.

[67] See, eg, Constitution of the Commonwealth of Liberia (1839) and Constitution of the Republic of Liberia (1847). See also Gershoni, 'Liberia's Boundaries, Part 1', 26.

idea. By the end of the nineteenth century, Britain and France were forcefully circumscribing it, making clear that, if the Black Republic was to subsist in the twentieth century as a nation-state, then it would have to define its territory and population and bring both under its rule.

In the next section of the chapter I examine the implications for the peoples of Liberia of these two requirements. As I show, for the Americo-Liberian ruling class, complying with the European demands meant avoiding a form of capital punishment—revocation of their international citizenship. Failure to satisfy the requirements of this legal framework, by developing Liberia beyond its coastal settlements, would have meant becoming vassals of either the British or French colonial empires. To avoid annexation, in addition to defining the territorial boundaries of Liberia, the government would have to ensure the peoples residing within that territory were effectively under its dominion.[68] However, if failure to pacify the hinterland would have meant civil death for the Americo-Liberians, with the revocation of their international citizenship, then for a majority of the Africans who would be made Liberian in the government's attempt to realise its dominion over them, 'the redemption of the African'[69] *would* come to mean civil death.

Before I get to the consequences, however, my concern here is with the production of a metonym—'Liberia'—through the deployment of this colonial framework. The process of demarcating 'Liberia' can be seen in the following set of maps, adapted from Reed Stewart's study of Liberia's boundaries (set out on the next page).[70] The first map, drawn in anticipation of Independence, shows the limited extent of Liberia's settlement along the coast. Known as 'littoral Liberia',[71] this thin coastal strip, reaching at its widest points little more than 65 kilometers inland, was effectively the limits of Americo-Liberian dominion well into the twentieth century.

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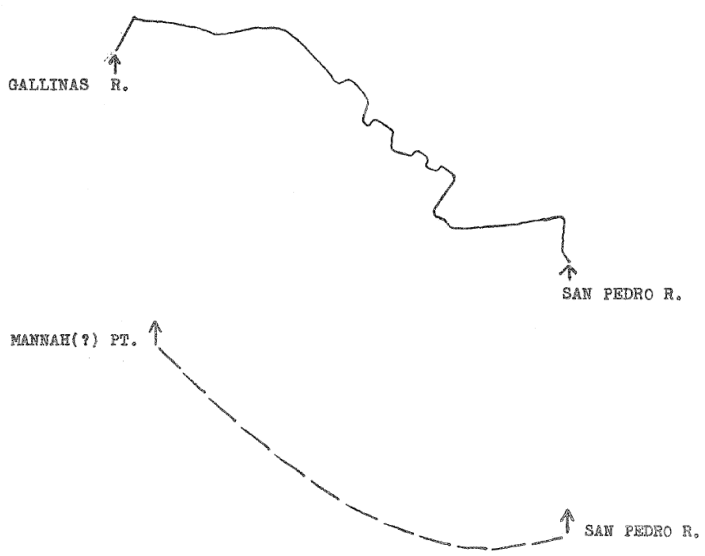
[68] The problem, as a 'Bishop of Africa' commented to the Washington *Times* in 1898, was that '[o]nly a small portion of the territory [is] under the absolute control of the government and the remainder of its square miles is occupied by over a million barbarous natives, [...]. They are very slow to accept governmental restraint, and often on the slightest pretext, resist it': 'To Ask Our Protection: The Liberian Government Needs Aid and Advice. Naturally Turns to Us', *The Times*, Washington, DC, 27 June 1898, p 1.

[69] Ibid.

[70] Reed F Stewart, 'Liberia's Boundaries: A Preliminary Study', *Conference on Social Science in Liberia* (Stanford, 1-2 August 1969). These maps are reproduced on the next page. My 'Map 1' is Stewart's 'Map B'; 'Map 2' is 'Map C'; 'Map 3' is 'Map E'; 'Map 4' is 'Map H'; and 'Map 5' is 'Map J'.

[71] See, eg, D Elwood Dunn and Svend E Holsoe, *Historical Dictionary of Liberia* (Metuchen: Scarecrow Press, 1985), 1.

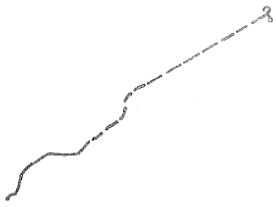


Map 1. Littoral Liberia, 1846

This map outlines the coastal territory of Liberia a year before Independence, stretching from Gallinas River to San Pedro River. The arrows point interior-wise, while the solid line marks the inward limit of 'known' Liberia.

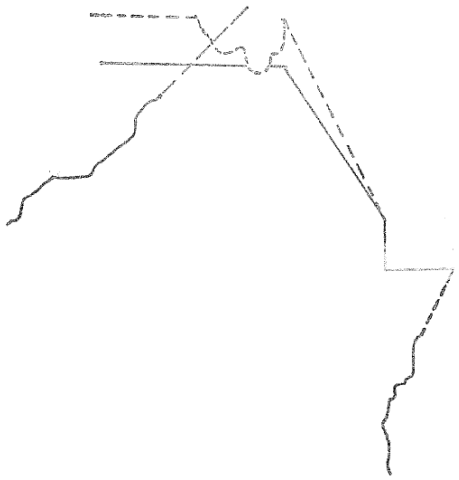
Map 2. Coastal limits, 1857

The north-western limit has contracted to Mannah Point (Mano River) under British force. Dashes mark the coastline; arrows point indefinitely into the interior.



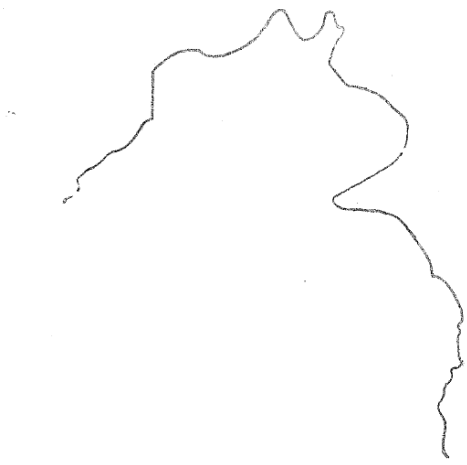
Map 3. North-west border, 1885

The border with Sierra Leone set by the 1885 Anglo-Liberian treaty begins by following the Mano River (solid line) before extending indefinitely into the interior (dashes). Note the question mark at the north-eastern end.



Map 4. Hinterland, 1892

The interior boundaries set by treaties with Britain and France in 1885 and 1892, showing the ambiguities in their definition. As Stewart notes, 'the map clearly shows the contradictory nature of the British and French treaties'.



Map 5. Proposed territory, 1906

A solid line demarks the interior boundaries of Liberia, although this map still only 'represents the proposals at one stage of negotiations between France and Liberia'. Whilst the most imaginative of the maps, in that it is merely a proposition, it also appears the most complete, and is said to be the most geographically accurate of the maps.

If Map 1 depicts the extent of the Republic on the ground at Independence, then Map 2 shows how Liberia nonetheless remained an unbounded idea. Despite the encroachment of the British on the Republic's north-western frontier, and the French to the south-east, Liberia was still seen to reach indefinitely into the interior. As Stewart notes, 'no definite limits are available for the interiorward extent of Liberia on this or on many of the following maps, even though such limits are shown on the maps' (as in Maps 4 and 5).[72]

Maps 3 and 4 then record the process of establishing Liberia as a bounded reality. Map 3 depicts the Republic's north-western boundary with Sierra Leone according to the 1885 Anglo-Liberian treaty, which, as Stewart notes, 'sets the Mannoh (Mano) River as the boundary; the left bank until the river intersects the interior boundary of Liberia, or if the river does not extend that far, a line from its farthest reaches extended in a northeasterly direction until it intersects that boundary.' Stewart then adds: 'The fact that there was no definite interior boundary at that time merely adds to the vagueness'.[73] The result is a solid line that begins confidently, before fading into the interior, the answer it is supposed to provide ending in a question mark. Likewise, Map 4, depicting the south-eastern boundary with France's west African colonies, 'tries to apply the provisions of the 1892 treaty to actuality';[74] and yet, as Stewart concludes, the result is 'two sets of boundary descriptions [that] do not jibe.'[75]

Whilst Maps 3 and 4 are an attempt to depict the bounded reality of 'Liberia', Map 5 is drawn as an imagined territory, proposed in 1906 during negotiations between Liberia and France. Thus the least realistic of the maps, in

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[72] Stewart, 'Liberia's Boundaries: A Preliminary Study', 'Map C'. Even after the boundaries had been finalised, the interior of Liberia remained indefinite. In Graham Greene's account of his 1936 walking tour through Liberia, he notes: 'I could find only two large-scale maps for sale. One, issued by the British General Staff, quite openly confesses ignorance; there is a large white space covering the greater part of the Republic, with a few dotted lines indicating the conjectured course of rivers (incorrectly, I usually found) [...]. The other map is issued by the United States War Department. There is a dashing quality about it; it shows a vigorous imagination. Where the English map is content to leave a blank space, the American in large letters fills it with the word "Cannibals". It has no use for dotted lines and confessions of ignorance; it is so inaccurate that it would be useless, perhaps even dangerous, to follow it, though there is something Elizabethan in its imagination. "Dense Forest"; "Cannibals": rivers which don't exist, at any rate anywhere near where they are put; one expects to find Eldorado, two-headed men and fabulous beasts represented in little pictures in the Gola Forest.' Graham Greene, *Journey Without Maps* (London: Vintage, 2002), 45-46.

[73] Stewart, 'Liberia's Boundaries: A Preliminary Study', 'Map E'.

[74] This is a reference to a treaty negotiated between Liberia and France in 1892 to settle the question of Liberia's south-eastern boundary.

[75] Stewart, 'Liberia's Boundaries: A Preliminary Study', 'Map H'.

the sense that it did not correspond to 'Liberia' as articulated by law, it is also the most realistic, in the sense that it comes closest to the actual lay of the land.[76]

Taken together this set of maps shows the high abstraction of the representational framework that was projected onto the lands and peoples of 'Liberia' in the attempt to consolidate the nation-state. The lines crawling across the blank page suggest an indeterminate, movable species of thing, capable of changing place without an essential change in its actual nature. At the same time, as a colonial technology, these lines were cutting deep into an actual place, reflecting and facilitating the transformation of its lands and peoples into the territory and citizens of Liberia.[77] Thus as a kind of performance artwork, the map series shows the gradual overlay of 'Liberia' upon the country over which it sought to extend its jurisdiction between 1846 and 1906; whilst as a work of surrealism, the maps show just how indefinite the territory remained, and how fantastic the process was of consolidating 'Liberia'.

The fantastical nature of this process can be read in the *Report of the Special Commissioner for the Demarkation of the Anglo Liberian Boundary*.[78] Written in 1903 as a record of the Commissioner's expedition to map the north-western boundary set down in the 1885 treaty,[79] the report reads in parts like the journal of a man exploring the realms of a mythical country that exists in name alone, as 'Liberia', but which has not yet been made conscious of itself as *Liberian*. Throughout the report there is a striking dissonance in how the Commissioner describes the places he passes through, as a kind of future-present Republic—present in the minds of Americo-Liberians, only yet to be made present on the ground. At the same time as he describes these places as 'our Republic', and advises the Government to 'lose no time in taking possession of and occupying' them, he notes the lack of presence of the Republic there. Thus at one point, having presented the Liberian flag to some Chiefs, he notes: 'For the first time had our flag been seen in this part of our Republic so they informed us'.[80]

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[76] Ibid, 'Map J'.

[77] Compare Olivia Barr, 'A Jurisprudential Tale of a Road, an Office, and a Triangle', *Law and Literature*, vol 27, no 2 (2015).

[78] *Report of the Special Commissioner*.

[79] On the demarcation process, see also Yekutiel Gershoni, 'The Formation of Liberia's Boundaries, Part 2: The Demarcation Process', *Liberian Studies Journal*, vol 17, no 2 (1992).

[80] Ibid, 9-10. In his study of the 'pacification of the Liberian hinterland', Akingbade also notes how 'there were many people in the interior who were totally untouched by the influence of the

The Americo-Liberian vision of making citizens out of the African peoples living within the envisioned territory of the Republic can also be seen in this report. At one point, on entering the town of Kailahun on the north-western frontier, the Commissioner notes that its '3000 or 4000 inhabitants' were 'kindly disposed and friendly—in a word they are nice people and will make us good citizens by and by. But the imitation must come from us.'[81] This reflects the view, shared by the government and its supporters, that the process of extending 'Liberia' into the interior would be uni-directional and top-down: these people would be made into *our* citizens.[82] The sentence that follows—'but the imitation *must come from us*'—is remarkable, not only because it repeats the thought that the extension of 'Liberia' into the interior would be uni-directional and top-down, but because of its apparent typographical error. Presumably the Commissioner meant 'invitation' and not 'imitation', in line with the European practice of establishing authority over an African people and their land through the signature of a treaty.[83] The 'invitation' would be to enter into a treaty with the Liberian government, perhaps on the promise of military protection and the provision of infrastructure and schools, in return for recognising the sovereignty of Liberia and allowing the Republic to raise its flag over the town.[84] But the word 'imitation' is equally appropriate, pointing to the implication of such an invitation. Becoming a Liberian citizen would involve not merely a change in legal status: it would involve, by and by, becoming 'civilised'. As the Commissioner writes early in his report, after carrying out 'an inspection of these stalwart sons of our forest': '[I was] proud to know that we had thousands of such good strong men that could be utilized as citizens, if civilized, in building up a strong commonwealth on our border and Interior.'[85] Of course to 'utilise' means not simply to 'use', but to use in a way that

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Americo-Liberians', and that 'their first awareness began when they were required to pay taxes and recruit men of their number for public works or for work on the farms of individual Americo-Liberians'. Harrison Akingbade, 'The Pacification of the Liberian Hinterland', *Journal of Negro History*, vol 79, no 3 (1994): 292-293.

[81] *Report of the Special Commissioner*, 12 (spelling 'mistakes' in original).

[82] As it turned out, these particular people and their land would be annexed to Sierra Leone by the British.

[83] See Gershoni, 'Liberia's Boundaries, Part 1', 27.

[84] See *Report of the Special Commissioner*, in particular the summary of the 'political character' of the mission at 20-24. On the importance of the flag as a sign of the Republic's dominion in the interior, see, eg, at 9-10, 13-14, 18, 20-21.

[85] Ibid, 5.

alters the object in use: it is to *'render useful'*; to *'convert to use'*.[86] To make these 'sons of the forest' into citizens would be to make them useful to the nation-state. Not only would they make useful soldiers for the Republic, as the Commissioner anticipated, but they would also be especially useful as labour.[87] However, as the Commissioner also notes, to make these 'hinterland peoples' useful in these ways, first they would have to be rendered 'civilised', which was essentially a process of imitation, involving conversion to Christianity and a proper 'book education' that would not only inform their beliefs but also their dress and manners.[88]

If the success of metonymy is in the fusion of signifier and signified—so that a name such as 'Liberia' is thought to correspond with the lands and peoples it circumscribes—then key to this success is the realism of the representational framework. This does not mean the representational framework must *actually* correspond with the given form of its object. The opposite: as an act of articulation, giving new form to what is, the framework must be super-real. Indeed, the more surreal the framework's articulated vision is, the more able it will be to bend its object into another form. This of course creates a dissonance between the representational framework and its object. But that is why the success of the metonym depends on the realism of the representation, which does not mean it has to be 'actually real', but only *imagined* to be real.

This is the genius of a metonym: its capacity to be simultaneously separate and inseparable from its object—inseparable in the sense that the framework and its object become all-but indistinguishable (hence the realism); separate in the sense that the two are never quite identical (hence the realism is over-laid or super-imposed, that is, surreal). Thus for the Commissioner going out to map the interior of Liberia, the task was not to describe the country 'as *is*', but to overlay the territory articulated in the treaty onto the country. As visionaries, instead of seeing an existing country, the Americo-Liberians who set out to create Liberia saw a fantasy world of primeval forests 'heavily timbered and watered' by 'brooks,

[86] 'Utilize, *v.*', OED Online, September 2015 (my italics).

[87] I discuss this in the next section. See also Akingbade, 'The Pacification of the Liberian Hinterland', 279.

[88] And yet, 'the imitation *must come from us*', which also points to the fact that the colonisers, rather than the colonised, would have to be the ones to assimilate to the other. (With thanks to Jeremy Farrall for pointing this out.) Of course, this is not how the Americo-Liberian settlers saw the situation. In general, they saw themselves as the *source* of imitation, and not the ones who would be doing the imitating—although in the end, of course, the influence worked both ways, with both 'colonisers' and 'colonised' influencing each other.

rivulets, and creeks' and populated by primitive 'sons of the forests'.[89] It is not that they did not see the dissonance between their vision and what they encountered on the ground; it is just that they saw their vision as *more* real. After all, this was the light that would illuminate Africa's true potential and enable its transformation.

In sum, the process of extending Liberia 'beyond the littoral' was meant to be a process of super-imposing the idea of Liberia over the blank space of the 'hinterland' to consolidate the nation-state. In the second half of the nineteenth century, 'littoral Liberia'—the place of Americo-Liberian coastal settlements—was a place in flux, its north-western limits under pressure from the British, its south-western limits contested by the French, with both threatening to subsume the nascent Republic within their colonial empires.[90] Extending Liberia 'beyond the littoral' was supposed to finally settle the uncertain, contested place of 'Liberia' in west Africa by establishing definite boundaries and bringing the country—both lands and peoples—under its dominion. And yet, as I now turn to show, super-imposing the idea of 'Liberia' over the hinterland using the surrealist apparatus of the colonial legal framework did not place Liberia beyond the littoral, in the sense of settling its place in west Africa. Rather, the effect was to extend littoral Liberia *into the interior*. Desmond Manderson and Honni van Rijswijk describe 'littoral spaces' as 'heightened and active, places of contested imaginaries'—'an environment of flux and change *par excellence*'.[91] Despite the attempt to settle 'littoral Liberia' by defining its territory and population, what had been throughout the nineteenth century a largely open and indeterminate idea, with only 'a narrow strip squeezed in between the twin perils of land and sea',[92] would become in the twentieth century a littoral space *par excellence*.

[89] See notes 61 and 85 above.

[90] See Gershoni, 'Liberia's Boundaries, Part 1'; Gershoni, 'Liberia's Boundaries, Part 2'.

[91] Desmond Manderson and Honni van Rijswick, 'Introduction to Littoral Readings: Representations of Land and Sea in Law, Literature, and Geography', *Law and Literature*, vol 27, no 2 (2015): 174. See also Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), Chapter 10.

[92] Manderson and van Rijswick, 'Littoral Readings', 174.

C Civil death

> The genius of liberty shall go out from thence; the dominion of freedom shall be extended; tribe after tribe shall send in its adhesion, until the entire of long neglected—long injured Africa—no longer pillaged and plundered of her children, shall be crowned with all the blessings of civil liberty. And by the advancement of this cause shall commerce be advanced. The hidden treasures of another continent shall be developed and borne upon many a sea.
>
> The Rev Mr Hammet
> *Annual Meeting of the American Colonisation Society*, 1822

The vision of making the African peoples over whom Liberia claimed jurisdiction into citizens was not formalised until 1904. Under the interior policy of President Arthur Barclay (1904–1912), the Constitution of the Republic was finally amended to enable Liberia's 'indigenous peoples' to be recognised as subjects of—rather than just subject to—the nation-state. The recognition remained partial, however, with African-Liberians given the constitutional status of 'uncivilised citizens', with the proviso that they *could* become 'civilised citizens', by and by, at which point they would be invested with the full body of rights that resided in Americo-Liberians. Finally, this would be the realisation of the promise of Liberia, as a beacon for the empire of reason and law in Africa: the possibility of becoming rightful subjects, marked by the graduation into civilization; this was the invitation (of citizenship), and the imitation (of civilization), that would render 'the sons of the forest' useful to the nation-state.

If this vision was a violent one, its violence was felt most in its non-realisation. Failure to become a wholly rightful citizen of the nation-state would mean suffering a form of civil death as an 'uncivilised citizen'. This is precisely what happened to the vast majority of Liberia's citizens in the first half of the twentieth century. The African peoples over whom the government sought to exercise dominion would remain 'Liberian' in name alone, the two ('African' and 'Liberian') being synonymous only in the language of the national law of the Republic. To be African-Liberian at this time was like being African-American in the United States, as free people of colour who remained unfree as a result of their

de-gradation as second-class citizens. This experience of civil death is writ large in the history of Liberia.

In the first decade of the twentieth century, the government was still struggling to establish effective occupation of the interior, in large part because it lacked the resources to extend its presence beyond its coastal settlements.[93] Without funds to build infrastructure, and without security forces to deploy, the hinterland remained 'effectively unoccupied', according to the terms of the 'declaration relative to the essential conditions to be observed in order that new occupations on the coasts of the African continent may be held to be effective', adopted by the *General Act of the Berlin Conference* in 1885.[94] In attempt to effectively occupy the interior, the Government had entered into an agreement with the British owned Liberian Development Company in 1904. The agreement was supposed to do two things: the Liberian Development Company would provide the Government with a loan, thus addressing its financial problems; and the company would carry out commercial operations in the interior, which would count towards 'effective occupation'.[95] In 1906, the government secured another large loan from British bankers with the assistance of the Liberian Development Company.[96]

Within a year—heavily indebted, unable to repay its loans, and still without control over the African peoples within its territory, to the frustration of the British and French—the government was forced to agree to a set of reforms. As the

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[93] See Akingbade, 'The Pacification of the Liberian Hinterland', 281.

[94] *General Act of the Berlin Conference*, 26 February 1885, Chapter VI. On what would constitute 'effective occupation', see also *General Act of the Brussels Conference Relative to the African Slave Trade*, 2 July 1890, in which 'the Powers', '[e]qually animated by the firm intention of putting an end to the crimes and devastations engendered by the traffic in African slaves, of effectively protecting the aboriginal populations of Africa, and of assuring to that vast continent the benefits of peace and civilization; […] have adopted the following provisions': 'ARTICLE 1. The Powers declare that the most effective means for counteracting the Slave Trade in the interior of Africa are the following:— 1. Progressive organization of the administrative, judicial, religious, and military services in the African territories […] 2. The gradual establishment in the interior by the responsible Power in each territory of strongly occupied stations in such a way as to make their protective or repressive action effectively felt […] 3. The construction of roads, and in particular of railways, connecting the advanced stations with the coast […] 6. Organization of expeditions and flying columns to keep up the communication of the stations with each other and with the coast, to support repressive action, and to assure the security of roadways. 7. Restriction of the importation of fire-arms, at least of modern pattern, and of ammunition, throughout the entire extent of the territories infected by the Slave Trade.'

[95] See Akingbade, 'The Pacification of the Liberian Hinterland', 280. See also *Brussels Conference Act* (1890), Art 1.

[96] See also Gershoni, 'Liberia's Boundaries, Part 1', 36-37.

British Consul-General in Monrovia put it to the Government, Liberia would have to 'put her house in order, or be prepared, at no distant date, to disappear from the catalogue of independent countries.'[97] Or as the US Secretary of State put it in a letter to a delegation appointed to investigate the situation in Liberia two years later:

> owing to the inability of the Liberian Government properly to control the native tribes and its consequent failure to maintain order upon the border, there is reason to apprehend the temporary and eventually the permanent occupation of Liberian territory by her more powerful neighbors [Britain and France] on the ground of the necessity of assuring order and safety in their own colimiting territories.[98]

'Putting her house in order' meant establishing a Frontier Police Force as well as reforming its Judiciary and Treasury, under the supervision of Western advisors.[99] Complying with the British demands, the Government established the Liberian Frontier Force in 1908,[100] putting it first under the command of a British army Major with the assistance of two British officers, and within a few years under US supervision and command.[101]

In the decades to follow, the Liberian Frontier Force would be used as an administrative instrument to pacify the hinterland.[102] Officially mandated 'for the maintenance of law and order throughout the republic and for the prevention and detection of crimes on the frontier and in the interior of the country',[103] it quickly gained a reputation for 'wanton cruelty, harassment, indiscipline, and rapine.'[104]

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[97] Cited in Monday B Abasiattai, 'European Intervention in Liberia with Special Reference to the 'Cadell Incident' of 1908-1909', *Liberian Studies Journal*, vol 14, no 1 (1989).

[98] 'The Secretary of State to the Commissioners of Liberia', US Department of State, Washington, DC, 13 April 1909.

[99] See Abasiattai, 'European Intervention in Liberia 1908-1909', 79.

[100] 'Joint Resolution Providing for the Pay and Formation of a Frontier Police Force', in *Acts Passed by the Legislature of the Republic of Liberia during the Session 1907–1908* (Monrovia: Government Printing Office, 1908), 23, cited in Akingbade, 'The Pacification of the Liberian Hinterland', 281-284.

[101] See Abasiattai, 'European Intervention in Liberia 1908-1909', 79-85. See also Akingbade, 'The Pacification of the Liberian Hinterland', 281. On the involvement of US officers in the Liberian Frontier Force between 1912 and 1927, see Timothy A Rainey, 'Buffalo Soldiers in Africa: The US Army and the Liberian Frontier Force, 1912-1927', *Liberian Studies Journal*, vol 21, no 2 (1996).

[102] See Raymond Leslie Buell, *Liberia: A Century of Survival, 1847-1947* (Philadelphia: University of Pennsylvania Press, 1947), 24-25. See also Akingbade, 'The Pacification of the Liberian Hinterland', 292.

[103] *Frontier Force Manual*, Article 2, Section 5, cited in Akingbade, 'The Pacification of the Liberian Hinterland', 286.

[104] Ibid.

Thus in 1910, the Frontier Force was deployed to suppress an uprising of the Grebo in the south-west of the country, which had begun as a revolt in protest 'against oppression, excessive taxation, forced labor, and other irregularities.'[105]

The Government's justification for the oppressive conduct of the Frontier Force was its necessity in realising the vision of Liberia. Not only would this Force assist in establishing the authority of the Republic in the interior, thereby securing Liberia's international citizenship, but it would also accelerate the development of Liberia's uncivilized citizens. As the Liberian Secretary of State Charles King wrote in 1916, through the Frontier Force, Liberia 'strikes at the very root of […] political, religious and social institutions which are uncompromisingly antagonistic to the laws of humanity and civilisation'.[106]

King would go on to become President of Liberia from 1920 to 1930, before being forced from office along with his Vice-President and several members of his cabinet upon the release by the League of Nations of an International Commission of Enquiry report into 'the existence of slavery and forced labour in the Republic of Liberia'.[107] From the earliest days of the Republic, African-Liberians were systematically forced to provide labour for public works as well as for individual Americo-Liberians.[108] In answer to the question of the extent to which 'compulsory labour exists as a factor in the social and industrial economy of the State, either for public or private purposes', the Commission of Enquiry found:

> that forced labour has been made use of in Liberia chiefly for motor road construction, for building civil compounds and military barracks, etc., and for porterage. That this labour has been wastefully recruited and used, frequently under conditions involving systematic intimidation and ill-treatment on the part of Government officials, messengers and Frontier Force soldiers. That labour recruited by County Superintendents and District Commissioners for public purposes we find in many instances has

[105] Ibid, 286, 292.

[106] 'Secretary of State CDB King to James L Curtis, American Minister Resident', 26 May 1916, RDSL 882.00/540, cited in Martin Ford, *Ethnic Relations and the Transformation of Leadership among the Dan of Nimba, Liberia (ca. 1900-1940)* (Dissertation, State University of New York at Binghamton, 1990), 93. Again compare Simpson, 'Humanity, Law, Force'.

[107] League of Nations, *Report of the International Commission of Enquiry into the Existence of Slavery and Forced Labour in the Republic of Liberia*, Monrovia, Liberia, August 1930 (Geneva: League of Nations, 1930). The findings and recommendations are reprinted in 'The 1930 Enquiry Commission to Liberia', *Journal of the Royal African Society*, vol 30, no 120 (1931): 277-290.

[108] See also Harrison Akingbade, 'The Liberian Problem of Forced Labor 1926-1940', *Africa: Rivista Trimestrale di Studi e Documentazione dell'Istituto Italiano per l'Africa e l'Oriente*, vol 52, no 2 (1997).

> been diverted to private use on the farms and plantations of high Government officials and private citizens. That none of this labour has been paid, though paid labour may exist on the plantations; on the other hand, in Maryland [a County of Liberia] some of it has been made to pay large sums to the plantation owners to be released from a term of unpaid and unfed labour.[109]

The greatest international outcry followed the finding that 'contract labourers' shipped to the Spanish island colony of Fernando Pó had been 'recruited under conditions of criminal compulsion scarcely distinguishable from slave raiding and slave trading'.[110] On the question of whether 'the Liberian Frontier Force or other persons holding official positions or in Government employ, or private individuals have been implicated in such recruiting', the Commission found that the Vice-President 'and other high officials of the Liberian Government' had 'given their sanction for the compulsory recruitment of labour for road construction, for shipment abroad and other work, by the aid and assistance of the Liberian Frontier Force'.[111] Moreover, the Commission found that these officials had 'condoned the utilisation of this force'

> for purposes of physical compulsion on road construction, for the intimidation of villagers, for the humiliation and degradation of chiefs, for the imprisonment of inhabitants, and for the convoying of gangs of captured natives to the coast, there guarding them till the time of shipment.[112]

A further effect, the Commission found, was the abandonment of villages by people who had fled into exile.[113] In the Commission's summation, '[t]he words

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[109] 'The 1930 Enquiry Commission to Liberia', 279.

[110] Ibid, 280.

[111] Ibid. See also at 289, where the Commission notes: 'Much of the ill-treatment of the people of the interior, the cessation of native village cultivation, the exodus from the country and the general discontent has, in our opinion, been the result of brigandage on the part of *Frontier Force soldiers*, who, from the accounts of the natives, are often unaccompanied by their officers, and, when accompanying them, the officers seem to encourage a general policy of intimidation' (italics in original).

[112] Ibid.

[113] 'On several occasions the Commissioners in their travels have passed through abandoned villages, or seen the now overgrown sites of others. Some of these villages may, of course, have been abandoned in the ordinary way in favour of more fertile or less exhausted sites, or as the result of the death of the chief or other cause. In the present instances observed by the Commission, however, local history afforded a different explanation. Reports have repeatedly reached the Commissioners of villages by the score in other parts of the country unoccupied and falling into disrepair, and of gardens reverting to bush': ibid, 284.

development and social progress are unknown, servitude and slavery have taken their place.'[114]

For the Africans who had been made Liberian, the experience was an abject one. Being branded an African-Liberian at this time meant civil death[115]—denied full rightful citizenship, subjected to slavery, forced labour, or exile, amongst other forms of degradation.[116] This was the opposite of 'making free' the peoples of Africa. Indeed it was the repetition of the very problem 'Liberia' was meant to resolve. Having set out to emancipate all of Africa, the Government had reduced the vast majority of its population to the status of 'uncivilised citizens', with terrible consequences. And yet, rather than see these results as a logical function of the original vision of colonisation, they were seen as a failure to properly implement that vision.

This can be seen in the Commission's report. 'The now obvious fact', the Commission observes in prelude to its recommendations, is 'that tropical Africa can never be developed, its agricultural, mineral, and other sources utilised, nor surplus Government funds be hoped for, without the willing co-operation and assistance of the indigenous population.'[117] In a continuation of the nineteenth century policy of enlightening the dark continent, the Commission then recommends gaining that 'co-operation and assistance' by finally making civilized the uncivilized citizens of Liberia, thereby investing them with full rights of citizenship under the Constitution. 'We believe that the sooner class distinction between civilised and uncivilised is broken, and the indigenous native allowed an equal status with the coast dweller, the better for all concerned.'[118] Better for the native, and better for the nation-state, because civilisation would make the native *truly useful*. 'It is now becoming everywhere recognised by tropical African

[114] Ibid.

[115] Recall the definition of civil death discussed in Part 1 above, which includes deprivation of citizenship, degradation to slavery, forced labour, exile, amongst other forms of degradation that amounted to a loss of liberty. See notes 32 and 33 above.

[116] According to the findings of the Commission of Enquiry, 'intimidation has apparently been and is the keyword of the Government's native policy. Not only have the native village classes been intimidated and terrorised by a display of force, cruelty and suppression, but the chiefs themselves, men whom the people not so many years ago looked up to, were glad to serve, and relied upon for protection […] have been so systematically humiliated, degraded and robbed of their power, that now they are mere go-betweens, paid by the Government to rob the people': 'The 1930 Enquiry Commission to Liberia', 284.

[117] Ibid, 281.

[118] Ibid, 282.

administrators that the first considerations towards financial competence must include provision for the civilisation, education, and the gaining of the confidence of the native'.[119]

> Schools are of the first importance, not merely for the purpose of teaching reading and writing, but for improving the native's sociological conditions; and specialist instructors invaluable for broadening his ideas, teaching him market values, and the use he can make of the innumerable economic products and raw materials around him. The unsophisticated native learns something of the outside world, and his wants are increased. The missionary, the school teacher, and the trader teach him what he may buy for money, and he then wants to learn what he can grow, what he should do, or where he should work to make some money, with the result that trade increases, the coast merchant flourishes, the revenues of Government expand, and money is forthcoming […][120]

The alternative to such development, the Commission cautions, is a situation where 'the native must continue his harried existence with a feeling that he is really and truly a slave'.[121] As if this is not fantastic enough, the Commission then points to Belgian Congo as an exemplary model for the Government of Liberia to follow in developing a policy for civilising its natives, before warning that if the Government fails to act on its recommendations, 'Liberia may discover that its place in the community of civilised nations is jeopardised'.[122]

The International Commission of Enquiry has been critiqued as an attempt to undermine the Black Republic as a model of African self-rule at a time of anti-colonial revolution across the continent.[123] However, whether or not the indirect

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[119] Ibid, 281.

[120] Ibid.

[121] Ibid. Later the Commission writes: 'The villagers have been intimidated by soldiers of the *Frontier Force*, and by messengers of the Paramount Chiefs and District Commissioners, to such an extent that they find themselves obliged to labour most of the year on road construction, private or Government farms, and other work so continuously, that they have no time to cultivate their own food supply. They have, in fact, to live a harried and half-starved existence or leave the country': ibid, 284.

[122] Ibid, 288.

[123] As Azikiwe wrote in 1932 in response to the Enquiry and the coverage of its findings: 'Liberia today is a winter resort for any artist who is interested in caricaturing Negro statehood'. Ben N Azikiwe, 'In Defense of Liberia', *Journal of Negro History*, vol 17, no 1 (1932): 45. Azikiwe goes on to critique the 'systematically organized propaganda that Liberia, Haiti, and Abyssinia are failures, and that they furnish evidence to prove the incapacity of the Negro for self-government in the tropical regions. Discarding all problems which sovereign states must face in order to maintain their *de jure* existence, most of the writers on Liberia, excepting Benjamin Brawley, McPherson, Froude, Jore, Cuthbert Christy, and Buell, have delighted themselves in seeing chaos, disorder, hopeless anarchy and failure of the Liberian "experiment" whenever her case is before the bar of international

aim was to make it a protectorate, more insidious was the Commission's direct goal, as expressed in its recommendations for reform. Liberia would keep its international citizenship as long as it demonstrated progress in making its population 'useful', by which it meant economically productive. At the time there was a shortage of labour in Europe's west African colonies, leading colonial administrations to erect barriers to keep their domestic labourers within the territories of their colonies. Against this policy, Liberia was committing two offences: not only was its government failing to make its population into productive citizens, but it was also 'leaking' labourers from its neighbouring colonies, especially Sierra Leone, by acting as a conduit for recruiters to ship them to the island of Fernando Pó.[124]

The intervention by the League of Nations in the form of the Enquiry succeeded in stopping that leak, to the satisfaction of British interests in Sierra Leone. But it also satisfied US interests, by putting international pressure on Liberia to create a domestic labour market.[125] In 1926, four years before the finalisation of the Commission's report, and around the time of the Commission's establishment 'at the instigation of the United States Government',[126] the US-owned Firestone Tire and Rubber Company had signed a planting agreement with the Government of Liberia to lease more than 1 million acres for its planned rubber plantations, requiring a projected 350,000 labourers[127]—labourers which, the Company reminded the Liberian Government, it had promised to make available. As Harvey Firestone Jr stated in a letter to President King in 1926: 'We desire to point out to the Government again that the success of our development in

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opinion. Even Emmett J Scott, of Howard University, holds that the usual charges of official corruption are not always true. This is generally done to take advantage of the people and pave way for economic exploitation'. Ibid, 46-47.

[124] See I K Sundiata, 'Prelude to Scandal: Liberia and Fernando Po, 1880-1930', *Journal of African History*, vol 15, no 1 (1974): 110.

[125] See also Azikiwe, 'In Defense of Liberia'. Azikiwe writes: 'As Dr Buell points out in his address the Firestone Agreement is chiefly responsible for the economic problems of Liberia today. This document is unilateral despite its imposing signatories. It grants Harvey S Firestone not only a veto power on refinancing this country, but elevates him to a dictatorship whereby he effectively controls the immediate economic destiny of that government. Like an octopus it has a stranglehold on Liberia which will ultimately threaten if not completely decimate the political existence of this lone African Republic. It is thus held in some quarters to have paved way for Yankee imperialism in Africa': 30. On the connection between the League of Nations International Commission of Enquiry into Liberia and the Firestone company/United States interests, see also W E Burghardt Du Bois, 'Liberia, the League and the United States', *Foreign Affairs*, vol 11, no 4 (1933).

[126] 'The 1930 Enquiry Commission to Liberia', 277.

[127] See Sundiata, 'Liberia and Fernando Po', 108.

Liberia is largely dependent upon the organization of a permanent and contented labour force.'[128] What Firestone needed was a mass of bodies to transform Liberia's primeval forest into a productive rubber plantation. If Liberia's already scarce human resources were being shipped to Fernando Pó, Firestone's investment would fail.

Figure 8. 'Tappers on Firestone's plantations in Liberia set out daily at sunrise to tap 250 to 300 trees apiece.'[129]

The International Commission of Enquiry into slavery and forced labour in Liberia marked a turning point in the Republic. In 1944, the new Government of President William V S Tubman (1944–1971) launched its National Unification Policy, according to which the Government would 'strive with all our might to agglutinate and unify our populations and political adherents composing the body politics […] to make our country a united nation with LIBERTY and JUSTICE for all'.[130] This was to be achieved through a government program that would seek, in line with the Commission's recommendations, to finally realise the vision of liberating African-Liberians by overcoming the division between 'civilised' and 'uncivilised' citizens

[128] Firestone Plantations Company, *Liberia and Firestone: The Development of a Rubber Industry, a Story of Friendship and Progress* (Akron: Firestone, 1956), 7. See also ibid.

[129] [image omitted from digital version]

[130] Tubman, cited in Varney J Fahnbulleh, 'A Concise Synopsis of the Tubman National Unification Policy', *William V S Tubman Papers*, Department of Internal Affairs, Republic of Liberia, 1967 (Bloomington: Liberian Collections, Indiana University Libraries, 2008), 2-3.

and ensuring equal economic development for all.[131] Specifically, the Unification Program would finally invest full rights of citizenship in all Liberians, including voting rights for women; it would abolish the distinction between 'Americo-Liberian' and 'tribal' jurisdictions, along with the parallel administrative division between coastal Counties and hinterland Provinces; and it would extend education and employment opportunities to Liberia's 'indigenous' population. As one of President Tubman's admirers wrote in 1967 in commemoration of the Unification Policy: 'In the mid 1940's, a great event occurred in the history of the indigenous population of Liberia. This was the coming into power of the Great Emancipator of the Liberian Hinterland, William V S Tubman.'[132]

And yet, rather than presenting a radical new vision of 'Liberia', Tubman's National Unification Policy represented an attempt to consolidate the old vision by making it total. The end of Unification, or 'oneness',[133] would be the absolute triumph of 'Americo-Liberianism', as the identity under which all other socio-political identities would be subsumed. The identity of 'Americo-Liberian' could be done away with, as President Tubman advocated, because there would no longer be anyone within Liberia who did not fit its description. As a nation of 'civilised citizens', all would be effectively 'Americo-Liberian', and so the distinction would be redundant.

With African peoples across the continent gaining momentum in the struggle for self-rule, the Unification Policy was a counter-revolutionary program designed to contain (hold within, and withhold from manifesting) the movements of Liberia's 'tribal' peoples. As suggested by the photograph on the next page, these movements, once contained by the government, would become little more than a state-sanctioned 'traditional performance'.

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[131] On the National Unification Policy, see also Yekutiel Gershoni, 'Liberia's Unification Policy and Decolonization in Africa: A Parallel Process', *Asian and African Studies*, vol 16 (1982).

[132] Fahnbulleh, 'Tubman National Unification Policy', 5. The subtitle reads: 'A Special Literary Work done for DR WILLIAM V S TUBMAN And presented during his 72nd Birthday Celebration in Gbarnga, Bong County, on November 29, 1967 as A Birthday Presentation by Varney Jakema Fahnbulleh, Liason Officer-General, Department of Internal Affairs'.

[133] See ibid, 1-2.

Figure 9. 'A traditional performance during the 1952 inauguration' of President Tubman. The flag is the Liberian 'lone-star'.[134]

If this monochrome image of 'a traditional performance during the 1952 inauguration' of President Tubman suggests a vision of Unification that would contain African-Liberians' revolutionary movements, then the damaged photograph itself, as the medium of the image, suggests what happened to the government, as the medium of this vision. In the 1970s, Liberia underwent a revolution led by young African-Liberians that culminated in a massive demonstration in 1979. A year later, the 'First Republic' of Liberia was brought to an end with a coup d'état led by the young 'indigenous' man, Master Sergeant Samuel Doe, who would become Liberia's 21st President, and its first African-

[134] [image omitted from digital version]

Liberian leader. In one of the first acts of the new government, thirteen ministers of the old regime were executed in a bloody act of capital punishment. The coup also precipitated the devastating civil wars of the 1990s and early 2000s that killed a quarter of a million people, displaced millions more, and destroyed the institutions and infrastructure of the state of Liberia. And yet, for very many Liberians, this year—1980—and not 1847, marks the year of Liberia's Independence.

3 Post-script

So far this chapter has examined how a logic of capital informed the articulation of 'Liberia' from its conception as an idea of liberty at the beginning of the nineteenth century to its consolidation as a nation-state in the twentieth. I set out this logic in Part 1, focusing on how it operates through a legal framework to render an object entirely fungible. In Part 2, I then showed how this logic operated through the law as its forceful medium to inform the making of Liberia. To make this argument, I examined the super-imposition of a representational framework over country in west Africa that sought to render lands and peoples productive as territory and citizens, and that culminated in a state of civil death.

That is not the end of the story, however. Rather, it points to a new beginning. This final part of the chapter anticipates that beginning, which I then pursue through the subsequent chapters. To do so, I first consider here an alternative representational framework. This 'independence framework' operates on the same logic as that of capital, but turns it from a medium of violent realism into a critical form that enables a more autobiographical expression of subjectivity. This, I argue, has the potential to underwrite the re-making of Liberia 'post-conflict'.

A Living dead

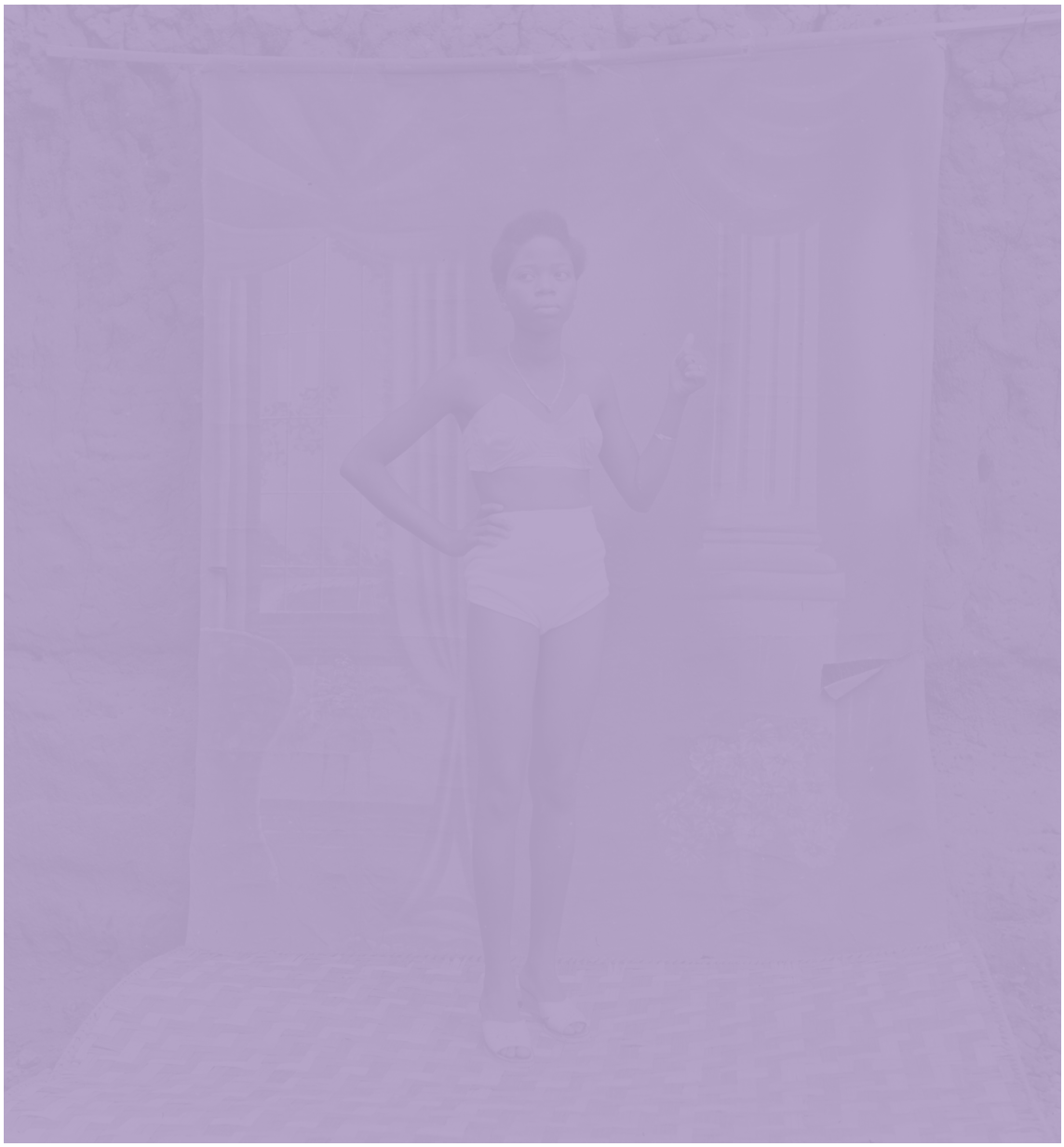

Figure 10. 'Untitled, 1960'[135]

This studio portrait was taken in 1960 by the Beninese photographer Joseph Moise Agbodjélou, within months of Benin gaining independence from France. I present it here in the place of Liberian material, because it works to intensify, and even authorise, the analysis of Liberia presented in this chapter. You may question the validity of this, but I suggest it would be better to question the *effect*, as one must interrogate the effect of every representational framework that has been studiously laid over its object.

[135] [image omitted from digital version]

The photograph is in what might be called critical *vertretbar* style, in its self-conscious use of the representational framework of the art form to create the art work. The art form is studio photography, which in its traditional mode was developed to create an idealised image. The result is supposed to be a representation, of the family for instance, that one can hang in the entrance of the home as a reminder of its *real nature*; thus the reality of family life is the one on display in the photograph and not the dysfunctional one on display in everyday life.[136] In this way, the traditional mode of studio photography uses the representational framework uncritically to create a fantasy that is portrayed as reality. This both substitutes for the actual dysfunction and authorises its continuation, by making it present in a way that the contradiction can be overlooked.

By contrast, the representational style used in this photograph is a critique of this traditional mode of studio portraiture performed from within the mode of studio portraiture. The photograph presents a body under a vestment, in keeping with the traditional mode of studio portraiture. By 'vestment' I mean, most broadly, a 'covering', which includes not only the clothing but also the jewellery and drape seen in the photograph. More narrowly, however, I also mean 'clothing' 'worn by the priest or priests at the celebration of the Eucharist'.[137] This points to the double effect of a vestment, covering a body and *thereby* making it sacred, but in so doing, reinforcing the unsacred quality of the unvested body. This also points to a third meaning of vestment: 'A right or privilege with which a person or body is invested or endowed'.[138] Again, it is the vestment that makes the body a rightful subject; but for the act of vestiture, the body would remain a mere object. Thus the young woman is presented in the fashion of a 'civilised subject', which, in the attempt to dignify her by endowing her in a rightful way, also does the opposite, stripping her body of its own dignity. The result would be the equation of the

[136] There is an episode of *The Simpsons* where the Simpson family are having their Christmas photograph taken in a studio at the local mall. At the moment the photograph is taken, Bart is yanked out of the frame by a security guard who had previously caught him shoplifting. Precisely as an accurate portrayal of the dysfunctional Simpson family, this portrait could not be hung on the wall. The episode ends with Bart re-taking his portrait, which is then hung over top of the dysfunctional one. See *The Simpsons*, Series 7, Episode 11, 'Marge be Not Proud' (17 December 1995).

[137] See 'vestment, *n.1*', OED Online, September 2015.

[138] See 'vestment, *n.2*', OED Online, September 2015.

rightful subject with the rightly invested body, which is to treat the body as an empty vassal.

That is the first or 'initial' effect of the photograph: to present the body as an object that is the play-thing of the representational framework. The young woman might be mistaken for a doll in a doll-house, or a mannequin in a shop-front display. And yet, unlike the traditional studio portrait, which is successful to the extent it effectively overlays the representational framework on its object, this photograph works *against* a merger of body and vestment and is effective to the extent it calls this unity into question. This is the second or 'other' effect, which becomes the primary effect the more one looks at the photograph: body and vestment, far from merging, appear in stark separation. The contradiction between body and vestment can be seen in the ill-fitting underwear that covers the young woman's body proprietorially. It can be seen in the young woman's eyes, which, instead of looking into the camera, thereby seducing the viewer into the portrait's reality—as is the desired effect of traditional studio portraits—are looking askance, directing the viewer *outside* the scene, thereby disrupting the illusion that reality is contained within its framework. Above all, the contradiction is seen in the un-cropped framing of the portrait, which shows a faded and torn rendition of European Civilisation draped tackily over a richly-textured place.

Thus in a way that cannot be overlooked, the photograph shows the fantastical and violent realism of a representational framework that would treat her body as its play-thing. The portrait is concerned with the woman as a living subject—with her dignity as a self-possessed young woman—rendered a mere object through the attempt to dignify her by super-imposing upon her the vestment of Civilised Europe. At the same time, the portrait is allegorical, presenting a critique of the colonial attempt to render Benin 'civilised'. By using the representational framework of studio portraiture to critique the violent realism of a representational framework, thereby highlighting the separation—indeed the *independence*—of the young woman's body from its vestment, the photograph also effectively portrays the divestment of French colonialism from the body of Benin.

As an art work, the photograph thus establishes the conditions of emancipation by critiquing a framework that sought to subsume the people and country of Benin within its realism. But this is not merely an act of negation. It is

also a record of history that is actively making history. After all, the art form is studio portraiture. As a studio portrait, the photograph substitutes in the place of a French-colonial framework a framework of independence, and authorises the independence framework through the critical representation of the colonial one. In the act of critiquing the reality of a representational framework, it is presenting an alternative reality in its place, and using the critique to *authorise* that alternative.

That was Benin in 1960, the year of Independence. Fifty years later, Leonce Raphael Agbodjélou—who inherited his father's photography studio as his generation inherited Benin—created the portrait of a young man reproduced on the next page. In the traditional mode of studio portraiture, this photograph also presents a body under a vestment, but like the portrait of the young woman, it also works against a merger of body and vestment. What makes this photograph so different from the photograph of the young woman, however, is how it treats the relation of body and vestment. The portrait of the young woman critiques the treatment of the body as an object that is the play-thing of a representational framework, and *thereby* establishes the body as subject. In a reversal of this, the portrait of the young man establishes the body as subject by presenting the representational framework as *its* play-thing.

Figure 11. 'Untitled, 2010'[139]

[139] [image omitted from digital version]

The young man appears dynamic and self-possessed, his gaze seducing the viewer into *his* reality—modern, vibrant, youthful. He smiles coolly as he poses for the photo. With cheeky defiance he leans against the wooden chair that the studio photographer presumably placed there for him to sit on. He holds up in mock appreciation the flowers that the studio photographer also presumably placed on the ground beside the chair (note that this is how the flowers appear in the portrait of the young woman).

At the same time, this is not a traditional studio portrait. The effect is not to merge body and vestment in the production of a fantasy that substitutes for and enables the perpetuation of a dysfunctional actuality. Like the portrait of the young woman, this photograph calls such unity into question. The colourfully patterned cloth that covers both body and place, combined with the silver aviator glasses that cover the young man's eyes, highlight the fantastical nature of the representational framework. And like the portrait of the young woman, the effect is to establish the body as subject precisely by emphasising its separation from the representational framework.

There is an important difference, however, between this portrait and the one of the young woman. The portrait of the woman presents the separation of body and vestment in a way that records the moment of independence and authorises that independence as a possible alternative framework, but the independence framework remains *negative*. Created in 1960, its effect is *critique*, presenting the possibility of an other future without presenting that future. Fifty years and a generation later, the portrait of the young man provides an answer, presenting a future in which the body is realising its own subjectivity. But it also remains *critical*: the answer is no more the realisation of an authentic subject than it is the presentation of an authentic reality. The photograph neither presents the body as subject in any absolute way—the body is *still* under a vestment—nor does it present a realistic reality—the vestment remains a fantastical representational framework.

In sum, whereas the portrait of the young woman uses the art form of studio portraiture to critique a colonial framework and thereby record and authorise the possibility of an independence framework, the portrait of the young man uses the same art form to show the critical possibilities of that independence framework. Presenting the body as subject playing with its independence, the

portrait is both positive and negative: positive in that it presents the body as a character full of life; negative in that it neither allows that identity to dominate the body (the body *plays* with the identity) nor allows the viewer to believe that the portrait is simply real. This is not some pure life free of all mediating frameworks, but a life that plays with the identity that frames it. *This* is the critical possibility of 'living dead'.[140]

B Vision 2030

Having emerged from nearly 150 years under a colonial framework, and almost 25 years of civil conflict including two civil wars, the question for Liberia now is whether the same logic of capital will inform the country's post-colonial, post-war, independence framework, or whether the re-making of Liberia might be informed by a more critical logic.

The evidence points towards the further institutionalisation of the logic of capital. The Government's primary policy documents for its state-building and development strategy read like a neo-liberal manifesto,[141] which is not surprising given that they were developed according to the framework of the International Monetary Fund and World Bank standard 'poverty reduction strategy'.[142] Thus 'Pillar II' of the Government's overarching five-year plan for 2012–2017 (also referred to as Liberia's 'development framework') is 'economic transformation', with the '*Goal:* To transform the economy so that it meets the demands of Liberians through development of the domestic private sector'.[143] 'Essential to this

[140] Compare this form of sovereignty, in which the condition of 'living dead' is an emancipatory one, with Mbembe's analysis of sovereignty under conditions of 'necropolitics' and 'necropower'. Recall from the Preamble and Introduction to the thesis, Mbembe describes a form of sovereignty 'in which, in our contemporary world, weapons are deployed in the interest of maximum destruction of persons and the creation of *death-worlds*, new and unique forms of social existence in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.' Achille Mbembe, 'Necropolitics', *Public Culture*, vol 15, no 1 (2003): 40 (italics in original).

[141] See Republic of Liberia, *Interim Poverty Reduction Strategy (2006–2008)* (Washington: International Monetary Fund, 2007); Republic of Liberia, *Poverty Reduction Strategy (2008–2011)* (Monrovia: Republic of Liberia, 2008); Republic of Liberia, *Agenda for Transformation: Steps toward Liberia RISING 2030 – Liberia's Medium Term Economic and Development Strategy (2012–2017)* (Monrovia: Republic of Liberia, 2012).

[142] See World Bank, 'What are PRSPs?': http://go.worldbank.org/CSTQBOF730; International Monetary Fund, 'Factsheet: Poverty Reduction Strategy in IMF-supported Programs' (September 2015): https://www.imf.org/external/np/exr/facts/prsp.htm.

[143] Republic of Liberia, *Agenda for Transformation*, 54 (italics in original).

economic transformation', the strategy states, 'is the growth of employment and output in agriculture, small-scale mining and forestry, agro-processing and other industries'.[144] The strategy continues:

> Ideally, households and individuals will have more opportunity to work or engage in their own enterprises, leading to improved income and the opportunity to purchase desired consumption. To support provision of public services and infrastructure, the private economy and concessions will generate tax and royalty revenue for the public sector.[145]

On one hand, there is nothing remarkable about this strategy. Indeed it is part of the standard economic system modeled by advanced-capitalist economies and pursued by 'developing countries' globally. On the other hand, that it would go without remark, remaining overlooked as a source of violence, would be remarkable. Also remarkable is how similar the language in this paragraph of the strategy is to the language in the International Commission of Enquiry's report into slavery and forced labour in Liberia, where it recommended developing the labour and consumption capacity of its citizens ('teach him what he may buy for money, and he then wants to learn what he can grow, what he should do, or where he should work to make some money, with the result that trade increases, the coast merchant flourishes, the revenues of Government expand, and money is forthcoming').[146]

The repetition, or continuation, does not end there. Central to achieving the primary goal of Pillar II is 'private sector development', and central to achieving this is 'property rights and contract enforcement'.[147] However, two fundamental problems arise at this point: (1) the necessary land rights regime is practically non-existent in Liberia; and (2) the state legal system is dysfunctional. Or as the strategy states: 'Currently, there is high cost and risk of investment by domestic

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[144] Ibid.

[145] Ibid.

[146] See note 120 above. The full passage reads: 'Schools are of the first importance, not merely for the purpose of teaching reading and writing, but for improving the native's sociological conditions; and specialist instructors invaluable for broadening his ideas, teaching him market values, and the use he can make of the innumerable economic products and raw materials around him. The unsophisticated native learns something of the outside world, and his wants are increased. The missionary, the school teacher, and the trader teach him what he may buy for money, and he then wants to learn what he can grow, what he should do, or where he should work to make some money, with the result that trade increases, the coast merchant flourishes, the revenues of Government expand, and money is forthcoming […]': 'The 1930 Enquiry Commission to Liberia', 281.

[147] See Republic of Liberia, *Agenda for Transformation*, Chapter 9.

and foreign firms due to uncertainty of land claims, leasing arrangements and other contracts.'[148] I examine the second problem of the state legal system in Chapter 7. Of interest here is the 'non-existence' of the land rights regime, and the Government's 'development framework' that will make land rightful.[149]

In 2013 the government published its *Land Rights Policy*.[150] The Policy has yet to be enacted into law, at the time of writing, but it looks set to pass through the legislature to form the country's new land rights law. The policy sets out a framework for creating four categories of land rights: 'public land', 'government land', 'private land', and 'customary land'. The last of these is the most radical proposition.

> Rights to Customary Land, including ownership rights, must be secured by ensuring that these rights are equally protected as private land rights. Rights to Customary Land include rights of the community as a collective land owner and rights of groups, families, and individuals within the community.[151]

In other words, with the overlay of this framework, 'customary land' will be invested with the character of private land, capable of alienation, although the rights will be possessed by 'the community as a collective land owner', with 'groups, families, and individuals within the community' also possessed of certain rights.[152]

However, in order to implement this policy—that is, to invest 'a community' and 'its customary land' with these rights—two criteria must be met: 'the community' must be clearly defined ('community ownership of Customary Land will be formalized by the issuance of a deed to a legal entity, bearing the name of the community'),[153] as must the boundaries of 'its land'.[154] The problem is that there are no such clear distinctions on the ground. Communities and their lands in this part of Africa have littoral identities. Extending this development framework over these communities and lands will not put them 'beyond the littoral'. Rather, it

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[148] Republic of Liberia, *Agenda for Transformation*, 61.

[149] Republic of Liberia, *Land Rights Policy* (Monrovia: Land Commission, 2013).

[150] Ibid.

[151] Ibid, 15.

[152] See ibid, 18 ('nature of customary land rights').

[153] Ibid.

[154] See ibid, 19 ('boundaries of customary land').

will extend the littoral back over Liberia. That is, the attempt to define these communities, by identifying their precise membership, along with the boundaries of their land, will create more conflict, not less. The Government is aware of this; indeed 'the policy recommendations recognize this diversity'.[155] That is why the Government has created a parallel policy for 'land conflict management',[156] whilst at the same time ensuring that the communities self-define their membership, lead the process of demarcating their boundaries, and have a large degree of regulatory autonomy over 'Customary Land management, use, and allocation decisions […] within a framework of shared responsibility with the Government.'[157]

Still the question remains: does this vision present the possibility of a future in which the bodies of 'Liberia' can realise their subjectivity? Or is it merely the most recent attempt to transform the lands and peoples of Liberia into productive things through the overlay of another framework informed by the logic of capital? On one hand, it seems Liberia is beginning again in the twenty-first century under the same logical framework that has operated para-sitically in this country since its colonial settlement. On the other hand, there remains the possibility that Liberians can now play with it as their own, to capitalise on its critical possibilities as an independence framework. This would not be a complete break from the logic, but rather than ending in civil death it might offer the hope of a living death, with the bodies of Liberia as subjects playing with their independence.

4 An insecure future

Saturday, 17 August 2013, noon, on a street parallel to Benson Street in central Monrovia. I have just turned off Newport Street to walk into the centre of Monrovia when I hear the sound of drums and singing coming from further up the hill. I wait on the sidewalk with a growing crowd of curious bystanders as a parade slowly makes its way down the road, framed by the hulking shell of Ducor Hotel high on the rise. A banner held by the parade's leaders reads:

Liberian Cultural Union, celebrating 10 years of peace

[155] Ibid, 15.

[156] Author interviews with officers of the Liberian Land Commission: Monrovia, 14 August 2013 (MG5, MG7, and MG8); Zorzor, 29 August 2013 (Li18); Harper, 27 September 2013 (Li39). See also Liberian Land Commission, *2014 Annual Report* (Monrovia: LC, 2014).

[157] Republic of Liberia, *Land Rights Policy*, 19 ('community governance and management').

Dancing behind the banner are a dozen or so small 'cultural troupes', each dressed in their own colourful uniforms, most of them with one or two djembe players. In stark contrast, a dozen men dressed in uniform long black pants, shiny black shoes, and light brown khaki shirts with a Liberian flag stitched to the shoulder lead the Cultural Union down the street, their troupe marching to the beat of a small military-style band. Standing at the head of the parade, marching in military uniform, the message seems clear: *the Government leads this Union*.

And yet, as I watch the parade pass by, it is clear that the Government's troupe is not leading the Cultural Union down the street. I am struck by how the parade frames the Government as just another cultural group amongst Liberia's many diverse groups; *although not quite*. Amongst the dozen cultural troupes, the Government's representatives stick out awkwardly. Compared with the mature, comfortable way the other groups appear—their women, men, and children dancing, singing, and laughing—the Government's troupe of unsmiling men appear stilted. *Stilted*: 'furnished with or having stilts; raised artificially as on stilts', 'supported on props or posts so as to be raised above the ground', 'artificially or affectedly lofty; unnaturally elevated; formally pompous. (The usual current sense.)'[158] It is as if the youngest brother, aware of his own impotence compared with his much older sisters and brothers, is seeking to assert his identity and power by placing himself at the head, whilst his more mature siblings carry on, tolerating his adolescent conceit if it keeps him quiet and allows them to continue down the street in peace.

And yet still, as I watch the parade pass by, I cannot overlook that behind the stilted leadership of the Government's troupe is a very real power. Overshadowing the celebration of this decade of peace: a hotel on the rise.

But then my focus returns to the street again; and *there*, in contrast to both the hotel's hulking shell and the Government's monochrome troupe, dancing, singing, and laughing their way, are Liberia's cultural groups—the *life* of the parade.

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[158] 'Stilted, *adj.*', OED Online, September 2015.

Through this chapter I have sought to show how a particular logic informed the articulation of 'Liberia' from its conception as an idea of liberty at the beginning of the nineteenth century to its consolidation as a nation-state in the twentieth century. Operating through the law as its forceful medium, this logic gave form to Liberia by super-imposing over country in west Africa a representational framework that would render its lands and peoples productive as territory and citizens. This logic, I argued, is the logic of capital.

I began by examining the logic itself through a reading of John Austin's lecture on 'things' in his influential nineteenth century treatise on English law, *Lectures on Jurisprudence, or the Philosophy of Positive Law*. This revealed a logic operating through a legal framework that, at its extreme, can render an object entirely fungible. Through the super-imposition of this representational framework, a singular object is invested with a general value, rendering it a movable species of thing, without an essential nature of its own. On one hand, as an act of realism, the effect is to give form to the object as a real asset. Thus lands and peoples become rightfully possessed as territory and citizens. On the other hand, as an act of surrealism, the result is a super-imposed reality that denies the 'subjectivity' of the object, as being self-possessed. On this logic, 'rightful possession' is a function of investment; thus an enslaved person might be made free as a rightful human through a process of civilisation that would invest their person with human rights; whilst land might be made productive through a process of cultivation that would invest it with property rights.

In the second part of the chapter I then examined how this logic was super-imposed over the peoples and lands of Liberia through a process of colonisation, which, since the Roman *colōnia*, has involved both the introduction of civilisation and the cultivation of new land. I began here with 'the idea of Liberia', to show how 'Liberia' was conceived at the beginning of the nineteenth century as a solution to the problem of slavery in the United States, created as a conceptual schema to achieve in practice what Austin had sought to do in his *Lectures*, that is, establish a clear distinction between a human person and a non-human thing. The increasingly common sight of African-Americans walking freely in the United States at the turn of the nineteenth century was seen to contradict the ongoing enslavement of Africans in America, whilst their ongoing treatment as a movable species of thing was seen to contradict their freedom as African-Americans. The

result was a situation where people of colour in the United States appeared simultaneously free and unfree, never wholly slaves, and yet never wholly rightful citizens. 'Liberia' was supposed to resolve this logical contradiction by re-establishing a clear line of separation between human and thing. Liberia in Africa would be a place where people of colour would be wholly free; the United States would be a place where people of colour would be wholly things of capital; and the distinction would be kept in place by a vast ocean.

The idea of Liberia was thus born as an analytical conceit to secure the logic of slavery in the United States by transporting the offending category ('free people of colour in the United States') across the ocean to Africa, where it would have the ancillary effect of making free all of Africa. However this did not resolve the paradoxical condition of the African-American migrants, of being simultaneously free and unfree. As Americo-Liberians, their 'sovereignty and independence' as a people remained contingent on recognition of their international personality. The problem was that, throughout the nineteenth and well into the twentieth century, this recognition remained extremely uncertain, with Americo-Liberians living under constant threat of becoming vassals of either the British or French empires. To resolve this situation—of being a 'sovereign and independent' people and yet treated as a *res colōnia,* that is, as a thing of colonialism—the Americo-Liberian government sought to define its lands and peoples and bring both under its dominion as territory and population, in accordance with the requirements of the international legal framework. However, as I showed through an examination of the demarcation process, the super-imposition of this framework involved a work of surrealism, both fantastical and violent, fusing name and country in the creation of a metonym that would, it was said, ensure the liberty of Liberia.

The nation-state of Liberia was thus born as an attempt to finally make free the Americo-Liberian people; extending Liberia beyond the littoral would settle its place in the world. The result, however, was to extend littoral Liberia *into the interior*, making the Republic a place 'of contested imaginaries', 'an environment of flux and change *par excellence*',[159] culminating in revolution and the eventual overthrow of the Americo-Liberian regime. Thus at the beginning of the twentieth century the government extended citizenship to Liberia's 'natives', whilst bringing the hinterland under Provincial administration. The effect was to leave 'African-

[159] Manderson and van Rijswick, 'Littoral Readings', 174.

Liberians' in this 'tribal jurisdiction' of the hinterland in a similar situation to African-Americans in the United States, as not wholly rightful citizens. The effect, in other words, was a form of civil death, their degradation manifesting at the extreme in slavery, forced labour, and exile. And yet, again, when the problem could no longer be ignored, the Government sought to resolve it by extending littoral Liberia into the hinterland, properly this time. Under the Government's National Unification Policy, the hinterland Provinces were made the same as the coastal Counties, as a matter of territorial jurisdiction, and African-Liberians were possessed of all the rights residing in Americo-Liberians. Finally, the vision of 'Liberia' as the land of the free'd would be realised. And in a sense, this is precisely what happened, with African-Liberians making 'Liberia' consonant *with them*.

The argument running through this history is that, at each point, the representational framework that was supposed to liberate its object—human and land—was informed by the logic of capital. On this logic, liberation would come with the super-imposition of a general value: rendering humans productive citizens, through the investment of human rights, and rendering land productive territory, through the investment of property rights. On one hand, the investment of the general value would make the object into a real asset that could circulate freely (at least within a certain class), giving it great power. On the other hand, this general value would come at the cost of denying the object its self worth. Each time in this history, this problem with the logic, and indeed its devastating violence, was revealed most clearly in its non-realisation. Thus African-Americans in the United States at the beginning of the nineteenth century suffered a form of civil death as a result of their non-recognition as wholly rightful persons in the United States. Americo-Liberians suffered from a similar condition at the turn of the nineteenth century and into the twentieth as a result of their non-recognition as wholly rightful persons in the 'international community'. And African-Liberians suffered as degraded citizens up until the overthrow of the Americo-Liberian regime. In each case, having been denied their own particular value as self-possessed humans, but not fully possessed of the general value, the result was a form of capital punishment—being abject before the law, suspended in a state of civil death.

Finally, in a post-script to this history, I considered an alternative representational framework. This independence framework operates on the same

logic but turns it from a medium of violent realism into a critical form that enables a more autobiographical expression of subjectivity. This, I suggested, might underwrite Liberia's independence 'post-colonialism' and 'post-war'. However, I also considered the government's new development framework for its 2030 vision of the country. Rather than a break with the logic that informed the making of the First Republic, this suggests a continuation, if not an intensification, of the institutionalisation of this logic in the re-making of Liberia. Given the violence of this logic, the question for the Government is how it will deal with this, that is, how it will secure a state of peace against the violence of the logic that informs it. This is the question I now turn to examine through the next chapter.

Chapter 5

a peace formidable to any eye

1 Peace through justice

Standing in the entrance hall of the Peace Palace in The Hague is a marble statue entitled 'Peace through Justice'. The statue depicts a figure who appears at once female and male, merging feminine and masculine types. This is the figure of a 'modern Lady Justice'[1]—of *Justitia* bulging with strength. Resembling Michelangelo's marble statue of David poised for battle against Goliath—and as the very embodiment of Pascal's *pensée*—this image poses a disturbing truth: *peace requires a forceful justice*.

> *Justice, force.*— [...] Justice without force is impotent; force without justice is tyrannical. Justice without force is contradictory, as there are always the wicked; force without justice is accused of wrong. And so it is necessary to put justice and force together; and, for this, to make sure that what is just be strong, or what is strong be just.[2]

Why is this image and what it poses disturbing? How does it differ from the conventional figure of Lady Justice brandishing a sword? In both, justice and force together constitute the image of *Justitia*, leaving no doubt about the capacity of justice for violence. There is a terrible difference. In the conventional image, *Justitia* holds a sword, she has picked up the sword, and she wields it as her instrument—an animate justice in control of an inanimate force. What is so disturbing about the statue in the Peace Palace is the ambiguity it introduces into this image. Force is no longer a mere object at the disposal and under the control of Lady Justice; force *ripples through her limbs*, force *pulses through her veins*. The wind blowing aside her gown reveals not the typically feminine legs of justice but brute trunks of force:

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[1] This is how the statue is described in US Department of State, 'Sites relating to US history in the Netherlands', 20 August 2013: http://photos.state.gov/libraries/netherlands/328666/pdfs/Sites%20of%20memory%20Ranked%20by%20Theme%202013-8.pdf, 35.

[2] Blaise Pascal, *Pascal's Pensées* (New York: E P Dutton & Co, 1958), 85. This translation is from Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', *Cardozo Law Review*, vol 11 (1989-1990): 937. See also Marin's discussion in Louis Marin, *Portrait of the King* (Minneapolis: University of Minnesota Press, 1988), 17-23.

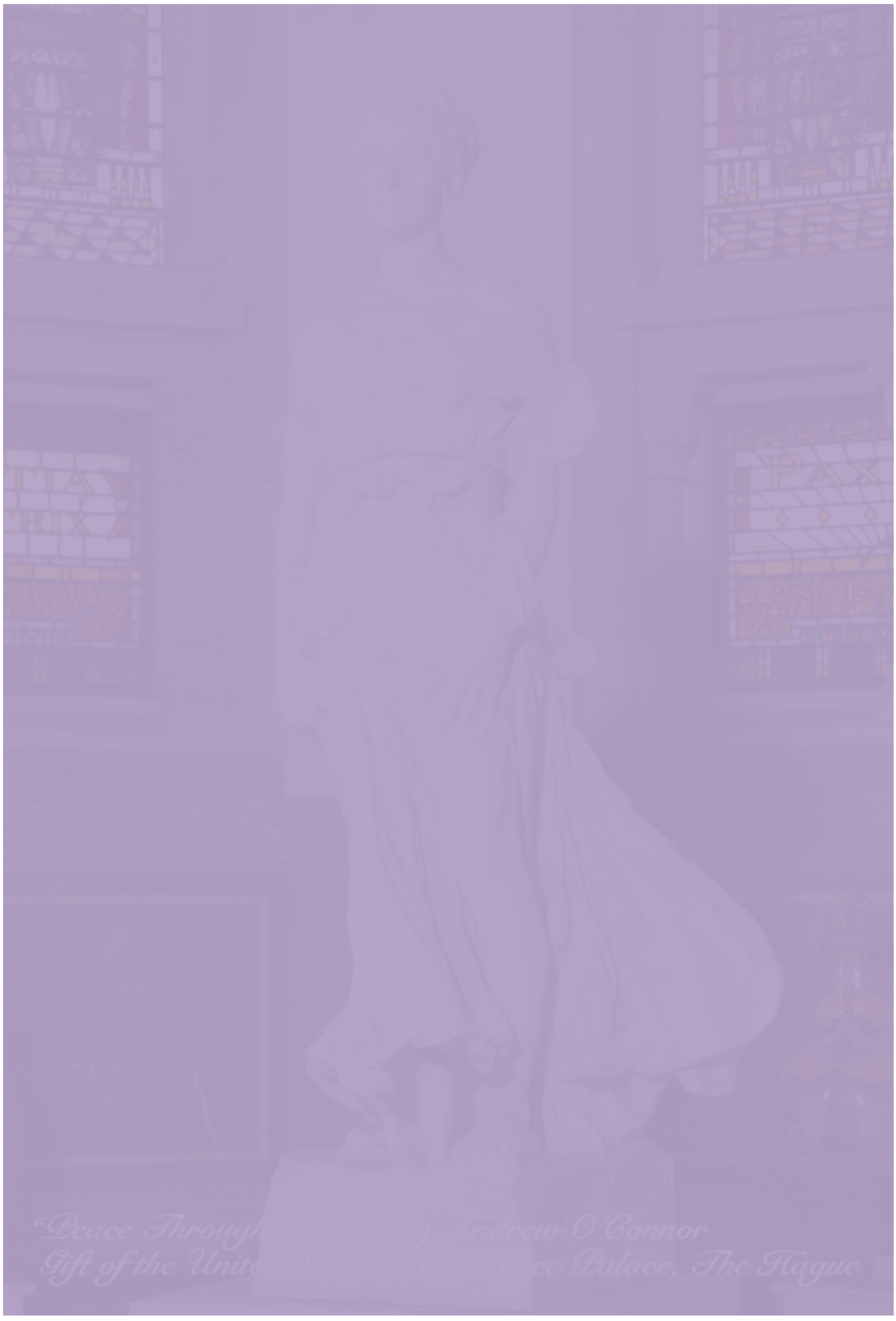

Figure 12. 'Peace through Justice'[3]

[3] [image omitted from digital version]

The experience of aporia in seeing this figure of *Justitia* is the impossibility of distinguishing justice from force, as one might distinguish the Lady from her sword. Here is justice and force embodied as one; and this, we are told, is *necessary* for peace. This is 'Peace through Justice'. Here justice is a force that is not only capable of great violence in itself, but depends on this self-defining capacity for violence to function in the service of peace.

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A growing body of United Nations policy literature represents justice and force as mutually constitutive conditions *for* and *of* peace. As the UN Secretary-General has made clear, peace must be secured: 'the most fundamental lesson for the United Nations is that security is a precondition for sustainable peace';[4] and it must be secured through the UN's peace operations by assisting in the reform of a state's 'security sector'.[5] The Secretary-General has also made clear that the UN's vision of security combines justice and force:

> The United Nations has devoted considerable attention to articulating a common understanding of security. The United Nations Millennium Declaration (General Assembly resolution 55/2) captures the principle that lies at the core of this vision: that men and women have the right to live their lives and raise their children in dignity, free from hunger and the fear of violence, oppression or injustice.[6]

Thus at the core of the UN's vision of security is a principle of justice; but make no mistake that this vision is not a forceful one. 'Security' may be presented as a heart-warming vision of justice, in which children are free to play,[7] but look over

[4] UN Doc A/62/659–S/2008/39 (23 January 2008), *Report of the Secretary General: Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform* ('S-G Report: Securing Peace'), para 35. See also UN Doc A/47/277–S/2411 (17 June 1992), *Report of the Secretary-General Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992: An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-Keeping* ('An Agenda for Peace'), para 22, where it states that the UN's peace operations, 'taken together, and carried out with the backing of all Members, offer a coherent contribution towards securing peace in the spirit of the Charter'.

[5] See also the UN Secretary-General's second report on 'security sector reform': UN Doc A/67/970–S/2013/480 (13 August 2013), *Report of the Secretary General: Securing States and Societies: Strengthening the United Nations Comprehensive Support to Security Sector Reform* ('S-G Report: Securing States and Societies').

[6] 'S-G Report: Securing Peace', para 5.

[7] Or at least where they might grow up 'free from hunger and the fear of violence, oppression or injustice': see passage quoted ibid.

the children's shoulders at the sector that secures this vision and one will see 'the structures, institutions and personnel responsible for the management, provision and oversight of security in a country' including 'defence, law enforcement, corrections, intelligence services and institutions responsible for border management, customs and civil emergencies' as well as 'elements of the judicial sector responsible for the adjudication of cases of alleged criminal conduct and misuse of force' along with 'actors that play a role in managing and overseeing the design and implementation of security, such as ministries, legislative bodies and civil society groups' not to mention the 'other non-State actors that could be considered part of the security sector' such as 'customary or informal authorities and private security services'.[8] The security sector is as vast as justice is core.

So when the UN says, 'security is a precondition for peace', it is also saying, justice and force brought together in a single mold—'the security sector'—is a precondition for peace, which is to say, *peace requires a forceful justice*.

In this discourse, however, security is not just a *pre*-condition *for* peace: it is also a condition *of* peace. The UN Secretary-General highlights this foundational nature of security when he emphasises the role of the security sector in 'preventing countries from relapsing into conflict and in laying the foundations for sustainable peace'.[9] Indeed, security is so foundational of peace that the two—'peace and security'—have become indistinguishable in UN discourse on security sector reform. Thus five years after the Secretary-General's initial report on security sector reform in 2008, the Secretary-General published a second report in 2013, with the central message that:

> The security of the State and the state of security (of individuals and communities) are mutually interdependent; in other words, we have learned that when populations are not secure, neither is the State.[10]

If the Secretary-General's first report on security sector reform set out a vision for the UN to strengthen its capacity to 'secure peace' (as that report is titled)—emphasising security as a pre-condition for peace—then this second report extends the vision to see security, and the State's security sector in particular, as a

[8] Ibid, para 14. This is the UN's definition of 'security sector'.

[9] Ibid, para 3.

[10] 'S-G Report: Securing States and Societies', para 9.

necessary condition of this state of peace.[11] In this report on 'securing States and societies' (as it is titled), 'State' and 'society' merge in a singular peace-and-security complex: when a 'population' (itself a category of governmental control[12]) is secure, the State is secure, and the result is a state/State of peace.

These two reports together present a vision of peace as secured only when security becomes indistinguishable from the state of the State. Recalling that the UN's 'common understanding of security' merges justice and force in the single concept, this vision of 'securing a state/State of peace' resembles the figure of 'Peace through Justice', with justice and force conjoined as conditions *for* and *of* peace.

A The logic of security

This vision of 'securing peace' is held together by a configuration of three antagonistic propositions: (1) peace contains the force of war; (2) law contains the force of peace; and (3) justice contains the force of law. Each of these three propositions is an unstable, internally combustible arrangement, with force—the very thing that is their generative essence—threatening to explode each in turn. When brought together the three propositions are supposed to be sustainable, securing a state/State of peace by containing force through a just rule of law. However, the antagonisms that bind this arrangement become its combined logic.[13]

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[11] That justice and force are considered within UN discourse as inseparable, coming together in a concept of security that constitutes a condition of peace, is recognised in the academic literature. See, eg, the contributions to the 'Special Issue on Rule of Law and Security Sector Reform', *Hague Journal on the Rule of Law* 4 (2012). For instance, Schröder and Kode discuss how the UN defines 'justice' and 'security' as inseparable conditions of peace, constituting (in the words of the UN Development Programme) a 'comprehensive and integrated whole': Ursula C Schröder and Johannes Kode, 'Rule of Law and Security Sector Reform in International State-building: Dilemmas of Converging Agendas', *Hague Journal on the Rule of Law*, vol 4, no 1 (2012): 32. See also Till Blume, 'Review Essay: Security, Justice and the Rule of Law in Peace Operations', *International Peacekeeping*, vol 15, no 5 (2008).

[12] See Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977-1978* (Palgrave Macmillan, 2007).

[13] In implicit ways, and at times explicitly, the discussion here is in conversation with Benjamin's study of law and force in his 'critique of violence': Walter Benjamin, 'Critique of Violence', in *Walter Benjamin: Selected Writings, Volume 1, 1913-1926*, ed Marcus Bullock and Michael W Jennings (Cambridge: Belknap Press, 2002). This is implicit, rather than explicit, due to the focus and scope of this chapter, which unfortunately works against a more direct and sustained engagement in the text with Benjamin's arguments about the relation of means and ends and 'law-making' and 'law-preserving' violence.

(i) peace contains the force of war

The first proposition is that peace contains the force of war. This means two things. First, peace 'contains' force in the sense that peace 'withholds' force from its violent manifestation. Second, peace 'contains' force in the sense that peace 'holds within it' the very force that would manifest violently. This is in keeping with how peace is imagined throughout the Peace Palace in the Hague, as a violent character that overpowers war, posing peace as the forceful opposition to the manifest violence of war. This can be seen most strikingly in the stained-glass windows of the International Court of Justice, where the figure of Peace is depicted stomping mercilessly on the head of War even while War is down.[14] In this, peace is not the absence of violence but its *containment*.[15] Peace *withholds* force from its violent manifestation by *holding within it* overwhelming force. Peace as such is 'made', 'kept', and 'built' through the forceful containment of violence, erecting a barrier to the manifestation of violent conflict by subsuming its potential within a state/State of peaceful violence.

This is *peace through force*, and the result is a combustible proposition: a state/State of peaceful violence; or in the UN's terminology, a state/State of security. The combination of 'peace' and 'force' within a single mold makes this peace antagonistic. If 'peace contains force', in the sense that peace forcefully opposes the manifestation of violent conflict by subsuming its potential as its own condition, then what contains the force of peace? What keeps the forces of this peaceful State from manifesting violently, as is its condition? What keeps this State of peace—this State of security—from being tyrannical? The difficulty is this: peace, we are told, must be secured against the manifestation of violent conflict,

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In line with this, throughout the discussion I use the word 'force' in the multiple senses of the German word *Gewalt*, as used by Benjamin, which carries the meanings 'violence', '(public) force' and '(legitimate) power'; on this see Derrida, 'Force of Law', 927. To retain the unsettling sense of connection between these meanings I have retained the ambiguity in the word 'force' rather than attempt to specify the 'most fitting' meaning in each case.

[14] This recalls the Biblical image of David standing on the head of Goliath: see, eg, Donatello's bronze figure of David (with thanks to Desmond Manderson for drawing my attention to this).

[15] Compare Michael Howard, 'The Concept of Peace', *Encounter*, vol 61, no 4 (1983). For discussion of Howard's approach as part of a 'minimalist approach to peace', see William Maley, 'Peace, Needs and Utopia', *Political Studies*, vol 33, no 4 (1985): 579. See also Johan Galtung, 'Twenty-Five Years of Peace Research: Ten Challenges and Some Responses', *Journal of Peace Research*, vol 22, no 2 (1985).

but what secures this peace *against itself*? What secures this state/State from becoming the manifestation of violence, in the name of 'peace and stability'?

(ii) law contains the force of peace

The first proposition (peace contains the force of war) is therefore unstable in itself, containing the potential to destroy the very state of peace it seeks to establish, requiring a second proposition to secure its peaceful intent. The second proposition is that law contains the force of peace. This is often formulated in the more specific proposition of 'the rule of law', namely that the rule of law contains the force of peace by guarding against its arbitrary exercise. 'Law contains force' by subsuming the violence that is the condition of peace within a legal framework that regulates its exercise and makes it 'accountable' and 'legitimate'.[16] Under the rule of law, the force of peace might be exercised in the interests of its state/State.

This proposition is central to the UN's discourse, according to which a State's security sector must be contained 'within a framework of the rule of law'.[17] As the UN Secretary-General emphasises in his 2008 report on security sector reform, if the first lesson the UN has learnt in its 60-year 'search for effective responses to address insecurity based on its Charter' is that security is a condition for and of peace, then the second lesson is that this 'can be achieved only within a broad framework of the rule of law'.[18] Above all, this means ensuring 'accountability to law'.[19] The UN thus qualifies its support for strengthening a

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[16] For reasons that will become clear in the following discussion, this resembles Benjamin's argument in his 'Critique of Violence', which might be summed up in his observation that 'one might perhaps consider the surprising possibility that the law's interest in a monopoly of violence vis-à-vis individuals is explained not by the intention of preserving legal ends but, rather, by the intention of preserving the law itself; that violence, when not in the hands of the law, threatens it not by the end that it may pursue but by its mere existence outside the law.' Benjamin, 'Critique of Violence', 239.

[17] 'S-G Report: Securing States and Societies', para 8.

[18] 'S-G Report: Securing Peace', paras 1 and 2. The same line is repeated by the UN Security Council in its first resolution on 'security sector reform' (SSR), in 'recalling that SSR must take place within a broad framework of the rule of law': UN Doc S/Res/2151 (28 April 2014), preambular para 15. As indicated above, the point is also repeated in the UN Secretary-General's report when he writes that the objective of security sector reform is 'enhanced effectiveness and accountability of security institutions operating under civilian control within a framework of the rule of law': 'S-G Report: Securing States and Societies', para 8.

[19] 'S-G Report: Securing Peace', para 12, citing the definition of the rule of law set out in UN Doc S/2004/616 (23 August 2004), *Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para 6 ('S-G Report: Rule of Law'). The definition is reproduced in note 29 below. On the discursive relation between 'the rule of law' and

State's capacity for peaceful violence with the proviso that security sector reform must seek to enhance the 'accountability' of the security sector.[20] And as the 2008 report emphasises, the first common feature of 'accountable security sectors' is a 'legal and/or constitutional framework providing for the legitimate and accountable use of force'.[21] That is, if security is a condition for/of peace, then accountability to law is a condition for/of the security sector as the domain of legitimate violence. This is the UN's 'vision of security based on the rule of law'.[22]

And yet this vision of securing peace through the institution of a legally accountable security sector does not overcome the antagonism of peaceful violence. Rather, the proposition that law contains the force of peace by making that force 'legitimate and accountable' takes over this antagonism as its own condition. The force of peace becomes the force of law.[23] Law 'contains' the force of peace by 'holding within it' a monopoly on legitimate violence in order to 'withhold it from' any unlawful manifestation. This makes the rule of law *fundamentally arbitrary* at the same time as it guards against the arbitrary exercise of power. To serve the interests of peace, the fundament or condition of law's rule must be its monopoly on violence: peace requires law to contain force, and to contain force, law must become *its* monopoly.[24] Force, in other words, *defines* the rule of law: law secures the state/State of 'peaceful violence' by making violence coincidental with itself.[25] In the same way that justice and force must inhabit the same body in the figure of 'Peace through Justice', law and force must merge indistinguishably in the rule of law in order to sustain this arrangement of 'peace through law'. This is arbitrary because it means that the rule of law is ultimately directed at securing *itself*. The end of the rule of law becomes the rule of law—an absurd tautology that

'accountability' in the context of UN peace operations, see Jeremy Matam Farrall, 'Rule of Accountability or Rule of law? Regulating the UN Security Council's Accountability Deficits', *Journal of Conflict and Security Law*, vol 19 (2014).

[20] See, eg, 'S-G Report: Securing Peace', paras 3, 12, 15, 17, 35, 45. That the 'objective of SSR is to help ensure that people are safer through the enhanced effectiveness and accountability of security institutions operating under civilian control within a framework of the rule of law' is reaffirmed in the Secretary-General's second report; see, eg, 'S-G Report: Securing States and Societies', para 8.

[21] 'S-G Report: Securing Peace', para 15.

[22] Ibid, para 4.

[23] See also Austin Sarat and Thomas R Kearns, 'Introduction', in *Law's Violence*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1995).

[24] See also Benjamin's argument that the thing most threatening to the rule of law is the manifestation of a force that is outside itself: Benjamin, 'Critique of Violence'.

[25] This is also how I read Benjamin's argument on the self-constituting and self-preserving force of law: ibid. See also Derrida's reading of Benjamin's essay in Derrida, 'Force of Law'.

is nonetheless necessary to sustain the *telos* of 'peace'.[26] To secure peace through law, the law of this state/State of peace must become the absolute arbiter of force; but in this, force becomes the arbiter of law. Hence the antagonism that enlivens this second proposition: 'law contains the force of peace' means that law and force must be conjoined indistinguishably. This is arbitrary in the precise meaning of the word: the use of force must be according to law (law must be its arbiter), but force *is* law, and so the force of law becomes its own arbiter.[27]

(iii) justice contains the force of law

The second proposition of 'peace through law' is thus as unsustainable as the first proposition of 'peace through force' that it is supposed to secure. If the rule of law is concerned with the stability of this state/State of peace, and must legitimately, according to its concept, exercise violence at will in order to uphold 'the peace', what ensures law's rule does not become endlessly tyrannical? What makes this state/State of peace under the rule of law bearable? To recall Pascal: justice without force might be impotent, but force without justice is tyrannical. And arbitrariness is by definition tyrannical: 'unrestrained in the exercise of will; of uncontrolled power or authority, absolute; *hence*, despotic, tyrannical'.[28]

The two propositions just considered ('peace contains the force of war' and 'law contains the force of peace') say little about justice and both risk becoming tyrannical. This vision of peace thus requires a third proposition to ensure that its antagonistic arrangement does not go up in flames. The third proposition is that justice contains the force of law. Justice must contain the force of law if the rule of law is not to become tyrannical, which means the force of law must be indistinguishable from justice, held within the body of *Justitia* in order that law's

[26] See also Slaughter's examination of how an 'impossible tautological-teleological developmental complex' animates the 'formal, paradoxical structure of international human rights law and the narrative of human personality development that it charters': Joseph Slaughter, 'Enabling fictions and novel subjects: The Bildungsroman and international human rights law', *PMLA*, vol 121, no 5 (2006): 1412.

[27] Compare Mary Ellen O'Connell, 'Peace through Law and the Security Council: Modelling Law Compliance', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016). O'Connell argues that '[l]aw is the principle alternative to violence for settling disputes and ordering societies. When the ROL [rule of law] prevails, violence does not. Definitions of the ROL are premised on these understandings. […] Thus, if a robust ROL is established, the use of violence will by definition be the exceptional and not the normal means of establishing social order'. Ibid, 257.

[28] 'Arbitrary, *adj*. and *n*.', OED Online, December 2015.

violence is withheld from its unjust exercise. Or to put this another way, force, as law, must be a means for and of justice if its rule is not to threaten the state/State of peace that it exists to secure. Finally, *this* is what is meant by 'peace through justice'.

This proposition is also apparent in the UN's discourse. While the UN Secretary-General's reports on security sector reform tell us that security must be accountable to law for peace to prevail, they say very little explicitly about justice. The implication is there, of course; as noted earlier, a principle of justice is said to be at the core of the UN's vision of security. However, one has to turn to the Secretary-General's 2004 report on 'the rule of law and transitional justice' to read that the full definition of the rule of law also requires 'fairness in the application of the law'.[29] It is in this report on the rule of law that we learn that 'for the United Nations, justice is an ideal of accountability and fairness',[30] and that the 'consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term' requires 'legitimate structures for the peaceful settlement of disputes and the fair administration of justice'.[31]

(iv) securing peace

Drawing these three antagonistic propositions together, the logic of 'securing peace' can be summarised as follows: (1) peace contains the force of war, and yet this gives rise to a state/State of peaceful violence that is highly combustible; (2) therefore peace requires the rule of law to contain the exercise of peaceful violence, and yet the forcefulness of law makes it fundamentally arbitrary; (3) therefore peace requires justice to contain the force of law—or in other words, *peace requires a forceful justice*. Without justice containing the force of law, the

[29] 'S-G Report: Rule of Law', para 6: 'The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.'

[30] Ibid, para 7.

[31] Ibid, para 2 and see also para 4.

arbitrariness of the rule of law would turn the exercise of peaceful violence against peace itself.

And yet, just as the antagonism of peaceful violence that is the condition for/of a state/State of peace is not resolved by the institution of the rule of law, so the antagonism of lawful violence that is the condition for/of a state/State of peace under the rule of law is not resolved by the inclusion of a principle of justice at the core of security. Rather, justice and force merge in this state/State of security. A state of peace, in other words, might be maintained only so long as the State's violence is *just* and its justice is *violent*. This is the residual antagonism—a just violence—that holds the whole arrangement together; *this* is what 'secures peace'.

B Overview

In the previous chapter I examined how a particular logic informed the articulation of 'Liberia' from its conception as an idea of liberty at the beginning of the nineteenth century to its realisation as a nation-state in the twentieth century. Operating through the law as its forceful medium, this logic gave form to Liberia by super-imposing over country in west Africa a representational framework that sought to render its lands and peoples productive as territory and citizens. This logic, I argued, is the logic of capital. At the end of the chapter, I then turned to the Liberian Government's post-war vision for the country—a vision that suggests a continuation, if not an intensification, of the institutionalisation of this logic of capital. This raises a question, which I posed in closing: how will the Government realise its envisioned peace, given the violence of the logic that informs it?

I address this question in Part 2 of the chapter in examining what is taking place in the attempt to consolidate a state/State of peace in Liberia post-war. There are four sections to the analysis. (1) I begin with the Government's vision of Liberia for 2030, introduced at the end of the previous chapter—a vision based on a strategy of growth that aims to achieve a Gross Domestic Product growth rate of 9% every year between 2012 and 2030. Based on an analysis of the Government's peace framework for realising this vision, I show how the logic of security set out above also informs this vision of securing peace through the institution of a just rule of law. (2) I then examine the UN's vision for assisting the Government to build this peace through its peace operations in Liberia. This reveals an

operational vision that is concerned above all with securing stability and order, bringing the rule-of-law and justice components of the UN's peace operation within the logic of security. (3) Having set out the Government's vision of peace and the UN's vision of peace-building in Liberia, I then turn to examine how the UN is supporting the Government to 'establish a State based on the rule of law' through UNMIL. This shows a peace operation directed at securing peace through the institution of a forceful rule of law. However, this also gives rise to the question: what of justice? I address this question in the final analysis (4) by examining the Government's attempt to fortify Liberia by bringing together force, law, and justice in five Regional Justice and Security Hubs.

What this analysis shows is an attempt to secure peace by combining force, law, and justice in a unified state/State. Whilst this is directed at containing force so it does not manifest violently, by bringing it within the State's security sector, this also has the effect of turning the rule of law into a medium of the State's security sector. Not only does this inform how the rule of law is taking place, as a medium of security, but it also enables the logic of security to take place through the institution of the rule of law. At the same time, the proposition 'justice contains the force of law' is supposed to make this arrangement bearable. The justice of this peace, brought within the logic of security, is supposed to secure the state of the State.

This is *peace through justice*—and the result is potentially explosive. Just as the propositions 'peace contains the force of war' and 'law contains the force of peace' have the potential to become tyrannical, there is the danger that the attempt to secure peace in this way will result in the institutionalisation of an increasingly violent authoritarian regime. This risk is not merely hypothetical: it is the historical experience of the First Republic of Liberia. As I discuss in the post-script to this chapter (Part 3), the idea of 'Liberia' as a vision of justice was forcefully consolidated in the nineteenth and twentieth centuries as an African-American republic in west Africa, securing the State of Liberia through the institutionalisation of an unjust rule of law that became a mere instrument of domination. The result was revolution and war.

2 Securing peace

A A peace framework

In 2012 the Government of Liberia launched a 'long-term national vision' for the country to pursue between 2012 and 2030.[32] The vision is introduced in the Government's overarching development framework, the *Agenda for Transformation: Steps Toward Liberia RISING 2030*,[33] which provides an 'action plan' for the first five years (2012–2017).[34] The Government describes its national vision in Chapter 2 of the *Agenda for Transformation*. In a passage that evokes the Liberian Commissioner's 1903 report on the demarcation of the hinterland,[35] the description creates the sense of a truly future-present vision of Liberia:

> The goal is to have a vibrant economy; one in which more than half of the workforce is employed in the formal sector. This is led—but not dominated by—the [natural resource] concessions economy, which is integrated into a prosperous Liberian economy. Liberians are successful managers and are entrepreneurs by choice. People trust that contracts and business agreements will be honored, all of which are supported by transparent, fair and efficient Commercial Courts. […] A special economic zone in Buchanan permits complex activities to service the extractive sector in the sub-region, while also acting as a staging ground for institutional reforms at the national level. […] Smaller commercial zones on the borders with Guinea, Sierra Leone and Ivory Coast serve as bridges of peace and prosperity, backstopping a broader regional integration of tariffs and infrastructure.[36]

The vision continues in the same way before ending with a note on the future beyond this present: 'Liberians are saving, confidently, for their own futures and average incomes have reached the middle-income threshold.'[37]

The *Agenda for Transformation* sets out a development framework for consolidating this national vision, based on four main 'pillar goals' that combine a capitalist-economic regime (Pillar II) with institutions of democratic governance

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[32] See Republic of Liberia, *Agenda for Transformation: Steps Toward Liberia RISING 2030* (Monrovia: Republic of Liberia, 2012), 29.

[33] Ibid, Chapter 2.

[34] Ibid, 29.

[35] Discussed in Part 2 of Chapter 4 of the thesis.

[36] Republic of Liberia, *Agenda for Transformation*, 9-10.

[37] Ibid, 10.

(Pillar IV), concern for human rights and development (Pillar III), secured through the rule of law (Pillar I).[38] I briefly discussed 'Pillar II—Economic Transformation' in the closing section of the previous chapter of the thesis. My focus now is on the pillar that is supposed to secure the entire edifice, that is, 'Pillar I—Peace, Justice, Security and Rule of Law'.[39]

The overarching goal of Pillar I is to establish the conditions for and of the peace envisioned by the Government.[40] The framework for achieving this overarching 'pillar goal' has four sector goals: (1) 'security'; (2) 'peace and reconciliation'; (3) 'justice and rule of law'; and (4) 'judicial reform'. The sector goals of 'justice and rule of law' and 'judicial reform' are both concerned with the institution of law, whilst the sector goal of 'peace and reconciliation' is concerned with social justice. Along with 'security', which is concerned with the institutionalisation of force, these sector goals constitute three propositions, which together provide a peace framework for realising the new, post-war idea of Liberia.

The diagram on the following page (Figure 13) juxtaposes the Government's framework for realising its post-war idea of Liberia (the phrases in brackets) with my analysis of that framework (the phrases in bold). Thus *Vision 2030: Liberia Rising* corresponds with the Government's post-war idea of Liberia; the *Agenda for Transformation* corresponds with the Government's framework for realising this vision; whilst 'Pillar I' of the *Agenda for Transformation* provides the 'peace framework' that is supposed to secure the entire edifice. This peace framework, as I now turn to show, is based on the same three propositions considered above, that is, the logic of securing peace.

[38] The four main 'pillars' are: Pillar I—Peace, Justice, Security and Rule of Law; Pillar II—Economic Transformation; Pillar III—Human Development; and Pillar IV—Governance and Public Institutions. A fifth pillar includes 'cross-cutting themes'. See ibid.

[39] See ibid, Chapter 8.

[40] As the government writes, the *Agenda for Transformation* will 'coordinate all activities for peace and security into one development framework': ibid, 41.

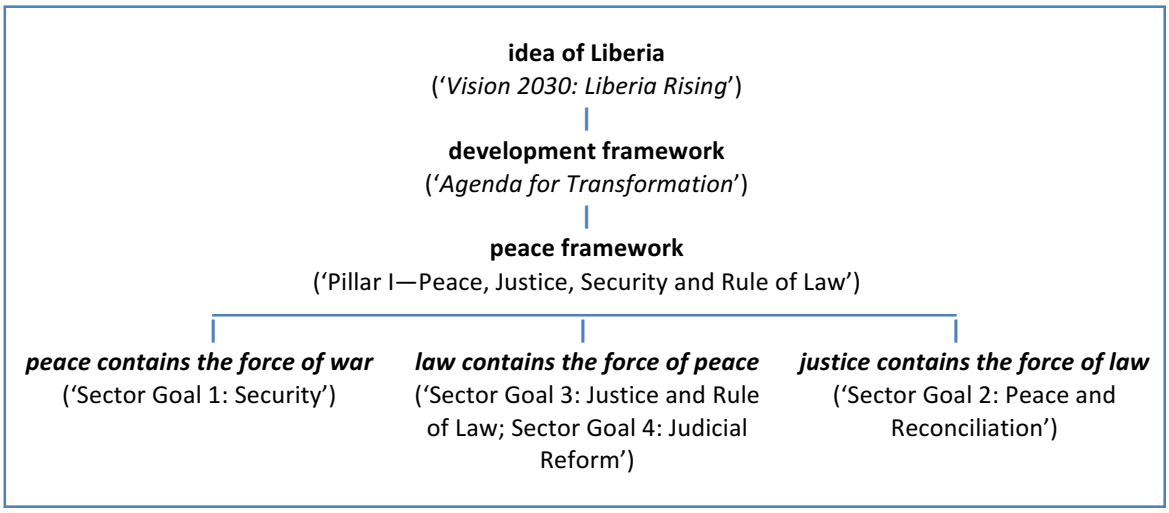

Figure 13. The framework for realising *Vision 2030: Liberia Rising*

(i) peace contains the force of war

The Government provides the following narrative in introducing the sector goal of 'security':

> Ten years ago, security forces intimidated and terrorized the population, intervened in political processes and disregarded the rule of law. Today, the police force, armed forces and all other security forces are being restored into professional and capable institutions.[41]

These first two sentences in the Government's narrative set out the transition from a state of war to a state of peace. In 2002 ('ten years ago') Liberia was experiencing its second civil war and some of the worst violence of the fourteen-year conflict; in 2012 ('today') the same forces that had 'intimidated and terrorized the population' 'are being restored into professional and capable institutions'. The narrative then emphasises how the Government has 'exerted immense efforts to effectively address the negative attributes of the security sector' and how it plans to continue 'building on these efforts' with a focus 'on sustaining and augmenting progress made in creating a secure environment'.[42] As it states in summary: '*Goal:* Maintain a secure and safe environment to enable sustainable socio-economic growth and development.'[43]

[41] Ibid, section 8.1 ('security').

[42] Ibid.

[43] Ibid.

The primary 'strategic objective' for achieving this sector goal is to 'maintain security nation-wide and protect territorial integrity' after the withdrawal of the UN's peace operation in Liberia, UNMIL, by 'consolidating […] the new Liberian security architecture'.[44] In other words, having brought the forces of war under the control of the Government, and transformed them into forces of peace, the goal of 'security' will be achieved through the consolidation of force within the State's 'security sector' (*peace will contain the force of war*).

However, the action plan also includes two other 'strategic objectives' for achieving the sector goal of 'security'. The first of these is 'increasing operational effectiveness'; the second is 'increasing the accountability and legitimacy of national security institutions and the public's confidence in them', to be achieved in part by 'building synergies' between the security sector and the state legal system.[45] Thus, whilst the primary goal of 'security' is to ensure peace contains the force of war, the action plan recognises that this is a combustible proposition, requiring more than just 'operational effectiveness'. To ensure the forces of peace do not become tyrannical, there must be 'oversight, accountability, professionalization, and legitimacy of the security sector'.[46]

(ii) law contains the force of peace

The Government sets out two 'ends' in its discussion of 'Sector Goal 3: justice and rule of law'.[47] One is to provide a medium for the capitalist-economic regime: 'an effective justice system' is 'essential to economic revitalization because it can provide a framework for resolving contractual and property disputes, increasing commercial certainty and promoting private sector growth'.[48] The other is to secure this regime: 'an effective justice system is vital to addressing Liberia's most significant security threat—the growth in crime.'[49]

[44] Ibid.

[45] Ibid.

[46] Ibid.

[47] Ibid, section 8.3 ('justice and rule of law').

[48] Ibid.

[49] Ibid.

By 'justice system' and 'the rule of law', the Government means the institutions of the State legal system.[50] The Government's goal of 'extending the rule of law' is therefore intended to strengthen the institutions of the State legal system, to achieve the overarching goal of securing peace.[51] At the same time, the Government is clearly concerned about the justice of its legal system.[52] Thus the overarching sector goal is not only 'to build the *effectiveness and integrity* of legal institutions', but also 'to increase *equitable* access to justice and to strengthen the rule of law *for the social and economic benefit of all Liberians*.'[53] That is, whilst the Government's goal of 'extending the rule of law' is to strengthen the institutions of the State legal system, to ensure 'law contains the force of peace', the Government also recognises that more is needed than institutional 'effectiveness and integrity'. The rule of law must be as just as it is forceful.

(iii) justice contains the force of law

The Government addresses the question of justice in the sector goal of 'peace and reconciliation'. The narrative for this section begins with the following lines:

> Reconciliation remains an indispensible goal for cultivating and protecting Liberia's still-fragile peace. The civil war opened and exacerbated social cleavages that must be bridged—inter-tribal tensions must be resolved and economic, social and political exclusion and marginalization must be addressed. The goal of this development strategy is to increase the equity and fairness necessary to build prolonged peace.[54]

The Government then summarises the sector goal:

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[50] 'The Justice and Rule of Law sector includes prosecutors, public defenders, legal aid practitioners and corrections officials. It also includes the court […]. Institutions such as the Louis Arthur Grimes School of Law, the James A.A. Pierre Judicial Institute, the Liberia National Bar Association and the Liberian National Police Training Academy play a major role in shaping the direction and effectiveness of the country's legal system. Traditional justice providers, such as tribal and village chiefs, also play an important role in the arbitration of disputes. *To extend the rule of law nationally, linkages between these institutions will be strengthened.*' Ibid (my italics).

[51] I examine the Government's legal system reform in Part 2 of Chapter 7 of the thesis, where I consider in particular the Government's efforts to address 'traditional justice'.

[52] As I examine in Chapter 7, the justice of the Government's vision of what is 'for the benefit of all Liberians' is questionable. Again, however, the point here is not to evaluate the Government's vision of justice, but to highlight its awareness that the proposition of 'peace through law' is a combustible one.

[53] Republic of Liberia, *Agenda for Transformation,* section 8.3 (my italics).

[54] Ibid, section 8.2 ('peace and reconciliation').

> To ensure long-term peace and stability through (1) managing tensions in society to reduce the risk of future conflict; (2) increasing social cohesion; and (3) ensuring that the principles of human rights are upheld.[55]

Thus the concern here is to ensure 'peace and stability' through justice. In this, 'justice' is framed primarily in terms of achieving social cohesion—in bridging social cleavages, resolving tensions, and generally reducing marginalisation and exclusion. Thus 'justice' is directed above all at overcoming the separation of subjects in society. This recalls the UN's global policy on security sector reform, which is directed at achieving a singular peace-and-security complex in which 'State' and 'society' merge in a state/State of peace. To achieve this state/State of peace, 'society' must first be reconciled. In this way, having achieved reconciliation of the nation-state, the national legal system will be 'legitimate' and 'equitable' to the extent that all will be equally before the law of the nation. As the Government writes, the aim of this sector goal is to ensure peace and stability by 'increasing social, economic and legal justice', as well as 'political reconciliation and procedural justice' in State governance.[56]

(iv) securing peace

Pillar I of the *Agenda for Transformation* thus sets out a peace framework for realising its national vision that brings together three propositions. The configuration of these propositions are seen most clearly in the introduction to Pillar I:

> The government will continue to address the key sources of conflict and insecurity, protecting the citizens of Liberia from violence and crime; delivering justice and upholding the rule of law; reconciling all Liberian people and together building a more peaceful and more secure nation.[57]

In other words: the overall goal of this Pillar is to achieve a state/State in which 'the government'/'all Liberian people' together constitute 'a more peaceful and more secure nation'; and this will be achieved by (1) 'address[ing] the key sources of conflict and insecurity' and 'protecting the citizens of Liberia from violence and crime' (*peace will contain the force of war*); (2) 'upholding the rule of law' (*law will*

[55] Ibid.

[56] Ibid.

[57] Ibid.

contain the force of peace); and (3) 'reconciling all Liberian people' and 'delivering justice' (*justice will contain the force of law*). Thus the Government's envisioned state/State of peace will be secured by containing force through a just rule of law.

In the next three sections, I examine how the Government, with the support of the UN's peace operation, is working to consolidate this vision, beginning with the UN's operational vision for building peace in Liberia post-war.

B Peace-building

In September 1997, in his final report to the UN Security Council on the United Nations Observer Mission in Liberia (UNOMIL), the UN Secretary-General observed:

> The conflict in Liberia was essentially a power struggle with some ethnic elements, but the command and control exercised by faction leaders over their commanders and troops in the field was often loose. The central government, law and order and physical infrastructure of Liberia had been either seriously degraded or had disappeared altogether. As a result, the fighting was characterized by widespread lawlessness, the easy availability of small arms and gross violations of human rights by all factions against innocent civilians.[58]

Forming part of the epilogue (the 'Observations and Conclusions') of the ultimate report on a Mission that had reached its 'successful conclusion',[59] this passage offers an account of the situation in Liberia at a moment of peace. The paragraphs that precede and succeed it in this part of the report recount a short history of the UN Observer Mission's establishment.[60] They recall the devastating facts that the war had taken as many as 150,000 civilian lives and driven 700,000 people to flee.[61] They also retrace the failed attempts since 1993 to resolve the conflict,[62] before the 'turning of the tide' in 1996,[63] which saw 'the restoration of a climate of security' that was 'crucial' to the 'successful organization and conduct of the

[58] UN Doc S/1997/712 (12 September 1997), *Final Report of the Secretary General on the United Nations Observer Mission in Liberia*, para 23.

[59] Words of the UN Secretary-General: ibid, paras 21 and 31.

[60] Ibid, paras 21-34 ('VIII. Observations and Conclusions').

[61] Ibid, para 22.

[62] Ibid, paras 24 and 25.

[63] Ibid, para 25.

elections'.[64] The human rights activities of the Mission receive special mention for their 'important role in the peace process',[65] as does the 'successful completion of the disarmament and demobilization exercise' and the 'initial reintegration programs' which were 'crucial in providing useful employment to thousands of former fighters and war-affected populations as a means both of restoring social stability and of rehabilitating some of the country's basic infrastructure'.[66]

These themes—violent conflict, law and order, stability; humanitarian relief, disarmament and demobilisation and reintegration; democratic elections, national reconciliation, human rights; the country's physical infrastructure—characterise the focus of the first UN peace operation in Liberia that had begun in 1993 and culminated in 1997 in the election of Charles Taylor to the presidency.[67] These themes also characterise the subsequent UN peace operations in Liberia, from the UN Peace-building Support Office (UNOL) that replaced the Observer Mission in 1997, to the Multilateral Force that oversaw the transition with the signing of the Comprehensive Peace Agreement in 2003 and the arrival of the UN Mission in Liberia (UNMIL).[68]

What is missing from the UN's characterisation of the situation in Liberia between 1993 and 1997 and the mandate of the UN Observer Mission is the expression that this has anything to do with the rule of law. The term 'rule of law' only entered the Security Council's lexicon with respect to the UN's peace operations in Liberia in September 2000, when it was used by the UN Secretary-

[64] Ibid, paras 28-30. That the elections were seen as a core benchmark of success is made clear in UN Doc S/1997/643 (13 August 1997), *24th Progress Report of the Secretary General on the United Nations Observer Mission in Liberia*, para 45, where the UN Secretary-General writes: 'With the establishment of a democratically elected government in Liberia, the principal objective of UNOMIL has now been achieved'.

[65] *Final Report of the Secretary General on the United Nations Observer Mission in Liberia*, para 31.

[66] Ibid, para 27.

[67] This can be read in the UN Security Council resolutions creating and adjusting the mandate of UNOMIL: UN Doc S/Res/866 (22 September 1993) and UN Doc S/Res/1020 (10 November 1995). It can also be read in the rest of the Security Council resolutions extending the mandate of UNOMIL: UN Doc S/Res/911 (21 April 1994); UN Doc S/Res/950 (21 October 1995); UN Doc S/Res/972 (13 January 1995); UN Doc S/Res/985 (13 April 1995); UN Doc S/Res/1001 (30 June 1995); UN Doc S/Res/1014 (15 September 1995); UN Doc S/Res/1041 (29 January 1996); UN Doc S/Res/1059 (31 May 1996); UN Doc S/Res/1071 (30 August 1996); UN Doc S/Res/1083 (27 November 1996); UN Doc S/Res/1100 (27 March 1997); UN Doc S/Res/1116 (27 June 1997).

[68] For the text of the CPA, see UN Doc S/2003/850 (29 August 2003), *Peace Agreement between the Government of Liberia, Liberians United for Reconciliation and Democracy (LURD), The Movement for Democracy in Liberia (MODEL) and the Political Parties*, annex. For discussion and evaluation of the activities and performance of UNMIL during the transitional period, see Jeremy Matam Farrall, 'Recurring Dilemmas in a Recurring Conflict: Evaluating the UN Mission in Liberia (2003–2006)', *Journal of International Peacekeeping*, vol 16 (2012).

General in a letter to the Council to justify the extension of UNOL's mandate for another twelve months.[69] In November 2002, in what appears to be the first use of the term by the Council itself with respect to Liberia, the President of the Council directed UNOL to '[offer] assistance to the Liberian authorities and to the public for strengthening democratic institutions and the rule of law'.[70]

The Security Council did not mention 'the rule of law' in its resolution authorising a Multinational Force to 'support the implementation of the 17 June 2003 ceasefire agreement', 'to help establish and maintain security', 'to secure the environment for the delivery of humanitarian assistance', and 'to prepare for the introduction of a longer-term United Nations stabilization force'.[71] Rather, the focus was on these other themes, and above all, security.[72]

It was only with the establishment of UNMIL in 2003 that the Security Council began to use the term 'rule of law' more prominently and frequently in its resolutions on the UN's peace operation in Liberia. Even then the Council used the term sparingly at first. In Resolution 1509 (2003) establishing UNMIL, the Council 'urged' the transitional government of Liberia to prioritise 'the establishment of a State based on the rule of law'.[73] The Council did not mention the priority of establishing the rule of law in its resolutions extending UNMIL's mandate in 2004,[74] 2005,[75] or 2006,[76] and only returned to it in 2007, in '[r]ecognizing that significant challenges remain in the consolidation of Liberia's post-conflict transition, including […] extension of the rule of law throughout the country'.[77] In

[69] UN Doc S/2000/945 (3 October 2000), *Letter Dated 28 September 2000 from the Secretary General Addressed to the President of the Security Council*.

[70] UN Doc S/2002/1305 (29 November 2002), *Letter Dated 29 November 2002 from the President of the Security Council Addressed to the Secretary General*, 1. This direction was reinforced two weeks later in a presidential statement: UN Doc S/PRST/2002/36 (13 December 2002), *Statement by the President of the Security Council*, 3.

[71] UN Doc S/Res/1497 (1 August 2003), para 1.

[72] Ibid.

[73] UN Doc S/Res/1509 (19 September 2003), preambular para 7.

[74] UN Doc S/Res/1561 (17 September 2004).

[75] UN Doc S/Res/1626 (19 September 2005); UN Doc S/Res/1638 (11 November 2005).

[76] UN Doc S/Res/1667 (31 March 2006); UN Doc S/Res/1694 (13 July 2006); UN Doc S/Res/1712 (29 September 2006).

[77] UN Doc S/Res/1750 (30 March 2007), preambular para 8. The same language is used in UN Doc S/Res/1777 (20 September 2007).

2008 the Council again 'recognized' the need for 'extension of the rule of law throughout the country'.[78]

The Security Council's language on the rule of law then shifted in 2009. In a preambular recital of its 2009 resolution extending UNMIL's mandate, the Council 'recognized' that 'lasting stability' in Liberia and the sub-region would require 'well-functioning and sustainable *security and rule of law sectors*'.[79] A second reference to the rule of law in the same resolution 'called upon' the Government and UN 'to redouble efforts to develop national *security and rule of law institutions*'.[80] This language, coupling 'security' and 'the rule of law' and framing them as technical matters for development, is repeated in the Council's resolutions extending UNMIL's mandate in 2010,[81] 2011,[82] and 2012.[83]

By 2012 reference to 'the rule of law' had become common-place in the Security Council's characterisation of UNMIL. In addition to its usage already noted above, the Council included the term an additional three times in the operative paragraphs of Resolution 2066 (2012): to refer to the 'goal of increasing the capacity of the Government of Liberia, particularly the LNP [Liberian National Police], to implement sustainable rule of law, justice, governance and SSR programs';[84] to 'emphasize' that 'in order to be sustainable, the transition planning process should take into account broad challenges, including governance and the

[78] The only difference in 2008 is the additional emphasis on developing 'the Liberian National Police' as part of the security architecture, and the note 'that crimes of corruption and violence, in particular with regard to exploitation of Liberia's natural resources, threaten to undermine progress towards those ends': UN Doc S/Res/1836 (29 September 2008).

[79] UN Doc S/Res/1885 (15 September 2009), preambular para 5 (my italics).

[80] Ibid, para 10 (my italics).

[81] UN Doc S/Res/1938 (15 September 2010), preambular paras 5 and 10.

[82] UN Doc S/Res/2008 (16 September 2011), preambular paras 4 and 11.

[83] UN Doc S/Res/2066 (17 September 2012), preambular paras 7 and 18. On the technocratic turn, Taylor notes how: 'Formulations of rule-of-law programming, such as "law and justice reform", "security sector reform" (SSR), and "rule-of-law promotion" itself, all display a tension between technocratic and substantive justice concerns. For instance, in SSR discourse, "justice" denotes a technical "sector" and is an analogue for criminal law, procedure, adjudication, sanctions and corrections, regardless of whether the processes and outcomes of these are just. The potential slippage between the externally funded justice "fix" and the substantive realisation of justice locally varies with each rule-of-law intervention, but it is not unusual for the formal, technical face of the rule of law to dominate the more complex, indeterminate negotiation of "justice".' Veronica Taylor, 'Big Rule of Law©®℠™(pat.pending): Branding and Certifying the Business of the Rule of Law', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall, and Hilary Charlesworth (Oxon: Routledge, 2016), 29.

[84] UN Doc S/Res/2066 (17 September 2012), para 7, repeated in UN Doc S/Res/2116 (18 September 2013), para 8.

rule of law as well as the political context';[85] and to 'call upon' UNMIL to enhance 'its support for security sector and rule of law reforms'.[86] Only one of these references was dropped from the 2013 resolution.

This account shows three things. (1) It shows *continuity* in how the Security Council has characterised the UN's peace operations in Liberia from 1993 to 2013, concerned above all with security and stability. (2) At the same time, it shows a *shift* in language to 'the rule of law' as the peace operation transitions from peace-keeping to peace-building. (3) It shows that the shift in language to 'the rule of law' does not change the characterisation of the peace operation; rather, 'the rule of law' enters the Council's resolutions only to be coupled with 'security' and brought within its logic. This is remarkable because it shows how 'the rule of law' emerges, not as a break from the logic of security, but as a concept of security. It leaves little doubt that 'establishing the rule of law' is supposed to *contain* (hold within, to withhold from manifesting) the force of peace.

These finding are not surprising; indeed they are in keeping with the Security Council's primary responsibility for the maintenance of international peace and security under the UN Charter.[87] Yet, no matter how obvious it might be that Council resolutions would characterise a UN peace operation as being fundamentally about stabilising a state of conflict and securing that stability, the point is nonetheless important. Its importance lies in the fact that 'security' ultimately frames the terms of the UN's peace operation in Liberia. Nothing enters the peace operation through the Council without becoming 'securitised'.[88] The question of 'peace' becomes a matter of 'stability'; the question of 'law' becomes a matter of 'order' (to pacify the population) and 'accountability' (to pacify the government and its armed forces); and the question of 'justice' becomes a matter of the injustices resulting from armed conflict and addressing them in the interests

[85] UN Doc S/Res/2066 (17 September 2012), para 8, not repeated in UN Doc S/Res/2116 (18 September 2013).

[86] UN Doc S/Res/2066 (17 September 2012), para 8, repeated in UN Doc S/Res/2116 (18 September 2013), para 8.

[87] See Article 24 and Chapter VII of the Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 *UNTS* 16.

[88] On 'securitisation', see Luckham and Kirk's analysis of the 'evolving concept of security' in Robin Luckham and Tom Kirk, 'The Two Faces of Security in Hybrid Political Orders: A Framework for Analysis and Research', *Stability: International Journal of Security and Development*, vol 2, no 2 (2013); Robin Luckham and Tom Kirk, 'Security in Hybrid Political Contexts: An End-User Approach', *Justice and Security Research Program* (Paper 2, 2012).

of 'securing stability', or else a matter of criminal justice and therefore a matter of 'law and order'. This, in other words, is the UN's vision of peace in Liberia: a reconciled state/State with a strong security sector capable of maintaining stability and order.

C Establishing a state based on the rule of law

I began the account in the previous section by quoting a passage from the final report of the UN Secretary-General on the UN Observer Mission in Liberia. Written at a moment of peace in 1997 and looking back on the first civil war in Liberia, the passage reflects on how the state/State of peace in Liberia had broken down ('the central government, law and order and physical infrastructure of Liberia had been either seriously degraded or had disappeared altogether'). This state/State of 'non-peace' was characterised by three elements in particular. (1) The conflict was defined by a lack of control over the use of force ('command and control exercised by faction leaders over their commanders and troops in the field was often loose', combined with 'the easy availability of small arms'). This was the opposite of the proposition 'peace contains force': this was a state in which force was *uncontained*. (2) The conflict was defined by a lack of law ('the fighting was characterized by widespread lawlessness'). This was the opposite of the proposition 'law contains force': this was a state in which force was wielded *lawlessly*. (3) The conflict was defined by injustice ('gross violations of human rights by all factions against innocent civilians'). This was the opposite of the proposition 'justice contains force': this was a state in which violence was inflicted on civilians *unjustly*.

This passage thus presented an image of the state/State that the first UN peace operation in Liberia had confronted, and it was the *opposite* of 'peace'. Or rather, because this passage was written as a reflection on what had supposedly been overcome, the state/State of peace that the UN was celebrating in its 1997 report was the opposite of this image of war. *This* was the 'peace' that had to be secured, defined in opposition to a state of *uncontained, lawless, unjust violence*.

Before the rule of law entered Security Council discourse with respect to the UN's peace operations in Liberia, its concern was with 'law and order', or its absence, 'lawlessness'. This is not the same as a concern for 'the rule of law'. As Nick Cheesman has persuasively argued, the two concepts are 'asymmetrically

opposed'.[89] By this Cheesman means that 'law and order' is in an antagonistic relation with 'the rule of law', not as its negation (its symmetrical opposite, as in 'non-rule of law') but as a positive concept with its own contents that make it inherently antagonistic to the concept of 'the rule of law'.[90] Following Michel Foucault, Cheesman highlights how 'law and order' is concerned above all with a police-like 'concern to maintain order, to abolish disorder, through good use of the state's forces'.[91] 'The rule of law', by contrast, 'does not aim to eliminate disorder' nor does it 'purposefully design and pursue activities for the obtaining and maintenance of order'.[92] Rather the rule of law seeks order in itself—or as Cheesman puts it, 'the rule of law is orderly'.[93] Cheesman does not elaborate on what he means by this, beyond saying that the rule of law is 'characterized by an inherent type of order […] it is orderly'.[94] I agree to the extent that the rule of law is characterised by its relation to force, which, as discussed in Part 1 of the chapter, seeks to make law and force coincidental. In this sense, 'the rule of law' is an ordering of force in itself. Whereas 'law and order' is concerned with maintaining an orderly population through the use of force (and, therefore, maintaining order *exogenously*, in others), 'the rule of law' is concerned with maintaining its monopoly of force (and, therefore, maintaining order *endogenously*, in itself).[95]

The distinction is important here because it assists in seeing how the two propositions—'law and order' and 'rule of law'—merge in this account of the attempt to secure the state/State of Liberia against a return to uncontained, lawless, unjust violence. Indeed, the antagonism that makes the two concepts asymmetrically opposed is what brings them together in the UN's discourse.

Thus in 2003, when the Security Council decided to establish UNMIL, 'the stabilization force called for in Resolution 1497 (2003)', it further decided that this 'stabilization force' would 'consist of up to 15,000 UN military personnel […] and up to 1,115 civilian police officers, including formed units to assist in the

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[89] Nick Cheesman, 'Law and Order as Asymmetrical Opposite to the Rule of Law', *Hague Journal on the Rule of Law*, vol 6, no 1 (2014).

[90] Ibid, 111.

[91] Ibid, 108.

[92] Ibid, 111.

[93] Ibid.

[94] Ibid.

[95] Compare ibid.

maintenance of law and order throughout Liberia'.[96] At the same time, one of the 'key priorities' of this stabilisation force was to support 'the establishment of a state based on the rule of law'.[97] So from the outset the peace operation was defined as a stabilisation mission with a primary objective of maintaining law and order (to assist in securing the State of Liberia from a return to a state of uncontained, lawless, unjust violence), but within the broader framework of the rule of law. The preambular position of the reference to the rule of law in the mandate is important here, setting it up as a threshold term of the peace operation.[98]

However, in bringing the two propositions together in the same discourse of securing peace, 'the rule of law' cannot avoid becoming conjoined with 'law and order'.[99] As a threshold term, its contents (what is meant by 'the establishment of a state based on the rule of law') become concrete through the operative paragraphs that direct UNMIL's work. And there is no doubt that maintaining order and stability is the dominant concern of the operative paragraphs of UNMIL's mandate, making the Mission's core tasks to assist in monitoring and restructuring the police force of Liberia and to develop a civilian police training program,[100] as well as to assist in developing a strategy to consolidate governmental institutions, including the national legal framework and judicial and correctional institutions.[101] UNMIL's rule-of-law mandate thus faithfully pursues the UN Department of Peacekeeping Operation's operational concept of the rule of law, focusing on the so-called justice-chain institutions of police, prisons, and courts, with the preambular goal of 'establishing a state based on the rule of law' acquiring its core operative meaning in relation to this overarching objective.[102]

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[96] UN Doc S/Res/1509 (19 September 2003), para 1.

[97] Ibid, preambular para 1.

[98] On the preamble to law, see Shane Chalmers, 'The Beginning of Human Rights: The Ritual of the Preamble to Law', *Humanity Journal* (forthcoming).

[99] I part company with Cheesman here in that, whereas Cheesman insists on keeping the two concepts separate in order to more clearly see what is meant by 'the rule of law', I suggest 'the rule of law' is more clearly understood in its confused relation with 'law and order'. That is, precisely because they are asymmetrical opposites, the two cannot be kept apart as clearly as Cheesman would like—at least not in this discourse of peace.

[100] UN Doc S/Res/1509 (19 September 2003), para 3(n).

[101] Ibid, para 3(q).

[102] This is not to deny that there are some elements of UNMIL's mandate that speak to the more substantive justice potential of the Secretary-General's 2004 definition of the rule of law (set out in note 29 above). These elements have included undertaking human rights promotion, protection,

Thus 'establishing a state based on the rule of law' can be seen to require, according to the implementation of UNMIL's mandate, bringing Liberia's forces of law and order—its police, prisons, courts—within the concept of 'the rule of law'. On one hand, this means ensuring Liberia's security sector is accountable to law, with appropriate democratic oversight and civilian control. On the other hand, this means making the security sector the focus or subject-matter of 'the rule of law'. In this, the exogenous condition of securing stability and order becomes the endogenous condition of maintaining the rule of law.

What this shows is how 'establishing a State based on the rule of law' was initially included in UNMIL's mandate as a preambular concern to the operative objective of securing the state/State of peace in Liberia. At this point, the term was included as an aspirational vision, an ideal on the horizon of the peace operation. The timing of this mandate (2003) also coincided with the entry of 'the rule of law' as a discrete item on the Security Council's agenda, and in the lead-up to the publication of the Secretary-General's definitional report on the rule of law in 2004.[103] This was a time of high aspiration for promoting the rule of law through the UN and the Council in particular. As UNMIL became more established, however, and especially as it began to transition from a peace-keeping to a peace-building operation after the 2006 presidential elections, 'the rule of law' was brought increasingly within UNMIL's mandate as an operative term and coupled with its security objectives. From 2009, the vision of establishing a State based on the rule of law became a reminder that 'lasting stability in Liberia and the subregion requires well-functioning and sustainable security and rule of law sectors' and 're-doubled efforts' 'to develop national security and rule of law institutions'.[104]

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and monitoring activities (see UN Doc S/Res/1509, paras 3(l) and (m)); assisting with the holding of democratic elections (see UN Doc S/Res/1509, para 3(s)); and, since 2012, assisting in advancing a range of priorities, including national reconciliation and constitutional reform (see UN Doc S/Res/2066, para 8). The point is that this orientation to justice has been marginal compared with the security focus on maintaining law and order. Thus by 2009 justice was clearly playing second fiddle to security in the 'Security and Justice Development Plans' being promoted by both the Security Council and UNMIL (see UN Doc S/Res/1885, para 10) and by 2015 building and strengthening the capacity of the Liberian National Police had become the dominant priority (see, eg, UN Doc S/Res/2116, paras 3 and 8). I discuss this further in the next section on the justice-and-security complex.

[103] See note 29 above.

[104] See notes 79 and 80 above.

D The justice-and-security complex

By 2015 it was clear that a securitised rule of law had become definitive of the UN's operation to assist the Government of Liberia to secure its vision of peace. If in 2003 it was implicit that the aim of establishing a State based on the rule of law contained the peace operation's objectives of securing stability and order, then by 2015 the contingent relation of 'the rule of law' and 'security' could not have been more explicit. So far this is in keeping with the first two propositions in the logic of securing peace. As I have shown, the UN's peace operations in Liberia have been directed, first and foremost, at ensuring peace contains the force of law. I have also shown how UNMIL's mandate became increasingly concerned with consolidating this State by ensuring law contains the force of peace. But the question remains: what about the third proposition, of securing this State of peace by ensuring justice contains the force of law?

At the time of writing, as the withdrawal of UNMIL becomes an increasingly unavoidable fact, with UN troops leaving the country in large numbers and a complete exit anticipated by 2017,[105] building the capacity of Liberia's security sector has become the main priority for the first time since the peace operation began in 2003.[106] Up until 2012, UNMIL's main security focus was to provide operational support to the Liberian National Police and the Bureau of Immigration and Naturalization as part of its peacekeeping strategy, rather than develop the capacity of these agencies.[107] At the same time, with UNMIL providing security under its peacekeeping mandate, the Government was reluctant to commit resources from its limited budget to develop the capacity of its security agencies.[108] This meant that in 2013 the police and immigration forces lacked the

[105] In 2013 UNMIL was in 'the first phase of the second military draw down': author interview with United Nations Department of Peacekeeping Operations official, New York City, 22 June 2013 (NY7). See also UN Doc S/Res/2215 (2 April 2015), para 1. In this Resolution, the Security Council '*Reaffirms* its expectation that the Government of Liberia will assume fully its complete security responsibilities from UNMIL no later than 30 June 2016 and also reaffirms its intention to consider the continued and future reconfiguration of UNMIL accordingly': para 3.

[106] Author interview with NY7.

[107] Ibid.

[108] Ibid. The reason for this reluctance is unclear, but a common interpretation within UNMIL is that it was at least partly a form of strategic dependence intended to prolong the UN Mission in Liberia. Once Liberia could maintain peace and stability on its own, UNMIL would no longer be necessary. As one UN official put it: 'In terms of political will […] the Government of Liberia would like the UN Mission to be there forever. That is unusual—we have been literally kicked out of other countries,

capacity to take control of domestic security in Liberia. Fearful that this would lead to a 'security vacuum' that would allow non-government actors to challenge the Government's monopoly on the use of force, especially in the interior, the Liberian Government began to focus on building the capacity of the police and immigration.[109]

In 2010 the Government had submitted a request to the UN Peacebuilding Commission to be placed on its agenda, which would open up access to international resources through the UN Peacebuilding Fund. The request was granted and a Statement of Mutual Commitments between the Government and the Peacebuilding Commission identified three core commitments in the areas of 'security sector reform', 'rule of law', and 'national reconciliation'.[110] As its 'centrepiece' the Statement of Mutual Commitments envisioned a network of five Regional Justice and Security Hubs covering the interior of Liberia. The promise was a new 'peacebuilding technology':[111] a decentralised network of fortified government complexes that would draw together the rule of law and security

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such as Chad recently—but in Liberia the Government feels very comfortable with the Mission. And you know, maybe the budget is part of the overall strategy of the Government in order to prolong the presence of the Mission—that is kind of a conspiracy theory.' Ibid.

[109] Ibid. See also UN Doc S/2013/124 (28 February 2013), *Twenty-fifth progress report of the Secretary-General on the United Nations Mission in Liberia*; UN Doc S/2013/479 (12 August 2013), *Twenty-sixth progress report of the Secretary-General on the United Nations Mission in Liberia*; UN Doc S/2014/123 (18 February 2014), *Twenty-seventh progress report of the Secretary-General on the United Nations Mission in Liberia*; UN Doc S/2014/598 (15 August 2014), *Twenty-eighth progress report of the Secretary-General on the United Nations Mission in Liberia*; UN Doc S/2015/275 (23 April 2015), *Twenty-ninth progress report of the Secretary-General on the United Nations Mission in Liberia*. See also Rory Keane, 'Reviewing the Justice and Security Hub Modality as Piloted in Liberia', *Stability: International Journal of Security and Development*, vol 1, no 1 (2012). Keane notes: 'The strategic focus on SSR and rule of law is based on the fact that the UN Peacekeeping Mission in the country, known as UNMIL, will gradually reduce troop numbers between 2012 and 2015 by up to 50%. In order to ensure that there is no security vacuum during or after this drawdown process, it is critical to build up and support Liberian security and justice services': 87.

[110] UN Doc PBC/4/LBR/2 (16 November 2010), *Statement of mutual commitments on peacebuilding in Liberia*. The Statement of Mutual Commitments was revised in 2012 as set out in UN Doc PBC/6/LBR/2 (9 May 2012), *Outcome of the first review of the implementation of the statement of mutual commitments on peacebuilding in Liberia*.

[111] As Keane notes in his review of the hubs: 'If the hub concept is capable of being adapted and successful elsewhere, the United Nations will not only have added a new instrument to its peacekeeping toolkit but will also firmly demonstrate how the UN Peacebuilding Fund can in essence be catalytic in fostering long-term and comprehensive approaches to peacebuilding': Keane, 'Justice and Security Hub Modality', 87. However, as Veronica Taylor pointed out to me, these Hubs resemble the Provincial Reconstruction Teams previously designed and implemented in Afghanistan and then in Iraq.

sector priorities in a way that would address both the feared 'security vacuum' and the perceived 'justice vacuum'.[112]

The vision is set out in a report published in early 2013 by the Government to update international stakeholders on the status of the project:

> The Justice and Security Regional Hubs are designed to extend security and justice services to all Liberians throughout the country. The Regional Hubs seek to promote a comprehensive approach to address justice and security problems through co-location of the regional Liberian National Police headquarters (including a robust Police Support Unit (PSU) element), as well as a Bureau of Immigration and Naturalization (BIN) Patrol Unit and elements of the justice system such as county attorneys, city solicitors, public defends, magistrates and judges.[113]

The first Hub, completed in 2013, was built just outside of Gbarnga to serve *Region 3*, the north-western security bloc comprising the interior Counties of Bong, Lofa, and Nimba. At least three reasons stand out for why Gbarnga was chosen for the location of the first Hub. (1) Gbarnga was the capital of Charles Taylor's 'Greater Liberia', the area he controlled during the civil war, and it remains a stronghold for his supporters, many of whom still occupy Taylor's farm just south of the city. (2) The social cleavages that hold the greatest potential to return Liberia to war run through Lofa and Nimba Counties. (3) Nimba County is the centre of the mining industry and economic activity outside of Monrovia.

From the perspective of the Government and its international partners, these are all good reasons to build the first Hub in Gbarnga, before extending the model to the other four security blocs in the country. And yet, the vision is for these Hubs to enhance access to justice in the process of strengthening security in the interior. Given this, the fact that the Gbarnga Hub stands as a fortified complex beyond the outskirts of town, and well beyond the physical access of the vast majority of the people it is supposed to serve, is perplexing. If the intention is to bring the law closer to the people, the only sense in which this is achieved is by reducing the time needed for police to respond to security threats in the region.

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[112] See ibid, 88.

[113] Justice and Security Joint Program, 'Introduction', *Gbarnga Regional Justice and Security Hub January 2012 – January 2013 Report*, 3.

Figure 14. Gbarnga Regional Justice and Security Hub[114]

The implication is that the Regional Justice and Security Hub in Gbarnga is directed at strengthening the police and immigration forces in the interior. Indeed, the Government originally conceived of the Hubs as regional command centres for the Liberian National Police to have 'forward operating bases' in the interior,[115] and, as the Government states in its 2013 report, 'this is precisely one of the reasons why the hub was established, as a rapid response forward operational base.'[116] Thus brought together within the same complex, 'justice' and 'security' would complement each other just as the Government and the UN hoped they would: a new police force deployed in the interior, with courthouses and lawyers co-located on-site for processing offenders of the national law.

[114] Photograph by Shane Chalmers.

[115] Author interview with NY7. The design was 'scaled up' to include legal services with the intervention of the UN Peacebuilding Commission. See also Keane, 'Justice and Security Hub Modality', 88.

[116] Justice and Security Joint Program, *Gbarnga Regional Justice and Security Hub January 2012 – January 2013 Report*, 11.

3 Post-script

A Justice to come

> Light appeared in the horizon: a triumph was before this Society such as the wisest man might envy, and the most virtuous man long to realize. They would triumph, not as conquerors, binding bleeding nations to their chariot wheels; but as liberators, who came not to destroy but to save. […] their march would be surrounded by the songs of the grateful, the blessings of the free; their triumph would be recorded in two hemispheres, and its lasting memorial would be written in heaven. [117]
>
> George Washington Park Custis
> *Address to the Annual Meeting of the American Colonization Society*

Imagine this. The year is 1821, the month is winter, and the day is stretched out radially between the unbroken circumference of the horizon, as the US brig the *Nautilus* courses across the Atlantic Ocean in the direction of Africa. Aboard are thirty three free black women, men, and children, under the command of two white officers of the US Government and two white agents of the American Colonization Society.[118] The *Nautilus* is bound for the British colony of Sierra Leone, where it is to join another group of black colonists who departed the United States a year earlier aboard the *Elizabeth*, before continuing to search for their promised land along the Windward Coast.

But all of that is to come. Out at sea for now, there they are: coursing across the Atlantic, gazing beyond the railings of the *Nautilus* at an apparently limitless expanse of sky and ocean, cut only by the horizon. And the light on the horizon holds out a promise: *imagine*, Africa ahead! A land of justice to come!

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[117] George Washington Park Custis, address to the Annual Meeting of the American Colonization Society in support of their colonisation mission: American Colonization Society, *Seventh Annual Report of the American Society for Colonizing the Free People of Colour of the United States* (Washington: printed by Davis and Force, 1824), 15-16.

[118] See Charles Henry Huberich, *The Political and Legislative History of Liberia*, vol 1 (New York: Central Book Company, 1947), 143. See also Frederick Starr, *Liberia: Description, History, Problems* (Chicago: [no publisher], 1913), 57.

To begin with, the American Colonization Society was dominated by slaveholders, and there is little doubt about their motivations in organising the colonisation mission that would establish Liberia in Africa: to secure the institution of slavery still foundational in the south of the country, as well as the whiteness of the United States. The answer to a visible contradiction was to make it less visible, in this case by deporting 'the free people of colour of the United States', whose presence threatened the security and purity of whites and the docility of their slaves. However, the idea of colonising these free people of colour 'in Africa (or elsewhere)' was also seen by some, both white and black, as a promise of liberty, equality, and fraternity.[119] Colonisation would, it was said, make black people free in a way they could never be in the United States. What is more, the establishment of an African-American colony in Africa would, it was said, provide a model of African civilisation that would lead to the emancipation of all of Africa's peoples.[120]

This was the colour of justice to come with the realisation of Liberia: the flourishing of the United States as a white homeland, and the flourishing of Africa as a black homeland. On one side this vision was propagated by slaveholders and white supremacists; on another side it was championed by radical black nationalists, along with pragmatists, black and white; whilst the views of the Africans who were to be made civilised were nowhere to be seen. And this troubled vision underwrote 'Liberia'. The colony, which had been referred to simply by its geographical indicator—Cape Montserado—and therefore by a name that 'meant nothing', by a name that signified no more than the outcrop of rubble that history had piled at the place where the settlers now stood, was named 'LIBERIA', expressing the 'object and nature' of the American Colonization Society's vision, not simply of liberty, but of the kind of liberty that comes with being *made* free. *This* was the justice of Liberia to come, just over the horizon.

[119] See also Eric Burin, *Slavery and the Peculiar Solution: A History of the American Colonization Society* (Gainesville: University Press of Florida, 2005), Chapter 1.

[120] See discussion in Part 2 of Chapter 4.

B A peace formidable to any eye

> Cape Montserado, November 26th, 1822, (morning.) Sir: I had the honour of writing you by the Shark, on the 9th ultimo, and, subsequently, by the 'Strong', in a very weak and sickly condition. We are now engaged in a bloody and perilous war with all the native tribes around us. On the morning of the 11th, were attacked by eight hundred, who were repulsed, after doing us some injury, with the loss of nearly one hundred killed on the spot. Subsequently, we have been employed in a negotiation for peace, which I fear will fail. We expect another assault to be made on us in two or three days. […] I have the honour, sir, to be, your most obedient servant,
>
> J. ASHMUN,
> *Acting Agent for liberated Africans*.
>
> November 26th, (evening.) Sir: Our negotiation with our perfidious enemies seems to have entirely failed of its object. They are bent on our ruin.[121]

Now imagine this. It is December 1822, mere months after the *Nautilus* was at sea, and the tiny colony erected on Cape Montserado is on the brink of ruin. Without food or adequate shelter, its fifty-odd residents, sick and dying from disease, are under attack from an alliance led by the Dey, who are demanding the return of land 'purchased' from them by the two white American agents with the assistance of a cocked pistol.[122] Two battles ensue. The first, in late November, is described by the American Colonization Society's 'Acting Agent for liberated Africans' in the letter to the Secretary of the US Navy quoted above. The second assault, foreseen by the Agent in his letter, occurs five days later. During this battle, an estimated fifteen hundred soldiers led by the Dey attack the American settlers. The settlement barely avoids destruction. Its survival is attributed to cannon fire, forcing the Dey to retreat.

This war will be memorialised as the Providential beginning of Liberia. Half a century later, the first President of the Republic, Joseph Jenkins Roberts, will recall it as 'that signal triumph of freedom over the implacable enemies of human progress and the rights of man'—a triumph 'which permanently established on

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[121] Letter from the acting Agent of the American Colonization Society at Cape Montserado, J Ashmun, to the Secretary of the US Navy, in American Colonization Society, *Seventh Annual Report*, 49-50.

[122] See, eg, 'Extract of a letter from Captain Robert T Spence to the Secretary of the US Navy', in American Colonization Society, *Seventh Annual Report*, 58-9.

this hill the foundations of our present political fabric'.[123] Or in the words of President William V S Tubman, addressing the legislature a century later: 'If the defenders of the Commonwealth had lost the day in the Battle of Fort Hill there would have been no Liberia'.[124]

But there is more to this scene. Shortly after the second battle, a US Navy ship arrives at the Cape, having heard the cannon fire. The Captain offers his assistance in constructing a fort—or as he describes it later, 'a tower of strength'. This, the Captain notes, 'I conceived well suited to effect the object in view', to make an 'impression on the minds' of those who might threaten the colony and its just claims.[125] He describes the construction of this 'tower of strength' in a letter to the Secretary of the US Navy:

> In fifteen days, a circular massive work of stone, measuring one hundred and twelve feet in circumference, eight feet in thickness, and ten feet in elevation, was seen to tower above the surrounding heights, commanding the site for the town, and a wide range of the circumjacent country.[126]

The result, he writes, is *'formidable to any eye'*. And indeed the Captain is left with no doubt about 'its effect in neutralizing, in no small degree, the menacing designs of the natives. Every day brought me additional proof of a change in their intentions […] I was happy in perceiving this revolution in their sentiments, this change in their designs'.[127]

∞

Not long after the settlers declared Liberia a Free, Sovereign and Independent Republic in 1847, accounts began to circulate that it was a young settler woman, Matilda Newport, who had fired the cannon that saved the colony during the Providential battle of Fort Hill.[128] Whether she did or not is unknown; but that fact is insignificant to this history. What is *significant* is that she came to be

[123] Cited in Svend E Holsoe, 'Matilda Newport: The Power of a Liberian-Invented Tradition', *Liberian Studies Journal*, vol 32, no 2 (2007): 30.

[124] William V S Tubman, 'Annual Message to the Legislature, November 16, 1965', in D Elwood Dunn, ed, *The Annual Messages of the Presidents of Liberia 1848–2010*, vol 1 (Gottingen: De Gruyter, 2011), 1348.

[125] American Colonization Society, *Seventh Annual Report*, 55 and 60 (my italics).

[126] Ibid, 60.

[127] Ibid (my italics).

[128] See Holsoe, 'Matilda Newport'.

represented as if she had. What is significant is that this image of 'Matilda Newport' substituted for a woman whose trace in history is little more than the name that would give birth to 'Liberia' as a republic. As another Liberian woman proclaimed admiringly almost a century later:

> It was […] our noble Matilda, seeing the handful of men dispirited, observing the shattered condition of affairs and the gloom which the menacing advance of the natives had cast upon the lives of the pioneers, stepped forth, lighted the cannon […] and the existence of the Republic became a possibility.[129]

Figure 15. Part of a relief depicting the origin myth of Liberia, set at the base of a monument on Cape Montserrado[130]

[129] Ibid, 34.

[130] Photograph by Shane Chalmers.

Figure 16. Stamp issued in 1947[131]

And the existence of the Republic became a possibility. There she stands: on public monuments and commemorative stamps, in children's school books,[132] in poems, parades,[133] and civic names,[134] her heroism re-told and re-enacted—Lady Newport, always behind the cannon with a hand to the fuse, a figure both *just* and *formidable to any eye*.

The timing of the emergence of the myth of Matilda Newport is important. In the second half of the nineteenth century, the European 'scramble for Africa' was accelerating, and the government of the black republic was under intense pressure to secure both its external sovereignty against the incursions of France and Britain, and its internal sovereignty against the African peoples who were rebelling against, or simply ignoring, the claims of the Americo-Liberian government. In this situation of colonial nation-state building, the name of Matilda

[131] Source: Manfred Beier, *Philately of Liberia*, philib.org.

[132] Holsoe, 'Matilda Newport', 38.

[133] 'The Story of Matilda Newport – Liberian Heroine,' *AFRO Magazine*, 3 February 1953, 8.

[134] A main street and a school in central Monrovia are named after Matilda Newport. An Act to establish a township named 'in honor of the heroine Matilda Newport' was also passed in 1854: see American Colonization Society, *The African Repository*, vol 30 (Washington: ACS, 1854), 241.

Newport was given to a company of the Republic's first militia.[135] Around the same time, December 1 was proclaimed a public holiday—to be named Matilda Newport Day—in honour of the 1822 battle of Fort Hill and the birth of the nation. In this way, and very importantly at this time, when the existence of the Republic was once again imperilled by its 'perfidious enemies',[136] both the militia created to secure Liberia's future presence, and the holiday created to commemorate the battle that secured Liberia's past presence, were drawn together in the figure of Matilda Newport.[137]

Matilda Newport thus emerged as an image in and of this history, connecting what was behind—the Providential battle for Liberia's past—with what was ahead—the Promise of Liberia's future—through an image that legitimated and propagated the legality and force of this history.[138] Where 'Liberia' remained an abstraction even after its declaration as a Republic in 1847—with an uncertain presence in international law and an uncertain presence on the ground in west Africa[139]—the figure of Matilda Newport came to sediment a place for 'Liberia' both as an image of justice and as an historical reality.

Thus the body of the settler woman, now the body of the Republic, gave birth to 'Liberia' in two ways. As an interpretive resource, an origin myth, Matilda Newport came to signify the history of Liberia, visualising—*making visible*—its providence as a settlement of pioneers under a banner of liberty. And as a technology, a tool of colonial nation-state-building, the image of Matilda Newport deployed to *make* this history.[140] In these two ways, not only did Matilda Newport come to represent the past and future of Liberia in west Africa—and thus a narrative of history that placed Liberia in history—but she also combined the

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[135] Holsoe, 'Matilda Newport', 33.

[136] See note 121 above.

[137] Thus an historian, writing in 1926, claimed that Matilda Newport's heroic deeds contributed to securing Liberia's independence from external powers, France and Britain: see Siahyonkron Nyanseor, 'Putting to Rest the Matilda Newport Myth – Part 2,' *The Perspective*, 7 January 2004: http//:www.theperspective.org/2004/jan/matildanewportmyth.htm.

[138] For a theoretical framework for thinking about images 'in' and 'of' history, see Shane Chalmers, 'The Visual Force of Justice in the Making of Liberia', in *Law and the Visual: Transition, Transformation, and Transmission*, ed Desmond Manderson (Toronto: University of Toronto Press, 2016).

[139] See discussion in Part 2 of Chapter 4.

[140] On the 'image' as 'interpretive resource' and as 'technology', see the introduction to Desmond Manderson, ed, *Law and the Visual: Transition, Transformation, and Transmission* (Toronto: University of Toronto Press, forthcoming).

justice of Liberia with the force that *had* and *would* secure its presence as a Republic in Africa and the world. Conjugating woman and cannon in the act that gave birth to the Republic, the image unites feminine justice with phallic force to make its vision of 'Liberia' manifest. There is nothing rigid, nothing timeless, nothing placeless, about Matilda Newport. Like Bernini's version of David,[141] she is tensed in action, a bandana keeping her hair and sweat from blinding her vision, the barrel of the cannon directed in no uncertain way at whatever would deny her place in the promised land. This is not an anaemic figure of *Justitia* for all times and for all places; she is active, determined, *forceful*.

And that is precisely why the image of Matilda Newport was eventually condemned as a representation of 'Liberia'. Following the revolution that culminated in 1980 with the overthrow of the Americo-Liberian regime, the celebration of Matilda Newport Day was swept away, and the image publicly denounced for glorifying 'the defeat of one group of citizens by another group of citizens'.[142] The image that had represented and that had deployed to achieve the consolidation of Liberia as a nation-state, through the forceful seizure of the lands and the institution of control over the peoples of this place, was condemned along with a government that had failed to see the problem with the state/State of peace secured through Matilda Newport.[143]

[141] With thanks to Desmond Manderson for drawing my attention to the comparison with the statues of David by Michelangelo and Bernini.

[142] Holsoe, 'Matilda Newport', 37-38.

[143] As President Tubman stated in 1965: 'Adverse comments on the Celebration of Mathilda Newport Day are being made but I see no objections to the celebration'; indeed, 'a day dedicated to her would appear to be most appropriate': Tubman, 'Annual Message to the Legislature, November 16, 1965', in Dunn, ed, *The Annual Messages of the Presidents*: 1348.

Figure 17. Relief at the base of the Centennial Pavilion in Monrovia[144]

[144] [image omitted from digital version]

4 Justice to come

The idea of 'Liberia' survived the revolution that swept the country in the second half of the twentieth century, as well as the wars of the 1990s and early 2000s. Whereas the figure of Matilda Newport, as a representation of 'Liberia', sunk too deeply into a specific colonial history to remain viable as a dynamic image of a revised, post-colonial Republic, the idea of Liberia as a nation-state remains wholly acceptable today. But the very floating quality that has kept the idea of Liberia from sinking into history along with Matilda Newport has also kept it from providing a solid basis for re-making the nation-state in the twenty-first century. The abstract idea of 'Liberia' that required the figure of Matilda Newport to ground it keeps it on the surface of history. What it means to 'be' Liberian in the second decade of the twenty-first century remains as fluid and plural as the peoples who inhabit its lands. Liberia remains a state without a nation, and more than that, a state without a definite *image* of itself as a nation. Like the figure of Matilda Newport, the official symbols of the Republic—its flag, patterned on the US flag, its coat of arms, with its colonial motifs, and its motto, 'the love of liberty brought us here'—are of a vision that *was*, a vision that a violent history has submerged.[145] Thus 'Liberia' remains an unsettled and disembodied ideal, *still* a promise of justice to come, just over the horizon.

The aim of this chapter has been to examine what is taking place in the attempt to consolidate 'Liberia' post-war, at the start of the twenty-first century. I began in Part 1 by considering a logic that I argued informs the UN's global vision of 'securing peace'. This logic brings together three propositions in a combustible arrangement, requiring in the end a forceful justice to secure a state/State based on the rule of law, which is itself directed at containing the manifestation of violent conflict. I then turned in Part 2 to show how this logic of securing peace can also be seen to inform the Liberian Government's twenty-first century vision of Liberia Rising, a vision that would consolidate the logic of capital. I examined this vision as set out in the Government's development framework, the *Agenda for Transformation*. At the core of this 'action plan' is the Government's framework for

[145] On the debate on Liberia's national symbols, see eg, Fred P M van der Kraaij, 'Liberia's national symbols – What happened to the national debate?', *Liberian Perspectives*, 31 May 2015: blog.liberiapastandpresent.org.

securing peace, the forces of which are to be contained by the rule of law, the violence of which is to be contained by justice—conjuring an image of the statue that stands in The Hague, of 'Peace through Justice'. I then examined how the UN is assisting to build this state/State of peace.

What this examination shows is an attempt to secure peace in Liberia by establishing an effective and accountable security sector, directed at maintaining order and stability, with rule-of-law and justice components brought within the logic of security. In other words, the examination shows an attempt to secure peace by combining force, law, and justice in a unified state/State. Whilst this is ultimately directed at containing force by bringing the forces of war within the State's security sector, this also has the effect of making the rule of law into a medium of security. Not only does this inform how the rule of law is taking place, as a medium of security, but it also enables the logic of security to take place through the institution of law's rule.

Thus, after a decade of peace-building, with an increasing emphasis on establishing a State based on the rule of law, new fortifications have been erected and new military and police forces commissioned, as the Liberian Government seeks to realise its vision of Liberia as a nation-state integrated into a transnational corporate-capitalist economy. Although the proposition 'justice contains the force of law' is supposed to make this arrangement bearable—by ensuring 'reconciliation', 'equality', and 'access to justice'—the justice of this peace, brought within the logic of security, is ultimately directed at securing the state of the State. The resemblance is clear: this is *peace through justice*—and the result is potentially explosive. Just as the propositions 'peace contains the force of war' and 'law contains the force of peace' have the potential to become tyrannical, there is the danger that the attempt to secure peace in this way will result in the institutionalisation of an increasingly violent and combustible authoritarian regime. This risk is not merely hypothetical: it is the historical experience of the First Republic of Liberia. As I showed in the post-script in Part 3, the idea of 'Liberia' as a vision of justice was forcefully consolidated in the nineteenth and twentieth centuries as an African-American republic in west Africa, securing the State of Liberia through the institutionalisation of an unjust rule of law. The result was revolution and war.

Lady Justice of the Peace Palace might have taken the place of Lady Newport of Colonial Liberia, as the image that is to secure the new Liberia, but the question remains: how *just* is this justice? The arrangement of 'peace through justice' is a highly combustible one, making the force of law's rule just, but its justice *violent*. This is a delicate balance at the best of times, but it becomes especially fragile when the 'justice' of law's rule is not in fact just, and merely violent. This was the case during the First Republic, when the forceful justice represented and propelled by the image of Matilda Newport was experienced as an instrument of domination by the vast majority of Liberians. The development of the Regional Justice and Security Hubs in Liberia point to a similar prospect for Liberia post-war, with the establishment of a State based on the rule of law appearing to be in the service of a forceful justice that risks becoming a mere instrument of domination. Thus the question remains: how just is the justice of this arrangement?

Chapter 6

talking drums, talking back

1 Law at sea

Re-imagine this. The year is 1821, the month is winter, and the day is stretched out radially between the unbroken circumference of the horizon, as the US brig the *Nautilus* courses across the Atlantic Ocean in the direction of Africa.

Now the *Nautilus* is sailing in the wake of another vessel, carrying a *Constitution For the Government of the African Settlement at* . 'At': like the thirty three free black women, men and children aboard the *Nautilus*, this is an unsettled law; defined by a blank space, imaginatively conceived so that it might take form elsewhere and otherwise, this is a law to come—*the light on the horizon*.

∞

The first iteration of Liberia's national law was inscribed in this sea-borne Constitution, adopted in 1820 by the United States-based Board of Managers of the American Colonization Society at the request of one of its Agents.[1] Along with this Constitution, the Board of Managers also provided a code of laws in Instructions to its Agents.[2] What is remarkable about these legal texts is that they were adopted in anticipation of the creation of a settlement on the west coast of Africa, while the ship that would eventually deliver the first emigrants to the shores of Liberia was still anchored off the coast of Sierra Leone.

The initial lack of a territorial basis for this law—and therefore, according to the intentions of the ACS, the fact that it was *not yet* law when it was set down in 1820[3]—appears as two blank spaces in the text of this Constitution, like a call that is waiting to be answered:

[1] See Charles Henry Huberich, *The Political and Legislative History of Liberia*, vol 1 (New York: Central Book Company, 1947), 145-146.

[2] Reproduced in ibid, 95-96, 103-105, 146-148.

[3] Ibid, 148.

Constitution
For the
Government of the African Settlement at

ARTICLE 1ST.

> All persons born within the limits of the territory held by the American Colonization Society in or removing there to reside, shall be free, and entitled to all the rights and privileges of the free people of the United States.

The answer that would be inscribed in the blank space is of course 'Liberia', but even that would remain more an open question than an answer …

Despite Liberia's formative shifts throughout the nineteenth and twentieth centuries—from Colony to Commonwealth to Republic, through revolution and war—the law under the 1820 Constitution has continued to inform the subsequent manifestations of Liberia's national law. This includes both what was posited in the 1820 Constitution, and what was left blank. What was posited as the law that would apply at settlement was most clearly expressed in Article 6 of the 1820 Constitution: 'The common law as in force and modified in the United States, and applicable to the situation of the people, shall be in force in the Settlement'—a provision that was essentially replaced in each of Liberia's subsequent Constitutions.[4] At the same time, the blank space that signified the law's groundlessness in west Africa has also allowed it to become grounded there. From 1847, at least, when Liberia declared itself a Free, Sovereign and Independent State, Americo-Liberians could speak of this law, as the national law of a sovereign republic, as the organic law of the land. From this point the unsettled nature of the law that marked the Constitution in 1820 was history.

… *and yet, the question lingers.* Precisely because it was history, the initial fact of *terra nullius*—of being 'without settled law'—has continued to underlie the Constitution of Liberia, as a law that was on first encounter empty of its new land, as a law that had to have inscribed upon it this land.[5] The blank space that marked the first iteration of the Constitution of Liberia could not be filled in simply by

[4] For example, Article 17 of the Constitution of the Commonwealth of Liberia (1839); Article V(1) of the Constitution of the Republic of Liberia (1847); and generally the Constitution of the Republic of Liberia (1984).

[5] Or as Farrall writes, 'Liberia began its existence as a constitution in search of a country': Jeremy Matam Farrall, 'Recurring Dilemmas in a Recurring Conflict: Evaluating the UN Mission in Liberia (2003–2006)', *Journal of International Peacekeeping*, vol 16 (2012): 313.

printing over it the name of this settled land, especially when that name itself signified an idea without any immediate grounding. 'Liberia': an imaginary land of liberty to come, for emigrants to come, in Africa (or elsewhere).

2 The problem of our laws

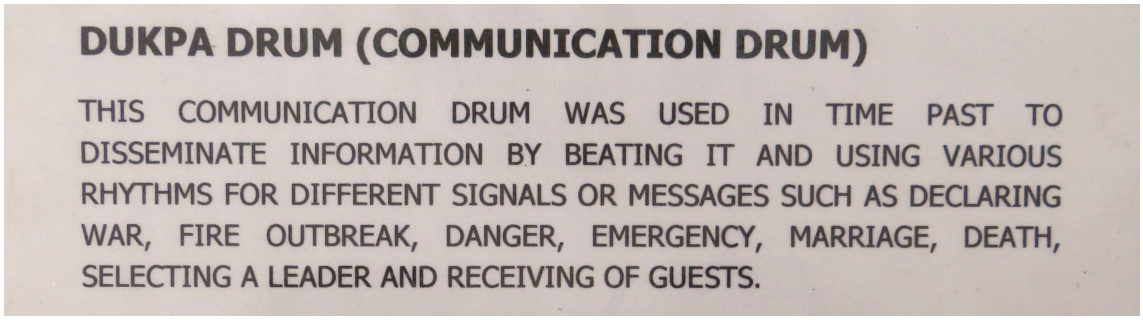
The blank space is one dimension of the chasmic structure of law, undermining every grounded expression of the law. This blank space is what leaves law open to being an oppressive conceit, but it also points to the ethical possibilities of law as a medium of justice.

In Chapters 4 and 5, I examined the violent consequences of law's conceptual blankness. In Chapter 4, I showed how the blank space that separates law from its subjects enables the super-imposition of a legal framework over land and peoples that transforms them into fungible things. Likewise, the separation of law from its subjects is at the core of the logic of 'securing peace' that I examined in Chapter 5. As I showed there, the proposition of 'peace through justice' requires the institution of a rule of law that is both forceful and just for the very reason that law's rule is fundamentally arbitrary, disconnected from the subjects within jurisdiction.

Having examined the violent consequences of law's conceptual blankness, I continue the analysis in this chapter by examining how this problem of law is also its ethical possibility, leaving law open to its object, that is, the experience of its subjects. I address this problem in Part 3 of the chapter by examining how the national law is taking form on the ground in Liberia. Before I get to that, however, first, what exactly is the 'problem of our laws' in the case of Liberia?

A Talking drums

On the threshold of the national museum of Liberia, set down between the curated expression of history contained within the building and the normality of everyday life taking place on the streets of Monrovia below, is a drum standing two-and-a-half meters tall. An official sign introduces the artefact as a 'Dukpa drum' and in brackets 'communication drum'. The sign then begins with the following description:



I had heard about the talking drums of west Africa before I arrived in Liberia, and I asked the museum guide (once a glimpse of the drum from the street drew me in) if this was one of them. The official laughed. Pointing through the door to the street below, he said 'talking drum' is what it is normally called. I asked if Liberians would know it as a 'communication drum'. He laughed again. No, he said, they would call it a 'talking drum'. Why then, I asked, does the museum call it a 'communication drum'. Because, he said, 'communication drum' better explains what the drum is used for. It *disseminates information*; it does not talk. And he laughed again.[6]

Several weeks later, in the interior of Liberia, a man in a teashop said to me in response to a question about the rule of law: 'The rule of law? How can you have the rule of law when we don't even know our own laws?'[7] Unlike the museum official this man was not laughing, and yet the irony was there. For him the national law of Liberia *is* law—he spoke of it in terms of 'our own laws'—and there is no doubt it could be enforced against him, that he would feel it as one can only feel the law. At the same time, it is not law, not *his* law. How could it be, when its laws are unknown to him? Like in the museum, in this man's response was a finger pointing past the official signs that hold up the national law of Liberia as 'the organic law of the land',[8] to law in a form that is also not law. Like the museum's drum, the law in this form might 'disseminate information' but it does not talk. Set down on the threshold of curated expression and the normativity of everyday life, it lacks the connection that would ground it and make it law; and yet it is the law of the nation.

[6] Conversation with author, Monrovia, Liberia, 28 March 2013.

[7] Conversation with author, Zorzor, Liberia, 2 August 2013.

[8] This is how Liberians often refer to the national law of Liberia today, as the 'organic law of the land'.

B Talking back

There is a Kafkaesque quality to the response of the man in the teashop to my enquiry about the rule of law, although Franz Kafka would not have been the first to reflect on how 'it is an extremely painful thing to be ruled by laws that one does not know'.[9] By 'not knowing' Kafka was clear that he did not mean a simple lack of information about the laws,[10] as if disseminating information would be sufficient to overcome the problem. What is so painful about being ruled by laws that one does not know is the pain of not knowing 'the very existence of these laws'.[11] Existing entirely otherwise, no more than a secret code, the essence of which is pure mystery—to be ruled by such laws is the very definition of arbitrariness: it is 'whatever the nobles do'.[12] It is to be ruled in a way that denies you the possibility of talking back, because the law does not talk to you. Left speechless, one option is to laugh at the absurdity; another is to, as Kafka put it, 'repudiate the nobility' in a more forceful manner.[13]

The First Republic of Liberia was brought to a bloody end in 1980. Led by Master-Sergeant Samuel Doe, a 25 year old African-Liberian man, the coup d'état was the culmination of a revolution that had been building since the 1960s against the oligarchic Americo-Liberian regime that had ruled Liberia since 1847. The revolution's driving force was the pain experienced by the vast majority of African-Liberians, whose ancestors had known the lands of Liberia long before it was an idea, and who were reduced to a state of abjection—of civil death—as the idea was consolidated into a nation-state.[14] For African-Liberians, the pain that drove the revolution and ultimately manifested in the bloody overthrow of the Americo-Liberian regime, precipitating the civil wars that engulfed Liberia in the 1990s and early 2000s, was the pain of being left speechless by the law of this regime, the

[9] Franz Kafka, 'The Problem of Our Laws', in *The Collected Short Stories of Franz Kafka* (London: Penguin, 1988), 437-438.

[10] Ibid.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] The Liberian Truth and Reconciliation Commission also highlighted the connection between the unjust rule of the Americo-Liberian regime and the civil conflict in its final report: Republic of Liberia, *Truth and Reconciliation Commission: Consolidated Final Report*, vol 2 (2009), Part V.

existence of which was known to them through the ways in which it was enforced against them.

Kafka ends his parable on 'the problem of our laws' not with the repudiation of the nobility, however, but with a paradox: 'Any party which would repudiate, not only all belief in the law, but in the nobility as well, would have the whole people behind it; yet no such party can come into existence, for nobody would dare to repudiate the nobility'.[15] Kafka summarizes the problem in a final line: 'The sole visible and indubitable law that is imposed upon us is the nobility, and must we ourselves deprive ourselves of that one law?'[16]

Having dared to repudiate the nobility in the bloodiest fashion, with the overthrow of the Americo-Liberian oligarchy, Liberians are now facing a reversal of this paradox. With the national law opened up to the whole people, the 'sole visible and indubitable law' has been broken. The one law that provided absolute certainty, in that its existence might be known at least in its enforcement against them, in 'whatever the nobles do', has been shattered by a quarter-century of civil conflict that has left the State of Liberia in fragments. The question now is: how can law rule in Liberia when there is no longer a sole visible and indubitable authority to signify its existence? Existing entirely otherwise, the arbitrariness of the national law is no longer 'whatever the nobles do' but whatever Liberia's different peoples do, in as much as they talk and talk back in so many different ways. For the Liberian man in the teashop, the pain of not knowing the very existence of 'our laws' is now the pain of having to know the national law in its non-existence as a wholly given form. This is the pain of having to know a law that exists otherwise, as an unsettled concept that is substantial only to the extent that it takes form on the ground—which is also the pain of speech, of having to recognise that every act of articulation is only ever substantiated through the acts of others talking back.[17]

My aim in the next part of the chapter is to address this paradox, by examining how the national law is taking form on the ground in Liberia, undermined by a blank space.

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[15] Kafka, 'The Problem of Our Laws', 437-438.

[16] Ibid.

[17] On the notion of talking back as a kind of 'call and answer', see Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), Chapter 9.

3 Law on the ground

In 2013 a coalition of civil society groups led by young, aspiring political leaders threatened to orchestrate a massive day of protest on the 12th of April, unless the Government of Liberia met its list of demands. Two grievances in particular were used to rally the masses in support of the protest: the failure to improve the economic situation for the majority of Liberians, despite 'ten good years of peace';[18] and the impunity with which the country's ruling class have continued to enrich themselves through corruption.[19]

The significance of the chosen date for this rally—'April 12'—was not lost on Liberians. It was on the 12th of April, 1980, that the last Americo-Liberian government was overthrown in a revolutionary coup that brought to power Liberia's first 'indigenous' government. More hauntingly, a year before the 1980 coup, almost to the day—the 14th of April, 1979—the capital was thrown into violent chaos as a similar planned demonstration descended into deadly riots and looting. The same two grievances had fuelled that protest, which became known as the 1979 'rice riots': impoverishment of the majority, and corruption of the ruling class.

With this in mind, and with the civil wars of the 1990s and early 2000s still a living memory, there is little wonder that Monrovians saw in the proposed demonstrations of the 12th of April, 2013, the spectre of violence and war. A passionate counter-campaign by a representative cross-section of Liberian civil society sought to persuade the organisers to call off the protest, for the sake of peace and stability;[20] which they finally did, but not without allegations and a widespread perception that the protest leaders had been 'bought off' by the Government,[21] reflecting Liberians' profound distrust of people in authority.

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[18] A number of times during my fieldwork I heard this phrase used by Liberians when critiquing the (in)action of the government.

[19] In the words of one of the organisers, the protest was intended to give voice 'to the cries of thousands of Liberians that are subjected to poverty in the midst of abundant resources [...] to champion the cause of the downtrodden masses for a better living condition and for an equitable distribution of our resources.' 'The Storm Passes Over – April 12 Demonstration Suspended', *The Analyst*, Monrovia, 9 April 2013: http://allafrica.com/stories/201304090983.html?viewall=1.

[20] Ibid.

[21] 'Government Admits Bribing "April 12" Protesters', *The New Dawn*, Monrovia, 18 April 2013: http://allafrica.com/stories/201304180788.html.

What made this cynical view of political leadership striking was its juxtaposition with an apparent universal belief in the good of 'the rule of law'. All sides to the debate framed their arguments using the language of law and stressed how their actions were within the limits of the Constitution of Liberia. The Government's public position was that the protest would be permissible so long as the organisers followed 'the rules and procedures allowing protests',[22] which in effect meant obtaining a permit from Government. With such permission, 'Government would not obstruct its citizens from exercising their rights as provided by the Constitution of Liberia'.[23] The protest leaders refused to apply for a permit, arguing as a matter of constitutional law that they did not need one. 'Peaceful assembly'—which is how they characterised the proposed demonstration—is protected under the Constitution and therefore, they argued, could be held lawfully without a permit. The Government rejected this argument and repeated its demand, eliciting from the organisers a blunt reply: 'we are going to oppose it in the full concept of the rule of law of the Republic of Liberia.'[24]

A The national law, accepted

It seems clear that most if not all Liberians accept the national law of Liberia as the predominant form of law in the country today. What that acceptance means, and how deeply it resonates in everyday life, is much less clear. At least Liberians appear united in a common acceptance of the national law as a political ideal, as much as they accept the idea of Liberia as a nation-state. During the fervent and divisive debate that played out on the radio, in newspapers, and on the streets in response to the planned 'April 12' protest, which threatened to return Liberia to civil war, the single point of agreement was the need to 'respect the rule of law', which appeared to mean ensuring the Constitution of Liberia and its law was upheld and not threatened by the actions of any group.[25] In this situation, the

[22] 'Observing the Law in Protest', *New Democrat*, Monrovia, 1 April 2013: http://allafrica.com/stories/201304011077.html%3fviewall=1.

[23] Ibid.

[24] 'Planned Rally Invokes Violent Past', *New Democrat*, Monrovia, 9 April 2013: http://allafrica.com/stories/201304091169.html%3fviewall=1.

[25] For example, see newspaper articles in the previous footnotes.

common acceptance of the rule of law appeared to reflect a commitment to the idea of Liberia itself.

In line with this idealistic commitment, however, to some extent acceptance of the national law also appears to reflect resignation to what is seen as the inevitability of 'modernity'. Human rights—one of the core aspects of the concept of the rule of law promoted by national and international actors in Liberia[26]—is exemplary in this regard. When I asked a Liberian scholar who researches in the field of legal anthropology in the country about how Liberians tend to perceive human rights, his response was to point out that 'human rights are not going anywhere', that they are here to stay.[27] In other words, my question—premised on the notion that human rights is something that might be accepted or rejected—naively missed the point. According to him, for people in Liberia it is not a question of whether human rights might be, or ought to be, accepted or rejected; the question is *how* to accept it as part of their future.

The same view was expressed to me by another Liberian scholar researching at the community level in the field of land rights. In a conversation about the shift that is currently taking place to a formalised system of land rights under a proposed national law that would require communities to precisely define their membership and the boundaries of their land,[28] he did not see any reason to resist the change. Again, for him the question is not whether this shift *should* take place, because it is taking place. The question for him is *how* it takes place—and critically, whether those leading the change are 'now *sincere* in trying to transform the society for the better'.[29] 'To me, that is more important as a question than the

[26] See, eg, the UN's definition of the rule of law set out by the Secretary-General in his 2004 report on 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies', UN Doc S/2004/616 (23 August 2004), para 6.

[27] Author interview with Liberian researcher, May 2013 (MC2).

[28] See discussion in Part 3 of Chapter 4.

[29] Author interview with Liberian researcher, 15 August 2013 (MN5). The contrast he appears to have had in mind here is with the previous attempt at social transformation, following the revolution of 1980 (although he did not say this). From the Doe Government to Charles Taylor to the array of faction leaders and financiers living abroad, the consensus amongst historians and Liberians is that the people who led Liberia into war were acting out of self-interest rather than being 'sincere' in trying to transform the society as a whole for the better. See also William Reno, 'Predatory Rebellions and Governance: The National Patriotic Front of Liberia, 1989-1992', in *Rebel Governance in Civil War*, ed Ana Arjona, Nelson Kasfir, and Zachariah Mampilly (New York: Cambridge University Press, 2015).

fact that the society will be transformed from what it was originally, because it's not like that anymore. Things have changed. You can't go back'.[30]

It is not just educated Liberians in Monrovia who are resigned to a modernity defined by the nation-state and its law. There appears to be a similar view amongst traditional leaders concerning changes to traditional practices considered repugnant to a modern nation, such as the use of magic to determine violations of traditional law and the cutting of girls' genitals as part of their initiation into womanhood. A female head *zoe*,[31] and 'one of the most powerful traditional leaders in Liberia', is quoted as saying in response to a national push to abolish the traditional *sande* society:

> We know the country has changed. We are in modern days. So we are changing the system small small until we reach to the end. But it can't be the way they want it to happen, as quickly as they want it to happen. We're not ready for people to say, 'No more Sande'.[32]

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[30] Ibid.

[31] Also spelt 'zo'. The term, as noted in the *Historical Dictionary of Liberia*, is 'used in Central and Western Liberia to refer to an individual, male or female, who is a respected elder. Often these individuals are considered to have medicial and spiritual powers, as well.' D Elwood Dunn and Svend E Holsoe, *Historical Dictionary of Liberia* (Metuchen: Scarecrow Press, 1985), 192.

[32] 'Female Circumcision Temporarily Stopped in Liberia', *PRI's The World*, 29 March 2012: http://www.pri.org/stories/2012-03-29/female-circumcision-temporarily-stopped-liberia. The terms *sande* and *poro* refer to institutions of 'traditional society' of peoples in central and western Liberia. See, eg, the entry for 'sande' in ibid, 153.

> A female sodality found among various peoples located in central and western Liberia. […] The main function of the Sande is to serve as an enculturative institution and to make the transition of girls to women. The Sande sessions in the past have lasted for three years. Among some groups, particularly the Vai, Gola and Mende, the main spirit of the society is represented by a helmet-masked figure which makes its appearance at important social events, such as the death of a prominent female. The male counterpart of this institution is the Poro.

See also the entry for 'poro' in ibid, 140.

> A male sodality found among several groups in central and western Liberia […] The society serves two primary functions. It is the main institution to enculturate young males and to formally carry them through the rite of passage from child to adult. In addition, the elders of the Poro serve as the intermediaries between the ancestors and the living, and thus act as the ultimate arbitors of asocial actions which affect the society. The female counterpart of this organization is the Sande society.

See also Warren L d'Azevedo, 'Gola Poro and Sande: Primal Tasks in Social Custodianship', *Ethnologische Zeitschrift Zürich*, vol 1 (1980); Kjell Zetterström, 'Poro of the Yamein Mano, Liberia', *Ethnologische Zeitschrift Zürich*, vol 1 (1980); William C Siegmann, 'Spirit Manifestation and the Poro Society', *Ethnologische Zeitschrift Zürich*, vol 1 (1980); Svend E Holsoe, 'Notes on the Vai Sande Society in Liberia', *Ethnologische Zeitschrift Zürich*, vol 1 (1980); Marie Jeanne Adams, 'Afterword: Spheres of Men's and Women's Creativity', *Ethnologische Zeitschrift Zürich*, vol 1 (1980); George W Harley, *Notes on the Poro in Liberia* (New York: Kraus Reprint Corporation, 1968 [1941]).

Liberians might be resigned to the idea of the national law under the Constitution as an abstract reality, but as this comment shows, they are also contesting its implications. Far from accepting the changes as given, they are deeply engaged in how this new Liberia takes form. In making the question of change a matter of *how* change takes place, rather than whether it takes place at all, Liberians are including their resistance within the process of transformation. 'Resignation' as such is not the same as passive acceptance of or absolute submission to a given state. From this perspective, 'to resign' has a much more dynamic meaning than its popular definition suggests ('to give up' or 'to yield' to the will of another,[33] as if there is ever an instance of simply being acted upon). From this perspective, 'to resign' is to accept the given situation, but it is also to 'sign again', which is to reject what is given as something that signifies itself. Thus it is to accept the nation-state and the rule of its law as a modern reality *and* to have a hand in signifying what that means in terms of the normativity of everyday life. Resignation to the national law of Liberia, in other words, can be seen as no less than an act of writing the land of Liberia into its given constitution.

The vast majority of Liberians appear to accept the national law as such for this reason: precisely because it represents an abstract expression of how they ought to be, as an idea, as a gesture, as a *future* state. At this moment in history—a moment when Liberia is beginning again as a nation post-war—the rule of law appears to represent a possibility of being together under the Constitution of Liberia. Whether for a Liberian on the street, a stakeholder in the political status quo, or a traditional leader, the national law is acceptable because it is seen as a process of becoming, a change that is taking place, rather than an immediate order of things. Without doubt some Liberians accept the national law in a more grounded way, as a form of law that already more or less reflects and informs the normativity of everyday life. However, for the vast majority, the opposite appears to be the case: the national law is acceptable for the very reason that it is still *not yet* law. The blank space that was written into the Constitution in 1820 by the American Colonization Society, on the basis that it was an unsettled law, still underlies the Constitution of Liberia; and so it is as an idea with no grounding, with no settled content to speak of, that the national law is acceptable today.

[33] 'Resign, *v.1*', OED Online, December 2015.

Acceptance as such—as a commitment to an idea of how things ought to be, without conforming to how that idea ought to take form in practice (according to the conceptual schema of those who are promoting it as given)—is transgressive. It is to undermine what is given; to accept *and* to reject it at the same time. And indeed for many Liberians, especially those who stand to lose power as the national law is strengthened, that is no doubt the point. For many traditional leaders, chiefs and government officials more generally, acceptance of the national law is little more than a political gesture, necessary to satisfy a system of patronage that is structured according to the model of the modern nation-state and the rule of its law.[34] Certainly whenever I spoke with legal authorities in Liberia, whether 'traditional', 'customary', or 'statutory', they were careful to repeat to me the official government position about the rule of law: chiefs are administrative and not judicial actors, in accordance with the doctrine of the separation of powers; all criminal matters are to be dealt with by the national legal system; rape and other instances of 'sexual and gender based violence' must be apprehended as criminal conduct and not treated as 'family matters'; communities are permitted to articulate their own laws as long as they are consistent with the national law, as set out in the Constitution of the Republic; and so on.

These messages were repeated to me precisely and formulaically in interviews, which is not surprising as they were the current focus of workshops, training sessions and civic education campaigns being run by the government and international and national organisations to disseminate information about the law. The messages were also widely contradicted in practice, however, leaving the distinct impression that the acceptance exhibited by these legal authorities was little more than a line expressed for the satisfaction of Western donors, the Government of Liberia, the UN Mission, and a researcher who might as well be an informant for those authorities.

B The national law, subverted

On the periphery of the administrative square of a small town in Liberia's north-western foothills, on a slope leading down to a residential quarter, its zinc-paneled

[34] On the patronage system in Liberia, see Amos Sawyer, *The Emergence of Autocracy in Liberia: Tragedy and Challenge* (San Francisco: Institute for Contemporary Studies Press, 1992).

roof and flagpole only just visible from the other administrative buildings, I find the Chief's Office. The Office is similar in layout to the Magisterial Court located on the opposite side of the administrative square, except that the main room of the Chief's Office—its hearing room—is enclosed only by lattice with wide gaps in the woodwork opening it to the outside. Rows of wooden-plank benches in the middle of the hearing room lead up to where the chief and clerks sit under a Liberian flag pinned high on the wall. Columns of manila folders containing the Office's files are arranged on the only table in the room. Each column of folders contains files for the different areas of Office work, including a column of four folders containing Case Documents. The arrangement of these files, elevated on the desk next to the chief's chair, is striking in a room with few other objects, with the exception of a large United States Agency for International Development poster on the wall below the flag illustrating the concept of 'Alternative Dispute Resolution'.

I am meeting with the Chiefdom Clerk to learn about the role of the Chief's Office. In the middle of describing the difference between the Chief's Office and the Magisterial Court—how the latter 'deals directly with the Constitution' while the function of the Chief's Office is to 'bring people together' and is not about 'the law'[35]—a small group of women enter. I ask the clerk if the women, who are sitting behind us, are waiting to speak with him. They are, and I offer to sit to the side while he hears from them. Two young women come forward and sit at the bench before the clerk. One of them explains that she has come to see the chief because her ex-husband is no longer abiding by their divorce settlement. The woman has made a complaint to another official, but the official said there is nothing he can do: he does not have the power to enforce the settlement. And so she has come to the Chief's Office. The chiefdom clerk then addresses the women. They should come back the next day with the other party and 'all the papers' so the chief will be able to assess the complaint. The Office has a record of the divorce on file setting out the settlement, he says, as evidence of the agreement. He appears to say this in order to assure the woman that enforcement will not be a problem. The two women thank the clerk and promise to come back the next day.

After meeting with the chiefdom clerk, I walk over to meet with a magistrate on the opposite side of the administrative square. The entry to the magistrate's office is inside the small concrete-block building that houses the

[35] Author interview with Paramount Chiefdom Clerk, 4 September 2013 (Li19).

Magisterial Court, through the courtroom, past the bailiff and clerk, the rows of wooden benches leading up to the bar, under the Liberian flag spread above the magistrate's court-room desk and the door behind it, which is the door to the magistrate's office. Sitting in the enclosure of this small room the magistrate explains to me, in answer to a question about the kinds of matters that come before the Court, how the Magisterial Court has trial jurisdiction for minor criminal matters and that any case exceeding its jurisdiction is referred to the superior court located in the County capital. Having said this, he then explains how he usually seeks a compromise between parties out of court. To be clear, I ask if he conducts these out-of-court proceedings in criminal matters. He says he does. He then adds that he is well respected in town as a community leader and people trust him to help resolve their disputes. At the time of our meeting a young man and an older woman are also sitting in the magistrate's office. To illustrate his point the magistrate introduces them to me and explains that they are there to reach an understanding so they can return to the community. The young man is said to have assaulted the older woman, a neighbour in town.[36]

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One of the most important rule-of-law messages being promoted during the time of my fieldwork in 2013 was that chiefs, who are officers of the Ministry of Internal Affairs, and therefore part of the executive branch of government, perform an administrative and not a judicial function, in accordance with the doctrine of separation of powers.[37] As the chiefdom clerk in that small town in the foothills of Liberia's north-west said to me, in describing the difference between the Chief's Office and the Magisterial Court, the latter 'deals directly with the Constitution', whereas the function of the Chief's Office is to 'bring people together' and is *not*, he was careful to emphasise, about 'the law'.

My point in describing the scene in the Chief's Office is not to suggest the officials are wrong when they say—as they repeatedly did to me—that what chiefs do is 'not law'. From one perspective, the official perspective, it is no doubt true

[36] Author interview with Magistrate, 4 September 2013 (Li22).

[37] For a summary of rule-of-law reform initiatives in Liberia, including the need for separation of powers, see Amanda C Rawls, 'Policy Proposals for Justice Reform in Liberia: Opportunities under the Current Legal Framework to Expand Access to Justice', *Traditional Justice: Practitioner's Perspectives* (IDLO Working Paper Series, 2011).

that what they are doing is not law. In hearing and resolving disputes in their Offices, chiefs are conducting 'Alternative Dispute Resolution', they are dealing with 'customary matters', they are doing 'peace-building', and they are not performing a judicial function properly so called. At the same time, it certainly appears to be law, albeit in a confused form, combining different sources of authority in a way that leaves its conceptual definition open as to whether it is 'the law' or otherwise.

One of the other important rule-of-law messages being promoted at the time was that all criminal matters are to be dealt with through the national legal system, and not 'informally' by community leaders. This message was being promoted in response to the fact that the vast majority of criminal matters—like almost all civil matters—are still dealt with at the community level.[38] This is especially the case in north-west Liberia, where traditional leaders are still powerful legal authorities, as well as in the south-east, where traditional society remains strong.[39] In the Mandingo district of Quardugboni in Lofa County, for instance, only one matter—a murder case—had come to the superior court from Quardugboni in the past six or so years, according to an officer of the superior court in Voinjama, the capital of Lofa County. The reason, he thought, was 'because of their beliefs', meaning they dealt with offensive conduct by community members under Islamic law.

This may undermine the national law, which is supposed to have exclusive jurisdiction over criminal matters, but it is not surprising that local legal authorities are continuing to enforce their own laws rather than refer violations to the national legal system. This reflects the separation between national and local law that has marked the legal landscape in Liberia since the first encounter. The situation becomes more interesting, however, when one considers how officials within the national legal system are also contradicting the official refrain that criminal matters are to be referred to the police and dealt with by the judiciary. That is, not only are traditional leaders and chiefs subverting the official line, but so too are members of the Liberian judiciary and police. This is all the more

[38] See, eg, Deborah H Isser, Stephen C Lubkemann, and Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options* (Washington: USIP Peaceworks, 2009).

[39] According to a prominent legal aid worker with a long history working in communities in the south-east of Liberia, traditional leaders are still the predominant legal authorities in all community-level disputes, including criminal matters: author interview with civil society actor, 26 September 2013 (Li35).

remarkable, and perplexing, because it is *here*—the point at which the national law is enlivened by its own authorities on the ground—that the line separating what is 'the law' and what is 'not law' again dissolves. The result is an understandable confusion: the national law, in a form that both reflects and informs local law; the national law, in a form that is also not the national law and a local law.

Thus national legal officials, such as the magistrate in the small town in Liberia's north-western foothills, are dealing with criminal matters unofficially, in ways that might be said to pervert the course of justice by violating rule-of-law principles such as due process. At the same time, the unofficial treatment of criminal matters is taking place under the authority of the national law. Just as the columns of manila folders containing Case Documents could be seen to represent and thereby enhance the legal authority of the Chief's Office (despite not being, officially, an office of law), the symbolism of being a Court officer no doubt enhances the authority of the magistrate as a respected community leader. Just as what was taking place in the Chief's court under the sign of Alternative Dispute Resolution was 'not law', and yet a form of law, what was taking place in the magistrate's office under the sign of the Court was also not law, not officially, and yet surely a form of law for those whose disputes were dealt with in his office.[40]

Resolving disputes in the shadow of a courthouse, with and without the intervention of a judge who might order a first round of alternative dispute resolution, is not necessarily perverse. Nor is an out-of-court deal between the prosecution and an accused with the purpose of avoiding trial. However, something else was taking place here: it was clear that the magistrate was acting as a mediator to resolve disputes, civil and criminal, through a process that was not the official one but that nonetheless derived its authority, like the magistrate's reputation in town, from the national legal system. On one hand, the criminal matters that are referred to the magistrate are being dealt with 'informally', in a way that might be said to pervert the course of justice by negating the principles of due process, the rights of the defendant, and the duty of the state to uphold the rights of the victim. On the other hand, the 'informal' out-of-court proceedings are taking place with the authority of the national law. These matters must cross

[40] See also Harry Arthurs, *'Without the Law': Administrative Justice and Legal Pluralism in Nineteenth-Century England* (Toronto: University of Toronto Press, 1985); Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: the Case of Divorce', *Yale Law Journal*, vol 88, no 5 (1979).

through the court to be resolved by the magistrate, and yet they are resolved based on an approach that prioritises 'peace' in the community over 'the law' under the Constitution.

This magistrate was not alone in taking this approach. When discussing with two other magistrates in another district about the referral of criminal matters to the courts, they repeated the line to me that 'all criminal matters are heard by the judiciary', before pointing out that some of these matters nonetheless 'must be resolved at the community level' because 'law doesn't necessarily mean peace'.[41] Of six magistrates I spoke with in four Counties across the country, four emphasised this difference between 'law' and 'peace' and expressed a preference for taking the 'restorative' or 'peacebuilding' approach, whilst the other two commented on the value of out-of-court 'mediation' without comparing it to the court process. The same view was shared by a prominent para-legal service provider whose profession is to promote the national law in communities through the provision of legal aid and education. Despite his obvious commitment to the national law, he still held the view that only 'serious' matters that cannot be handled by community leaders should be dealt with through the national legal system, such as violent crimes, otherwise disputes should be handled 'informally', in a way that 'brings the parties together'. Taking these matters to court, he said, 'only causes bitterness in the community'.[42]

Subversion of the national law is not only taking place in the process of resolving disputes, but also prior to that in the criminal justice system, at the point of police apprehension. A Human Rights Officer from UNMIL told me about a case that had perplexed their Field Office.[43] The case involved a police investigation into conduct relating to 'female genital mutilation'. Whilst the ritual-cutting of girls' genitals was not a crime under the Criminal Code of Liberia, it was alleged that crimes had been committed in connection with this particular instance. The Liberian National Police, initially reluctant to investigate, eventually carried out an investigation under the supervision of UN Police and UNMIL Human Rights monitors. The matter was referred to the County Attorney (as prosecutor) along with a brief of evidence, however the case failed to progress through the court

[41] Author interview with Magistrates, 12 September 2013 (Li7 and Li8).

[42] Author interview with Li35.

[43] Author interview with UN officer, 21 June 2013 (NY8).

system, and was eventually dropped. According to the Human Rights Officer, it was clear that there was an unwillingness to prosecute these particular crimes. Despite being listed as offences in the Liberian Criminal Code, there was apparently 'no shared understanding' about the imperative to prosecute. Curious to hear more about this, I asked whether the Human Rights Officer thought this reflected different understandings of what is 'the law'. The Officer responded by pointing out that the crux of the problem in this case was probably the fact that the prosecution and judicial officers did not see the crimes as 'crimes'.

On the assumption that the case had failed because the police and judiciary were operating incoherently, the UNMIL Human Rights Field Office held a workshop that aimed to bring together the local Liberian police and judicial officers to enhance their professional and institutional coordination and cooperation. The outcomes of the workshop included: (1) proposed reforms to the standard operating procedures for dealing with the transition from investigation to prosecution in general, and in particular for dealing with sexual offences; and (2) the proposed creation of a liaison mechanism to coordinate and strengthen the relationship between the police and the judiciary. Thus the response was to treat the different understandings of the law as an information asymmetry, to be overcome with more and better information sharing.

It may be the case that the failed prosecution was a matter of inadequate institutional coordination between police and judiciary. No one doubts the 'justice-chain institutions' in Liberia are dysfunctional and can be improved with better operating procedures and institutional mechanisms.[44] Even so, the issue here was fundamentally a normative one. The crimes were not prosecuted because they were also not crimes, which is what the Human Rights Officer pointed out, and what UNMIL appeared to recognise as the problem. From what the Human Rights Officer told me, and what I was told by other UN officers about the way the UN Police and Liberian National Police co-operate, it seems that the matter in this case was only investigated and referred to the County Attorney for prosecution in the first place because of the intervention by the UN, both through the co-location of UN police with Liberian police and the watchful gaze of a UN Human Rights Officer.

Thus the critical problem was not a lack of institutional coordination or shared understanding between Liberian National Police and the Judiciary. Indeed

[44] See, eg, Isser, Lubkemann, and N'Tow, *Looking for Justice*.

the opposite is much more likely, with the Liberian police and judicial officers sharing the understanding that, as a matter of local law, the case had no grounds. The practice of cutting girls' genitals is part of an initiation rite into *sande* society in many parts of Liberia, and as such it comes under the authority of the female *zoes*. Any conduct carried out in the course of *sande* business would likewise come under the authority of the *zoes*. Subjects and authorities of this local law—including members of the police and judiciary—would have known that the conduct in question was within the jurisdiction of the *sande* society, and that the question of whether the conduct constituted a crime would have been decided under this law. What is more, given the law of secrecy that regulates traditional society, it is unlikely that this information would have been shared with the UN officers, as uninitiated outsiders. The incoherence, in other words, would not have been between the local police and judiciary, but between the UN officers and their Liberian counterparts.

It became clear in the course of my fieldwork that officers of the Liberian National Police tend not to intervene in traditional society, unless a dispute arises between communities or threatens the peace more broadly. This contradicts both the official role of the Liberian police as officers of the national law, as well as the refrain that all criminal matters are referred to the national courts. The police have this power as officers of national law, and they do exercise it; the prisons are not vacant. Yet, at the same time, there are no grounds for the police who are also subjects of the local law to investigate ritual killings and other forms of violence that are lawful under that local law, even if there are grounds to do so under the Criminal Code of Liberia. The authority of the national law is still subject to the authority of local law, with officers of the judiciary and executive also subjects of local law.

C The national law, ignored

Authorities in Liberia are not alone in undermining how the national law is taking form. Its subjects are also rejecting the national law, turning instead to local forms of law in the resolution of their disputes. In 2009 the United States Institute of Peace conducted the first extensive post-war study of 'Liberian experiences with

and perceptions of local justice options'.[45] One of the study's most significant findings was a clear preference by Liberians across the country to use 'customary dispute resolution processes' rather than resort to the 'formal' legal system.

The researchers identified a number of structural problems with the national legal system as reasons for this preference: it is considered unaffordable, inaccessible, untimely; non-transparent, un-accountable, corrupt; and simply ineffective in delivering 'justice'.[46] Underneath this structural dysfunction,[47] however, the researchers also identified a deeper normative problem: the national law articulates a fundamentally different approach to justice.

> One of the most striking findings of our research is that most Liberians would still be unsatisfied with the justice meted out by the formal system, even if it were able to deliver on the basics discussed earlier [the structural problems]. This is because the core principles of justice that underlie Liberia's formal system, which is based on individual rights, adversarialism, and punitive sanctions, differ considerably from those valued by most Liberians.[48]

The perceived inappropriateness of the national legal system as a medium for resolving disputes was also a consistent theme in my conversations with Liberians. The reason for this is well-known and widely discussed in Liberia: the national law, based on the Anglo-American Common Law tradition of dispute resolution, is fundamentally at odds with the 'restorative' approach that informs the African legal traditions in Liberia.[49] Unlike the national legal system, which seeks a determination of individualised cause and remedy through an oppositional trial process concerned only with a temporally limited set of facts, the African legal systems in Liberia tend to be based on compromise and community well-being and a deep concern for the past and future.[50]

This is about more than what Liberians 'value' as 'core legal principles',[51] however. It is about a normative disposition that informs and reflects how most

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[45] Ibid.

[46] Ibid, 3.

[47] I address the problems of structural dysfunction in the national legal system in Chapter 7.

[48] Isser, Lubkemann, and N'Tow, *Looking for Justice*, 3.

[49] See also ibid, 69.

[50] This was how a Liberian elder described the difference to me: author interview with civil society actor, 16 September 2013 (Li25). I consider these different approaches in more detail in Part 3 of Chapter 7.

[51] See note 48 above.

Liberians see the world. It is therefore unsurprising that this understanding of law and justice grounds the dispute resolution processes that take place at the local level in Liberia. This is certainly true of the 'traditional' legal systems that still function in many parts of the country, but it is also true of 'modern' dispute resolution processes being used by community 'peacebuilders' throughout Liberia who are working to repair relationships fractured during the civil wars.[52] It is also true of how government officials, including legal authorities, understand what is 'appropriate' dispute resolution. This should not be surprising, given the deep social roots of this approach in the world-views of most Liberians.

What makes this remarkable is that the difference in approach underlies one of the most perplexing dilemmas that rule-of-law promoters face in the country: the fact that traditional leaders, chiefs, magistrates, as well as the police and the population in general, are not engaging with the national law as they ought to, according to its official concept. When they do engage with the national law, they do so in ways that undermine its conceptual schema. This dilemma is a contemporary manifestation of the blank space that was written into the Constitution in 1820, reflecting the remaining groundlessness of the national law of Liberia. The national law remains unsettled and this underlies the contradictory ways in which law is taking form on the ground.

One critical implication is that Liberians' repudiation of the national law has to be seen *in light* of its acceptance and not *in spite* of it. If the problem is seen in terms of the national law being rejected in spite of its acceptance, doubt is cast on its acceptance. If the law is rejected, then it cannot *really* be accepted, as it appears to be. The acceptance as such must be only apparent and not actual; it must be empty rhetoric, a political gesture, and nothing more. On this equation the solution that follows is to find ways to make 'the law' more acceptable. Only then might the rule of law exist. If Liberians' repudiation of the national law is seen *in light* of its acceptance, however, rejection is not equated with a lack of acceptance but is seen as a form of acceptance. From this perspective, acceptance as such—as a rhetorical commitment to a groundless idea, as resignation, as a political gesture—is not merely 'apparent', without 'actual' substance, but also a productive enactment. 'The law' may not be taking form as expected, according to its concept, but it is nonetheless taking form. The dilemma, then—although now it begins to look less

[52] See discussion of 'community peacebuilders' in Part 3 of Chapter 7.

like a dilemma and more like an answer—is that acceptance of the national law in Liberia is taking place in the form of repudiation.

This is no doubt frustrating for those who are attempting to institute the rule of law according to their own conceptual schema. For them, instituting law's rule is not about supporting acceptance of the national law *as such*, but fundamentally about promoting *proper* acceptance, relegating any other form of acceptance to non-acceptance (rejection). Framing the intervention in terms of increasing rates of acceptance and decreasing rates of rejection may make the process seem more neutral, scientific—and therefore more legitimate—but it does not overcome the fact that what is taking place is an attempt to dictate the grounds of law according to a particular imagination of it.

This can be seen in the increasing use of 'civic education' as a tool for developing the rule of law.[53] Recognising the subjectivity of law, interveners are using a range of media, including workshops and more general public awareness-raising campaigns, to teach people the 'proper' concept of law.[54] The assumption underpinning these programs is that the national law is not taking form on the ground as it ought to, because Liberians at large do not know how it ought to take form. The mistake, however, is in thinking that this ignorance—this *not knowing*—is simply a matter of a lack of information, to be resolved through the dissemination of more information about the concept of law. This is fundamentally about Liberians being out-of-order in their knowledge. To those who know this *is* 'the law', to know *this* otherwise becomes a negative infraction: it is to not know 'the law' at all. But as a negative infraction, not knowing is of course also a form of knowing—it is just a form of knowing that does not register positively with the given concept. Just as repudiation is acceptance in negative form, to not know 'the law' is to know law *otherwise*.

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[53] On the increasing use of 'legal awareness' in United Nations rule-of-law assistance, see Richard Zajac Sannerholm and Frida Wall, 'Rule-of-Law Assistance in UN Peace Operations: Securitisation, Sectorisation and Goal Displacement', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016). See also Richard Zajac Sannerholm, et al, *UN Peace Operations and Rule of Law Assistance in Africa 1989-2010: Data, Patterns and Questions for the Future* (Stockholm: Folke Bernadotte Academy, 2012).

[54] See, eg, the training manual developed by the Carter Center in Liberia, *Handbook for Civil Society Partners Community Education and Awareness Program on the Rule of Law* (2008): www.cartercenter.org/resources/pdfs/peace/conflict_resolution/liberia/Civil-Society-Partner-Handbook.pdf.

4 The littoral law of Liberia

When confronted with a law that does not talk with you, one response is laughter; another is to take the law in its given form and ground it in such a way that it *does* talk with you.

Communities in Liberia are doing exactly this at the moment, in the process of articulating what one government official referred to as their own Constitutions.[55] I was given a copy of one of these Constitutions, entitled the *Rules and Regulations Governing the Town of Killiwu* (see extracts on the following pages).[56] The choice of title reflects the national legislation that has regulated the lives of Liberia's 'indigenous' peoples since 1905, and which since 1949 has been referred to as the *Rules and Regulations Governing the Hinterland*.[57] More generally, as a written text, its format and language reflects an Act of the Liberian legislature or of an official delegated authority. Thus on the face of it, this Constitution expresses the law of Killiwu in an official form; and yet, just as the museum official had to point through the door to the street in order to give a full account of the 'communication drum', this Constitution has to point through its text to another source in order to give a full account of the law. Or to put that another way, this Constitution too is defined by a blank space that must be known otherwise.

[55] Author interview with Li19.

[56] 'Rules and Regulations Governing the Town of Killiwu', Zorzor District, Lofa County, Liberia, 8 August 2013 (copy on file with author).

[57] 'Revised Rules and Regulations Governing the Hinterland of Liberia', 7 January 2001.

RULES AND REGULATIONS GOVERNING
THE TOWN OF KILLIWU
ZORZOR DISTRICT, LOFA COUNTY, LIBERIA

INTRODUCTION

We the citizens of Killiwu Town, home and away from home, comprising of Elders, Youth Group, women Group, and our entirety here- by declare, ascribe; and submit to these rules and regulations as guarding principles for the Governing of our beloved town, Killiwu, located in the District of Zorzor, Lofa County, Republic of Liberia.

Section I BASIC RULES:

a. Every citizen shall be responsible and pay allegiance to Killiwu Town at all times regardless of status.
b. All Laws governing our sacred institutions (Poro. Sande, and their associates) shall be respected at all times by all persons living in the territorial limit of Killiwu Town.
c. Any violator of these standing Rules shall be reprimanded in accordance with the section here under.

Section II Regulations and Fines:

a. Indecent dressing or appearance shall never be tolerated in the Town. No man or woman shall walk bodily in the town without cloths or cover up. Violators shall pay the fine of LD 1,500.

b. There shall be no violence (physical assaults, profanity, fighting, or any form of violence) instigated or encouraged by any person in the territorial limit of Killiwu Town. Any violator shall pay the fine of LD 2,500.

c. Violators of "section II b" shall pay a fine in addition to our sacred Institutions as per their moral Guideline set forth.

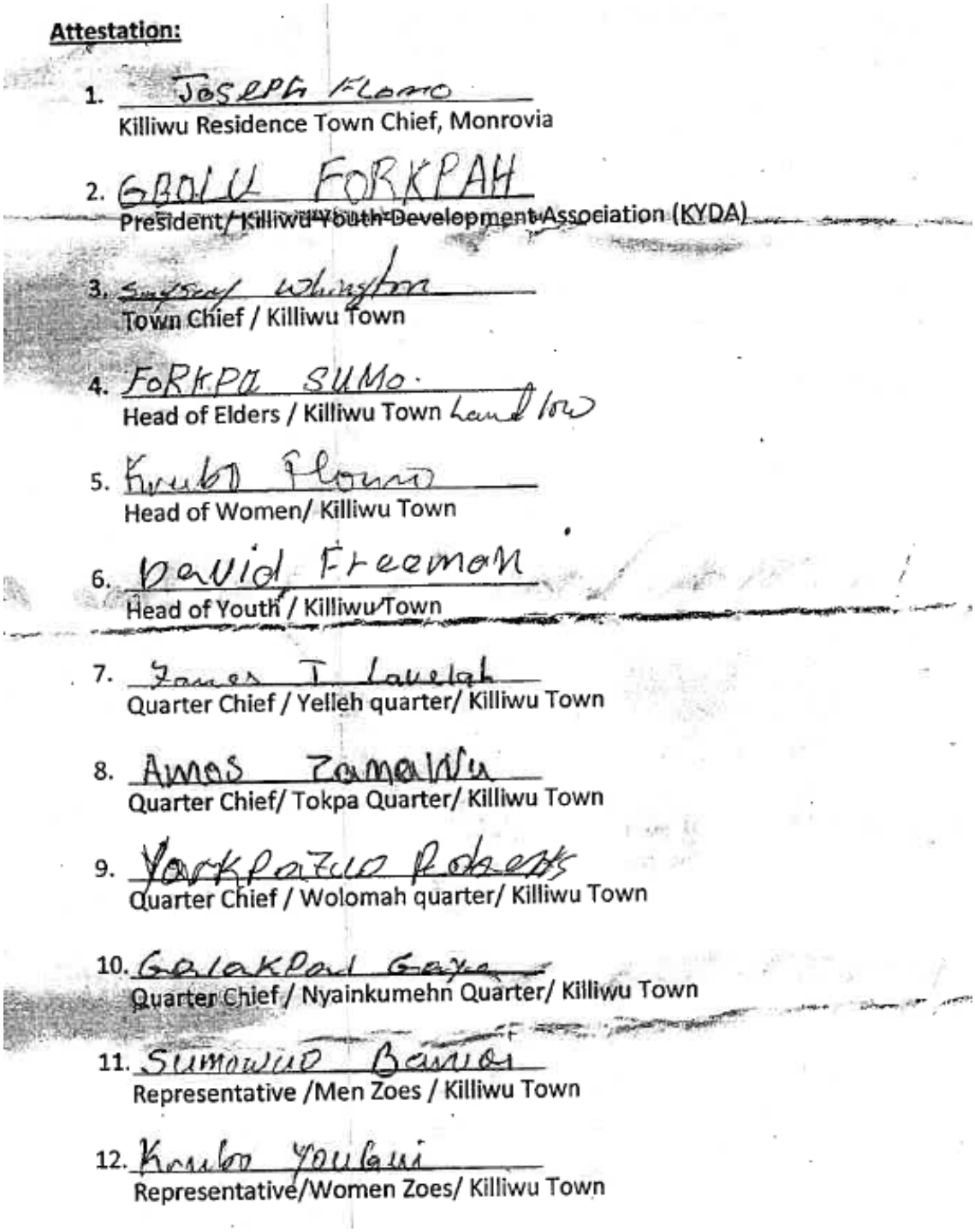
Section IV Amendment:

a. These Rules and Regulations shall be amended based upon two/ third (2/3) majority of citizens sitting in a well organized and publicized meeting.

Section V Administration:

a. The Killiwu Town shall be headed by a Town Chief who shall run the day-to-day activities of the Town in consultation with the Elders, and heads of our Traditional institutions.

Figure 18. Extracts from *Rules and Regulations Governing the Town of Killiwu*



Attestation:

1. Joseph Flomo
Killiwu Residence Town Chief, Monrovia

2. GBOLU FORKPAH
President/ Killiwu Youth Development Association (KYDA)

3. Sayway Whinyton
Town Chief / Killiwu Town

4. FORKPA SUMO.
Head of Elders / Killiwu Town Land Lord

5. Kuubo Flomo
Head of Women/ Killiwu Town

6. David Freeman
Head of Youth / Killiwu Town

7. James T Lavelah
Quarter Chief / Yelleh quarter/ Killiwu Town

8. Amos Zamawu
Quarter Chief/ Tokpa Quarter/ Killiwu Town

9. Yorkpazuo Roberts
Quarter Chief / Wolomah quarter/ Killiwu Town

10. Goiakpai Gaye
Quarter Chief / Nyainkumehn Quarter/ Killiwu Town

11. Sumowuo Bawoi
Representative /Men Zoes / Killiwu Town

12. Kuubo Youbai
Representative/Women Zoes/ Killiwu Town

Figure 19. Extract from *Rules and Regulations Governing the Town of Killiwu*

Section 1(b) of the Constitution states: 'All laws governing our sacred institutions (Poro, Sande, and their associates) shall be respected at all times by all persons living in the territorial limit of Killiwu Town'. Section 2(c) also refers to the 'moral guidelines' set forth in the sacred institutions (that is, 'violators of "section II b" shall pay a fine in addition to our sacred institutions as per their moral Guideline set forth'). And yet, apart from the prohibition on violence in section 2(b),[58] the Constitution does not expressly lay down the laws of the sacred institutions. Nor can it. Only those who are initiated through the sacred institutions might know and speak of its laws.[59] To specify these laws of Killiwu in this document would be to violate these laws of Killiwu. And so it is by pointing to the sacred institutions through a blank space that the Constitution of Killiwu succeeds in articulating law in an official form that nonetheless connects with its subjects normatively.

From the perspective of the people of Killiwu, this overcomes the contradiction in the national law under the Constitution of Liberia. By leaving the text blank as to 'the law', referring through it to the sacred institutions of *poro* and *sande*, through which boys and girls are initiated into society through a process of education, the Constitution gives form to both national and local law. As an official expression of law—signed by officials of the Ministry of Internal Affairs and filed in the Office of the Paramount Chief—it is also grounded in the land of the law, informed by and reflecting how the people of Killiwu imagine it to be. Thus the blank space of law, which opens 'the law' to contradiction when it takes form on the ground, can be seen to provide a positive opening for the people of Killiwu to articulate their own law in conversation with the national law. This would be a littoral law *par excellence*.[60]

Resolving the contradiction in this way, however—by having it talk back, by making the national law of Liberia fundamentally local—does not overcome the contradiction. The law, inverted under the Constitution of a local community, is at best inconsistent with and at worst repugnant to the national law under the

[58] 'There shall be no violence (physical assaults, profanity, fighting, or any form of violence) instigated or encouraged by any person in the territorial limit of Killiwu Town. Any violator shall pay the fine of LD 2,500': section 2(b) of the 'Rules and Regulations Governing the Town of Killiwu'.

[59] The 'sacred institutions' of *poro* and *sande* ('and their associates') are often referred to as 'secret societies' for this reason. See also note 32 above.

[60] See Manderson, *Kangaroo Courts*; Desmond Manderson and Honni van Rijswick, 'Introduction to Littoral Readings: Representations of Land and Sea in Law, Literature, and Geography', *Law and Literature*, vol 27, no 2 (2015). See also Part 2 of Chapter 4 of the thesis.

Constitution of the Republic. Most critically in this case, the law of the sacred institutions covers subject matter that the central government has arrogated to itself, and legalises practices that are unlawful under the national law. This includes the authority to take life. In this form, the law under the Constitution of Killiwu might be said to undermine the rule of law. Inverting the national law in this way certainly violates the principle of sub-ordination that informs the kind of rule that rule-of-law promoters have in mind. The charge might be that this verges on a state in which there is no proper ordering of law, where local law contradicts national law. Such an inordinate rule of law (the argument would go) is no such thing at all.

And without doubt, this does violate that sole and indubitable order of law. But in the harmony of voices that fearfully question whether it is wise 'to deprive ourselves of that one law'—of certain order imposed from somewhere outside and above—and promote the rule of law as the very thing that would avoid such an inordinate state, the response continues to resound so discordantly on the ground: *'How can you have the rule of law when we don't even know our own laws?'*

∞

My aim in this chapter has been to draw out a contradiction that began with the constitutional act of 1820, when the Board of Managers of the American Colonization Society laid down a law defined by a blank space, and show through a configuration of scenes how the simultaneous grounded- and groundless-ness of this law continues to inform its life in Liberia. My argument is not that this contradiction undermines the national law of Liberia to the point that it is simply *not law*, negating in turn the possibility of its rule. The national law might be subverted by chiefs and traditional leaders, it might be perverted by its own legal authorities, it might be ignored by its subjects, and ultimately flipped on its head—and yet at the same time, *and because of this*, the national law is taking form as law.

Repudiation might define the plurality of ways in which the national law is accepted in Liberia today, its authority being undermined by its subjects and authorities alike, but this does not negate the fact of its acceptance, nor does it completely negate its authority. On the contrary, its adverse treatment is what makes acceptance of the national law also the opposite of empty rhetoric and what grounds its authority in Liberia. By making resistance a constitutive dimension of

acceptance, the idea of the national law under the Constitution of Liberia—an otherwise groundless vision of how things ought to be—is taking form on the ground in ways that leave it open to its ethical possibility as a responsive law. Undermined by a blank space, it has place to take root.

Law might take form as the law in contradictory ways as a result, violating the rule of law as conceived by rule-of-law promoters, but such is its imaginary life as law. Seen through the imaginary, the law on the ground is *only* law to the extent that it is also *not law*: a contradictory form in which the idea of it is acceptable because, as a law of the land, it is defined by a blank space that calls for the place of its settlement to be written back into it again and again. That is why for Liberians 'the problem of our laws' is not whether the national law ought to be accepted or repudiated, but how it might be accepted *and* repudiated at the same time. In answer to Kafka's question—how is it possible for a people to repudiate the sole and indubitable law of the nobility?—Liberians appear to be answering: by accepting it *through and through*. Grounding it as their own, rather than rejecting it outright, the existence of the national law is no longer apparent in 'whatever the nobles do' but in all manner of other ways.

Figure 20. At sea: the Atlantic Ocean seen through a war-torn villa, Monrovia[61]

[61] [image omitted from digital version]

At the end of Chapter 4, I considered the Liberian Government's national vision for the country post-war—a vision that suggests a continuation, if not an intensification, of the institutionalisation of the logic of capital through the rule of law. In Chapter 5, I then examined the work that is being done to secure this vision through a peace framework and peace-building operation aimed at establishing a state based on a rule of law that is both forceful and just. The analysis in Chapter 5 ended with a caution, however: the arrangement of 'peace through justice' is a highly combustible one, making the force of law's rule just, but its justice violent. This is a delicate balance at the best of times. It becomes especially fragile when the 'justice' of law's rule is not in fact just, and merely *violent*. This was the case during the First Republic of Liberia, when the forceful justice represented and propelled by the image of Matilda Newport was experienced as an instrument of domination by the vast majority of Liberians. As I showed in Chapter 5, the development of the Regional Justice and Security Hubs in Liberia point to a similar prospect for Liberia post-war, with the establishment of a state based on the rule of law appearing to be in the service of a forceful justice that risks becoming a mere instrument of domination. The question that remains is whether, or the extent to which, the justice of this arrangement is just.

With this question in mind, I examined in this chapter how the national law of Liberia is taking form on the ground in post-war Liberia. This showed two things. One, it showed that the justice of the national law as conceived by the Government and its international supporters is not perceived as just by the majority of Liberians. But two, it showed that the national law is nonetheless taking form in ways that might *make* it just.

This raises a critical problem, however. If the proposition 'peace through justice' is to secure the state/State of Liberia, and not destroy it, the institution of the rule of law has to be open to the contradiction that makes the national law of Liberia only law to the extent that it is also not law. That is, 'peace through justice' requires an *inordinate* rule of law—a rule of law that is responsive to the contradictory demands of justice it confronts on the ground.

Recall the alternative representational framework I considered at the end of Chapter 4. This 'independence framework' operates on the same logic as that of capital, but turns it from a medium of violent realism into a critical form that enables a more autobiographical expression of subjectivity. This, I suggested,

might frame Liberia's independence 'post-colonialism' and 'post-war'. This holds out a possibility: if this critical logic informs the institution of the rule of law, the logics of both capital and security might be flipped on their heads. The logic of capital would become the logic of independence, and this independence would be secured through an inordinate rule of law that is *both* forceful *and* just.

Of course, such a framework for peace would be based upon a contradictory logic—indeed, it would require facing the contradiction in law and its rule rather than attempting to resolve or dismiss it. Whether, and how, such a critical approach to the rule of law might be instituted is the question to which I turn in the final chapter, in examining the legal system reform process in Liberia.

Chapter 7

facing the contradiction

1 Mediation of law

Chapters 4 and 5 were concerned with the consequences of the attempt to give form to 'Liberia' through law. In Chapter 4 I showed how African-Americans in the United States at the beginning of the nineteenth century suffered a form of civil death as a result of their non-recognition as wholly rightful persons. Likewise, I showed how Americo-Liberians suffered a similar sentence in the nineteenth century and into the twentieth as a result of their non-recognition as wholly rightful persons in the 'international community'. Finally, I showed how African-Liberians suffered as degraded citizens up until the overthrow of the Americo-Liberian regime at the end of the twentieth century. In each case, having been denied their own particular value as self-possessed humans, but not fully possessed of the general value expressed by law, the result was a form of capital punishment—being abject before the law, suspended in a state of civil death. I then turned in Chapter 5 to examine what is taking place in Liberia post-war to consolidate peace through the establishment of a state based on the rule of law. I showed how this risks establishing a tyrannical state secured through an arbitrary rule of law that is forceful but unjust.

If the problem in Chapters 4 and 5 is the institutionalisation of an arbitrary rule of law that is entirely directed at securing the logic of the regime that animates it, then the problem examined in Chapter 6 is the opposite: a law that rules entirely otherwise. Again, the problem is one of arbitrariness, but it is not the arbitrariness of being abject before a law that rules in disregard of its subjects. Rather, it is the arbitrariness of an inordinate rule of law—a rule of law that verges on whatever its subjects make of it. As I showed in Chapter 6, Liberians are facing a reversal of Kafka's paradox. Having dared to 'repudiate the nobility' in the bloodiest fashion, by overthrowing the Americo-Liberian oligarchy, Liberians have broken the one law that provided absolute certainty, in that its existence was at least known in its enforcement against them. Now the national law of Liberia has been opened up to the whole people. Existing entirely otherwise, the arbitrariness of the national law is no longer 'whatever the nobles do', but whatever Liberia's different peoples do, in as much as they talk and talk back in so many different ways.

Thus from the first perspective (Chapters 4 and 5), law's rule is seen to be arbitrary to the extent that what it affirms as given is experienced otherwise;

whilst from the other perspective (Chapter 6), law's rule is seen to be arbitrary to the extent that it leaves law open to take form in ways other than expressed. Neither position is entirely satisfactory. On one side, law's rule risks becoming tyrannical, its expressions no more than an instrument of domination, closed to subjects who remain abject before it. On the other side, law's rule risks becoming lawless, its expressions no more than what its subjects make of it, opening it to all manner of perversion, subversion, inversion, and ignorance. Neither position is entirely satisfactory; and yet neither can be entirely avoided. Law's rule must remain *decisive*, expressing what is 'the law' as a matter of common good, and law's rule must remain *responsive*, articulating normativity in a way that is open to the experience of subjects who are abject before it.[1]

The question I address in this chapter is how to deal with this 'double demand of modernity' institutionally.[2] If law *takes place* in-between these two positions, making the articulation of normativity both potentially dominating and emancipating,[3] then what does this mean for instituting the rule of law? To answer the question, I begin here by considering how law can become both 'over-mediated', articulating normativity 'from outside and above', as well as 'under-mediated', articulating normativity 'from within'—and how the critical function of a legal system is to mediate the contradiction, to ensure law does not rest on either extreme and remains in-between the two. In Parts 2 and 3 of the chapter I then examine what is taking place in reforming Liberia's national legal system.

A Over-mediated law

When an expression of law has little basis in its object,[4] the law is potentially radically transformative and potentially an instrument of domination.

One way this occurs is when law does not articulate the normative dispositions of its subjects, informed by their experiences in and of the world, and

[1] See Part 2 of Chapter 1.

[2] As noted in the Introduction to the thesis, Fitzpatrick describes the 'double demand of modernity' as 'the demand for assured position integrated with a responsiveness to all that is beyond position, a demand to be met now without resort to erstwhile solutions of a transcendent kind.' Peter Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge: Cambridge University Press, 2001), 2.

[3] See Part 2 of Chapter 2.

[4] Recall the object of law is the experience of subjects within jurisdiction, to whom law is speaking, and therefore speaking against, contra-dictorily. See Chapter 2.

instead articulates an other sense of normativity as 'the law' and imposes *that* vision on them ('from above'). This occurs 'from outside' rather than 'from within' when the law is expressed primarily from a standpoint external to the subject within jurisdiction. When the concern is to transform the subject as a normative matter, the intervention is 'from outside' to the extent that it reflects an other's dissatisfaction with the norm more than internal revolt. Individuals and groups might come to identify with the law in this form and seek to bring the normative disposition of society in line with it 'from within'. Even so, the more the law is used to bring about radical transformation, by imposing an other sense of how things ought to be, the more over-mediated law becomes, and the more likely the contradiction will manifest in a violent reaction to the law.[5]

The intention might be to bring about social change by law, but it might be concerned only with enforcement by law. Of course these alternatives are extremes. On one side: attempting to radically transform how things are by law, from a standpoint that is set against the subject whose experience is the object of articulation. On the other side: enforcing the law as given in total disregard of the subject. Yet despite their differences—one directed at transforming what is before the law, the other directed at enforcing what is posited by law—these two positions are highly complementary. In the absence of a responsive dimension to the process, enforcement provides a means of containing the unavoidable reaction. Enforcement makes law 'responsive' in a perverse way, with force providing a proxy for critical reflection. Through an enforced transformation, rather than a genuinely responsive one, an over-mediated system of law might sustain itself, at least as long as those who control expressions of 'the law' also control the use of force.

Law enforcement is generally directed at informing the minds of subjects about 'the law' through the use of force. The aim might be to bring subjects closer to the law as expressed, but it might be merely to make them *compliant*—to

[5] Sarat and Kearns discuss a similar approach to law in terms of 'instrumentalism', which they contrast with a 'constitutive' approach; see Austin Sarat and Thomas R Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life', in *Law in Everyday Life*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 1993). Another way the law might be said to be 'over-mediated' is when there is 'too much' mediation. This occurs when the medium used to express the law displaces law's normative foundation in society and the law becomes an expression of itself, as if 'the law' were also the object of law. This has been thoroughly examined in the scholarship of Legal Realists and Critical Legal Studies in terms of the problem of 'legal formalism'.

remind them of the law without necessarily intending to bring them closer to it as a normative matter. Either way enforcement is about overcoming the impotence of what is posited by law, by trying through force to make the law identical with the experience of its subjects, or at least *felt* by them.

In contemporary state legal systems, still one of the most popular means of achieving this is through the use of brute force.[6] With brute force, the law is laid down on the bodies of subjects, with the rationale that this will inform their minds. In this way, 'the law' is brought closer to a subject as a matter of fact; and in a very real way, the law, brought violently into contact with the body, could be no closer to the subject. But as a normative matter, brute enforcement also has the opposite effect. By realising the contradiction in law with such visceral means, brute force acts to reify the separation of the law from subjects. The more brute force is used, the more the body recoils, the more the contradiction is reinforced as a physical reality—to the point where 'the law' becomes a mere instrument of domination, bludgeoning the subject as if it were nothing more than an object. At this point the true nature of brute enforcement is clear: rather than working to bring the law closer to a subject, it works to *maintain* the contradiction in law through sheer force; and the result only aggravates the situation.[7]

A genuinely responsive law enforcement, by contrast, involves the use of force in a way that is critically concerned with a subject *as subject*—with the fact that every subject of law is always also law-maker and not merely an object to be beat into subjection. A responsive use of force thus aims to bring about a change in behaviour from within the minds of subjects.[8] This is still a violent process. Whether brutish or responsive, the need for enforcement is always a function of

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[6] But compare this with the regulatory scholarship on other forms of regulation, such as the use of supportive tools to assist regulatees to comply. See, eg, Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford: Oxford University Press, 1992); Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000); Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law ', in *Regulating Law*, ed C Parker, et al (Oxford: Oxford University Press, 2004); John Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation', *UBC Law Review*, vol 44, no 3 (2011); Jeremy Matam Farrall and Hilary Charlesworth, eds, *Strengthening the Rule of Law through the UN Security Council* (Oxon: Routledge, 2016).

[7] This has motivated the search for alternative approaches to regulation, such as 'responsive' and 'smart' regulation. See, eg, the literature cited in note 6 above.

[8] Compare the work on 'responsive regulation', eg, Braithwaite, 'Fasken Lecture: The Essence of Responsive Regulation'.

law's impotence.[9] That law is always in a state of failure as a result of its separation from subjects is not the problem, however. The critical problem is not the fact of the contradiction in law, which makes the law a violent conceit, but *how* the contradiction is dealt with.

I examine this problem in Part 2 of the chapter by analysing what is taking place in reforming Liberia's national legal system post-war. On one hand, the analysis shows a Government, supported by a coalition of Western international actors, intent on reforming the national legal system in a way that would make it articulate normativity from 'outside and above' the majority of subjects, informed by a liberal-modernist ideology.[10] On the other hand, there is a genuine responsiveness to the reform process that might ensure the national legal system articulates normativity 'from within'. At the same time, however, the legal system reform process is being overshadowed by another reform process—that of the security sector—which is set to provide the Government with the means to enforce its law against the subjects who are talking back in the process of reforming the legal system. The result points to the institutionalisation of an over-mediated legal system that depends on brute force to uphold the rule of law.

B Under-mediated law

Another set of problems arises when the medium through which law is expressed is dysfunctional. 'Under-mediated', a legal system becomes incapable of mediating the articulation of normativity. To the extent that the system functions at all, what takes form as the law is no less arbitrary than when law's acts of articulation are over-mediated. The arbitrariness of the law is no longer that it gives expression to an other vision and forces subjects to conform to that vision. The arbitrariness of an under-mediated law is that law takes form subjectively, according to the contradictory ways in which its subjects give expression to it in everyday life, from moment to moment, without certainty, consistency, or equality.

Thus if the problem of over-mediation is the reification of the *separation* of law from its subjects, then the problem of under-mediation is the opposite: the more the articulation of normativity is under-mediated, the more the contradiction

[9] See discussion in Part 2 of Chapter 2 on the impotence of law.

[10] I discuss what I mean by a 'liberal-modernist ideology' below, in Part 2 of the chapter.

in law manifests in terms of the *inseparability* of law and its subjects. This is potentially no less violent than an over-mediated legal system. The more 'the law' is indistinguishable from the normative disposition of the subject who gives expression to it, the more 'the law' is disconnected from other subjects, who have had no part in authorising it, for whom law in this form is only experienced as an arbitrary will. This is the corruption of law: when what is 'the law' is indistinguishable from what a subject expresses it to be. This is corruption in the sense of dissolution: when the chasmic structure of law collapses to the point that 'law' and 'the law' are all-but inseparable. In this state, the will of the expressive subject becomes all-but equivalent to the law—and potentially terrifyingly so, the more powerful the subject.[11]

The more dysfunctional a legal system, the more prone law is to such corruption. Yet even the most dysfunctional legal system mediates the articulation of normativity to *some* extent and limits the degree to which law is merely a subjective act of articulation. The law might be corrupted in the process, but there is still a system to speak of. When a situation is said to be 'lawless', more often than not this reflects a failure to see the system that mediates the madness.

Although that is not necessarily the case. It may be that there is no functioning system at all—no structuring medium—in which case law would take form *unmediated*. On one hand, this would be the absolute corruption of law; on the other hand, it would be the purest expression of normativity. Unmediated, law would lose all positive constraint and take form in an uncontrolled outburst: a subject giving immediate expression to how things ought to be at that very moment—indeed, how they *will be*. At this point, law and normativity would collapse in on each other. As the articulation of normativity, this would be law in its most negative form; and as an entirely negative force, it would be incapable of articulating normativity in any positive way. As a result, law would be wholly normative, and normativity would be wholly law: a form of law that is simultaneously the antithesis of law, and a form of normativity that could not realise itself in any positive way. *This is lawlessness*—a pure expression of

[11] Recall 'the subject' might be an individual subject, but it might also be a collective subject. Thus, as I discuss below, 'the will of the subject' might be the will of a police officer on patrol who demands a bribe in the name of the law, or it might be the will of a mob who lynch a man in the name of the law.

normativity without any positive dimension, erupting straight from its subjective source—*with all the force of law*.

For those who know law primarily through a highly mediated legal system, and in terms of the orthodoxy of legal positivism, which sets 'the law' in opposition to something called 'lawlessness', an unmediated form of law—a law without jurisprudence, without institutions, without lawyers—can only appear lawless, as utterly other than what is the law. It may no longer be contentious to say that law takes many forms; however, it is still contentious to say that one of those forms is 'lawlessness' itself. Acting lawfully and rioting are surely opposites: one respects the rule of law, the other manifests a complete disregard for it. *And yet*, as opposites, so-called 'lawfulness' and 'lawlessness' are identical in one critical respect: both involve the articulation of normativity. The difference—which is a difference of quality—is *how* the act of articulation is mediated.[12]

I examine this problem of under-mediation in Part 3 of the chapter, where I consider the dysfunction in the national legal system of Liberia and its connection not only with increasing corruption of the police and judiciary, but also with the rising incidences of mob violence across the country. Both official corruption and mob violence, I argue, are instances of an under-mediated law, in which the law takes form in terms of the will of the expressive subject who articulates 'the law'. I then return to the threatened 'April 12' protests discussed in Chapter 6, and consider how the threat of revolutionary violence might be understood in terms of an unmediated law.

2 Beginning again

A Access to justice

In 2010, officers of Liberia's Ministry of Justice and Judiciary sat down with Chiefs, traditional leaders and members of civil society for the first time since the end of the war to consider the relationship between 'statutory', 'customary', and

[12] See also E P Thompson, 'The Moral Economy of the English Crowd in the Eighteenth Century', *Past & Present*, no 50 (1971).

'traditional' law in Liberia.[13] The occasion was the National Conference on Enhancing Access to Justice,[14] and at stake was the very ethical possibility of law in Liberia: how the national legal system could be reformed in light of the fact that the national law is not law for the vast majority of Liberians, and other law is not law in fundamental ways under the Constitution of Liberia.[15]

In her opening statement, the President of Liberia, Ellen Johnson Sirleaf, made clear that the Conference was about nothing less than beginning again:

> If you look across Africa our peoples and governments have made significant progress in developing truly African approaches to justice. In many countries, diverse groups have come together and developed ways to enhance access to justice for all people—the rich, the poor, ethnic minorities and majorities alike. This conference should be the beginning of such a process in Liberia.[16]

The Minister of Justice echoed the President in her foreword to the report on the Conference proceedings: this 'is not the end of the process—in many ways, it is a beginning'—a beginning to make law in Liberia 'responsive to the basic desires and values of all Liberian people'.[17]

Getting to this beginning was not easy. By 2010 the Government of Liberia might have 'taken to heart' the importance of reforming the national legal system in light of the plurality of difference that animates law in the country,[18] but in the years leading up to that point, and even in 2015, the idea of reforming the national legal system in light of law's pluralism has met strong resistance from government officials as well as Liberia's ruling class more generally. For foreign actors involved

[13] Author interview with UN officials, 24 May 2013 (MU1 and MU2). The term 'statutory law' is used in Liberia to refer to the law articulated by Liberia's legislative and judicial organs of government. The term 'customary law' refers to the law articulated by members of the Liberia's executive organ of government, primarily in the Ministry of Interior, most frequently Chiefs. 'Traditional law' by contrast refers to the law articulated by 'unofficial' organs of government, such as the sacred institutions of the *poro* and *sande* societies. On *poro* and *sande* see Part 3 of Chapter 6.

[14] Held 15-17 April 2010, Gbarnga, Bong County, Liberia.

[15] As seen in Chapter 6.

[16] Ellen Johnson Sirleaf, 'Special remarks at the National Conference on Enhancing Access to Justice' (15 April 2010), 4-5.

[17] Christiana Tah, 'Foreword from the Minister of Justice', *Report on the National Conference on Enhancing Access to Justice* (Monrovia: 2010), viii.

[18] Amanda C Rawls, 'Policy Proposals for Justice Reform in Liberia: Opportunities under the Current Legal Framework to Expand Access to Justice', *Traditional Justice: Practitioner's Perspectives* (IDLO Working Paper Series, 2011): 4.

in the process,[19] it is obvious why members of government have resisted and continue to resist the idea. For those in power in Monrovia, the national law as it stands *is* law. For the judiciary and members of the national legal profession, but also for Liberia's ruling class more generally, 'traditional law' is not law properly so-called;[20] rather, it persists anachronistically as an outmoded social form that will eventually wither away with modernisation.[21] Indeed, from this perspective, if Liberia is to modernise, the only logical development is towards the abolition of traditional law.[22]

This mind-set might be at an extreme end of how Liberia's ruling class thinks about legal pluralism in the country, but there is at least a common reluctance to commit scarce resources to strengthening 'traditional practices' in the course of establishing a state based on the rule of law. As a UN official said to me, reflecting on the difficulty faced by UNMIL in convincing the Government to 'buy-in' to the 'access to justice' process introduced at the beginning of this section: 'They see no reason why we should be spending time and energy on other law'.[23] This is not surprising, given that many if not most members of Liberia's ruling class have no connection with 'other law'. The same UN official, echoing what I heard elsewhere, put it like this: 'How do you sell this idea to people who are not subject

[19] UNMIL, The Carter Center in Liberia, and The United States Institute of Peace were instrumental in initiating and facilitating the process leading up to the 2010 Conference on Access to Justice, over several years and against significant resistance from government.

[20] Thus it is called 'informal justice', 'traditional justice', 'customary justice', 'alternative dispute resolution', amongst other terms, but not 'law'. This reflects the terminology used by international actors, as well as Western governments. For instance, in 2007, in explaining why Australia voted against the *United Nations Declaration of Indigenous Peoples Rights*, Australia's Ambassador to the UN, Robert Hill, argued that '[c]ustomary law is not "law" in the sense that modern democracies use the term; it is based on culture and tradition', effectively limiting 'law' properly so-called to 'state law'. See UN Doc A/61/PV.107 (13 September 2007), 11. See also Laura Grenfell, *Promoting the Rule of Law in Post-conflict States* (Cambridge: Cambridge University Press, 2013), 54.

[21] Grenfell makes a similar observation with respect to the attitude in many international organisations: see Laura Grenfell, 'The UN and "Rule-of-Law Constitutions"', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall and Hilary Charlesworth (Oxon: Routledge, 2016), 128.

[22] This is how one very senior member of the national legal profession sees it. When asked by officers within UNMIL about the idea of initiating a process to 'harmonise' what is referred to as 'statutory law' and 'customary law', he is said to have replied: 'Why do you want to do this? Let's just abolish this customary law. Let's just have the statutory system': author interview with MU1 and MU2.

[23] Ibid.

to it, and will never be subject to it—and in any event, over generations, over a hundred years, it hasn't ever applied to them?'[24]

For many politically and economically powerful Liberians, returning to the country from abroad post-war and concerned with turning Liberia into a modern 'middle-income' country,[25] there is nothing self-evident about the need to address law's pluralism.[26] Or at least, if the problem of law's pluralism was initially recognised, it was not prioritised as such in the first six years of post-war rule-of-law reform. Whatever the reason for this, significant persuasion was required to get the Government to the point of beginning again.

UNMIL might take credit for getting the Government to this point,[27] but as an organisation and as a mission, UNMIL was even less prepared to see the need to address law's pluralism as part of its mandate to provide rule-of-law reform assistance. To start with, the UN Security Council resolution establishing UNMIL did not give it an explicit mandate to do so, nor has the Council done so in subsequent resolutions amending UNMIL's mandate.[28] The work done by UNMIL's Legal and Judicial Services Support Division on 'informal justice systems', which largely underwrote the 'access to justice' process, only came about as a result of a generous interpretation of the mandate by UN officials who took a personal interest in the issue of legal pluralism.[29]

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[24] Ibid. The same point was repeated by another informant working within the Ministry of Justice: author interview with Government officer, 28 May 2013 (MG3).

[25] See Republic of Liberia, *Agenda for Transformation: Steps Toward Liberia RISING 2030. Liberia's Medium Term Economic and Development Strategy (2012–2017)* (Monrovia: Republic of Liberia, 2012).

[26] Chelsea Payne, the Country Representative and Access to Justice Project Lead for The Carter Center Liberia during this period, and Peter Chapman, also working for The Carter Center Liberia at the time, note: 'In the period following the signing of the Accra Peace Accords in 2003, donors and government viewed (re)creating a Liberian justice sector as a centralized initiative, to be imposed from the top down, and from the capital to the countryside. Various actors envisioned a functioning justice sector, modeled on "best practices", believing capacity building, technical assistance, and financial support could make it attainable. The United Nations Security Council authorized the United Nations Mission in Liberia to "reestablish […] national authority throughout the country" and develop "a strategy to consolidate governmental institutions", including the justice sector. This exercise began with basic infrastructure improvements, such as county-level circuit courts, and the training and deployment of county attorneys. Such an approach necessarily directed the vast majority of justice sector investment to state institutions, including the Ministry of Justice and the Liberia National Police, the judiciary, and Liberia's only law school at the University of Liberia.' Peter Chapman and Chelsea Payne, '"You Place the Old Mat with the New Mat": Legal Empowerment, Equitable Dispute Resolution, and Social Cohesion in Post-Conflict Liberia', *Open Society Justice Initiative* (Autumn 2013): 15.

[27] Author interview with MU1 and MU2.

[28] For a discussion of UNMIL's mandate, see Chapter 5.

[29] Author interview with MU1 and MU2.

The turning point in the process came in 2009 with the publication of the United States Institute of Peace study led by Deborah Isser, Stephen Lubkemann and Saah N'Tow of 'Liberian experiences with and perceptions of local justice options'.[30] Building on the work of Liberian Common Law jurist, Philip Banks, this was the first in-depth empirical study of 'how both formal and customary justice systems are perceived and utilized by Liberians'.[31] As discussed in Chapter 6, the results provided undeniable evidence of the relevancy of local systems of law for the vast majority of Liberians, and the impotency of the national legal system. At the same time, with the backing of UNMIL's Legal and Judicial System Support Division, as well as The Carter Center Liberia, the US Institute of Peace facilitated the formation of a Legal Working Group made up of Liberian scholars from government, the national legal profession, and civil society.[32] The Legal Working Group's terms of reference were 'to engage both members of the legal community and traditional leaders in discussions about justice reform in Liberia, in particular regarding the dual legal system'.[33] Their findings, reflecting the US Institute of Peace study, confirmed the need to address the serious 'capacity and legitimacy shortfalls' of the national legal system.[34] Indeed, the 'key policy question' asked by the Group in light of the national legal system's 'legitimacy shortfall' was how to make the national law more reflective:

> As Liberia considers the future of its justice, how can it move toward a system that inclusively reflects the values of the Liberian people?[35]

The recommendations of the Legal Working Group, combined with the US Institute of Peace study and feedback from a series of national consultations held in the lead-up to the 2010 Conference, amounted to a call that could not be ignored by government; and yet the mind-set that gave rise to the Government's initial resistance had not changed.

All of this culminated in the 2010 Conference on Access to Justice, and the result was a fundamental tension running through the proceedings. A US lawyer

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[30] Deborah H Isser, Stephen C Lubkemann, and Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options* (Washington: USIP Peaceworks, 2009).

[31] Ibid, 3.

[32] Author interview with MU1 and MU2. See also Rawls, 'Justice Reform in Liberia', 2.

[33] *Findings of the Legal Working Group* (Monrovia: adopted 10 December 2009), 1.

[34] Ibid, 'Section II: Basic principles that should guide justice policies', 5.

[35] Ibid, 'Section III: Key policy questions and options', 7 (my italics).

who was working within the Liberian Ministry of Justice at the time, and who was close to the process, notes that the Government's preference was always 'for building trust in the formal legal system and using law and policy to change beliefs and behaviors'.[36] At the same time, the Government could not ignore the evidence that Liberians not only use, but also prefer, 'local' legal systems. The Government's preference for a policy of social transformation thus came up against the need to make the national legal system more reflective, or at least more responsive to Liberia's diverse social body. To the Government's credit, the fact that the Conference took place with high-level attendance, on top of a series of nation-wide consultations, demonstrated a degree of responsiveness by the Government.

And yet, this responsiveness was selective, framed by an ideological opposition between what is thought 'modern' and what is denigrated as 'traditional'. For the organisers of the Conference—the Ministry of Justice, the Ministry of Internal Affairs, and the Supreme Court[37]—the bottom line running through the Conference was that the very integrity of a 'modern' legal system does not admit certain aspects of 'tradition'. Or more to the point, if the national legal system is to be reformed as one of the core institutions of a 'modern' Liberia, it cannot also be traditional. Other systems of law might be *part* of the national legal system, but they must be 'modernised' in the process. This is what is meant by 'harmonisation', the new catchword used by the Government under the influence of its international partners to describe their solution to law's pluralism. Like the pre-1980 policy of National Unification,[38] 'harmonisation' is directed at resolving the problem of law's pluralism by ensuring local expressions of law are at one with the national law, dissolving *them* within *it* without compromising the integrity of the national legal system.

This limited responsiveness is reflected in the way the organisers of the Access to Justice Conference framed the proceedings in their agenda.[39] The three main discussion themes were 'enhancing customary justice', 'enhancing the formal

[36] Rawls, 'Justice Reform in Liberia', 6. Veronica Taylor also points to a possible economic rationale for this position, in so far as the policy directs resources to the centre (personal correspondence).

[37] The official organisers were the Ministry of Justice, the Ministry of Internal Affairs, and the Supreme Court, 'with support from the Ministry of Gender and Development, the National Traditional Council, the United States Institute of Peace, the Carter Center, the United Nations Mission in Liberia (UNMIL), the United Nations Development Programme (UNDP)': *Report on the National Conference on Enhancing Access to Justice* (2010).

[38] See Part 3 of Chapter 4.

[39] *Report on the National Conference on Enhancing Access to Justice* (2010), Annex 1, 68-74.

justice system', and 'reforming both systems to increase access to justice for all Liberians'.[40] The session on 'enhancing customary justice' was set to open with a discussion of 'the empirical data on onerous customary practices' and 'potential mechanisms that could be developed to address such practices in the customary system'.[41] The subgroup was then to consider two questions in breakout sessions:

> Breakout Question 1: How should trial by ordeal[42] be addressed?
> – What are the alternatives to trial by ordeal?
> – Apart from making trial by ordeal illegal, what steps can the Government of Liberia take to discourage the practice?
>
> Breakout Question 2: Cooperation between the formal and customary systems. *How can we change the way the two justice systems interact to better address issues of customary beliefs and practices that the formal system finds problematic?*
> – Should there be specific types of cases that are under initial jurisdiction of the customary system?
> – How should cases be appealed from the customary system?
> – How can the formal system provide better alternatives to problematic customary practices?[43]

Meanwhile another subgroup was to consider 'enhancing the formal justice system', beginning with consideration of 'the empirical data on unjust practices in both systems […] before beginning a discussion of potential mechanisms that could [be] developed to address [the] problems.'[44]

> Breakout Question 1: Making formal courts more effective in rural areas.
> – How can the Government best combat corruption, and prevent bias in the formal system?
> – When corruption or bias is encountered in the formal system, how should the parties, chiefs, or other leaders respond?
>
> Breakout Question 2: Relationship between formal courts and customary Chiefs.

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[40] Ibid.

[41] Ibid, 70.

[42] 'Trial by ordeal' is the English term used to describe judicial procedures for determining guilt and innocence. 'Sassywood', which is often used synonymously for 'trial by ordeal' in Liberia, is one such procedure, whereby poison extracted from the bark of a tree is administered in the form of a drink to the accused person. For discussion of similar questions, in a very different time and place, see Manderson's essay on the Magna Carta: Desmond Manderson, 'The Other 1215', *Papers on Parliament: Magna Carta 800 Symposium*, no 65 (Proceedings of a symposium held by the Department of the Senate and the Rule of Law Institute of Australia, 2016): 67-68.

[43] *Report on the National Conference on Enhancing Access to Justice*, 71 (italics in original).

[44] Ibid, 72.

– What types of cases should be heard first by traditional leaders?
– What types of cases should be heard first in formal courts?[45]

The juxtaposition of these two sessions is revealing. Whilst discussion of the 'formal justice system' focused on its institutional dysfunction—ineffectiveness, corruption, bias—discussion of 'customary justice' focused on the 'traditional practices' themselves, and specifically on their unacceptability. To put this another way, the normativity of the formal system was never put in question, whilst 'onerous customary practices' framed the line of enquiry on 'enhancing customary justice'. It is also not surprising that 'trial by ordeal' was singled-out as exemplary of 'onerous customary practices'.[46]

Trial by ordeal represents in spectacular form precisely what modernity has worked so hard to overcome, and what a modern-liberal ideology finds so repugnant: a theory of causation that uses a powerful ritual to enact a knowledge of what is right that does not separate out the individual person from the community. As a method of addressing conflict within a community, 'trial by ordeal' is not about what is right for any particular individual but what is right for individuals-in-community. In this, both scientific knowledge and individual rights are stepped over by a rationality that does not stop in the final analysis at the individual human or individuated cause and effect. To a liberal mind, especially one initiated into the Anglo-American Common Law, what appears to take place in a 'trial by ordeal' is a violation of *natural justice*: a potentially innocent individual suffering harm without being accorded due process (based on a scientific determination of guilt).

Such 'traditional practices' are intolerable to the international interveners engaged in reforming Liberia's legal system, such as The Carter Center, US Institute of Peace, and the UN, whether because they personally find such practices repugnant to their modern-liberal normative disposition, and/or because institutionally they are required to uphold the normative order of international law as set out in its largely Western-liberal human rights instruments. The result is also intolerable to members of the Government of Liberia, whether because of their personal convictions (many having been raised and/or educated in Western-liberal societies such as the US) or because funding from Western states and

[45] Ibid.

[46] On 'trial by ordeal', see note 42 above.

international organisations is contingent upon ensuring the national law is 'consistent with international human rights norms and standards'.[47]

And yet, despite this commitment to a modern-liberal normative order, and a policy of changing Liberians' beliefs and behaviour to bring them in line with it, the Government opened these questions up to debate during both the pre-Conference consultations and the Conference itself. And the result was *truly modern*—a littoral cacophony. Having framed the debate in a way that reflected the organisers' standpoint, presumably with the hope of directing discussion towards the 'right' answer, the response was a resounding chorus of voices supporting 'onerous customary practices', and above all trial by ordeal (also referred to here as sassywood):

> A Maryland chief from the National Traditional Council noted that there is a need to understand what is meant by trial by ordeal.
>
> A National Traditional Council Chairman from River Gee added […] we need to distinguish genuine sassywood from fake sassywood.
>
> The Paramount Chief from Bong County agreed that there is a need to test sassywood practitioners to check if they are genuine. However, he added that the Government cannot do away with the tradition. He asked whether the Government was willing to change its Constitution.
>
> The National Traditional Council Chairwoman from Bong County said that sassywood is effective, but human rights are confusing traditional justice cases.
>
> A female Clan Chief from Nimba County said that the administering of sassywood is good. She gave an example of one Kollie-tambo who used to perform his Marico (traditional drum) to identify witchcraft during President Doe's time.
>
> A representative from the Ministry of Gender and Development noted that people do not want to give up sassywood, and that there are no alternatives to sassywood in certain cases.
>
> A Women's Representative from Grand Cape Mount pointed out that there are non-harmful ways of administering sassywood. She also noted that magic is real.[48]

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[47] See the UN Secretary-General's definition of the rule of law, which requires a state's laws to be 'consistent with international human rights norms and standards': UN Doc S/2004/616 (23 August 2004), para 6.

[48] These 'voices' are recorded in the official report on the Conference proceedings: *Report on the National Conference on Enhancing Access to Justice*, 31-34. On law and magic, see also Miranda

This, then, was the beginning for a government that could no longer deny the need to be responsive but found itself caught between an 'agenda for transformation',[49] and subjects demanding greater critical reflection in the process of reforming Liberia's national legal system. It is this tension, running through the dialogue that began in the wake of the US Institute of Peace study and into the Conference sessions, that ensures 'access to justice' remains a critical concept in Liberia, denying the possibility of law becoming a positive expression of either a 'modern-liberal' or a 'traditional-customary' mind-set.

For the Government and its international supporters, who continue to see the national law as the only law properly so-called, access to justice means overcoming the 'justice vacuum' that results from not having a functioning national legal system.[50] If other systems of law have to be brought within the national legal system to make it effective, then those other systems must become 'modern' in the process.[51] At the same time, for many Liberians, access to justice has the opposite meaning: if the national legal system is to be a *truly modern* institution, it must be capable of articulating normativity 'responsably', that is, in a way that is able to respond to the normative disposition of subjects within jurisdiction.[52]

B Security sector reform

If this represents the possibility of beginning again in Liberia, to make the national legal system more responsive, it is taking place in the shadow of another process that currently dominates national and international efforts to establish a state based on the rule of law in Liberia. As the withdrawal of UNMIL draws closer, with a complete exit anticipated by 2017, building the capacity of Liberia's 'security

Forsyth and Richard Eves, 'The Problems and Victims of Sorcery and Witchcraft Practices and Beliefs in Melanesia: An Introduction', in *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia*, ed Miranda Forsyth and Richard Eves (Canberra: ANU Press, 2015); Miranda Forsyth, 'A Pluralist Response to the Regulation of Sorcery and Witchcraft in Melanesia', in *Talking it Through: Responses to Sorcery and Witchcraft Beliefs and Practices in Melanesia*, ed Miranda Forsyth and Richard Eves (Canberra: ANU Press, 2015).

[49] Republic of Liberia, *Agenda for Transformation: Steps Toward Liberia RISING 2030.*

[50] See *Report on the National Conference on Enhancing Access to Justice*, 71.

[51] See also ibid, 71-72.

[52] '"The law" thence would be an unconditional law of utter responsiveness to the other, a responsability, to revive an old usage.' Peter Fitzpatrick, 'The Revolutionary Past: Decolonizing Law and Human Rights', *Metodo: International Studies in Phenomenology and Philosophy*, vol 2, no 1 (2014): 128.

sector' has become the main priority for the first time since the peace operation began in 2003.[53] Fearful of a 'security vacuum' that would allow non-government actors to challenge the Government's monopoly on the use of force, especially in the interior, the Government's priority is to build the capacity of its police force.

As discussed in Chapter 5, one the main security-sector projects is the development of five Regional Justice and Security Hubs—a project that appears to have very little to do with the kind of 'access to justice' being discussed at the 2010 Conference and everything to do with strengthening the police force in the interior.[54] But as such, the Hub concept is entirely consistent with the Government's preferred direction on 'access to justice' and national legal system reform. Indeed the Hubs were originally conceived by the Government of Liberia as regional command centres for the Liberian National Police to have 'forward operating bases' in the interior.[55] It is surely no coincidence that, just as the Government and its international supporters have begun to focus their attention and resources on security sector reform and building up a police presence in the interior, the initiative on 'access to justice' has gone backwards. After the 2010 Conference an inter-Ministerial Committee on Access to Justice was formed to consider policy options on legal system reform in light of the recommendations coming out of the Conference. Since then nothing has happened. Not only has the Committee not built on the momentum leading into the Conference, but as of 2013, a newly-appointed Solicitor-General, taking over the Chair of the Committee, was considering returning to the start with more research and consultations.

Thus at the same time as the Government was being held to account at the 2010 Conference on Access to Justice in a way that was offering a glimpse of the possibility of the national legal system being reformed in light of its 'legitimacy deficit', the Government was moving ahead with a deal to build a series of Justice and Security Hubs in the interior.[56] Brought together within the same complex,

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[53] While security sector reform has been part of UNMIL's mandate since 2003, building the capacity of the Liberia's security sector, with a focus on the Liberian National Police in particular, has only become a top priority with UNMIL's withdrawal. See Part 2 of Chapter 5.

[54] Part 2 of Chapter 5.

[55] Ibid.

[56] For a global perspective on the rule-of-law industry that also helps explain what is taking place here in Liberia, in terms of the lack of concern for justice on the ground, see Veronica Taylor, 'Big Rule of Law©®℠™(pat.pending): Branding and Certifying the Business of the Rule of Law', in *Strengthening the Rule of Law through the United Nations Security Council*, ed Jeremy Matam Farrall, and Hilary Charlesworth (Oxon: Routledge, 2016).

'justice' and 'security' would complement each other just as the Government and UN hoped they would: a new police force deployed in the interior, with courthouses and lawyers co-located on-site for processing offenders of the national law. Without the need for the hard critical reflection demanded by the delegates at the 2010 Access to Justice Conference, the national law *would be* law.

C Legal empowerment

Thus the 2010 Conference on Access to Justice might have represented a new beginning in a national dialogue on legal system reform in Liberia, but it is not taking place in isolation. Outside of these meeting rooms, both government and communities across Liberia are working to strengthen their hand in the reform process. For the Government, this largely means strengthening the 'security sector' to maintain 'peace and stability' as it pursues its policy of transforming beliefs and behaviour. By contrast, for many communities, it means strengthening their capacity to engage with the Government and international actors to ensure they remain responsive in the process of reforming the legal system.

To this end, local and international non-government organisations are working to empower Liberians as both subjects and authorities of law. The two most prominent NGOs working in this field of 'legal empowerment' are The Carter Center in Liberia and the Liberian Catholic Justice and Peace Commission. These two organisations work in partnership to provide legal advisory and dispute resolution services in communities, and to strengthen traditional leaders' dispute resolution capabilities. Whilst The Carter Center provides financial, technical, and capacity-building support to the Justice and Peace Commission, primarily in the form of 'monitoring and mentoring',[57] the Justice and Peace Commission engages directly with Liberians through its nation-wide network of offices and local staff. The major component of their 'legal empowerment' work takes place through their Community Justice Advisor program, a para-legal service that employs and trains

[57] See The Carter Center, *Handbook for Civil Society Partners — Community Education and Awareness Program on the Rule of Law* (Monrovia: TCC, 2008). See also Walter Leitner International Human Rights Clinic, *A Handbook for the Justice and Peace Commission: Best Practices of Community Legal Advice Programs, Program Assessment and Recommendations* (Fordham Law School, 2008), commissioned by The Carter Center and the Justice and Peace Commission.

local Liberians to provide free legal education, advice, and dispute resolution services to towns and remote communities throughout Liberia.[58]

The Carter Center and the Justice and Peace Commission are not alone in this work. In the area of land, the Norwegian Refugee Council pioneered a highly successful community-based dispute resolution and legal education program, and the Liberian Sustainable Development Initiative has been at the forefront of policy development on land rights and dispute resolution. Other local and international NGOs are carrying out similar work in the area of human rights.

What brings these otherwise distinctive organisations together is their approach to law's pluralism. At the heart of their work is a motivation to 'bridge the gap' between different systems of law, by increasing Liberians' knowledge of and material access to the national legal system whilst at the same time supporting community legal systems. As two practitioners who worked on the Access to Justice Project for The Carter Center in Liberia explain:

> Legal empowerment can promote locally-driven processes of change capable of supporting peaceful and equitable outcomes in the near term, while simultaneously enabling citizens to influence institutional structures. Prioritizing support for legal empowerment represents an alternative and complement to the supply-side paradigm that is currently dominant in Liberia. Rather than taking a top-down, Monrovia-centered approach, supporting legal empowerment can provide a means to incorporate community aspirations into justice reform.[59]

Such 'legal empowerment' thus seeks to bring about social change from 'within and below', transforming the legal landscape in a way that respects and even strengthens local legal systems (promoting 'locally-driven processes of change […] to begin to meaningfully incorporate community aspirations into justice reform').[60] At the same time, it has a missionary agenda: to bring about normative transformation according to a modern-liberal understanding of right. Just as the organisers of the 2010 Access to Justice Conference were selective in their response to what 'legal system reform' might look like in a modern nation-state—tolerating the idea of bringing other systems of law within the national legal

[58] See also Chapman and Payne, '"You Place the Old Mat with the New Mat"', 26.

[59] Ibid. On legal empowerment, see also Stephen Golub, 'The Legal Empowerment Alternative', in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed Thomas Carothers (Washington: Carnegie Endowment for International Peace, 2006).

[60] Chapman and Payne, '"You Place the Old Mat with the New Mat"'.

system so long as they are harmonised with it in the process—the organisations working to support legal empowerment in Liberia are selective in what can be 'empowered'. And the limit of their toleration is more or less the same, based on a particular view of what they deem normatively acceptable. In short, if 'legal empowerment' is directed at bridging the gap between local and national systems of law, the 'bridge' is conceived as a one-way path to a liberal-modernity.

From my conversations with the members of the organisations working on such legal empowerment, it is clear that their vision is circumscribed by a commitment to human rights as the standard of what is acceptable,[61] and by a concept of the state that admits only one legal system within which all expressions of law must eventually be harmonised. This vision of 'legal empowerment' hardly diverges from that of the Government and Western international interveners, and in this sense remains 'over-mediated' to the extent that it is under-written by an agenda to transform the minds of Liberians according to an other normative disposition. There is a difference, however, in how the 'legal empowerment' actors are trying to realise their mission, by providing Liberians with information through education campaigns and material access to the institutions of government.[62] Another difference is the involvement of Liberians. The Carter Center, the Justice and Peace Commission, the Norwegian Refugee Council, the Sustainable Development Initiative, as well as others working on 'legal empowerment' in Liberia, could not do this work without Liberians responding to their offers of support. Many Liberians that engage with these organisations want to influence the changes taking place in their country 'from within and below'.[63] In this way, 'legal empowerment' is dependent on the organisations being responsive to the communities they are motivated to transform.

These differences matter. Whilst the members of the organisations with whom I spoke were unapologetic about their organisations' missionary agenda, what that actually means, at this point in history, is not obvious. The parallel with the nineteenth-century colonial mission to civilise Africa, and the use of equivalent 'legal empowerment' and 'rule-of-law reform' interventions to realise that vision, is striking. But the conclusion that what is taking place in post-war Liberia is

[61] See the discussion of the perceived inevitability of human rights in Part 3 of Chapter 6.

[62] See, eg, the handbooks in note 57 above.

[63] On the notion of working from 'within and below', see discussion in Part 1 of the chapter. On Liberians' desire to influence the changes taking place in their country, see also Part 3 of Chapter 6.

simply a neo-colonial intervention is complicated by the fact that the current process in Liberia is being led in fundamental ways by Liberians, 'from within and below'. A powerful example is the women's movement in Liberia. Throughout the country there is a broad constituency of women aligned with the national and international intervention to end 'onerous customary practices', such as female genital cutting, and more broadly patriarchal domination, which finds expression in the high rates of violence against girls and women by men. For these women—who greatly influenced the election and re-election of Ellen Johnson Sirleaf to the Presidency in 2005 and 2011[64]—the national legal system holds out the potential to provide a critical medium for challenging oppressive community norms and articulating another vision of how they can continue to be together with men.

Thus 'legal empowerment' is about working with Liberians to bring about a normative shift that is already taking place but remains contentious—to bring about a transformation 'from above' that is already under-way 'from below' but by no means resolved into any broadly accepted normative position. Because 'things have changed', because 'you can't go back'[65]—but even more importantly, because most Liberians do not *want* to 'go back'—the problem becomes as much or more of an internal struggle over how a people ought to continue to be together in society.

3 Facing the contradiction

The fact that the national legal system articulates normativity in a way that remains fundamentally disconnected from most Liberians is compounded by the fact that the national legal system is also severely dysfunctional. This is especially problematic in a post-war state with a growing demographic who are neither part of the 'traditional-customary' world of their parents nor part of the 'modern-liberal' world of Liberia's ruling class. This includes a generation of young men and women who fought in the wars, and more generally youth born since the 1980s. Without effective and responsive social structures capable of articulating their normative disposition, Liberia now faces a situation where subjects are giving expression to the law for themselves.

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[64] See African Women and Peace Support Group, *Liberian Women Peacemakers* (Trenton: African Women and Peace Support Group, 2004).

[65] See Part 3 of Chapter 6.

This is manifesting in two ways in particular in post-war Liberia. The dysfunctional national legal system opens law up to become a terrifyingly violent expression of 'mob justice'. However it also opens law up to unofficial mediation, which points to the possibility of a genuinely responsive legal system. I examine these two situations in the following two sections.

A Mob justice

The structural problems in the national legal system discussed at the 2010 Conference on Access to Justice are symptomatic of a legal system that is seriously under-mediated: unaffordable, inaccessible, and untimely; non-transparent and un-accountable; and generally ineffective in 'delivering justice'.[66] The Liberian National Police is no exception. Rated by Liberians in national surveys as the most corrupt institution of government, the police force is not only dysfunctional but also exploitative.[67] At the same time, incidents of mob violence have risen since the end of the war, spiking in 2013[68]—the same year that Human Rights Watch published its findings on police corruption.[69] Causation is hard to establish, but it would be naïve to see the incidents of mob violence that are becoming more and more common across Liberia as irrational outbursts disconnected from the dysfunction and corruption in the national legal system.

The rationality of 'mob justice', and its connection to the dysfunction in the national legal system, was pointed out to me during one of my trips in a bush taxi in the interior of Liberia in 2013, when a news report on the radio prompted three of my fellow male passengers to swap stories about their experiences with the national legal system. Their stories invariably ended with a line about how one could not expect to get justice from the police or the courts. When I asked how they *could* get justice, given the dysfunction in the national legal system, they laughed: 'we have to get it ourselves'. They may have been laughing but they were not

[66] See also Isser, Lubkemann, and N'Tow, *Looking for Justice*, 3.

[67] See Human Rights Watch, *'No Money, No Justice': Police Corruption and Abuse in Liberia* (New York: HRW, August 2013).

[68] Author interview with UN official, 11 October 2013 (MU6). See also UN Doc S/2013/479 (12 August 2013), *Twenty-sixth progress report of the Secretary-General on the United Nations Mission in Liberia*; UN Doc S/2014/123 (18 February 2014), *Twenty-seventh progress report of the Secretary-General on the United Nations Mission in Liberia*.

[69] Human Rights Watch, *Police Corruption and Abuse in Liberia*.

joking. Throughout my stay in Liberia I read and heard reports on a regular basis of mostly young men responding in this way—'getting justice for themselves'—by burning trucks, buses or cars that had hit a motorcycle or pedestrian, or beating up thieves caught in the market. In one major incident in 2013, the members of the motorcycle transport union in Gbarnga, apparently fed up with criminal gangs operating in the town, responded by attacking the residential quarters where the 'criminals' lived. As a newspaper reported the incident:

> At least one person was reported dead and several others seriously wounded after motorcyclists went on the rampage in Gbarnga and its environs last Saturday destroying ghettoes. According to our Bong County correspondent the riot began after the motorcyclists visited a police station in the city in demand of a suspect detained for allegedly stealing a motorcycle which they claimed belong to a colleague of theirs. As police rejected their demand to turn over the suspect to them hundreds of them took to the streets of Gbarnga carrying cutlasses, axes and other metals destroying ghettoes on grounds that they were hide-ups for criminals.[70]

Less than two weeks earlier the police had held 'peace talks' with the same motorcycle transport union at the Gbarnga Regional Justice and Security Hub. For several years motorcycle taxi drivers—many of whom are former combatants who fought in the civil war as children and young men—had clashed with government security forces in Gbarnga (as well as elsewhere in the country). According to the President of the Bong Chapter of the Liberia Motorcyclist Transport Union, harassment by police was a major reason they had taken up arms, and the peace talks were intended to find a way to work together to maintain 'peace and stability'. Whilst the talks suggested a responsive approach to the problem, the dialogue nonetheless took place within the fortified walls of the Gbarnga Justice and Security Hub. That could send only one message, and it was the same message that the Minister of Defence issued in the lead-up to the threatened 'April 12' protest.[71] In a statement that sought to justify a threat he had made earlier to use lethal force against the protesters, the Minister of Defence declared:

> You can understand; when a Liberian says, 'I want to demonstrate' he has that right to demonstrate under the law, nobody stop you. We've had demonstrations here; you follow the provisions as stipulated under the law, you go and have your demonstration. But then when you hear a Liberian

[70] 'In Gbarnga Riot One Dead Several Injured', *New Dawn*, Monrovia, 23 September 2013.

[71] See discussion in Part 3 of Chapter 6.

> saying 'we will not stop until the Government comes down', what you want me to do? Put my hand in my back pocket and go and sit down?[72]

Figure 21. Front cover of a RAND Corporation report to the US and Liberian Governments[73]

Like the motorcycle transport unionists who threatened to give expression to the law on their own terms, and Liberians who felt they had to get justice for themselves through mob violence, the April 12 protest threatened something far more dangerous than a random act of massive violence. It threatened to give expression to a sense of right in an entirely negative form. As a newspaper commented, not even the 'positive intentions of the organisers' would be able to

[72] Wade Williams, '"No Apologies" – Liberia's Defense Chief Stands By Pre-April 12 Statement', *Front Page Africa*, Monrovia, 22 April 2013.

[73] [image omitted from digital version]

channel this demonstration through a 'lawful' protest.[74] The Defence Minister saw this threat, as did the police, when they made clear their own threat to use lethal means to maintain peace and stability. 'We are here to maintain peace', a police spokesperson reassured the public after a display of force in the days leading up to 12 April. 'The men wearing police uniform are here for peace. We are sending a message to those who think they can undermine the peace of this country.'[75]

Here too was 'peace talk' in response to the threat of Liberians giving immediate expression to their normative disposition in a way that would threaten 'peace and stability'. Without doubt the threat was of a short-sighted law—a *revolutionary* law—set against a short-sighted peace; but the extreme violence of this threatened act of articulation was a response to the extreme violence of the 'peace'.

Despite the violence of this state of peace, in the end the April 12 protest was called off. For a majority of Liberians, who know from experience the terrifying destructiveness of war and revolution, it was still preferable to face the contradictions inherent in this state/State of peace and that are felt with such violence by the majority on a daily basis than to be again subject to a revolutionary law. This was a passionate, knowledgeable and indisputable preference to begin again on 13 April by facing the contradiction of peaceful violence secured through the rule of law rather than return to the rule of mob justice.

B Peace-builders

It is in this preference to face the contradiction on a daily basis, rather than through a revolutionary event, that Liberians are realising the ethical possibility of law. Largely out of sight of the national legal system reform process and the Government's concern with harmonising expressions of the law, communities throughout Liberia are engaging in a more radical process of mediating the articulation of normativity in a way that makes difference the basis of the law.

These mediators are the every-day 'peace-builders' found throughout Liberia, in each town and village,[76] working to re-build relationships between

[74] 'Observing the Law in Protest', *New Democrat*, Monrovia, 1 April 2013.

[75] 'Police Flex Muscles', *New Democrat*, Monrovia, 8 April 2013.

[76] At least in every place I visited.

people whose shared histories are of intimate friendship and violence. Women's leaders, youth leaders, religious leaders, elders, concerned members of the community—whether 'up-skilled' in Alternative Dispute Resolution by Western interveners, or drawing on their own knowledge and experience as members of legal traditions that long pre-date the West's 'discovery' of ADR—it is these women and men who are facing the contradiction on the ground in Liberia. These diverse Liberians share an awareness that their communities, and by extension the nation, can only continue to be together as communities and a nation if the cleavages that run through them are made the basis of the law.[77]

The differences between the approach taken by these 'peace-builders' to law, and the approach taken by the national legal system, are deeply considered and discussed throughout Liberia. One reason is that the differences mirror the differences between 'indigenous' legal traditions in Liberia, which are often described as restorative, and the Anglo-American Common Law tradition that was introduced by the American Colonisation Society and African-American settlers and that informs the national legal system. As discussed in Chapter 6, the main difference is between a restorative legal system that is based on compromise and community wellbeing and a concern for the past and future, and a national legal system that seeks a determination of individualised blame and remedy through an oppositional trial process concerned only with a temporally limited set of facts. To quote a veteran peace-builder in the northwest of Liberia who discussed these differences with me:

> If we are in court, the law is talking about what I did, and to quote the law that I was wrong, and I'm guilty. And I have to go to jail for 30 years, or pay a fine of one million dollars. And then the judge is finished with it. He is not looking at the future, what will happen—even with reference to your generation and the next man's generation. […] The legal system seeks to promote the organic law of the land. It's the law that they are protecting, the Constitution. If you kill, you must be killed. There is no compromise. [By contrast, our approach] is looking at relationship-building between the parties, their children. These people came from the community, they are going to be living together, they are mourning. [Our approach is to have] both parties sit down together, look at the positive side of one another in the community, before coming over to where they had a misunderstanding. [We

[77] Compare J Wood, C Shearing, and J Froestad, 'Restorative Justice and Nodal Governance', *International Journal of Comparative and Applied Criminal Justice*, vol 35, no 1 (2011).

> then focus on] how do they work together to make their future brighter, for the benefit of their offspring.[78]

I met many others who echoed this understanding of the different approaches to law, and they were not just Liberians with a vocation in community peace-building. Government administrators, as well as official legal and para-legal officers, frequently made the same point in conversations with me. This may not be a comprehensive sample, but it reflects the broader pattern of evidence about how Liberians think about the relationship between law, justice, and peace. It also highlights the fact that 'ADR' increasingly is being promoted and advanced as part of the national legal system, despite strong resistance from the national legal profession. This is remarkable because it suggests a critical turn within government towards an approach to law that has the potential to realise its ethical possibility within the legal system as well as through the work of community peace-builders.

Thus at a point in history when Liberia is facing its contradictions in a way that it has not before, perhaps the most critical work is being done in communities throughout the country in every-day acts of mediation. At the same time as the Government is beginning again to reform the national legal system—seeking to harmonise expressions of law under the Constitution of the Republic, whilst strengthening its enforcement through the security sector—in an effort to overcome the contradictions that are seen to be the cause of conflict, these community-based peace-builders are doing the opposite. The elder quoted above described the law that emerges in the process of the community peace-builders' mediation when he spoke of how 'both parties sit down together, look at the positive side of one another in the community, before coming over to where they had a misunderstanding'. Facing one another, the parties articulate how they can continue to be together. The 'parties', however, are not just the individual disputants but also the community members who have been divided by the cleavage that is manifesting through the disputing individuals. That is why the mediation takes place in the most public place—such as a palava hut—with the community inseparably a part of what takes place.

This system of law is not about resolving conflict by providing an answer either this way or that way, in favour of this outcome or that outcome. (By law: 'it

[78] Author interview with elder and civil society actor, 16 September 2013 (Li25).

is this'; or by law: 'it is that'.) Such an approach, which characterises the national legal system, denies the contradiction between *this* and *that* and makes that denial the basis of the law (thus the judge rules: it is *this* and *not that*). As Liberians repeated to me again and again, the law that emerges from the national legal system is set against peace. It delivers 'justice' by resolving the confusion analytically, dividing 'right' from 'wrong', the 'right party' from the 'wrong party'. But as the elder made clear, if the ethical possibility of reconciliation is to take place, there must be a *coming over*. What is 'wrong' must be included within the very definition of what is 'right', so that what is 'right' can become the law in light of the fact that at its heart is a 'wrong' that cannot be dissolved and must live on through the law.

4 Conclusion

After a decade of peace, and more than three decades after the overthrow of the First Republic, Liberians are reforming their national legal system in the process of establishing a state based on the rule of law. In doing so, they are facing a contradiction in the rule of law that holds the potential to return the nation to war, but also to realise the ethical possibility of being together post-war. On one hand, Liberians are seeking to bring about radical social transformation through the national legal system; on the other hand, Liberians are demanding fundamental reform to this system, to make it better reflect them; whilst out of hand—outside of the national legal system—Liberians are mediating the articulation of normativity in their own ways. In every case, law, force and justice are at play; and in every case Liberia is in a truly revolutionary position of beginning again.

The aim of this chapter has been to examine how a legal system might articulate normativity in ways that make law more or less reflective and more or less transformative. The critical question, however, is not whether the intention is to bring about normative change according to law or to make the law better reflect the normative dispositions of its subjects. For one, 'the law' as expressed can never be at one with its object, that is, the experience of its subject. Moreover, whilst the contradiction opens law up to being an instrument of domination, it also makes law potentially emancipatory, by providing a means for breaking through oppressive norms and articulating different ways of being together. Thus the

critical question is not whether the intention is to make 'the law' more or less reflective or transformative, because neither outcome can be entirely avoided, and moreover, neither outcome is necessarily good or bad in itself. What is *critical* is how responsive the process of articulating normativity is. This is the critical concern of a legal system: not with *what* takes form as 'the law', but with *how* the articulation of normativity is mediated. Under-mediated, the system is incapable of structuring the process of articulation; over-mediated, the legal system is unconcerned with remaining responsive to its subjects; and either way, what takes form as 'the law' becomes an arbitrary expression, and potentially terrifyingly so.

I began in Part 1 of the chapter by examining how law can be mediated in ways that make the law more or less transformative and more or less reflective, to the point where law becomes an instrument of domination or a lawless outburst—but also potentially a critical medium of peace-building. With this in mind, I examined in Part 2 how the Government of Liberia is beginning to reform the national legal system post-war. The view was of a national legal system that is being reformed in a way that risks making it both a medium for a modern-liberalist agenda for transformation and an instrument of domination, with a strong state security sector enforcing through brute force the liberalist regime. According to the logic of this regime, every recognised subject is seen to be equivalent, reducing them to an empirical individuality that denies their subjective differences. As an 'empirical individual', the subject becomes the object of a universal subjectivity that makes it not only legitimate but a categorical humanitarian imperative to assist in developing it to its full potential as such. On this logic, legal pluralism is seen as a problem that will be transcended as subjects gain access to the system of the one true and just law.

As I also showed in Part 2, the state security sector, with its 'justice-chain' of police, courts, and corrections facilities, is being developed to facilitate access to this justice throughout Liberia. At the same time, international and national non-government organisations are assisting Liberians to gain access to this justice through 'legal empowerment'. Like the Government's vision of an enforced transformation, there is little doubt that their agenda is also transformative, informed by a modern-liberalist logic; and yet they remain responsive to the communities they are seeking to empower. Indeed, in many instances, community members are leading the transformation, as I showed in the case of Liberian

women who are using international human rights law to overcome gender violence.[79] The result, nonetheless, is reform to the national legal system that risks making the national law an over-mediated instrument of transformation. That the push for change is coming both 'from outside' and 'from within' does not make this law any less over-mediated.

At the same time, as I examined in Part 3 of the chapter, the national legal system remains dysfunctional, marked by corruption of the police and courts, as well as rising incidences of mob violence. Both, I argued, are expressions of under-mediated law, in which the law is taking form in terms of the will of the expressive subject who articulates 'the law'. Alongside this, however, outside the national legal system communities are also mediating the articulation of normativity in ways that make the process of law more genuinely responsive. What is critical about these community 'peace-builders' is not the law that takes form in the process, but *how* they make conflict the basis of a legal resolution. The 'peace' they work to uphold every day is a peace riven by conflict. The aim is not to overcome the conflicts that separate individuals, families, neighbours, communities—the aim is to recognise that living together in Liberia means living inseparably apart.[80] More specifically, it means ensuring the law is not simply 'this', but that 'the law is this' always in respect of the fact that it is also *not* 'this'. To recall the elder, this means crossing both ways: 'both parties sit down together, look at the positive side of one another in the community, before coming over to where they had a misunderstanding.' Crossing both ways, what is wrong is included *within* what is right. Without doubt the result is unstable—but that is why Liberians are beginning again each day to face the contradiction.

[79] For similar cases, see also Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

[80] See Valeria Vázquez Guevara, 'Reconciliation in the Basque Case: Will they live happily ever after?', *Oñati Socio-Legal Series* (forthcoming).

PART III

Conclusion

death and life of the rule of law

1 Portrait of the thesis

Figure 22. Painting of Liberian women by F B Yekehson (Zorzor, Liberia: 2010)

In the course of researching this thesis I stayed several weeks in the small town of Zorzor. Each day I would spend several hours sitting in the street-side tea shops that line the town's dusty, and more often muddy, main road. These open-air tea shops are usually little more than a zinc roof nailed over three wooden walls, with stools and sometimes a table or two, serving a variety of teas, including a local favourite, Chinese Gunpowder Tea (the ingredients of which I never quite worked out, but it seemed to keep the motorcycle-taxi drivers going all day, and long into the night), along with excellent percolated coffee, baguettes, and eggs in any style. Across Liberia these tea shops provide the meeting place for mostly men to gather throughout the day, to discuss current affairs, debate intellectual puzzles ('what is the difference between respect and fear?', 'what do Liberians have in common?', 'how can you have the rule of law when we don't even know our own laws?')—the men coming and going, joining a common table to listen or standing at the head lecturing to the group; or else questioning a stranger. After a few days in these tea shops, there would not be a person in town who was not aware of my presence. Such familiarity bred curiosity, making conversations and interviews much easier.

Alongside one of these tea shops in Zorzor is an art gallery. It too is little more than a zinc roof with three wooden walls. The owner, who is also the artist, is a man of very few words, and I never heard his story. But one of his small water-colour paintings caught my eye. It shows five women who appear to be walking together, their bodies identified in bold black outline and yet remaining amorphous, blending in to each other as well as into the background; whilst the background, which is also the foreground, is a montage of colourful block-like strokes, at once firm expressions, precise in their measure, and yet a messy patchwork, with the blocks overlapping and leaving gaps exposed. *Here* is the thesis I had come to Liberia to examine; here is an image that expresses the life of law's rule.

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This is a portrait of the dialectic of law and normativity that animates law's rule, seen from the vantage of a tea shop.

To be more precise, this thesis is both a general argument about the rule of law as a common experience, animated by a dialectic of law and normativity, and a portrait of that dialectic as it plays out in the rule of law in Liberia. More than that,

this thesis is an argument for an approach to research that engages both the empirical and the imaginary.

Consider again the painting by Yekehson of the Liberian women (Figure 22). Its significance is not merely its illustrative quality. The painting *is* illustrative, but its significance is also the painting's form as an artwork. Even more, its significance is what the social scientist might learn from the method of analysing the artwork. To understand this is to understand the three main arguments that run through this thesis.[1]

Thus as an illustration, Yekehson's painting can be seen as a portrayal of the dialectic of law and normativity that I have argued animates law's rule in general. The dialectic, examined in the abstract in Part I of the thesis in answering the question of what takes place in the rule of law, can be seen in the relation of the montage of block-colours, on one side, and the amorphous social grouping, on the other. Like the blocks of colour, expressions of the law provide a social-structural background/foreground, although there is no easy analytical separation. The relation is dialectical, with law giving form to the social body, as well as to the individual bodies, and everything else besides, whilst the shifting dispositions of the bodies gives form to law. To see this is to see how law gives form, *vividly*, and how law takes form, *socially*, in a dialectic between the act of articulation and what is being articulated.

In this, a dialectic might be seen to connect the forms of expression and the amorphous subject of the portrait, without the two finally merging or remaining entirely separate. It is this irresolvable contradiction that enlivens law's rule. But much is missed if this portrait is seen ahistorically, as an empty signifier. Yekehson's painting expresses horror and heartbreak. Blood is everywhere. It soaks the women's hair. It smears their faces. It covers their bodies. The women walking together appear as ghosts, spectres of the recent wars that tore Liberia apart. This does not make the painting merely an illustration of the past, any more than it simply presents an image in empty and homogenous time and space. It is precisely as *spirits* that the women in this painting remain, as much part of Liberia now as the empirical individuals who continue to recall their names.

[1] As noted in the previous paragraph, these three arguments are on (1) the 'form' of the rule of law as a common experience, (2) the 'substance' of the rule of law in Liberia, as well as (3) the approach to the study of the rule of law. See also Part 1 of the Introduction where I introduced these three lines of argument.

I have argued that the importance of the approach I take in this thesis is that it makes law essentially plural, by bringing and keeping law in dialogue with the subjects who enliven its forms as a normative matter. By approaching law as only really meaningful, or 'whole', when seen in relation to its subjects, pluralism becomes law's essential condition. But this is not only true of *present* expressions of law, as if law only takes place on a horizontal-spatial plane. As can be seen in Yekehson's painting, present expressions are not enlivened by subjects isolated in time. What *has been*—historically—informs the present, mediating how it is now, just as historical representations are mediated through-and-through by the present and can only be grasped as contemporary figurations of what has been.[2] Just as there is nothing historical that is not a matter of the here and now, there is nothing here and now that is not a matter of history.[3]

Like Yekehson's painting, there is a temporal depth to law, a temporal legal pluralism, that makes what has been part of its expressions now.[4] It is this temporal dimension that makes the question of 'what is taking place' in the rule of law an historical question as much as an empirical one.[5] If the *empirical* problem is that the rule of law cannot be finally separated from the rule of humans here and now, then the *historical* problem is that law's rule here and now cannot be

[2] Writing on his historical-materialist methodology for *The Arcades Project*, Benjamin notes: 'It is not that what is past casts its light on what is present, or what is present its light on what is past; rather, an image is that wherein what has been comes together in a flash with the now to form a constellation. In other words: image is dialectics at a standstill. For while the relation of the present to the past is purely temporal, the relation of what-has-been to the now is dialectical: not temporal in nature but figural <*bildlich*>. Only dialectical images are genuinely historical—that is, not archaic—images.' Walter Benjamin, *The Arcades Project*, trans Howard Eiland & Kevin McLaughlin (Cambridge: Belknap Press, 1999), 463.

[3] Whilst it is a dialectical image that is illuminated in this discursive construction of history, this is nonetheless 'genuinely historical', against the 'vulgar historical naturalism' that lays claim to history by amassing facts and 'establishing a causal nexus' between them in 'empty and homogenous time': see Walter Benjamin, 'On the Concept of History', *Gesammelte Schriften*, vol 1, no 2 (1974): Adendum A. See also Benjamin, *The Arcades Project*, 461-462. Compare this with the approach to history influenced by Quentin Skinner that 'dominates Anglophone history today', according to which 'historical texts must not be approached anachronistically in light of current debates, problems and linguistic usages or in the search for the development of canonical themes, fundamental concepts or timeless doctrines': for discussion see Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law', *Institute for International Law and Justice Working Paper 2012/2* (2012).

[4] On law, time, and visual representation, see Desmond Manderson, 'Blind Justice', in *McGill Companion to Law*, ed A Popovici and L Smith (online: 2015). On time and legal pluralism, see also Keebet von Benda-Beckmann, 'Trust and the Temporalities of Law', *Journal of Legal Pluralism and Unofficial Law*, vol 46, no 1 (2014).

[5] See also Austin Sarat and Thomas R Kearns, 'Writing History and Registering Memory in Legal Decisions and Legal Practices: An Introduction', in *History, Memory, and the Law*, ed Austin Sarat and Thomas R Kearns (Ann Arbor: University of Michigan Press, 2009).

separated from what has been. Just as spirits mediate life in Liberia,[6] the spirit world mediates the life of law's rule. Indeed, the rule of law cannot be separated from the rule of humans any more than it can be separated from the rule of spirits. When the Liberian elder spoke of including what is wrong within every expression of right,[7] he understood this: that there is a temporal depth to law that makes the spirit world part of law's rule no less than the empirical confusion that makes law always also not law on the ground. Whether they are the spirits of the civil dead, whose bodies have been decimated by the logic of capital; the spirits of the civil wars, whose bodies have been laid to rest; or the spirits of the living dead, whose bodies, yet to be buried, defy—and even *mock*—the frameworks that confine them: these spirits mediate expressions of law.

Recall the scene in Liberia's Central Prison, where the thesis began.[8] Recall the drawing on the prison wall: an exact representation of the Liberian coat of arms, with its image of a ship sailing towards the west African shore carrying the 'free people of colour of the United States' who would establish what would become the Republic of Liberia. Hanging over this coat of arms was a slightly larger than usual banner—and here, I suggested, the prisoner's hand must have lingered a moment, a flicker of a smile must have crossed his face, for a moment, if not a burst of laughter, shaking the foundations of the Central Prison as he reprinted the line: 'The love of liberty brought us here'.

This was an act of articulation that confronted an institution of law with its history, that placed this history in juxtaposition with the material reality of this institution. The prisoner's drawing requires this history to be seen from the perspective of the prisoner within this institution; but it also requires this institution to be seen from the perspective of this history. The effect is to place the institution in history—to make it a matter not only of the here and now but also a matter of what has been. The effect is also to draw out the history from the institution—to make the history of Liberia a matter of what is taking place here and now.

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[6] See also M C Jedrej, 'Cosmology and Symbolism on the Central Guinea Coast', *Anthropos*, vol 81, no 4 (1986); William C Siegmann, 'Spirit Manifestation and the Poro Society', *Ethnologische Zeitschrift Zürich*, vol 1 (1980).

[7] See Part 3 of Chapter 7.

[8] See Prelude.

What this historical-materialist analysis points to is a fundamental contradiction, writ large on the prison wall, concentrating the ironies of the rule of law in Liberia in one scene. Here is the nineteenth-century vision of liberty that resulted in civil death for the majority of Liberians; here is the ship chartered by the American Colonization Society that brought the *Constitution for the Government of the African Settlement at* , which made the law of Liberia a littoral one *par excellence*,[9] its lawfulness requiring a restless process of talking and talking back; and here they are, represented on the inside of a cell-block of Liberia's Central Prison—a fortification designed to secure a state/State of peace by containing within it any body that contradicts its logics. This drawing is an act of articulation of a living-dead man, playing with the logics that frame him in the most concrete way. This is an act of talking back that confronts the institution of the rule of law with the spirits of Liberia's capitalist-colonial history.

As a Liberian portrait of law's rule, the aim of Part II of the thesis was to show how all of this is at the beating heart of the rule of law in Liberia. As I said in introducing the thesis, it is in the refuse of scattered off-cuts that the crystal of the totality is to be discovered; not the totality *itself*, but in the assemblage of the smallest and least remarkable data, a composite that refracts a dialectical image of it.[10] The dialectical image of the rule of law that I have sought to illuminate through this discursive configuration may not be 'the rule of law' as it is known by its concepts. And yet it is by representing the life of law's rule configuratively, through the imaginative work of the scholar, that one might obtain an image of it that is *more real* than these concepts admit on their own. That is what I have attempted to create, portraying through a constellation of scenes the life of law's rule in Liberia.

But this thesis is not only about Liberia. It is also a general argument about the rule of law as a common experience. In its *form* as an artwork, the painting by Yekehson suggests how this thesis can be about both—how it can be both a singular portrayal of the rule of law in Liberia, enlivened by humans and spirits alike, as well as a generic argument about the life of law's rule. As I have sought to

[9] As discussed in Chapter 4, Manderson and van Rijswijk describe littoral spaces as 'heightened and active, places of contested imaginaries'—'an environment of flux and change *par excellence*'; Desmond Manderson and Honni van Rijswick, 'Introduction to Littoral Readings: Representations of Land and Sea in Law, Literature, and Geography', *Law and Literature*, vol 27, no 2 (2015): 174. On littoral law, see also Desmond Manderson, *Kangaroo Courts and the Rule of Law* (Oxon: Routledge, 2012), Chapter 10.

[10] See Part 2 of the Introduction.

show here, Yekehson's painting expresses a content that is singular, being of a particular time and place and experiences of that time and place that are without equivalence; and yet its form leaves its content open to be seen in the light of different times and places and experiences.[11]

This also demonstrates the methodology of the thesis, in its attempt to bring a humanities approach to bear on sociological research in a way that engages both the empirical and the imaginary. In the same way that an image might be analysed to see how its form makes a work of expression both singular and generic, expressing a particular material history without the two becoming identical, so too might law be analysed, as an expressive form that articulates normativity without its expressions becoming identical with its object, that is, the experience of its subjects.

2 Law's rule in Liberia (or elsewhere)

'What more has to be studied? You don't need to do more research to see that the justice system is broken here'.[12]

The challenge I took up in this thesis was to see how law's rule is enlivened by a struggle to make law predominant over its subjects at the same time as law is given form, and takes form, in and through those subjects' lives and interactions. And the challenge was to do this in a way that speaks to the prisoner in his cell—speaks to him directly, face to face, providing an answer to his question that finds its justification in that exchange.

The answer I have put forward in the thesis is that this study matters to you, who remains abject before the law, because it makes your experience *critical* to law's rule, in both positive and negative senses of the word. Positively, your experience *constitutes* how the rule of law is taking place—law's rule always taking place in and through its subjects.[13] But for this very reason, negatively, your experience also *critiques* how the rule of law is taking place. Thus the 'more' that

[11] See also Desmond Manderson, 'Bodies in the Water: On Reading Images More Sensibly', *Law and Literature*, vol 27, no 2 (2015).

[12] See Prelude.

[13] In this positive sense, to be 'critical' means to be 'decisive, crucial', 'to determine or decide': see entry 6 for 'critical, *adj*.', OED Online, March 2016.

needs to be known is your experience, cut short by the law, but which law must remain responsive to if its rule is not to become synonymous with death.

Law's rule may not avoid the grim association with death, but the two are not identical.[14] Against the absolution of death, law's rule holds out the possibility of a *living* death. This is not necessarily a hopeless condition. As the studio portraits by Joseph Moise Agbodjélou and Leonce Raphael Agbodjélou suggest,[15] and as the prisoners in Liberia's Central Prison show, the living dead are never mere bodies but always also subjects capable of critical acts of articulation, no matter how well an institution succeeds in containing their expression. Against the logics of capital, security, or a liberal-internationalist regime that would reduce the subject to an exchangeable object, the subject remains, until finally death comes. But at that point, too—*in* death—law has no power, and ceases to rule.[16]

The implication for theory is that the rule of law might be seen as a medium for subjects to give expression of themselves, without the law becoming identical with its subjective expression. Neither over-mediating nor under-mediating expressions of law, law's rule mediates a contradiction that holds the potential to make law both dominating and emancipating. This is what distinguishes the *rule* of law from *law*. It is the governance of the articulation of normativity. And like any form of governance, the ethical potential of law's rule is its responsiveness to subjects, which requires remaining consistently conscious of the contradiction that leaves subjects abject before the law whilst leaving law open to them.

The negative-dialectical approach that I have sought to model in the thesis allows one to appreciate this, the chasmic structure of law, whereby law is simultaneously singular, incorporating all subjects within jurisdiction, and plural, taking place in non-identical ways, enlivened by the subjects over whom law rules. More critically, this approach enables one to analyse the different responses to the contradiction—to see how these responses inform the rule of law, and how the rule of law provides a medium for them to take place. This is important for understanding law and its rule as a common experience, but it is especially

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[14] See Austin Sarat, 'Introduction: On Pain and Death as Facts of Legal Life', in *Pain, Death, and the Law*, ed Austin Sarat (Ann Arbor: University of Michigan Press, 2001). This also returns to Mbembe and how expressions of sovereignty can create 'death worlds', 'in which vast populations are subjected to conditions of life conferring upon them the status of *living dead*.' Achille Mbembe, 'Necropolitics', *Public Culture*, vol 15, no 1 (2003): 40 (italics in original).

[15] See Part 3 of Chapter 4.

[16] See Sarat, 'On Pain and Death as Facts of Legal Life'.

important when it comes to the question of what is taking place in the rule of law in particular cases.

The implication for practice is that this provides an approach to instituting the rule of law that opens the concept to the non-conceptual, making the living realities of law's rule critical to the conceptual schemas deployed to institute it. This provides an approach to the problem of instituting the rule of law in situations of social diversity that makes difference *essential* to law's rule. This is in contrast to approaches that seek to erase from law all traces of pluralism, or, where differences in law are recognised, that seek to establish a hierarchical Constitution that places 'other law' in a position of subordination to a higher (national) law, with any contradiction resolved in favour of the higher law. It is also in contrast to approaches that seek to establish a radical separation of law, seeking to avoid contradictions in law by decentralising legal authority. None of these approaches takes seriously the challenge posed by law's pluralism, which cannot be wished away any more than it can be overcome through the establishment of a hierarchical constitutional system or the decentralisation of legal authority. Law's pluralism remains in any case because it is the condition of law in its every expression.

At a time when international organisations, governments, as well as non-government organisations and civil society actors are working to build the rule of law around the world,[17] understanding this could not be more important. For those who repeat the mantra, 'context matters', this is what it means to take context seriously; for those who care about understanding 'rule of law cultures',[18] *this* is the cultural life of law's rule.

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[17] See Per Bergling, Jenny Ederlöf, and Veronica Taylor, eds, *Rule of Law Promotion: Global Perspectives, Local Applications* (Uppsala: Iustus Förlag, 2009); Jeremy Matam Farrall and Hilary Charlesworth, eds, *Strengthening the Rule of Law through the UN Security Council* (Oxon: Routledge, 2016); Laura Grenfell, *Promoting the Rule of Law in Post-conflict States* (Cambridge: Cambridge University Press, 2013); Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge: Cambridge University Press, 2012); Charles Sampford and Ramesh Thakur, eds, *Institutional Supports for the International Rule of Law* (Oxon: Routledge, 2015); Richard Zajac Sannerholm, *Rule of Law after War and Crisis: Ideologies, Norms and Methods* (Cambridge: Intersentia, 2012); Michael Zürn, André Nollkaemper, and Randy Peerenboom, eds, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (Cambridge: Cambridge University Press, 2012).

[18] Compare McKay, Leanne, *Toward a Rule of Law Culture: Exploring Effective Responses to Justice and Security Challenges* (Washington: United States Institute of Peace, 2015).

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Appendix

interview list

Research for the case study involved six-months fieldwork in Liberia in 2013. Four of the months I was in Monrovia, and the other two months I was in the interior of Liberia. I also visited New York City to meet with staff in the UN Headquarters working on global issues of rule-of-law assistance.

During this fieldwork I conducted a total of 78 semi-structured interviews, listed in the following tables. All participants were promised confidentiality. For this reason, I only list their general position, the general location of the interview, and the date of the interview, with an identifying code.

In addition to these interviews, I had many other conversations that were not officially interviews but were no less informative. These cannot be quantified.

Monrovia, Liberia

Code	Position	Date
Government of Liberia		
MG1	Ministry of Internal Affairs	22 May 2013
MG2	Ministry of Internal Affairs	15 May 2013
MG3	Ministry of Internal Affairs	28 May 2013
MG4	Ministry of Justice	15 May 2013
MG5	Land Commission	14 August 2013
MG6	Land Commission	7 August 2013
MG7	Land Commission	14 August 2013
MG8	Land Commission	14 August 2013
MG9	Ministry of Internal Affairs	15 August 2013
United Nations in Liberia		
MU1	United Nations Mission in Liberia	24 May 2013
MU2	United Nations Mission in Liberia	24 May 2013
MU3	United Nations Mission in Liberia	15 August 2013
MU4	United Nations Development Program	19 June 2013
MU5	United Nations Development Program	30 July 2013
MU6	United Nations Mission in Liberia	11 October 2013
foreign government agencies in Liberia		
MB1	US State Department / Pacific Architects & Engineers	5 June 2013
MB2	US Agency for International Development	5 August 2013
MB3	German International Cooperation (GIZ)	12 August 2013
MB4	Australian Agency for International Development	8 October 2013
non-government organisations		
MN1	The Carter Center	9 April 2013
MN2	The Carter Center	13 April 2013
MN3	The Carter Center	6 August 2013
MN4	former legal adviser to The Carter Center	25 April 2013
MN5	Sustainable Development Institute	15 August 2013
MN6	Norwegian Refugee Council	16 August 2013
Civil society		
MC1	journalist	1 April 2013
MC2	researcher	14 May 2013

Interior of Liberia

Code	Position	Date
Li1	Ministry of Justice	26 August 2013
Li2	Rural Human Rights Activists	26 August 2013
Li3	Superintendent	10 August 2013
Li4	Land Commissioner	13 August 2013
Li5	City Mayor's Office	11 August 2013
Li6	Refugee Repatriation & Resettlement Commission	10 August 2013
Li7	Magistrate	12 August 2013
Li8	Magistrate	12 August 2013
Li9	Public Defender	9 August 2013
Li10	United Nations Mission in Liberia	10 August 2013
Li11	United Nations Mission in Liberia	9 August 2013
Li12	FIND	11 August 2013
Li13	Lofa Network of Local NGOs	7 August 2013
Li14	journalist	7 August 2013
Li15	youth leader, member of county Peace Committee	10 August 2013
Li16	journalist	30 August 2013
Li17	journalist	2 September 2013
Li18	Land Commission	29 August 2013
Li19	Paramount Chiefdom Clerk	2 September 2013
Li20	Paramount Chiefdom Assistant Clerk	2 September 2013
Li21	town leader	2 September 2013
Li22	Magistrate	2 September 2013
Li23	Police Commander	3 September 2013
Li24	City Mayor	16 September 2013
Li25	Lutheran Trauma Healing & Reconciliation	16 September 2013
Li26	City Mayor's Office	18 September 2013
Li27	Magistrate	19 September 2013
Li28	Ears for the Masses	19 September 2013
Li29	Paramount Chief	19 September 2013
Li30	United Nations Mission in Liberia	23 September 2013
Li31	Community Peace Hut	23 September 2013
Li32	Magistrate	24 September 2013
Li33	Magistrate	24 September 2013
Li34	Catholic Justice and Peace Commission	24 September 2013
Li35	Catholic Justice and Peace Commission	26 September 2013
Li36	City Mayor	26 September 2013
Li37	United Nations Mission in Liberia	26 September 2013
Li38	United Nations Mission in Liberia	27 September 2013
Li39	Land Commission	27 September 2013

New York City, USA

Code	Position	Date
NY1	United Nations Department of Peacekeeping Operations	20 June 2013
NY2	United Nations Department of Peacekeeping Operations	25 June 2013
NY3	United Nations Department of Peacekeeping Operations	25 June 2013
NY4	United Nations Department of Peacekeeping Operations	20 June 2013
NY5	United Nations Department of Peacekeeping Operations	17 June 2013
NY6	United Nations Department of Peacekeeping Operations	25 June 2013
NY7	United Nations Department of Peacekeeping Operations	22 June 2013
NY8	United Nations Department of Peacekeeping Operations	21 June 2013
NY9	United Nations Department of Political Affairs	26 June 2013
NY10	United Nations Development Program	26 June 2013
NY11	United Nations Development Program	27 June 2013
NY12	Human Rights Watch	18 June 2013