

## Narrative, nomos, world(s): Response to Van Marle

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### 1 Newness

How will 'newness' enter the world? By way of a story, of course.

When this newness concerns an erstwhile colony and political community emerging from apartheid, violence, civil war and social and economic fragmentation – the question is also about the contours of the 'political' itself. Van Marle's essay addresses this question of the political – the conditions of its renewal – through an examination of various orientations to lawful relations. She does this from the outset with knowledge that law is double-edged – it is at once law making and law destroying (jurisgenerative and jurispthic, drawing from Cover). Her reflections are not made in the abstract. There is nothing abstract about the relationship between law and the political. Laws have constituted and shaped communities, and generated enduring inequalities. There are specific peoples and places made by apartheid administrations: Mangaung, Thaba 'Nchu and Botsabelo. These proper nouns are emblematic of apartheid violence. They are the creation of law and politics – but also of fathers, mothers, kinfolk, churches, universities and associations. There is no easy separation of the public and private here. Mangaung, Thaba 'Nchu and Botshabelo are symbolic of a certain aftermath, enduring trauma and crisis of responsibility. What does Arendt's notion of 'natality' look like here?

### 2 Violence

How can newness operate as a principle, an orientation, when the pressing demand is that it emerges from violence and trauma? This is a question that is not specific to South Africa. Indeed, South Africa is often presented as having found the emblematic and politically optimum

compromise. Of course, the post-1994 resolution is far from perfect, and many have challenged the terms of that putative resolution. However, South Africa has been commended for managing to separate the 'nation' from the 'state'.<sup>1</sup> To not make this separation is to condemn the decolonial project to interminable violence. Why? Nations are the modern political form constituted by ethnicised and racialised majorities and minorities. You do not need to read Carl Schmitt to understand that the political decision *par excellence* is the division to be wrought between majorities and minorities in nationalist formations. There is no question that South Africa, like almost all other colonised territories, could have sought to replace the colonial racial state with a post-colonial racial state. The laws that control indigenous peoples in the United States, partition of the Indian subcontinent and resurgent Hindu domination, the civil war between Singhalese and Tamils in Sri Lanka, the war in Israel/Palestine are all enduring legacies of failing to separate the ethnicised nation from post-colonial states. This is not to say that all forms of colonial governance have been abandoned in South Africa. The ill-gotten wealth from colonial plunder has largely remained with the corporate barons and their new sponsors. Differentiations and hierarchies that colonisers conveniently called 'custom' have also survived and can be put to regressive use. However, the violence that ushered in the post-apartheid state allowed a new principle of political belonging to emerge.

### 3 Constitution

The South African political imaginary – and the fiction embodied in the Preamble to the Constitution that 'South Africa belongs to all who live in it' – suggests that the political violence that ushered in a new polity did not ventriloquise colonial modes of determining membership in political community. But for nativists, and those who believe that sovereignty has a quiddity to be lost, found, and recovered, the constitutional compromise was a betrayal of true emancipation. They are wrong. Sovereignty has no such substance that can be lost and regained.<sup>2</sup> Sovereignty interpolated through blood and soil has wreaked

1 M Mamdani *Neither settler nor native: The making and unmaking of permanent minorities* (2020) 334.

2 S Motha *Archiving sovereignty: Law, history, violence* (2018) chs 1 & 4.

havoc whenever it has been the operative principle of the political. What really is at stake is the criteria for membership in a political community. Equal citizenship is a liberal compromise where some are 'more equal', in reality, than others. The political frontier for undoing that perversity is not sovereignty but ongoing social and political struggle.

The problem that ought to be occupying the critics of the South African Constitution is that the political transformation was so heavily juridified through the language, discourse and practice of human rights. The new *nomos* of this world was to be given substance through rights. While it is true that the Constitution famously reached beyond the guarantee of civil and political rights to also include social and economic rights – this rights discourse has saturated political struggle across the world in a manner that stifles democratic contestation and transformation. It seems as if what rights cannot give must not even be dreamed.

The South African Constitution of 1996 embodied the juridical solutions to seventeenth century problems associated with European feudalism. Holding centralised power in check and creating a system of constitutional supremacy is the solution to the divine right of kings. It is true that post-colonial presidents and chiefs wedded to customary norms may also assert such divinities. However, the problems of being in the world today far exceed the theologico-political crises of early modern Europe to which the rights model is a solution.

It is in rethinking the role of the Constitution in constituting the political that the question of 'lawful relations' could make its cogent entry.

What does it mean to live lawfully in South Africa today? Whose life is mediated by this lawfulness? Do lawful relations extend, as it now must do, to the *non-human* as well as to those whose lives are cast by manifold forms of *inhumanity*? What about the juridical status of what is called *nature*? The most common alibi for the degradation of ecosystems is that it is corporations and not individuals that damage climate and planet. This ignores the fact that it is humans, in a highly skewed distribution of high to middle-income countries that consume the products of the capitalist growth model. In the Global South, it is all too easy to also point to the Global North as the most intense consumers. While it is true that the north has industrialised at the greatest cost to the planet, and North Americans and Europeans are among the greatest emitters of greenhouse gases (GHG) – OECD-FAO statistics demonstrate that the

African continent has the highest rate of rise of GHG emissions from meat on the planet, with Zimbabwe and South Africa among the highest *per capita* consumers of meat in the world.<sup>3</sup> Revisiting the hierarchical relationship between law and nature (*nomos* and *physis*) is now the most urgent task for jurisprudence. The interrogation of property in land must be extended to contesting property in animals with the same vigour demonstrated in the abolition of slavery.

#### 4 Storying the world

The Haitian-American scholar Michel-Rolph Trouillot wrote one of the most astute treatments of the role of narrative in history.<sup>4</sup> The debate that has raged in the humanities since the early 1980s in relation to history has concerned whether the historian can retrieve ‘facts’ to access an ‘event’, or whether narratives ‘construct’ the past. Trouillot rejected both these positions:

Between the mechanically ‘realist’ and naively ‘constructivist’ extremes, there is the more serious task of determining not what history is – a hopeless goal if phrased in essentialist terms – but how history works. For what history is changes with time and place or, better said, history reveals itself only through the production of specific narratives. What matters most are the process and conditions of production of such narratives. Only a focus on that process can uncover the ways in which the two sides of historicity intertwine in a particular context. Only through that overlap can we discover the differential exercise of power that makes some narratives possible and silences others.

What exercises of power make some narratives possible? Post-apartheid South Africa had a powerful institution to produce a particular history of the past in the form of the Truth and Reconciliation Commission (TRC). While the narratives that emerged were contested both then and now, it has left an edifice, a monument to the past, that will in time be braided with other stories. These will be the stories of homes and cities, urban and rural, personal and institutional, that will be accessed to give an account of what is now. What processes determine when a story can be told? What power enables that telling, and what is silenced in the meantime? These are the questions that must attend – by way of tuning-in rather than censoring – the narratives that will constitute the *nomos* of a world to come.

3 OECD & FAO OECD-FAO Agricultural outlook 2021-2030 (2021).

4 M Trouillot *Silencing the past: Power and the production of history* (1995).

## References

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