

“The Time of Reconciliation and the Space of Politics”

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The time of reconciliation and the space of politics

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Reconciliation is often discussed in terms of restoring moral community (e.g. see Bennett 2002, 2003). On this account, wrongdoing alienates the perpetrator both from the victims he has injured (by failing to show respect for them as his moral equals) and from the moral community he has disturbed (by violating its publicly recognised norms). Reconciliation is initiated by the perpetrator's acknowledgement of the wrongfulness of his act, followed by remorse and reparation, which opens the way for forgiveness and, ultimately, the restoration of community. In this paper, I presuppose that it is a political mistake to think of reconciliation in these terms, given the starkly opposed narratives in terms of which members of a divided polity typically make sense of past political violence. A project of reconciliation is unlikely to ever get off the ground, in such contexts, if it is made conditional on first establishing a shared moral account of the nature of past wrongs. Community can not be presupposed because the politics of reconciliation turn precisely on the question of belonging, of *who* "we" are.

To understand reconciliation *politically*, then, we should think of it in terms of revolution rather than restoration. As such, reconciliation would not begin with the recollection of a prior state of harmony (whether ideal or real) in terms of which our present alienation might be understood. Rather it would be initiated by the invocation of a "we" (that exists only as a potentiality) as the basis of a new political order. What I want to do in this paper, then, is to take seriously Bert van Roermund's (2001: 179) suggestion that in certain circumstances 'reconciliation is what makes the revelation of truth possible' and explore what I take to be the first step in what he calls the 'anthropological' sequence of reconciliation, namely: the act of constitution.¹

¹ Van Roermund (2002) describes the anthropological sequence, which he contrasts with the 'practical sequence' (i.e. restoration), in this way: 'forgiveness would come first as an offer made by the former victims of oppression. The offer would be a proposal to bury the past by honouring it as a history of 'right suffering' (orthopathema, as Robert J. Schreiter, following Samuel Solivan, calls it). According to this sequence, the readiness to forgive would create the space in which perpetrators can feel repentance so that they can come forward and reveal their wrongdoings.' I have discussed the moments of wanting to forgive and assuming responsibility in other papers (see Schaap 2001; 2003). Adapting van Roermund's description slightly, I take

Following Hannah Arendt, constitution entails both beginning and promising. On the one hand, it requires that we conceive the present as a point of origin, which might appear in retrospect as the moment in which ‘the people’ first appeared on the political scene. On the other, it requires that former enemies promise ‘never again’ in order to condition the possibility of community in the future. By constitution, then, I do not refer primarily to issues of jurisdiction and state organisation. Rather, I am concerned, more specifically, with the performative constitution of a “we” through collective action and the constitution of a space for a reconciliatory politics in which the appearance of this “we” is an ever-present possibility.

By juxtaposing Arendt’s ruminations on time and love in Augustine with her later work on public freedom in the American and French revolutions, I want to show that the temporal modality in terms of which we conceive reconciliation might work either to delimit or diminish the space for politics in the present. For, when reconciliation is conceived in terms of restoration, the moral community tends to be re-presented as a regulative ideal that over-determines the terms in which a reconciliatory politics might be enacted in the present. By contrast, politics is sustained by the recognition of community as a contingent, historical possibility that depends upon our common action in the present for its actualisation.

I begin by arguing that political reconciliation must also be historical; it must be enacted in the gap between past and future, between the memory of offence and anticipation of community. In section 2, I argue that the hope of reconciliation derives from understanding the present as a possible new beginning. Constitution is world-rupturing to the extent that it enacts a radical break with the past through the act of founding the polity anew. However, as I show in section 3, if this beginning is to succeed it requires that former enemies establish shared expectations through promising. This is the world-delimiting moment of constitution. Yet, the institutionalisation of promises within a legal constitution tends to over-determine political reconciliation by presupposing that community *already is* rather than recognising it as *always not yet*. In section 4, I look to Australia and South Africa to illustrate how a legal constitution in this way both facilitates and frustrates the ethical constitution of a “we” that political reconciliation seeks to realise.

1. Between past and future

The Christian faith in reconciliation is inseparable from the moral ideal, articulated by Jesus in the sermon on the mount, that we should love our enemies (*Luke 6: 31-37*).

the act of constitution to create a space for politics between enemies, which wanting to forgive helps to sustain. A willingness to forgive can not, in itself, create this space.

Yet, as Arendt shows in her intriguing dissertation on St Augustine, there is a paradox inherent in the ideal of loving one's neighbour as one's self, given the self-denying nature of Christian love. Since right love of God (*caritas*) involves relinquishing one's wrong love of the world (*cupiditas*), Arendt wonders how the individual who is 'isolated from all things mundane' in God's presence can be 'at all interested in his neighbour' (LSA: 7).² For to love one's neighbour as oneself is to love him not in terms of his singular, worldly existence but by virtue of the universal quality of his createdness. The other's will toward me as friend or enemy is relevant only in the situation of worldly interdependence. In the presence of God his particular relation to me becomes irrelevant. To love one's neighbour in *caritas* is, thus, to love the source of his being rather than the particular person who appears before me. Yet this seems an inhumane love, which contradicts our mundane experience of love as both partial toward and dependent on its object.

For Augustine, the human experience of alienation is closely associated with our existence as temporal beings. To exist in the world is to be subject to time, to be always no more and not yet. By contrast, God always is and, as such, stands outside time. The wish to be reconciled with God, in this context, reflects the human aspiration to overcome the alienation of temporal existence by 'returning' to eternity. It is this anticipation of an absolute future – the re-presentation of our absolute past (before the Fall) as a radical future possibility (through Grace) - that gives rise to the paradox of neighbourly love. For the anticipated future of eternal life in God serves as a point of reference that lies outside the world and regulates 'all things inside the world as well as...the relationships by which they are interconnected' (LSA: 37). A tension is thus established between the vertical reconciliation between individual and God and the horizontal reconciliation among neighbours in the world. Since the world is used as a means toward realising this highest good rather than enjoyed for its own sake, it 'loses its independent meaningfulness and thus ceases to tempt man' (LSA: 33). Consequently, all bonds between man and world are undone. Reconciliation between neighbours is predicated on a universal love that renders all distinctions between persons (including that between friend and enemy) irrelevant. But this seems to require ordering human affairs from a timeless standpoint such that community with the other is countenanced in terms too abstract to realise any meaningful "we" in the world.

Following Augustine, Arendt argues that time itself is unthinkable without a creature through whom time passes, a creature who is 'inserted' in time in such a way

² The following abbreviations are used when citing Arendt's texts: BPF - *Between Past and Future*; HC - *The Human Condition*; LKPP - *Lectures on Kant's Political Philosophy*; LM II - *The Life of the Mind II: Willing*; LSA - *Love and Saint Augustine*; MDT - *Men in Dark Times*; OR - *On Revolution*; OT - *The Origins of Totalitarianism*.

that it is broken up into the tenses of past, present and future (LSA: 55). As the only animal that knows it was born and that it will die, the human agent experiences time as a stretching out between its first inexplicable appearance in the world and its ultimate disappearance from it. In other words, we actualise temporality through remembrance and anticipation.³ This is the meaning of Faulkner's famous claim that 'the past is never dead, it is not even past' (BPF: 10). For the achievement of memory is to re-present the past, to make present for our thinking attention what is no-longer. Similarly, the future is actualised by our hopes and fears as the 'threatening or fulfilling 'not yet' of the present' (LSA: 13). We exist, then, in the broken middle of time, the 'gap between past and future.' In our present situation we anticipate the future with fear or hope based on remembrance of what was and the knowledge that what has been could be again. Conversely, we remember the past with regret or nostalgia in terms of our imaginative anticipation of the possibilities that the future holds (LSA: 48).⁴

Time, as it is humanly experienced, is therefore distinct both from the non-time of eternity (the absolute of temporality) and the time of nature (the everlasting cycles of life). Expectation of death and remembrance of birth make humans aware of their finitude in contrast to the infinity of a God who has no beginning or end but stands outside time (OR: 206). Against the dispersion of human existence into past, present and future, eternity is conceived as a standing still of time in which the presence of the whole of time is manifest in an enduring Now (LSA: 53). We experience alienation from God because we are able to imagine eternity when we retreat from the world to think. Yet we remain aware of our own finitude due to our acting and suffering in the world.⁵

On the other hand, the human experience of time is in contrast to the time of nature because it follows a linear rather than a cyclical course. In contrast to the endless cycles of nature, which proceed along their course indifferent to human affairs, the stretching out of time through remembrance and anticipation means that events,

³ As such, time is not reducible to the intervals by which we measure it. Rather, it is because we reckon with time through remembrance and anticipation that we are driven to measure it. Our preoccupation with the world leads us to reckon with time in such a way that we can waste time or have the time, there can be a time to do this, a right time and a wrong time. Thus, human existence becomes meaningful, in temporal terms, through public interaction by which time is 'woven in common' with others (Ricoeur 1981: 169-171).

⁴ At least, this is what I make of Arendt's interpretation of Kafka's parable of "He" who struggles with two antagonists. One 'presses him from behind, from the origin. The second blocks the road ahead. He gives battle to both' while each assists him in his struggle against the other (Kafka in BPF: 7). It is only because He seeks to stand his ground that the flow of indifferent time becomes broken in the middle.

⁵ As Ricoeur (1983: 62) writes: 'The question of time is raised, or rather time is raised as a question, because man is the only being which knows that it is "mortal," because man alone thinks and thinks what is eternal. Hannah Arendt never departed from this basic worldview – which is both pre-Socratic and Hebraic – that eternity is what we think, but that it is as "mortals" that we think it.'

actions, biographies, epochs are thought of as having a beginning, middle and an end. As animals we are subject to the cycles of nature and to those necessities required to sustain life. Yet, we also transcend nature in our historical existence as worldly creatures who seek to establish a sense of permanence in our affairs through work and remembrance. We experience alienation from Nature because, although we are subject to the never ending rhythms of life, we have a sense of the irrevocable succession of events, of time “marching on.” This ordering of experience in terms of a rectilinear time concept has the potential to redeem human existence from the futility of nature’s endless repetition.

Yet it also threatens to empty experience of its immanent meaning by explaining our doing and suffering in relation to an ultimate end. Hope for reconciliation with God underpins a teleological conception of time as building towards a unique and shattering climax, a final judgement at the end of history, which will restore believers to their place in the eternal kingdom of God. Sheldon Wolin (1961: 124f.) argues that this Christian conception of time, which displaced the classical conception of cyclical time, had enormous political implications. Christianity transformed human beings’ relation to the future with the promise of redemption. This enabled men to anticipate the unfolding of time with hope rather than the dread that had been characteristic of the classical mind.⁶ But this new time-dimension was anti-political, according to Wolin (1961: 124), because ‘political society was implicated in a series of historical events heading towards a final consummation which would mark the end of politics.’ Consequently, politics was no longer looked on as an opportunity for glory but as a weary necessity of worldly existence. Moreover, the quest for the ideal polity was condemned as irreverent and proud ambition animated by the desire to establish Man’s independence from God.

The manner in which we reckon with time, then, not only opens the possibility of meaning in human affairs but may undermine the conditions according to which we invest the world with meaning. To some extent, Arendt concurs with Wolin’s conclusions about the anti-political nature of the Christian concept of time (HC: 21, 54-55, 120).⁷ The ideal of an absolute future by which we make sense of the present

⁶ The Greeks tended to understand time in terms of cycles which closely resembled nature’s seasons of growth and decay. Consequently, heroic action (being able to answer the demands of the moment with excellence, with the hope of being immortalised by the poets) and founding a polis (which could withstand the destructive impact of time) were fundamental political aspirations. However, for the Christian, ‘the classical notion of an eternally recurrent cycle governing human affairs, a rhythm which began in hope and ended in despair, seemed a mockery to both God and man’ (Wolin 1961: 124)

⁷ However, it is to Augustine that she frequently attributes the fundamental political insight that human freedom is inherent in our capacity to begin (e.g. HC: 177). Moreover, she observes that ‘only under the condition of a rectilinear time concept are such phenomena as novelty, uniqueness of events, and the like conceivable at all’ (OR: 27).

leads us to take an instrumental attitude to the world, according to which events and actions are explained as means toward this ultimate end. Consequently, human affairs are divested of any intrinsic worth so that ‘this world is for the faithful...what the desert was for the people of Israel – they live not in houses but in tents’ (Augustine in LSA: 19). Yet, asks Arendt in her dissertation, ‘Would it not be better to love the world in *cupiditas* and be at home? Why should we make a desert out of the world?’ (LSA: 19). Indeed, it is precisely such love of the world that Arendt advocates in her later work, when she turns to politics to redeem human existence from the meaninglessness generated by such an instrumental mentality in public life.

In this context, Arendt affirms the striving for a worldly immortality against the yearning for eternity. Philosophy and the life of contemplation begin from wonder at the eternal, a sublime which can only be experienced outside the company of others in the solitude of thought. By contrast, political life is animated by the desire of actors to win recognition from their peers and to establish a lasting remembrance of their words and deeds (HC: 17-21). As Paul Ricoeur (1983: 62) observes, immortality is ‘what we attempt to confer upon ourselves in order to endure our mortal condition’. That every life can eventually be told as a story that begins with birth and ends in death is the ‘pre-political and pre-historical condition of history, the great story without beginning or end’ (HC: 184). History presupposes a common world that precedes and will succeed the comings and goings of generations (HC: 97). The achievement of the polity is that it makes possible an organised remembrance by which to overcome the frailty of action. The political enterprise of distinguishing ourselves through action and of founding and preserving a world in common is, in this respect, the ‘highest attempt to “immortalise” ourselves. From this attempt springs both the greatness and the illusion of the whole human enterprise’ (Ricoeur 1983: 62).

Against the temptation to conceive the time of reconciliation in relation to a sacred origin or end of history in which our alienation is overcome once and for all, this suggests that a mundane reconciliation depends upon constituting a space for politics in the present within which conflicting memories and expectations can be brought to bear on each other. Politics is concerned with men in their temporal existence and in their neighbourly relations to each other as friends and enemies. As Arendt observes, morality may require us to imagine the ‘earth as the homeland of all mankind’ and to presuppose ‘one unwritten law, eternal and valid for all’ (MDT: 81). Politics, however, does not deal with ‘Man’ in the abstract (as autonomous, rational being, subject to the laws he gives to himself) but with ‘men’ in their plurality (as earthbound creatures who belong to different communities and are ‘heirs to many pasts’) (MDT: 81; LKPP: 27). Following from this, if reconciliation is to be political, it depends on citizens discovering

good grounds to want to share a polity at all with their historical enemy or oppressor. This requires not that we transcend our relation to our neighbour as enemy but that we transform it into one of civic friendship.

As we shall see, what animates political reconciliation, then, is not the anticipation of community as absolute end according to which we ought to regulate our present relations. Rather, it is the will that the present be remembered by a possible future community as the moment in which it originated. In this way, the constitution of a space for politics makes possible a future collective remembrance. Or, as Bert van Roermund (2002) writes, in a different context, it makes available 'a past to look forward to'. Reconciliation necessarily anticipates a future community. However, insofar as it is political, this is conditioned by an awareness of the frailty and contingency of the "we" it seeks to realise. It is this anticipated remembrance that holds together (in the present) the world-rupturing and world-delimiting aspects of constitution, which coincide with the exhilaration of beginning and the concern to establish a lasting institution through promising.

2. Beginning

Political reconciliation presupposes a revolutionary moment. As Bruce Ackerman (1992: 5) observes, revolutionaries divide history into a Before and a Now: 'Before, there was something deeply wrong with the way people thought and acted. Now, we have a chance to make a "new beginning" by freeing ourselves from these blinders.' As such, political reconciliation is predicated on the 'recasting of the present as a point of *origin*' (Christodoulidis 2000: 199 - emphasis in original). It is frequently observed that political reconciliation must be both retrospective (in coming to terms with the past) and prospective (in bringing about social harmony) and, therefore, must involve striking a balance between the competing demands of these temporal orientations. For instance, past-oriented concerns with punishing human rights violators must be considered in the light of future-oriented concerns with establishing democratic institutions (see Ackerman 1992: 70f.; Teitel 2000: 191-211; Villa-Vicencio & Verwoerd 2000).

Yet, understanding the present as a point of origin entails a reckoning with time that is more subtle and complex than is immediately suggested by the metaphor of 'looking back' while 'reaching forward'. This is because political reconciliation refers to a future anterior, an imagined 'not yet' that is 'brought into the present to become constitutive of the experience of the present' (Christodoulidis 2000: 198). From the perspective of this imagined common future, the experience of the present is

interpreted as a possible new beginning, as the moment in which reconciliation ‘will have been’ initiated. To perceive the present from the perspective of this future anterior is to recognise its contingency since what ‘has been’ could always ‘have been otherwise’. Following Christodoulidis (2000: 198), this ‘temporal modality’ of political reconciliation is ‘to be celebrated’ because it ‘imports an awareness that keeps community both attuned to the aspiration of being-in-common and aware of its vulnerability.’ It is this awareness that politicises reconciliation since it interprets the present in relation to a contingent historical possibility rather than an absolute end.⁸

But this temporal modality also requires that we reckon with an absolute that is neither anticipated nor remembered but, rather, confronts us in the present in the act of beginning. The foundation of a new polity is, for Arendt, as it was for the Romans, the political act *par excellence*. This is because it exemplifies the human potentiality to do the unprecedented. Beginning is exhilarating because it is the actualisation of freedom in action. Yet the act of foundation is also perplexing because it confronts us with the arbitrariness inherent in every beginning. We accord coherence to human experience by telling a story of how we came to be where we are and by projecting this story into the future in terms of what we are questing after. In the case of the beginning, however, we are confronted with ‘an unconnected, new event breaking into the sequence of historical time’ (OR: 205).⁹ It is this arbitrary aspect of every beginning that makes it so difficult to be pleased with human freedom. Consequently, when confronted with the new we are driven to try justify it in terms of what came before.

The riddle, for those who wish to found a new social order, then, is ‘how to restart time within an inexorable time continuum’ (LM: 214). Since political reconciliation is impelled by the hope of establishing such a new beginning, it is self-consciously enacted in the gap between past and future. This transitional moment between the no-more of enmity and the not-yet of community resembles the legendary ‘hiatus between disaster and salvation’ that is described in the great foundation myths of Western society: the wanderings of the Israeli tribes and the adventures of Anaeis. As Arendt discusses, both the Romans and Hebrews conceived their past in terms of ‘a story whose beginning could be known and dated’ (LM II: 203). Moreover, in both myths there is a period of transition between the liberation from oppression and the realisation of political freedom through the foundation of a polity. The importance of these myths

⁸ The “we” that animates political reconciliation thus closely resembles that ‘indeterminate consensus’ Arendt calls the *sensus communis* (see Burns 1987: 177).

⁹ Because it is unprecedented, it is as though the revolutionary act came out of nowhere and, as such, it seems to have ‘nothing...to hold onto’ (LM II: 208). In the revolutionary moment, it is ‘as though the beginner had abolished the sequence of temporality itself, or as though the actors were thrown out of the temporal order and its continuity’ (OR: 206).

for modernity, according to Arendt, is that they show how human beings have sought to come to terms with the perplexities of beginning (OR: 205). The revolutionaries of the eighteenth-century turned to these myths in order to understand and justify what they were doing. As Arendt discusses, these revolutionaries were peculiarly modern in their rejection of traditional authority and their faith in the human capacity to invent new forms of government and community that could be rationally justified. Yet, when confronted by the contingency of the founding act, they were led to ‘renege on the very experience of freedom and novelty’ by construing what they were doing in terms of restoration, an improved restatement of the principles on which Rome was founded (LM II: 210; OR: 210).

Since political reconciliation must also proceed from an understanding of the present as a point of origin, it is similarly initiated by constitution. In its political sense, constitution refers to the founding act by which a space for politics is established. According to Arendt, this space ‘comes into being wherever men are together in the manner of speech and action’ and so ‘precedes all formal constitution of the public realm’ (HC: 199). Yet, because its existence ultimately depends on its actualisation through performative action it quickly disappears when citizens withdraw from public life (HC: 200). In its legal sense, constitution refers to the fundamental law of the polity that is laid down in the founding act. The formal organisation of the public realm according to legal principles provide a measure of continuity and stability that the space of appearances would otherwise lack (OT: 463). In its third ethical sense, constitution refers to the emergence of a “we” as an ‘identifiable entity’ in the act of foundation (LM II: 201). As Arendt observes, a “we” arises wherever people come together to act and speak in public and it may take many different forms. Because this identity emerges from collective action, it never simply *is* but is always in the mode of becoming. Nevertheless, ‘no matter how this “We” is first experienced and articulated, it seems that it always needs a beginning, and nothing seems so shrouded in darkness and mystery as that “In the beginning”’ (LM II: 202).

Constitution thus refers to the complex inter-relation between politics (democratic will), law (constitutional reason) and ethics (the identity of the people), according to which constitution of a “we” emerges from the articulation of law and politics (Christodoulidis 2001: 115). Fundamentally, then, the act of constitution requires holding together the apparently ‘irreconcilable and even contradictory’ logics of performing and legislating: on the one hand an ‘exhilarating awareness of the human capacity of beginning’; on the other hand, a ‘grave concern’ with establishing an enduring regime (OR: 223). For revolutionaries, the legitimacy of the founding act does not derive from tradition but the will of the demos in the present. Yet, it is in the name of

the present revolutionary will that they would bind the will of future actors according to the rational principles laid down in a legal constitution. The founding principles become the higher source of law from which the authority of future positive law should be derived (OR: 160). The act of foundation, in which the revolutionaries actualise their freedom to begin, thus, paradoxically, seems to deny this same freedom to future generations for the sake of the stability of the political association (OR: 232f.).

In temporal terms, this paradoxical articulation of performance and legislation emerges in the fact ‘those who would get together to constitute a new government are themselves unconstitutional, that is, they have no authority to do what they set out to achieve’ (OR: 183-184). As Derrida (1986: 10) makes clear, it is only in retrospect that they might be understood as founders of law; in the act of foundation they are outlaws since the democratic will they purport to represent is not yet legally constituted.¹⁰ In the revolutionary moment, the will of the people lacks an institutional framework in terms of which it may be re-presented as such. The ethical constitution of a “we” emerges from this articulation of action and institution. Indeed the “we” of the people is invoked in fundamentally different ways in the performative and legislative moments of constitution. Whereas politics brings a “we” to presence through performative action, law re-presents this “we” by institutionalising it. While politics is enabled by invoking a “we” as an (indeterminate) potentiality,¹¹ law over-determines this “we” since it must re-present community as already existing in order to establish its legitimacy (see Christodoulidis 2001).

Nevertheless, Arendt argues that if we are to recover the ‘lost treasure’ of the revolutionary tradition, we must attempt to think together and combine meaningfully ‘what our present political vocabulary presents to us in terms of opposition and contradiction’ (OR: 224). For, she insists, concern for stability and the spirit of the new were ‘not mutually exclusive opposites’ in the experience of revolution ‘but two sides of the same event’ (OR: 223). For the American revolutionaries, it was a matter of course

¹⁰ In his commentary on the American Declaration of Independence, Derrida (1986: 10) writes: ‘The “we” of the declaration speaks “in the name of the people.” But this people does not yet exist. They do *not* exist as an entity, it does *not* exist, *before* this declaration, not *as such*. If it gives birth to itself, as free and independent subject, as possible signer, this can hold only in the act of the signature. The signature invents the signer. The signer can only authorise him- or herself to sign once he or she has come to the end, if one can say this, of his or her own signature, in a sort of fabulous retroactivity’.

¹¹ As Paul Connerton (1989: 59) writes: ‘Through the utterance of the ‘we’ a basic disposition is given definitive form, is constituted among the members of the liturgical community. The community is initiated when pronouns of solidarity are repeatedly pronounced. In pronouncing the ‘we’ the participants meet not only in an externally definable space but in a kind of ideal space determined by their speech acts. Their speech does not describe what such a community might look like, nor does it express a community constituted before and apart from it; performative utterances are as it were the place in which the community is constituted and recalls to itself the fact of constitution.’

that they needed a constitution to preserve the space of appearances they had brought into being in the act of foundation. Having succeeded in the first task of founding a body politic, the second task of the revolution was to 'assure the survival of the spirit out of which the act of foundation sprang' (OR: 126). This depended on ensuring the opportunity for "public happiness" by constituting a space in which freedom could appear.

Yet, Arendt suggests, it was the 'constitution itself' that eventually 'cheated' the Americans of 'their proudest possession' - the practice of public freedom. For they came to interpret 'happiness' in terms of the private freedoms the constitution secured rather than the participation in government it enabled and so forgot the joys of initiatory action (OR: 239). If the French revolution ended in Terror because it located the authority of law in an unpredictable revolutionary will, the American revolution ultimately failed because no space was reserved within the stable republic it established 'for the exercise of precisely those qualities which had been instrumental in building it' (OR: 232).

Arendt's attempt to recover the treasure of the revolutionary tradition by combining the spirit of the new with a concern for stability thus depends on divesting the latter of its legislative moment and re-conceiving it terms of a promise that is intended to preserve the memory of beginning. It is in this context that she develops a conception of authority as *augmentation*, which involves a binding back to the beginning. Rather than looking to an Absolute that transcends the realm of politics (such as a mythical origin or end) to legitimate the founding law of the polity we should look to the founding act itself. For, she suggests, it is 'futile to search for an absolute to break the vicious cycle in which all beginning is inevitably caught, because this 'absolute' lies in the very act of beginning itself' (OR: 204).¹²

In this context, she suggests that the 'political genius' of the American people (i.e. before they lost the treasure of the revolution) derived from their 'extraordinary capacity...to look on yesterday with the eyes of tomorrow' (OR: 198). The stability of the polity was derived their willingness to bind themselves back to a contingent historical beginning. The authority of the legal constitution depended on its being taken as a common reference point for action. Consequently, Arendt suggests, rather than denying future generations the freedom to act it bestowed a 'communicative legacy'

¹² As Kimberly Hutchings (1996: 98-99) observes: 'Arendt wants to keep politics from being law governed. In *The Human Condition*, this results in political action being characterised as a kind of pure spontaneity; an arbitrary and purposeless process which is matched by the arbitrary violence of the legislator, and only recouped by the judgement of the storyteller. In *On Revolution*, this results in a recourse to judgement, as opposed to law, as the standard for legislation and political action more generally.'

that might inspire future action (see Buckler 2001: 296). For the legitimacy of political action depended on the extent to which it would increase and enlarge the principle of public freedom as enacted in the foundation of the polity (BPF: 122; OR: 201-202).¹³ I am not sure that Arendt succeeds in combining, let alone reconciling, the contending logics of law and politics with this account of authority.¹⁴ However, as we shall see, it provides a suggestive basis for considering the role that promising plays in sustaining a reconciliatory politics.

3. Promising “never again”

Political reconciliation is predicated on the promise *nunca más* or “never again”. This was the title, for instance, of the report of the truth commission established in Argentina to investigate the “disappearance” of 10,000 - 30,000 people by successive military juntas between 1976 and 1983.¹⁵ The promise “never again” locates the possibility of community between former enemies in their present intention to prevent the recurrence of wrongdoing. In this context, the ethical constitution of a “we” depends, as van Roermund (2002) suggests, on prolonging the present moment in which this intention is expressed in order to avoid either a preoccupation with the past (that unduly limits future opportunity) or a preoccupation with the future (that too easily forgets the past).¹⁶

If beginning has the potential to disclose a “we” in the moment of its performance, promising conditions the possibility that this “we” might be brought to

¹³ As Waldron (2000: 213) points out, this does not mean treating the constitution as ‘sacrosanct and beyond change; but it means treating *it* as the object of change and augmentation, rather than simply purporting to begin again every time we suppose ourselves to have accumulated more wisdom than our ancestors’.

¹⁴ Honig (1991: 106) and Keenan (1994: 319) both suggest that it is not possible to separate the performative moment of the political from the violence of institutions. For instance, Keenan (1994: 316) argues that ‘The realm of freedom – seen as a logic of indeterminacy, openness, plurality, and the possibility of new beginnings – is inevitably compromised in the attempt to found it, even as some such foundation is necessary for its survival...As a result of this paradoxical relation of freedom and foundation, the loss of the “political”...that Arendt regularly laments is a loss that cannot fail to happen’. Yet, since my concern is with the ethical constitution of a “we” through performative action, I want to resist Keenan’s conclusion that violence is an ineradicable aspect *of* the political rather than inherent to an institutional logic that *is other to it*. With Arendt, I want to maintain an ethical distinction between violence and the political in order to invoke politics against the institutional logic of closure that would undermine the possibility of reconciliation.

¹⁵ Since its publication, a digest of the report has become one of the best-selling books in Argentina’s history (Hayner 2001: 33-34).

¹⁶ Similarly, as Mario Di Paolantonio (1997: 456) observes, to promise “never again” is to make a promise about a future that can never arrive. As such, it is a promise that can never be fulfilled.

presence in the future. There is ‘an element of the world-building capacity of man in the human faculty of making and keeping promises’, Arendt insists, because it is animated not so much by a concern with ourselves and our own time but with that of those who will succeed us (OR: 175).¹⁷ The achievement of promising is that it establishes a ‘limited independence’ of our present actions ‘from the incalculability of the future’ (HC: 245). By establishing shared expectations, promising reduces the radical contingency of the future so that we are able to make plans and form projects. It provides a partial remedy against the predicament of unpredictability by establishing certain ‘guideposts of reliability’ or ‘isolated islands of certainty in an ocean of uncertainty’ (HC: 244; 224). In contrast to the ideal of sovereignty, the faculty for promising presupposes the presence of others since ‘no one can feel bound by a promise he makes to himself’ (HC: 237). Yet, it can only provide a partial remedy against the risk of action because, as Alan Keenan (1994: 317) puts it, ‘a promise, like any agreement, is at best a point of conjecture, a site at which conflicting goals, intentions, forces, and projects find a common expression or formulation but never an identity of meaning.’¹⁸

As social contract theory attests, the capacity to make and keep promises is fundamental for securing the individual rights of those who would enter into political society together. Arendt understands this role of a constitution in securing the private freedom of citizens to be, not the sole end of government, but an enabling condition for the exercise of political freedom (OR: 218). Far from being a natural attribute of individuals, equality is an artificial achievement of the political association, which establishes an ‘equality of unequals’ for the limited purpose of enabling politics between them (HC: 215). ‘We are not born equal’ but become so ‘as members of a group on the strength of our decision to guarantee ourselves mutually equal rights’ (OT: 301). As the plight of stateless people demonstrates, human rights acquire a concrete reality only to the extent that they are institutionalised and guaranteed by the political association (OT: 297; OR: 149).¹⁹ The constitutional guarantee of rights establishes civility by assigning public roles to private individuals. It provides ‘channels

¹⁷ ‘...binding and promising, combining and covenanting and the means by which power is kept in existence, where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of constituting a stable worldly structure, to house, as it were, their combined power of action’ (OR: 175).

¹⁸ The context of this sentence in Keenan’s critique suggests that he is making this point against Arendt, whereas this seems to me a fundamentally Arendtian insight.

¹⁹ The predicament of the rightless is not that they lack equality before the law but that ‘no law exists for them...If a human being loses his political status, he should, according to the implications of the inborn and inalienable rights of man, come under exactly the situation for which the declarations of such general rights provided. Actually the opposite is the case. It seems that a man who is nothing but a man has lost the very qualities which make it possible for other people to treat him as a fellow-man’ (OT: 296, 300).

of communication' between citizens by attributing to them a legal 'persona' (OT: 465; OR: 106-109). The conventions and roles established by the law in this way depersonalise action in order to preserve the fragile inter-space of the world (Kateb 1984: 12).²⁰

As such, promising helps to constitute and preserve a 'space where freedom as virtuosity can appear' (OR: 175). Due to its frailties, action alone is insufficient to sustain a space for politics through time. Rather, it is the force of promise that establishes a measure of stability in human affairs and so makes possible an organised remembrance, which conditions the possibility of community in the future. In order to be actualised as a tangible reality, freedom must be 'spatially limited' (OR: 275). Politics is always transacted within a complicated framework of laws and institutions that are constituted through promising (BPF: 164). 'The laws hedge in each new beginning and at the same time assure its freedom of movement, the potentiality of something entirely new and unpredictable' (OT: 465). Without the common reference points that such limits provide, public action and speech would be incoherent. In this sense, the 'boundaries of positive laws are for the political existence of man what memory is for his historical existence: they guarantee the pre-existence of a common world' (OT: 465). Laws and covenants establish a continuity that transcends the life span of each generation. They provide a context within which action can appear meaningful by providing a stable structure to house the movement of action. In reducing the contingency of the future, a legal constitution thus not only forecloses certain options but 'makes available possibilities which would otherwise lie beyond reach' (Holmes 1988: 226).²¹

Yet, despite her celebration of promising as a faculty inherent to action that mitigates the risk of unpredictability without reducing its performative quality, Arendt suggests (in her reflections on revolution) that promising may be insufficient to assure the perpetuity of a political association. If the legal constitution is to become the 'higher law' of the polity, 'authoritative and valid for all' both now and in the future, it seems it must derive its authority from a source that transcends politics (OR: 182). The fundamental law of the polity seems to require a more stable ground than the promises

²⁰ In the theatrical metaphor borrowed by law, the civic persona or mask the actor adopts enables the truth of his opinion to resonate by distancing his private self from public act. By mediating action in this way, the roles and conventions established by law prevent conflict between political adversaries from degenerating into relation of enmity (see Villa 1999).

²¹ Stephen Holmes illustrates this power generating potential of promising by comparing constitutions to the rules of a game. Whereas regulative rules govern pre-existent activities (e.g. 'no smoking'), constitutive rules 'make a practice possible for the first time' (e.g. 'bishops move diagonally'). Constitutive rules, in this way, are not primarily disabling but enabling. They do not merely restrain power but assign and channel power.

of men can provide. In order to arrest the potentially destructive aspect of democratic will, it seems that revolutionaries must appeal to a higher source of authority - an Absolute - to authorise the fundamental law they seek to establish.²²

Such an appeal to an Absolute is articulated, for instance, in the Preamble of the Declaration of Independence, which states 'we hold these truths to be self-evident' (OR: 192). As Arendt discusses, Jefferson's famous words paradoxically combine a relative agreement with an Absolute. To the extent that the truths of the Declaration are 'held' by those who articulate them they are a matter of opinion. They are relative because they relate those who acknowledge their authoritative status for the life of the polity. Yet, if they are self-evident they stand in no need of agreement because they compel with the force of reason. Their self-evidence 'puts them beyond disclosure and argument' so that 'they are not held by us but we are held by them' (OR: 192, 193). Their validity is independent of the democratic will. With this appeal to self-evidence, Arendt argues, Jefferson promotes reason to a transcendent source from which the legitimacy of the legal constitution is derived. Yet, she suggests, he must have been aware that the claim 'all men are created equal' is not self-evident to all or he would not have felt it necessary to include the performative "we hold", according to which moral truth becomes politically relevant.

Although the need for an Absolute was revealed in the moment of foundation, Arendt suggests that this dilemma was, in part, based on a misunderstanding of the nature of law. Only if law is conceived in terms of a commandment to which men owe their obedience irrespective of their consent and agreement does it require an absolute foundation (OR: 189).²³ For the Romans, the law needed no such basis but was the outcome of conflict. Law was predicated on an alliance, which not only established peace but constituted a new unity between two different entities that had been thrown together by war. Thus, a war was concluded to the satisfaction of the Romans not merely with the defeat of an enemy but 'only when the former enemies became 'friends' and allies (*socii*) of Rome' (OR: 188). The Romans thus recognised in alliances and covenants a powerful institution for the 'creation of politics at the point

²² The mistake of the French Revolution, according to Arendt, was that it identified the will of the people as the source of both power and law. Yet since the will is by nature changeable, it subjects the law to the movement of politics, as was evidenced in the multitude of decrees and ordinances that were produced, which became obsolete the moment they were enacted, 'swept away by the Higher Law of the Revolution' (OR: 183). Similarly, in the case of the totalitarian regimes of the twentieth century 'the term "law" itself changed its meaning: from expressing the framework of stability within which human actions and motions can take place, it became the expression of the motion itself' (OT: 464)

²³ This traditional concept of law was an inheritance from: 1) the Hebrew tradition in terms of which law was understood on the model of the ten commandments; 2) the Christian tradition according to which an Absolute appears in history as the "word made flesh", and; 3) the Absolutist regimes displaced by the eighteenth century revolutions.

where it was reaching its limits' (Arendt in Tamineaux 2000: 176).²⁴ Indeed, the *res publica* was itself the outcome of war between the patricians and plebeians, 'whose internal strife was concluded through the famous laws of the Twelve Tables' (OR: 188). Moreover, the foundation myth of Rome was based on Virgil's reversal of the Homeric epic of the sacking of Troy according to which the 'end of the war is not victory and departure for one side, extermination and slavery and utter destruction for the others, but 'both nations, unconquered, join treaty forever under equal laws' [Virgil] and settle down together' (OR: 209). On this account, as Jacques Tamineaux (2000: 176) puts it, law is the 'institution of a relationship between conflictual sides of a pluralistic interaction.' Law expresses a relation or *rapport* (Montesquieu) rather than an imperative and so has no need of absolute validity (OR: 188-189).

As we have already seen, Arendt proposes to solve the problem of the Absolute, which seems to be required in order to break the vicious cycle of constitution, by looking not to a source of authority that transcends politics but to the foundational act itself (OR: 213). The founding act, in which the freedom to begin is dramatically enacted, becomes exemplary for all future action. The authority of the constitution thus depends on its illumination by the memory of the founding itself. For unlike law, which can only set limits to action, the beginning carries its own principle in itself, which inspires the subsequent acts of citizens (OT: 467; OR: 212). In this context, Arendt suggests that 'the authority of the republic will be safe and intact as long as the act itself, the beginning as such, is remembered whenever constitutional questions in the narrower [legal] sense of the word come into play' (OR: 204). By conceiving authority in terms of augmentation of the founding act, Arendt claims to have established the basis on which change and permanence are tied together such that 'change could only mean increase and enlargement of the old' (OR: 201).

Yet, intriguing as Arendt's attempt to reconcile the contradictory constitutional moments of performance and legislation is, this is a reconciliation that ultimately fails. For, in emphasising the relational aspect of law – its capacity to create politics at the point at which it reaches its limits – she tends to neglect the extent to which this achievement rests on a reduction that simultaneously forecloses politics. If the achievement of law is that it establishes certainty and stability in human affairs, its failing is that it tends to over-determine the terms in which we make sense of the world. As system of representation, law reduces the vast complexity of the world by filtering information as either fulfilment or disappointment of the expectations it institutionalises.

²⁴ For alliances allowed the extension of politics beyond 'relationships between citizens of one and the same City' (as the Greek conception of politics was limited) to include relations 'between foreign and dissimilar nations' (Arendt in Tamineaux 2000: 177).

Consequently, much that happens in the world does not register at all or registers only on the law's own terms (Christodoulidis 2000: 198).

Thus, as Christodoulidis (2001: 124 – emphasis in original) explains, a legal constitution at once ‘frustrates and facilitates the political’: *facilitates*, as Arendt recognises, by staking out ‘joint boundaries’ in terms of which it is possible for adversaries to engage in a rational dispute that lends itself to resolution; yet *frustrates*, as she sometimes forgets, because in order to discipline conflict the law must represent it selectively ‘by setting the thresholds of valid dissensus, the *when* and *how* of possible conflict.’²⁵ In allowing political conflict to be ‘played out and resolved as *internal* to the constituency’ in this way, law ‘removes any potential threat to the constituency, i.e. to the unity of the polity’ (Christodoulidis 2001: 127-128 – emphasis in original). Since conflict can be concluded *satisfactorily* only with the establishment of society between former enemies, the law must re-present political conflict as always-already communal.

Against Arendt, then, we must recognise the paradox of constitution as real and unavoidable, since it involves the articulation of the irreconcilable logics of law and politics. Constitutional democracy is, as Christodoulidis (2001: 122) puts it, ‘a hybrid, harbouring and enabling the co-existence of two radically incommensurable orders: one that is driven by disruption, and openness and is thus radically contingent; and one that is driven by the need to reach a state of order through normative closure and the curtailment of contingency.’ This paradox expresses itself in temporal terms, as we have already seen, in the way in which politics and law invoke the “we” of the constitution. Whereas law looks to the past in order to bring the future under control (i.e. by reducing contingency through securing expectations), politics freely inclines into the openness of future, imports the risk of what is not yet as its enabling condition in the present (Christodoulidis 2000: 196-199). If reconciliation relies on the indeterminacy of community to constitute a space for politics in the first instance, a legal constitution tends to undercut political reconciliation by making community a regulative ideal and, hence, over-determining the terms within which a reconciliatory politics can be enacted. A legal constitution thus seems to be predicated on a *necessary forgetting* of the founding act that brings it into being, the moment of beginning which imports an awareness of the frailty and contingency of community.

²⁵ I say *sometimes* forgets because Arendt shows an awareness of this reductive tendency of institutions when she writes that the ‘moment promises lose their character as isolated islands of certainty in an ocean of uncertainty, that is, when this faculty is misused to cover the whole ground of the future and to map out a path secure in all directions, they lose their binding power and the whole enterprise becomes self-defeating’ (HC: 244).

Yet, with Arendt, we might resist this tendency to forget by invoking politics as indispensable in prolonging the present moment in which the intention 'never again' is expressed. What I want to take from Arendt, then, is the idea that political reconciliation is impelled by an anticipated remembrance, which emerges in the act of constitution out of the (ultimately impossible) effort to hold together the world-rupturing and world-delimiting moments of beginning and promising. As such, political reconciliation is impelled, on the one hand, by the recasting of the present as a point of origin and, on the other, by the attempt to memorialise this beginning by promising "never again". It is from the effort to hold together these two moments that a "we" might be constituted, in terms of which a collective reckoning with the past becomes possible. Yet, against the tendency of a legal constitution to over-determine the terms within which this "we" is constituted, political reconciliation must be conditioned by a sense of the risk of this venture; that the beginning we seek to enact in the present might not be remembered as such.

4. "We the people"

Bruce Ackerman (1992: 5-6) defines revolution as a 'successful attempt to transform the governing principles and practices of a basic aspect of social life through an act of collective and self-conscious mobilisation'. In this context, constitution should be understood not just in terms of the procedures and rules that discipline conflict but as the performative act in which 'a people constitutes itself into a body politic' (OR: 203). This aspect of constitution is vivid in the transitional moment of political reconciliation when 'citizens are most alive to their problem in political construction: How, given fundamental disagreements, are they to elaborate principles of justice that will give all a fair and equal opportunity to pursue their different lives?' (Ackerman 1992: 26). It is because the identity of the people cannot be taken for granted at such times that citizens are aware of the fragility of community. In these circumstances, constitutional politics inevitably turn around the question: who are "we"? It is by raising community as a question, in this way, that constitution initiates political reconciliation.

Of course, given the role a *legal* constitution is supposed to play in preventing state wrongs, there are other, common sense reasons why so much attention is paid to constitutional issues during a transition to democracy. The legitimacy of modern government depends upon its limitation by the rule of law whereas tyranny comes about when the will of the sovereign is presumed to be above the law. Constitution-making during a political transition, therefore, is typically associated with 'restoring' the rule of law, the reinstatement of a publicly known set of procedures by which to

arbitrate political conflict and secure the rights of citizens. The turn to constitutionalism thus underscores both the legitimacy of the new regime (as *Rechtstaat*) and the illegitimacy of the old (*Unrechtstaat*). Whereas the legitimacy of the *Rechtstaat* depends on its 'self-binding', its commitment to abide by publicly agreed decision-making procedures, the illegitimacy of the *Unrechtstaat* was due to its failure to be bound by such predetermined procedural limitations to power. These kinds of concerns were clearly fore-grounded, for instance, during the transitions to democracy in Eastern Europe following the collapse of the Soviet Union (e.g. see McAdams 2001: 41f.; Pribán 2002; Borneman 1997).

Yet, as Ackerman emphasises, the creative aspect of constitution-making is equally important. Negotiation over a new constitution provides a 'crucial mechanism' through which former enemies 'try to work out the terms of their new beginning together' (Ackerman 1992: 116). Indeed, Ackerman insists that this unifying project of constitutional creation should take precedence over the divisive concern with corrective justice, which tends to emerge from a rights-centred approach. For while an emphasis on corrective justice tends to divide a citizenry into 'evil doers and innocent victims', the framing of a constitution 'invites citizens to put the past behind them and to think about how they all might contribute to a definition of the new order' (Ackerman 1992: 70-71). Leaving aside doubts about what 'putting the past behind' means here, I agree with Ackerman that, given its orientation to the future, the constitution of a space for politics may initiate political reconciliation. However, I share Christodoulidis's (2000: 192-194; 2001: 166-122) suspicion that Ackerman (like other republican legal theorists) is unduly optimistic in entrusting to a *legal* constitution the task of sustaining a reconciliatory politics.

For, as we have seen, law frustrates political reconciliation by re-presenting community as the given end of politics rather than a contingent historical possibility that conditions the possibility of politics in the present. The tendency of a legal constitution to undercut the ethical constitution of a "we" in this way was demonstrated, for instance, in the constitutional politics of South Africa. The temporal modality of political reconciliation is clearly revealed in the much cited postscript to the Interim Constitution of South Africa (1993), in which it is declared: 'With this constitution and these commitments, *we the people* of South Africa open a new chapter in the history of our country' (emphasis added). The constitution is supposed to provide 'a historic bridge between the past of a deeply divided society, characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy, peaceful coexistence and development for all South Africans,' Moreover, it should establish the 'foundation for the people of South Africa to transcend the

divisions and strife of the past', which left a 'legacy of hatred, fear, guilt and revenge' (cited in de Lange 2000: 21).

The present of the interim constitution is taken as a point of origin, a transitional moment between the 'no more' of civil strife and the 'not yet' of peaceful coexistence. In this context, the twofold aspect of constitution as beginning ('opening a new chapter') and promising ('these commitments') is explicit. But, as Christodoulidis (2000: 190-194) discusses, this renders the "we" that is invoked in the constitution problematic. For just as there could be no collective identity (no unified 'people' of South Africa) in the past characterised by strife and gross violations of human rights, so the legacy of hatred, fear and guilt precludes community in the present. The "we" that is invoked in the interim constitution can belong, then, only to the democratic future. And yet, since the legitimacy of the constitution is founded on the restoration of community, it must presuppose the continuity of this community (albeit a community that was previously divided) over time. Yet, in this the constitution makes an 'unwarranted presumption of a "we"' since it elides the risk of politics by re-presenting the conflict of the past as communal. In doing so, the law takes as a given what political reconciliation is supposed to achieve: the constitution of a "we". In legal terms, the conflict of the past can only be 'resolved' and community thereby 'restored' by a reductive representation that silences political objections that question how such a "we" is possible in the first place. Yet it is precisely the possibility of such questioning that is the enabling condition of a reconciliatory politics.

If reconciliation is to be conceived politically, it must accommodate the risk that the beginning on which it is predicated may not eventuate. Though less dramatic than the transitions to democracy in South Africa and elsewhere, demands for constitutional recognition by indigenous groups in settled democracies may be similarly understood as attempts to establish such a new beginning, what Ackerman would call a constitutional moment (e.g. see Tully 1995: 1-25). It was no coincidence, for instance, that Aboriginal demands for a treaty coincided with the debate over whether Australia should become a republic in the late 1990s. For what was at stake in both issues was the question of identity of the Australian 'people', their relationship to their government(s) and the terms of association between settler and indigenous societies. Constitutional politics in Australia in the 1990s turned around competing interpretations of the founding moments of the state. While the settler society celebrated its bicentennial in 1988, many indigenous Australians and their supporters mourned what they called 'invasion day'. Similarly, during the republican conventions leading up to the celebration of the centenary of federation in 2001, Aboriginal leaders called attention to

the fact that indigenous Australians were omitted from the original contract on which the foundation of the Commonwealth of Australia was based (Rowse 2002: 30).

State commemorative activities in this way provided focal points that were understood by some to present a political opportunity to establish a new beginning by calling into question the legitimacy of the “we” re-presented in the constitution while for others they were supposed consolidate state sovereignty. While, for one side, the possibility of reconciliation depended on inaugurating a new friendship between settler and indigenous societies, on the other it depended upon leaving the past behind by assimilating indigenous Australians into the broader society. For instance, in his Redfern Park speech, Prime Minister Keating (2000: 62) declared that the High Court’s Mabo decision provided ‘an historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians’. Yet, this was a beginning that never eventuated. For, under the Howard government, recognition of native title provided a legislative framework in terms of which the legitimization crisis of the settler society could be ‘resolved’ by allowing for the historical extinguishment of an entitlement that was never respected.

Despite the well-attended celebratory marches for reconciliation in the 1990s, many indigenous Australians continue to insist that there is unfinished business between the settler and indigenous societies. In calling for a treaty, indigenous Australians have sought to establish a framework within which the new beginning that reconciliation was supposed to establish might become more meaningful. A treaty would provide a measure of historical justice by recognising that indigenous peoples did have a political claim over the territories that were appropriated from them by the settlers and that treaties ought to have been sought with them at the time of settlement (see Thompson 2002: 29f.). In this context, the failure to provide for constitutional recognition of indigenous Australia perpetuates the original injustice. In the absence of a treaty, argues Aboriginal and Torres Strait Islander Commission (ATSIC) chairman, Geoff Clark (2000: 229), reconciliation is like ‘a football game without goal posts or accepted referees’. The value of a treaty for Clark is the measure of continuity and certainty it would bring to relations between indigenous people and the settler society. For the history of indigenous peoples’ dealings with the state ‘leaves us suspicious. Decisions and agreements reached during one term are too easily revoked during the next.’ What is required, rather, is ‘an explicit commitment about our place in the community that will endure changes in political fortunes’ (Clark 2000: 233). Without the common reference point that such a promise would establish there is only a directionless and futile talking-past-each-other. The opportunity for a meaningful

political dialogue between indigenous and non-indigenous Australians - one which might transform their historical relation to each other - is undermined.

These examples reveal how a legal constitution both reduces and makes available political opportunity. By establishing a common reference point, it provides an opportunity for a meaningful dissensus. In this context, law institutes a relationship between conflicting sides of a pluralistic interaction. Consequently, the absence of a treaty in Australia appears to undermine reconciliation between indigenous and settler societies, since politics lacks a stable ground that the institution of common expectations establishes. However, as system of representation, a legal constitution renders conflict resolvable by reducing contingency, which is the enabling condition of politics. As such, a legal constitution forecloses the opportunity to contest the terms within which such a relationship is determined. Thus, because the legal constitution of South Africa presupposes that the conflict of the past will turn out to be communal, it can not represent an objection that might call into question the legitimacy of this community in the first place.

Following Arendt, there can be no collective subject that pre-exists the act of constitution. Rather this “we” emerges from political interaction. Since the possibility of this “we” depends on its ongoing actualisation through public action and speech, a legal constitution cannot guarantee community. As foundational act, constitution invites the risk and promise of politics by establishing reconciliation as a ‘joint enterprise in time’ (Bankowski 2002). As foundational law, however, it elides both by institutionalising the terms within which reconciliation is to be enacted such that any conflict which might call into question the legitimacy of community fails to register as meaningful. The ethical constitution of a “we”, then, cannot be entrusted the ‘rule of law’, but ultimately depends on the willingness ‘to live together with others in the mode of acting and speaking’ (HC: 246).

The possibility of reconciliation thus depends on forsaking the certainty of law for the risk of politics. As such, the attempt to enact a new beginning in the present and to memorialise this beginning by promising “never again” always involves a leap of faith. It politicises reconciliation by inculcating an awareness that there is no inevitability to community; that the conflict of the past might turn out to drive communities further apart than bring them closer together. Yet, invoking community as a contingent future possibility also enables a reconciliatory politics in the present by projecting a horizon in terms of which former enemies *might* eventually arrive at a shared understanding of the significance of past wrongs for their political association, now and in the future.

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