Voices of Law and Justice

The (Re-)enactment of Legal Discourse in Tricycle's Tribunal Plays and IIPM's Public Trials

KLAAS TINDEMANS

EUROPEAN JOURNAL OF THEATRE AND PERFORMANCE Nº 3 SEPT 2021 ISSN: 2664-1860 PP.288-337 HTTPS://JOURNAL.EASTAP.COM

Klaas Tindemans

Royal Institute for Theatre, Cinema and Sound (RITCS)
Vrije Universiteit Brussel (VUB)
klaas.tindemans@ehb.be

Ph.D. in Law, teacher and researcher at the Royal Institute for Theatre, Cinema and Sound (RITCS), Brussels, and at the Royal Conservatoire Brussels. As a dramaturge he worked with the Antwerp actors' collective 'de Roovers', with BRONKS, the Brussels youth theatre, and with directors Ivo van Hove and Lies Pauwels, among others. He wrote and directed the plays *Bulger* (2006) and *Sleutelveld* (2009). He has edited books about playwright David Mamet and theatre director Jan Decorte. In 2019 he published De *dramatische samenleving. Een politieke cultuurgeschiedenis*, a collection of his essays. His research interests and publications are situated in the field of political theory, legal theory, and performance/theatricality.

KEYWORDS
Tribunal play, legal performativity, speech acts, Tricycle Theatre, Milo Rau

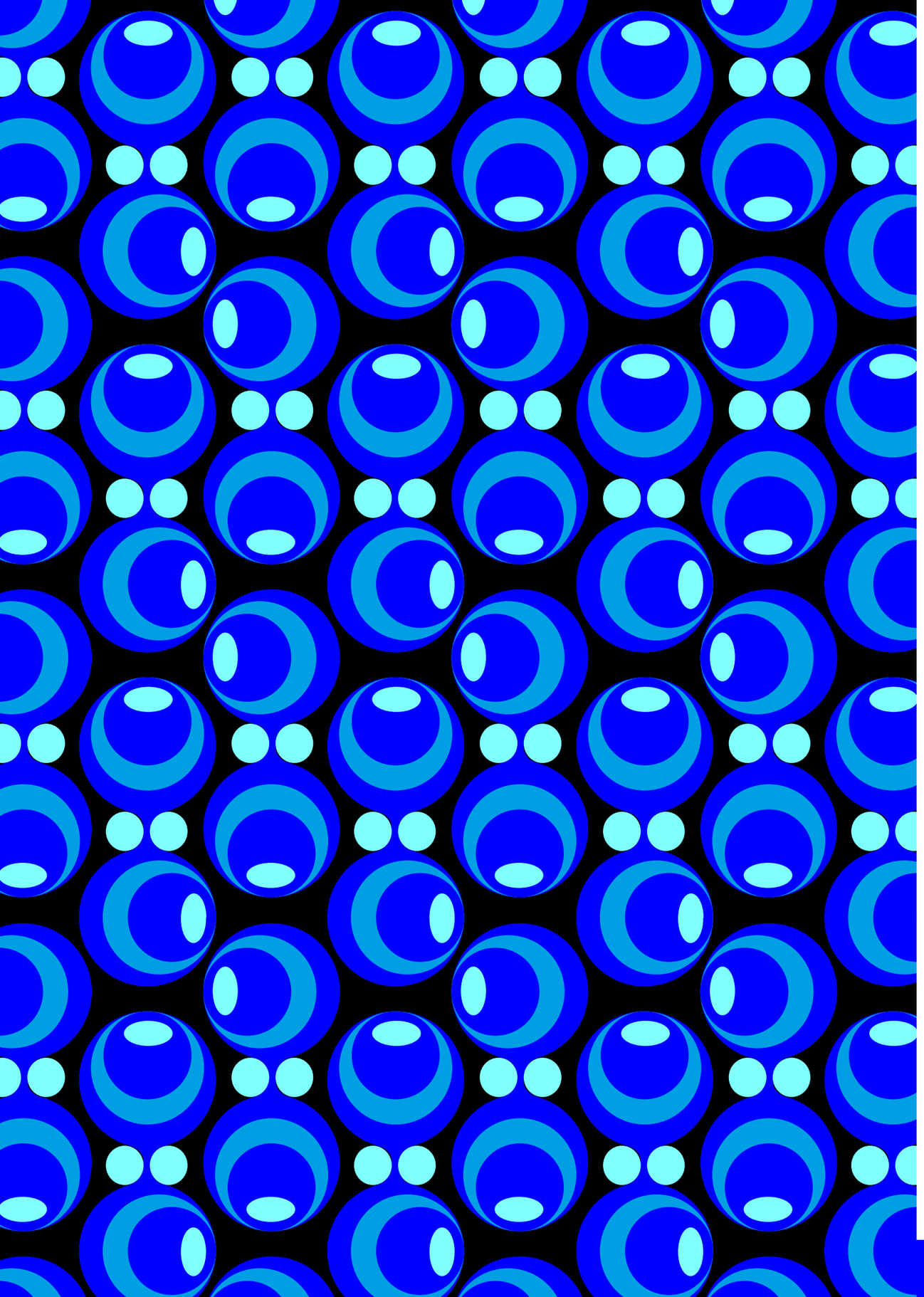
MOTS-CLÉS
Drame judiciaire, performativité juridique, actes de langage, Tricycle Theatre, Milo Rau

Summary

The Tricycle Theatre produced 'tribunal plays', staged re-enactments of public inquiries about the failings of the British political regime. Theatre director Milo Rau organised tribunals in Moscow — about artistic freedom — and East Congo — about violent economic exploitation. This contribution discusses the discourses of these performances, with John L. Austin's speech act theory as an analytical tool, including the fundamental critique (from Jacques Derrida and others) on this paradigm. This theory is also widespread in legal-theoretical analysis, which allows interesting comparisons. The analysis of representative scenes from these performances allows for the assessment of the 'felicity conditions' (Austin's term) that the characters/witnesses in the (re-)enacted tribunals try to define, in order to affirm their legal and bodily identity in complex political and societal contexts. Do these performances accept Austin's (dis)qualification of theatre and drama as 'parasitical' on presumably more real speech acts?

Résumé

Le 'Tricycle Theatre' à Londres a réalisé des 'tribunaux théâtraux', des reconstitutions d'enquêtes publiques sur les échecs du régime politique Britannique. Le metteur-en-scène Milo Rau a organisé des tribunaux à Moscou — sur la liberté artistique — et dans l'Est du Congo — sur l'exploitation économique violente. Cette contribution traite les discours de ces performances, ayant recours à la théorie des actes de parole (*speech acts*) de John L. Austin comme outil analytique, y inclus la critique fondamentale de ce paradigme (par Jacques Derrida et autres). Cette théorie est aussi bien répandue dans l'analyse théorique du droit, ce qui permet des comparaisons bien intéressantes. L'analyse de scènes représentatives dans ces performances permet une évaluation des conditions de félicité (*felicity conditions*, dans la terminologie d'Austin) que les personnages/témoins essaient de définir devant ces tribunaux (re-)constitués, afin d'affirmer leur identité juridique aussi bien que physique dans un contexte politique et sociétal compliqué. Est-ce que ces performances acceptent la (dis) qualification, par Austin, du théâtre et de la parole dramatique comme 'parasitaires' des actes de parole présumés comme plus réels ?



In the aftermath of the spectacular and highly televised O.J. Simpson trial in 1994, direct courtroom broadcast, theatrical re-enactments, and ‘mock trials’ became immensely popular, in the United States and beyond. The night court of New York City, an exhibition of the way in which the judicial system mainstreams the precarity and the underworld of Manhattan, became an attraction for alternative tourists. A report on this phenomenon reads as a review of a theatre performance (Scott 1999) and the lifestyle website Thrillist puts it on its must-see list (Reilly 2015). The blurring between theatre and performance, on the one hand, and the procedures of law and justice, on the other hand, is not that new. Film directors such as John Ford and Stanley Kramer documented the Nazi concentration camps, their footage being used as evidence at the Nuremberg trial in 1945-1946. This trial would prove exemplary for technological transformations in the judiciary (e.g., simultaneous

translation), an evolution that enhanced the theatricality of the procedure, as Cornelia Vismann argues. This theatrical character of mediatised trials about crimes against humanity can be seen continued and extended in the Eichmann trial in Jerusalem, in 1961, and in the Auschwitz trial in Frankfurt am Main, in 1963 (Vismann 2011: 241-270). In this respect, it might be argued that the upsurge of (documentary) courtroom drama in the 1960s, most outspokenly represented by *Die Ermittlung*, Peter Weiss' 'oratorio' about the same Auschwitz trial, constitutes a kind of reappropriation of the 'theatre of justice' by the theatre itself — on its own terms. *Die Ermittlung* ends with a shocking remark by accused #1:

> ACCUSED #1 We ought to concern ourselves
> with other things
> than blame and reproaches
> that should be thought of
> as long since atoned for
> (Weiss 1968: 199)

No verdict, the judge is left alone, and remains silent in his humble role of 'witness of the witness'. The audience has taken over the role of the judge — that is Weiss' point (Boos 2014: 168-169).

Scholarly interest about the relationship between law and theatre goes in two directions: the theatricality of the judicial events themselves, and the (re)enactments of legal processes by the theatre. This contribution deals, in principle, with the last category: playwrights and theatre directors staging their narratives and their performances as tribunals, based on the formal requirements of legal procedure, but re-arranged to reach a maximal theatrical result — an artistic and a political result. A first collection is the series of 'tribunal plays' edited (not written, as he emphasises) by Richard Norton-Taylor, performed at the Tricycle Theatre, London, between 1994 and 2012. All of his plays deal with the scars of British society after Thatcher, with the participation of Prime Minister Tony Blair's government in U.S. President George G.W. Bush's Iraq War of 2003 as its low point (Brittain et al. 2014). A second corpus consists of the tribunal performances of the International Institute of Political Murder (IIPM) of theatre director Milo Rau, about censorship on contemporary art such as *Die Moskauer Prozesse* ('The Moscow Trials', 2013) (Rau 2014), and about the ongoing civil war in Eastern Congo such as *Das Kongo Tribunal* ('The Congo Tribunal', 2015) (Rau 2017). Most of Richard Norton-Taylor's plays are editions of previous judicial hearings.[1] Milo Rau and IIPM organise their own theatrical tribunals with 'real' lawyers and 'real' witnesses, even when Rau announces (and stages) clearly a theatrical environment for the proceedings. In both cases theatricality is a supplement to the textual or discursive materials, but in a very different way.[2]

To assess the supposed particularity of these tribunal plays and performances, I will rely on a set of analytic tools based upon J.L. Austin's speech act theory. Austin's theory allows (relatively) easy access to fundamental problems of performativity, as the poignant criticism of Jacques Derrida, Stanley Fish, Judith Butler, and many others in their footsteps, have demonstrated abundantly. Austin's term '(in) felicity conditions' (Austin 1962: 12-24) denotes the circumstances determining the successful performance of a 'performative' speech act — a speech act intended to cause actual effect in the material world. A speech act should take place within the framework of 'accepted

1. There is one notable exception: *Called to Account* stages a fictitious indictment of Tony Blair for his alleged aggression with regards to the war in Iraq, based upon interviews with actual witnesses (Kent and Norton-Taylor 2007).

2. Milo Rau also staged an imitative tribunal play, in 2009, with *The Last Days of the Ceaucescus*. This play constitutes a 're-enactment', minute by minute, of a 'legal' procedure, but also of a historical event that continues to haunt the present (Le Roy 2017).

conventional procedures having a certain conventional effect' and this actual context should match with these conventions (Austin 1962: 26). Therefore, every speech act must correctly execute the procedure, and all the participants should share the intentions and respect the consequences of the performatives, according to their role and function in the procedure. A trivial utterance such as 'Bring the laundry inside, honey, it's going to rain' (a request) meets these conditions, although legal speech acts allow better, at first sight, this analytical approach. That is because Austin's conventional procedure and conventional effect are the explicit subjects of legal discourse itself. So-called proceduralism — a rigid adherence to legal procedures — even thrives on the manipulability of these conventions.

The '(in)felicity' of the legal-procedural conditions is most often the heart of the legal conflict. The felicity conditions of a theatrical (speech) event are clearly of a different nature, as the performative consequences are fundamentally different. In theatre, the consensus on the 'felicity' of a performed speech acts is never as straightforward as in a judiciary context: when a judge sends an accused to jail, he will be sent to jail. Theoretically at least, since, strictly speaking, the 'felicity' of the speech act does not depend on the actual action: an extradition of an undocumented migrant — i.e., the words of the warrant, validated by a competent officer — is felicitous, in Austin's logic, even when this person goes into hiding. Speech act theory itself cannot tell anything about the success of a request, a promise, an order, or any other 'strong' speech act: the consequences are contingent. The same goes obviously for the consequences of theatrical performances: nobody can be sure if the spectator will or will not change the world or even her/his worldview, after leaving the theatre. One should take care, however, not to subscribe too easily Austin's own qualification of drama — 'mock' speech acts by actors — as 'parasitic' upon normal use of speech, as 'etiolations' of language (Austin 1962: 22). Moreover, 'parasitism' as a cultural force might even help us to understand the performative nature of legal and theatrical discourse (Pellegrini and Shimakawa 2018: 104).

This article will try to identify some of the 'felicity conditions' of the aforementioned collections of drama, including the supposedly 'parasitical' nature of legal discourse in tribunal plays/performances. 'Parasitical' means here that the re-enactment creates an illusion of justice. In an exaggerated Austinian reasoning, this would mean that the performance imitates the 'felicity' of a legal speech act, that it suggests a 'felicity' (or justice) on its own terms, that it undermines the constitutional monopoly of the judiciary and, at the end of this slippery slope, that it would silence the voices of justice itself. The actual analysis will not end up in this Platonic deadlock, but it will meet, inevitably, fundamental issues of legal and theatrical performativity. Stanley Fish says that, on closer look, the difference between, on the one hand, the 'serious' physical world that the law pretends to describe and to standardise, and, on the other, the 'non-serious' world of (documentary) drama appears to be more of degree than of kind or substance (Fish 1980: 231-244). In terms of audience response and societal impact beyond the 'felicity' of the speech acts themselves, the distinction between these discourses might be quite subtle, without underestimating the violence of the law nor overestimating the sustainability of theatre.

This article is divided into three sections. The first section situates the *corpus* of performances in the larger framework of the tribunal as a form of documentary theatre, considering the track records of, respectively, Nicolas Kent's Tricycle Theatre and Milo Rau's IIPM. Secondly, a theoretical section sketches the landscape of speech act theory and performativity, insofar as it is relevant for law and performance as connected discursive practices. Before conclusions, representative excerpts from the plays will be analysed, in a third and final section, applying theoretical insights to the performance material.

Tribunals as Documentary Theatre

It is possible to write a comprehensive history of the Western theatre by taking tribunal drama as an anchor point, from Aeschylus' *Eumenides* (485 B.C.), over William Shakespeare's *Measure for Measure* (1604), until Bertolt Brecht's *The Caucasian Chalk Circle* (1944) and Arthur Miller's *The Crucible* (1953). They all use the iconic form of the judicial process to make a point about political power, about sovereignty even, and about the different ways that different layers of society perceive, use, and manipulate the force of law. Doubts about the suitability of legal procedure as a dramaturgical blueprint have been expressed since Aeschylus (Tindemans 2005). In a mirroring argument, the theatricality of the legal process itself has been criticised, most notably in Hannah Arendt's report on the Eichmann process (Arendt 1964/2011: 26-32). Contemporary tribunal plays can be situated between two extremes: the seamless imitation and the activist performance. A caricatural example of the first variation is the historical mimicry of the Scopes or 'Monkey' trial in Dayton, Tennessee wherein a yearly re-enactment of the infamous indictment of a teacher of evolution theory is mixed with a bluegrass music contest (Scopes Festival 2020). Chokri Ben Chikha's *The Truth Commission* (2013), about colonialism in Belgium's world exhibitions in the 20th century, provides a good example of activism (Ben Chikha 2017; Tindemans 2016). For this analysis, performances are chosen which also cover both ends of this specific repertoire. The Tricycle tribunal plays are, in text, cast, and design, careful imitations of real hearings, in a replicated courtroom configuration. The IIPM tribunals, in contrast, create their own jurisdictional realities, in discourse and space, with pseudo-legal procedures and outcomes — and activist intentions. The contrast is interesting, since it allows us to determine more clearly both differences and commonalities in the 'felicity' of these performative discourses.

The tribunal plays of the Tricycle Theatre, produced at the initiative of its artistic director Nicolas Kent, constitute one of the most elaborate corpuses of the 'imitative' type.[3] Apart from Richard Norton-Taylor's texts, the Tricycle tribunal plays included productions that could better be qualified as 'testimonial plays' (Brittain et al. 2014). They are based upon interviews that writers Gillian Slovo and Victoria Brittain conducted with witnesses of the events — 'from spoken evidence', as their subtitles say. *Guantanamo 'Honor Bound to Defend Freedom'* (2004) about British detainees in Guantanamo and *The Riots* (2012) about the looting spree in England in the summer of 2011 are examples of such plays. With the exception of *Nuremberg* (1996) and *Srebrenica* (1996, edited by Nicolas Kent), these hearings deal with British homeland issues: arms traffic (*Half the Picture*, 1994), police racism (*The Colour of Justice*, 1999), the Iraq War (*Justifying War*, 2003, and *Tactical Questioning*, 2011), and the 'troubles' in Northern Ireland (*Bloody Sunday*, 2005). The hearings are 'public inquiries', initiated by a government minister, based upon ad-hoc legislation and, since 2005, on the Inquiries Act, with or without judiciary powers such as subpoenaing (Institute for Government 2018). Most of them are concluded with a list of recommendations for government and administration, some of them become politically very sensitive. The severe conclusions of the Scott inquiry (arms traffic to Saddam Hussein's Iraq) lead to an enforced vote of confidence for the government of Prime Minister John Major. Meanwhile, the Hutton

3. Norton-Taylor's editing of the raw transcripts of official hearings reminds of Eric Bentley's pioneering *Are You Now or Have You Ever Been* (1973), a 'theatre of fact' about the interrogations of Hollywood directors, screenwriters, and actors, by the (anti-communist) House of Un-American Activities Committee (HUAC), between 1947 and 1952. Bentley justifies his 'arrangement' of the hearings, sometimes against chronology, with the 'principal shock effect' he wants to achieve: the perception of 'knavery' and 'folly' amongst all the participants, on both sides of the bench (Bentley 1972: X).

inquiry (the 'sexing up' of Saddam Hussein's immediate threat for Great Britain) according to many observers 'whitewashed' deceptive collusions between the Blair cabinet and defence specialists (Cozens 2004). The inquiries were presided by senior Law Lords, and they practiced a procedure of forensic hearing, but with fewer formalities: a chairman to the inquiry, counsel to the inquiry and to the parties involved (defendants, identifiable victims, witnesses), cross-examinations. Norton-Taylor says that inquiries, as distinguished from trials, better suit his explicit intention to reveal the truth. They do not just state the facts, but they also expose 'the attitude of mind, the intellectual sub-culture, of individuals in positions of power and authority' (Norton-Taylor 2008: 113-114).

Norton-Taylor's tribunal plays, especially those dealing with Iraq, focus on the (alleged) perpetrators, on those persons — politicians, civil servants, businessmen, experts — who, based on their daily dealings with the cases under scrutiny, are supposed to bear responsibility concerning possible misdemeanour. In Tricycle's testimonial plays of Gillian Slovo, which are based upon her own research and which do not imitate a realistic courtroom situation, those staged as victims (or bystanders) — young British Muslims suspected of terrorism and sent to Guantanamo, or people involved in the 2011 England riots — get much more attention. Alex Feldman, observing this contrast, refers to the post-Eichmann debate about the theatricality of the courtroom (Feldman 2018: 5-6) — I already mentioned Hannah Arendt's critique in this respect. Arendt suggests elsewhere, analysing the dynamics of the French Revolution, that a focus on the 'pathos' of victims, on pity with their individual misery, risks unleashing violent, inhumane reactions, in the name of humanitarian ideals — as the example of Robespierre has abundantly shown (Arendt 1963/1990: 92).

Arendt's position has been ascribed to her sympathies for Bertolt Brecht's epic theatre (Horsman 2011: 15-17), and this might make sense. A 'forensic aesthetic' implies primary orientation toward the language, speech, and gesture of those under (quasi-)legal scrutiny and that operation comes close to Brecht's *Historisierung* ('historicization'). In Brechtian theory, historicization means that one social system, in its development, is looked upon from the viewpoint of another, possible (utopian) social system, in order to demonstrate its contingency, that is, the variable character of the connection between human beings and their social environment (Brecht 1967a: 652). As the courtroom and the theatre belong to very different social (societal) systems, the forensic transposition is comparable. Moreover, the impact of the play is supposed to depend upon the transparency and the opacity of the characters' relationships with the scrutinised 'real' matter, without 'theatrical' bypasses (or teasers) (Feldman 2018: 13). For *Half the Picture*, the first play of the series, Kent and Norton-Taylor asked playwright John McGrath to write short monologues for an arms trader, an economist, a Palestinian, and a Kurd. Kent wanted 'to spruce up' the performance, anxious that the audience would not swallow the 'static' and 'wordy' piece, as Norton-Taylor told. Critics praised McGrath's inserts for providing a larger political and humanitarian context, but Alan Clark, a minister of state involved in the scandal that the Scott inquiry was supposed to clarify, saw these interventions ('soliloquies of Joan-Littlewood-Memorial-Plaque kind') as biased ideological framing (Megson 2009: 201-202). However, the 'dry' inquiring dialogues happened to be the keystone of the play's success, also due to characters such as chief inquisitor Presiley Baxendale. She had to confront all the arrogance, the deceptiveness, and other vices of the British regime — with the hearing of Lady Margaret Thatcher, former Prime Minister, as its highlight (Stoller 2013: 137-138). Norton-Taylor, who was incidentally *The Guardian*'s security editor until 2016, emphasises that the 'impersonation' of the facts, by actors aiming at verisimilitude, is more effective at contextualising the 'truth behind the Whitehall walls' than the written word: 'The experience of watching […] involves empathy for the victims […][and] the search for truth and

David Michaels as Alastair Campbell in *Justifying War – Scenes from the Hutton Inquiry*, 2003
Directors: Nicholas Kent and Charlotte Westenra
© Tristram Kenton – Kiln Theatre

the exposure to injustice [...] places a corporate responsibility on the audience to acknowledge that injustice' (Norton-Taylor 2008: 123-124).

The tribunals Milo Rau and IIPM created in Moscow (*Die Moskauer Prozesse*, 2013) and in Bukavu/Berlin (*Das Kongo Tribunal*, 2015) seem hard to compare with the Tricycle tribunal plays. Milo Rau dived both times into the heart of the actual conflict: the Sakharov human rights centre in Moscow, the exact location of the first religion-inspired attacks on 'blasphemous' contemporary art, and Bukavu, capital of the Congolese province of South Kivu, ravaged by civil war and reckless exploitation of precious minerals. Very diverse situations, but the configuration was essentially the same, with a hearing of actual parties in the conflict, a symbolic place — a human rights centre, a theatre of a Jesuit college — but a different legal framework. In Moscow, three trials concerning blasphemy (two art exhibitions and the short-lived performance of Pussy Riot in the Cathedral of Christ the Saviour) were re-opened and ended with a new 'mock' verdict, in Bukavu (with a sequel in Berlin) hearings about three cases about abuses of economic power in the mines took place, with a comprehensive political decision and no individual or corporate convictions.

Milo Rau's tribunals put the stakes high. His adviser Rolf Bossart endorsed the remark, in the weekly magazine *Die Zeit*, that 'when politics resign, only art can help' (Bossart 2017: 8). Bossart compares the actual exercise of this tribunal with Brecht's 'good judge Azdak' in *The Caucasian Chalk Circle*. This 'mock trial' dealt with the extremely complicated intertwinements between East Congo's richness in raw materials, the misty presence of international economic forces, the aftermath of the genocide in Rwanda, and the incoherence of political society in Congo in general — all factors contributing to violent chaos. The law is only represented symbolically, that is, no conclusion (adjudication) has any effective consequences. But this structural weakness allows precisely the participants — lawyers, witnesses, and an engaged audience — to 'turn the theatrical space of possibilities for the law, in an unmediated and unconscious way, into a space of realities' (Bossart 2017: 11). What kind of discursive (and linguistic) strategies can be conceived to approach this ambition? Moreover, Milo Rau acknowledges in his opening speech that the jury is cast according to the logic of discourse, not the logic of judgment (Rau 2017: 58). The trials themselves, in Congo and in Moscow, avoid open confrontations; their dramaturgy is not more polemical than the 'agonistic' nature of jurisdiction itself. As Christine Wahl says, Rau 'boils down' (*herunterkochen* in German) the heated conflicts to transform them into a situation of collective experience and reasoning: the creation of an *agora* (Wahl 2014: II). He does so by underlining continuously the artificial character of the proceedings, most simply by being present himself as Milo Rau, theatre director.

In the Tricycle tribunal plays, actors imitated meticulously the lawyers and witnesses they embodied in terms of linguistic accent, body language, and attitude. Rau worked with real lawyers and experts — sometimes politically active — with actual witnesses and defendants, and with a jury (experts in Congo, laymen and women in Moscow), which underscored, paradoxically, the artificiality of the performative situation. Here the lawyer 'plays' the lawyer, they expose and historicise themself. This radical choice leads to a debate about the security of the event — in both cases, the national regime was suspicious — and more specifically about witness protection. Pragmatic remarks about care for the safety of the witnesses after the tribunal and about perceived bias possibly leading to repression turned into a debate about the mere right to use artistic means to deal with potentially violent political conflicts, especially when this 'artefact' is performed in the high-risk area itself (Geenen and Tyteca 2018). Rau replied, apart from a factual refutation of supposed unsafety, that artistic interventions, even when there is no blurring between 'facts' and 'fiction', are always situated on a symbolic

level — and are thus unsatisfying, by definition (Rau 2018). Again, it's the responsibility of all the participants to turn a space of possibilities into a space of realities. But how can you exclude the realism — i.e., imminent danger, risk of violence — about the political and social endeavour from the discourse that is supposed to initiate the larger objectives, outside the realm of art? Of course, Rau takes care of this translation, but one should see what it actually means, in the performances.

Speech acts, Performativity, and the Theatre of Law

In order to analyse the performative value of a few snapshots from the Tricycle tribunal plays and IIPM's trials, in their own dramaturgical context, it is necessary to give attention to the notion of the 'performative', an essential concept in linguistic-pragmatic, legal, and theatrical discourse. Austin himself illustrates the idea of 'performative utterances', as a category of 'speech acts', by referring to the law. Under American law, a report of what someone else said is admitted as evidence, because this utterance is not so much a report of something this person said (hearsay is not admissible as evidence), but rather something this person *did*, an action (Austin 1962: 13). However, this example does not clarify what kind of action — e.g., deceptive or trustworthy — is meant, which is obviously an important qualification. Peter Brooks remarks that within a confession, for a long time considered as the strongest evidence thinkable in forensic situations such as police interviews, speaking *of* guilt should be strictly distinguished from speaking *the* guilt. A psychoanalyst also makes this distinction in a therapeutic situation, when the analysand confesses. In a forensic context too, the fact that the interrogated person has overcome the resistance to confess, does not validate automatically the factuality of his or her utterance (Brooks 2000: 117). One of the first references to the (performative) solidity of the law, in Austin's theory, runs here against some ambiguity.

A linguistic theory built upon the supposedly firm ground of the law — that is, normativity itself — happens to be an important source for performance theory, and especially for the concept of 'performativity', as coined by Judith Butler (Butler 1997: 24-25; Butler 1990/1999: XV-XVI) — despite the fact that Austin's theory evinces 'parasitic', pseudo-performative speech. Austin's theory starts with distinguishing 'performatives' and 'constatives': a 'performative' is a speech act that cannot be qualified as true or false, but only as 'felicitous' (happy) or 'infelicitous' (hollow). Performatives can be broken down into three elements: the *locutionary* act, i.e. the mere utterance of a sign in speech, meaningful or not; the *illocutionary* act, i.e. the change performed by the speech act as such; and the *perlocutionary* act, i.e. the effect that the speech act has, independent of the intentions of the speaker. Speech act theory is foremost interested in the *illocutionary* aspect (Austin 1962: 103) since the forces mobilised there belong (almost) completely to language/speech itself. Here words bind the subject: the promise, including its legal value, is the kind of speech act Austin elaborates. He refers, ironically, to Euripides' tragedy *Hippolytos*, to distinguish the objective binding from the subjective intention, thus resulting in *illocutionary* success, but in *perlocutionary* misfire: the moralist can qualify this as a failure, from the context, but the linguist sees/hears a 'felicitous' speech act (Austin 1962: 9-10). Stanley Fish analysed Shakespeare's *Coriolanus* from an 'Austinian' point of view, and he concluded that its dramatic effect lies in the tragic failure of the speaker/character (Coriolanus) to invest enough in the illocutionary authority which should make his speech act, his promise or his command, binding for the audience: the Roman citizens want to see him as a statesman, who respects the

conventional rules, but Coriolanus relies on (his own) independent values (Fish 1980: 205-206).

This 'misfire' reveals two difficulties on which Jacques Derrida, criticising Austin, focused: the (conventional) authority of the subject/speaker, and the difference between constative and performative utterances, already problematised by Austin himself (Austin 1962: 133-147). The convention/authority, which determines the felicity of the illocutionary act, is rather indeterminate for Austin, except the citation of the law. As such it is difficult, says Derrida, to generalise this condition. This lack of clarity about context and reference of a speech act could better be conceived as a necessity, and not as an accident (Derrida 1972b: 385). This structural feature, combined with Austin's aversion to the 'parasitism' of the actor, has the consequence that Austin's logic of speech-as-an-act should be reversed: the (conventionally authorised) subject/speaker does not produce the speech act, but the speech act brings forth (or 'performs', in Butler's logic) the subject. Speech, and communication in general, is based on 'iterability': words and their meanings are continuously repeated — and this is fundamentally different from citation, which is non-committal. Tracing back the origin of this semiosis leads to nowhere, except 'mystique'. Now this risk — of falling into the abyss of infinity, time and again — can be excluded or confronted, but then the performer/speaker meets the moment where authority can only be authorised by itself: violence, in other words (Derrida 1990: 934-937). Derrida tries indeed to retrieve this moment in his bilingual essay *Force de loi/Force of Law*, insisting on the arbitrary foundational act which takes place in every legal case, the judge (or jury) being haunted by the 'spectre of undecidability' (Derrida 1990: 1020-1024).

In his second critique on Austin — the constative/performative distinction — Derrida points again to the principle of iterability, which explains better the linguistic character of illocutionary force than Austin's insistence on (subjective, conscious) intention (Derrida 1972b: 388-389). The 'truth value' of the constative is irrelevant in the performative, but, as Austin himself acknowledges, the validation of this 'truth value' or factuality depends as much on the context — loaded with normativity, with rules defining meanings — as the felicity of a performative (Austin 1962: 142-143). Stanley Fish even notes that the philosophical distance between Derrida and Austin is small, and not so irreconcilable as John Searle, Austin's fellow speech act theorist, suggests (Searle 1977: 198). Their crucial distinction lies of course in the abyssal nature of 'infelicity', as Derrida continues to emphasise (Fish 1989: 57-66). In *Force de loi*, he concludes that 'every constative utterance relies, at least implicitly, on a performative structure ("I tell you that, I speak to you, I address myself to you to tell you that this is true, that things are like this, I promise you or renew my promise to you to make a sentence and to sign what I say when I say that, tell you, or try to tell you the truth," and so forth)' (Derrida 1990: 969).

Two final remarks, helpful to an analysis of tribunal theatre, can be made about theatricality/performativity. Julie Stone Peters shows how the emphasis on theatricality in jurisdiction and jurisprudence, put forward by Pierre Legendre, complements Derrida's abyssal iterability of (legal) authority (Peters 2008: 188-191). Legendre says: 'Les grands interdits se fondent et déploient leurs effets non seulement par des énoncés juridiques explicites, mais avant tout moyennant des formes et des mises en scène qui ont pour caractéristique de déborder la parole. La théâtralité nécessaire au fonctionnement de la normativité manie l'imparlable' (1989 : 25).[4] This theatricality, close to ritual, reveals the law as an institutional play of images and accomplishes even more: one

4. 'The great proscriptions are founded in and deploy their effectivity not only by explicit legal statement, but before anything in mediating forms and mises-en-scene, going beyond speech. The theatricality necessary to the functioning of normativity manipulates the unspeakable.' (My translation)

cannot argue with beauty, so this theatre produces and ratifies the normativity of the legal order. The 'unspeakable' origin of the law — the 'real' of Lacanian psychoanalysis — or its *aporia*, its dead-end alley, can only be presented theatrically, thus constituting law's ultimate tool for authority, for command (Peters 2008: 190). In this logic, theatre can hardly be qualified as parasitical. Ross Charnock however demonstrates how this performativity meets its limit by analysing the iconic judiciary speech act of 'overruling' — that is, the substantial change of an authoritative precedent that is protected by the *stare decisis* principle in (mainly Anglo-Saxon) law — within the highest courts such as the Supreme Court in the U.S.A. or the House of Lords in the U.K. When judges speak, according to the so-called declaratory theory (the law is already there, the judge is only its mouthpiece), the actual history of overruling older precedents shows that contradictory rhetorical tricks and circular reasoning are used to hide substantial changes that might be constitutionally weak, thus undermining its own 'felicity conditions' (Charnock 2006: 422-423).[5] The legal theatre does not function smoothly in a secular age, while normativity itself has become a legal-political battleground. The deconstructionist critique of Derrida, the theatricalised *aporia* of Legendre, and the pragmatic analysis of Charnock lead to the same conclusions about normativity: the law does not justify itself, and a reference to the law — both legislation and jurisdiction — to the contextuality of Austin's speech act theory does not help. Sandra Laugier suggests that Austin's *rationale* of the illocutionary act, if freed from subjectivity and consciousness, comes remarkably close to the idea of the basic norm Hans Kelsen posited as ultimate defense against the remnants of 'descriptivism' in legal theory (including, probably, declaratory theory): his *Grundnorm* is the all too simple pleonasm (or emptiness) of 'the law is the law', disguised as transcendental condition (Laugier 2004: 624).

5. The famous Roe vs. Wade case (Roe vs. Wade 1973) of the U.S. Supreme Court, establishing a three-trimester system regulating conditions for legal abortion, is an interesting example. Its lack of normative rigour (or its mere rhetoric) allowed subsequent verdicts to narrow down the scope of a milestone decision perceived as clearly 'pro-choice' (Morgan 1977).

For the purpose of the analysis of Tricycle's and IIPM's tribunal plays, some essential things can be learnt from these debates. Derrida argues that, taking 'iterability' as a necessary requirement to make any speech act meaningful, the distinction between 'constative' and 'performative' speech acts is much less relevant than Austin thought: every speech act is performative and its origin is not retracable. For the theatre — and especially for courtroom drama — this is important, since it functions thanks to this performative nature of speech, even if it is illusionary and ephemerous. Moreover, as Legendre argues, theatricality is as essential for the courtroom — also based upon speech acts — to hide its 'abyssal' foundations. So both law and theatre perform a groundless reality, but, paradoxically, they do everything to sublimate this groundlessness. This might indeed be the basic wager of courtroom theatre, in its double meaning: theatre imitating justice, or justice imitating theatre — and a starting point for the present analysis.

Tribunal Plays, or Tales of Unemancipated Citizens and their Regents

Tribunal plays use legal theatres and narratives as a metaphor and/or as a dramaturgical device, but it remains unsure, *prima facie*, if and to what extent this deconstruction of the 'theological' authority of the law is part of their appropriation of legal discourse. Is the transition from the language of the law, in its self-asserted accuracy, to dramatic speech as simple as, for instance, the translation of political rhetoric into

dramatic spectacle? Is it possible to observe any feedback between the 'aporetic' character of legal speech and discourse and the 'affective autonomy' of language in drama and theatre? Or does legal theatre-of-the-real adhere, paradoxically, to an (outdated) positivistic notion of law and language? An analysis of some fragments from Tricycle's tribunal plays and Milo Rau's *Prozesse* could be the beginning of an answer.

The chosen scenes from two texts of Richard Norton-Taylor — *Half the Picture* and *The Colour of Justice* — can be considered as representative. Stephen Bottoms sharply criticises the London wave of 'verbatim' plays in London after 1990, and more specifically David Hare's 'naturalistic' docudrama, because they entertain the illusion that verisimilitude — specifically the television-like *mise en scène*, combined with a perfected imitative acting style — reveals irrefutable factuality and truth (Bottoms 2006: 67). Bottoms does not mention Tricycle's tribunal plays, but they run the same risk, if only by pretending that the transcripts of the hearings are 'merely' edited. Chris Megson notes that this (fake) naivety about the literalness of documentary representation was already given up by Peter Weiss himself, when he emphasised the montage character of documentary theatre: 'unaltered in content, edited in form' is self-contradictory, and Weiss admitted that openly. *Half the Picture* ends with such a montage, and Lady Thatcher has the final word: 'I fear there will be much grammar to be corrected.' (Megson 2009: 199-200; Norton-Taylor 1995: 274). But what does it mean when an edited transcript becomes performance? What is exactly performed — a legally valid statement, an illustration of political arrogance, or something else? Seen as a metatheatrical subtext, Thatcher's remark also suggests that the hearings — or by extension any hearing — could be seen as a 'live' montage of the testimonies, with the presiding judge as the editor. It was not only Scott who corrected the grammar, Norton-Taylor performs this montage a second time — with different cuts and different narrative constraints.

The Scott inquiry, subject of *Half a Picture*, dealt with the eagerness of the British military industry to export arms and technology to Saddam Hussain's Iraq, immediately after its ceasefire with the Islamic Republic of Iran in 1988. When the trial against weapons manufacturer Paul Henderson in 1992 revealed that the Conservative government had given silent authorisation and that Henderson had a hardly disclosable connection with intelligence services, the trial itself collapsed. Under pressure, Prime Minister John Major appointed Lord Justice Richard Scott to conduct an inquiry. David Gore-Booth was the head of the Middle-East Department of the Foreign Office and played a minor role in the scandal — he justified the silent softening of arms trade guidelines — but he embodied perfectly the elitist mentality of Whitehall, the 'upper class' of British civil service. In the play, the function of his character is to 'perform' this attitude. His performative plus-value is slightly different in both situations: the 'real' Scott inquiry is mainly interested in the lines of (authoritative) advice, leading to a controversial decision of the government, but his performance in the play is focused on the creation of a context — the sub-system of back-door politics. However, in both cases, he performs (and so reveals) a tacit understanding of the instrumental nature of the law regarding 'major' political interests. The elitism thus has its reasons. In Austinian terms: how does this context augment 'felicity conditions' for the illocutionary force of the challenged decisions?

> **[CHIEF INQUISITOR PRESILEY] BAXENDALE** You say that the original guideline 3 ['we should not, in future, approve orders for any defence equipment which, in our view, would significantly enhance the capability of either side to prolong or exacerbate the conflict', 1985] is still in place?
> **GORE-BOOTH** It is kept under constant review and applied on a case by case basis in the light of the prevailing circumstances, including the ceasefire [between Iraq and Iran].
> **BAXENDALE** That is completely ridiculous, is it not, in the light of the fact that it has been amended for Iraq, to completely different words?

GORE-BOOTH I do not think so at all. We come back to the point of whether you think the British public and parliament are so dumb as to realise that there has not been a ceasefire.
SCOTT They certainly cannot have known what the revised wording was.
GORE-BOOTH Indeed not, but it had been decided not to make a public announcement.
BAXENDALE It is not completely misleading?
GORE-BOOTH I do not think so at all.
(Norton-Taylor 1995: 224-225)

The diplomat David Gore-Booth performs here, by defending the secrecy of a re-interpretation of the guidelines, the logic of political deception: his answers are arrogant, but their illocutionary force lies in the blatant (theatrical) creation of a world of different truths — not necessarily 'alternative facts' but rather alternative qualifications of seemingly obvious rules. This is risky, because the logic of this illocution is based upon the public denial of its working. The straightforward interrogation of Lord Justice Scott and Presiley Baxendale, Queen's Counsel — their titles enhancing the authority of their questions and the validity of their (legalistic) reasoning — reveal this paradox. In another testimony, witness/defendant Alan Clark, Minister of State for Trade and, later, for Defence Procurement — a notorious wit — states:

CLARK (…) It is a brilliant piece of drafting, because it is far from being restrictive. It is open to argument in respect of practically every one of its elements. I regarded the guidelines as being so imprecise and so obviously drafted with the objective of flexibility in either direction – elasticity, shall I say – as to make them fair game. It denies the ordinary meaning of the English language to say that the guidelines were not changed.
(Norton-Taylor 1995, 238)

Clark even provides intellectual background by suggesting that guideline 3 is a perfect illustration of 'the constructive tension between positivism and ambiguity', referring to Alfred Ayer. However, Gore-Booth's and Clark's statements, taken together, create, *a posteriori*, a discursive fact, or an institutional fact. This is a fact presupposing 'the existence of certain human institutions', in contrast with 'brute facts' (Searle 1969: 51), although it is exactly the speech act that blurs the factuality of the institution, be it 'the Prime Minister', 'the Government', or 'Whitehall', by defining the guidelines. Here the law itself, albeit in a soft version, is presented as an empty shell, available for any suitable (cynical) use. The speech act opens up an abyssal series of justifications ('umbrella politics'),[6] postponing/distinguishing (*différant*, in the Derridean sense)[7] the final authority. The difference becomes acute between an actual inquiry which, by its mere existence, constitutes an institutional fact, and the (edited) theatrical representation of the same hearings. The latter begs for a criterium of veracity, which is an implicit (and problematic) characteristic of all documentary theatre (Tindemans 2013). The question is whether the imitative setting of *Half the Picture* characterised by a mimetic acting style and naturalistic sets does justice to the (linguistic) construction of 'aporetic' authority that both jurisdiction and drama, albeit in very different ways, require. 'Suspension of disbelief' won't do.

6. The term 'umbrella politics' is a specific Belgian expression that has the following meaning: 'People who try to escape their responsibilities are doing umbrella politics. They hold an umbrella over their heads, so that they do not take their responsibility but put it aside and eventually drop it. The word "umbrella politics" only occurs in Belgium, in addition to the expression "opening one's umbrella". They may have been derived from the informal French language in which, in this context, "ouvrir son parapluie" is used' (TeamTaaldavies Vlaamse Overheid, 2007, my translation)

7. In French, *différer* means both to postpone and to differ. This ambiguity leads to Derrida's coinage of the neologism *différance*, about which he says that it is not 'a concept, but the possibility of conceptuality itself, the playing movement that […] "produces" these differences' (Derrida 1972a, 11-12).

In *The Colour of Justice*, discursive constructivism is shown from the other end of the state's institutions. The play focuses on professional misdemeanours amongst authorities (relatively) close to the general public: the police force and their supervisors. *Half the Picture* builds up, dramaturgically, from untransparent government policy to the concreteness of a commercial deal about lethal weapons. *The Colour of Justice* has roughly the same structure, from inconsistencies about forensic methods (or sheer clumsiness), to the blatant reality of (possibly) institutionalised racism. Richard Norton-Taylor edits sixty-nine days of public hearings about the racist murder of Stephen Lawrence in 1993 followed by a (deliberately?) dysfunctional forensic inquiry, the dropping of the prosecution of the suspected thugs, a failed criminal trial and, on top of it, the cover-up of these flaws by supervising police officers. The Stephen Lawrence case became notorious due to the activism of his parents and the British-Jamaican community, resulting in a public inquiry, on request of Home Secretary Jack Straw in 1997, chaired by Sir William McPherson, a retired High Court Judge (Norton-Taylor 1999: 7-14). In 2012 two suspects were finally convicted after a retrial at the instigation of Keir Starmer, then Director of Public Prosecutions.[8] Norton-Taylor casts a diversity of witnesses: police officers, an accidental eyewitness, an acquitted suspect, Stephen Lawrence's parents, and his friend Duwayne Brooks, who saw Stephen Lawrence being stabbed. The testimonies of the bereaved fulfil here the same function as John McGrath's fictional monologues in *Half the Picture*: they undermine the firm ground of institutional reality, as created by the police witnesses, which tries to justify itself. These figures are not present for mere empathy, they draw the picture of a 'brute' reality. The illocutionary forces, by which speech acts create the institutional reality the audience observes, are most present in the hearings of the police officers. The interrogation of DC Linda Holden, liaison officer between the police and the family, is particularly telling and theatrical:

> **[DETECTIVE CONSTABLE LINDA] HOLDEN** Detective Constable Linda Holden.
> **[CHAIRMAN SIR WILLIAM] MACPHERSON** Thank you. You do not need actually to lean forward over the microphone but bring the microphone close to you and then everybody will hear what you say. But speak up so the stenographer can hear you across the room.
> (…)
> **[ASSISTANT COUNSEL TO THE INQUIRY ANESTA] WEEKES** So you had some experience with a black family and an Asian family at least two years prior to Stephen Lawrence?
> **HOLDEN** Yes.
> **WEEKES** Can I go to the Lawrence family. The relationship with Mr and Mrs Lawrence became very difficult?
> **HOLDEN** Unfortunately yes, it was very, very difficult, yes. There was so many outside agencies from different sorts of parties. I couldn't – I couldn't really get a close relationship with the family because there seemed to be a lot of barriers put up.
> (Norton-Taylor 1999: 79)

The opening remarks are neutral and helpful in a normal courtroom, yet they become awkward when imitated on stage, as if the scenery resists the witness. This awkwardness continues when hostility between the police and the Lawrence family is suggested. Activism is not appreciated because it creates a reality beyond the usual emotional empathy: the police officer resists, unconsciously perhaps, the politicisation of the case.

The cross-examination of Stephen Lawrence's mother, by the solicitor of the highest-ranking police officer, is a common demonstration of judicial agonism, but the (linguistic) construction of an 'alternative' reality reaches beyond a fencing contest:

8. Today, Doreen Lawrence, Stephen's mother, is a 'working peer', which is the term for a non-judicial member of the House of Lords, and she advises Keir Starmer, now leader of the Labour party, on ethnic minorities policy and health issues (Prime Minister's Office 2013; BBC News 2020).

[COUNSEL FOR THE COMMISSIONER OF THE METROPOLITAN POLICE JEREMY] **GOMPERTZ** (…) Can I ask you please to look at your note. Those are the names, are they not, that you wrote on the piece of paper and took with you when you went to see Mr Ilsley?

MRS [DOREEN] LAWRENCE Yes.

GOMPERTZ You see, the reason I ask you is that if all the names were written on this piece of paper, they did not include the names Norris or Knight, did they?

MRS LAWRENCE No, people were confused about the names when they came to us.

GOMPERTZ Can I ask you about something quite different now: your journey home from the hospital on the night in question. You went, did you not, to the Welcome Inn?

MRS LAWRENCE No.

GOMPERTZ Where did you go then?

MRS LAWRENCE Can I ask a question here? Am I on trial here or something here? I mean, from the time of my son's murder I have been treated not as a victim. Now I can only tell you or put into my statements what I know of went on that night. And for me to be questioned in this way, I do not appreciate it.

MACPHERSON Mr Gompertz, I think your discretion should be exercised in favour of not asking further questions.

GOMPERTZ Sir I will, of course, accept your guidance.

(Norton-Taylor 1999: 115-116)

The crisis in this exchange shows that Mrs Lawrence is conscious that the words, grammar, and reasonings of Gompertz have indeed illocutionary force: he performs, for himself, the character of the one-sided lawyer, but at the same time he destabilises — politely perhaps — the careful balance that chairman MacPherson tries to uphold between institutionalised authority and 'daily life'. Considering the previous fragment, this balance is politically delicate and a legal assessment of the facts seems to be a necessary warrant of any political interpretation of the murder and its aftermath, if this institutional setting allows any politicisation at all. In her appreciative review, Janelle Reinelt criticises, on the one hand, the surface realism of *The Colour of Justice*, and its all too Aristotelian theatricality — pity and fear, resulting in katharsis — but she recognises, on the other, the huge societal impact of both the MacPherson report and its theatrical translation as exemplary for contemporary documentary art. The question remains, however, if the relationship between the actual MacPherson inquiry — which was very present in the UK, over the years — and the Norton-Taylor adaptation is purely mimetic, as Reinelt seems to suggest (2006: 79-82). Did Tricycle merely repeat and amplify the actual hearings, or were different, more subtle, illocutionary forces at work? And what is exactly meant by 'societal impact'? If performative speech acts change social reality, as Austin suggests, does the transformation occur, respectively, after the actual (mediatised) events, after the inquiry, or after the performance? The reification of race relations, for instance, an aspect of the Stephen Lawrence case that Paul Gilroy points out, is not the subject of MacPherson or Norton-Taylor, although the linguistic-pragmatic importance is undeniable (Gilroy 2000: 49-53).

If the Tricycle tribunal plays were a public success that often exceeded the expectations of an independent, politically outspoken English theatre company — *Half the Picture* was performed in the Palace of Westminster whilst the BBC broadcasted *The Colour of Justice* — the audience remained a theatre audience, familiar with theatrical codes and critical about aesthetic quality and societal relevance, within a 'niche' of cultural London. The configuration of Milo Rau's tribunals is completely different. Here there were no normal theatre venues and engaged audiences closely related to the parties in the process alongside real witnesses, real politicians, etcetera — yet without any jurisdictional power, as Rau himself announced in his introduction. The trials as such were not edited, although the films — deliberately made to disseminate

the statements Milo Rau made with the performances — are dramaturgically comparable to any process play, as a chronology of revelations, case after case. In May 2013 Milo Rau organised, only a few weeks after *Die Moskauer Prozesse*, and in the same configuration of lawyers, experts, witnesses, and jury, another play entitled *Die Zürcher Prozesse* in Zürich, Switzerland. In that case, *Die Weltwoche*, a weekly magazine with a populist right-wing profile, was indicted for 'hate speech' in its inflammatory anti-migration and anti-Sinti & Roma headlines and (manipulated) pictures. Tobi Müller's remarks about Zürich are equally valuable for both other 'theatrical trials', even when the Swiss Milo Rau has much more an outsider position in Congo or Moscow. Müller calls Rau's trial theatre 'learning plays' — *Lehrstücke* in German (Müller 2014: 11). Bertolt Brecht wrote *Lehrstücke* — such as the radically Leninist *Die Massnahme* (Brecht 1967b) — but they were not, or not in the first place, meant to teach the audience, but rather to educate the players themselves: 'When you perform a 'learning play', you should play like students. With a deliberately clear speech, the student tries, going through the difficult passage again and again, to determine the meaning or to store it into his memory.' (Brecht 1967c: 1022). In the Zürich trial, this meant for Milo Rau that the liberal news media had to learn to set aside their moralism and to look at the grossness of *Die Weltwoche* from the point of view of the rule of law and human rights, including the constitutional and societal limits to the law's impact.

In Moscow, the (mock) trial dealt with three separate infringements on legally protected respect for religion ('inciting religious hatred'): the exhibition *Caution! Religion* (2003), the exhibition *Forbidden Art* (2007), and the performance of the all-female punk band Pussy Riot in the Cathedral of Christ the Saviour (2012). Rau had cast representative public figures from both sides, with expert for the prosecution Maxim Shevshenko as the most prominent one. Shevshenko, popular television journalist and politician, maintains that in Russia church and state are one and that this unity stands for Russia's historic unicity (Rau 2014: 48). His declarations at the trial express the political and cultural framework that would justify the prosecution on purely legal grounds. His speech could be considered, in Austin's terms, as sequences of constative utterances — representation of social facts — but with a strong illocutionary force, thus drawing a particular image of rule of law in Russia, that merges tendentious, partisan opinions and attitudes with standards of normativity.

> **SHEVSHENKO** I believe it are the faithful who need defence, here and now. I declare that these 'artists' are the vanguard of a liberal-totalitarian state, a liberal-fascist state, which has infiltrated our country. When the action of these girls took place, I wrote in an article that they form the vanguard of a liberal offensive against the heart and soul of the Russian Federation and one should stand out against them. Artists are weapons in the hands of a dark power who wants to destroy all human in man. Therefore I pray you to consider, when you give a judgment, when you have heard experts, lawyers, solicitors, prosecutors, whether a man possesses the right to be a man. Or if, on the contrary, this inhuman power, which bears many names, which even calls itself 'liberalism' and whose offshoot postures as 'action artists', if this power has the right to penetrate the most sacred place of all. I thank you.
> (Rau 2014: 46-47)

The un-juridical arguments of his speech are difficult to refute within the existing judiciary trial framework. Immediately afterwards the 'verdict', that is the real meaning of this ideological context despite its commonsensical circularity or absurdity, emerges in all its (radical) clarity. The deliberation of the jury happens to culminate in a tied vote, which legally implies the acquittal of all the accused on all charges. Most penal procedures, under the rule of law, lead to an acquittal in the event of a tie, but Shevshenko reinterprets the result:

Maxim Shevshenko in *The Moscow Trials*, 2013
Director: Milo Rau
© Maxim Lee – IIPM

> **SHEVSHENKO** (…) Three votes in favor [of a conviction], three votes against, one abstention. The verdict doesn't say that they are not guilty. This is a mistake, and I don't understand why the court interprets the judgment of the jurors in this sense. The votes of the jurors are equally divided, exactly in the way as our society has two opinions about this issue. I think that the distribution of the votes of the jurors demonstrates the schism in society. (…) In short, there is no 'guilty' or 'not guilty'.
> (Rau 2014: 154)

Shevshenko shrewdly conflates two conventional frameworks, the judiciary and the theatrical. This is an ambiguity that Milo Rau deliberately creates for every tribunal (Zürich, Moscow, Congo) via the extensive and detailed seriousness of their research, factually and politically. This makes an evaluation of 'felicity conditions' particularly hard. Shevshenko's opening speech is a strange example of ideological patchwork. His protest against the tied vote of the verdict is implicitly based upon his earlier sketch of a 'decadent' society: simple legality — *in dubio pro reo* — is not sufficient anymore, a blind application of the rule of law does not do justice to the fundamentals of society at stake. This conclusion should have consequences for a dangerously divided society: Shevshenko's illocution reaches beyond procedural logic. He does not accept that 'proceduralism' — understood as the respect for procedures enabling the anticipation of the illocutionary forces of statements during a judicial process — constitutes precisely one of the pillars of the rule of law. Rau's theatrical framework allows observers to see, quite transparently, the true nature of the political attitude of those who identify state and church as one in Russia.

In *Das Kongo Tribunal*, Rau exploits again the tension between legality and theatricality — raising doubts for the audience about the nature of illocution and degrees of factuality — but the polemical character of the trial is less outspoken. The trial was split in two sessions, one in Bukavu, one in Berlin, and the Bukavu session gave the impression of a people's assembly, with a very engaged audience, all linked, at least emotionally, to the situation characterised by civil war, exploitation by (multinational) mining companies, and the dubious relations between both. All dignitaries of the region, including Marcellin Cishambo, Governor of South Kivu and his Ministers, and presidential candidate Victor Kamarhe — now disgraced — were present. The court was presided by Jean-Louis Gilissen, a Belgian lawyer specialising in international penal law and previously involved in the International Criminal Tribunal for Rwanda (ICTR), which dealt with the 1994 genocide. More than the Moscow tribunal, the Congo tribunal inquired into issues with a larger, even global impact: human rights, of course, but against a background of international economic relationships, post-colonial exploitation and surreptitious power mechanisms, creating together an extremely unbalanced confrontation between governments and multinationals, often backed by their own national governments. The jurors, all experts from Congo and Europe, reached a verdict (in Berlin), clearly denouncing the systematic violation of human rights and proposing mixed national/international penal tribunals. However, it proved much more difficult, if not impossible, to cast the economic misdemeanour and the collateral misgovernance in a legally valid, let alone enforceable mould, partly due to the diversity of actors involved that included representatives of national and regional governments, MONUSCO peacekeepers, European bureaucracies, and international NGOs (Rau 2017: 258-262). Three cases were chosen, supposedly representative of the complexity of the situation. The 'Banro-case' was about a village relocated by force to make way for large-scale extraction of gold and tin. The villagers were robbed of their humble source of income from digging gold. The second case, the 'Bisie-case', dealt with a conflict between large mining companies, local artisanal miners, and rebel groups. When the USA forbade their trading companies to buy raw materials from conflict

areas, jobless *creuseurs* were forced to join militia, with deterioration of the region and more indiscriminate violence as a result. The third case was an inquiry into a recent massacre in Mutarule, which demonstrated the inefficiency of, on the one hand, the passive Congolese government and army and, on the other, carelessness of the MONUSCO 'protection' force and international NGOs with their own agendas.

The example of the interrogation of Jean-Julien Miruho, Minister of the Interior in South Kivu, shows how discourse and speech acts create a legal-theatrical reality. Every utterance fits neatly in the legal construction (of government accountability, in this case) and when combined with *decorum* (in gesture, in setting, even in costume), adjudication seems to become self-evident. Miruho had to deal with the Mutarule massacre. After a devastating testimony of a local student leader about the belated arrival of the government at the place of the carnage, he tries to answer, with a clichéd account of governmental impotence:

> **MIRUHO** This witness is a student, that's what I want to say first. (...) I have welcomed a delegation of students, and this student was among them. First: talking about the government, this is not only the Minister of the Interior or the Governor. The government is a whole. We have sent there a protection unit. We have sent there members of our security council. And we ourselves were there, the next day, because we had to organize everything. We ourselves arrived the next day in Mutarule, and we organized there the burial of the victims of the massacre. I don't know, if these were three days. It were not three days.
> (Rau 2017: 195-196)

In itself, this is an anecdotical statement, reproducing not the banality of evil, but rather the banality of incompetence, although the setting of the Eichmann tribunal is, *mutatis mutandis*, comparable: (organised) massacres, millions of victims, heart-rending testimonials, petty bureaucrats, a theatrical setting — simply not with Israeli Prime Minister Ben-Gurion as the theatre director,[9] but rather artist-activist Milo Rau. The contrast between the actual violence in Congo and the emptiness of the political or legal responsibility is shockingly exposed: the 'dramaturgy' of the Eichmann-in-Jerusalem was much more linear, from badly disguised evil to the execution. The testimony of Miruho and the closing speech of governor Cishambo about his fruitless efforts to reform the armed forces in his province (Rau 2017: 232-236) form the first stage in a discursive sequence of weak illocutionary acts — these speech acts are unable to perform actions — gradually culminating in an intellectually impressive, but performatively (politically) powerless, pseudo-verdict without (perlocutionary) consequences. In a remarkable way, this trial shows the 'groundlessness' of international law, particularly when immense economic interests are at stake: every action opens a new abyss, renders rules meaningless, and destroys normativity. The political strength (and thus the theatrical impact) of *Das Kongo Tribunal* lied however in its contextualisation, in its effort to de-polemicise the ordeal of a population, even when this leads to awkward utterances by the official 'lawgivers' in a lawless situation.

9. The Eichmann trial in Jerusalem marked a political shift in the 'dramaturgical' function of the Holocaust to legitimise the existence of the state of Israel by associating the murder of 6 million Jews by Hitler's Germany with the imminent danger (of annihilation) from Israel's Arab neighbors. Prime Minister Ben-Gurion declared openly that he was not interested in the fate of Eichmann, but only in the spectacle. Indeed, it can be argued that the abduction and the spectacular trial were not necessary to prove Eichmann's guilt (Zertal 2005: 107-108).

Conclusions

De-legitimisation of arms trade or at least its placement under public control; structural measures against institutional racism with the police; an end to the persecution of (political) artists in Russia; legal action against those responsible for violent economic exploitation in East Congo: these are the concrete societal measures and changes the discussed Tricycle tribunals plays and the Moscow and Congo trials propose or at least suggest implicitly. Is it possible to assess these desired results and evaluate the perlocutionary force of these plays? Maybe together with the non-theatrical hearings on which the Tricycle plays are based? Or together with the rare verdicts of the European Court of Human Rights (concerning Russia) (Press country file Russia 2020) or the International Criminal Court (concerning Congo) (International Criminal Court 2020)? Or are we forced to acknowledge that any artistic effort in this respect is futile and that 'art taking over when justice fails' eventually means that art is doomed to fail too? It is indeed hard to assess the direct societal impact of tribunal plays or other forms of 'theatre of the real'. The formal difference between 'imitative' and 'activist' tribunal plays does not play a fundamental role: both claim that an artistic intervention — qualifiable as *Historisierung* — constitutes a plus value to legal adjudication, as they contribute to a different, more comprehensive framing of the events at stake. In an analysis of the reception and the effect of documentary film and video, especially forms of activist, 'committed' documentary, Jane M. Gaines warns of an overestimation of any social impact. 'Realistic' screenings of injustice or violence have resulted, sometimes, in the mobilisation of the 'politicised body'. But this politicisation is already a preliminary condition, and it is highly questionable whether the result — e.g., the Los Angeles riots in 1992, after the broadcasting of footage of police brutality towards Rodney King — has to do with the genre, with forms of adaptation and distribution, or with the represented facts themselves. The latter might be more accurate, the document 'has a special power of which it is a copy because it derives its power from the same world' (Gaines 1999: 95). Committed documentary makers may opt to use the 'political mimicry' that would result from an unproblematised relationship between (reported) reality and recorded images (plus their massively disseminated copies). This is a relation that has only intensified since 1992. But it is questionable if the aesthetics of documentary film — never mind Sergei Eisenstein, Jean-Luc Godard, or Peter Watson — bring about more political action (and subsequent societal change) than the raw footage (rarely) does. There are few reasons to think that documentary theatrical re-enactment has different results. The 'liveness' is questionable as an impact factor — except perhaps for the actual audience — but the uniqueness of that experience is lost in (audio-visual) dissemination.

However, there is another issue at stake in the 'tribunal form' of documentary theatre, in Tricycle's strictly scripted re-enactments or in Milo Rau's contingent (non-recurring and unpredictable) performances. With *Das Kongo Tribunal*, Milo Rau wanted to test the conditions of possibility of a real, legitimate tribunal, choosing three cases out of thousands. Even when the political, economic, and military situation in Congo has hardly improved since 2015, the experience of the tribunal by its participants (and spectators) has changed something in their minds, he claims (Rau 2017: 294-295). The 'felicity conditions' of the performative speech act uttered at these tribunals are not to be measured by the actual punishments imposed by a (hypothetical) constitutionally sound judge on those responsible for governmental misdemeanour, racial prejudice, political-religious intolerance, economic exploitation, or indiscriminate violence. A tribunal play is the representation of a representation: the legal configuration translates the factual world, it represents the facts insofar as they can be qualified in legal terms, whilst the theatrical *mise en scène* — no matter how imitative it might

be — translates the first translation, again. Taking into account that the normative framework used in the first (legal) translation has, in its normativity itself, an abyssal character (see Derrida), the *mise en abyme* is only extended, maybe *ad infinitum* — resulting in the indeterminate character of 'felicity' itself.

The theatrical gaze, however, makes an alternative interpretation of the efficiency and impact of these productions possible, by interrogating the felicity conditions of legal speech acts or, to be more precise, speech acts in a conventionally accepted 'mock' legal context. The discussed examples show how all the witnesses — actors or real witnesses — are trying to create their own context for the perception of the reality of the case as a whole. In the theatre this happens all the time, so the focus can shift to the details, or at least to different details. The Russian journalist Maxim Shevshenko, acting as a 'mock' constitutionalist, is excessive in this respect, by re-defining explicitly the notion of rule of law, but others do not fail to do the same regarding, for example, the importance of confidentiality for political decision-making (Gore-Booth), the reduction of social-racial contradictions to private disputes (DC Holden), or the structural inertia of governance (Miruho). In some cases, these affirmations (or even confessions) are to be seen as excuses for what these witnesses experience themselves as transgressive acts. But the (theatre) spectator — not worried about the physical outcome of the process, simply because there is no such outcome: no fine, no jail — observes how speech acts perform their own realities by trying to create their own 'felicity conditions', all within the overarching framework of speech itself, without regard to the referential consequences outside the (imitated) courtroom. With regards to the above case studies this would equate to the desired fluency of governmental affairs (Gore-Booth), the imagined convivial and apolitical relationship between police and bereaved families (DC Holden), the unconditional defence of the unity of state and church in Russia (Shevshenko), or the structural impotence of bureaucracy or 'statelessness' in Congo (Miruho). These strategies become transparent in the theatrical event with a precisely circumscribed space-and-time (and a suspension of disbelief) and they are identifiable as postponing/distinguishing (*différant*) devices. Such strategies distinguish between reality and its representation (or iteration), and they postpone responsibilities concerning claiming the rules, applying the rules, or complying to the rules — and all the other versions of law-abiding behaviour (including its opposites, i.e. its infringements).

Heather Schuster says, analysing a case that the Supreme Court of Florida once got entangled in, that the last resort of legal performativity — in Butler's sense wherein speech acts construct the legal *persona* — is the constitution of the legal subject as a provisional citizenship, never able (or never ready) to acknowledge the complex reality of the body (Schuster 1999: 196-199). This idea is interesting, since it makes legal and theatrical illocution – and thus their felicity conditions, their 'happiness' — more comparable. Although Schuster understands this performative failure — which is structural for speech, as Derrida suggests in his critique of Austin — as politically malignant, it can also be seen as a confession of the contingency of any linguistic utterance which pretends to coincide seamlessly with the body — the physical body or, metaphorically, the social body. In the tribunal plays, all characters try to define the context and the conventions in which their illocutionary statement should be felicitous: consensus on paternalistic government, convivial relationships between police and citizens, acceptance of national-orthodox Russia, subservience to political leaders, strong or weak. However, where the law obscures, as a necessary strategy, this inability to discipline the body with speech, the theatre lays it bare. By not being felicitous, by affirming itself as an 'etiolation' of real action, the theatre displays vulnerable bodies, even when they are stand-ins such as professional actors. The theatre subtly undermines the 'paternity' of the law, it does not accept the provisional nature of legal citizenship as a *fait accompli*. •

Bibliography

ARENDT, HANNAH. [1964] 2011. *Eichmann in Jerusalem. A Report on the Banality of Evil* (London: Penguin)

—— [1963] 1990. *On Revolution* (London: Penguin)

AUSTIN, J.L. 1962. *How to Do Things with Words* (Oxford: Clarendon Press)

BBC NEWS. 2020. 'Coronavirus: Doreen Lawrence to Head Labour Probe on Minorities'. 24 April, *https://www.bbc.com/news/uk-politics-52405243* [accessed 20 December 2020]

BEN CHIKHA, CHOKRI. 2017. *Zoo Humain: De blijde terugkeer van de barbaar* (Leuven: LannooCampus)

BENTLEY, ERIC. 1972. *Are You Now or Have You Ever Been* (Harper & Row: New York)

BOOS, SONJA. 2014. *Speaking the Unspeakable in Postwar Germany: Toward a Public Discourse on the Holocaust* (Ithaca, NY: Cornell University Press)

BOSSART, ROLF. 2017. 'Die Schönheit des Rechts', in *Das Kongo Tribunal*, by Milo Rau (Berlin: Verbrecher Verlag), pp. 8-14

BOTTOMS, STEPHEN. 2006. 'Putting the Document into Documentary: An Unwelcome Corrective?', *The Drama Review*, 50.3: 56-68

BRECHT, BERTOLT. 1967A. 'Der Messingkauf', in Bertolt Brecht, *Gesammelte Werke 16: Schriften zum Theater 2* (Frankfurt am Main: Suhrkamp), pp. 499-657

—— 1967B. 'Die Massnahme', in Bertolt Brecht, *Gesammelte Werke 2: Stücke 21* (Frankfurt am Main: Suhrkamp), pp. 631-664

—— 1967C. 'Zu den Lehrstücken', in Bertolt Brecht, *Gesammelte Werke 17: Schriften zum Theater 3* (Frankfurt am Main: Suhrkamp), pp. 1022-1035

BRITTAIN, VICTORIA, NICOLAS KENT, RICHARD NORTON-TAYLOR, AND GILLIAN SLOVO. 2014. *The Tricycle: Collected Tribunal Plays* (London: Oberon Books)

BROOKS, PETER. 2000. *Troubling Confessions: Speaking Guilt in Law and Literature* (Chicago: The University of Chicago Press)

BUTLER, JUDITH. 1997. *Excitable Speech: A Politics of the Performative* (New York / London: Routledge)

—— 1990/1999. *Gender Trouble: Feminism and the Subversion of Identity*, 2nd edn (London / New York: Routledge)

CHARNOCK, ROSS. 2006. 'Overruling as a Speech Act: Performativity and Normative Discourse', *Journal of Pragmatics*, 41: 401-426

COZENS, CLAIRE. 2004. 'Widespread Scepticism to Hutton "Whitewash"' 29 January *https://www.theguardian.com/media/2004/jan/29/huttoninquiry.davidkelly2* [accessed 12 October 2020)

DERRIDA, JACQUES. 1990. 'Force de loi: Le "fondement mystique de l'autorité" / Force of Law: The "Mystical Foundation of Authority'', *Cardozo Law Review*, 11: 919-1045

—— 1972A. 'La différance', in Jacques Derrida, *Marges de la philosophie* (Paris: Minuit), pp. 1-29

—— 1972B. 'Signature, événement, contexte', in Jacques Derrida, *Marges de la philosophie* (Paris: Minuit), pp. 365-393

EUROPEAN COURT OF HUMAN RIGHTS. 2020. 'Press Country File Russia', September. *https://echr.coe.int/Documents/CP_Russia_ENG.pdf* [accessed 21 December 2020]

FELDMAN, BENEDICT ALEXANDER. 2018. 'The Theatre of Culpability: Reading the Tricycle's Tribunal Plays through the Trial of Adolf Eichmann', *Law, Culture and the Humanities*: 1-22

FISH, STANLEY. 1989. *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press)

—— 1980. *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press)

GAINES, JANE M. 1999. 'Political Mimesis', in *Collecting Visible Evidence*, ed. by Jane M. Gaines and Michael Renov (Minneapolis: University of Minnesota Press), pp. 84-102

GEENEN, SARA, AND KRISTOF TYTECA. 2008. 'Ook politiek theater heeft spelregels', *De Standaard*, 2 May

GILROY, PAUL. 2000. *Between Camps: Nations, Cultures and the Allure of Race* (London: Penguin)

HORSMAN, YASCO. 2011. *Theaters of Justice: Judging, Staging, and Working Through in Arendt, Brecht and Delbo* (Stanford, CA: Stanford University Press)

INSTITUTE FOR GOVERNMENT. 2018. 'Public Inquiries', *https://www.instituteforgovernment.org.uk/explainers/public-inquiries* [accessed 12 October 2020]

INTERNATIONAL CRIMINAL COURT. 2020. 'Democratic Republic of the Congo', 12 October *https://www.icc-cpi.int/drc* [accessed 21 December 2020)

KENT, NICOLAS, AND RICHARD NORTON-TAYLOR. 2007. *Called to Account: The Indictment of Anthony Charles Lynton Blair for the Crime of Aggression Against Iraq. A Hearing* (London: Oberon Books)

LAUGIER, SANDRA. 2004. 'Performativité, normativité et droit', *Archives de Philosophie* 67: 607-627

LE ROY, FREDERIK. 2017. 'The Documentary Doubles of Milo Rau & the International Institute of Political Murder: Realistic Rituals', *Etcetera* 148 *https://e-tcetera.be/the-documentary-doubles-of-milo-rau-the-international-institute-of-political-murder/* [accessed 20 December 2020]

LEGENDRE, PIERRE. 1989. *Le crime du caporal Lortie: Traité sur le Père* (Paris: Fayard)

MEGSON, CHRIS. 2009. '"Half the Picture": "A Certain Frisson" at the Tricycle Theatre', in *Get Real: Documentary Theatre Past and Present*, ed. by Alison Forsyth and Chris Megson (London: Palgrave Macmillan), pp. 195-208

MORGAN, RICHARD GREGORY. 1977. 'Roe v. Wade and the Lesson of the Pre-Roe Case Law', *Michigan Law Review*, 77: 1724-1748

MÜLLER, TOBI. 2014. 'Das Theater als unmoralische Antstalt', in *Die Zürcher Prozesse*, by Milo Rau, (Berlin: Verbrecher Verlag), pp. 10-15

NORTON-TAYLOR, RICHARD. 2008. 'Richard Norton-Taylor', in *Verbatim Verbatim: Contemporary Documentary Theatre*, ed. by Will Hammond and Dan Steward (London: Oberon Books), pp. 103-131

—— 1999. *The Colour of Justice: Based on the Transcripts of the Stephen Lawrence Inquiry* (London: Oberon Books)

—— 1995. *Truth Is a Difficult Concept. Inside the Scott Inquiry* (London: Fourth Estate)

PELLEGRINI, ANN, AND KAREN SHIMAKAWA. 2018. 'Reenactability' in *Law and Performance*, ed. by Austin Sarat, Lawrence Douglas and Martha Merrill Umphrey (Amherst / Boston, MA: University of Massachusetts Press), pp. 101-121

PETERS, JULIE STONE. 2008. 'Legal Performances Good and Bad', *Law, Culture and the Humanities* 4: 179-200

PRIME MINISTER'S OFFICE. 2013. 'Working peerages announced', 1 August. *https://www.gov.uk/government/news/working-peerages-announced* [accessed 20 December 2020]

RAU, MILO. 2017. *Das Kongo Tribunal*. (Berlin: Verbrecher Verlag)

—— 2018. 'Een tribunaal als mogelijkheid', *De Standaard*, 11 May

—— 2014. *Die Moskauer Prozesse*. (Berlin: Verbrecher Verlag)

REILLY, LAURA. 2015. 'I Spent the Night Inside the Weird World of NYC Night Court', 12 December. *https://www.thrillist.com/lifestyle/new-york/i-was-a-tourist-at-new-york-city-night-court* [accessed 10 October 2020]

REINELT, JANELLE. 2006. 'Toward a Poetics of Theatre and Public Events', *The Drama Review*, 30.3: 69-87

'ROE VS. WADE.' 1973. *Library of Congress*. 22 January. *https://tile.loc.gov/storage-services/service/ll/usrep/usrep410/usrep410113/usrep410113.pdf* [accessed 14 October 2020]

SCHUSTER, HEATHER. 1999. 'Reproduction and the State: Between Bodily Performance and Legal Performativity', *Journal of the Theoretical Humanities*, 4.1: 189-206

***SCOPES FESTIVAL*. 2020.** *scopesfestival.com* [accessed 12 October 2020]

SCOTT, JANNY. 1999. 'Night Court Joins the Theater That Is New York', *The New York Times*, 5 March

SEARLE, JOHN R. 1969. *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press)

—— 1977. 'Reiterating the Differences: A Reply to Derrida', *Glyph*, 1: 198-208

STOLLER, TERRY. 2013. *Tales of the Tricycle Theatre* (London: Bloomsbury)

TEAMTAALDAVIES VLAAMSE OVERHEID. 2007. 'Paraplupolitiek', 10 April *https://www.vlaanderen.be/taaladvies/paraplupolitiek* [accessed 15 February 2021]

TINDEMANS, KLAAS. 2005. 'Help mij, Recht! Helpt, aloude Wraakgodinnen! Proces en theatraliteit, het voorbeeld van de Oresteia van Aischylos', *Trema. Tijdschrift voor de Rechterlijke Macht*: 474-478

—— **2013.**'Regard et réalité: Le spectateur du théâtre documentaire', *Théâtre/Public*, 208: 34-37

—— **2016.** 'Truth, Justice, and Performative Knowledge: Chokri Ben Chikha's Theatrical "Truth Commission" on (Neo)colonial Injustices', *Kritika Kultura*, 26: 130-143

VISMANN, CORNELIA. 2011. *Medien der Rechtsprechung* (Frankfurt am Main: S. Fischer)

WAHL, CHRISTINE. 2014. 'Das Agora-Prinzip: Milo Raus Prozess-Theater in Moskau und Zürich', in *Die Moskauer Prozesse*, by Milo Rau (Berlin: Verbrecher Verlag)

WEISS, PETER. 1968. 'Die Ermittlung', in Peter Weiss, *Dramen 2* (Frankfurt am Main: Suhrkamp), pp. 7-199

ZERTAL, IDITH. 2005. *Israel's Holocaust and the Politics of Nationhood* (Cambridge: Cambridge University Press)

← BACK TO TABLE OF CONTENTS