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Toward a Self-Reflexive Law? Narrating Torture's Legality in Human Rights Litigation

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Abstract

This essay's starting point is scholarship describing the state practice of using law as a tool of mass atrocity, and the part played by liberal trials in obscuring this 'dark side' of legality. It asks whether law's complicity with atrocity is only visible when one steps outside the legal arena, or whether there might be opportunities within liberal legal institutions to develop what the essay calls self-reflexive law: rule of law mechanisms that expose the part played by law in violence. To explore this question, the essay offers a close reading of a lawsuit in which the key part played by law in atrocity was made explicit at trial: a class action filed in 1986 under the Alien Tort Statute on behalf of 10,000 Philippine victims of torture and other gross abuses against Ferdinand Marcos. Studying the representations of violence produced by the various participants in the litigation, the essay attempts to elicit some of the legal and political conditions favorable to a self-reflexive law. The essay offers a distinct version of 'minor jurisprudence,' recovering 'minor' practices within orthodox law itself, namely oral trial proceedings, and attempting to derive insights from the minor in order to contribute to legal design.

Toward a Self-Reflexive Law? Narrating Torture's Legality in Human Rights Litigation

Natalie R. Davidson*

In *Law after Auschwitz: Towards a Jurisprudence of the Holocaust*, David Fraser argues that criminal trials held in the post-war era in North America, England and Australia constructed a memory of the Nazi crimes that obscured the 'legality of the Holocaust' (2005: 216). He challenges the view, most famously advanced by American prosecutors at Nuremberg, of the Third Reich as a regime of brute force to which law is the corrective, by arguing that there is no radical discontinuity between law as practiced and understood by German jurists between 1933 and 1945 and legal practice and reasoning in democracies. Fraser has been accused of adopting a reductive understanding of law as mere technique (Mertens 2007: 542-3), and in my view draws from the continuities between Nazi law and democratic law the unwarranted conclusion that there is no meaningful distinction between the two. Nevertheless, his book should be welcome for emphasizing law's potentiality as a tool of physical atrocity, and the part played by trials in obscuring this 'dark side'¹ of legality.

We are by now familiar with challenges to the law/violence dichotomy. Robert Cover famously observed that law facilitates the exercise of state violence, through the provision of justifications and the division of labor among actors (Cover 1986). Yet whereas Cover accepts this state of affairs as a necessary 'disciplin[ing]' of violence

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(1628), Fraser claims that legal discourse can be key to even the most extreme and arbitrary forms of violence. Moreover, given that trials are important contributors to collective memory (Savelsberg and King 2011: 24), Fraser's demonstration of the ways trials have obscured the legality of Nazi violence suggests that the public does not recognise the part play by law in heinous violence. As a result, law can continue to contribute to extreme violence unhindered. Thus, Fraser exposes the complicity with violence of two distinct layers of legality: the law of repressive states, and trials of mass atrocity.

That responses to mass atrocity should better acknowledge law's contribution to violence is all the more pressing in light of authoritarian regimes' reliance on courts (Mayoral Diaz-Asenzio 2012), and the growing and paradoxical obsession with legal form accompanying widespread violence in the neo-liberal era (Comaroff and Comaroff 2006b). If trials of atrocity, intensely publicized and reported upon, do not acknowledge the legality of much violence, we – lawyers and members of the public, including potential perpetrators – might fail to recognise mass atrocity when it is before us, cloaked with legal rationality and familiarity. Yet the principal legal mechanisms used to address mass atrocity, namely domestic and international criminal trials as well as truth commissions, do not appear to expose the legality of violence any better than the post-war criminal trials described by Fraser. These mechanisms are accused of concealing the bureaucratic, banal character of state-sponsored and organised repression (Leebaw 2011).

To clarify the issue, we can follow Jothie Rajah in distinguishing between the 'rule of law' (law substantively infused with liberal principles and constraining arbitrary power) and the 'rule by law' (law in which there are no effective constraints on power) (Rajah 2012: 50; see Nonet and Selznick 2009 for a comparable distinction between 'autonomous law' and 'repressive law'). It seems that when rule of law mechanisms address mass violence, they are incapable of exposing the rule by law. In this way, rule of law mechanisms unwittingly shield the rule by law from scrutiny and challenge. But need this be the case?

My concern lies not in the normative quandary of whether the

unjust laws of authoritarian regimes should be considered legitimate and applied (Hart 1958; Fuller 1958). Rather, I consider as an empirical matter the state practice of using law as a tool of mass atrocity. Is this practice only visible when one steps outside the legal arena, or might there be opportunities within liberal legal institutions to develop what I will call self-reflexive law – mass atrocity trials that could expose the part played by law in violence?

To explore this question, I turn to a lawsuit in which the key part played by law in atrocity was made explicit: a class action filed in a Hawaii federal court on behalf of 10,000 Philippine victims of torture and other gross abuses against Ferdinand Marcos, one month after his ouster from power in 1986. The lawsuit was filed under the Alien Tort Statute (ATS), a statute interpreted between 1980 and 2013 as granting U.S. federal courts jurisdiction over lawsuits by foreign victims of gross human rights abuses even if committed outside the United States.

The legal treatment of torture is a particularly fertile area in which to explore the possibility of self-reflexive law. Torture, as traditionally conceptualised by international lawyers, is an official act linked to the exercise of public power. If its prohibition is ‘emblematic of our determination to break the connection between law and brutality’ (Waldron 2005: 1739), international law must impliedly recognise the existence of that connection. Yet in practice, even among international lawyers, ‘[t]orture is more often understood to have arisen from primal or political impulses emerging in spite of law, than from the manipulation of legal language.’ (Johns 2012: 34).

This paradox is on view in *Marcos*, where the legality of torture was made very clear at trial in the thick descriptions of repression provided by witnesses, while the courts, in their principled written decisions, exhibited great difficulty confronting law’s contribution to violence. This essay offers a close reading of the case inspired by scholarship on law’s representation of history (Douglas 2001), in an attempt to elicit some of the legal and political conditions under which a mass atrocity trial could expose, where relevant, the legality of extreme violence.

This essay does not seek to explain the conditions favoring the

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rule by law, though I suggest that trials of atrocity that obscure this phenomenon enable its recurrence. It focuses on the secondary layer of legality discussed by Fraser: atrocity trials. With respect to that layer, it does not propose a general model of law, such as the model of 'responsive law' furthering substantive justice advocated by Nonet and Selznick (2009). Instead, it draws attention to one by-product of atrocity trials, historical narratives about violence. My argument is not that judges or lawyers should consciously aim to expose the legality of violence or teach history, as this could undermine defendant rights. Rather, given the important part played by atrocity trials in the social construction of violence, I submit that when choosing among and designing legal responses to mass atrocity, we should give weight to those features that are favorable to rich historical accounts exposing the legality of violence.

The term 'self-reflexive law' is not meant to fully equate ATS litigation with martial law, or more generally the rule of law with the rule by law. It highlights however the commonalities between these forms of law, in particular the formalism which provides legal institutions an appearance of rationality and legitimacy. These commonalities suggest difficulties in exposing legal foundations of violence through legal proceedings. Through the *Marcos* case, this essay seeks to identify those difficulties and possibilities of overcoming them.

My understanding of law as imbricated in violence and as contributing to the social construction of reality owes much to Critical Legal Studies (CLS). This essay departs from CLS not because of its attempt to harness the law in progressive ways, as much critical human rights scholarship has redemptive elements (Golder 2014). What distinguishes the present analysis from CLS is the methodology of critique and reconstruction: the analysis of the historical narratives produced in litigation. Critical scholars have historicized the law in order to recover alternative paths, but those efforts have typically focused on the doctrinal history of 'mandarin' texts (Gordon 1984: 120). This essay gives oral trial proceedings center stage not only because they are likely to make a significant contribution to lay constructions

of violence (with journalists more likely to report on them than to read appellate court decisions), but also because they are a rawer, richer source of narratives about violence.

Drawing on CLS but analysing historical narratives, the present analysis offers a distinct version of ‘minor historical jurisprudence’, in the sense of a critical historical analysis (Tomlins 2015). Similarly to the line of minor jurisprudence associated with Peter Goodrich, this essay attempts to recover practices ‘denied or ignored’, ‘repressed or absorbed’ (Goodrich 1996: 3) in order to disrupt assumptions prevalent in mainstream legal scholarship. However, while scholars engaged in minor jurisprudence have turned to practices far removed from orthodox modes of law-making, such as literary texts, this essay suggests recovering ‘minor’ practices within orthodox law itself, namely oral trial proceedings. While trial proceedings are of course conventional sources of sociolegal history, neither they nor the historical narratives contained in them are conventional sources of normative legal analysis. This turn to the minor within the major reflects a less radical relation to the major than that offered by most authors in this collection. While their work is primarily disruptive and antifoundational, this essay attempts to derive insights from the minor in order to contribute to legal design.

Part I provides background on the lawsuit. Part II shows that at trial the contribution of legal form and discourse to repression was made very clear for doctrinal and evidentiary reasons. Part III argues that these insights were lost in the court decisions disseminated throughout the legal community. The conclusion reflects on the possibilities of developing a self-reflexive law.

1. From Martial Law to the Alien Tort Statute

Ferdinand Marcos declared martial law in September 1972, before the end of his second term as elected president of the Philippines. Until February 1986, when he was deposed by a popular movement, he ruled in an authoritarian manner. Known as an exceptionally brilliant lawyer, Marcos endeavored to provide legal legitimacy to his regime,

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seeking constitutional amendments and Supreme Court approvals of his concentrations of power. The regime's attachment to law has been explained as a technique of rationalisation masking arbitrariness, along with a technocratic discourse of socio-economic development (Thompson 1995: 4). Both were partly geared toward international support: the technocratic discourse impressed international lenders, while the attachment to legal and democratic form pleased the United States, which provided Marcos unfailing economic, political and military support throughout most of his rule (Muego 1988: 129-30).

Following the assassination in 1983 of opposition leader Benigno Aquino, Ronald Reagan's administration urged Marcos to hold free elections to promote economic stability and restore political legitimacy (id 141). In February 1986, Marcos was announced winner of the elections against Aquino's widow, Corazon Aquino, but the polls had been clearly rigged. Aquino launched a successful civil disobedience campaign backed by the Catholic Church and a rebel group of officers. After receiving assurances that Aquino was a moderate, on the 3rd day of the 'People Power Revolution,' Reagan asked Marcos to resign, arranging for his flight to Hawaii (id 160-1).

A number of human rights groups had helped to expose the hypocrisy of Marcos' formally legal 'democracy'. In 1986, Philadelphia attorney Robert Swift contacted these groups, which subsequently convinced victims to file claims. Few believed that the plaintiffs would win the case, but they hoped that the filing of the lawsuit could serve to document the extent of repression under Marcos. Thus, one month after Marcos and his entourage fled to Hawaii, five lawsuits, including one class action led by Swift, were filed against him in federal courts in California and Hawaii pursuant to the ATS, alleging torture, disappearances, and extrajudicial killing. Marcos died in 1989 while the litigation was pending, and was replaced thereafter by his estate, represented by his widow and son.

The five cases, including the class action relating to 'all civilian citizens of the Philippines, who, between 1972 and 1986, were tortured, summarily executed or 'disappeared' by Philippine military

or paramilitary groups' (Order Granting Class Certification) were consolidated for trial in a federal court in the District of Hawaii. In 1992, Marcos' liability was determined by a six-member jury after two weeks of trial. While forty-four victims testified in person, the case rested largely on circumstantial evidence. Proving liability towards the class members who were not named plaintiffs required establishing a pattern of human rights violations that would indicate that thousands of similar violations had likely occurred (Fitzpatrick 1993). This evidence was provided through the testimony of eight expert witnesses, comprising members of international and Philippine human rights organisations, Philippine academics, and U.S. State Department officials, and legal documents, including legislation and decrees issued by Marcos, arrest orders and certificates of release.

On September 22, 1992, the jury found the defendant liable for torture, summary execution and disappearance (*In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 910 F. Supp. 1460, hereinafter '910 F. Supp.': 1463-4). On February 23, 1994, the jury awarded the plaintiffs \$1.2 billion in exemplary damages (Trial Transcript, hereinafter 'TT', 22 February 1994: 111-2). The third and compensatory damages phase of the litigation ended with an award of close to \$800,000 to 9,541 claimants (*Hilao v. Estate of Ferdinand Marcos* 1996).

Human rights lawyers have applauded the *Marcos* litigation for breaking new legal ground. Elsewhere, I analyse how the plaintiffs' attempts to enforce their damage award have conflicted with transitional justice policy in the Philippines (Davidson 2017b). I have also argued that the participants in the *Marcos* litigation produced narratives that legitimated the neo-colonial relationship between the United States and the Philippines (Davidson 2017a). In what follows I show that the case succeeded to some extent in exposing the legality of violence, and offer my interpretation of the conditions that enabled and constrained law's self-reflexivity.

2. Self-Reflexivity at Trial

At trial, law enabled the plaintiffs to connect Marcos to the acts of

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individual torturers and to prove a pattern of abuses that would apply to the entire class, in addition to being a form of documentary – and therefore ‘objective’ – evidence. However, the trial’s success in revealing law’s dark side was limited as plaintiffs presented martial law as resulting from the Philippines’ failure to properly follow the U.S. legal model.

A. Law as Facilitator of Abuses

The plaintiffs presented the human rights violations as having been perpetrated by ‘a dictator’ (*TT* 9 September 1992: 17), in a ‘systematic and repetitive’ (id 13-14) manner. This notion of systematic state action derived from the definitions of torture, summary execution and disappearance under international law, which require official action, combined with the nature of class actions. Given that the defendant was at the top of a hierarchy of perpetrators, it would have been impossible to connect him to most victims without establishing a policy of repression.

In the narrative put forward by the plaintiffs at trial, law played a key role in realizing the state’s policy of repression, and also provided concrete evidence of wrongdoing. The legal theory of liability was that of ‘command responsibility,’ a doctrine developed by the international military tribunals at Nuremberg and Tokyo, whereby defendants are held responsible for the actions of their subordinates. To establish Marcos’ personal liability, the jury was instructed that even if he had not directly ordered torture, summary execution and disappearance, his knowledge of these violations and failure to take effective measures to prevent them was a sufficient basis for liability (Final Jury Instructions: 10). In relation to most victims, liability rested on failing to prevent abuses. To show that he had knowledge of the abuses, the plaintiffs tried to prove that he knew of the pattern of violations or even specific violations. This was done by showing that ‘Marcos received daily intelligence briefings and Marcos was informed of the fruits of the torture of high profile dissidents’ (*TT* 9 September 1992: 18), and that international human rights organisations and the U.S. government had approached Marcos and his circle to discuss the violations. In order to convince the jury that Marcos had the power to prevent the abuses,

the plaintiffs insisted that Marcos 'was a micro manager, a hands-on person.' (ibid).

The plaintiffs' theory of a tightly managed policy of repression probably concentrates excessive blame on Marcos, erasing the responsibility of his collaborators. However, this theory had the advantage of attributing to law a crucial facilitative role. First, the plaintiffs explained that Marcos' constitutional maneuvers allowed him to concentrate power. In fact, as shall be explained shortly, constitutional law provided the overarching framework to understand the case. Second, the plaintiffs showed how legal formalism served to mask arbitrariness.

After the opening statements, during which Swift explained that 'martial law created the opportunity for Ferdinand Marcos to commit human rights abuses' and described Marcos' extensive powers to order arrests and detention (*id* 17), the first expert witness called by the plaintiffs was constitutional law professor Father Joaquin Bernas, who testified 'about the structure and practical legal effect of Philippine constitutional law and proclamations, decrees, general orders and letter of instruction enacted by Ferdinand E. Marcos between 1972 through 1986' (*TT* 10 September 1992: 10), Bernas opined that:

'between September 21, 1972 and February 25, 1986, by virtue of the constitution which Mr. Marcos had declared ratified, and by virtue of his proclamations, decrees and other enactments, he exercised complete control over both the executive and legislative branches of government. He also significantly weakened the judicial system by transferring much of its jurisdiction to the military tribunals under his control. Moreover, the atmosphere he created seriously undermined the independence of the Supreme Court and other courts. He alone could appoint justices and judges.' *id* 11).

In order to explain his opinion, Bernas described in detail Marcos' maneuvers to revise the constitution, ensuring his continued tenure and the expansion of his powers. He explained the coherent and hierarchical legal structure of repression, from the constitution down through the declaration of martial law, General Orders 2 and 2-A

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that authorised the arrest by the military of listed individuals, to the individual arrest orders signed by Marcos. The jury was asked to become familiar with the regime's bureaucratic jargon, hearing detailed expositions of the differences between three types of arrest order: the ASSO, PCO and PDA. Bernas explained how Marcos removed the judiciary's independence through formal legality – by requiring all judges outside the Supreme Court 'to submit their letter of resignation for acceptance or rejection by the President, so the President would hold it as long as he wanted to, or act on it whenever it was opportune for him to act on it' (id 43). Legal events – the declaration of martial law in September 1972, a cosmetic lifting of martial law in January 1981, and the 'notorious Amendment 6, which gave [Marcos] full legislative powers parallel and superior to that of the national assembly' (id 18-19) – were presented as the milestones of repression. During his testimony, twelve laws, orders, decrees and letter of instruction signed by Marcos were introduced as exhibits. In other words, legal texts were offered as evidence of wrongdoing.

By recounting one of the jokes common in Philippine political culture, Bernas also conveyed the gap between the legal formality of the constitutional system and the arbitrariness of Marcos' powers:

In Proclamation 1081, in which Marcos declared martial law, he stated that, and I quote, 'all persons presently detained, as well as all others who may hereafter be similarly detained for the crimes of insurrection or rebellion, and all other crimes and offenses committed in furtherance or on the occasion thereof, or incident thereto, or in connection therewith, for crimes against national security and the law of the nations, crime against public order, crimes involving the usurpation of authority, rank, title and the improper use of names, uniforms and insignia, crimes committed by public officers, and for such other crimes as will be enumerated in orders that I shall subsequently promulgate, as well as crimes as a consequence of any violation of any decree, order or regulation promulgated by me personally, or promulgated upon my direction, shall be kept under detention until otherwise ordered released by me or by my duly designated representative'. Whereas, the current joke had it, 'until

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released by me or by Julie'. (id 14).

It was important for the plaintiffs to show that law provided a cover for arbitrariness in order to explain the context of the human rights violations, as well as to counter the line of defense. The overall defense can be reconstructed as follows: Martial law was declared in accordance with the constitution, and was necessary given instability in the country; Marcos did not personally order or know about the abuses, for which responsibility lies fully with the military; and the human rights abuses were not as numerous as claimed by the plaintiffs (id 45). To support these points, defense counsel argued that victims of abuse had legal recourses in the Philippines (*TT*9 September 1992: 45-7). Throughout the trial they made reference to the holding of elections and the formal legality of Marcos' rule as well as to the complaints procedures put in place by the regime to address claims of abuse by the military.

Other experts on behalf of the plaintiffs echoed Bernas' view of law as having facilitated repression under Marcos, and this in order to link Marcos to the human rights violations committed by his subordinates. Describing Decree 1850 that gave military courts exclusive jurisdiction over cases involving human rights violations committed by Philippine security forces, expert witness Prof. Dianne Orentlicher insisted that '[t]his decree exemplifies a general characteristic of Ferdinand Marcos's leadership, one that is critical to understanding his personal responsibility for the violations that I've described. Marcos created a legal framework that enabled abuses to occur and enabled them to occur based on the predilections of one man.' (*TT* 18 September 1992:126)

This constitutional framework or 'legal atmosphere' having been established by the experts, the individual victim testimonies and exhibits added evidence about law's repressive uses under Marcos. For each victim testifying, an arrest or temporary release order was put in evidence to prove the arrest had taken place. Many victims were asked if they recalled when martial law was declared – that legal event being the defining moment of the dictatorship. Through their testimonies, law even appears as a pervasive presence in the everyday experience of repression. In the more than forty testimonies of victims, a pattern

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of suppression of dissent emerges: potential critics of the regime were arrested with an arrest order, 'broken' through torture and months – sometimes years – of detention in 'rehabilitation centers,' and released with a Temporary Release Order, which often required them to report regularly to the military or police. While on temporary release, it was close to impossible for them to find employment, as they lacked security clearance. Following years of good behavior, they would sometimes be granted a final release order and finally be left alone by the security services. In this way, torture and the terror created by the salvaging and disappearance of other dissidents were only the initial stages of a long-term bureaucratic system of suppression of dissent.

The testimony of Adora Faye de Vera, a student activist for the women and the poor who was arrested, tortured and raped during nine months, after which she was turned into an agent for the government, provides a vivid account of the formal use of law by the regime in its relations with its victims. She described how upon becoming an agent, she was made to sign a number of absurd-sounding documents:

'In March 1977, I signed an agent's agreement, I signed a purchase of information agreement, I signed a sworn statement saying I was arrested alone, that I didn't know where Flora and Rolando [*the friends arrested with her and later killed*] were, and admitting that I was a subversive, and I also signed a waiver saying that I wasn't tortured and that everything I was signing was not under duress.' (TT 14 September 1992: 41).

Expert witness Michael Posner, Executive Director of the Lawyers Committee for Human Rights, also testified that '[t]orture victims were regularly forced to sign statements that they had not been badly treated.' (TT 15 September 1992: 26-7). These documents cannot be viewed simply as tools for the regime to cover its traces, counter-evidence to be provided to human rights monitors, courts or governmental commissions in the event of accusations of abuses, though that is undoubtedly part of the story. Some of these documents, such as the 'agent's agreement' and 'purchase of information agreement' were unlikely to ever be shown to a third party. Moreover, one witness

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testified to having signed, upon release from detention and torture, a 'pledge of allegiance where we need not to, you know, be interviewed, to talk with anybody.' (TT 18 September 1992: 42). One can surmise that the regime believed such documents would have some persuasive force in silencing victims, and possibly making repression appear more legitimate to the security forces and low-level torturers and bureaucrats themselves. If that was the case, then law was not only used to centralise power and legitimate the regime vis-à-vis foreign donors and the Philippine public, but also to control victims and perpetrators.

B. Martial Law as Degenerate Law

Regrettably, these insights about the dark sides of law were understood to be limited to non-Western law. Indeed, in order to explain the intricacies of Philippine constitutional law to a jury of ordinary Americans, the plaintiff lawyers and expert witnesses drew comparisons with the U.S. constitution. The result was a representation of martial law as a distortion or degenerate form of U.S. law. Typical of such a comparison was the opening speech of plaintiff counsel Randall Scarlett:

'Just as President Reagan only had two terms here, under their constitution, we will learn, that President Marcos could only do two terms there. That term was to end in 1973. What he did instead was a systematic or system wide change to the entire government that allowed him to remain in power for 13 years beyond 1973 and become a consummate dictator of the Republic of the Philippines.' (TT 9 September 1992: 40, emphasis added)

Bernas explained that before Marcos revised the constitution, '[t]he 1935, Philippine Constitution *closely resembled the American Constitution* as to the structure of government. It provided for three branches of government, executive, legislative and judicial, and for an elected president. The president was given a term of 4 years with a maximum of two terms for a total maximum of 8 consecutive years. It also contained *a bill of rights borrowed largely from the United States Federal Constitution.*' (TT 10 September 1992:11-12, emphasis added)

The didactic advantages of such a comparative approach are clear,

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and none of the cited statements are inaccurate. However, the experts failed to mention that not only the separation of powers and the bill of rights, but also the very possibility of declaring martial law and suspending rights, were a legacy of U.S. colonialism. Indeed, this possibility had been introduced into Philippine law by the U.S. Congress in 1916, and the provision of the 1935 Constitution copied the wording of the U.S. legislation.² Similarly, the possibility of suspending the writ of habeas corpus was initially granted to the American Governor General by the 1902 Philippine Bill, and had been used by him in 1905.³ In the 1970s and 1980s the United States had also contributed much to the Marcos regime's parody of the rule of law by insisting that the regime periodically provide appearances of electoral democracy and legality. By offering a very partial picture of the American legal legacy in the Philippines, the trial limited the law's self-reflexivity: law was understood to have a repressive potential *outside* the United States.

Indeed, the possibility that the American counterparts could also degenerate into repression was implicitly denied. Expert witness Posner stated in his testimony on the subservience of the judiciary to Marcos: 'It may be difficult for U.S. citizens to comprehend how a strong and independent civilian court system was seriously undermined by a series of martial law decrees issued by Mr. Marcos himself.' (*TT* 15 September 1992: 24). Similarly, when witness Ramon Mappala, a former member of the Reserve Officers' Training Corps in the Philippines, testified about his arrest after he had given a lecture 'about the Marcos regime tendency towards going towards martial law', Swift asked him whether the lecture was critical of the Marcos regime. He answered: 'I was highly critical, yes, sir. I'm very much familiar with democratic process of the United States.' (*TT* 17 September 1992: 87).

While this limitation of law's dark side to non-Western or non-US law can be traced to ethnocentrism, strategic factors were also likely at work. For Swift, avoiding discussions of U.S. support of the regime was necessary in order to win the case.⁴ This limit to law's self-reflexivity might be seen as peculiar to legal processes with juries.

However, courts and prosecutors engaged in proceedings concerning mass atrocity generally face heightened legitimacy concerns, leading them to produce ‘tortured history’ (Douglas 2001: 113). Indeed, the next section shows how legitimacy concerns among appellate courts in *Marcos* ultimately obscured the legality of repression.

3. Self-Reflexivity in the Courts

In their descriptions of the facts of the case, the courts reproduced the plaintiffs’ narrative of the Marcos regime as grounded in a constitutional arrangement (e.g. *910 F. Supp.*, 1462). Moreover, they occasionally discussed the human rights violations as having been state-sponsored, as required by doctrinal considerations, such as the definition of torture under international law. Yet in their discussions of legal doctrine, the courts generally portrayed the violations in a manner that is difficult to reconcile with an understanding of law as a facilitator of violence. Even when the District Court discussed the element in the definition of torture that connects it to the law (the requirement the court had crafted that torture be done ‘under color of law’), it explained that element as an abuse or imitation of law. The court instructed the jury thus:

‘Torture, summary execution, disappearance or arbitrary detention committed by a person under color of law violates international law, United States law *and Philippine law* and renders that person liable to the victim. The phrase ‘under color of law’ means that the person allegedly responsible, here Ferdinand Marcos, used his government position as President of the Philippines and Commander-in-Chief of the military, paramilitary and intelligence forces to act *beyond the bounds of his lawful authority*. In order for Marco’s (sic) alleged unlawful acts to have been done ‘under color of law,’ the unlawful acts must have been done while Marcos was *purporting or pretending to act in the performance of his official duties*. That is to say, the unlawful acts must consist of an *abuse or misuse of power* which is possessed by Marcos only because he was a government official. Color of law as used in these instructions means action *purported to be taken by an official of a government under any law* of that country.’ (Final Jury Instructions: 9, emphases added).

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One possible explanation for this construction of torture as an abuse of law is that it is easier to show a violation of a legal norm if the violation itself is portrayed as non-law. In the context of transnational human rights litigation, this portrayal is as much a question of being legally 'correct' – ie proving a violation – as it is a question of legitimacy, for a foreign court will have more difficulty justifying its intervention if it is judging an act that was legal in the country in which it was committed. Another explanation relates to the law's uneasy blending of descriptive and normative functions. The court can be taken here to be explaining that torture, summary execution and disappearance are abuses of the law as it should be, in the process obscuring that these abuses relied on the law as it is.

In addition, specific doctrines in U.S. law, as in many jurisdictions, preclude domestic courts from adjudicating the acts of foreign states. The lawsuits had originally been dismissed under the act of state doctrine, a doctrine that prevents courts from judging the public acts of another sovereign state committed within that sovereign's territory (*Trajano v. Marcos*). Moreover, under the Foreign Sovereign Immunities Act of 1976 (FSIA), foreign governments are immune from suit in the U.S. except for categories of claims that reflect liability arising out of private law transactions. Though the plain language of the FSIA suggests that it is not applicable to individual defendants, and that is indeed how it was interpreted in 2011 by the U.S. Supreme Court (*Samantar v. Yousuf* 2010), this was not clear at the time of *Marcos*. In fact, in an earlier case also involving the Philippines, the Ninth Circuit itself had held that the FSIA could be invoked by individual defendants (*Chuidian v Philippine National Bank*), and Marcos' estate argued that Marcos' acts were immunised under the FSIA (*Hilao v. Marcos* 1994). In *Marcos*, the courts rejected the applicability of these doctrines by presenting the human rights abuses as personal wrongdoing abusive of the constitutional and legal framework rather than repression enabled by that framework.

When in 1989, the Ninth Circuit determined that the act of state doctrine was not applicable to Marcos because he was a former dictator,

it referred to its 1988 decision in *Republic of the Philippines v. Marcos* in which it had insisted that ‘Marcos is a private citizen residing in the United States.’ (*Trajano v. Marcos*). The Ninth Circuit applied the same reasoning in a 1994 appeal by Marcos’ estate from a District Court decision enjoining the estate from dissipating assets pending litigation:

‘the Estate argues that Marcos’ acts were premised on his official authority, and thus fall within FSIA. However... Marcos’ actions should be treated as taken without official mandate pursuant to his own authority.’ (*Hilao v. Marcos* 1994, 1470-1).

The Court also cited its own decision in *Republic of the Philippines v. Marcos*, referring to the comparison to rape, a crime with intensely personal connotations:

‘Although sometimes criticized as a ruler and at times invested with extraordinary powers, Ferdinand Marcos does not appear to have had the authority of an absolute autocrat. He was not the state, but the head of the state, bound by the laws that applied to him. Our courts have had no difficulty in distinguishing the legal acts of a deposed ruler from his acts for personal profit that lack a basis in law... the latter acts are as adjudicable and redressable as would be a dictator’s act of rape.’ (id 1471).

Commentators have criticised the Ninth Circuit for failing to develop a principled approach to the act of state doctrine and sovereign immunity. With respect to both, the court distinguished *Marcos* on the facts – the supposedly personal nature of the defendant’s acts – instead of carving out a human rights exception to the doctrines (Fitzpatrick 1993: 511), as the English House of Lords would later do in *Pinochet*, where it held that torture could not be considered a state function for the purposes of functional immunity (*R. v. Commissioner of Police for the Metropolis and Others*). The U.S. Court of Appeals for the Fourth Circuit in 2012 followed in *Pinochet*’s footsteps, when it recognised that torture could be ‘performed in the course of the foreign official’s employment by the Sovereign’ yet not count as an official act for purposes of immunity (*Samantar v. Yousuf* 2012). However, such a principled approach might have been too much to ask in *Marcos*,

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where the U.S. courts' legitimacy in exercising an extraordinary form of jurisdiction was more questionable than in *Pinochet*,⁵ and the courts were exposed to the charge of intruding on U.S. foreign policy.⁶ Marcos was thus held liable, but this liability was portrayed as more personal than institutional.

Conclusion

How can we use the *Marcos* case to begin thinking about developing law's self-reflexivity?

While trial proceedings offered opportunities for rich, detailed discussions of constitutional structure, legal formalism and victims' experiences of law, the more abstract discussions of higher courts erased and obscured the legality of violence. Yet it is precisely these higher court decisions that are diffused throughout the legal community, concealing the insights gleaned during the lower court proceedings. This essay has attempted to recover those insights, in the belief that exposing and understanding law's 'dark side' should become central to the project of fighting mass atrocity. Such a project should, however, abandon the assumption implicit in *Marcos* that law in the U.S. and by extension other Western democracies cannot be used to such repressive ends. Recovery and critical analysis of trial proceedings is one step; using these proceedings along with historical writing as teaching materials in law schools might also hold some promise. These steps would mainstream what has until now been considered a 'minor' source of law.

Having recovered trial proceedings, analyses of the type conducted here can also help elicit axes of inquiry for the design of self-reflexive legal responses to mass atrocity, effecting a shift from a minor to a major form of jurisprudence. The detailed and contextualized nature of the present analysis, in which the historical narratives produced in *Marcos* are understood against the background of later doctrinal developments, enabled me to make such a shift without falling into the trap of overbroad generalizations. The following illustrates the sort of shift I have in mind:

A first axis of inquiry might concern the type of defendant, from head of state to low-level perpetrator. In *Marcos*, the fact that the litigation took the form of a class action against a former head of state significantly contributed to the representation of law as violent. The need to prove a pattern of violations that could reach all members of the class led the plaintiffs to offer numerous testimonies of experts, witnesses and victims themselves as well as legal documents as evidence, leading to discussions of law as enabling violence. While this points to the class action as a valuable mechanism through which to address mass atrocity, other legal mechanisms targeting high-level perpetrators might have similar effects: when the definition of an international crime or international human right, or theory of responsibility requires understanding the broader context, proving a policy, or considering the abuse's effects on a large number of victims, law and legal documents might serve to explain techniques of concentration of power, or of legitimization of violence, or to 'connect the dots' between the defendant and various actors involved in mass atrocity.

A second axis concerns the applicable legal norms, from various forms of international law to domestic law. The *Marcos* case shows that international human rights law's traditional focus on state-sponsored violence carries the possibility of addressing law's contribution to violence because of requirements of officialness in the definition of torture. The courts' construction of the litigated violence as personal rather than institutionalised reflects to a certain extent the limitations of early case-law on the issue of torture and immunity, case-law which has since evolved.

Jurisdiction might constitute a third axis. We saw that the distortions in the plaintiffs' and courts' narratives about the Marcos regime derived in part from attempts to avoid alienating the jury and appearing to interfere in a foreign country's government, respectively. The fact that legitimacy concerns affect the ability to produce rich narratives about mass violence suggests that domestic courts exercising universal jurisdiction as well as international tribunals, if they lack strong legitimacy, might have limited abilities to expose the legality

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of violence, as opposed to domestic courts judging their country's prior regime. This would seem especially true if the foreign domestic court is, like the United States in *Marcos*, implicated in the establishment of the colonial legal order from which the litigated violence emerged.

My interpretation of the District Court's construction of torture as an abuse of law seems to point to inherent limitations of the legal process for facing the legality of violence: the tendency to present violations of legal norms as non-law, and to blend descriptive and normative functions of judgment. This might point to a fourth axis, concerning the degree of legalism of the institution, from criminal trials where guilt must be proven beyond a reasonable doubt, to quasi-legal mechanisms such as truth commissions where public testimony and confession take centre stage, without requiring a determination that norms have been violated. Truth commissions' relaxation of legal requirements certainly have advantages for the production of rich, structural narratives about violence (though as argued by Leebaw 2011, in practice they been conducted under legalist approaches). I would argue nevertheless that giving up on the possibility of self-reflexivity within legal processes would be overly deterministic. International legal scholars have begun developing theories of adjudication that explicitly seek to distinguish between descriptive and aspirational functions of judgment (Mohamed 2014). *Marcos* might be taken to suggest that as a strategic matter, we should pursue these projects in established institutions enjoying strongest legitimacy, as the case shows how courts exercising controversial forms of jurisdiction insist on their authority by drawing sharp distinctions between their own legality and that of the defendant.

The *Marcos* case exposes the close imbrication of brutal violence, law and settler colonialism, and the difficulties of undoing such violence within the postcolonial framework of international law. Yet rather than condemning us to despair, this detailed historical analysis revealed the web of contingent doctrinal limitations, litigation strategies, political constraints and cultural assumptions that shaped the historical narratives in this case, suggesting paths for reconstruction. It is in this

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sense that, to me, minor jurisprudence offers a mode of legal theorizing beyond critique.

Endnotes

- * Lecturer (Assistant Professor), Buchmann Faculty of Law, Tel Aviv University. I thank Saira Mohamed, the workshop participants, and the reviewers for very helpful comments.
1. In using the expression 'dark side' I draw on Kennedy 2005.
 2. P.L. 240 (Organic Act for the Philippine Islands) granted the right to declare martial law to the Governor-General of the Philippines. Muego 1988: 29.
 3. The only other suspension of the writ occurred in 1950 when President Quirino had used it to cope with a peasant insurgency. *Id* 31.
 4. Telephone interview, 4 December 2014.
 5. The *Pinochet* case did not raise as many questions about the court's legitimacy since it was based on an interpretation of the Convention against Torture, which explicitly provided universal jurisdiction, and in 1988 the United Kingdom had changed its criminal code to grant its courts universal jurisdiction.
 6. The Reagan administration began urging courts to decline jurisdiction of human rights ATS claims in 1984. Stephens 2014: 1486.

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