

Pots, Tents, Temples

Angus McDonald*

1. The site

The site of this text being a journal called *No Foundations: An Interdisciplinary Journal of Law and Justice*, the eleventh issue, a start might be made by asking what the insistence on *No Foundations* marks, and how the journal calling itself by that name has defined its project(s). *No Foundations*, the journal, was, for eight issues, from the first in 2005 until the eighth, identified as *a Journal of Extreme Legal Positivism*. The first editorial referred to a project on necessarily contingent law, and the first editor referred to the sociology, culture, politics and philosophy of positive law and the positivistic conception of law. Then, in 2012, the ninth issue, under new editors and a new editorial direction, replaced the subtitle describing the journal's theoretical orientation with *An Interdisciplinary Journal of Law and Justice*, the first issue of the relaunched journal being concerned with *Law's Justice: A Law and Humanities Perspective*; the second after the relaunch, issue 10, being concerned with *Judging Democracy, Democratic Judgment*. It is not a new journal, it still adheres to the commitment to *No Foundations*, it has a continuity beyond these shifts in emphasis; but, to a reader uninformed about how and why these developments have taken place, there is something curious here.

As the teaching of traditional jurisprudence would have it, the great either/or of legal theory is the choice between positivism and natural law. Natural law is the theory that links law to morality, was incubated in theology, speaks of higher and lower law, in some versions of god's law, the law of nature, the law of reason—in short, the theory which links law to other phenomena connected to ethics, justice and a substantive content embodying core values. Positivism, by contrast, is the theory that seeks to isolate law from all such 'fuzzy' talk, and seeks to take instead a cool, realistic, even cynical look at law as an institution defined by the use of compulsion, of force. For positivism, law has an author, the sovereign, who posits positive law, and what the sovereign wills is law. The content can be whatever the sovereign wills, is therefore massively contingent, and untrammelled by ethical or moral concerns.

* Associate Professor in Constitution, Culture and Critique at the Law School, Staffordshire University.

In the natural law tradition, law is reason; in positivism law is will, backed by force. Put this way, the shift from a journal committed to the positivistic theory of the contingency of law to one which makes the linkage between law and justice central to its project is not explicable as some gradual evolution, but might appear to be a complete rejection of its starting point.

A blow by blow reading of the journal's corpus of articles would not be appropriate here, but some surmises as to the point of containing the evident shift within a framework of continuity might be proposed. *No Foundations* in its positivist guise presumably takes its impetus from a rejection, above all, of metaphysics. Although law was to be investigated via politics and philosophy and sociology, the legal object would be presumed to be analytically autonomous, not a derivative of any other field of enquiry such as the moral and political philosophy of justice, or ethics. It would be literally not a metaphysics, but a physics—denominated by a field of forces, sceptical, like postmodernism, of the *meta*.¹ A view of law with no foundations, the anti-foundationalist position would reject any discourse of justification of law derived from any position claiming to be higher than or deeper than law. In its newer formulation, the journal's commitment to linking law and justice through interdisciplinarity would appear to suggest an assimilation of a natural law perspective, a perspective usually associated with foundationalist discourses, but the anti- (or at least non-) foundationalist commitment remains on the masthead. Can one be an anti-foundationalist natural lawyer? Presumably the new editors think so. This would have to be a theory of necessarily contingent justice. This may be possible, but will take some elaboration. Can one square the theory of reason with the theory of will? Well, yes, a Hegelian can, by means of the theory of rational will, but the Hegelian perspective has not to my knowledge been utilised here, and would be precisely the metaphysics which the journal is at pains to avoid. Or are there options beyond reason and will, such as, for example, imagination?

2. Watt's Beckett: gods, greeks

One contribution from the new era can be used as an example of the matters at stake. Gary Watt's contribution refers to:

[T]he classic dramatic tension between, on the one side, a person's *prima facie* obligation to obey posited law, and, on the other side, a person's obligation to respect extra-legal norms, whether established by reference to 'gods' (which term is taken to include transcendental value systems of a non-religious nature, such as 'respect for human rights') or by reference to the immanent values of the social 'group', which I refer to by the shorthand 'being Greek'. (Watt 2012, 119.)

Watt discusses law, transcendental rights, and customary values, and if he were the new natural lawyer of new-era *No Foundations*, we might expect to find these

¹ See Lyotard 1984, xxiv: 'I define *postmodern* as incredulity towards metanarratives.'

transcendental rights and customary values trumping positivist legal norms as reasons for setting aside the obligation to obey positive law. But Watt's sardonic tone, where rights are immediately paired with righteousness and customary values with excessive respect suggests that the positivist is still present in these pages; indeed the view that ideas of human rights and social norms are not intrinsic to law but are 'extra-legal norms' marks Watt's perspective as positivist. For Watt, law is law, and all the other stuff—gods and Greeks—is not law. Law for Watt has as its due *obligation*, transcendental or immanent values call forth only *respect*, an attitude rather weaker than the recognition of an obligation. Positive law is 'capital L Law'; other values—although Watt refers to 'transcendental norms such as the law of the gods and the law of kindred blood' (Watt 2012, 120)—are 'small l law' (not quite law).

Actually, Watt is confusing his categories here. He started with the centrality of positive law as 'real law', and flanked it with two kinds of 'not quite real law', on one side the transcendent norms of religion and its contemporary equivalent, he would say, human rights; the other being the immanent norms of social custom, rather oddly presented as 'kindred blood'. But this latter has become transcendent too—'transcendental norms such as the law of the gods and the law of kindred blood'(Ibid., 120), Watt says, contradicting his earlier definition of social group values as immanent contrasted with the transcendent values associated with divinity. How social norms shift from immanence to transcendence by way of a rebranding as kindred blood is a worrying development that, in its *volkisch* undercurrent, is rather troubling. And why is human rights grouped with the gods as the contemporary version of religion? Presumably for its universalism as against the particularism of kin. For its transcendence as opposed to its immanence (if we set aside that blood became transcendent too in Watt's argument). The difference between law's relation to transcendent values on the one hand and to immanent values on the other is an undercurrent running through the argument here developed, which will not entirely be given its due, but it suffices to say for the present that the distinction is crucial, and Watt's elision of the two is surely a misstep.

What Watt does resolve, although he may not be representative of the totality of the new orientation of *No Foundations* in this, is our earlier question of what kind of continuity of non-foundationalism is being pursued across the transition from extreme legal positivism to interdisciplinary law & justice studies. It becomes apparent that the sense of integrity & equity outlined by Watt which is not quite virtue, but maybe better, is a kind of Stoic ethic of internal consonance to process which makes no appeal to transcendence, finds justice in the mean, and in the keeping in harmony of two competing procedural values. The image is of a taut bow (Watt 2012, 139), wood and string in complementary tension, neither dominant. Watt contrasts 'a moral ideal in any categorical sense', which is not what he is proposing, with 'merit in a non-ideal (which is also to say "moderate" or "qualified") sense' (Watt 2012, 140-141). This is a specifically positivist law & justice: thus Watt offers one resolution (and an elegant one) of the matter which had me puzzled, how to remain without *Foundations* while making this move. He endorses behaviour

which, whilst ‘not always positively virtuous’, but ‘can certainly be regarded as more desirable’ (Ibid., 140). This moderate amelioration, where one aims to do better, but not to do the best—and it is implied even, that to aim to do the best might mar the less ambitious aim to do better—leads to his conclusion, in line with the Stoicism outlined, with the decidedly modest aspiration, in the well-known Beckett phrase, to ‘fail better’. The use of this Beckettian sentence as carrying a meaning equivalent to helping ‘to improve law and lawyers in practice’ (Ibid., 141) seems to me to underestimate Beckett’s massive comic gleeful pessimism. Fail better is funny. Watt’s prescription is just melancholy. Is this best we can hope for? Is the aspiration actually to succeed exorbitant? What counts as success or failure, in the matters of law and constitution?

3. Beckett’s Watt: ‘pot, pot and be comforted’

Watt’s take on Beckett as some kind of moderate liberal, like Jaroslav Hašek’s party of moderate and peaceful progress within the limits of the law,² fails to get the Beckettian talent for worrying away at a detail until it explodes into a world view, or its collapse. For an example, look to, not Watt’s Beckett, but Beckett’s *Watt* (Beckett 1976). Watt worries about the attachment of names to things. The passage in question repays a lengthy quotation, slightly edited unfortunately, which damages Beckett’s rhythm, but hopefully not his meaning.

For Watt now found himself in the midst of things which, if they consented to be named, did so as it were with reluctance. [...] Looking at a pot, for example, or thinking of a pot [...] it was in vain that Watt said, Pot, pot. Well, perhaps not quite in vain, but very nearly. For it was not a pot, the more he looked, the more he reflected, the more he felt sure of that, that it was not a pot at all. It resembled a pot, it was almost a pot, but it was not a pot of which one could say, Pot, pot, and be comforted. It was in vain that it answered, with unexceptionable adequacy, all the purposes, and performed all the offices, of a pot, it was not a pot. And it was just this hairbreadth departure from the nature of a true pot that so excruciated Watt. For if the approximation had been less close, then Watt would have been less anguished. For then he would not have said, This is a pot and yet not a pot, no, but then he would have said This is something of which I do not know the name. And Watt preferred on the whole having to do with things of which he did not know the name, though this too was painful to Watt, to having to do with things of which the known name, the proven name, was not the name, any more, for him. (Beckett 1976, 78.)

This Watt’s angst, is, I hope, clearly the same as that of the other Watt. This Watt, Beckett’s Watt, is animated by a fear that the existent object somehow lacks the essence that would allow its name to be its true name. The comfort of knowing the names

² Hašek 1974, x. Jaroslav Hašek, author of *The Good Soldier Švejk*, founded such a group as a satire on the timidity of electoral politics.

of things is lost. Likewise Watt, Professor Watt we better say, aims to distinguish the law that is truly law from the so-called law that is, by a hairbreadth, not law. This is the classic futile positivist quest, to isolate law from not-law, from transcendence and from immanence, and to allow that, if it ‘answers all the purposes, performs all the offices’, then it is law. But the law that lacks justice, is it law?—the classic question of the natural lawyer, which Professor Watt seeks not to answer but to neutralise by redefining justice as integrity & equity, or at least, by substituting the latter coupling in tension for the former ideal virtue. Watt has not after all provided the new *No Foundations* with the conjunction of law and justice which is being sought, perhaps because he remains more aligned with the legal positivist project of the earlier phase. What was troubling, after all, to Beckett’s Watt? That things resisted naming. That names gave no comfort. That things slip from being not quite what their name calls them, inexorably, to being, even by a hairbreadth, not that thing anymore.

This puts the matters that separate the positivist from the natural lawyer in a broader framework. The positivist, as a species of analytical philosopher, believes that fixing the names of things is an exercise in eliminating metaphysics, resisting, with the later Wittgenstein, bewitchment by language.³ The name of a thing is a matter of describing how it functions in language, with no surplus or residue. Law is that institution which is known as law. The natural lawyer is an essentialist by comparison, law’s essence is to be located in a way that will involve a certain dealing with metaphysics, consideration of justice, concession to equity and fairness and so forth. The positivist may concede some of this, if this is how people refer to law, but only by way of usage, not by way of essence. The objection to the natural law tradition is the classic positivist accusation that an *ought* is being smuggled into a discussion concerning what *is*. Law ought to have justice as its essence, but if law is justice and the institution we observe is unjust then for the natural lawyer it is not law, whatever people may call it. For the positivist it remains law even if tarnished by injustice, because people (both people working in the legal institution [so-called] with an internal point of view, and people out there at large in the community regulated by this so-called law) persist in calling it law. The natural lawyer is foundationalist, law has a non-contingent essence. So, how can *No Foundations* remain so named yet investigate the conjunction of law and justice? One resolution, here suggested, is to accept the natural law argument not as an essentialist argument, but as a hermeneutical and genealogical one. Law has been associated with religious and moral arguments pertaining to justice, and what law *has been* cannot be ignored, as in the positivist vein, in favour of what it *has now become* in a secular context, but neither may the religious arguments be taken to be truths. This is perhaps the only way a non-foundationalist discourse of law & justice can be pursued. Therefore

³ Wittgenstein 1958 # 38: ‘[...] the conception of naming as, so to speak, an occult process. Naming appears as a *queer* connexion of a word with an object. —And you really get such a queer connexion when the philosopher tries to bring out the relation between name and thing by staring at an object in front of him and repeating a name or even the word “this” innumerable times. For philosophical problems arise when language *goes on holiday*.’

the name of law is a matter beyond the offices and purposes of law, but, avoiding the question of true law, law's essence, we can see that it is a matter of 'the more he looked, the more he reflected'.

For there is a more serious problem adumbrated here, which takes the *angst* from the ontological to the epistemological stage. It is not just that names cease to attach to things, but that this is so for Watt alone. It is Watt's ability to see names attach to things in a way that gives comfort which is lost. The name, 'was not the name, any more, *for him*' (emphasis added). For he could always hope, of a thing of which he had never known the name, that he would learn the name, some day, and so be tranquillized. But he could not look forward to this in the case of a thing of which the true name had ceased, suddenly or gradually, to be the true name for Watt. For the pot remained a pot, Watt felt sure of that, for everyone but Watt. For Watt alone it was not a pot, any more. (Beckett 1976, 78-79.)

This subjective doubt—it remained a pot for everyone else—leaves the positivist in possession of usage, but leaves Watt, looking, reflecting—Watt the thinker, Watt the critic—with an enquiry. One resolution of this, the conservative and reactionary position, is that the philosopher's only job is to find philosophical justifications for the common sense usages of language in his or her community,⁴ returning to the reality that the pot remains a pot for everyone else, and that is what is to be justified. We are not in the foundationalist realm of absolute objective truth, but of 'the true name for Watt'. This is to twist the hermeneutical analysis in an interesting direction. Not the conservative sense that a tradition produces its own continuity, but that the questioning critic of here and now must excavate, or, even better, construct his own predecessors.

Watt is in effect experiencing Cartesian doubt—what he can know of the true names of things is not a problem caused by things, an ontological problem, but an epistemological one, caused by his crisis of the possibility of having doubt-free knowledge of things (even, it transpires shortly after, of his own identity and whether the name 'man' applies to him or not). The complicating factor added by my elision of pots and laws is of course the difference between concrete and ideal objects. Whether a pot can be called by me a pot, and thus be a comforting claim of knowledge of the nature of things is a question of a different order than the question whether that system understood by others to be law can be called law. Beckett's Watt has trouble with pot and not-pot. This could be a matter of this pot or that pot approximating to the true pot more or less. Professor Watt has trouble with law and not-law in relation to gods and Greeks. The law problem is not one of this law or that law (or this legal system or that legal system) approximating to the true law more or less. It is in this case a problem of the concept of law: how to make justice intrinsic to law but still have a contingent non-foundationalist theory.

To answer this question requires, I suggest, a shift of perspective beyond the dualism of either physics or metaphysics, either empiricism or idealism, either

⁴ Wittgenstein 1958, # 43: 'For a *large* class of cases—though not for all—in which we employ the word "meaning" it can be defined thus: the meaning of a word is its use in the language.'

positivism or natural law. The question becomes whether it is possible for law to open to the transcendent (and also the immanent, without equating the two), but remain non-foundationalist. I will endeavour to show that it is, in the very particular case of constitutionalism, in the very specific tradition of England. The argument, if it works, does so by rejecting an absolute opposition between the sacred and the secular, between law grounded in transcendent truth and the necessarily contingent law.

4. The architecture of constitution

The argument proceeds by way of a consideration of the appropriate architectural image of constitution, figuring constitutionality as a structure which can house law. I have introduced a complication here: law and constitution, and whether constitution is a kind of law, how the two terms relate. The problem can be instantiated by noting that there is an English legal system, and a Scottish legal system, but a UK constitution. Is a constitution a necessary prerequisite for a legal system? It is possible to argue in the UK that there is no constitution, certainly in terms of the definitions or instances of constitution found in most other countries. But again, the argument always proceeds by way of a discussion as to what exactly is meant by a constitution, and whilst other countries have a constitution with the features of permanence, entrenchment, a meta-level of fundamental rights or a higher law of transcendent values, well, the UK constitution lacks all these but is still some sort of constitution, less formal, less permanent, of the same level as ordinary law, but a constitution which can be named a constitution nonetheless. We can see the Watt question returning here: is the UK constitution something that resembles a constitution, is almost a constitution, but not a constitution of which one could say, Constitution, constitution, and be comforted? Is it a hairbreadth departure from the nature of a true constitution? Or is it something of which we have never known the name? Is there an overarching notion of constitution, encompassing these true constitutions of others, and the UK's slightly anomalous version, such that both are terms in one set?

It is difficult to think of the notion of constitution without thinking of an attempted permanence. Constitution lends itself to monumentality, it speaks a language of depth, of the fundamental, of eternal truths, occupying a more profound level of legislation than simple legislation: it is the necessary precursor to all future legislation, a legislation anterior to legislation. The making of a constitutionality marks a breach in history, a breaking of the soil which inaugurates a new building. This is the language of laying down a foundation, upon which a superstructure to contain a polity and its laws can be constructed. It is the notion of entrenchment, digging the ditches which will become the foundations guaranteeing the stability of the visible building, a building which can be adapted and developed in different ways, stable upon its unchanging secure foundation. A constitution is an architecture, a temple.

And yet, the exceptionality of the English has always resisted this pomposity.

The English constitution, as every English undergraduate student of law quickly learns to repeat, is different. Against the rigidity of others, it is flexible. Unlike the codification of others, it is ‘merely’ legislation. Against the unchanging stability of others, it is evolutionary, adaptable, capable of novelty in a way those ‘carved in stone’ could never be.

So, our image of English constitutionality cannot be an image of the entrenched foundational masonry built elsewhere. The English constitution was not a plan on an architect’s drawing board, then executed in stone. No architect, no stone.

And yet, the English constitution, without plan, without solid materials, nonetheless *is*. How to picture it? Rather than a more solid building, conceding that it is a construction of some sort, think of it as a *tent*.

4.1 Tent, temple ...

The temple and the tent; both are structures, one far more solid than the other, but with certain functions in common. Both create a division of space into inside and outside, both divide an interior from an exterior, allowing the interior to take on a special status. The temple interior may be sacred, the outside secular, and, as will be seen, the tent can perform this division too. The metaphor of the tent and the temple invokes a theology provoking a commentary which performs some of the moves suggested in the discussion so far—an invocation of a tradition but divested of its truth claims.

For tents do not lack a significant standing in ways of thinking. A tent is flimsy, vulnerable to the elements (also offering protection from the elements), to be erected and dismantled and moved to the next place. It may contain a travelling freakshow, the headless man and the bearded woman, Lola Montes or the army general on manoeuvres; it may on the other hand contain a god. In common is the fact of being a container. A tent can be a foundation.

In the book of Exodus, the children of Israel, in the wilderness of Sinai, receive the ten commandments and what the Bible glosses as ‘various laws and ordinances’, and place the ark of the covenant in a tabernacle (*tabernaculum*, a tent), instructions for the construction of which are exhaustive: ‘thus was all the work of the tabernacle of the tent of the congregation finished’ (King James, Exod. 39.32). The tent is an enclosure to sanctify the covenant with god—but it is a portable, movable enclosure. It defines a community, a congregation, and so an inside and an outside, of a people at that point without a land.

The sequence of the biblical narrative is instructive. In Exodus, Moses communes with god, and receives the ten commandments, written by god on the tablets, and the instructions for the construction of the building within which god will meet with the children of Israel, the tabernacle, the tent. While all this is happening, the people make the golden calf and worship it. When Moses descends with the laws, in anger at the idolatry, he smashes the tablets of the law. Then the idol is destroyed, and the word of the law is reinscribed a second time, and the tabernacle is built to contain the covenant. These are the moments of the people’s relationships

with gods. In the first, their leader meets god directly, and receives the tablets of the laws, and the instructions for the construction of the tabernacle. In the second, the people worship an idol of gold. In the third, after the destruction of the false idol, the physical representation of the true covenant between god and the people is made sacred in the construction of a tabernacle. Thesis: god's laws, delivered only to Moses; antithesis: idolatry, the people's worship; synthesis: the law, constitutionalised and revered in the tabernacle.

The relationship between the giving of the laws, figured by the tablets, and the making of the constitution, figured by the tabernacle, inverts the expectations of a constitutionalist: instead of, first, the framework and form of a constitution, and then the substance and content of the laws, here the substantive laws are given by god first, and then the framework to memorialise and contain and present the covenant is constructed. God gives the laws to the leader while remote from the people, then the theatre, the spectacle of the covenant is built amongst the people. It is a home in which god may become manifest, also a storing place for the laws. This inversion of the logic which says, first build the container, then fill it with content, is perplexing. For, surely, one cannot start with uncontained content and only subsequently enclose it in a containment? But the apparent paradox is instructive, for the narrative presupposes starting with the sovereignty of god. It is this primordial sovereignty, uncontained by constitutionality, which gives Moses, not a constitution, but laws. The function of a constitution would be to specify a legislator empowered to make laws, but divine sovereignty does not require the medium of a constitution to define and delimit its powers (if there is any constitutionality in divine sovereignty, it is a self-imposed limit, the rainbow shown to Noah which promises an end to destruction).

But between the laws and the constitution—between the plans for the constitution (the covenant) and its construction—there is the moment of idolatry. The handing down of the laws is a moment of legislation without constitution, of content without form, it is a moment of external legislation for a people not present except by the representation of their leader. The conversation between god and Moses has as its object how the people will be required to behave, but the people are not present to accept or reject the terms offered; Moses accepts on their behalf, but it is not clear, in fact the next moment of the idolatry confirms, that the people have not given to Moses the authority to make this compact with god. The laws say, 'you will be together this way', but it is an external command, and moreover the addressee is absent. The idolatry is a moment of form without content, 'the people gathered themselves together unto Aaron, and said unto him, make us gods' a moment of auto-instituted worship, of 'something/anything', an indeterminate object without symbolic significance. This is an institution of a social form saying, not 'we want to be together in this particular way, and to commemorate this we institute this constitution', but merely 'we want to be together, unified in togetherness, in no particular way'. When Moses, bearing the laws, encounters the idol-worshippers, he destroys the laws, for the practice of idolatry the people have instituted in his

absence is in breach of god's laws. To Moses, the people are not worthy of god's laws, and so the laws are not promulgated. The people must be purified, the pious separated from the idolatrous, and so Moses orders a massacre: 'Put every man his sword by his side [...] and slay every man his brother, and every man his companion, and every man his neighbour. And the children of Levi did according to the word of Moses: and there fell of the people that day about three thousand men' (King James, Exod. 32.27-28). Only after this were the laws re-inscribed in stone and the tabernacle constructed to house them.

So the tent has a violent pre-history. God gives Moses his laws, the people worship an idol, Moses destroys the laws and, following god's will, orders a massacre. Only after these false starts is the process of containing the laws in a tabernacle which will represent the covenant of god and people constructed. Before this, the people have rejected god, by means of idolatry, and god has rejected the people, by means of massacre. The limits of consensus are bounded by the two acts of rejection, the people's rejection of the god of laws in favour of the golden idol, and the god of laws' act of slaughter against the people. This presents a figure of the fragility of the possibility of a constructed harmony between god and people, built by means of the tent, the aftermath of apostasy and civil war.

The tent has a two-fold function—first, to domesticate god, to provide a container for his presence to his people, neutralising his wrath against the idolatry of the people, thus making the transcendent immanent, the universal particular. God becomes the people's god; the people become god's people. Second, to unify the people after the civil war, to give them an identity in their common worship, to provide a focus, a hub around which their loyalty can revolve.

The architecture of the tabernacle is a complex, detailed plan, and, in its specificity, it may well depart from our notion of a tent as a rather flimsy, variable and flexible construction, but the essential feature, that it is not fixed in place, that it accompanies the people without a land in their desert wanderings, is the crucial point for the present argument. The tent has an ultimate destination, the ark of the covenant, temporarily at home in the tabernacle, is ultimately bound for the temple, which will be its ultimate eternal resting place, but in the time before the temple, it is both a crucial location—where god and people memorialise their connection, and meet—and not of a particular site, a nomadic, ever impermanent place, reconstituted anew as the journeying continues. Even thus, it makes the identity of the people, as a people of god's law, and unified in that identity in relation to each other, and particularised in that identity in comparison to other peoples.

This exegesis of the tale from Exodus might seem to be itself a wandering thought, but if we take it, rather, as attempting the thinking of the significance of wandering, of how, even in non-fixity, a symbol can perform the essential tasks of a constitution, but without becoming the permanent entrenched fixed place of a constitution, being a tent, not a temple, then we might comprehend the tradition of English constitutionality: resistant to any definitive definition of form or content, but still embodying the promise and identity-giving function of constitution. Part of

that function is the openness to the transcendent, and the interest lies in achieving this without defining and fixing the identity of the transcendent—about universal values, but these values not defined, not fraternity, equality, liberty, not the pursuit of happiness, as we find in the temple-constitutions of other countries, but a fugitive gesture in the direction of values evoked but not defined in the tent-constitution. Another part is the immanent connection to its particular community, but once again the tent-constitution is different, it travels with its people, it does not become a temple-constitution to which the people must make a pilgrimage.

This might seem all quite particular, an investigation of English exceptionalism—but the suggestion can be made as to whether the tent is the exception that proves the rule. Are temple-constitutions really that much more solid, permanent, entrenched? Or is their apparent permanence illusory, an apparently grand architecture of fundamental rights just as easily dismantled as a tent-constitution? If you have the right tools—state of exception, state of emergency, derogation, margin of appreciation—then cannot the temple be reconfigured as easily as the tent?

Gary Watt gave us the useful image of the bow, and the tension between the wood and the string, as a way of imagining how two values might interact in a mutually sustaining way. This helpful image can be expanded in the notion of the tent, for the tent is nothing more than canvas, sustained by multiple tensions produced by the vectors of the guy ropes and poles. J.B. White has used the tent image too, to think about law, but in a way that appears more like an image of a toddler in reins, only experiencing restraint when pulling too sharply in one direction.⁵ The tent gives us rather the notion of a structure where the sustainability of the always tentative equilibrium which means the tent stays up depends on the relative forces at play. In a temple, the more solid architecture fixes these relationships, and we know and understand the determining power of the pillars, their density and weight, and how the structure is stabilised upon its solid, entrenched foundations. The tent, by contrast, gives us a sense of a negotiation between the forces at play, the values of transcendence and immanence, whereby the edifice will either stand up, or tilt in one direction, distorted by an over-emphatic force in one direction not countered by countervailing forces, eventually toppling over into outright collapse. There is a ‘true’ shape to the tent-constitution, but also a margin of variation, where it can become rather otherwise in proportions, but still be sustainable. Then there is a point, or rather a series of points, when the balance is lost and the tent fails and falls. These comments are the beginnings of a suggestion that the tent image works for the English constitutional tradition, and perhaps for others too. The English constitution, pictured as a tent, allows of an analysis concerning the constituent elements that hold the tent up, the poles and guy ropes, the need for a taut canvas to keep the outside out and the inside in. It allows too, that the tent may shift shape

⁵ This notion of tension has been discussed by White in relation to Robert Frost’s poem, *The Silken Tent* (‘[...] And only by one’s going slightly taut [...] Is of the slightest bondage made aware’), as discussed by Etxabe and Watt in their editorial introduction to the forthcoming volume of essays on White (Etxabe & Watt 2014). I am grateful to Julen Etxabe for drawing this to my attention.

over time and in reaction to the demands it faces, may be pushed and pulled out of one shape and into another without ceasing to be the same tent.

But a further difference might be the allowed vagueness by means of which the tent poles and guy ropes are not decoded into specified values, but instead summoned up as a complex system of interactions. In the temple-constitutions, the ideas named and represented in the foundations, the corner stone and the pillars are certainly, beyond ambiguity, given their true names.

4.2 ...Adam's hut, Noah's ark

Beyond tent and temple, Barthes has taken the analysis of scriptural enclosed spaces further, in his discussion of various types of room spaces. Barthes is studying what he calls *idiorrhhythmy*, the attempt by groups of several individuals to live together while preserving his or her *rhuthmos*. Ideas of community, of difference within sameness and sameness within difference, and so, the demarcation of spaces as different from their surroundings is part of the inquiry. Barthes starts from the notion of Adam's hut in the garden of Eden, 'that primitive, fantasized hut [...]. Every architect tries to remake Adam's hut—not a functional determination, but a symbolic operation. To create a space that the subject can interpret through his own body. House can't be understood without reference to the sacred (dwelling = language?)' (Barthes 2013, 49).

Adam's hut, the dwelling in language: Barthes' notes go no further, but must now inevitably evoke a Heideggerian notion. A structure communing directly with divinity in a prelapsarian Eden. Barthes presents the other spaces he discusses as variations on this theme. After Adam's hut, his first room space is Noah's ark, one of three forms, the others being the desert tabernacle and the temple of Jerusalem which puts us in spaces already discussed here.

For Barthes, Noah's ark is 'total autarky: compendium of the worlds, encyclopedia of all species'; the Desert Tabernacle is 'tent, pavilion, dwelling, Tabernacle (the tent in which the Ark of the Covenant would be placed)', 'different groups spread around an uninhabited centre = the very principle of idiorhythmic organizations (I'd like a less voluntarist term: constellations?)'; the Temple of Jerusalem is 'Solomon's temple + Ezekiel's two visions = fantasy of the "total building". [...] Early model of the monastic structure: an exclusive, total multifunctional space. [...] Sacred calculations: the Temple and the tribes around the Tabernacle > Monastery, palace and church.' (Barthes 2013, 49-51.)

Taking Barthes notes on these three spaces, as models for ways for people to live together, we can tease out three models of relevance to the thinking of constitutions. Noah's ark, as Barthes says, is a totally self-sufficient community, present to itself without rules (either laws or constitution). The Tabernacle is a focus, but an empty space, the uninhabited place of power, the form without content, the structuring of an absence, a constituted space in anticipation of a future presence. The Temple is the fantasy of an eternal totality, the definitive constitution imposing for all futurity limits, boundaries and definitions, the presence made permanent. Noah's ark is

a solid structure which drifts, the tabernacle is a temporary structure which also moves, the temple is both solid and fixed (stationary).

Taking Noah's ark as the link between Adam's hut and the tent and the temple, variations on humanity's relationship to divinity are evoked: direct presence in Eden, the preserved community of beings in the time of the flood, the people in covenant with god at the tabernacle, and the 'total institution' of worship in the temple.

Noah's ark adds to the present discussion an evocation of the drifting community, outside of god's pleasure in Eden, awaiting the retreat of the flood, sustaining an inside against the great and threatening outside, embodying a covenant with god, eventually symbolised by the dove, the olive leaf, the rainbow. Just as the ark of the covenant was constructed after the slaughter of the idolatrous and in order to save the chosen, so Noah's ark kept close and safe those immune to the wrath of god delivered by means of the flood. The ark of Noah is certainly the first ark of the covenant.

The temple of Jerusalem adds to the present discussion a destination, a fixed site and fixed proportions for the placing of the ark of the covenant. The temple of Solomon is certainly the last tabernacle.

5. Conclusion

What interests me, in conclusion, is whether there is a point, in a 'tent-constitution' culture, in resisting the impelling teleology that transforms tents into temples. There are many, both progressive and reactionary, who call for a constitutionalising of the UK, a written document, installed in an ark of the covenant and put on the altar of the temple for worship—although this is not the imagery they would use. Also in Scotland, also in Europe, we have seen the demands for clarity in the definition of the institutions and the rules and their relationships, also definitions of what is inside and what is outside, lines between. The vagueness of the tent is not an essential virtue, the tabernacle which cannot be entered because it is occupied by the divine cloud: some dispersing of the divine vapours is a necessary act of rationalist enlightenment; but a transformation into a purely utilitarian machine of administration would lose a central truth of the constituting of a polity—that it has to be open both to the transcendent and the immanent in the realm of values.⁶

However, tentatively, these values can be named, without being claimed as

⁶ King James Version, Exodus 40.34-40: 'Then a cloud covered the tent of the congregation, and the glory of the LORD filled the tabernacle. And Moses was not able to enter into the tent of the congregation, because the cloud abode thereon, and the glory of the LORD filled the tabernacle. And when the cloud was taken up from over the tabernacle, the children of Israel went onward in all their journeys: But if the cloud were not taken up, then they journeyed not till the day that it was taken up. For the cloud of the LORD *was* upon the tabernacle by day, and fire was on it by night, in the sight of all the house of Israel, throughout all their journeys.' In relation to this, the method here employed, in the words of David Friedrich Strauss, is 'that the matters narrated in these books must be viewed in a light altogether different from that in which they were regarded by the authors themselves. This latter method, however, by no means involves the entire rejection of the religious document; on the contrary, the essential maybe firmly retained, whilst the unessential is unreservedly abandoned' (Strauss 1983, 25).

‘British’. At this point in this presentation, this is no more than an assertion, but I wish to suggest that the cardinal vectors by means of which the ‘tent’ is kept in an appropriate tension amount to four poles, held taut by twelve guy ropes. Those expecting a constitution to be a temple of marble built from an architect’s plans will deny the name constitution all together when applied to the English tent (a tent which can stretch over England, Great Britain, the United Kingdom, or retract from these areas); the tent, it will be said, is too impermanent, too vague a structure, too dispersed to take that name. The poles over which the canvas is stretched are four in number, and stand for four poles of attraction, determining the force field, the surface planes (in the manner of Deleuze⁷). They are (or could be, for example), in turn, the idea of the sovereign, of the law, of the constitution and of the public. These four poles, in various combinations, produce twelve forces, namely sovereign law, sovereign constitutionality and sovereign public; legal sovereignty, legal constitutionality and the legal public; constitutional sovereignty, constitutional legality, and the constitutional public; public sovereignty, public law and public constitutionality. Developing this content in which the names of the forces at play are sought, defined and their deployment analysed, is a larger work of specific content; what the current piece has presented by way of prolegomena, is an indication of the form such a study might take. A possible suggestion, by way of conclusion, might be that what is specific to the English situation is not any of these values, alone or in combination, all of which are transcendent and universal, but instead the very act of keeping their relationships in movement—this might be the English essence (but not foundation)—not deciding, deliberately not resolving which balance of powers will be definitive. A resolution in favour of irresolution. Everything remains in flux, and to be played for, and subject to politics rather than resolved by law, as long as the tent does not become a temple, as long as, unlike Beckett’s Watt, we refuse to be excruciated by the ghosts of the divine, by the pot which, by a hairbreadth, is not the true pot, by the temptation to turn our tents into temples.

At a time (June 2014) in the UK when constitutional politics is defined in terms of independent sovereignty—both for Scotland from the UK (the forthcoming referendum on independence, promoted by the SNP, the Scottish National Party, whose platform is the need to assert Scottish sovereignty by leaving the UK) and for the UK from Europe (the recent electoral successes in both local and European elections of UKIP, the United Kingdom Independence Party, whose platform is the need to assert UK sovereignty by leaving the EU); at a time when political debate is defined by one government minister asserting the need for schools to resist ‘Islamisation’ by promoting ‘British values,’⁸ including the core value of rule of law, when, at the very same time, a court accepts the need, for the first time, for significant

7 See Deleuze & Guattari 1988, 20: ‘It is not a question of this or that place on earth, or of a given moment in history, still less of this or that category of thought. It is a question of a model that is perpetually in construction or collapsing, and of a process that is perpetually prolonging itself, breaking off and starting up again.’

8 As Ian Jack reports in *The Guardian*: ‘Michael Gove thinks that every state-funded school in England should be obliged to promote “British values”’ (Jack 2014, 37).

elements of a criminal trial concerning alleged terrorists to take place out of public view⁹—a decision which at the very least strains the definition of rule of law—then, at such times, the need to assert and develop ways of thinking that allow clear images of how the transcendent and immanent values which inform the UK’s constitutional covenant interact (with each other and with the legal systems of the UK) is more pressing than ever. The pot that is not a true pot, the tent that is not a temple.

⁹ See Bowcott 2014 in *The Guardian*, 14 June 2014.

Bibliography

Barthes, Roland: *How to Live Together*. Translated by Kate Briggs. Columbia University Press, New York 2013.

Beckett, Samuel: *Watt*. John Calder, London 1976.

Bowcott, Owen: 'Secret Hearings for Terror Trial Raise Fears for Press Freedom.' *The Guardian*, London, 14 June 2014.

Deleuze, Gilles & Guattari, Felix: *A Thousand Plateaus*. Translated by Brian Massumi. Athlone Press, London 1988.

Etxabe, Julen & Gary Watt (eds): *Living in a Law Transformed. Encounters with the Works of James Boyd White*. University of Michigan Press, Ann Arbor 2014 (forthcoming).

Hašek, Jaroslav: *The Good Soldier Švejk*. Translated by Cecil Parrott. Penguin Books, Harmondsworth 1974.

The Holy Bible: Authorised King James Version. Collins, Glasgow 1819.

Jack, Ian: 'Was the 1980s Bradford Headteacher Who Criticised Multiculturalism Right?' *The Guardian*, London, 14 June 2014.

Lyotard, Jean-François: *The Postmodern Condition*. Translated by Geoff Bennington & Brian Massumi. Manchester University Press, Manchester 1984.

Strauss, David Friedrich: 'The Life of Jesus'. In Lawrence S. Stepelevich (ed): *The Young Hegelians*. Translated by Marilyn Chapin Massey. Cambridge University Press, Cambridge 1983, 21-51.

Watt, Gary: 'Having Gods, Being Greek and Getting Better'. 9 *No Foundations. An Interdisciplinary Journal of Law and Justice* (2012) 119-143.

Wittgenstein, Ludwig: *Philosophical Investigations*. Second Edition. Translated by G.E.M. Anscombe. Basil Blackwell, Oxford 1958.